STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2000-2001 RECOMMENDATIONS

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March 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
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CALIFORNIA LAW REVISION COMMISSION

NOTE

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Jurisdictional Classification of Good Faith Improver Claims

November 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Jurisdictional Classification of Good Faith Improver Claims*, 30 Cal. L. Revision Comm'n Reports 281 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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ASSEMBLY MEMBER HOWARD WAYNE, Chairperson
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November 30, 1999

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This recommendation would revise Code of Civil Procedure Section 871.3 to clarify the jurisdictional classification of cases that include good faith improver claims. This would not be a substantive change in the law.

This recommendation is submitted pursuant to Government Code Section 70219.

Respectfully submitted,

Howard Wayne
Chairperson

JURISDICTIONAL CLASSIFICATION OF GOOD FAITH IMPROVER CLAIMS

Code of Civil Procedure Sections 871.1-871.7 set out rights and remedies of a person who makes an improvement to land in good faith and under the erroneous belief that the improver is the owner.[1] Section 871.3 states in part that a good faith improver "may bring an action in the superior court or, subject to Section 396 and Chapter 2 (commencing with Section 403.010) of Title 4, may file a cross-complaint in a pending action in the superior or municipal court for relief under this chapter."[2] This provision requires clarification, because it is susceptible to differing interpretations.[3]

Specifically, the provision could be interpreted to mean that a good faith improver claim must be brought in superior court if it is asserted in a complaint, even if the amount in controversy is $25,000 or less (the jurisdictional limit in municipal court and maximum for a limited civil case in superior court[4]), but may be brought in municipal court if it is asserted

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1. These provisions were enacted in 1968 on recommendation of the Law Revision Commission. See 1968 Cal. Stat. ch. 150, § 3; *Recommendation Relating to Improvements Made in Good Faith Upon Land Owned by Another*, 8 Cal. L. Revision Comm'n Reports 1373 (1967). Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

2. Section 396 governs transfer of a case from one court to another (e.g., from municipal court to superior court) due to a lack of subject matter jurisdiction. Sections 403.010-403.090 set forth procedures for reclassification of a case that is misclassified in a unified superior court (e.g., reclassification of a case that is improperly filed as a limited civil case).

3. The Legislature directed the Law Revision Commission to undertake this study, in consultation with the Judicial Council. Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 1, 85 (1998).

4. Matters traditionally within the jurisdiction of the municipal court are now known as limited civil cases. Section 85 & Comment. In a county in which the superior and municipal courts have not unified, the municipal court has

by way of cross-complaint and the amount in controversy is $25,000 or less.[5] This scheme may be regarded as illogical and inconsistent.

A more satisfactory construction is that the provision is consistent with general rules of practice governing equitable claims. A good faith improver claim is essentially equitable in nature.[6]

In general, an equitable complaint must be filed in superior court, regardless of the amount in controversy.[7] But an equitable claim may be asserted in a cross-complaint in municipal court (or a cross-complaint in a limited civil case in a unified superior court), if it is defensive and the case satisfies the $25,000 limit and other requirements for a limited civil case

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jurisdiction of limited civil cases. Section 85.1. In a county in which the courts have unified, the superior court has original jurisdiction of limited civil cases, but these cases are subject to procedures traditionally used in municipal court (e.g., economic litigation procedures). *Id.*; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 1, 64-65 (1998).

5. See Letter from Paul N. Crane to Nathaniel Sterling (March 11, 1998) (attached to First Supplement to Memorandum 98-12, on file with California Law Revision Commission); Letter from Jerome Sapiro, Jr., to David C. Long (March 9, 1998) (attached to Memorandum 98-25, on file with California Law Revision Commission).

6. Because Section 871.5 authorizes relief "consistent with substantial justice to the parties under the circumstances of the particular case," remedies under the good faith improver statute more nearly resemble equitable than legal remedies. A good faith improver claim should therefore be treated as one in equity. Southern Pac. Transp. Co. v. Superior Court, 58 Cal. App. 3d 433, 129 Cal. Rptr. 912 (1976) (no right to jury trial under good faith improver statute); *see also* Okuda v. Superior Court, 144 Cal. App. 3d 135, 139-41, 192 Cal. Rptr. 388 (1983) (court has "broad equitable jurisdiction" under good faith improver statute).

7. 2 B. Witkin, California Procedure *Courts* § 211, at 279-80 (4th ed. 1996). A few equitable causes may be asserted by complaint in municipal court or as a limited civil case in a unified superior court. Sections 85.1, 86(b)(1), (b)(3).

under Section 85.[8] A cross-complaint is defensive if it merely shows that the plaintiff is not entitled to recover.[9]

Likewise, under Section 871.3 a complaint that includes a good faith improver claim must be filed in superior court, regardless of the amount in controversy. But a good faith improver claim may be asserted in a cross-complaint in municipal court (or a cross-complaint in a limited civil case in a unified superior court), if it is defensive and the case satisfies the $25,000 limit and other requirements for a limited civil case under Section 85.

Section 871.3 should be amended to make this more explicit and thereby prevent confusion. The proposed legislation would not be a substantive change in the law, but would be declarative of existing law.

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8. Sections 85.1, 86(b)(2).

9. Jacobson v. Superior Court, 5 Cal. 2d 170, 173, 53 P.2d 756 (1936) (in an action on an insurance policy, cross-complaint seeking cancellation of the policy merely showed plaintiff was in default and not entitled to recover); 2 B. Witkin, California Procedure *Courts* § 255, at 330 (4th ed. 1996).

PROPOSED LEGISLATION

Code Civ. Proc. § 871.3 (amended). Good faith improver

SECTION 1. Section 871.3 of the Code of Civil Procedure is amended to read:

871.3. ~~A good faith improver may bring an action in the superior court or, subject to Section 396 and Chapter 2 (commencing with Section 403.010) of Title 4, may file a cross-complaint in a pending action in the superior or municipal court for relief under this chapter.~~ *(a) An action for relief under this chapter shall be treated as an unlimited civil case, regardless of the amount in controversy and regardless of whether a defendant cross-complains for relief under this chapter. Any other case in which a defendant cross-complains for relief under this chapter shall be treated as a limited civil case if the cross-complaint is defensive and the case otherwise satisfies the amount in controversy and other requirements of Section 85.*

(b) In every case, the burden is on the good faith improver to establish that the good faith improver is entitled to relief under this chapter, and the degree of negligence of the good faith improver should be taken into account by the court in determining whether the improver acted in good faith and in determining the relief, if any, that is consistent with substantial justice to the parties under the circumstances of the particular case.

Comment. Section 871.3 is amended to clarify the jurisdictional classification of a good faith improver claim. This is declarative of existing law.

If a good faith improver claim is asserted by way of complaint, the case is an unlimited civil case regardless of the amount in controversy. This treatment is consistent with the equitable nature of such a claim. See Southern Pac. Transp. Co. v. Superior Court, 58 Cal. App. 3d 433, 129 Cal. Rptr. 912 (1976) (no right to jury trial under good faith improver statute); Okuda v. Superior Court, 144 Cal. App. 3d 135, 139-41, 192

Cal. Rptr. 388 (1983) (court has "broad equitable jurisdiction" under good faith improver statute). If a defendant in the case cross-complains for relief under this chapter, the case remains an unlimited civil case.

If, however, a good faith improver claim is asserted by way of cross-complaint, and the complaint does not include a good faith improver claim, the proper treatment depends on whether the cross-complaint is defensive and whether the case satisfies the amount in controversy and other requirements for a limited civil case. A case may be transferred from municipal court to superior court if it includes a good faith improver cross-complaint that is not defensive. See Section 396 (court without jurisdiction); see also Cal. Const. art. VI, § 10 (original jurisdiction of trial courts); Sections 85 (limited civil cases) & 85.1 (original jurisdiction in limited civil case) & Comments. Likewise, a limited civil case in a unified superior court may be reclassified if it includes a good faith improver cross-complaint that is not defensive. See Section 403.030 (reclassification of limited civil case by cross-complaint); see also Section 403.040 (motion for reclassification). For guidance on whether a cross-complaint is defensive, see Jacobson v. Superior Court, 5 Cal. 2d 170, 173, 53 P.2d 756 (1936) (in an action on an insurance policy, cross-complaint seeking cancellation of the policy merely showed plaintiff was in default and not entitled to recover); 2 B. Witkin, California Procedure *Courts* § 255, at 330 (4th ed. 1996); see also Section 86(b)(2). For authority to sever a cross-complaint, see Section 1048.

See Section 88 (unlimited civil case). See also Section 32.5 (jurisdictional classification).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED RECOMMENDATION

Authority to Appoint Receivers

February 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Authority to Appoint Receivers*, 30 Cal. L. Revision Comm'n Reports 291 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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February 2, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Two different provisions govern a court's authority to appoint a receiver. The Law Revision Commission recommends consolidating these provisions. This would not be a significant change in the law, but would simplify the statutes and provide uniform court procedures.

This recommendation is submitted pursuant to Government Code Section 70219.

Respectfully submitted,

David Huebner
Chairperson

AUTHORITY TO APPOINT RECEIVERS

A receiver is a court officer or representative appointed to control and manage property that is the subject of litigation before the court, to preserve the property, and to dispose of it according to the court's final judgment.[1] A receiver may not be appointed except in cases expressly authorized by statute.[2] A person seeking appointment of a receiver must also show inadequacy of other remedies.[3] A receivership can be harsh, time-consuming, and expensive, so it should not be granted unless it is essential.[4]

Before 1998, the superior court had authority to appoint a receiver in "cases where receivers have heretofore been appointed by the usages of courts of equity"[5] and in other specifically enumerated cases.[6] Under the statute governing municipal court jurisdiction generally, the municipal court had authority to appoint a receiver "where necessary to pre-

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1. 6 B. Witkin, California Procedure *Provisional Remedies* § 416, at 337 (4th ed. 1997).

2. Miller v. Oliver, 174 Cal. 407, 410, 163 P. 355 (1917); Marsch v. Williams, 23 Cal. App. 4th 238, 246, 28 Cal. Rptr. 2d 402 (1994).

3. Jackson v. Jackson, 253 Cal. App. 2d 1026, 62 Cal. Rptr. 121 (1967); Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 116 Cal. App. 2d 869, 873, 254 P.2d 599 (1953).

4. See Hoover v. Galbraith, 7 Cal. 3d 519, 528, 498 P.2d 981, 102 Cal. Rptr. 733 (1972); Golden State Glass Corp. v. Superior Court, 13 Cal. 2d 384, 393, 90 P.2d 75 (1939); City & County of San Francisco v. Daley, 16 Cal. App. 4th 734, 744, 20 Cal. Rptr. 2d 256 (1993); Witkin, *supra* note 1, § 417, at 339.

5. 1996 Cal. Stat. ch. 1154, § 2.1 (former Code Civ. Proc. § 564(b)(8)). In equity, exercise of the power to appoint a receiver traditionally rested in the sound discretion of the court, to be governed by consideration of the whole circumstances of the case, including the probability that the plaintiff would ultimately be entitled to a decree. Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 16 (1864).

6. 1996 Cal. Stat. ch. 1154, § 2.1 (former Code Civ. Proc. § 564(b)(1)-(7), (b)(9)-(11), (c)). All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

serve the property or rights of any party" or to enforce a judgment.[7]

Most of the statutory detail on appointment of a receiver in superior court dates from enactment of the 1872 Code of Civil Procedure.[8] The briefer, more general statutory authority on appointment of a receiver in municipal court was introduced in 1933.[9] A number of the circumstances specifically enumerated in the statute on appointment of a receiver in superior court were beyond the jurisdiction of the municipal court.[10]

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7. 1997 Cal. Stat. ch. 527, § 2 (former Section 86(a)(8)).

8. The court's authority to appoint a receiver dates from the first California Legislature in 1850. See 1850 Cal. Stat. ch. 142, § 220 (order appointing receiver for property of judgment debtor). See also 1854 Cal. Stat. ch. 54, § 19.

9. 1933 Cal. Stat. ch. 743, § 13 (enacting Code of Civil Procedure Section 89, authorizing the municipal court "to appoint receivers, where necessary to preserve the property or rights of any party to an action of which the court has jurisdiction"). This is the same language as in former Code of Civil Procedure Section 86 (1997 Cal. Stat. ch. 527, § 2). The authority for the municipal court to appoint a receiver in aid of execution of judgment was added in 1941. 1941 Cal. Stat. ch. 371, § 1. Although the earlier, more general language apparently was broad enough to include the subject matter of the 1941 amendment, "evidently it was thought advisable to have a more specific provision in the section in this respect." Howell, *The Work of the 1941 California Legislature: Civil Procedure*, 15 S. Cal. L. Rev. 1, 2 (1941).

10. For example, Section 564(b)(5) refers to appointment of a receiver in an action to dissolve a corporation. The superior court had exclusive jurisdiction of such an action. See Section 565 (appointment of receiver on dissolution of corporation); Corp. Code §§ 1800 (involuntary dissolution), 1904 (voluntary dissolution); 2 B. Witkin, California Procedure *Courts* § 215, at 283 (4th ed. 1996).

Similarly, Section 564(b)(7) refers to appointment of a receiver where the Public Utilities Commission requests a receiver pursuant to certain provisions of the Public Utilities Code. These proceedings were exclusively in superior court. 1996 Cal. Stat. ch. 1154, § 31 (former Pub. Util. Code § 5259.5); see also Pub. Util. Code § 855.

These are not the only examples. See, e.g., 1996 Cal. Stat. ch. 411, § 2 (former Health & Safety Code § 129173), referring to appointment of a receiver *by the superior court*. See also former Cal. Const. art. VI, § 10 (superior court has original jurisdiction except where jurisdiction is given by statute to another trial court); 1997 Cal. Stat. ch. 527, § 2 (former Code Civ. Proc. § 86) (listing causes triable in municipal court).

This may be a reason for the greater degree of detail in the statute on appointment of a receiver in superior court, as compared to the similar statute for municipal court.

The statutes on authority to appoint a receiver were revised in 1998 in connection with trial court unification.[11] The statute formerly applicable in municipal court now applies in "limited civil cases."[12] A "limited civil case" is a case traditionally within the jurisdiction of the municipal court and subject to economic litigation and other traditional municipal court procedures.[13] The statute formerly applicable in superior court now applies in "cases other than a limited civil case,"[14] which are referred to as "unlimited civil cases."[15] These types of cases are traditionally within the jurisdiction of the supe-

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11. On June 2, 1998, the voters approved Proposition 220, which revised the California Constitution to provide for unification of the municipal and superior courts in a county on a vote of a majority of the municipal court judges and a majority of the superior court judges in that county. See Cal. Const. art. VI, § 5(e). At the direction of the Legislature, the Commission prepared extensive legislation to implement this measure, including revisions of Sections 86 and 564. 1998 Cal. Stat. ch. 931, §§ 29, 75. As of February 8, 2001, the trial courts in all of California's 58 counties have unified.

12. Section 86(a)(8).

13. Section 85 & Comment, Section 85.1. To implement trial court unification, statutes that applied to municipal courts were expanded to encompass cases in a unified superior court that traditionally would have been within the jurisdiction of the municipal court. See 1998 Cal. Stat. ch. 931. The Commission narrowly limited the scope of this legislation, preserving existing procedures but making them workable in the context of unification. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998). The Commission recommended further study of court procedures, however, with a view to possible elimination of unnecessary procedural distinctions between limited civil cases and other cases. *Id.* at 82. One of the areas recommended for study was whether to conform the statutory provisions on circumstances for appointment of a receiver. *Id*. at 85. The Legislature directed the Commission to undertake this study, in consultation with the Judicial Council. Gov't Code § 70219.

14. Section 564.

15. Section 88.

rior court and subject to traditional superior court procedures.[16]

The differences in standards for appointment of a receiver in limited civil cases and unlimited civil cases are minor, and appear to be the result of historical development.[17] Court unification creates an opportunity to simplify practice and procedure without a significant change in substance, by consolidating the provisions.

The Law Revision Commission recommends that the statute on appointment of a receiver in an unlimited civil case (Section 564) be broadened to apply to all cases.[18] To promote clarity, this provision should state that appointment of a receiver is authorized "where necessary to preserve the property or rights of any party," instead of referring to the usages of courts of equity.[19] The language on circumstances for appointment of a receiver should be deleted from the former municipal court statute (Section 86), but replaced with a cross-reference to Section 564.

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16. See generally *Revision of Codes*, *supra* note 13, at 64-65.

17. Section 564(b)(8) permits appointment of a receiver under the "usages of courts of equity." If the case is within a specific class listed in Section 564, however, the general usage theory cannot be invoked, and the plaintiff must make a sufficient showing under the specific provision. Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 237, 133 P. 1155 (1913); Witkin, *supra* note 1, § 421, at 342. This might be considered a substantive difference between the court's authority under Section 564 and its authority under Section 86, but the difference is not a major one, because the specific classes listed in Section 564 merely impose reasonable conditions on appointment of a receiver. The *Dabney* case, for example, was an action to recover property, so appointment of a receiver was statutorily conditioned on showing that the property was in danger of being lost, removed, or materially injured. 22 Cal. App. at 237-39. Similarly, Section 86 authorizes appointment of a receiver only "where necessary to preserve the property or rights of any party."

18. Although Section 564 would cover both limited and unlimited civil cases, some of the types of actions listed in the statute may only be brought as an unlimited civil case. See *supra* note 10; see also Section 85 & Comment.

19. See Section 564 Comment *infra*.

PROPOSED LEGISLATION

Code Civ. Proc. § 86 (amended). Miscellaneous limited civil cases

SECTION 1. Section 86 of the Code of Civil Procedure is amended to read:

86. (a) The following civil cases and proceedings are limited civil cases:

(1) Cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to twenty-five thousand dollars ($25,000) or less. This paragraph does not apply to cases that involve the legality of any tax, impost, assessment, toll, or municipal fine, except actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant.

(2) Actions for dissolution of partnership where the total assets of the partnership do not exceed twenty-five thousand dollars ($25,000); actions of interpleader where the amount of money or the value of the property involved does not exceed twenty-five thousand dollars ($25,000).

(3) Actions to cancel or rescind a contract when the relief is sought in connection with an action to recover money not exceeding twenty-five thousand dollars ($25,000) or property of a value not exceeding twenty-five thousand dollars ($25,000), paid or delivered under, or in consideration of, the contract; actions to revise a contract where the relief is sought in an action upon the contract if the action otherwise is a limited civil case.

(4) Proceedings in forcible entry or forcible or unlawful detainer where the whole amount of damages claimed is twenty-five thousand dollars ($25,000) or less.

(5) Actions to enforce and foreclose liens on personal property where the amount of the liens is twenty-five thousand dollars ($25,000) or less.

(6) Actions to enforce and foreclose liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under the provisions of Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code, or to enforce and foreclose an assessment lien on a common interest development as defined in Section 1351 of the Civil Code, where the amount of the liens is twenty-five thousand dollars ($25,000) or less. However, where an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or where the total amount of the liens sought to be foreclosed against the same property aggregates an amount in excess of twenty-five thousand dollars ($25,000), the action is not a limited civil case~~, and if the action is pending in a municipal court, upon motion of any interested party, the municipal court shall order the action or actions pending therein transferred to the proper superior court. Upon making the order, the same proceedings shall be taken as are provided by Section 399 with respect to the change of place of trial~~.

(7) Actions for declaratory relief when brought pursuant to either of the following:

(A) By way of cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case.

(B) To conduct a trial after a nonbinding fee arbitration between an attorney and client, pursuant to Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, where the amount in controversy is twenty-five thousand dollars ($25,000) or less.

(8) Actions to issue temporary restraining orders and preliminary injunctions, *and* to take accounts, ~~and to appoint receivers~~ where necessary to preserve the property or rights of any party to a limited civil case; ~~to appoint a receiver and~~ to

make any order or perform any act, pursuant to Title 9 (commencing with Section 680.010) of Part 2 (enforcement of judgments) in a limited civil case; *to appoint a receiver pursuant to Section 564 in a limited civil case;* to determine title to personal property seized in a limited civil case.

(9) Actions under Article 3 (commencing with Section 708.210) of Chapter 6 of Division 2 of Title 9 of Part 2 for the recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor where the interest claimed adversely is of a value not exceeding twenty-five thousand dollars ($25,000) or the debt denied does not exceed twenty-five thousand dollars ($25,000).

(10) Arbitration-related petitions filed pursuant to either of the following:

(A) Article 2 (commencing with Section 1292) of Chapter 5 of Title 9 of Part 3, except for uninsured motorist arbitration proceedings in accordance with Section 11580.2 of the Insurance Code, if the petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under paragraphs (1) to (9), inclusive, of subdivision (a) or if the petition is filed after the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within paragraphs (1) to (9), inclusive, of subdivision (a).

(B) To confirm, correct, or vacate a fee arbitration award between an attorney and client that is binding or has become binding, pursuant to Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, where the arbitration award is twenty-five thousand dollars ($25,000) or less.

(b) The following cases in equity are limited civil cases:

(1) Cases to try title to personal property when the amount involved is not more than twenty-five thousand dollars ($25,000).

(2) Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.

(3) Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

Comment. Subdivision (a)(6) of Section 86 is amended to reflect elimination of the municipal courts as a result of unification with the superior courts pursuant to Article VI, Section 5(e), of the California Constitution. For reclassification of an action in a unified superior court, see Sections 403.010-403.090.

Subdivision (a)(8) is amended to delete the language on circumstances for appointment of a receiver in a limited civil case, and insert a cross-reference to Section 564, which now governs appointment of receivers in both limited and unlimited civil cases. The language deleted from the first clause of subdivision (a)(8) is continued in Section 564(b)(8), but broadened to apply to all cases. This is not a significant change. See Section 564 Comment. The language deleted from the second clause of subdivision (a)(8) is not continued, because it is redundant with Section 564(b)(3) and (b)(4).

Code Civ. Proc. § 564 (amended). Appointment of receiver

SEC. 2. Section 564 of the Code of Civil Procedure is amended to read:

564. (a) A receiver may be appointed, in the manner provided in this chapter, by the court in which an action or proceeding is pending in any case in which the court is empowered by law to appoint a receiver.

(b) ~~In superior court a~~ *A* receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in the following cases~~, other than in a limited civil case~~:

(1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is

probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

(2) In an action by a secured lender for the foreclosure of ~~the~~ *a* deed of trust or mortgage and sale of ~~the~~ property upon which there is a lien under a deed of trust or mortgage, where it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt.

(3) After judgment, to carry the judgment into effect.

(4) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or pursuant to Title 9 (commencing with Section 680.010) (enforcement of judgments), or after sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law.

(5) ~~In the cases when~~ *Where* a corporation has been dissolved, ~~or~~ *as provided in Section 565.*

(6) Where a corporation is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

~~(6)~~ *(7)* In an action of unlawful detainer.

~~(7)~~ *(8)* At the request of the Public Utilities Commission pursuant to Sections 855 and 5259.5 of the Public Utilities Code.

~~(8)~~ *(9)* In all other cases where ~~receivers have heretofore been appointed by the usages of courts of equity~~ *necessary to preserve the property or rights of any party*.

~~(9)~~ *(10)* At the request of the Office of Statewide Health Planning and Development, or the Attorney General, pursuant to Section ~~436.222~~ *129173* of the Health and Safety Code.

~~(10)~~ *(11)* In an action by a secured lender for ~~specified~~ *specific* performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document. ~~In~~

~~addition, that~~ *The* appointment may be continued after entry of a judgment for specific performance ~~in that action~~, if appropriate to protect, operate, or maintain real property encumbered by ~~the~~ *a* deed of trust or mortgage or to collect ~~the~~ rents therefrom while a pending nonjudicial foreclosure under power of sale in ~~the~~ *a* deed of trust or mortgage is being completed.

~~(11)~~ *(12)* In a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to subdivision (g) of Section 2938 of the Civil Code.

(c) A receiver may be appointed, in the manner provided in this chapter, including, but not limited to, Section 566, by the superior court in an action ~~other than a limited civil case~~ brought by a secured lender to enforce the rights provided in Section 2929.5 of the Civil Code, to enable the secured lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security. The secured lender shall not abuse the right of entry and inspection or use it to harass the borrower or tenant of the property. Except in case of an emergency, when the borrower or tenant of the property has abandoned the premises, or if it is impracticable to do so, the secured lender shall give the borrower or tenant of the property reasonable notice of the secured lender's intent to enter and shall enter only during the borrower's or tenant's normal business hours. Twenty-four hours' notice shall be presumed to be reasonable notice in the absence of evidence to the contrary.

(d) Any action by a secured lender to appoint a receiver pursuant to this section shall not constitute an action within the meaning of subdivision (a) of Section 726.

(e) For purposes of this section:

(1) "Borrower" means the trustor under a deed of trust, or a mortgagor under a mortgage, where the deed of trust or

mortgage encumbers real property security and secures the performance of the trustor or mortgagor under a loan, extension of credit, guaranty, or other obligation. The term includes any successor-in-interest of the trustor or mortgagor to the real property security before the deed of trust or mortgage has been discharged, reconveyed, or foreclosed upon.

(2) "Hazardous substance" means (A) any "hazardous substance" as defined in subdivision (f) of Section 25281 of the Health and Safety Code as effective on January 1, 1991, or as subsequently amended, (B) any "waste" as defined in subdivision (d) of Section 13050 of the Water Code as effective on January 1, 1991, or as subsequently amended, or (C) petroleum, including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture thereof.

(3) "Real property security" means any real property and improvements, other than a separate interest and any related interest in the common area of a residential common interest development, as the terms "separate interest," "common area," and "common interest development" are defined in Section 1351 of the Civil Code, or real property consisting of one acre or less that contains 1 to 15 dwelling units.

(4) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including continuing migration, of hazardous substances into, onto, or through soil, surface water, or groundwater.

(5) "Secured lender" means the beneficiary under a deed of trust against the real property security, or the mortgagee under a mortgage against the real property security, and any successor-in-interest of the beneficiary or mortgagee to the deed of trust or mortgage.

Comment. For purposes of simplification, Section 564 is broadened to govern appointment of a receiver in all cases, regardless of the

jurisdictional classification of the case. Formerly, a separate provision governed appointment of a receiver in a limited civil case. 1998 Cal. Stat. ch. 931, § 29 (former Section 86(a)(8)).

Although Section 564 covers both limited and unlimited civil cases, some of the types of actions listed in the statute may only be brought as an unlimited civil case. For example, Section 564(b)(7) refers to appointment of a receiver where the Public Utilities Commission requests a receiver pursuant to Public Utilities Code Section 855 or 5259.5. Such a proceeding may only be brought as an unlimited civil case. See Section 85 & Comment.

To aid practitioners, subdivision (b)(5) of Section 564 is amended to refer to Section 565 (appointment on dissolution of corporation).

Subdivision (b)(9) (former subdivision (b)(8)) is amended to delete language authorizing appointment of a receiver "where receivers have heretofore been appointed by the usages of courts of equity," and insert more readily understandable language formerly found in Section 86. This is not a significant change. The deleted language conferred broad authority to appoint a receiver, but only where other remedies were found to be inadequate. See, e.g., Golden State Glass Corp. v. Superior Court, 13 Cal. 2d 384, 393, 90 P.2d 75 (1939) (superior court should appoint receiver only where necessary to "adequately protect the rights of the parties"); Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 116 Cal. App. 2d 869, 873, 254 P.2d 599 (1953) (where less severe remedy will adequately protect parties, court ordinarily should not appoint receiver); see also Murray v. Murray, 115 Cal. 266, 275, 47 P. 37 (1896) (in equity, receiver may be appointed where plaintiff has equitable claim to property and "receiver is necessary to preserve the same from loss"). Similarly, subdivision (a)(9) authorizes appointment of a receiver only "where *necessary* to preserve the property or rights of any party." (Emphasis added.)

As before, the general language of subdivision (b)(9) does not override specific requirements enumerated elsewhere in the statute. See, e.g., Marsch v. Williams, 23 Cal. App. 4th 238, 246 n.8, 28 Cal. Rptr. 2d 402 (1994); Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 237, 133 P. 1155 (1913).

Subdivision (b)(10) (former subdivision (b)(9)) is amended to correct the cross-reference. Health and Safety Code Section 436.222 was repealed in 1995 and its substance recodified in Section 129173. See 1995 Cal. Stat. ch. 415, §§ 9, 79.5.

For other provisions concerning receivers, see Sections 565-570, 708.610-708.630, 712.060, 1422. See also Civ. Code § 3439.07; Corp. Code §§ 1801, 1803, 16504; Fam. Code § 290; Ins. Code §§ 1064.1-1064.12.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Stay of Mechanic's Lien Enforcement Pending Arbitration

April 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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April 13, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Code of Civil Procedure Section 1281.5 relates to preservation of arbitration rights during mechanic's lien enforcement proceedings. This recommendation would amend the provision to:

(1) Permit the plaintiff to preserve arbitration rights by including appropriate allegations in the complaint and filing a motion for a stay order within 30 days after service of the summons and complaint. This is generally consistent with case law and with existing practice.

(2) Prohibit discovery without leave of court pending determination of the motion for a stay order.

(3) Delete an anomalous sentence that could be read to limit municipal court jurisdiction.

This recommendation is submitted pursuant to Government Code Section 70219.

Respectfully submitted,

Howard Wayne
Chairperson

STAY OF MECHANIC'S LIEN ENFORCEMENT PENDING ARBITRATION

A construction dispute may be resolved through a mechanic's lien foreclosure action, contractual arbitration, or other means. Code of Civil Procedure Section 1281.5[1] governs the effect of a mechanic's lien foreclosure action on contractual arbitration of the underlying dispute. It specifies means of preserving a contractual right to arbitrate, as well as circumstances in which the right is waived:

> 1281.5. (a) Any person who proceeds to record and enforce a claim of lien by commencement of an action pursuant to Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, shall not thereby waive any right of arbitration which that person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant at the same time presents to the court an application that the action be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action to enforce the claim of lien. In a county in which there is a municipal court, the applicant may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court.
>
> (b) The failure of a defendant to file a petition pursuant to Section 1281.2 at or before the time he or she answers the complaint filed pursuant to subdivision (a) shall constitute a waiver of that party's right to compel arbitration.

The Law Revision Commission recommends revision of this provision to clarify and improve the procedure for preserving a contractual right to arbitrate and to delete the confusing and obsolete sentence on joinder of claims.

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1. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Procedure for Preserving Contractual Right to Arbitrate

Before Section 1281.5 was enacted, commencement of a mechanic's lien foreclosure action was sometimes deemed a waiver of the plaintiff's right to arbitrate.[2] This put the prospective plaintiff in a difficult position, because the limitations period for a mechanic's lien foreclosure action was (and is) very short,[3] making it impossible for the plaintiff to delay litigation until completion of arbitration, except where arbitration was completed very quickly.[4] To address this problem, Section 1281.5 makes clear that the filing of a foreclosure action is not a waiver of arbitration if the plaintiff simultaneously files an application for a stay of the action pending arbitration.[5]

By itself, however, an application for a stay is not sufficient to stay the action.[6] Although the statute does not say so expressly, it contemplates that the summons, complaint, and application for a stay will be served on the opposing party within a reasonable time after the action is commenced, and a separate motion for a stay will be noticed, filed, served, and resolved as promptly thereafter as is reasonably possible.[7] This prevents the plaintiff from using the application as a

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2. Compare Titan Enterprises, Inc. v. Armo Constr., Inc., 32 Cal. App. 3d 828, 832, 108 Cal. Rptr. 456 (1973) (foreclosure action was waiver of arbitration) with Homestead Sav. & Loan Ass'n v. Superior Court, 195 Cal. App. 2d 697, 16 Cal. Rptr. 121 (1961) (foreclosure action was not waiver of arbitration); *see also Review of Selected 1977 California Legislation*, 9 Pac. L.J. 281, 386-87 (1978).

3. Civ. Code § 3144 (lien foreclosure action must be commenced within 90 days after recording of lien claim).

4. *Review of Selected 1977 California Legislation*, *supra* note 2, at 387.

5. The application for a stay must be filed at the same time as the complaint, not afterwards. R. Baker, Inc. v. Motel 6, Inc., 180 Cal. App. 3d 928, 931, 225 Cal. Rptr. 849 (1986).

6. Kaneko Ford Design v. Citipark, Inc., 202 Cal. App. 3d 1220, 1226, 249 Cal. Rptr. 544 (1988).

7. *Id*. at 1226-27.

tactic to preserve arbitration rights while exploring the defendant's case through discovery techniques unavailable in arbitration.[8]

The proposed legislation would make this procedure explicit while providing an alternative to preparation of a separate application for a stay. To preserve the right to arbitrate, the plaintiff could file an application for a stay along with the foreclosure complaint (as under existing law), or simply allege in the complaint that the dispute is subject to arbitration and the plaintiff intends timely to seek a stay. Regardless of which approach the plaintiff selects, the plaintiff would be required to file a motion for a stay within 30 days after service of the summons and complaint. This would provide clear statutory guidance implementing the existing requirement that arbitrability be promptly resolved.

The proposed legislation would further provide that no party is entitled to discovery without leave of court unless and until the claimant expressly waives the right to arbitration, the claimant fails timely to move for a stay, or the court denies the motion for a stay.[9] This will ensure that discovery

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8. *See id.* at 1228-29; *see generally* Christensen v. Dewor Developments, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983) (courtroom may not be used as "convenient vestibule to arbitration hall" permitting party to create unique structure combining litigation and arbitration); Sobremante v. Superior Court, 61 Cal. App. 4th 980, 997, 72 Cal. Rptr. 2d 43 (1998) (benefits of arbitration become illusory "where there is a failure to timely and affirmatively implement the procedure"); Davis v. Continental Airlines, Inc., 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997) (defendants waived arbitration by using court's discovery processes to gain information about plaintiff's case, then seeking to change game to arbitration, where plaintiff would not have similar discovery rights); Zimmerman v. Drexel Burnham Lambert Inc., 205 Cal. App. 3d 153, 159-60, 252 Cal. Rptr. 115 (1988) (delay in requesting arbitration was prejudicial because opponent had to disclose defenses and strategies and "bear the costs of trial preparation, which arbitration is designed to avoid").

9. Without this restriction, the claimant could serve interrogatories as early as 10 days after service of summons and complaint. Section 2030(b). The claimant could take depositions as early as 20 days after service of summons and

processes are not invoked merely as a tactical tool to gather information for use in arbitration.[10]

Jurisdiction and Joinder of Claims

In a county in which there is a municipal court, Section 1281.5 expressly permits the plaintiff to join with the application for a stay pending arbitration "a claim of lien otherwise within the jurisdiction of the municipal court."[11] This language may generate confusion.

It could be interpreted to imply that the application for a stay must be brought in superior court, regardless of whether the underlying lien claim is within the jurisdiction of the municipal court. The statute may thus mean that the lien claim may be joined with the application in superior court, even if it is "otherwise within the jurisdiction of the municipal court."[12] So construed, the statute would constitute an

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complaint. Section 2025(b)(2). The defendant could serve interrogatories or take depositions at any time. Sections 2025(b)(1), 2030(b).

10. See *supra* note 8.

11. As originally enacted, Section 1281.5 stated without qualification that the plaintiff "may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court." 1977 Cal. Stat. ch. 135, § 1. Due to trial court unification, a county may now have a unified superior court, rather than a municipal court. On Commission recommendation, the statute was amended to reflect this development: "*In a county in which there is a municipal court*, the applicant may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court." 1998 Cal. Stat. ch. 931, § 122 (emphasis added); *see also Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 233-34 (1998).

The Commission also recommended, and the Legislature directed, further study of the procedure for obtaining a stay of a mechanic's lien foreclosure action pending arbitration. Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 85 (1998). This recommendation is the result of that study.

12. See Letter from Paul N. Crane to Nathaniel Sterling (March 11, 1998) (First Supplement to Memorandum 98-12, Exhibit p. 3, on file with California Law Revision Commission); Letter from Jerome Sapiro, Jr., to David Long (March 9, 1998) (Memorandum 98-25, Exhibit pp. 2-4, on file with Commis-

incongruous and inefficient rule requiring the superior court to consider a stay application even though the underlying controversy and its arbitrability are cognizable in municipal court.[13]

A more compelling explanation is that the language is an historical anomaly. When Section 1281.5 was enacted in 1977,[14] municipal courts had jurisdiction of certain mechanic's lien foreclosure actions, but did not have jurisdiction of any arbitration-related petitions.[15] Thus, a petition to compel arbitration of a construction dispute had to be filed in the superior court, regardless of whether the underlying claim of lien was within the jurisdiction of the municipal court.[16] By expressly authorizing joinder of "a claim of lien otherwise within the jurisdiction of the municipal court," Section 1281.5 clarified that the lien claim could be brought in superior court along with the petition to compel arbitration, instead of being filed in municipal court.[17] When municipal courts were given jurisdiction of arbitration-related petitions concerning municipal court claims,[18] this

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sion). But see Section 1292.8 (motion to stay action on ground that issue is subject to arbitration shall be made in court where action is pending).

13. For the extent of municipal court jurisdiction of a mechanic's lien foreclosure action and related petition to compel arbitration, see Sections 85.1, 86(a)(6), (a)(10).

14. 1977 Cal. Stat. ch. 135, § 1.

15. See 1961 Cal. Stat. ch. 461, § 2 (former Section 1292); 1976 Cal. Stat. ch. 1288, § 5 (former Section 86); see also *Recommendation and Study Relating to Arbitration*, 3 Cal. L. Revision Comm'n Reports at G-61 (1961).

16. Titan Enterprises, Inc. v. Armo Constr., Inc., 32 Cal. App. 3d 828, 833, 108 Cal. Rptr. 456 (1973) (amount of mechanic's lien was within jurisdiction of municipal court, whereas petition to compel arbitration must be brought in superior court).

17. In *Titan Enterprises*, 32 Cal. App. 3d at 833, the court questioned, but did not resolve, whether such joinder would be permissible. *Titan Enterprises* was decided shortly before Section 1281.5 was enacted, so it is not surprising that the Legislature addressed the issue in the statute.

18. 1984 Cal. Stat. ch. 1719, § 1.1 (amending former Section 86).

reference to joinder became unnecessary, but it was not deleted.

To prevent confusion and simplify the statute, the obsolete sentence on joinder should be deleted.

PROPOSED LEGISLATION

Code Civ. Proc. § 1281.5 (amended). Application to stay pending arbitration

SECTION 1. Section 1281.5 of the Code of Civil Procedure is amended to read:

1281.5. (a) Any person who proceeds to record and enforce a claim of lien by commencement of an action pursuant to Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, ~~shall~~ *does* not thereby waive any right of arbitration ~~which that~~ *the* person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant ~~at~~ *does either of the following:*

(1) Includes an allegation in the complaint that the claimant does not intend thereby to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action.

(2) At the same time ~~presents to the court~~ *that the complaint is filed, the claimant files* an application that the action be stayed pending the arbitration of any issue, question, or dispute ~~which~~ *that* is claimed to be arbitrable under the agreement and ~~which~~ *that* is relevant to the action to enforce the claim of lien. ~~In a county in which there is a municipal court, the applicant may join with the application for the stay, pending arbitration, a claim of lien otherwise within the jurisdiction of the municipal court.~~

(b) *Within 30 days after service of the summons and complaint, the claimant shall file and serve a motion and notice of motion pursuant to Section 1281.4 to stay the action pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien.*

(c) Notwithstanding Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4, if the claimant complies with subdivision (a), no party to the action is entitled to discovery without leave of court, until one of the following occurs:

(1) The claimant expressly waives the right to arbitration.

(2) The court denies the motion for a stay.

(3) The claimant fails to comply with subdivision (b).

(d) The failure of a defendant to file a petition pursuant to Section 1281.2 at or before the time ~~he or she~~ *the defendant* answers the complaint filed pursuant to subdivision (a) ~~shall constitute~~ *is* a waiver of ~~that party's~~ *the defendant's* right to compel arbitration.

Comment. The first sentence of subdivision (a) of Section 1281.5 is amended to add an alternative to the requirement that an application for a stay be made when the action is filed. In lieu of preparing a separate application for a stay, the lien claimant may include appropriate allegations in the complaint.

Subdivision (a) is also amended to delete the last sentence, which is no longer necessary, because the jurisdiction of the municipal court now includes a petition to compel arbitration of a claim within the court's jurisdiction. Sections 85.1 (original jurisdiction of municipal court), 86(a)(10) (arbitration-related petitions). Compare 1961 Cal. Stat. ch. 461, § 2 (former Section 1292) (petition shall be filed in superior court); 1976 Cal. Stat. ch. 1288, § 5 (former Section 86) (arbitration-related petition not within jurisdiction of municipal court).

Subdivision (b) is added to require the lien claimant to file a motion for a stay order within 30 days after service of the summons and complaint. This is generally consistent with case law, but provides concrete guidance implementing the "reasonable time" requirement recognized by the courts. See Kaneko Ford Design v. Citipark, Inc., 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544 (1988).

Subdivision (c) is added to prevent litigants from using discovery processes as a tactical tool to prepare for arbitration. *See generally* Christensen v. Dewor Developments, 33 Cal. 3d 778, 784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983); McMillan Dev. Co. v. Home Buyers Warranty, 68 Cal. App. 4th 896, 909-10, 80 Cal. Rptr. 2d 611 (1998); Davis v. Continental Airlines, Inc., 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79 (1997); *Kaneko*, 202 Cal. App. 3d at 1228-29.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Trout Affidavit

April 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Trout Affidavit*, 30 Cal. L. Revision Comm'n Reports 319 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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April 13, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Fish and Game Code Section 2357 makes it unlawful to carry trout into an area where the season is closed, unless a notarized affidavit was previously made in duplicate in the area where the trout were taken and the duplicate was left on file with the notary. The Law Revision Commission recommends that this provision be repealed, because it is unused and contrary to common expectations, and because a notary is not a proper repository of an affidavit.

This recommendation is submitted pursuant to Government Code Section 70219.

Respectfully submitted,

Howard Wayne
Chairperson

TROUT AFFIDAVIT

Fish and Game Code Section 2357 makes it unlawful to carry trout into an area where the season is closed, unless a notarized affidavit was previously made in duplicate in the area where the trout were taken[1] and the duplicate was left on file with the notary.[2] The provision appears to pertain to dead trout, not live specimens.[3] Presumably, it is intended to facilitate determination of whether the trout were lawfully taken.[4]

The Law Revision Commission has been directed to review

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1. To "take" trout means to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill" trout. Fish & Game Code § 86. (Unless otherwise indicated, all further statutory references are to the Fish and Game Code.)

2. The statute provides:

> 2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.

3. Section 2357 is in a chapter of the Fish and Game Code entitled "Importation and Transportation of *Dead* Birds, Mammals, Fish, Reptiles, and Amphibia," in an article called "*Dead* Wild Birds, Mammals, Fish, Reptiles, and Amphibia." (Emphasis added.) The immediately preceding chapters are "Importation, Transportation, and Sheltering of Restricted *Live* Wild Animals" and "Importation and Transportation of *Live* Plants and Animals." (Emphasis added.) The latter chapter includes an article on "Aquatic Plants and Animals," which is further evidence that live fish are not within the scope of Section 2357.

For provisions on placing live fish and other aquatic plants and animals in California waters, see Sections 15200-15202.

4. An angler who possesses trout where the season is closed may be accused of taking the trout out of season. In defense, the angler may contend that the trout were taken where the season was open. If the angler raises this defense, the angler could support it by presenting the affidavit required by Section 2357. Without the required affidavit, the angler risks prosecution pursuant to that statute.

this provision, because its operation is problematic.[5] It is questionable whether a notary public is a proper repository of an affidavit.[6] The requirement that a duplicate of the affidavit be filed with the notary also appears unnecessary, because an angler's possession of the original should be sufficient proof of the angler's proper activity.

Rather than correcting these technical imperfections in the statute, the Commission recommends its repeal. The provision is obscure, even within the sport fishing community. It appears to be unpublicized and unenforced.[7] The statutory requirements are also burdensome and inconsistent with common expectations.

Fishing is a highly regulated activity[8] and other restrictions on transporting fish may be appropriate,[9] but Section 2357

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5. Gov't Code § 70219; see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 86 (1998).

6. See Gov't Code § 8205 (duties of notary public).

7. The requirement is not mentioned in *1999 California Sport Fishing Regulations*, a booklet the Department of Fish and Game distributes to anglers to inform them of applicable restrictions. When contacted by a researcher from the Institute for Legislative Practice, Fish and Game personnel were surprised to learn of the statute's existence. See Yang & Kelso, *Transportation of Trout Into Closed Areas* (Inst. Legis. Prac. 1998). Legal research disclosed no reported cases construing the statute.

8. See, e.g., 14 Cal. Code Regs. §§ 1.74 (salmon punch card and steelhead trout catch report-restoration card), 7.00 (bag and possession limits, fishing seasons), 7.50 (waters subject to special restrictions on fishing methods and gear, bait, seasons, size limits, bag and possession limits, fishing hours), 8.00 (supplemental restrictions on taking and possessing trout and salmon).

9. See, e.g., Sections 2356 (removal of trout from state), 2358 (shipping trout into area where season is closed); 14 Cal. Code Regs. § 135 (importation of fish commercially taken out-of-state); Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400 (1934) (upholding statute prohibiting transportation of salmon through specified ocean districts of State in closed season); Van Camp Sea Food Co. v. Department of Natural Resources, 30 F.2d 111 (S.D. Cal. 1929) (Supreme Court has repeatedly recognized power of state to prohibit shipment of game lawfully taken within its borders to points without state, and to prohibit possession of game within state, when shipped from points without state); Adams v. Shannon, 7 Cal. App. 3d 427, 86 Cal. Rptr. 641 (1970) (upholding prohibition on importa-

appears to achieve no purpose. It criminalizes a failure to act (failure to obtain a notarized affidavit) under circumstances where even a conscientious trout angler is unlikely to be aware of the statutory requirement.[10] It is not a necessary or reasonable means of enforcing the trout season.[11] The statute may be repealed without adverse effect.

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tion and possession of piranha); Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. 2d 56, 63, 130 P.2d 256 (1942) (state is owner of its fisheries for benefit of its citizens and can impose any condition on taking and use, after taking, of fish within its waters, reasonably necessary for conservation of its fisheries and beneficial use of its citizens).

Section 2001 (unlawful possession) restricts the time period during which trout may be possessed, but does not impose a geographic limitation on transportation of trout. See Smith & Kelso, *Possession of Fish During "Open Season Where Taken" Pursuant to Fish & Game Code Section 2001: A Brief Legislative History* (Inst. Legis. Prac. 2000).

10. A statute that criminalizes a failure to act in circumstances where a reasonable person would not think there was an obligation to act is inconsistent with established principles of fairness and due process. Lambert v. California, 355 U.S. 225, 227-29 (1958) (where person did not know of duty to register and there was no proof of probability of such knowledge, person may not be convicted consistently with due process); but see State v. Huebner, 252 Mont. 184, 827 P.2d 1260, 1263 (1992) (hunters are responsible for knowing laws pertaining to their sport). The Institute for Legislative Practice has reviewed Section 2357 and concluded that it is constitutionally suspect, although perhaps not unconstitutional. See *Transportation of Trout Into Closed Areas*, *supra* note 7.

11. The lack of necessity is evident from the lack of a similar affidavit requirement, and existence of a contrary provision, for black bass and spotted bass. See Section 2360 (black bass and spotted bass lawfully taken may be carried into area where season is closed). The apparent lack of enforcement (*supra* note 7) is further evidence that Section 2357 is unnecessary.

Although the affidavit required by Section 2357 would be relevant in a prosecution for taking trout out of season, other means of proof exist. Possession of trout where the season is closed is strong circumstantial evidence that the possessor took the trout out of season. See Section 2000 (possession of fish is prima facie evidence that possessor took fish); compare H. Thoreau, 8 Writings 94 (1906), *quoted in* Oxford Dictionary of Quotations, p. 696 (Oxford Univ. Press, 4th ed. 1992) ("Some circumstantial evidence is very strong, as when you find a trout in the milk."). The prosecution may also introduce other evidence (e.g., evidence that the trout was recently caught and the defendant had not recently been in an area where the season was open), as may the defense (e.g., witnesses who recently saw the defendant catch or possess trout in an area where the season was open).

PROPOSED LEGISLATION

Fish & Game Code § 2357 (repealed). Trout affidavit

SECTION 1. Section 2357 of the Fish and Game Code is repealed.

~~2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.~~

Comment. Section 2357 is repealed because it is unused and contrary to common expectations, and because a notary is not a proper repository of an affidavit. See Gov't Code § 8205 (duties of notary public).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Expired Pilot Projects

October 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA

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October 6, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

There are a number of statutes establishing pilot projects that have expired. The Law Revision Commission recommends the repeal of 90 such statutes as obsolete.

In preparing this recommendation, the Commission benefited greatly from the assistance of the Institute for Legislative Practice at the McGeorge School of Law. In particular, the Commission appreciates the assistance of Professor J. Clark Kelso and his students, Erin Koch and Tamika Spirling.

This recommendation was prepared pursuant to Government Code Section 70219.

Respectfully submitted,

David Huebner
Chairperson

EXPIRED PILOT PROJECTS

In the course of studying the statutory changes necessary to implement trial court unification, the Law Revision Commission identified a small number of apparently obsolete statutes relating to expired pilot projects.[1] Further research revealed others.[2] The agencies responsible for implementing the expired pilot projects were contacted to learn whether it would be appropriate to repeal these statutes.[3] Agency responses were of three general types:

(1) The statute in question is obsolete and appropriate for repeal in Commission-recommended legislation.
(2) The statute is obsolete and the agency will be sponsoring legislation to repeal it. It should not be repealed in Commission-recommended legislation.
(3) The statute has continuing relevance and should not be repealed.

The Commission recommends the repeal of those provisions that were identified by the responsible agency as obsolete and appropriate for repeal in Commission-recommended legislation.[4] This would result in the repeal of 90 obsolete sections. See proposed legislation, *infra*. Notes following each

1. See *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 85 (1998).

2. The Commission is also conducting research to identify provisions imposing apparently obsolete reporting requirements, which might be appropriate for repeal.

3. In conducting this study, the Commission benefited greatly from the assistance of the Institute for Legislative Practice at the McGeorge School of Law. In particular, the Commission appreciates the assistance of Professor J. Clark Kelso and his students, Erin Koch and Tamika Spirling.

4. See Spirling & Kelso, *Obsolete Pilot and Demonstration Projects* (Inst. Leg. Prac. April 7, 2000) (on file with Commission). In one case, an amendment to delete a subdivision establishing a pilot project is recommended, rather than repeal of the entire section. See proposed amendment of Health and Safety Code Section 43840, *infra*.

section proposed for repeal identify the nature of the expired pilot project and the responsible agency.

In addition, the Commission recommends the repeal of Code of Civil Procedure Section 1167.25, which relates to a pilot project established by former Code of Civil Procedure Section 1167.2. Section 1167.2 was repealed by its own terms. With the repeal of Section 1167.2, Section 1167.25 serves no purpose.

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PROPOSED LEGISLATION

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 221 (repealed). Experimental eight person juries

SECTION 1. Section 221 of the Code of Civil Procedure is repealed.

~~221. (a) A trial jury in civil actions in municipal and justice courts may consist of eight persons in the County of Los Angeles, pursuant to rules adopted by the Judicial Council, as an experimental project operative until July 1, 1989.~~

~~(b) The Judicial Council shall appoint an advisory committee which shall include at least one judge of each court or courts in which the project will take place, one court administrator from that court or courts, or his or her designee, and one member of the Los Angeles County Bar Association, Trial Lawyers Section, who practices in the municipal or justice courts, to make recommendations regarding the design of the eight-person jury experiment. The Judicial Council shall adopt rules for the implementation of the project, including rules governing the assignment of cases to eight person juries during the experimental period, and establish procedures for the collection and evaluation of data.~~

~~(c) The Judicial Council shall report to the Legislature no later than January 1, 1990, comparing the performance of eight and 12 person juries. The comparison shall include, but not be limited to, the following factors:~~

~~(1) Cross-sectional representation of the community.~~

~~(2) Numbers of verdicts favoring plaintiffs or defendants, and size of awards.~~

~~(3) Accuracy, consistency, and reliability of awards.~~

~~(4) Time required for impanelment, trial, and deliberations.~~

~~(5) Public and private costs of the jury.~~

~~(d) Notwithstanding the provisions of Section 206, the project courts shall collect and provide to the Judicial Council the data required for a proper evaluation of the experiment. Any bona fide researcher or research organization shall be permitted access to any data regarding the conduct or evaluation of the pilot project.~~

Comment. Section 221 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Code of Civil Procedure Section 221, enacted in 1988, established a pilot project relating to jury composition. The project was to end by July 1, 1989. A report on the project was to be submitted to the Legislature by January 1, 1990. The Judicial Council, Office of Governmental Affairs, confirmed that this section is obsolete and should be repealed.

Code Civ. Proc. § 270 (repealed). Audio and video recordings used to produce verbatim records

SEC. 2. Section 270 of the Code of Civil Procedure is repealed.

~~270. (a) Notwithstanding Section 269 or any other provision of law, the Judicial Council shall establish a demonstration project to assess the costs, benefits, and acceptability of utilizing audio and video recording as a means of producing a verbatim record of proceedings in up to 75 superior court departments .~~

~~The Judicial Council shall select the counties to participate in the project, but shall include in its selection the Counties of Alameda, Los Angeles, Orange, Sacramento, San Mateo, Santa Cruz, and Solano.~~

~~In each county, the project shall only commence after the board of supervisors adopts a resolution finding that there are sufficient funds for the project, and the superior court adopts local rules for implementation of the project. The demonstration project in each county shall terminate on January 1, 1994.~~

~~(b) In courtrooms operating under the demonstration project, audio or video recording may be used in lieu of the verbatim record prepared by a court reporter except in any criminal or juvenile proceedings.~~

~~(c) The Judicial Council shall adopt the following: (1) specifications for audio and video recording equipment; (2) rules for courtroom monitoring of audio and video recording; (3) standards for the training of personnel and maintenance of equipment for audio and video recording; and (4) rules for certification of transcripts produced by means of audio and video recording.~~

~~(d) An audio or video recording or transcript produced therefrom when certified as being an accurate recording, video taping, or transcript of the testimony and proceedings in a case, is prima facie evidence of that testimony and those proceedings.~~

~~(e) A transcript of a proceeding in a court of the demonstration project shall be provided by the court to a party in the same manner and form and at the same cost as a transcript prepared and delivered by an official court reporter. If a portion of a video or audio recording fails or is unable to be understood, a transcript of such portion of the proceeding shall designate such condition as "inaudible" and "unintelligible," respectively.~~

~~(f) No presently employed court reporter shall have his or her hours of employment reduced as a result of the demonstration project nor shall be required to prepare a transcript of a proceeding in a court of the demonstration project.~~

~~(g) The Judicial Council shall report to the Legislature on or before January 1, 1992, and thereafter as the Legislature may require, as to the costs, benefits, and acceptability of such audio or video recording as a method of keeping the verbatim court record.~~

~~(h) The Joint Rules Committee shall appoint an advisory committee consisting of two certified shorthand reporters, one person skilled in courtroom audio recording, one person skilled in courtroom video recording, two judges experienced in trial work, one court administrator, and two attorneys experienced in trial work to evaluate the demonstration project, and it shall report its findings and recommendations, including minority views, if any, to the Legislature at the same times as the Judicial Council reports pursuant to subdivision (g). The advisory committee shall be afforded access to all material relating to the conduct and operation of the demonstration project, including, but not limited to, copies of audio and video tapes, logs thereof, transcripts, transcript requests, and the identity of any vendor and consultants involved in the demonstration project.~~

Comment. Section 270 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Code of Civil Procedure Section 270, enacted in 1986, established a pilot project relating to electronic recording to produce a verbatim record of court proceedings. The project was to end by January 1, 1994. A report on the project was to be submitted to the Legislature by January 1, 1992. The Judicial Council, Office of Governmental Affairs, confirmed that this section is obsolete and should be repealed.

Code Civ. Proc. § 1012.5 (repealed). Use of facsimile transmission

SEC. 3. Section 1012.5 of the Code of Civil Procedure is repealed.

~~1012.5. (a) The Legislature finds that the use of facsimile transmission (FAX machines) has become commonplace in business and government. Currently, there are over 2.5 million FAX machines in the nation and the legal profession owns approximately 12 percent of these machines. Across the nation, courts are starting to address the use of FAX machines in the judicial system as a means of transmitting documents to the courts and to lawyers and litigants.~~

~~Use of FAX transmission of documents may alleviate congestion in and around courthouses, promote savings in the time spent by attorneys in filing documents with the courts and with other attorneys and litigants, and ultimately, will result in a savings to the legal consumer.~~

~~Therefore, the Judicial Council shall conduct pilot projects to encompass cases filed in three or more superior courts and three or more municipal or justice courts from January 1, 1990, to December 31, 1992, to determine how best to implement the use of facsimile transmission of documents in the judicial system and to assess the extent of savings due to implementation of FAX transmission. Moreover, the Judicial Council shall report to the Legislature on the results of these pilot projects and its specific proposals for implementation.~~

~~(b) The Judicial Council shall determine the effectiveness of these pilot projects by conducting a survey of attorneys, judicial officers, clerks of court, and process servers registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code, to determine whether the pilot project is effective in: (1) reducing courthouse congestion, (2) increasing courthouse filings by FAX to at least 25 percent of all filings in those courts participating in the pilot projects, (3) producing a time savings of at least 50 percent of the time normally required to file documents with the court, and (4) producing a savings in costs billed to the client.~~

~~(c) The Judicial Council shall report to the Legislature on these pilot projects and make its recommendations on any changes in law needed to promote uniform, efficient, and effective service or filing of legal documents by FAX on or before December 31, 1991. The report shall include a compilation of data, proposed standards, rules, or statutes for: (1) the types of facsimile machines, including personal computers with facsimile modems, that are suitable for use by~~

~~the courts in receiving legal documents for filing, (2) the quality of paper to be used to ensure the permanency of court records, (3) the readability of documents sent by facsimile transmission, (4) the service and filing of documents which require an original signature, (5) the service on other parties to the action of legal documents by FAX, (6) the filing with the court of originals of documents first filed by FAX, (7) if necessary, modification of time periods for service and filing of documents by FAX, and (8) the cost to the courts for the equipment, supplies, additional staff, and administrative costs associated with the filing of legal documents by FAX and how these costs should be recovered.~~

~~(d) Notwithstanding any other provision of law, the Judicial Council may adopt rules of court for use in the pilot project counties to facilitate the purposes of the pilot project and to provide an appropriate experiment. Any rules of court adopted by the Judicial Council pursuant to this subdivision shall not affect the requirements for personal or substituted service of the summons and complaint or any other opening paper.~~

Comment. Section 1012.5 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Code of Civil Procedure Section 1012.5, enacted in 1989, established a pilot project relating to the use of facsimile machines in the judicial process. The three-year project was to commence on January 1, 1990, and end on December 31, 1992. A report on the project was to be submitted to the Legislature by December 31, 1999. The Judicial Council, Office of Governmental Affairs, confirmed that this section is obsolete and should be repealed.

Code Civ. Proc. § 1167.25 (repealed). Occupant served prejudgment claim of right to possession

SEC. 4. Section 1167.25 of the Code of Civil Procedure is repealed.

~~1167.25. (a) Notwithstanding Section 415.46, in addition to the service of a summons and complaint in an action for~~

unlawful detainer, filed pursuant to Section 1167.2, upon a tenant and subtenant, if any, as prescribed in Section 415.46, a prejudgment claim of right to possession, and a reply form as described in Section 1167.2 may also be served on any person who appears to be or who may claim to have occupied the premises at the time of the filing of the action. Service upon occupants shall be made pursuant to subdivision (c) of Section 415.46 by serving a copy of a prejudgment claim of right to possession, as specified in subdivision (b), attached to a copy of the summons and complaint, and a reply form as described in Section 1167.2 at the same time service is made upon the tenant and subtenant, if any.

(b) When an action for unlawful detainer is filed pursuant to Section 1167.2, the prejudgment claim of right to possession shall be made on the following form:

☞ **Note.** To conserve paper, the statutory form has not been reproduced.

(c) Notwithstanding Section 1174.25, any occupant who is served with a prejudgment claim of right to possession in accordance with this section may file a claim, as prescribed in this section, and a reply form, as described in Section 1167.2, with the court within five days of the date of service of the prejudgment claim to right of possession as shown on the return of service, which period shall include Saturday and Sunday, but excluding all other judicial holidays.

(d) At the time of filing, the claimant shall be added as a defendant in the action for unlawful detainer, filed pursuant to Section 1167.2, and the clerk shall notify the plaintiff that the claimant has been added as a defendant in the action by mailing a copy of the claim filed with the court to the plaintiff with a notation so indicating. Thereafter, the name of the claimant shall be added to any pleading, filing, or form filed in the action for unlawful detainer filed pursuant to Section 1167.2. Upon filing of the claim, the claimant shall comply

~~with all of the provisions of Section 1167.2 just as any named defendant. Further, the claimant shall also be liable for the posting of a prospective rent deposit as described in subdivision (e) of Section 1167.2 as a condition of continuing to trial.~~

Comment. Section 1167.25 is repealed as obsolete. It relates to a pilot project established in former Section 1167.2, which was repealed by its own terms.

☞ **Note.** Code of Civil Procedure Section 1167.2, enacted in 1994, established a pilot project relating to unlawful detainer proceedings. Section 1167.25 was enacted in 1995 to modify the pilot program procedure. In 1996, Section 1167.2 was amended to provide that it would be repealed by its own terms on July 1, 1999. An analogous "sunset" provision was not added to Section 1167.25. This appears to have been an oversight, as Section 1167.25 has no purpose on repeal of Section 1167.2. The Judicial Council, Office of Governmental Affairs, has confirmed that Section 1167.25 is obsolete and should be repealed.

Code Civ. Proc. § 1174.3 (amended). Occupants not named in judgment for possession

SEC. 5. Section 1174.3 of the Code of Civil Procedure is amended to read:

1174.3. (a) Unless a prejudgment claim of right to possession has been served upon occupants in accordance with Section 415.46 ~~or 1167.25~~, any occupant not named in the judgment for possession who occupied the premises on the date of the filing of the action may object to enforcement of the judgment against that occupant by filing a claim of right to possession as prescribed in this section. A claim of right to possession may be filed at any time after service or posting of the writ of possession pursuant to subdivision (a) or (b) of Section 715.020, up to and including the time at which the levying officer returns to effect the eviction of those named in the judgment of possession. Filing the claim of right to possession shall constitute a general appearance for which a fee shall be collected as provided in Section 72056 of the Government Code. Section 68511.3 of the Government

Code applies to the claim of right to possession. An occupant or tenant who is named in the action shall not be required to file a claim of right to possession to protect that occupant's right to possession of the premises.

(b) The court issuing the writ of possession of real property shall set a date or dates when the court will hold a hearing to determine the validity of objections to enforcement of the judgment specified in subdivision (a). An occupant of the real property for which the writ is issued may make an objection to eviction to the levying officer at the office of the levying officer or at the premises at the time of the eviction.

If a claim of right to possession is completed and presented to the sheriff, marshal, or other levying officer, the officer shall forthwith (1) stop the eviction of occupants at the premises, and (2) provide a receipt or copy of the completed claim of right of possession to the claimant indicating the date and time the completed form was received, and (3) deliver the original completed claim of right to possession to the court issuing the writ of possession of real property.

(c) A claim of right to possession is effected by any of the following:

(1) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, an amount equal to 15 days' rent together with the appropriate fee or form for proceeding in forma pauperis. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact. Immediately upon receipt of an amount equal to 15 days' rent and the appropriate fee or form for proceeding in forma pauperis, the court shall file the claim of right to

possession and serve an endorsed copy with the notice of the hearing date on the plaintiff and the claimant by first-class mail. The court issuing the writ of possession shall set and hold a hearing on the claim not less than five nor more than 15 days after the claim is filed with the court.

(2) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, the appropriate fee or form for proceeding in forma pauperis without delivering the amount equivalent to 15 days' rent. In this case, the court shall immediately set a hearing on the claim to be held on the fifth day after the filing is completed. The court shall notify the claimant of the hearing date at the time the claimant completes the filing by delivering to the court the appropriate fee or form for proceeding in forma pauperis, and shall notify the plaintiff of the hearing date by first-class mail. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact.

(d) At the hearing, the court shall determine whether there is a valid claim of possession by the claimant who filed the claim, and the court shall consider all evidence produced at the hearing, including, but not limited to, the information set forth in the claim. The court may determine the claim to be valid or invalid based upon the evidence presented at the hearing. The court shall determine the claim to be invalid if the court determines that the claimant is an invitee, licensee, guest, or trespasser. If the court determines the claim is invalid, the court shall order the return to the claimant of the amount of the 15 days' rent paid by the claimant, if that amount was paid pursuant to paragraphs (1) or (3) of

subdivision (c), less a pro rata amount for each day that enforcement of the judgment was delayed by reason of making the claim of right to possession, which pro rata amount shall be paid to the landlord. If the court determines the claim is valid, the amount equal to 15 days' rent paid by the claimant shall be returned immediately to the claimant.

(e) If, upon hearing, the court determines that the claim is valid, then the court shall order further proceedings as follows:

(1) If the unlawful detainer is based upon a curable breach, and the claimant was not previously served with a proper notice, if any notice is required, then the required notice may at the plaintiff's discretion be served on the claimant at the hearing or thereafter. If the claimant does not cure the breach within the required time, then a supplemental complaint may be filed and served on the claimant as defendant if the plaintiff proceeds against the claimant in the same action. For the purposes of this section only, service of the required notice, if any notice is required, and of the supplemental complaint may be made by first-class mail addressed to the claimant at the subject premises or upon his or her attorney of record and, in either case, Section 1013 shall otherwise apply. Further proceedings on the merits of the claimant's continued right to possession after service of the Summons and Supplemental Complaint as prescribed by this subdivision shall be conducted pursuant to this chapter.

(2) In all other cases, the court shall deem the unlawful detainer Summons and Complaint to be amended on their faces to include the claimant as defendant, service of the Summons and Complaint, as thus amended, may at the plaintiff's discretion be made at the hearing or thereafter, and the claimant thus named and served as a defendant in the action shall answer or otherwise respond within five days thereafter.

(f) If a claim is made without delivery to the court of the appropriate filing fee or a form for proceeding in forma pauperis, as prescribed in this section, the claim shall be immediately deemed denied and the court shall so order. Upon the denial of the claim, the court shall immediately deliver an endorsed copy of the order to the levying officer and shall serve an endorsed copy of the order on the plaintiff and claimant by first-class mail.

(g) If the claim of right to possession is denied pursuant to subdivision (f), or if the claimant fails to appear at the hearing or, upon hearing, if the court determines that there are no valid claims, or if the claimant does not prevail at a trial on the merits of the unlawful detainer action, the court shall order the levying officer to proceed with enforcement of the original writ of possession of real property as deemed amended to include the claimant, which shall be effected within a reasonable time not to exceed five days. Upon receipt of the court's order, the levying officer shall enforce the writ of possession of real property against any occupant or occupants.

(h) The claim of right to possession shall be made on the following form:

☞ **Note.** To conserve paper, the statutory form has not been reproduced.

Comment. Subdivision (a) of Section 1174.3 is amended to delete an obsolete reference to former Section 1167.25.

GOVERNMENT CODE

Gov't Code §§ 11805-11807 (repealed). Performance budgeting

SEC. 6. Article 2 (commencing with Section 11805) of Chapter 8 of Part 1 of Division 3 of Title 2 of the Government Code is repealed.

Comment. Sections 11805-11807 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Government Code Sections 11805-11807, enacted in 1993, established a pilot project relating to performance budgeting techniques. The project was to end by July 1, 1999. However, former Section 11808.1, which specified the project ending date, was repealed by its own terms on January 1, 2000. Reports on the project were to be submitted to the Legislature on or before January 1, 1996 and March 1, 1998, and after the conclusion of the project. The Department of Finance confirmed that these sections are obsolete and should be repealed.

The full text of the article is set out below for reference:

§ 11805. Performance budgeting pilot project development

11805. The Department of Finance shall develop a performance budgeting pilot project, involving at least four departments, including the Stephen P. Teale Consolidated Data Center, the Department of Parks and Recreation, the Department of General Services, and the Department of Consumer Affairs, or other departments substituted by the Department of Finance, to be implemented during the 1994-95 fiscal year. The pilot project shall be developed by the department in accordance with the following principles:

(a) Strategic planning is central.

(b) Outcome measures are the primary focus of management accountability.

(c) Productivity benchmarks measure progress toward strategic goals.

(d) Performance budgeting may work in conjunction with total quality management, which emphasizes an orientation toward customer service and quality improvement.

(e) Budget contracts between the Legislature and the executive branch require departments to deliver specified outcomes for a specified level of resources.

(f) Budget contracts shall include evaluation criteria, and shall specify "gainsharing" provisions, in which 50 percent of savings resulting from innovation are reinvested in the program.

(g) Managers are provided sufficient operational flexibility to achieve stated outcomes.

(h) Legislative involvement is critical and is appropriately focused on strategic planning and performance outcomes.

(i) Innovation is rewarded, not punished.

§ 11806. Legislative review of budget contracts

11806. Budget contracts entered into pursuant to Section 11805 shall be reviewed by the fiscal subcommittees of the Assembly and the Senate. Any budget contract proposed to be effective for the fiscal year beginning July 1 shall be submitted in draft form no later than January 31 to the fiscal subcommittees of the Assembly and the Senate.

§ 11807. Evaluation of pilot program

11807. The Department of Finance shall evaluate the pilot program and submit a report to the Chairperson of the Joint Legislative Budget Committee on or before January 1, 1996. The evaluation shall determine the extent to which performance budgeting results in a more cost-effective and innovative provision of government services. The evaluation also shall report on the gainsharing rewards to each department in the program and the specific innovation which brought about the savings.

§ 11808.1. Budgets and reports to be delivered to the legislature

11808.1 (a)(1) As required in subdivision (e) of Section 11805, the Department of General Services shall enter into a contract with the Legislature that produces specified financial performance.

(2) The department also shall deliver all of the following to the Legislature in accordance with the following timelines:

(A) On or before January 10, 1997, the department shall submit its budget for the 1997-98 fiscal year to the Legislature in the traditional program format and in an alternative format that displays financial performance by program and element.

(B) During the 1997-98 fiscal year, the department shall track financial performance for each program and element to ascertain whether, or to what degree, the department attained the performance specified.

(C) On or before March 1, 1998, the department shall submit a report to the Legislature on the extent to which the department attained the specified performance for the first half of the 1997-98 fiscal year.

(D) On or before January 10, 1998, the department shall submit its budget for the 1998-99 fiscal year to the Legislature in the traditional program format and in an alternative performance format. The Legislature may determine which format the department shall use for the 1998-99 fiscal year. If the Legislature chooses to use the performance budget format, the Budget Bill shall be amended accordingly.

(E) The pilot project shall conclude by July 1, 1999, and the department shall submit a final report identifying any efficiencies and economies resulting from performance budgeting and recommending whether the department should continue performance budgeting on a permanent basis.

(b) This section shall remain in effect only until January 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2000, deletes or extends that date.

Gov't Code § 14035.1 (repealed). High density residential development near mass transit guideway station

SEC. 7. Section 14035.1 of the Government Code is repealed.

~~14035.1. As part of implementation of the demonstration program established pursuant to Section 14045 of the Government Code, the commission, in the allocation of funds made available pursuant to Section 99317 of the Public Utilities Code or pursuant to a voter-approved rail bond for an exclusive mass transit guideways project, shall consider those projects proposed to be located on a demonstration site where the applicant and the local entity responsible for land use decisions have entered into a binding agreement to promote high density residential development within one-half mile of a mass transit guideway station. The commission shall consider all projects within a selected demonstration site submitted to it as a part of a regional transportation program by December 1, 1993, or as an applicant for inclusion in the 1991 or subsequent Transit Capital Improvement Program. Any project selected by the commission which is located in a demonstration site shall be considered for inclusion in the 1991 or subsequent annual Transit Capital Improvement Program or in the 1992 or subsequent State Transportation Improvement Program. This section does not authorize the granting of any priority that conflicts with any bond law governed by this section, or which impairs the rights of bondholders under any of these bond laws. Nor does this section preclude the commission from applying the criteria for making awards which may be required or permitted pursuant to other provisions of law.~~

Comment. Section 14035.1 is repealed as obsolete. The section implements a pilot project that has expired.

☞ **Note.** The Commission recommends repeal of Government Code Section 14045. See *infra*. Government Code Section 14035.1 implements

the pilot project established by Section 14045. Since Section 14045 is obsolete, this section is also obsolete.

Gov't Code § 14045 (repealed). Residential development near mass transit

SEC. 8. Section 14045 of the Government Code is repealed.

~~14045. (a) The department, in cooperation with the commission, shall develop and implement a demonstration program to test the effectiveness of increasing densities of residential development in close proximity to mass transit guideway stations to increase the benefit from public investment in mass transit. The department and commission shall jointly select three or more demonstration sites, at least one of which includes an existing transit station and at least two of which include proposed transit stations. Each demonstration site shall be located in a city or county that has adopted land use policies and programs encouraging the development of high-density residential development near mass transit guideway stations. These policies and programs may be included in the locality's general plan, zoning ordinance, including a density bonus ordinance adopted pursuant to Section 65915, development agreement adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 3 of Division 1 of Title 7, redevelopment plan or amendment to the plan adopted pursuant to Article 4 (commencing with Section 33330) of Chapter 4 of Part 1 of Division 24 of the Health and Safety Code, and congestion management plan adopted pursuant to Chapter 2.6 (commencing with Section 65099) of Division 1 of Title 7.~~

~~(b) The department shall prepare a preliminary report regarding the disposition of projects proposed for inclusion in either the 1991 or subsequent annual Transit Capital Improvement Program or the 1992 or subsequent State Transportation Improvement Program, and a final report regarding the impact of the demonstration program on the~~

~~level of use of mass transit by residents living within one-half mile of the mass transit guideway station. The department shall submit each report to the commission for review and comment. The commission shall submit the preliminary report, with its comments, to the Legislature no later than January 1, 1994, and the final report, with its comments, to the Legislature no later than January 1, 1996.~~

Comment. Section 14045 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Government Code Section 14045, enacted in 1990, established a pilot project relating to residential development near mass transit sites. No ending date for the project is specified. Reports on the project were to be submitted to the Legislature by January 1, 1994, and January 1, 1996. The Department of Transportation confirmed that this section is obsolete and should be repealed.

Gov't Code § 14680.8 (repealed). State property management

SEC. 9. Section 14680.8 of the Government Code is repealed.

~~14680.8. (a) The Department of General Services shall conduct a state property management demonstration project within a defined geographic region to be determined by the department. The federal and local governments may add funds to the total amount the state makes available for consulting fees in exchange for the consultant's analysis of the market value of locally or federally owned public buildings and the consultant's evaluation of opportunities to adopt proactive assets management procedures and strategies with respect to those properties.~~

~~(b) In conducting this demonstration project, the department shall, utilizing a request for proposal process, contract with real estate investment and development consultants, alternative public sector financing consultants, and public management and policy consultants, in order to provide all of the following services:~~

(1) Develop an information base on state-occupied property to include location, size, and present use in leased space, and location, size, present use, and estimated market value of state-owned space.

(2) Identify segments of state-owned properties, such as, by market value, size, geographic region, proximity to commercial development, or historical significance, and recommend an order of priorities in which proactive assets managers should consider disposition or ownership restructuring alternatives.

(3) Describe and analyze in terms of cost and benefits to the state alternatives for selling, exchanging, or restructuring ownership of land or buildings currently owned by the state. These alternatives shall include, but not be limited to, appropriate forms of leveraged leasing.

(4) Enumerate possible options for earning revenue on the state's real estate holdings, including estimates of overall revenue currently foregone due to the lack of proactive assets management, and expected interest earnings on investment of the revenue from sale of state-owned properties the present use of which is not economical from a proactive assets management point of view.

(5) Develop a proactive assets management methodology, with recommendations structuring cost controls and performance incentives within state government to meet strategic goals, including, but not limited to, all of the following:

(A) To reduce occupancy costs.

(B) To maximize efficiency of space utilization.

(C) To maintain or increase the value of state-owned property.

(D) To maximize revenue from state-controlled property.

(E) To manage property to support and implement state programs and policies, with an emphasis on the utilization of existing state-owned facilities.

(6) Assess the strength of bureaucratic resistance to proactive assets management in state government and suggest means of managing this resistance, including identification of appropriate areas for compromise.

(7) Analyze existing state and federal laws pertaining to proactive assets management options in state government, identify existing legal barriers to proposed alternative models for proactive assets management, and recommend changes in legislation necessary to facilitate the alternatives that would minimize state costs and maximize state revenue.

(8) Analyze the public policy implications of the recommendations for implementation of a proactive assets management approach to state-owned and state-controlled real estate, including, but not limited to, all of the following:

(A) Long-term versus short-term advantages and disadvantages of custodial property management and proactive assets management.

(B) Normalization parameters for public-private partnerships created for the purpose of conducting property management activities on behalf of the state, including an analysis of civil service barriers to contracting for specialized services.

(C) The comparative effectiveness of personal versus institutional incentives for performance of public obligations.

(c) The department shall appoint an advisory committee to assist the department and the consultants utilized under the demonstration project. The advisory committee shall participate in all aspects of the pilot project, including the assistance in the development of the request for proposals, as required under subdivision (a), and reviewing and commenting upon the final recommendations of the

~~consultants prior to submission to the Governor and the Legislature. The department shall invite the federal government and affected local governments to participate in the advisory committee. The advisory committee shall include, but is not limited to, representatives, who shall be either directors or business service officers, of the state agencies that own or occupy property in the designated pilot project area.~~

~~(d) The department shall submit to the Legislature and the Governor the final recommendations of the consultants utilized under this section, along with any comments made on those recommendations by the advisory committee created under subdivision (c).~~

Comment. Section 14680.8 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Government Code Section 14680.8, enacted in 1986, established a pilot project relating to the management of state property. No fixed beginning or ending date for the project is specified. The Department of General Services confirmed that this section is obsolete and should be repealed.

Gov't Code §§ 15290-15300 (repealed). Homeless relief pilot project

SEC. 10. Chapter 1 (commencing with Section 15290) of Part 6.6 of Division 3 of Title 2 of the Government Code is repealed.

Comment. Sections 15290-15300 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note**. Government Code Sections 15290-15300, enacted in 1986, established a project relating to the provision of relief services to the homeless. The project was to end two years after the sections' effective date. A report on the project was to be submitted to the Legislature by March 1, 1988. The Department of Housing and Community Development confirmed that these sections are obsolete and should be repealed.

The full text of the chapter is set out below for reference:

§ 15290. Legislative findings and declarations

15290. The Legislature finds and declares all of the following:

(a) Many persons residing in this state lack sufficient income or capacity to provide daily shelter, food, and clothing for themselves or their families.

(b) Federal, state, local, and private efforts to assist these homeless persons are not well coordinated and data concerning these shelterless persons are not kept in a consistent manner.

(c) Local and state efforts to help homeless persons have not fixed overall coordination responsibility with individuals in either county or state government.

(d) Existing programs providing homeless services to unsheltered residents, especially clients such as the elderly, displaced workers, juveniles, veterans, and the mentally ill do not adequately meet the needs of these persons.

(e) The expansion, improvement, and initiation of homeless services to unsheltered residents will aid in returning these persons to productive society.

(f) To feed the hungry, clothe the naked, and to house the homeless consistent with this part is a priority for this state.

§ 15291. Establishment and administration of project

15291. There is hereby established the Homeless Relief Pilot Project, to be administered by the Department of Housing and Community Development for a period of two years from the effective date of this part in the County of San Diego. The purpose of the project shall be to coordinate and centralize the delivery of state and local services, both public and private, for homeless persons in order to maximize the individual benefit and cost-effectiveness of those services and to assess the suitability of the program model hereby established for implementation on a permanent statewide basis.

§ 15292. Definitions

15292. The following definitions shall govern the construction of this part:

(a) “Board” means the Federal Emergency Management Agency Board in the County of San Diego.

(b) “Department” means the Department of Housing and Community Development.

(c) “Homeless person” means an individual who lacks the financial resources, mental capacity, or community ties needed to provide for his or her own adequate shelter.

(d) “Permanent housing” means occupancy, for at least 90 days, in either of the following:

(1) A dwelling unit with self-contained kitchen and bathroom facilities, which dwelling unit is not a shelter for homeless persons.

(2) A duly accredited public or private facility for the care of the mentally or physically ill, which facility is not a juvenile hall, reform school, jail, prison, or similar penal institution.

(e) "Positive cash flow" means steady income equal to or in excess of expenses.

(f) "Steady income" means a legal, regular, permanent source of funds maintained for a period of at least 90 days while resident in permanent housing.

§ 15293. Powers and duties

15293. The department shall have the following powers and duties:

(a) To promulgate such rules and regulations as are necessary for the effective administration of this part.

(b) To recommend a comprehensive plan for the coordinated delivery of existing state services for homeless persons in San Diego County to every state entity administering such services. The recommendations shall be in writing. The recommendations shall be consistent with the local plan required pursuant to Section 15294. The recommendations shall be included in the report to the Legislature required by Section 15300 and shall include comments regarding compliance by the various state entities with the recommendations.

(c) Approve the local plan for the delivery of services to homeless persons required pursuant to Section 15294. If the department does not approve the local plan by March 1, 1987, it shall report a detailed explanation why the report was not approved to the Legislature within 30 days.

(d) Disburse and monitor funds appropriated for the purposes of Section 15294.

(e) Report to the Legislature as required by Section 15300.

§ 15294. Allocation of funds

15294. The department shall allocate funds to the board for provision of services to homeless persons pursuant to a local plan to be submitted by January 1, 1987, which contains all of the following elements:

(a) Coordinated delivery of local public and private services for homeless persons, including designation by the county of a single person to coordinate the delivery of local county services.

(b) Collection of information, including, but not limited to, the number of homeless persons in the county and the currently unmet needs of the homeless.

(c) Establishment of one or more homeless service centers administered by the board, or its contractor, which shall provide at least all of the following services:

(1) Food.

(2) Clothing.

(3) Emergency shelter in accordance with Section 15296.

(4) Transportation services to a place of permanent residence in accordance with Section 15297.

(5) Case management services, including an evaluation of the client's needs and the making of referrals to other entities which provide services needed by the client. These case management services shall include an assessment of existing entitlements and the prevention of duplication of services in accordance with subdivision (a).

§ 15295. Use of funds

15295. None of the funds provided under this part may be used to satisfy, directly or indirectly, the county's existing legal obligations under Section 17000 of the Welfare and Institutions Code, to provide food, clothing, transportation, shelter, and other necessities of life. Funds may be used for both capital and operating costs, as specified in the local plan. Funds shall be used to expand availability of existing programs, resources, and services, or to initiate new ones. If pilot project funding is reduced or eliminated, no new services pursuant to this part shall be mandated on the county. The county is not required to divert existing funding for mental health, alcohol and drug programs for services under this part.

§ 15296. Emergency shelter services

15296. (a) In providing emergency shelter services under this part, the board or its contractor may utilize either direct services or a voucher system.

(b) A homeless person shall be entitled to an annual maximum concurrent stay in an emergency shelter funded by this part of 90 days provided that within the first five days he or she begins participation in case management services and provided that he or she complies with rules of conduct and cleanliness established by the shelter.

§ 15297. Permanent residence in another state

15297. Whenever a homeless person indicates a desire to establish permanent residence in another state and demonstrates that he or she will be able to establish a permanent residence in another state, such as with relatives, friends, or through the acceptance of a pending job offer, the board or its contractor shall, if consistent with cost effectiveness guidelines which shall be adopted by the board, provide the individual with funding for transportation to the out-of-state residence. The board or its contractor may purchase the necessary services. An agency shall not be eligible to disburse funds for transportation under this part until it has received approval from the board. Each disbursement of funds for transportation shall be approved by the board coordinator. The board

shall adopt guidelines specifying the manner in which an individual would have to verify his or her potential permanent residence in order to receive services under this section. Under no circumstances may a homeless person be forced to relocate.

§ 15298. Job placement and counseling services

15298. The board or its contractor may also provide job placement services, including job counseling, to homeless persons. If the board contracts with other entities to provide job services under this chapter, the board shall utilize incentives to reward agencies that successfully place homeless individuals in unsubsidized employment.

The board or its contractor may also provide or arrange for the provision of counseling services.

§ 15299. Loans to individuals placed in employment

15299. If consistent with cost effectiveness guidelines which shall be adopted by the board, a contractor may utilize funds allocated pursuant to this part in order to provide loans to individuals placed in employment for first and last month's rent and for cleaning deposits. Any loan made pursuant to this section shall be approved by the board.

§ 15300. Status report and recommendations

15300. By March 1, 1988, the department shall report to the Legislature on the status of the project and make recommendations for its future disposition.

(a) At minimum, the report on program status shall include the percentage of homeless persons in the county, from January 1, 1987, to January 1, 1988, to whom all of the following apply:

(1) Those who obtain permanent housing.

(2) Those who achieve a steady income.

(3) Those who maintain a positive cash flow.

(b) At minimum, the department's recommendations shall address questions of termination or continuation and restriction to San Diego County or expansion statewide.

Gov't Code § 65083 (repealed). Residential development with increased density in close proximity to mass transit guideway stations

SEC. 11. Section 65083 of the Government Code is repealed.

~~65083. As part of implementation of the demonstration program established pursuant to Section 14045 of the Government Code, the regional transportation planning~~

~~agency preparing the four-year regional transportation improvement program pursuant to Section 65082 shall consider those exclusive mass transit guideway projects where the applicant and the local entity responsible for land use decisions have entered into a binding agreement to promote high density residential development within one-half mile of a mass transit guideway station. Any project selected by the agency which is located in a demonstration site shall be considered for inclusion in the regional transportation improvement program. This section shall not preclude the agency from applying the criteria for making awards which may be required or permitted pursuant to other provisions of law.~~

Comment. Section 65083 is repealed as obsolete. The section implements a pilot project that has expired.

☞ **Note.** The Commission recommends repeal of Government Code Section 14045. See *supra*. Government Code Section 65083 serves no purpose other than implementing the pilot project established by Section 14045. Since Section 14045 is obsolete, this section is also obsolete.

Gov't Code § 65460.2 (amended). Transit village plan

SEC. 12. Section 65460.2 of the Government Code is amended to read:

65460.2. A city or county may prepare a transit village plan for a transit village development district that addresses the following characteristics:

(a) A neighborhood centered around a transit station that is planned and designed so that residents, workers, shoppers, and others find it convenient and attractive to patronize transit.

(b) A mix of housing types, including apartments, within not more than a quarter mile of the exterior boundary of the parcel on which the transit station is located.

(c) Other land uses, including a retail district oriented to the transit station and civic uses, including day care centers and libraries.

(d) Pedestrian and bicycle access to the transit station, with attractively designed and landscaped pathways.

(e) A rail transit system that should encourage and facilitate intermodal service, and access by modes other than single occupant vehicles.

(f) Demonstrable public benefits beyond the increase in transit usage, including all of the following:

(1) Relief of traffic congestion.

(2) Improved air quality.

(3) Increased transit revenue yields.

(4) Increased stock of affordable housing.

(5) Redevelopment of depressed and marginal inner-city neighborhoods.

(6) Live-travel options for transit-needy groups.

(7) Promotion of infill development and preservation of natural resources.

(8) Promotion of a safe, attractive, pedestrian-friendly environment around transit stations.

(9) Reduction of the need for additional travel by providing for the sale of goods and services at transit stations.

(10) Promotion of job opportunities.

(11) Improved cost-effectiveness through the use of the existing infrastructure.

(12) Increased sales and property tax revenue.

(13) Reduction in energy consumption.

(g) Sites where a density bonus of at least 25 percent may be granted pursuant to specified performance standards.

(h) Other provisions that may be necessary, based on the report prepared pursuant to subdivision (b) of *former* Section 14045, *as enacted by Section 3 of Chapter 1304 of the Statutes of 1990*.

Comment. Subdivision (h) of Section 65460.2 is amended to correct an obsolete reference to former Section 14045.

Gov't Code § 65913.5 (repealed). Density bonus for developer of housing within one-half mile of mass transit guideway station

SEC. 13. Section 65913.5 of the Government Code is repealed.

~~65913.5. (a) As part of implementation of the demonstration program established pursuant to Section 14045 of the Government Code, a city, county, or city and county participating in the demonstration program shall grant a density bonus to a developer of housing within one-half mile of a mass transit guideway station unless the locality finds that granting of the density bonus would result in a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact.~~

~~(b) Notwithstanding subdivision (f) of Section 65915, as used in this section, "density bonus" means a density increase of at least 25 percent over the otherwise maximum residential density allowed under the general plan and any applicable zoning and development ordinances.~~

~~(c) A city, county, or city and county may require a developer to enter into a development agreement pursuant to Article 2.5 (commencing with Section 65864) of Chapter 3 of Division 1 of Title 7 to implement a density bonus granted pursuant to this section.~~

~~(d) In an action or proceeding to attack, set aside, void, or annul a density bonus granted pursuant to this section, a court shall uphold the decision of a city, county, or city and county to grant the density bonus if the court finds that there is substantial evidence in the record that the housing development will assist the city, county, or city and county to do all of the following:~~

~~(1) Meet its share of the regional housing needs determined pursuant to Article 10.6 (commencing with Section 65580) of Chapter 4 of Division 1 of Title 7.~~

~~(2) Implement its congestion management plan adopted pursuant to Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7.~~

~~(e) Nothing in this section shall be construed to relieve any local agency from complying with the provisions of the Congestion Management Program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7.~~

Comment. Section 65913.5 is repealed as obsolete. The section implements a pilot project that has expired.

☞ **Note.** The Commission recommends repeal of Government Code Section 14045. See *supra*. Government Code Section 65913.5 serves no purpose other than implementing the pilot project established by Section 14045. Since Section 14045 is obsolete, this section is also obsolete.

Gov't Code § 65917 (amended). Purpose of density bonus

SEC. 14. Section 65917 of the Government Code is amended to read:

65917. In enacting this chapter it is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter shall contribute significantly to the economic feasibility of lower income housing in proposed housing developments. In the absence of an agreement by a developer in accordance with Section ~~65913.5 or~~ 65915, a locality shall not offer a density bonus or any other incentive that would undermine the intent of this chapter.

Comment. Section 65917 is amended to correct an obsolete reference to former Section 65913.5.

Gov't Code § 68086 (amended). Official reporters and official reporting services

SEC. 15. Section 68086 of the Government Code is amended to read:

68086. (a) ~~In all superior court departments not selected to participate in the demonstration project established under Section 270 of the Code of Civil Procedure~~ *The following provisions apply in superior court*:

(1) In addition to any other trial court fee required in civil cases, a fee equal to the actual cost of providing that service shall be charged per one-half day of services to the parties, on a pro rata basis, for the services of an official reporter on the first and each succeeding judicial day those services are required.

(2) All parties shall deposit their pro rata shares of these fees with the clerk of the court at the beginning of the second and each succeeding day's court session.

(3) For purposes of this section, "one-half day" means any period of judicial time during either the morning or afternoon court session.

(4) The costs for the services of the official reporter shall be recoverable as taxable costs at the conclusion of trial.

(5) The Judicial Council shall adopt rules to ensure all of the following:

(A) That parties are given adequate and timely notice of the availability of an official reporter.

(B) That if an official reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs therefore recoverable as provided in paragraph (4).

(C) That if the services of an official pro tempore reporter are utilized pursuant to this section, no other charge will be made to the parties.

(b) ~~In all superior court departments selected to participate in the demonstration project established under Section 270 of the Code of Civil Procedure, and in all municipal courts~~ *The following provisions apply in municipal court*:

(1) In addition to any other trial court fee required in civil cases, a fee equal to the actual cost of providing that service shall be charged per one-half day of services to the parties, on a pro rata basis, for official reporting services on the first and each succeeding judicial day those services are required.

(2) All parties shall deposit their pro rata shares of these fees with the clerk of the court at the beginning of the second and each succeeding day's court session.

(3) For purposes of this section, "one-half day" means any period of judicial time during either the morning or afternoon court session.

(4) The costs for the official reporting services shall be recoverable as taxable costs at the conclusion of trial.

(5) The Judicial Council shall adopt rules to ensure all of the following:

(A) That litigants receive adequate information about any change in the availability of official reporting services.

(B) That if official reporting services are not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs therefore recoverable as provided in paragraph (4).

(C) That if the services of a pro tempore reporter are utilized because official reporting services are unavailable, no other charge will be made to the parties for recording the proceeding.

Comment. Section 68086 is amended to delete obsolete references to former Code of Civil Procedure Section 270.

Gov't Code § 69845.6 (repealed). Suspension of maintenance of register of actions

SEC. 16. Section 69845.6 of the Government Code is repealed.

~~69845.6. As a three-year pilot project, the Placer County Board of Supervisors may direct the clerk of the Superior Court in Placer County to suspend the maintenance of a~~

~~register of actions from January 1, 1981, to January 1, 1984. After January 1, 1984, the clerk of the Superior Court in Placer County shall keep a register of actions pursuant to Section 69845 or 69845.5, unless a statute enacted prior to January 1, 1984, extends such pilot project.~~

Comment. Section 69845.6 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Government Code Section 69845.6, enacted in 1980, established a pilot project relating to the register of actions in Placer County Superior Court. The three-year project was to commence on January 1, 1981, and end on January 1, 1984. The Judicial Council, Office of Governmental Affairs, confirmed that this section is obsolete and should be repealed.

HEALTH AND SAFETY CODE

Health & Safety Code §§ 1339.51-1339.61 (repealed). Chronically or terminally ill children

SEC. 17. Article 11 (commencing with Section 1339.51) of Chapter 2 of Division 2 of the Health and Safety Code is repealed.

Comment. Sections 1339.51-1339.61 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Health and Safety Code Sections 1339.51-1339.61, enacted in 1984, established a pilot project relating to chronically or terminally ill children. The project was to end by July 1, 1990. A report on the project was to be submitted to the Legislature by July 1, 1989. The State Department of Health, Office of Legislative Affairs, confirmed that these sections are obsolete and should be repealed.

The full text of the article is set out below for reference:

§ 1339.51. Legislative findings and declaration

1339.51. The Legislature finds and declares as follows:

(a) That parents of children who have chronic illnesses or disabilities or who have terminal illness have no place to turn for temporary relief from the burden of providing for the daily physical care needs of their children.

(b) That many single parents of these children must work or further their education, but are unable to find a child care agency in the

community equipped and staffed to provide the physical care required for these children.

(c) That there are children for whom home health aides provide adequate care, but who have unmet socialization needs.

(d) That these children daily require more than the incidental medical care available in a community care facility, but less than the medical care provided in an acute care hospital or skilled nursing facility.

(e) That the extraordinary demands placed upon the families of these children often result in unnecessary and expensive admissions to acute care hospitals or skilled nursing facilities or in delayed discharge from acute care.

§ 1339.52. Definitions

1339.52. For the purposes of this article:

(a) "Children" means persons under the age of 21 years.

(b) "Chronic illness" means a physical condition which restricts physical development, impairs ability to engage in age-appropriate accustomed and expected activities, and requires periodic medical treatment during the year in a hospital or other medical outpatient or inpatient facility. "Chronic illness" does not include developmental disabilities as defined in Section 4512 of the Welfare and Institutions Code.

(c) "Intermediate care facility for chronically or terminally ill children" means a facility which provides 24-hour personal care and supportive health services and day care to children with chronic or terminal illnesses who need care and supervision and regular health services, and each client has been certified by the client's attending physician and surgeon as not requiring continuous skilled nursing care. An intermediate care facility for chronically or terminally ill children shall be limited to a capacity of 12 day care clients with provision for intermittent 24-hour care for no more than four of the day care clients at any one time.

§ 1339.53. Care to be provided in intermediate care facility

1339.53. The care provided in an intermediate care facility for chronically or terminally ill children under this chapter shall include, but not be limited to, child supervision, dietary services, administration of medications, day activities and socialization, coordination with local education agencies, and special services, as determined by the client's attending physician and surgeon. At the time of admission or within 24 hours of admission, an individual care plan shall be developed. The individual care plan shall be coordinated by a registered nurse who shall be on call at all times for the provision of needed skilled nursing services. Medications shall be administered by the registered nurse and licensed vocational nurse within the scope of their respective licenses. The

department shall determine staffing standards which shall include at least one licensed vocational nurse and at least one care provider trained in early childhood education. Each client accepted for care shall be under the continuing supervision of an attending physician and surgeon who shall evaluate the client as needed and at least once every 30 days unless there is an alternate schedule. The attending physician and surgeon shall document the visits in the client's health record.

§ 1339.54. Demonstration project

1339.54. The state department shall establish a demonstration project for one intermediate care facility for chronically or terminally ill children as provided in this chapter as follows:

(a) On or before July 1, 1985, the state department shall contract with a qualified organization in Sacramento County using a competitive bidding process to conduct the demonstration project.

(b) On or before July 1, 1989, the state department shall submit to the Legislature an evaluation report which shall include, but not be limited to, all of the following:

(1) The number of children served.

(2) The medical diagnosis of children served.

(3) The reasons for admission.

(4) The services provided.

(5) The length of stay.

(6) The reason for discharge.

(7) An evaluation of the services by the family.

(8) The private and public cost of service.

(9) Recommendations for expansion or termination of the program. If it is recommended that the program be expanded, the report shall identify possible funding sources for the expansion and shall identify any waivers necessary to secure the funding.

(10) An assessment of the cost effectiveness of the project.

(c) The state department shall conduct an evaluation of the program at least annually.

(d) The demonstration project established pursuant to the section, shall be extended until July 1, 1990.

§ 1339.55. Fire safety standards applicable to facility

1339.55. (a) The intermediate care facility for chronically or terminally ill children shall meet the same fire safety standards adopted by the State Fire Marshal pursuant to Sections 13113, 13113.5, 13143, and 13143.6 that apply to community care facilities, as defined in Section 1502, of similar size and with residents of similar age and ambulatory status. No other state or local regulations relating to fire safety shall apply to these

facilities, and the requirements specified in this section shall be uniformly enforced by state and local fire authorities.

§ 1339.56. Seismic safety requirements of facility

1339.56. The intermediate care facility for chronically or terminally ill children shall meet the same seismic safety requirements applied to community care facilities of similar size with residents of similar age and ambulatory status. No additional requirements relating to seismic safety shall apply to these facilities.

§ 1339.57. Zoning of facility

1339.57. For the purposes of all local zoning and use permit ordinances, an intermediate care facility for chronically or terminally ill children shall be considered to be a community care facility of six beds or less and shall meet the requirements of Section 1566.3. No other state or local requirements relating to zoning and use permits shall apply to these facilities.

§ 1339.58. Multipurpose spaces in facility

1339.58. Multipurpose spaces in an intermediate care facility for chronically or terminally ill children shall be utilized to provide rest periods, space, and accommodation for day care clients.

§ 1339.59. Daily rate

1339.59. Subject to approval by the state department, the provider of services pursuant to the demonstration project shall establish a daily rate based on the cost of care, and a sliding daily fee scale based on ability to pay. The families of children receiving services under this chapter shall be billed in accordance with the sliding fee scale.

§ 1339.60. Termination of demonstration project

1339.60. The director may terminate the demonstration project at any time it is determined that conditions exist which constitute a threat to the health, safety, security, and welfare of the clients.

§ 1339.61. Legislative intent; flexibility

1339.61. It is the intent of the Legislature that for purposes of this article, statutes and regulations governing intermediate care facilities be applied to this demonstration project by the state department in a manner that provides for maximum flexibility in requirements in areas including, but not limited to, staffing, dietary services, physical plant and equipment, and client records, so long as this flexibility is consistent with client health and safety.

Health & Safety Code §§ 25242.5-25242.6 (repealed). Hazardous Waste Reduction Internship

SEC. 18. Article 11.6 (commencing with Section 25242.5) of Chapter 6.5 of Division 20 of the Health and Safety Code is repealed.

Comment. Sections 25242.5-25242.6 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Health and Safety Code Sections 25242.5-25242.6, enacted in 1987, established a pilot project relating to a hazardous waste management internship program. The project was to commence by June 1, 1988, but no ending date for the project is specified. Reports on the project were to be submitted to the Legislature on or before June 1, 1988, and January 1, 1990. The University of California, Office of State Government Relations, confirmed that these sections are obsolete and should be repealed.

The full text of the chapter is set out below for reference:

§ 25242.5. Establishment of program

25242.5. The Legislature hereby requests the University of California to develop a hazardous waste reduction internship pilot program, except as provided in Section 25242.6, on or before June 1, 1988, which would place students in engineering, environmental sciences, or related subject areas in private businesses for the purpose of providing onsite assistance on hazardous waste reduction methods to small quantity generators. These students shall assist small businesses by conducting hazardous waste audits, assisting in preparing waste reduction plans, and providing information concerning the hazardous waste laws and regulations as they apply to small quantity generators.

§ 25242.6. Funding and reporting

The Legislature hereby requests the University of California to do all of the following:

25242.6. (a) Attempt to secure funds from private foundations, industry, the federal government, or other sources for the costs of the program which the University of California is authorized to establish pursuant to this article.

(b) Notwithstanding Section 25242.5, if the funding specified in subdivision (a) is not available, the University of California is requested to instead conduct a study and submit a report to the Legislature on or before June 1, 1988, concerning the feasibility of establishing a hazardous waste reduction internship program, including an examination of similar existing programs in other states and whether such a program could be operated on a fee-for-service basis.

(c) Report to the Legislature on or before January 1, 1990, concerning the implementation of this article, including outreach strategies, number and type of businesses requesting assistance, number and type of businesses assisted and type of assistance provided, a summary of successes and problems with the pilot project, and the potential for expanding the program statewide.

Health & Safety Code § 32354 (repealed). Rural California professional liability loan program

SEC. 19. Section 32354 of the Health and Safety Code is repealed.

~~32354. The program established by the Chowchilla Memorial Hospital District and others who enter such a joint powers agreement shall be deemed to be a pilot project to be used as a guide for the State Department of Health Services in establishing the Rural California Professional Liability Loan Program in the event Assembly Bill 2865 of the 1975-76 Regular Session is enacted, and in such case funds for loans under this chapter shall be made available from the Rural California Professional Liability Loan Fund upon creation by the State Controller.~~

Comment. Section 32354 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Health and Safety Code Section 32354, enacted in 1976, established a pilot project relating to rural medical care. The project was to serve as a model for a statutory scheme that was ultimately not enacted. No fixed beginning or ending date for the project is specified. The Department of Health, Office of State Legislative Affairs, confirmed that this section is obsolete and should be repealed.

Health & Safety Code § 43840 (amended). Alcohol-fueled vehicles

SEC. 20. Section 43840 of the Health and Safety Code is amended to read:

43840. (a) The Legislature finds and declares that emission of air pollutants from motor vehicles is a major contributor to air pollution within the State of California and, therefore, declares its policy to encourage the testing of various types of

vehicle fuels, which would contribute substantially to the protection and preservation of the public health and well-being.

(b) The Legislature further finds and declares that programs to expand the use of alcohols as substitutes for gasoline and other petroleum-based fuels can offer significant environmental benefits while reducing the nation's dependence on imported crude oil.

(c) The Legislature further finds and declares that pure alcohol fuels burn cleanly and that motor vehicles fueled with alcohol can be modified at reasonable cost to burn alcohol fuels without decreasing efficiency and without creating air quality problems.

~~(d) It is, therefore, the intent and purpose of Legislature, to authorize the establishment of a demonstration program in the County of Ventura for the testing of pure alcohol fuels in the county and municipal motor vehicle fleets.~~

Comment. Section 43840 is amended to delete subdivision (d), which is obsolete. The pilot project established by that subdivision has expired.

☞ **Note.** Health and Safety Code Sections 43840(d)-43841.5, enacted in 1980, established a pilot project relating to alcohol-fueled vehicles. No fixed beginning or ending date for the project is specified. The Air Resources Board and the California Energy Commission confirmed that these provisions are obsolete and should be repealed.

Health & Safety Code § 43841 (repealed). Alcohol-fueled vehicles

SEC. 21. Section 43841 of the Health and Safety Code is repealed.

~~43841. The Secretary of the Business and Transportation Agency shall reimburse the County of Ventura from funds appropriated for alternative motor vehicle fuels for the cost of conversion of fleet vehicles provided that the state board finds both of the following:~~

~~(a) All changes to the vehicles are absolutely necessary for the vehicles to operate on pure alcohol.~~

~~(b) The fuel systems of the motor vehicles have been certified pursuant to Section 43006.~~

Comment. Section 43841 is repealed as obsolete. The pilot project which it implements has expired.

☞ **Note.** Health and Safety Code Sections 43840(d)-43841.5, enacted in 1980, established a pilot project relating to alcohol-fueled vehicles. No fixed beginning or ending date for the project is specified. The Air Resources Board and the California Energy Commission confirmed that these provisions are obsolete and should be repealed.

Health & Safety Code § 43841.5 (repealed). Alcohol-fueled vehicles

SEC. 22. Section 43841.5 of the Health and Safety Code is repealed.

~~43841.5. The Secretary of the Business and Transportation Agency shall make the reimbursement pursuant to Section 43841 only in the event the County of Los Angeles and the California Energy Commission fail to reach an agreement, on or before December 31, 1980, to conduct a demonstration program similar to that provided in this article, as determined by the secretary, for the testing of alcohol fuels. If the County of Los Angeles and the State Energy Resources Conservation and Development Commission do reach such an agreement by December 31, 1980, no reimbursement shall be made pursuant to this article.~~

Comment. Section 43841.5 is repealed as obsolete. The pilot project which it implements has expired.

☞ **Note.** Health and Safety Code Sections 43840(d)-43841.5, enacted in 1980, established a pilot project relating to alcohol-fueled vehicles. No fixed beginning or ending date for the project is specified. The Air Resources Board and the California Energy Commission confirmed that these provisions are obsolete and should be repealed.

Health & Safety Code § 50502.5 (repealed). High density residential development

SEC. 23. Section 50502.5 of the Health and Safety Code is repealed.

~~50502.5. (a) In conjunction with the implementation of the demonstration program established pursuant to Section 14045 of the Government Code, and subject to the availability of funds authorized pursuant to Chapter 3.5 (commencing with Section 50531) and Section 50771.1, the department shall consider applications for funding of high density residential development located at demonstration sites within one-half mile of an existing or proposed mass transit guideway station. If the mass transit guideway station is proposed, the application shall include a binding agreement between the local legislative body and the transit operator regarding its timely development, including the source of committed funds.~~

~~(b) This section does not authorize the granting of any priority that conflicts with any bond law governed by this section, or which impairs the rights of bondholders under any of those bond laws. Nor does this section preclude the department from applying the criteria for making awards which may be required or permitted pursuant to other provisions of law.~~

Comment. Section 50502.5 is repealed as obsolete. The section implements a pilot project that has expired.

☞ **Note.** The Commission is recommending the repeal of Government Code Section 14045. See *supra*. Health and Safety Code Section 50502.5 serves no purpose other than implementing the pilot project established by Government Code Section 14045. If Section 14045 is obsolete, then this section is also obsolete.

LABOR CODE

Lab. Code § 4612 (repealed). Employer-provided health care

SEC. 24. Section 4612 of the Labor Code is repealed.

~~4612. (a) A pilot project is hereby authorized, for a duration of up to 36 months, under regulations to be developed and implemented by the administrative director. The purpose of the pilot project is to authorize an employer participating in~~

~~the pilot project to contract with a licensed health care service plan to be the exclusive provider of medical, surgical, and hospital treatment for occupational and nonoccupational injuries and illnesses incurred by its employees. The health care service plan shall provide all occupational- related medical treatment coverage required by this division without any payment by the employee of deductibles, copayments, or any share of the premium. Employers participating in the pilot project shall make available health plan coverage for their employees' dependents for the treatment of nonindustrial injuries and illnesses. Nothing herein shall require an employer to pay for that dependent coverage. An employer participating in the pilot project shall offer its employees a choice between the exclusive provider of care option and a traditional health benefits plan which allows employees to obtain workers' compensation treatment from a traditional workers' compensation provider. In the case of a pilot project established by a multiemployer, collectively bargained employee welfare benefit plan, or by a recognized exclusive bargaining agent for state employees that sponsors an employee welfare benefit plan for the benefit of employees, this choice may be exercised by an exclusive or certified bargaining agent that represents employees of the employer.~~

~~(b) That pilot project may be implemented in four counties as designated by the administrative director and may include more than one health care service plan. One county shall be in northern California, one in central California, and two in southern California. Multiemployer, collectively bargained employee welfare benefit plans that operate in one or more of the designated counties, or recognized bargaining agents for state employees that sponsor a welfare benefit plan, may implement a pilot project in all counties in which participants are employed and covered for nonoccupational injuries and illnesses.~~

~~(c) Notwithstanding the terms of Section 4600, 4601, or any other provision of this article, an employee employed by an employer participating in the pilot project who has elected to enroll in the pilot project shall not have the option of predesignating a personal physician, other than a physician provided by the licensed health care service plan designated by the participating employer, as his or her treating physician, nor shall an employee have the option of changing to a physician not provided by the health care service plan pursuant to Section 4601. However, this section shall not be construed to limit the requirement under Section 4600 that an employer provide treatment reasonably required to cure or relieve the effects of an injury, nor shall this section be construed to prohibit an employee from changing to another provider of health care services during any annual open enrollment period.~~

~~(d) The administrative director shall, at the completion of the second year of the pilot project, or sooner if feasible, prepare a preliminary report, and within one year after completion of the pilot project, prepare a final report to the Legislature and the Governor describing the pilot project. The report shall include a review of the following:~~

~~(1) Employer costs.~~

~~(2) Vocational rehabilitation implications of 24-hour care pilot projects.~~

~~(3) Numbers and percentages of employees in pilot worksites that enroll in the plan.~~

~~(4) Incentives used by employers to encourage enrollment in the plan.~~

~~(5) Extent to which dependents of pilot project employees enroll in health plans.~~

~~(6) Determination of employee satisfaction with the pilot program.~~

(7) Extent to which employees enrolling in the pilot plan continue to stay within it during the length of the pilot program.

(8) Differentials in costs of treatment between different types of pilot programs for occupational and nonoccupational injuries and illnesses.

(9) Differentials in costs of treatment and of indemnity benefits among workplaces comparable in size, type of industry, and location, between pilot programs and non-24-hour care for occupational and nonoccupational injuries and illnesses.

(10) Differentials in costs of claims administration between pilot programs.

(11) Percentage of occupational injury claims litigated and the type of dispute giving rise to litigation.

(12) How continuing obligations for medical treatment under workers' compensation will be secured after completion of the pilot project.

(13) Whether the pilot project was or could be utilized by small employers.

The pilot project shall be deemed a success if the administrative director can verify that the information contained in the report required by paragraphs (1) to (13), inclusive, compares favorably with that of employers and employees not included in the pilot project. In order to prepare the report, the administrative director shall prescribe information to be collected by each approved pilot program for submission to the division in a timely manner.

(e) The administrative director shall prepare an itemization of the costs to the division associated with preparation of the report described in subdivision (d). The cost of the report shall be borne by the employers participating in the pilot project, and, if available, by other external sources outside of the General Fund. Contribution by the employers shall be

~~apportioned on a per capita basis based upon the number of employees enrolled under the pilot project.~~

~~(f) For purposes of this section, "health care service plan" includes health care service plans and disability insurers that offer a managed care product within a pilot project county, workers' compensation insurers as defined in Section 3211 of the Labor Code that offer a managed care product within a pilot project county, multiemployer collectively bargained employee welfare benefit plans that offer a managed care product within a pilot project county, and welfare benefit plans sponsored by recognized exclusive bargaining agents for state employees. Pilot projects covering state employees shall be approved by the state employer and approved pursuant to Part 5 (commencing with Section 22751) of Title 2 of the Government Code.~~

~~(g) The employer's contract with the health care service plan shall include a surcharge or other provision to cover the cost of the medical care of an injured employee which is required by this division after the employee leaves the contracting employer's employment.~~

~~(h) Enrollment or subscription in the pilot project may not be canceled or not renewed except in the following:~~

~~(1) Failure to pay the charge for that coverage if the subscriber has been duly notified and billed for the charge and at least 15 days has elapsed since the date of notification.~~

~~(2) Fraud or deception in the use of the services or facilities of the plan or knowingly permitting that fraud or deception by another.~~

~~(3) Any other good cause as is agreed upon in the contract between the plan and a group or the subscriber.~~

~~(i) Notwithstanding any other provision of this section, no employer that is required to bargain with an exclusive or certified bargaining agent which represents employees of the employer in accordance with state or federal employer-~~

~~employee relations law for represented employees, shall contract with a managed care organization for purposes of this section unless authorized to do so by mutual agreement between the bargaining agent and the employer.~~

Comment. Section 4612 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Labor Code Section 4612, enacted in 1992, established a pilot project relating to employer-provided health plans. The project was to last for three years. No fixed beginning or ending date for the project is specified. The Division of Workers' Compensation confirmed that this section is obsolete and should be repealed.

PENAL CODE

Penal Code §§ 1000.30-1000.36 (repealed). Treatment of child sexual abuse perpetrators

SEC. 25. Chapter 2.67 (commencing with Section 1000.30) of Title 6 of Part 2 of the Penal Code is repealed.

Comment. Sections 1000.30-1000.36 are repealed as obsolete. The pilot project governed by these sections has expired.

☞ **Note.** Penal Code Sections 1000.30-1000.36, enacted in 1985, continued an existing pilot project relating to the treatment of child sexual abuse perpetrators. The project was to last for two years. No fixed beginning or ending date for the project is specified. The Office of Criminal Justice Planning confirmed that these sections are obsolete and should be repealed.

The full text of the chapter is set out below for reference:

§ 1000.30. Selection of participating counties

1000.30. The Office of Criminal Justice Planning shall, pursuant to Chapter 1660 of the Statutes of 1984, establish a pilot project for a period of two years in not more than three counties. The pilot projects shall test a program to provide treatment to child sexual abuse perpetrators, including intrafamilial and pedophiliac abusers, and including abusers who are incarcerated, as well as those who are not. The office shall designate the pilot project counties from among those counties that wish to participate. The office shall give priority to selection of at least two of the three pilot projects in counties where an existing project provides services to child sexual abuse perpetrators and where the proposed pilot project is an expansion of, and integrated with, existing services.

These counties shall provide all of the following information to the Office of Criminal Justice Planning:

(a) Identification of sexual abuse perpetrator treatment and victim services as a need in the county's child abuse services plan developed pursuant to Section 18962 of the Welfare and Institutions Code.

(b) Evidence in the application to provide service under this chapter that county mental health, welfare department, district attorney, juvenile court, superior court, municipal court, probation department, and private child welfare service agencies are participating in and coordinating case referral, case management, and service delivery to the target population.

(c) Evidence as to how incest offender treatment will be integrated with victim treatment.

Nothing in this section prohibits the use by district attorneys of counseling and other treatment programs as a diversion from prosecution. In pilot counties, diversion services shall be integrated with the services provided under this chapter.

§ 1000.31. Applicability of chapter provisions

1000.31. The provisions of this chapter shall be applicable in the designated counties for the duration of the pilot project.

§ 1000.32. Counseling of convicted offenders

1000.32. (a) Except as provided in subdivision (b), in any case in which the defendant has been convicted in a pilot project county of violating Section 261, 264.1, 285, 286, 288, 288a, or 289, and the victim is a person who was under 18 years of age at the time the offense was committed, the court shall, in addition to any other punishment or confinement that may be imposed, require counseling of the convicted person pursuant to Section 1000.33, when the person is confined or placed on probation within the county.

(b) Notwithstanding subdivision (a), a court may exclude from counseling and other treatment programs any convicted person described in subdivision (a) who is confined within the county, if the person is found by the court not to be amenable to counseling or other treatment services on either of the following bases:

(1) The person is a repeat offender who has previously been ordered by a court to receive counseling and who has been found by either the court or a counselor to be nonresponsive or not amenable to counseling services.

(2) The person has professed to the court that he or she continues to sexually abuse children and has refused counseling services.

§ 1000.33. County mental health department

1000.33. In a pilot project county, the county mental health department shall do both of the following:

(a) Assign a counselor to the convicted person described in Section 1000.32. The counselor shall be qualified, as determined by the county mental health department, in carnal abuse or sexual molestation counseling, as appropriate.

(b) Determine and collect from the convicted person a fee for the counseling, according to ability to pay, but not exceeding actual cost.

§ 1000.34. Reimbursement of pilot counties

1000.34. The state shall reimburse each pilot project county less any fees received pursuant to subdivision (b) of Section 1000.33 for any costs it incurs in conducting the pilot project under this chapter.

§ 1000.36. Award of project funds

1000.36. To the extent that funds are appropriated for that purpose, the Office of Criminal Justice Planning shall award project funds to three counties which meet the criteria set forth in Section 1000.30. Pilot counties shall utilize each of the following:

(a) Third-party payments, where appropriate.

(b) Defendant fees, where ordered by the court.

(c) Existing counseling treatment and education services, where appropriate.

(d) Project funds to provide case management for each defendant and to purchase appropriate services where subdivisions (a), (b), and (c) are not applicable.

Penal Code § 1348.5 (repealed). Representation of child in family sexual abuse cases

SEC. 26. Section 1348.5 of the Penal Code is repealed.

~~1348.5. (a) On or before July 1, 1987, upon adoption of a resolution of the board of supervisors, a county may establish a three-year pilot project, whereby the court, in any criminal action in which an act of child abuse or molestation is alleged against a member of the child's immediate family, may appoint a children's representative to represent the interests of the minor who was a victim of, or a witness to, the alleged act of abuse or molestation, provided that the victim or witness is under the age of 14. Counties participating in the program shall report to the Legislature before December 31, 1988, on the interim results of the program, and shall submit a final report to the Legislature on or before September 30, 1990, on the results of this program.~~

~~(b) The program shall be considered to be successful if the participation of child witnesses in criminal matters has increased 10 percent after the first year and increased 20 percent after the third year of the program. The amount of the increase shall be determined by comparing the 1986 participation rate with the participation rate data for 1987 and 1989, respectively.~~

~~(c) The court shall consider all of the following guidelines in appointing the children's representative.~~

~~(1) The person's willingness and ability to undertake working with and accompanying the child witness through all proceedings, including criminal proceedings, dependency proceedings, and civil proceedings.~~

~~(2) The person's willingness and availability to communicate with the child witness.~~

~~(3) The person's willingness and availability to express the child's concerns to those authorized to come in contact with the child as a result of the proceedings.~~

~~(d) After considering the guidelines stated in subdivision (b), the court, in its discretion, may appoint a trained volunteer as a children's representative, including a person who has received training from a program formed and operated under the guidelines established by the National Court Appointed Special Advocate Association.~~

~~(e) In cases involving more than one child victim under the age of 14, the court may, if it finds it appropriate, appoint a children's representative for each of the victims.~~

~~(f) In consideration of the special ethical responsibilities of attorneys and the attendant problems that might be raised by an attorney serving as a children's representative, the court shall not appoint attorneys as children's representatives under this section.~~

~~(g) In order to be appointed as a children's representative, the volunteer shall meet all of the following requirements:~~

(1) Possess adequate training in the court process, the dynamics of child abuse and neglect, child abuse laws, the social service system, and how to avoid becoming a witness in a case. Volunteers shall receive this training from persons who are involved in the judicial process (prosecutors, defense attorneys, county counsel, social services, child protective services, judges, and advisory board). Each county shall establish such a training program.

(2) Be screened for a criminal record pursuant to Section 11105.3, including, but not limited to, a fingerprint check. A criminal conviction, other than a conviction of a sexually related crime or a conviction of child abuse, shall not bar a person from acting as a children's representative.

(3) Meet other requirements as deemed necessary by the court.

(4) Not have any interest in the case, nor any connection to either the prosecution or defense.

(h) The requirements of this section are the minimum requirements for the appointment of a volunteer as a children's representative. Each county participating in the program shall appoint a volunteer special children's representative advisory board, which shall develop additional criteria requiring additional initial training, continuing in-service training, a system to screen volunteer applicants on an individual basis, and guidelines for supervising and monitoring the volunteers.

The board shall be appointed by the board of supervisors and shall be composed as specified by the board as nominated by the local child abuse council.

(i) The court shall admonish the children's representative that he or she shall not discuss the facts and circumstances of the case with the child witness.

(j) The court shall appoint an administrator whose duties shall be to enforce the guidelines established by this section

and the guidelines set up by the volunteer advisory board. The administrator's duties shall also include monitoring the training program and supervising the volunteers.

(k) The children's representative shall do all of the following:

(1) Accompany the child witness through all proceedings, including criminal proceedings, dependency proceedings, and civil proceedings.

(2) Explain to the child witness in terms he or she will understand, based upon his or her age and maturity, the nature and progress of the proceedings and what the child will be called upon to do, including, but not limited to, telling the child that he or she is expected to tell the truth. These explanations shall be made prior to the child's courtroom appearance.

(3) Be available to observe the minor in all aspects of the case, in order to consult with the court as to any special needs of the minor. These consultations shall take place prior to the testimony of the child. For purposes of this paragraph, the court, during a recess, may recognize the children's representative when the representative indicates a need to address the court. The representative shall indicate such a need through the court clerk or bailiff. If a jury is present in the courtroom when the court decides to meet with the representative, the judge shall excuse the jury or convene an in-chambers session with the representative, the defense attorney, and the prosecuting attorney. The session shall be on the record.

(*l*) It is the intent of the Legislature that the court shall consider the goal of continuity between the children's representative and a child victim or witness in the various court proceedings. The Legislature thereby declares that it is desirable for a children's representative appointed to represent the interests of the minor in a dependency proceeding to

~~continue to represent the minor's interest in any ensuing criminal and civil proceedings.~~

~~(m) The children's representative shall not be required to testify with respect to the contents of a dependency proceeding in any other proceeding.~~

~~(n) The judge may appoint a children's representative at the initial proceeding or any proceeding thereafter. The minor or a person representing the minor may request the appointment of a representative.~~

~~(*o*) The children's representative is not immune from prosecution for dissuading a witness or from interfering with any judicial proceeding.~~

~~(p) The children's representative shall not discuss the facts and circumstances of the case with the child witness.~~

~~(q) Nothing in this act shall be construed to confer or create a privilege between the child and the children's representative.~~

~~(r) The inability of the children's representative to attend any proceeding is not cause for a continuance.~~

~~(s) The children's representative shall not be involved in any investigatory interviewing with the child.~~

Comment. Section 1348.5 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Penal Code Section 1348.5, enacted in 1986, established a pilot project relating to representation of a child in family sexual abuse cases. The three-year project was to commence on or before July 1, 1987. Reports on the project were to be submitted to the Legislature on or before December 31, 1988 and September 30, 1990. The Office of Criminal Justice Planning confirmed that this section is obsolete and should be repealed.

Penal Code § 2053.3 (repealed). Prisoner cell study

SEC. 27. Section 2053.3 of the Penal Code is repealed.

~~2053.3. (a) The Director of Corrections shall implement a two-year correctional education program that increases inmate assignments through adoption of a pilot project cell~~

~~study program. The program shall be implemented at three institutions, one for female inmates and two for male inmates, with the sites to be chosen by the Department of Corrections and the employee bargaining unit. Inmates shall be assigned to a classroom for three hours per day or 15 hours per week, not to exceed 20 inmates per classroom. Classroom-assigned inmates shall then be assigned to their cells for a study period of three hours per day or 15 hours per week. Inmates shall be housed contiguously to ensure appropriate educational supervision and educational assistance by an instructor and inmate teaching assistants. Cell study instruction shall be limited to 80 inmates housed contiguously where feasible to accomplish the objectives of the cell study program. The department shall adjust cell assignments to accomplish the program's intent. In implementing this program, the department shall adhere to the State Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code).~~

~~(b) An inmate participating in a cell study program pursuant to this section shall demonstrate appropriate educational progress, as certified by the instructor, as a condition of any reduction in the time served pursuant to Section 2933. Appropriate educational progress shall be demonstrated based upon preprogram and postprogram testing that reflects improved literacy of the inmate.~~

~~(c)(1) The pilot project cell study program shall commence on January 1, 1994, and end on December 31, 1995.~~

~~(2) Representatives from the Department of Corrections and the employee bargaining unit shall evaluate the cell study program and submit a report to the Legislature by July 30, 1996. If there is not a consensus, then a minority opinion shall also be included with the final report.~~

~~(d) The Department of Corrections may initiate a system of negative timekeeping with regard to the participation of inmates in inmate work, training, and education assignments.~~

Comment. Section 2053.3 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Penal Code Section 2053.3, enacted in 1993, established a pilot project relating to education of prisoners. The two-year project was to commence on January 1, 1994, and end on December 31, 1995. The Office of Criminal Justice Planning confirmed that this section is obsolete and should be repealed.

Penal Code § 5020 (repealed). Individualized prisoner education

SEC. 28. Section 5020 of the Penal Code is repealed.

~~5020. (a) The Department of Corrections and the California Youth Authority shall conduct a two-year pilot project in juvenile halls, the Youth Authority, and the state prison system if and when the necessary computer hardware, software, and technical assistance is donated to the departments to implement innovative individualized education programs in these institutions.~~

~~(b) The Department of the Youth Authority and the Department of Corrections shall, within budgetary limitations, provide staff to be trained and participate in educating and testing the inmates. At the end of the project period, the departments shall evaluate the effectiveness of the training techniques employed and report to the Legislature on their findings.~~

Comment. Section 5020 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Penal Code Section 5020, enacted in 1984, established a pilot project relating to education of prisoners. The project was to last for two years. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Legislature after the conclusion of the project. The Department of Corrections confirmed that this section is obsolete and should be repealed.

Penal Code § 6247 (repealed). Public inebriate reception center

SEC. 29. Section 6247 of the Penal Code is repealed.

~~6247. (a) Notwithstanding any other provision of this chapter, the County of Orange may establish, in consultation with the Board of Corrections, a regional public inebriate reception center in the County of Orange as a one-year pilot project to provide short-term shelter with a minimum capacity of 20 sleeping spaces, surveillance, assessment, and referral services for men and women.~~

~~(b) The County of Orange may operate and administer the pilot program specified in subdivision (a) and report to the board within nine months after commencement of operation of the regional public inebriate reception center as to whether its operation has resulted in cost savings by diversion of persons from the criminal justice system, and in other public benefits.~~

Comment. Section 6247 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Penal Code Section 6247, enacted in 1994, established a pilot project relating to shelter of public inebriates. The project was to last for one year. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Board of Corrections within nine months of commencement of the project. The Board of Corrections confirmed that this section is obsolete and should be repealed.

Penal Code § 13823.20 (repealed). Foot patrols in high intensity drug-related crime areas

SEC. 30. Section 13823.20 of the Penal Code is repealed.

~~13823.20. (a) The Office of Criminal Justice Planning shall establish a demonstration project in the City of Los Angeles for the purpose of creating police foot patrols in high intensity drug-related crime areas. Funds for these demonstration projects shall be allocated to the City of Los Angeles no later than 30 days following enactment of this section.~~

~~(b) The office also shall issue a request for proposal to select at least three additional cities for police foot patrol demonstration projects. Funds for this request for proposal shall be awarded no later than 90 days following enactment of this section.~~

~~(c) The police department in each city shall identify targeted areas for foot patrols based on high incidence of crime related to drug trafficking and other drug crimes. At a minimum, the Los Angeles Police Department shall target areas in south Los Angeles, central Los Angeles, east Los Angeles, and the San Fernando Valley.~~

~~(d) The Office of Criminal Justice Planning shall conduct an evaluation of the foot patrol programs created by this section and shall submit a report to the Legislature no later than August 31, 1991.~~

~~(e) The evaluation shall examine the effectiveness of the program relative to the following objectives:~~

~~(1) Each city shall demonstrate empirically that areas targeted for foot patrols have a high incidence of drug-related crimes.~~

~~(2) Officers are deployed to the targeted areas at least 20 percent of the time of each week.~~

~~(3) Against a baseline period established by the city police department, the following reductions occur in the aggregate for the targeted areas during the pilot period:~~

~~(A) An 8 percent reduction in radio calls.~~

~~(B) A 6 percent reduction in repressible crime.~~

~~(C) A 12 percent reduction in violent crime.~~

~~(4) Each city shall demonstrate whether changes in the incidence of drug- related crimes in areas adjacent to the targeted areas are appreciable and the extent to which those changes may be caused by increased foot patrol activity in the targeted areas.~~

Comment. Section 13823.20 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Penal Code Section 13823.20, enacted in 1990, established a pilot project relating to police foot patrols in drug crime areas. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Legislature by August 31, 1991. The Office of Criminal Justice Planning confirmed that this section is obsolete and should be repealed.

Penal Code §§ 13894.5-13894.9 (repealed). Fingerprinting of persons convicted of driving under the influence

SEC. 31. Chapter 10.3 (commencing with Section 13894.5) of Title 6 of Part 4 of the Penal Code is repealed.

Comment. Sections 13894.5-13894.9 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Penal Code Sections 13894.5-13894.9, enacted in 1990, established a pilot project relating to fingerprinting of persons convicted of driving under the influence of alcohol. The project was to last for eighteen months. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Legislature by November 1, 1992. The Office of Criminal Justice Planning confirmed that these sections are obsolete and should be repealed.

The full text of the chapter is set out below for reference:

§ 13894.5. Legislative findings and declarations

13894.5. The Legislature finds and declares all of the following:

(a) The people of California have a public safety interest in ensuring that individuals who are arrested and convicted of driving a motor vehicle while under the influence of an alcoholic beverage, any drugs, or any controlled substances receive the appropriate sentence or penalty based on that individual's complete driving history.

(b) An accurate record of the prior arrests and convictions of a person for driving under the influence may not be available to the judge at the time of sentencing because the person may have used an alias or some other form of false identification.

(c) There is a need for a reporting system that can identify, in a timely fashion, the prior arrest histories of those arrested for driving under the influence.

(d) The intent of this act is to require that a pilot project relating to the fingerprinting of those persons arrested for driving under the influence be implemented in a designated county.

§ 13894.6. Pilot fingerprint project

13894.6. The Department of Justice shall designate an appropriate county or portion of a county, with the county's consent, for a pilot

fingerprint project. The designated area should be as self-contained as possible to increase the likelihood that the arrestees' residences, places of work, and general driving patterns are within its boundaries. In consultation with the department, the sheriff of the designated county shall fingerprint persons who are arrested for a violation of Section 23152 or 23153 of the Vehicle Code using a livescan fingerprint computer system. The sheriff of the county designated by the Department of Justice shall cooperate with the department in the county's implementation of the pilot project.

§ 13894.7. Persons arrested for driving under influence of alcohol

13894.7. Under the pilot project, the sheriff of the designated county shall statistically track the persons arrested for driving under the influence for an 18-month period to determine whether the same individuals are arrested for subsequent driving offenses during the pilot period and whether the person's prior records in the pilot project fingerprint data base are successfully matched as a result of the fingerprint identification process.

§ 13894.8. Livescan fingerprint computer system

13894.8. The sheriff of the portion of the county designated by the Department of Justice shall take the fingerprints of persons arrested for driving under the influence of alcohol or drugs, or both, with the livescan fingerprint computer system.

§ 13894.9. Report

13894.9. The Bureau of Crime Statistics, within the Department of Justice, shall advise on the study's design, review the findings, and assist the county in preparing a report to the Legislature which shall be submitted by the designated county to the Legislature on or before November 1, 1992. The report shall include all of the following:

(a) The basis for the selection of the county or the portion of a county designated for the implementation of the pilot project, including consideration of the number of persons arrested for driving under the influence in the jurisdiction chosen, the geography, and the population.

(b) The staffing and other support requirements of the designated county sheriff's department which assisted in the taking and processing of the fingerprints with regard to the implementation of the pilot project.

(c) Any recommendations by the sheriff or the department for legislation as a result of the pilot project.

Penal Code § 14113 (repealed). Community violence prevention and conflict resolution

SEC. 32. Section 14113 of the Penal Code is repealed.

~~14113. (a) The Office of Criminal Justice Planning shall contract for four two-year community violence prevention and conflict resolution pilot programs throughout this state. They shall be commenced after July 1, 1985. Each of the four pilot programs may continue for a maximum of two years.~~

~~(b) Each program shall address the following subject areas as they interrelate with violence and to the extent they affect the geographic area served by the programs:~~

~~(1) Parenting, birthing, early childhood development, self-esteem, and family violence, to include child, spousal, and elderly abuse.~~

~~(2) Economic factors and institutional racism.~~

~~(3) Schools and educational factors.~~

~~(4) Alcohol, diet, drugs, and other biochemical and biological factors.~~

~~(5) Conflict resolution.~~

~~(6) The media.~~

Comment. Section 14113 is repealed as obsolete. The pilot projects established by this section have expired.

☞ **Note.** Penal Code Section 14113, enacted in 1984, established four concurrent pilot projects relating to violence prevention. The two-year projects were to commence after July 1, 1985. The Office of Criminal Justice Planning confirmed that this section is obsolete and should be repealed.

Penal Code § 14114 (amended). Program priorities

SEC. 33. Section 14114 of the Penal Code is amended to read:

14114. *(a)* First priority shall be given to programs which provide community education, outreach, coordination, and include creative and effective ways to translate the recommendations of the California Commission on Crime Control and Violence Prevention into practical use in one or more of the ~~subject areas set forth in Section 14113.~~ *following subject areas:*

(1) Parenting, birthing, early childhood development, self-esteem, and family violence, to include child, spousal, and elderly abuse.

(2) Economic factors and institutional racism.

(3) Schools and educational factors.

(4) Alcohol, diet, drugs, and other biochemical and biological factors.

(5) Conflict resolution.

(6) The media.

(b) At least three of the programs shall do all of the following:

~~(a)~~

(1) Use the recommendations of the California Commission on Crime Control and Violence Prevention and incorporate as many of those recommendations as possible into its program.

~~(b)~~

(2) Develop an intensive community-level educational program directed toward violence prevention. This educational component shall incorporate the commission's works "Ounces of Prevention" and "Taking Root," and shall be designed appropriately to reach the educational, ethnic, and socioeconomic individuals, groups, agencies, and institutions in the community.

~~(c)~~

(3) Include the imparting of conflict resolution skills.

~~(d)~~

(4) Coordinate with existing community-based, public and private, programs, agencies, organizations, and institutions, local, regional, and statewide public educational systems, criminal and juvenile justice systems, mental and public health agencies, appropriate human service agencies, and churches and religious organizations.

~~(e)~~

(5) Seek to provide specific resource and referral services to individuals, programs, agencies, organizations, and institutions confronting problems with violence and crime if the service is not otherwise available to the public.

~~(f)~~

(6) Reach all local ethnic, cultural, linguistic, and socioeconomic groups in the service area to the maximum extent feasible.

Comment. Section 14114 is amended to replace an obsolete reference to former Section 14113 with the substance of the former provision.

Penal Code § 14119 (amended). Pilot programs and workshops

SEC. 34. Section 14119 of the Penal Code is amended to read:

14119. (a) ~~Commencing on or after July 1, 1985, the Office of Criminal Justice Planning shall contract for no more than four pilot programs as described in Section 14113.~~

~~(b) Commencing on or after July 1, 1985, the~~ *The* Office of Criminal Justice Planning shall promote, organize, and conduct a series of one-day crime and violence prevention training workshops around the state. The Office of Criminal Justice Planning shall seek participation in the workshops from ethnically, linguistically, culturally, educationally, and economically diverse persons, agencies, organizations, and institutions.

~~(c)~~

(b) The training workshops shall have all of the following goals:

(1) To identify phenomena which are thought to be root causes of crime and violence.

(2) To identify local manifestations of those root causes.

(3) To examine the findings and recommendations of the California Commission on Crime Control and Violence Prevention.

(4) To focus on team building and interagency cooperation and coordination toward addressing the local problems of crime and violence.

(5) To examine the merits and necessity of a local crime and violence prevention effort.

~~(d)~~

(c) There shall be at least three workshops.

Comment. Section 14119 is amended to delete an obsolete reference to former Section 14113, and an obsolete commencement date.

PUBLIC RESOURCES CODE

Pub. Res. Code §§ 25920-25925 (repealed). Energy efficient mortgages

SEC. 35. Chapter 10.7 (commencing with Section 25920) of Division 15 of the Public Resources Code is repealed.

Comment. Sections 25920-25925 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Public Resources Code Sections 25920-25925, enacted in 1993, established a pilot project relating to energy efficient mortgages. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Governor and the Legislature on the project's completion. The California Energy Commission confirmed that these sections are obsolete and should be repealed.

The full text of the chapter is set out below for reference:

§ 25920. Legislative findings and declarations

25920. The Legislature hereby finds and declares all of the following:

(a) The Energy Policy Act of 1992 (P.L. 102-486) directs the federal government to establish an energy efficient mortgage pilot program in five states to promote the purchase of existing energy efficient residential buildings and the installation of cost-effective improvements in existing residential buildings. The act also establishes a training program regarding the benefits of energy efficient mortgages and the operation of a pilot program, and authorizes the appropriation of federal funds to carry out those pilot programs and training programs.

(b) The high cost of housing is a critical problem in California, as less than one-half of California households can afford to buy a median-priced home.

(c) Reducing a home's monthly energy costs through energy efficiency improvements can make the home more affordable by increasing the homeowner's disposable income, which allows the homeowner to qualify for a higher mortgage and increases the number of Californians that can afford to buy a home.

(d) More than 60 percent of California homes were built before energy standards were adopted for new homes in the mid-1970s. These older homes are disproportionate energy consumers. The average home built in 1968 consumes twice the energy of a home built after 1983.

(e) A wide range of cost-effective energy efficiency improvements can be made to homes, resulting in lower energy use, lower utility energy bills, reduced societal demand for new energy sources, and reduced environmental degradation related to the generation of energy.

(f) Energy efficient mortgages provide money to fund energy efficiency improvements in residential homes, resulting in lower energy costs to the homeowner. Energy efficient mortgages also increase the number of Californians, particularly of low- and moderate-income, who can qualify for home financing, because the incremental increase in monthly mortgage cost is more than offset by lower monthly energy bills.

(g) Although energy efficient mortgages have been available for a number of years, they are rarely used because borrowers are unaware of their existence or of the benefits that they can provide, and most lenders and real estate licensees are unaware of, or unfamiliar with, the energy efficient mortgage.

(h) The 1992-93 California Energy Plan, endorsed by the Governor, recommends that the state support the marketing of mortgages that account for energy efficiency.

§ 25921. Additional legislative findings and declarations

25921. The Legislature further finds and declares all of the following:

(a) It is in the interest of the people of this state that energy efficient mortgages be marketed and made available statewide, to increase awareness of their availability and their benefits.

(b) It is also in the interest of the state to seek to participate in federal government programs in this area, including energy efficient mortgage pilot and related training programs, and to seek federal funding to promote the use of energy efficient mortgages.

§ 25922. Development and implementation of pilot program

25922. The commission shall develop and implement a pilot program to determine how best to inform homeowners and potential homeowners of the availability, methods, and benefits of obtaining an energy efficient mortgage.

§ 25923. Functions of pilot program

25923. The pilot program shall be designed to do all of the following:

(a) Meet the eligibility requirements of the energy efficient mortgage pilot program and training program established by the federal government pursuant to the Energy Policy Act of 1992 (P.L. 102-486) if this state is chosen to participate in the federal government's pilot program.

(b) Familiarize mortgage lenders, real estate licensees, home appraisers, home inspectors, energy utilities, energy service providers, and other participants with the features of the energy efficient mortgage and the benefits that can result from its use.

(c) Identify and implement effective methods of informing the public of the availability and benefits of the energy efficient mortgage.

(d) Develop methods of incorporating the use of the energy efficient mortgage into the regular business practices of mortgage lenders, real estate licensees, home appraisers, home inspectors, and other persons involved in the sale, refinancing, and remodeling of residential real estate.

(e) Encourage the use of a home energy rating analysis as a precondition to qualification for an energy efficient mortgage.

(f) Identify obstacles to the use of energy efficient mortgages and recommend ways to mitigate or eliminate the obstacles.

§ 25924. Workshops and consultations

25924. (a) The commission shall convene one or more workshops with mortgage lenders, real estate licensees, home appraisers, home inspectors, energy utilities, energy service providers, and other appropriate parties to solicit recommendations on the implementation of the pilot program. The commission shall encourage those parties to participate in the pilot program.

(b) The commission shall consult, as needed, with the Department of Financial Institutions, the Department of Real Estate, and the Department of Housing and Community Development in carrying out this chapter.

§ 25925. Report to governor and legislature

25925. The commission shall report to the Governor and the Legislature upon the completion of the pilot program. Copies of the report shall also be sent to the appropriate policy committees of the Legislature, including the housing committees of the Senate and the Assembly. The report shall include all of the following:

(a) Results of the pilot program, including, but not limited to, the number of energy efficient mortgages used and the number of people who qualified for home financing as a result of using an energy efficient mortgage.

(b) Obstacles to the use of energy efficient mortgages.

(c) Recommendations on how to improve the use and effectiveness of energy efficient mortgages.

Pub. Res. Code § 48695 (repealed). Used oil filter recycling

SEC. 36. Section 48695 of the Public Resources Code is repealed.

~~48695. (a) The board may, on or before July 1, 1995, establish a pilot program for recycling used oil filters. Any pilot program established pursuant to this section shall develop opportunities for the public to voluntarily dispose of used oil filters and be eligible for an incentive fee of four cents ($0.04) upon disposal.~~

~~(b) The board shall operate any pilot program established pursuant to this section from July 1, 1995, until July 1, 1997. The board shall, in conducting any pilot program established pursuant to this section, solicit voluntary participation by certified used oil collection centers and curbside collection programs, operate the program in specific geographic areas selected by the board, and pay a recycling incentive fee to every participating curbside collection program or certified used oil collection center for used oil filters collected from the public and transferred to a metal reclaimer for the purpose of recycling.~~

~~(c) The board shall, on or before November 1, 1997, prepare a report on the success or failure of any pilot program established pursuant to this section and include recommendations for legislation, if warranted, for a used oil filter recycling program. The board shall make the report available to the Governor, the appropriate policy and fiscal committees of the Legislature, and, upon request, to Members of the Legislature.~~

~~(d) The board shall not expend more than one hundred twenty thousand dollars ($120,000) annually during each year~~

~~of the two-year pilot program for purposes of conducting the program.~~

~~(e) If a statewide oil filter recycling program is enacted by the Legislature prior to July 1, 1997, the board shall terminate the pilot program and prepare the final report within six months of the enactment of the oil filter recycling program.~~

Comment. Section 48695 is repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Public Resources Code Section 48695, enacted in 1994, established a pilot project relating to recycling of used oil filters. The two-year project was to commence on July 1, 1995, and end on July 1, 1997. A report on the project was to be submitted to the Governor and the Legislature by November 1, 1997. The California Integrated Waste Management Board confirmed that this section is obsolete and should be repealed.

VEHICLE CODE

Veh. Code § 2802.5 (repealed). Commercial vehicle inspection facilities

SEC. 37. Section 2802.5 of the Vehicle Code is repealed.

~~2802.5. (a) The Department of the California Highway Patrol, in cooperation with the Public Utilities Commission, the State Board of Equalization, the Department of Motor Vehicles, the Judicial Council, and other appropriate agencies, shall develop an interagency agreement under which the agencies shall assign one or more employees or interagency clerks at one or more commercial vehicle inspection facilities of the department which are open on a continuous basis. The employees or interagency clerks shall be assigned duties to perform on behalf of the state agencies which are a party to the agreement as specified in subdivision (b). However, in the case of the Judicial Council, the clerk shall perform duties on behalf of the clerk of the municipal court district in which the inspection facility is located, or of~~

~~the superior court in a county in which there is no municipal court.~~

~~(b) The employees or interagency clerks may issue registration permits for any of the state agencies which are parties to the interagency agreement, accept the payment of any fees due any of the state agencies, accept payment of bail or fines, set court dates, and perform other ministerial administrative functions for the state agencies or court. The Department of the California Highway Patrol, in cooperation with the other state agencies, shall provide computerized equipment appropriate to identify the status of any vehicles or drivers passing through the inspection facility. The employees or interagency clerks shall accept payment by credit card. Assigned personnel may remain the employees of their respective agencies, or as may otherwise be provided by the interagency agreement. The interagency agreement shall provide for sharing of associated costs between participating agencies, based on the anticipated enhanced revenue collections.~~

~~(c) At the request of any peace officer, the employees or interagency clerks shall determine the status of any outstanding warrants and whether all fees due have been paid with respect to a driver or vehicle present at the inspection facility.~~

~~(d) A peace officer at the inspection facility may store or impound any vehicle upon determination that the vehicle or the driver of the vehicle has failed to pay registration, regulatory, fuel permit, or other fees, or has any outstanding warrants in any county in the state. The stored or impounded vehicle shall be released upon payment of those fees, fines, or the posting of bail. Upon request, the driver or owner of the vehicle may request a hearing to determine the validity of the seizure.~~

~~(e) The Department of the California Highway Patrol may implement this program as a demonstration pilot program at one or more locations. The department, on or before February 1, 1992, shall report its recommendations for continuation, expansion, or termination of the program to the Legislature. The report shall also include comments from the trucking industry concerning the benefits and problems in the program and any recommendations as a result of the pilot project. The report shall also consider the potential for ports of entry at major highway entry points to California, similar to programs already implemented in other states.~~

Comment. Section 2802.5 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Vehicle Code Section 2802.5, enacted in 1989, established a pilot project relating to staffing of vehicle inspection facilities. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Legislature by February 1, 1992. The California Highway Patrol confirmed that this section is obsolete and should be repealed.

Veh. Code § 4764.1 (repealed). Collection of unpaid parking penalties

SEC. 38. Section 4764.1 of the Vehicle Code is repealed.

~~4764.1. The Legislature finds that there is a significant loss of revenue to local governments due to the present inability of the department to collect unpaid parking violation penalties in cases where the ownership of a vehicle has been transferred. It is, therefore, the intent of the Legislature that the department, in cooperation with parking citation processing agencies, shall develop a plan to establish a pilot program by which parking violation penalties and administrative fees may be collected without regard to whether a vehicle is transferred.~~

Comment. Section 4764.1 is repealed as obsolete. The pilot project established by Sections 4764.1-4764.4 has expired.

☞ **Note.** Vehicle Code Sections 4764.1-4764.4, enacted in 1988, established a pilot project relating to the collection of unpaid parking penalties. The two-year project was to commence on or before December 31, 1989. Reports on the project were to be submitted to the Legislature on or before January 1, 1991 and July 1, 1991. The Department of Motor Vehicles confirmed that these sections are obsolete and should be repealed.

Veh. Code § 4764.2 (repealed). Collection of unpaid parking penalties

SEC. 39. Section 4764.2 of the Vehicle Code is repealed.

~~4764.2. Notwithstanding Section 4764, the department shall, in cooperation with parking citation processing agencies, develop a plan to establish a pilot program by which parking penalties and administrative fees may be collected without regard to whether a vehicle is transferred. The plan shall address, but not be limited to, a review of the following:~~

~~(a) A method by which parking violators with 25 or more notices of parking violations on file with the department can be identified and be made responsible for payment of their parking penalties. The director may establish a lower numerical threshold if it is determined to be cost-effective.~~

~~(b) A system by which a common identifier can assist the department in identifying any vehicles owned by the same owner if a common identifier is deemed desirable.~~

Comment. Section 4764.2 is repealed as obsolete. The pilot project established by Sections 4764.1-4764.4 has expired.

☞ **Note.** Vehicle Code Sections 4764.1-4764.4, enacted in 1988, established a pilot project relating to the collection of unpaid parking penalties. The two-year project was to commence on or before December 31, 1989. Reports on the project were to be submitted to the Legislature on or before January 1, 1991 and July 1, 1991. The Department of Motor Vehicles confirmed that these sections are obsolete and should be repealed.

Veh. Code § 4764.3 (repealed). Collection of unpaid parking penalties

SEC. 40. Section 4764.3 of the Vehicle Code is repealed.

~~4764.3. The department, pursuant to Section 4763, shall assess a fee to cover the costs of the pilot program.~~

Comment. Section 4764.3 is repealed as obsolete. The pilot project established by Sections 4764.1-4764.4 has expired.

☞ **Note.** Vehicle Code Sections 4764.1-4764.4, enacted in 1988, established a pilot project relating to the collection of unpaid parking penalties. The two-year project was to commence on or before December 31, 1989. Reports on the project were to be submitted to the Legislature on or before January 1, 1991 and July 1, 1991. The Department of Motor Vehicles confirmed that these sections are obsolete and should be repealed.

Veh. Code § 4764.4 (repealed). Collection of unpaid parking penalties

SEC. 41. Section 4764.4 of the Vehicle Code is repealed.

~~4764.4. The department shall report on the plan developed pursuant to Section 4764.2 to the Legislature on or before March 31, 1989. The report shall examine whether the costs of the pilot program can be recovered from fees and whether the pilot program will result in a net revenue gain for all local agencies which participate in the program. If the pilot program is shown to be cost- effective, then the department may request funding for the program in the 1989- 90 Governor's Budget. Upon appropriation of funds for the pilot program in the 1989-90 Budget Act, the department may implement a 24-month pilot program on or before December 31, 1989. The department shall submit an interim report to the Legislature evaluating the results of the pilot program by January 1, 1991, and a final report, with recommendations, by July 1, 1991.~~

Comment. Section 4764.4 is repealed as obsolete. The pilot project established by Sections 4764.1-4764.4 has expired.

☞ **Note.** Vehicle Code Sections 4764.1-4764.4, enacted in 1988, established a pilot project relating to the collection of unpaid parking penalties. The two-year project was to commence on or before December 31, 1989. Reports on the project were to be submitted to the Legislature on or before January 1, 1991 and July 1, 1991. The Department of Motor

Vehicles confirmed that these sections are obsolete and should be repealed.

WELFARE AND INSTITUTIONS CODE

Welf. & Inst. Code § 729.11 (repealed). Juvenile offender substance abuse treatment program

SEC. 42. Section 729.11 of the Welfare and Institutions Code is repealed.

~~729.11. (a) There is hereby established within the Office of Criminal Justice Planning, a demonstration program known as the "Juvenile Offender Substance Abuse Treatment Program." The goal of the demonstration program shall be to provide substance abuse intervention options for the juvenile courts.~~

~~(b) The Office of Criminal Justice Planning shall establish a county probation department demonstration project in at least three counties which shall be selected from among those counties submitting applications to the office. The demonstration projects shall be limited to the treatment of delinquent youth who have been assessed to be substance dependent or in imminent danger of substance dependence. Eligible youth will be those over which the juvenile court has retained jurisdiction pursuant to Section 602.~~

~~(c) The goals and functions of each demonstration project shall include, but are not limited to, all of the following:~~

~~(1) Development of substance assessment screening instruments at each project to be used at intake to classify the juvenile for possible placement in the program.~~

~~(2) Intensive in-custody substance abuse programs, including drug and alcohol education, individual and group counseling, family counseling, job training, self-esteem and personal motivation, life skills, and a volunteer mentor support network.~~

(d) Wards placed in custody shall be assigned to substance intervention team staff trained in program elements based on a reduced caseload.

(e) All wards who complete an in-custody substance abuse program or those placed directly on probation by the courts who require substance abuse intervention shall be transferred to an intensive aftercare or maximum supervision probation caseload. Wards assigned to these intensive caseloads may be required to meet intensive surveillance standards, including antidrug testing, day reporting, frequent contact with the probation officer, frequent contact with a therapist, and participation in designated community service substance prevention work projects for selected youth.

During this period of supervision, program elements, similar to those provided within juvenile custodial facilities, shall be established in the community for individual probationers, and their families, by designated intervention team staff. The "intervention team staff" shall include a probation officer, a treatment counselor, an educator, and job counselor.

(f) The development of the programs specified in subdivisions (c), (d), and (e) shall be in consultation with the county drug and alcohol administrator to assure appropriate program standards and to assure that the program is not duplicative, and that it is coordinated with California's Drug and Alcohol Abuse Master Plan, as specified in Section 11998.1 of the Health and Safety Code.

(g) The demonstration program shall be a two-year program and is contingent upon the availability and receipt of federal Anti-Drug Abuse Act funding. The first-year funding of the program shall be appropriated from moneys received by the Office of Criminal Justice Planning pursuant to the federal Anti-Drug Abuse Act of 1988 (Public Law 100-690). The

~~second year of funding the program shall be provided by the selected demonstration program projects.~~

Comment. Section 729.11 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 729.11, enacted in 1991, established a pilot project relating to treatment of juvenile substance abuse offenders. The project was to last for two years. No fixed beginning or ending date for the project is specified. The Office of Criminal Justice Planning confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code § 1760.3 (repealed). Graffiti removal pilot project

SEC. 43. Section 1760.3. of the Welfare and Institutions Code is repealed.

~~1760.3. (a) For purposes of this section "graffiti" means any unauthorized inscription, word, figure, or design which is marked, etched, scratched, drawn, or painted on any structural component of any building, structure, or other facility regardless of its content or nature and regardless of the nature of the material of that structural component.~~

~~(b) The Youth Authority shall establish and monitor the progress of a three- year pilot project in Los Angeles County for the removal of graffiti. The pilot project shall be administered by the Los Angeles County Probation Office which shall require adults, minors, or adults and minors, who are on probation, as part of community service ordered to be performed as a condition of their probation, to perform work necessary and proper to repair, remove, clean, or reconstruct any damage or defacement resulting from the application of graffiti to public buildings, structures, or other facilities owned by the state, Los Angeles County, any city within Los Angeles County, or any district or other political subdivision of the state.~~

~~(c) The Los Angeles County Probation Office also may, in its discretion, as part of the pilot project, require wards of the juvenile court who are placed in the juvenile hall for Los~~

~~Angeles County or any juvenile home, ranch, or camp located in Los Angeles County to perform work necessary and proper to repair, remove, clean, or reconstruct any damage or defacement resulting from the application of graffiti to public buildings, structures, or other facilities owned by the state, Los Angeles County, any city within Los Angeles County, or any district or other political subdivision of the state.~~

Comment. Section 1760.3 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 1760.3, enacted in 1988, established a pilot project relating to removal of graffiti. The project was to last for three years. No fixed beginning or ending date for the project is specified. The Department of the Youth Authority confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code § 8016 (repealed). Financial services for seniors

SEC. 44. Chapter 1 (commencing with Section 8016) of Division 8 of the Welfare and Institutions Code is repealed.

Comment. Section 8016 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 8016, enacted in 1987, established a pilot project relating to the provision of financial services to seniors. The eighteen-month project was to commence on January 31, 1988. A report on the project was to be submitted to the Legislative Analyst's office by May 1, 1989. The State Controller's Office confirmed that this section is obsolete and should be repealed.

The full text of the chapter, which consists of a single section, has been set out below for reference.

§ 8016 . Financial services for seniors

8016. (a) The public guardian shall enter into a contract or written agreement with eligible private or public nonprofit agencies to provide those services in subdivision (c) to seniors.

(b) Eligible agencies shall only include those agencies which provide case management services to seniors. Preference shall be given to proposals from those agencies which are providing case management services to seniors under the Institutionalization Prevention Services Program, also referred to as the Linkages Program, pursuant to Sections 9390, and following, or the Multipurpose Senior Services Program.

(c) Services which may be provided to seniors pursuant to subdivision (a) include all of the following:

(1) Financial counseling for elders in need of assistance in the management of their income or referral to an appropriate agency.

(2) Assistance for elders in payment of bills, mailing checks, organizing a budget, and other fiscal administrative jobs when the elders are able to manage their own finances, but due to a disability, such as vision loss, loss of motor functioning, or mild confusion, need regular assistance.

(3) Provision of representative payee services for elders with a mental or physical disability or a drug or alcohol problem who cannot manage their money and who receive checks from any government agencies. The representative payee services shall be provided by the public guardian, and the contracting agency shall be responsible for budgeting. The public guardian shall be responsible for auditing expenditures authorized by the contracting agency.

(4) Durable power of attorney for elders who are unable to manage their finances, who are competent when the power of attorney is created, and who agree to financial management assistance.

(5) Conservatorship services for elders who are unable to manage their finances or other aspects of daily living and who are not competent.

(d) This section is not intended to prevent either the public guardian or the contracting service agencies from exercising power of attorney or placing clients on conservatorship as appropriate.

(e) Elders who are competent shall be required to authorize, in writing, the commencement or termination of financial services under this section.

(f) Any agency contracting for the provision of services under this section and the public guardian may charge fees for those services provided by each, at a rate based on the type and amount of services provided and the ability of the elders to pay. Fees charged under this section shall not exceed the usual and customary rates charged by similar providers, and shall be limited to the costs of administering these programs.

(g) Any provider of services under this section shall only be liable for actual damages in the event of malfeasance or self-dealing.

(h) The provision of services under this section shall be an 18-month pilot program, in which any or all of the Counties of Los Angeles, Orange, San Francisco, and Yolo may, upon request for funding, participate.

(1) Counties' public guardians shall notify the Controller of their intention to participate by January 31, 1988.

(2) The Controller shall notify each interested county's public guardian of the amount available for allocation to the county according to the formula in subdivision (k) by March 1, 1988.

(3) Public guardians in participating counties shall issue requests for proposals by April 1, 1988.

(i) Not less than 85 percent of the funds appropriated for the pilot program shall be used for the purposes of the program, and not more than 15 percent of the funds appropriated may be used for administrative costs incurred by the public administrator in the pilot program.

(j) As part of the administrative function, the public guardian in each participating county shall, by May 1, 1989, submit a report to the Legislative Analyst's office, which shall include, but not be limited to, the following data:

(1) The total number of seniors served by the program.

(2) The number of seniors served at each level of service described in subdivision (c).

(3) The number of seniors which reasonably have been diverted from conservatorship or institutionalization due to their participation in the program.

(4) Total amount of money raised for the program through the use of fees charged, and the degree to which use of fees assisted in furtherance of the program.

(k) The sum of two hundred forty thousand dollars ($240,000) is appropriated for the duration of the pilot program, without regard to fiscal years, from the General Fund to the Controller, for allocation to eligible counties requesting funding for commencement of the program established pursuant to this act. The funds shall be allocated in the following manner:

(1) The Controller shall allot to each participating county a base amount of thirty thousand dollars ($30,000).

(2) The Controller shall divide the remainder of the two hundred forty thousand dollars ($240,000) as follows:

(A) The Controller shall add together the total number of persons placed on probate conservatorship in each participating county.

(B) The Controller shall add to each county's base amount an amount equal to the percentage that each county's number of persons on conservatorship is to the total number of conservatorships among the participating counties.

(C) No single county's allotment under the formula for this section shall exceed ninety thousand dollars ($90,000). If any county's total allotment exceeds ninety thousand dollars ($90,000), the amount over ninety thousand dollars ($90,000) shall be apportioned to the remaining participating counties based on the percentage that each of the remaining

county's number of persons on conservatorship is to the total number of conservatorships among those remaining counties.

Welf. & Inst. Code § 11265.5 (amended). Testing of reporting systems

SEC. 45. Section 11265.5 of the Welfare and Institutions Code is amended to read:

11265.5. (a)(1) The department may, subject to the requirements of federal regulations and Section 18204, conduct three pilot projects, to be located in the Counties of Los Angeles, Merced, and Santa Clara, upon approval of the department and the participating counties. The pilot projects shall test the reporting systems described in subparagraphs (A), (B), and (C) of paragraph (4).

(2)(A) The pilot project conducted in Los Angeles County shall test one or both reporting systems described in subparagraphs (A) and (B) of paragraph (4). The pilot project population for each test shall be limited to 10,000 cases.

(B) The pilot projects in the other counties shall test one of the reporting systems described in subparagraph (A) or (C) of paragraph (4) and shall be limited to 2,000 cases per project.

(3)(A) The pilot projects shall be designed and conducted according to standard scientific principles, and shall be in effect for a period of 24 months.

(B) The projects may be extended an additional year upon the approval of the department.

(C) The projects shall be designed to compare the monthly reporting system with alternatives described in paragraph (4) as to all of the following phenomena:

(i) Administrative savings resulting from reduced worker time spent in reviewing monthly reports.

(ii) The amount of cash assistance paid to families.

(iii) The rate of administrative errors in cases and payments.

(iv) The incidence of underpayments and overpayments and the costs to recipients and the administering agencies of making corrective payments and collecting overpayments.

(v) Rates at which recipients lose eligibility for brief periods due to failure to submit a monthly report but file new applications for aid and thereafter are returned to eligible status.

(vi) Cumulative benefits and costs to each level of government and to aid recipients resulting from each reporting system.

(vii) The incidence of, and ability to, prosecute fraud.

(viii) Ease of use by clients.

(ix) Case errors and potential sanction costs associated with those errors.

(4) The pilot projects shall adopt reporting systems providing for one or more of the following:

(A) A reporting system that requires families with no income or whose only income is comprised of old age, survivors, or disability insurance benefits administered pursuant to Subchapter 2 (commencing with Section 401) of Chapter 7 of Title 42 of the United States Code, and with no recent work history to report changes in circumstances that affect eligibility and grant amount as changes occur. These changes shall be reported directly to the county welfare department in person, in writing, or by telephone. In all cases in which monthly reporting is not required, a form advising recipients of what changes must be reported, and how they may be reported shall be provided to recipients of aid along with benefit payments each month.

(B) A reporting system that permits families with no income or whose only income is comprised of old age, survivors, or disability insurance benefits administered pursuant to Subchapter 2 (commencing with Section 401) of Chapter 7 of Title 42 of the United States Code, and with no changes in

eligibility criteria, to report electronically monthly, using either an audio response or the food stamp on-line issuance and recording system, or a combination of both. Adequate instruction and training shall be provided to county welfare department staff and to recipients who choose to use this system prior to its implementation.

(C) A reporting system that requires all families to report changes in circumstances that affect eligibility and grant amount as changes occur. The changes shall be reported directly to the county welfare department in person, in writing, or by telephone. In all cases in which monthly reporting is not required, a form advising recipients of what changes must be reported, and how they may be reported, shall be provided to recipients of aid along with benefit payments each month.

(b)(1) The participating counties shall be responsible for preparing federal demonstration project proposals, to be submitted by the department, upon the department's review and approval of the proposals, to the federal agency on the counties' behalf. The development, operation, and evaluation of the pilot projects shall not result in an increase in the state allocation of county administrative funds.

(1.5) Each pilot county shall prepare and submit quarterly reports, annual reports, and a final report to the department.

(2) Each quarterly report shall be submitted no later than 30 calendar days after the end of the quarter.

(3) Each annual report shall be submitted no later than 45 days after the end of the year.

(4)(A) Each pilot county shall submit a final report not later than 90 days following completion of the pilot projects required by this section ~~and Section 18920~~.

(B)(i) As part of the final report, the pilot counties shall prepare and submit evaluations of the pilot projects to the department.

(ii) Each evaluation shall include, but not be limited to, an analysis of the factors set forth in paragraph (3) of subdivision (a) compared to each other and the current reporting systems in both the AFDC and food stamp programs. The final evaluations shall be prepared by an independent consultant or consultants contracted with for that purpose prior to the commencement of the projects.

(C) The department shall review and approve the evaluations submitted by the pilot counties and shall submit them to the appropriate policy and fiscal committees of the Legislature.

(c) The department may terminate any or all of the pilot projects implemented pursuant to this section after a period of six months of operation if one or more of the pilot counties submits data to the department, or information is otherwise received, indicating that the pilot project or projects are not cost-effective or adversely impact recipients or county or state operations based on the factors set forth in subparagraph (C) of paragraph (3) of subdivision (a).

(d) The pilot projects shall be implemented only upon receipt of the appropriate federal waivers.

Comment. Subdivision (b)(4)(A) of Section 11265.5 is amended to delete an obsolete reference to former Section 18920.

Welf. & Inst. Code § 14115.6 (repealed). Independent billing for services by nurse-practitioner

SEC. 46. Section 14115.6 of the Welfare and Institutions Code is repealed.

~~14115.6. The department shall establish a pilot project under which a nurse practitioner may bill independently for services provided in a nursing facility, as defined in Section 1250 of the Health and Safety Code. Nurse practitioners shall be compensated by the department for those services which would be compensable had the services been provided by a physician. If a nurse practitioner chooses to bill independently~~

~~for these services, the department shall make the payment for the services directly to the nurse practitioner. The department shall ensure that payments made to providers who employ nurse practitioners who bill separately are adjusted to reflect this separation so as not to increase the financial obligation incurred by the Medi-Cal program. The department shall establish a reimbursement rate for nurse practitioners who choose to bill independently pursuant to this section.~~

~~The pilot project shall be in operation for one year and the department shall submit a report to the Legislature no later than three months after the completion of the project.~~

~~Nurse practitioners shall, however, continue to bill through physicians for Medicare patients until such time as relevant federal regulations are changed or until waivers of relevant federal regulations are obtained.~~

~~The department shall seek any federal waivers necessary to avoid conflict with federal law. If a waiver is necessary, the department may, until the waiver is obtained, limit the implementation of this section to the extent that federal matching funds are available.~~

Comment. Section 14115.6 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 14115.6, enacted in 1984, established a pilot project relating to billing for the services of a nurse practitioner. The project was to last for one year. No fixed beginning or ending date for the project is specified. A report on the project was to be submitted to the Legislature within three months after the conclusion of the project. The State Department of Health, Office of Legislative Affairs, confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code § 14133.61 (repealed). Micrographics document location and retrieval system practitioner

SEC. 47. Section 14133.61 of the Welfare and Institutions Code is repealed.

~~14133.61. The State Director of Health Services shall implement and pilot test the use of a micrographics document location and retrieval system in the San Francisco Medi-Cal Field Office during fiscal year 1981-82 as a means to reduce treatment authorization request requirements on providers in the area served by that field office. The purpose of the pilot test is to demonstrate the feasibility of using a micrographics supported records system to reduce TAR requirements on providers of Medi-Cal services. System implementation shall be through a lease contract with a micrographics company doing business in California. The State Director of Health Services shall report progress on this pilot project to the Legislature by July 31, 1982.~~

Comment. Section 14133.61 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 14133.61, enacted in 1981, established a pilot project relating to document management. The project was to last for one year, during the 1981-1982 fiscal year. A report on the project was to be submitted to the Legislature by July 31, 1982. The State Department of Health, Office of Legislative Affairs, confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code § 16515 (repealed). Respite care services for children

SEC. 48. Section 16515 of the Welfare and Institutions Code is repealed.

~~16515. The State Department of Social Services shall select two county children's service agencies to operate a model project to provide respite care services for children with special needs in the area of physical and health handicaps in foster care. The respite care pilot project shall be operational until July 1, 1991.~~

~~(a) The director shall designate the County of Orange and the County of San Diego as the pilot counties to provide respite care for handicapped children in family homes, small~~

~~family homes, as defined in paragraph (6) of subdivision (a) of Section 1502 of the Health and Safety Code.~~

~~(b) The services to be provided shall include respite care defined as child care occurring up to 24 hours in one day. This respite care shall not be provided for any longer than 48 hours for any child in any one month.~~

~~(c) The State Department of Social Services in conjunction with the Orange County Social Services Agency and the San Diego County Department of Social Services, shall report to the Legislature on the effectiveness of this respite care pilot project by July 1, 1990. The evaluation report shall include, but not be limited to, the following data, by county:~~

~~(1) The number of handicapped children in family homes and small family homes before, during, and at the conclusion of the respite care pilot project.~~

~~(2) The number of foster children for whom respite care was provided by the pilot project.~~

~~(3) The number of hours of respite care provided by the pilot project.~~

~~(4) The cost of providing respite care, on an hourly and aggregated basis.~~

~~(d) This project shall be deemed to be successful if the Counties of Orange and San Diego each experience a 25 percent increase in the total number of family homes and small family homes.~~

Comment. Section 16515 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 16515, enacted in 1987, established a pilot project relating to respite care services for children. The project was to end by July 1, 1991. A report on the project was to be submitted to the Legislature by July 1, 1990. The Department of Social Services confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code §§ 18210-18215 (repealed). Food delivery

SEC. 49. Article 2 (commencing with Section 18210) of Chapter 3 of Part 6 of Division 9 of the Welfare and Institutions Code is repealed.

Comment. Sections 18210-18215 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Welfare and Institutions Code Sections 18210-18215, enacted in 1970, established a pilot project relating to the delivery of meals to handicapped or infirm persons who are eligible for public assistance. The project was to commence by January 1, 1971, but no ending date for the project is specified. Annual reports on the project were to be submitted to the Legislature. The Department of Social Services confirmed that these sections are obsolete and should be repealed.

The full text of the article is set out below for reference:

§ 18210. Pilot project

18210. In addition to other demonstration projects authorized under this chapter a pilot project shall be conducted pursuant to this article. This project shall commence January 1, 1971, and be limited to two counties, one in the northern and one in the southern part of this state, which are willing to participate and are designated for participation by the department.

§ 18211. Meals for handicapped or infirm persons

18211. A designated county may prepare and deliver, or contract to be prepared and delivered, meals in the county to handicapped or infirm persons eligible for public assistance under Chapter 3 (commencing with Section 12000), Chapter 4 (commencing with Section 12500), Chapter 5 (commencing with Section 13000), and Chapter 6 (commencing with Section 13500) of Part 3 of this division or any handicapped or infirm persons who meet the eligibility requirements of aid to the aged except for their age and who without such service may be required to live in a protective living arrangement. A designated county may provide such service to other persons unable to properly provide meals for themselves and who are unable to secure assistance to do so who shall pay the full cost of such meals to the county. The service may be provided pursuant to contract by the county with another public or private organization.

§ 18212. Charge for portion of cost of meals

18212. The department shall develop and test as a part of the pilot project under this article methods under which persons furnished meals as provided under Section 18211 may be charged a portion of the cost of home-delivered meals based on their ability to pay, provided that the

charges for any meals provided to a recipient shall not exceed one-third of the daily food allowance of that recipient.

§ 18212.5. Cooperation and study; voluntary nonprofit organizations

18212.5. In carrying out the provisions of this article the department shall cooperate with, secure information from, and study the methods and procedures of any voluntary nonprofit organization with the consent of such organization that is conducting similar federally funded projects on the effective date of this act.

§ 18213. Federal funds

18213. The department shall actively seek, and make maximum use of, federal funds which might be available for the purposes of this chapter.

§ 18214. Annual progress reports

18214. The department shall make annual progress reports to the Legislature including, but not limited to, a cost and benefit analysis of the program established pursuant to this article and any information and comparative analysis of other programs secured pursuant to Section 18212.5 not later than the fifth legislative day of the legislative session, commencing with the 1971 Regular Session of the Legislature.

§ 18215. Appropriation

18215. There is hereby appropriated from the General Fund the sum of fifty thousand dollars ($50,000) provided that the federal government makes available an amount equal to or in excess of such sum prior to July 1, 1971, for allocation to the designated counties for the purposes of this article.

Welf. & Inst. Code § 18600 (repealed). Services for newly blind and severely visually-impaired persons over 55

SEC. 50. Section 18600 of the Welfare and Institutions Code is repealed.

~~18600. There is hereby established a two-year pilot project under which the State Department of Rehabilitation shall contract with private nonprofit organizations serving the blind to provide the newly blind and severely visually impaired persons 55 years of age or older with the following services as needed:~~

~~(a) Counseling.~~

~~(b) Personal adjustment including instruction in daily living skills.~~

~~(c) Instruction in orientation and mobility.~~

~~As used in this article a severely visually impaired person shall be defined as a person who, with best corrected vision, is unable to read newsprint.~~

Comment. Section 18600 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 18600, enacted in 1980, established a pilot project relating to services for the blind. The project was to last for two years. No fixed beginning or ending date for the project is specified. The Department of Rehabilitation confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code § 18919 (repealed). Food stamp cash out

SEC. 51. Section 18919 of the Welfare and Institutions Code is repealed.

~~18919. (a) The director may establish, within the Food Stamp Program, the Food Stamp Cash Out Demonstration Project.~~

~~(b) To enable San Diego County to conduct a demonstration project, the director may, by formal order, waive the enforcement of Section 18904 and specific regulations and standards. The order establishing the waiver shall provide alternative methods and procedures of administration and issuance, shall not be in conflict with the basic purposes or coverage provided by law, shall not reduce the amount of benefits that recipients would otherwise be entitled to under the Food Stamp Program, shall not be general in scope but shall apply only to this project, shall not exceed five years, and shall not take effect unless and until the following conditions have been met:~~

~~(1) The appropriate federal agency has agreed on or before June 30, 1989, to waive the federal requirements for the same project.~~

~~(2) A comprehensive plan, including an analysis of the expected costs and savings, has been published in a~~

~~newspaper of general circulation in San Diego County and filed with the policy and fiscal committees of each house of the Legislature.~~

~~(c) During the duration of the demonstration project, cashed out food stamp benefits shall not be considered as income in determining eligibility, the amount of aid, or benefit levels in any other public benefit or subsidy program. Applicants and recipients shall be entitled to the same rights to fair hearings and appeals that they would otherwise be entitled to under the Food Stamp Program.~~

~~(d) San Diego County shall submit an annual report to the department on the demonstration project authorized by this section. The county shall additionally collect and report any data and findings as required by the department and shall cooperate with the department in evaluating the demonstration project.~~

~~(e) Within nine months of the termination of the demonstration project authorized by this section, the department shall submit to the Legislature a report evaluating the effectiveness of the demonstration project. The report shall address, but not be limited to, the impact of the demonstration project on all of the following:~~

~~(1) Food stamp processing and mailing costs.~~

~~(2) Eligibility staff time and other administrative costs.~~

~~(3) Losses caused by fraud and theft.~~

~~(4) Changes in program benefits received by, and receptivity to cashed out benefits of, food stamp recipients.~~

~~(5) Food stamp error rate prior to and during cash out of food stamps.~~

~~(f) The director may extend the demonstration project to June 30, 1997.~~

Comment. Section 18919 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 18919, enacted in 1988, established a pilot project relating to "food stamp cash out." The project

was to last for five years. No fixed beginning or ending date for the project is specified. However, the project can be extended through June 30, 1997. A report on the project was to be submitted to the Legislature within nine months after the conclusion of the project. The Department of Social Services confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code § 18920 (repealed). Food stamp reporting systems

SEC. 52. Section 18920 of the Welfare and Institutions Code is repealed.

~~18920. (a) (1) The department may conduct three pilot projects, to be located in the Counties of Los Angeles, Merced, and Santa Clara, upon approval of the department and the participating counties. The pilot projects shall test the reporting systems described in subparagraphs (A), (B), and (C) of paragraph (4).~~

~~(2)(A) The pilot project conducted in Los Angeles County shall test one or both of the reporting systems described in subparagraphs (A) and (B) of paragraph (4). The pilot project population in Los Angeles County shall be limited to 10,000 cases for each test.~~

~~(B) The pilot projects in the other counties shall test one of the reporting systems described in subparagraphs (A) and (C) of paragraph (4) and shall be limited to 2,000 cases per project.~~

~~(3)(A) The pilot projects shall be designed and conducted according to standard scientific principles, and shall be in effect for a period of 24 months.~~

~~(B) The projects may be extended an additional year upon the approval of the department.~~

~~(C) The projects shall be designed to compare the monthly reporting system with alternatives described in paragraph (4) as to the phenomena described in subparagraph (C) of paragraph (3) of subdivision (a) of Section 11265.5.~~

~~(4) The pilot projects shall adopt reporting systems providing for one or more of the following:~~

(A) A reporting system that requires households with no income, other than grants issued by the county welfare department, or whose only income is comprised of old age, survivors, and disability insurance benefits administered pursuant to Subchapter 2 (commencing with Section 401) of Chapter 7 of Title 42 of the United States Code, and with no recent work history, to report changes in circumstances that affected eligibility and benefit amount as changes occur. These changes shall be reported directly to the county welfare department in person, in writing, or by telephone. In all cases in which monthly reporting is not required, a form advising recipients of what changes must be reported, and how they may be reported, shall be provided to recipients of aid along with benefit payments each month.

(B) A reporting system that permits households with no income, other than grants issued by the county welfare department, or whose only income is comprised of old age, survivors, and disability insurance benefits administered pursuant to Subchapter 2 (commencing with Section 401) of Chapter 7 of Title 42 of the United States Code, and with no changes in eligibility criteria, to report electronically monthly, using either an audio response system or the food stamp on-line issuance and recording system, or a combination of both. Adequate instruction and training shall be provided to county welfare department staff and to recipients who choose to use this system prior to its implementation.

(C) A reporting system that requires all households to report changes in circumstances that affect eligibility and benefit amount as changes occur. These changes shall be reported directly to the county welfare department in person, in writing, or by telephone. In all cases in which monthly reporting is not required, a form advising recipients of what changes must be reported, and how they may be reported,

~~shall be provided to recipients of aid along with benefit payments each month.~~

~~(b)(1) The participating counties shall be responsible for preparing federal demonstration project proposals, to be submitted by the department. If federal approvals or waivers are necessary to implement the proposals, the department shall seek these approvals and waivers from the appropriate federal agency. The development, operation, and evaluation of the pilot projects shall not result in an increase in the state allocation of county administrative funds.~~

~~(1.5) The pilot counties shall prepare and submit quarterly reports, annual reports, and a final report to the department.~~

~~(2) Each quarterly report shall be submitted no later than 30 calendar days after the end of the quarter.~~

~~(3) Each annual report shall be submitted no later than 45 days after the end of the year.~~

~~(4)(A) Each pilot county shall submit a final report not later than 90 days following completion of the pilot projects required by this section and Section 11265.5.~~

~~(B)(i) The final reports shall each include an evaluation of the pilot project based on an analysis of the factors set forth in subparagraph (C) of paragraph (3) of subdivision (a) compared to each other, to the current reporting systems in the AFDC and Food Stamp programs and any additional factors as determined by the department. The final evaluation shall be prepared by an independent consultant or consultants contracted with for that purpose prior to the commencing of the projects.~~

~~(ii) Each evaluation shall include, but not be limited to, an analysis of the factors set forth in subparagraph (C) of paragraph (3) of subdivision (a) of Section 11265.5 compared to each other and the current reporting systems in both the AFDC and food stamp programs.~~

~~(C) The department shall review and approve the evaluations submitted by the pilot counties and shall submit them to the appropriate policy and fiscal committees of the Legislature.~~

~~(c)(1) The director may, by formal order, waive the enforcement of specific statutory requirements, regulations, and standards in one or more counties, as required for the implementation of the pilot projects.~~

~~(2) Any waiver under paragraph (1) shall meet all of the following requirements:~~

~~(A) It shall not conflict with the basic purposes, coverage, or benefits provided by law.~~

~~(B) It shall not be general in scope, but shall apply only to this project.~~

~~(C) It shall apply only during the authorized period during which the pilot projects are implemented under this section, not to exceed a period of three years.~~

~~(D) It shall provide alternative methods and procedures of administration.~~

~~(E) It shall not reduce the amount of benefits to which recipients would otherwise be entitled under the Food Stamp Program.~~

~~(F) It shall not take effect unless and until the appropriate federal agency has agreed to waive the federal requirements for the same project.~~

~~(d) The department may terminate any or all of the pilot projects implemented pursuant to this section after a period of six months of operation if one or more of the pilot counties submits data to the department, or information is otherwise received, indicating that the pilot project or projects are not cost- effective or adversely impact recipients or county or state operations based on the factors set forth in subparagraph (C) of paragraph (3) of subdivision (a).~~

~~(e) The pilot projects shall be implemented only upon receipt of the appropriate federal waivers.~~

Comment. Section 18920 is repealed as obsolete. The pilot project established by this section has expired.

☞ **Note.** Welfare and Institutions Code Section 18920, enacted in 1991, established three pilot projects relating to reporting systems for the administration of the food stamp program. The projects were to last for no more than three years. No fixed beginning or ending date for the projects are specified. Reports on the project were to be submitted to the Legislature quarterly, and within 90 days after the conclusion of the projects. The Department of Social Services confirmed that this section is obsolete and should be repealed.

Welf. & Inst. Code §§ 18990-18991 (repealed). Grandparent phonefriend project

SEC. 53. Chapter 13 (commencing with Section 18990) of Part 6 of Division 9 of the Welfare and Institutions Code is repealed.

Comment. Sections 18990-18991 are repealed as obsolete. The pilot project established by these sections has expired.

☞ **Note.** Welfare and Institutions Code Sections 18990-18991, enacted in 1988, established six concurrent pilot projects relating to telephone support services for unsupervised school children. The project was to commence by April 1, 1989, but no ending date for the project is specified. A report on the project was to be submitted to the Legislature by January 1, 1992. The Department of Aging confirmed that these sections are obsolete and should be repealed.

The full text of the chapter is set out below for reference:

§ 18990. Legislative findings

18990. The Legislature finds both of the following:

(a) Older citizens have a great deal to offer children who might not have a close-knit family relationship. A program which utilizes the resources of older citizens as persons providing support or information, or both, to unsupervised children after school hours, and known as "phonefriends," would enhance the self-esteem of the participating older citizens while filling a great societal need.

(b) "Older citizens," as used in this article, means individuals 60 years of age or older.

§ 18991. Establishment, funding and requirements of pilot projects; report to legislature

18991. (a) The Department of Aging shall establish six pilot projects to provide after school telephone help lines for children in kindergarten through 6th grade. The department shall establish two of these projects in Los Angeles County, and one each in Alameda, Butte, Marin, and Riverside Counties. Each pilot project shall be conducted by a public or private entity, selected by the department, which provides services to older citizens. The department shall provide one-time only loans, of up to fifteen thousand dollars ($15,000) to each entity so selected for startup costs of the project, which shall be limited to the costs of telephone installation and operation; the printing of informational material; a full-time, salaried coordinator; a 20-hour per week secretary; liability insurance; and fingerprinting costs.

(b) The Department of Aging in its operation and administration of the program shall select a coordinator. The coordinator shall work with phonefriend projects already in existence to assist new programs through the developmental stages.

(c) Within one year from the date of obtaining private sector funding, each pilot project coordinator shall submit a report to the Department of Aging citing the effectiveness of the program, the number of children assisted, and the type of assistance provided.

(d) The Department of Aging shall report to the Legislature prior to January 1, 1992. This report shall contain each individual report received pursuant to subdivision (b), along with an overview of the programs and an assessment of the ability of the programs to meet the objectives of this article.

(e) All loans made by the department pursuant to this section shall be repaid to the General Fund with interest equal to that earned by funds of the Pooled Money Investment Board.

(f) The Department of Aging shall notify all eligible parties through the network of providers of service to older citizens, of the availability of funds pursuant to this article.

(g) Prior to April 1, 1989, the Department of Aging shall select the six participants and shall, within six weeks from the selection distribute startup funds, not to exceed fifteen thousand dollars ($15,000) to each of the participants.

(h) Each pilot project shall meet the following requirements, as verified by the department:

(1) Services shall be provided through telephone help lines created for the purpose of providing information or support, or both, to children in kindergarten through 6th grade, when the children are without adult supervision after school hours.

(2) The telephone help lines shall be staffed on a volunteer basis by older citizens, who shall be known as "grandparent phonefriends" for purposes of publicizing the project.

(3) Volunteers answering the phone lines shall as a minimum be trained to: make appropriate referrals in cases of emergency or in other cases necessitating the assistance of another agency; listen to children who express feelings of loneliness or fear; provide practical information to callers about common household, school, or other problems, as determined by the department and the entity conducting the project; and inquire of children with problems.

(4) Each project shall include procedures for contacting parents in appropriate cases, and procedures to ensure that confidentiality is respected. A caller's phone number shall be requested only if the volunteer believes it might be necessary to call back the child.

(5) The coordinator for the Department of Aging shall arrange with local entities for fingerprinting volunteer older citizens before the volunteers can begin any training on the phonefriend lines.

(6) Each pilot project shall work with the local school boards and any parent or teacher group in determining training procedures described in paragraph (3).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Law Library Board of Trustees

February 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Law Library Board of Trustees*, 30 Cal. L. Revision Comm'n Reports 429 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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February 1, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Existing law (Bus. & Prof. Code § 6301) establishes elaborate criteria for selection of a law library board of trustees. To promote flexibility, improve clarity, and build relations between law libraries and the general public, the Law Revision Commission proposes to revise this provision to:

(1) Reflect trial court unification by eliminating the references to municipal courts.
(2) Permit the judges of a superior court to select either four or five law library trustees at their discretion, without regard to the number of judge trustees authorized as of January 1, 1998.
(3) Clarify which attorneys may serve on a law library board.
(4) Increase flexibility as to the size of a law library board.
(5) Permit laypersons to serve on the law library board in specified circumstances.

The Commission also proposes to expand the scope of a special provision that permits reduction of the size of the law library board in some counties (Bus. & Prof. Code § 6301.5).

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999 and Government Code Section 70219.

Respectfully submitted,

David Huebner
Chairperson

LAW LIBRARY BOARD OF TRUSTEES

EXISTING LAW

Each county in the state is to have a law library governed by a board of trustees.[1] Although other provisions apply in some counties, Business and Professions Code Section 6301 is the main provision governing selection of the board.[2] It establishes elaborate criteria for selection of the trustees. To enhance clarity and ease of use, improve the functioning and fund-raising capabilities of law library boards, and promote effective relations between law libraries and the general public, the Law Revision Commission recommends revision of these criteria.

PROPOSED REFORMS

Section 6301 should be revised to: (1) eliminate the references to municipal courts, (2) eliminate use of the historical benchmark (January 1, 1998) in determining how many trustees the judges of a unified superior court may select, (3) clarify which attorneys may be selected to serve on a law library board, (4) increase options regarding the size of the law library board, and (5) increase diversity by permitting laypersons to serve on law library boards in specified circumstances.

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1. Bus. & Prof. Code § 6300. All further statutory references are to the Business and Professions Code, unless otherwise indicated.

2. For a special provision governing the composition of the law library board in San Diego County, see Section 6301.1. For a provision authorizing a board of less than six members in a county in which there is no county bar association, see Section 6301.5. For a provision grandfathering pre-1941 legislation establishing a law library and board of law library trustees in a county, see Section 6363. See also Section 6364 ("It is discretionary with the board of supervisors of any county to provide by ordinance for the application of the provisions of this chapter to the county.").

Trial Court Unification

In 1998, California voters approved a constitutional amendment providing for trial court unification on a county-by-county basis.[3] Since then, the trial courts in all fifty-eight counties have unified. Each county now has a unified superior court; all municipal courts have been eliminated.

Section 6301 should be amended to reflect these developments. The references to municipal courts should be deleted as obsolete.

Use of Historical Reference Point

The number of judge trustees in a unified superior court now depends on the number of judge trustees authorized as of January 1, 1998. Three superior court judges (or, under specified circumstances, one superior court judge and two members of the bar of the county appointed by the superior court judges) are to be selected pursuant to Section 6301(a). One or two additional superior court judges may be selected pursuant to Section 6301(b), "so that the number of judges elected shall not exceed the number of judge trustees authorized as of January 1, 1998."

As January 1, 1998, becomes more distant, use of this historical reference point may cause confusion and become inappropriate. Section 6301 should be amended to eliminate this benchmark and permit the judges of a unified superior court to select either four or five judge trustees at their discretion, without regard to the number of judge trustees authorized as of January 1, 1998. This would not significantly alter the existing balance of power on law library boards.[4]

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3. 1996 Cal. Stat. res. ch. 36 ("SCA 4"), which appeared on the ballot as Proposition 220.

4. The proposed amendment would only permit an increase in the number of judge trustees in some counties: Those in which four as opposed to five judge trustees were authorized as of January 1, 1998. Even in those counties, judges (or attorneys designated or appointed by judges) already constitute a majority of

Attorney Members

Section 6301 permits a "member of the bar of the county" to serve on a law library board in specified circumstances, but does not define this term. It is unclear whether an attorney must reside in the county, belong to a county bar association, have a law office in the county, satisfy some combination of these criteria, or meet other criteria to be eligible to serve.

This ambiguity should be eliminated. The provision should afford the flexibility to select highly capable members.[5] The proposed law would achieve this by permitting any member of the State Bar (as opposed to any "member of the bar of the county") to serve on the board in the circumstances already specified by statute. Further requirements are unnecessary, because the selection process should suffice to eliminate attorneys who would not be responsive to the needs of the county or available to effectively serve on the board.

Size of the Board of Trustees

Existing law requires a six-member board in some counties and a seven-member board in other counties.[6] As opposed to a six-member board, a seven-member board helps to prevent deadlock and makes it easier to obtain a quorum.[7] To make these benefits widely available, the proposed legislation would allow each county governed by Section 6301 to have

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the board: They hold four of six positions on the board, rather than five of seven positions. See Section 6301(d).

5. Overly rigid criteria may exclude the best-qualified persons from serving. For example, restricting membership to attorneys who reside in the county may prevent a senior partner of a prominent local law firm from serving on the board. Similarly, requiring an attorney trustee to belong to the local bar association may exclude a smart but independent-minded practitioner from serving.

6. See Section 6301(d); but see *supra* note 2 (special provisions governing size of board in some counties).

7. If a board has six members, only two can be absent for the board to transact business. If the board has seven members, a quorum is present even if three members are absent.

either a six- or a seven-member board, as best meets the needs of the county.

The proposed legislation would further enhance flexibility by expanding the scope of a special provision (Section 6301.5) permitting reduction of the size of the board in some counties. At present, this statute only applies in a county where there is no county bar association and too few eligible attorneys to constitute a board of six or seven members.[8] The statute should be revised to provide that in any county where there are three or fewer superior court judges, the board of supervisors, with the concurrence of the superior court judges, may reduce the law library board to not less than three members.[9] As under current law, reduction of the size of the board pursuant to this provision would be optional, not mandatory.

Diversity of the Board

At present, laypersons may attend and participate in law library board meetings, but they cannot vote and their perspectives and talents may differ from those who can. Although laypersons are a significant proportion of law

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8. Section 6301.5 provides:

> In any county in which there is no county bar association, if the board of supervisors determines that there is not a sufficient number of members of the State Bar residing, and with their principal places of office for the practice of law, in the county eligible for appointment to the board of library trustees by the board of supervisors pursuant to subdivision (d) of Section 6301 for the constitution of a six-member or seven-member board of library trustees, the board of library trustees may consist of not less than three members.

This provision appears to remain useful in some small counties. See Letter from Tony Nevarez, Legislative Representative for Council for California County Law Libraries, to Barbara Gaal (Jan. 21, 1999) (on file with California Law Revision Commission).

9. Where the board of supervisors and the superior court judges agree to reduce the size of the board, their agreement may also address the composition of the board.

library users, they have no direct voice in library operations.[10] The public also indirectly benefits from county law libraries because prosecutors, public defenders, private attorneys, and courts are able to share books and other legal resources, instead of maintaining their own collections and passing along the cost to clients or the public. The lay public may be oblivious to these benefits, however, and thus uninterested in supporting law libraries.

Including a member of the general public on a law library board may broaden the board's perspective, helping to ensure that the law library effectively serves the public. It may also increase public awareness of the law library, the services that it provides, and the support that it needs. In particular, a lay member may help the library supplement existing funding by encouraging private donations or county assistance.[11] Because law libraries traditionally depend on civil filing fees for funding,[12] and the number of civil cases has decreased in recent years,[13] availability of funding sources such as these may be crucial to maintaining full library services.

Despite these potential benefits, the proposed law would not require each law library board to include a member of the general public. Instead, it would broaden the range of persons who could serve on the board. Any resident of the county, not

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10. In the past, law libraries typically served judges and attorneys. Increasingly, however, law library patrons are laypersons. This is probably due to the trend towards self-representation, as well as attorneys' increasing reliance on electronic research materials rather than library resources. See, e.g., Letter from Samuel Torres, Jr., Santa Cruz County counsel, to California Law Revision Commission (Sept. 20, 2000) (Memorandum 2000-70, Exhibit pp. 11-12, on file with Commission).

11. As compared to lay trustees, judge trustees may be less effective at fundraising, because they are subject to ethical restrictions. See, e.g., Cal. Code of Judicial Ethics, Canon 4C(3)(d).

12. See Bus. & Prof. Code §§ 6321, 6322, 6322.1.

13. See Judicial Council & Administrative Office of the Courts, 2000 Court Statistics Report, p. 51.

just a member of the bar, could be designated by a judge to act for the judge as trustee, or, under the circumstances already specified by statute, appointed by the judges of a superior court to serve as trustee instead of a judge. Similarly, any resident of the county could be appointed to serve in place of the chair of the board of supervisors, not just another supervisor or an attorney. To ensure that judges, attorneys, and the board of supervisors continue to be represented on the law library board, a maximum of two laypersons could serve on the board at the same time. The proposed law thus authorizes diversification of the board to include laypersons, but permits flexibility in the composition of the board, allowing each county to structure its board according to its needs.

PROPOSED LEGISLATION

Bus. & Prof. Code § 6301 (amended). Board of law library trustees

SECTION 1. Section 6301 of the Business and Professions Code is amended to read:

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

~~(a)~~

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

(2) In a county where there are more than three judges of the superior court, the judges of that court shall elect either four or five of their number to serve as trustees.

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

~~(b) In a county with one or two municipal courts the judges of the court or courts shall elect one of their number to serve as trustee. In a county with three or more municipal courts, the judges of the courts may elect two of their number to serve as trustees. In a county in which there is no municipal court, the judges of the superior court may elect one or more of their number to serve as trustee, in addition to the trustees elected pursuant to subdivision (a), so that the number of judges elected shall not exceed the number of judge trustees~~

~~authorized as of January 1, 1998. Any judge who is an elected member may at the judge's option designate a member of the bar of the county to act for the judge as trustee.~~

~~(c)~~

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

~~(d)~~

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

(b) No more than two law library trustees may be residents of the county who are not judges of the county, members of the State Bar, or members of the board of supervisors of the county.

Comment. Section 6301 is amended to reflect elimination of the municipal courts as a result of unification with the superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Section 6301 is also amended to clarify that an attorney need not belong to a county bar association to serve on a law library board. It is also unnecessary for the attorney to reside in the county or regularly practice law in the county. It is sufficient if the attorney is a member of the State Bar. The local trial judges and the board of supervisors thus

have broad discretion to select capable attorneys to serve as trustees, yet eliminate unsuitable candidates in the selection process.

Section 6301 is further amended to permit a resident of the county to serve on a law library board in specified circumstances. To ensure that judges, attorneys, and boards of supervisors continue to be represented on law library boards, the number of lay trustees serving at the same time is limited to two.

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

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

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

Section 6301 is also amended to make technical changes.

Bus. & Prof. Code § 6301.5. (amended). Board of law library trustees in county with three or fewer superior court judges

SEC. 2. Section 6301.5 of the Business and Professions Code is amended to read:

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

~~board of library trustees may consist of~~ *where there are no more than three judges of the superior court, the board of supervisors, with the concurrence of the judges of the superior court, may reduce the number of law library trustees to* not less than three members.

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

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

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases

February 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases*, 30 Cal. L. Revision Comm'n Reports 443 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

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February 1, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

To identify opportunities for simplification, the California Law Revision Commission reviewed statutes that differentiate between limited and unlimited civil cases. The Commission recommends the following reforms:

(1) The same rules for pleading damages should apply in all actions for personal injury or wrongful death, regardless of the jurisdictional classification of the case. Code Civ. Proc. §§ 425.10, 425.11.

(2) The distinction between attachment undertakings in limited and unlimited civil cases should be eliminated, and the amount of the initial undertaking increased to $10,000. Code Civ. Proc. § 489.220.

(3) The clerk of court should be permitted to record a satisfaction of judgment where there is an interest deficit of $10 or less in an unlimited civil case, not just in a limited civil case. Code Civ. Proc. § 685.030.

(4) The differentiation between limited and unlimited civil cases as to the amount of a creditor's undertaking where there is a third-party claim should be eliminated. Code Civ. Proc. §§ 720.160, 720.260.

(5) The same filing fee should be required for all confessions of judgment, regardless of the size of the claim. Code Civ. Proc. § 1134.

(6) The same filing fee should be required for the first paper in all limited civil cases, regardless of the size of the demand. Gov't Code § 72055.

This recommendation was prepared pursuant to Government Code Section 70219.

Respectfully submitted,

David Huebner
Chairperson

UNNECESSARY PROCEDURAL DIFFERENCES BETWEEN LIMITED AND UNLIMITED CIVIL CASES

The California codes include provisions that distinguish between limited civil cases and unlimited civil cases. In some instances, this complexity may not be necessary. To simplify and improve civil procedure, the California Law Revision Commission recommends elimination of some of the procedural distinctions between limited and unlimited civil cases.

Background

On June 2, 1998, California voters approved a constitutional amendment providing for trial court unification on a county-by-county basis.[1] At that time, each county had a superior court and one or more municipal courts.[2] These courts heard different types of cases and used different procedures.[3] The ballot measure provided for unification of the superior and municipal courts in a county on a majority vote of the superior court judges and a majority vote of the municipal court judges within the county.[4]

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1. 1996 Cal. Stat. res. ch. 36 ("SCA 4"), which appeared on the ballot as Proposition 220.

2. Former Cal. Const. art. VI, §§ 4, 5. Justice courts were previously eliminated. 1994 Cal. Stat. res. ch. 113 ("SCA 7") (Proposition 191, approved by the voters Nov. 8, 1994, operative Jan. 1, 1995).

3. See, e.g., former Cal. Const. art. VI, § 10 ("Superior courts have original jurisdiction in all causes except those given by statute to other trial courts"); 1997 Cal. Stat. ch. 527, § 2 (former Code Civ. Proc. § 86) (civil cases within original jurisdiction of municipal court); 1985 Cal. Stat. ch. 1383, § 2 (former Code Civ. Proc. § 91) (economic litigation procedures in municipal court). See also Code Civ. Proc. § 85 Comment.

4. Cal. Const. art. VI, § 5(e).

Numerous statutory revisions were necessary to implement trial court unification. At the direction of the Legislature,[5] the Law Revision Commission reviewed the codes and drafted extensive implementing legislation.[6] The statutory revisions[7] were narrowly limited to generally preserve existing procedures but make them workable in the context of unification.[8]

To that end, the term "limited civil case" was introduced to refer to civil actions traditionally within the jurisdiction of the municipal court,[9] and the term "unlimited civil case" was introduced to refer to civil actions traditionally within the jurisdiction of the superior court.[10] Provisions prescribing municipal court procedures were revised to apply to limited civil cases;[11] provisions prescribing traditional superior court procedures were revised to apply to unlimited civil cases.[12]

The Law Revision Commission recommended, however, that the procedural distinctions between limited civil cases and unlimited civil cases be reviewed to identify opportunities for simplification.[13] The Legislature directed the Commission

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5. 1997 Cal. Stat. res. ch. 102; see also 1998 Cal. Stat. res. ch. 91.

6. *Trial Court Unification: Revision of Codes* (hereafter *Revision of Codes*), 28 Cal. L. Revision Comm'n Reports 51 (1998); see also *Report of the California Law Revision Commission on Chapter 344 of the Statutes of 1999 (Senate Bill 210)*, 29 Cal. L. Revision Comm'n Reports 657 (1999). This assignment followed an earlier legislative assignment in which the Commission made recommendations on the constitutional revisions necessary to implement trial court unification. See *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994); *Trial Court Unification: Transitional Provisions for SCA 3*, 24 Cal. L. Revision Comm'n Reports 627 (1994).

7. 1998 Cal. Stat. ch. 931; see also 1999 Cal. Stat. ch. 344.

8. *Revision of Codes*, *supra* note 6, at 60.

9. *Id*. at 64-65; see also Code Civ. Proc. §§ 85-85.1 & Comments.

10. Code Civ. Proc. § 88 & Comment.

11. See, e.g., Code Civ. Proc. § 91 & Comment; see also *Revision of Codes*, *supra* note 6, at 64-65.

12. See, e.g., Code Civ. Proc. § 564.

13. *Revision of Codes*, *supra* note 6, at 82-83.

and the Judicial Council to jointly undertake this work, as well as to reexamine other aspects of civil procedure in light of trial court unification.[14]

Methodology

Statutory provisions using the terms "limited civil case" or "unlimited civil case" were identified through computer searches. Of the provisions identified, many simply state that a particular type of action is a limited civil case.[15] A few are definitional or otherwise fundamental provisions.[16] Still other provisions establish procedural distinctions between limited and unlimited civil cases, but are being dealt with in another context.[17]

The Commission and the Administrative Office of the Courts ("AOC") analyzed the remaining provisions, assessing

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14. Gov't Code § 70219. A consultative panel of experts has been selected to assist in this endeavor. The panel consists of Prof. Walter Heiser (University of San Diego School of Law), Prof. Deborah Hensler (Stanford Law School), Prof. Richard Marcus (Hastings College of Law), Hon. William Schwarzer, ret. (U.S.D.C., N. Dist. Cal.), Prof. William Slomanson (Thomas Jefferson Law School), and Prof. Keith Wingate (Hastings College of Law). Others who have assisted with this study include Prof. David Jung (Hastings College of Law), Prof. J. Clark Kelso (McGeorge School of Law), and Larry Sipes (President Emeritus, National Center for State Courts).

15. See Civ. Code §§ 798.61, 1719, 3342.5; Code Civ. Proc. §§ 86, 86.1, 1710.20; Food & Agric. Code §§ 7581, 12647, 27601, 31503, 31621, 52514, 53564; Gov't Code §§ 53069.4, 53075.6, 53075.61; Pub. Util. Code § 5411.5; Veh. Code §§ 9872.1, 10751, 14607.6, 40230, 40256.

16. See Code Civ. Proc. §§ 32.5 ("jurisdictional classification" defined), 85 (limited civil cases), 85.1 (original jurisdiction in limited civil case), 87 (rules applicable to small claims case), 88 ("unlimited civil case" defined), 403.030 (reclassification of limited civil case by cross-complaint), 403.040 (motion for reclassification), 422.30 (caption); Gov't Code § 910 (contents of claim against governmental entity); Welf. & Inst. Code § 742.16(l) (jurisdiction of judge of juvenile court in restitution hearing).

17. These include provisions relating to appellate jurisdiction, appointment of receiver, court reporters and electronic recording, economic litigation procedures, filing and transmittal fees, judicial arbitration, relief awardable, and writ jurisdiction. See Commission Staff Memorandum 2000-55 (July 7, 2000), Attachment pp. 5-7.

whether the distinctions between limited and unlimited civil cases should be eliminated, and whether the provisions should be revised in other respects. Having studied the provisions, the Law Revision Commission recommends reforms in the following areas:[18]

- Pleading personal injury and wrongful death damages
- Undertaking to obtain writ of attachment or protective order
- Satisfaction of judgment
- Undertaking of creditor in case of third-party claim
- Confession of judgment
- Filing fee for the first paper in a limited civil case

Each topic is addressed in order below.[19]

Pleading Personal Injury and Wrongful Death Damages (Code Civ. Proc. §§ 425.10, 425.11)

Under Code of Civil Procedure Section 425.10, if a plaintiff demands recovery of money or damages, the complaint must state the amount of the demand. In an action brought in superior court for personal injury or wrongful death, however, the complaint may not include the amount of the demand, except in a limited civil case:

> 425.10. A complaint or cross-complaint shall contain both of the following:
>
> (a) A statement of the facts constituting the cause of action, in ordinary and concise language.
>
> (b) A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual or punitive damages for personal injury or wrongful death, in which case the amount thereof shall not be stated, except in a limited civil case.

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18. The Judicial Council supports the legislation proposed in this report, but it has not taken an official position on the remainder of the report.

19. Additional reforms may be proposed at a later date.

It is natural to ask whether there is a good reason for distinguishing between limited and unlimited cases in pleading damages for personal injury or wrongful death.

The Legislature first enacted the statutory prohibition on pleading damages for personal injury or wrongful death in 1974.[20] The California Medical Association supported the legislation, which addressed a concern that inflated claims in multimillion dollar malpractice lawsuits tend to attract sensational media coverage and unfairly cast physicians in a bad light.[21]

The provision presents due process and fairness issues, because it does not put the defendant on notice of the extent of potential liability. Those issues are addressed in Code of Civil Procedure Section 425.11, which provides for a separate notice of the claimed damages.[22] A default judgment in a case

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20. See 1974 Cal. Stat. ch. 1481, § 1 (amending Code Civ. Proc. § 425.10).

21. See *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 216-17 (1975); Schwab v. Rondel Homes, Inc., 53 Cal. 3d 428, 808 P.2d 226, 280 Cal. Rptr. 83 (1991).

22. Section 425.11 provides:

> 425.11. (a) As used in this section:
> (1) "Complaint" includes a cross-complaint.
> (2) "Plaintiff" includes a cross-complainant.
> (3) "Defendant" includes a cross-defendant.
> (b) When a complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought, except in a limited civil case. The request shall be served upon the plaintiff, who shall serve a responsive statement as to the damages within 15 days. In the event that a response is not served, the party, on notice to the plaintiff, may petition the court in which the action is pending to order the plaintiff to serve a responsive statement.
> (c) If no request is made for the statement referred to in subdivision (a), the plaintiff shall serve the statement on the defendant before a default may be taken.
> (d) The statement referred to in subdivision (b) shall be served in the following manner:
> (1) If a party has not appeared in the action, the statement shall be served in the same manner as a summons.

governed by this section may not exceed the amount that the plaintiff claims in the statement of damages.[23]

Like the prohibition on pleading damages, the requirement of a separate notice of damages does not apply in a limited civil case.[24] To the Commission's knowledge, the reason for excluding such cases from the special pleading rules is nowhere expressly stated. It is likely, however, that the concern about grossly inflated damage claims is less acute in a limited civil case than in an unlimited civil case, because the maximum amount in controversy in a limited civil case is $25,000.[25]

It does not appear productive to consider eliminating the prohibition on pleading damages or the requirement of a separate notice of damages in an unlimited case for personal injury or wrongful death. These special rules are politically based. There is no indication that those who obtained their enactment are dissatisfied with the rules. Although the rules

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(2) If a party has appeared in the action, the statement shall be served upon his or her attorney, or upon the party if he or she has appeared without an attorney, in the manner provided for service of a summons or in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(e) The statement referred to in subdivision (b) may be combined with the statement described in Section 425.115.

See also Code Civ. Proc. § 425.115, which requires a similar statement as to punitive damages. The Judicial Council has developed an official form for statements prepared pursuant to Sections 425.11 and 425.115. See Code Civ. Proc. § 425.12; Judicial Council form 982(a)(24).

23. Code Civ. Proc. §§ 580, 585. The same rule does not apply in a contested case. The plaintiff may recover damages proved in excess of the amount stated, just as if the prayer for relief were in the complaint. See, e.g., Damele v. Mack Trucks, Inc., 219 Cal. App. 3d 29, 267 Cal. Rptr. 197 (1990).

24. Before unification, those provisions were limited to an action in superior court. See *Revision of Codes*, *supra* note 6, at 182-83.

25. Code Civ. Proc. § 85. Despite the $25,000 maximum, the defendant in a limited civil case is entitled as a matter of fundamental fairness to know the amount claimed by the plaintiff. See, e.g., Janssen v. Luu, 57 Cal. App. 4th 274, 66 Cal. Rptr. 2d 838 (1997).

have received some criticism from other sources,[26] it is unlikely that they could be eliminated.

What about the converse? In an effort to attain consistency between limited and unlimited civil cases, should pleadings in limited civil cases be conformed to pleadings in unlimited cases? The pleadings would not include the amount of damages claimed in a personal injury or wrongful death case, but

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26. The Judicial Council opposed enactment of the provision in 1974, raising questions "as to its efficacy as well as to its constitutionality." *Review of Selected 1974 California Legislation*, 6 Pac. L. J. 216-17 (1975). Justice Mosk sharply criticized the statute in a 1991 dissent:

> Ultimately, the solution to this problem lies with the Legislature. The procedural hurdles to recovery now greatly outweigh the Legislature's apparent concern about the embarrassment to personal injury defendants of adverse publicity stemming from a lawsuit with a prayer for monumental damages. [Citations omitted.]
>
> A statutory scheme that forbids a party to provide useful information — a form of compulsory silence — and that creates anomalous results of the type reached today urgently needs reexamination. Moreover, in a newsworthy case a lawyer or party can always call a press conference and trumpet the claim to the heavens, or at least to the terrestrial media. Thus not only are sections 425.10 and 425.11 bad law and bad policy, they are an ineffective means of implementing the Legislature's apparent intent. Nor can they be made effective: I cannot conceive of legislation that could constitutionally prevent plaintiffs with sensational personal injury damage claims from announcing those claims in any forum whatsoever.

Schwab v. Rondel Homes, Inc., 53 Cal. 3d 428, 440-41, 808 P.2d 226, 280 Cal. Rptr. 83 (1991).

The statutory scheme has been revised since these criticisms were advanced. 1979 Cal. Stat. ch. 778, § 2; 1993 Cal. Stat. ch. 456, § 2; 1995 Cal. Stat. ch. 796, § 2. It is unclear to what extent dissatisfaction with the statute persists. A treatise explains:

> The statement of damages requirement makes entry of default more complicated: If defendant does not respond to the summons and complaint, plaintiff must go back and *re-serve* defendant with the statement of damages *before* seeking entry of default — i.e., double service may be required!

R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, *Pleading* § 6:288, at 6-60.3 (1999) (emphasis in original). The authors advise practitioners to attach the statement of damages to the summons if there is a likelihood of default.

a statement by the plaintiff would be provided on demand. Of course, consistency between limited and unlimited cases in this respect would simultaneously create internal inconsistency among pleadings in various types of limited civil cases.

But for the practitioner, as well as for judges, it is probably better to have the same pleading rules for personal injury and wrongful death cases, regardless of the jurisdictional classification of the case as limited or unlimited. Moreover, if the jurisdictional amounts are increased in the future, some of the same policy concerns about inflated claims in unlimited civil cases might surface in limited civil cases. For these reasons, the proposed law would revise Sections 425.10 and 425.11 to conform the pleading requirements for all personal injury and wrongful death cases.[27] Regardless of the jurisdictional classification of the case, the prohibition on pleading damages and the requirement of a separate notice of damages would apply.

Undertaking for Writ of Attachment or Protective Order (Code Civ. Proc. § 489.220)

Code of Civil Procedure Section 489.220 provides for an undertaking as a prerequisite to issuance of a writ of attachment. The undertaking is $2,500 in a limited civil case and $7,500 in an unlimited civil case.[28]

This provision has its origin in the pre-1974 attachment statute, which provided simply for an undertaking in one-half the principal amount of the total indebtedness or damages claimed, excluding attorney's fees.[29] The court was permitted

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27. Code of Civil Procedure Sections 425.115 (statement of punitive damages) and 425.12 (Judicial Council forms for statements of damages) would not require revision. A conforming revision of Government Code Section 72055 is necessary, because that provision requires that the amount of the demand in a limited civil case be stated on the first page of the first paper immediately below the caption. See "Filing Fee for First Paper in a Limited Civil Case" *infra*.

28. For the text of Code of Civil Procedure Section 489.220, see "Proposed Legislation" *infra*.

29. 1973 Cal. Stat. ch. 20, § 6 (former Code Civ. Proc. § 539(a)).

to decrease the amount on ex parte application of the plaintiff, if the court was satisfied that a lower amount would adequately protect the defendant.[30] The court could also increase the required undertaking on the defendant's motion, but the statute gave no guidance as to the increased amount.[31]

This scheme was changed in the Attachment Law of 1974 to provide for a fixed undertaking amount: $2,500 in municipal court proceedings, and $7,500 in superior court proceedings.[32] The defendant could object to the amount of the undertaking on the ground that it was less than the probable recovery for wrongful attachment. If the court determined that the amount was insufficient, the undertaking was to be increased to the amount of the probable recovery for wrongful attachment.[33]

This approach had several advantages over the earlier scheme. Because the fixed undertaking amounts were "arbitrary but modest,"[34] they were affordable for plaintiffs. This was not always true under the previous scheme, because the undertaking amount depended on the amount of the plaintiff's claim, which could be so large as to prohibit an attachment.[35] By permitting the defendant to seek an increase in the undertaking amount, but expressly tying the amount of any increase to the probable recovery for wrongful attachment, the new provision also protected the defendant to a more appropriate and more predictable extent than the previous statute.[36]

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30. 1973 Cal. Stat. ch. 20, § 6 (former Code Civ. Proc. § 539(a)).

31. *Id*.; see also *Recommendation Relating to Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701, 738 (1973).

32. 1974 Cal. Stat. ch. 1516, § 9.

33. *Id*.; see also *Prejudgment Attachment*, *supra* note 31, at 738, 833-34.

34. Commission Staff Memorandum 73-95 (Oct. 25, 1973), at 5.

35. See *id*. at 4 (referring to the "apparent unfairness of requiring a large bond where the only property subject to attachment has a much smaller value").

36. *Id*. at 4-5.

The new approach was also simple to administer, because the initial undertaking amounts were always the same and the amounts could only be increased, not decreased.

Trial court unification led to the current scheme in 1998. The undertaking is $2,500 in a limited civil case, and $7,500 in an unlimited civil case.[37] As before, if the fixed amount is insufficient, the court may increase the undertaking to the amount of the probable recovery for wrongful attachment.

Is it still useful to distinguish between limited and unlimited civil cases in fixing the initial amount of the attachment undertaking? The function of the undertaking is to ensure that funds are available to compensate the defendant for any damages that may result from a wrongful attachment.[38] For this purpose, the jurisdictional classification of the case as limited ($25,000 or less in controversy) or unlimited (more than $25,000 in controversy)[39] bears little or no relationship to the amount of damage that the defendant may sustain due to a wrongful attachment.

Moreover, the amount of the initial undertaking in today's dollars is even more modest in light of its intended purpose than it was in 1974.[40] It provides very little protection to the defendant against the potentially devastating effects of a wrongful attachment (e.g., forcing the defendant out of busi-

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37. See *Revision of Codes*, *supra* note 6, at 183-84.

38. See North Hollywood Marble Co. v. Superior Court, 157 Cal. App. 3d 683, 690, 204 Cal. Rptr. 55 (1984).

39. For greater detail on what constitutes a limited or unlimited civil case, see Code Civ. Proc. §§ 85 (limited civil cases) & Comment, 88 (unlimited civil cases); see also Code Civ. Proc. §§ 32.5 (jurisdictional classification), 580 (relief awardable).

40. Inflation has eroded the protection provided by the statute. A $2,500 undertaking in 1974 would be the equivalent of over $9,000 in 1999 dollars. This amount was determined using "The Inflation Calculator" found at <http://www.westegg.com/inflation/>, a website created and maintained by S. Morgan Friedman, as modified Jan. 19, 2000. The adjustments are based on the Consumer Price Index from 1800-1999.

ness). The defendant's only real protection lies in the ability to obtain a court-ordered increase in the amount of the undertaking.

Because the amounts of the undertakings required by Section 489.220 are inadequate, and the rationale for the undertakings does not support a differential based on the jurisdictional classification of the case, the statute should be revised. The Commission recommends that the distinction between attachment undertakings in limited and unlimited civil cases be eliminated, and that the amount of the initial undertaking be increased to $10,000 to account for inflation since 1974. Although this figure may not be adequate in every case, it would be more realistic than the current $2,500 and $7,500 amounts, it would be subject to upward adjustment where needed, and it would be simpler than having two different undertaking amounts.

As under existing law, the court would not be authorized to decrease the amount of the undertaking. An undertaking of $10,000 is minimal in view of the potential harm to the defendant from a wrongful attachment. The likelihood that a smaller amount would suffice is small. Certainly, the amount should not be reduced without first affording the defendant adequate notice and an opportunity to be heard. Nor would it make sense to permit a plaintiff to file a $10,000 undertaking, attach property, and then apply for a reduction in the amount of the undertaking. The difference between the premium for a $10,000 undertaking and the premium for a smaller undertaking would not be large enough to justify the costs that such a procedure would impose on the court and the litigants.

Satisfaction of Judgment (Code Civ. Proc. § 685.030)

In 1991, the satisfaction of judgment statute was amended to allow entry of a satisfaction in cases in which the only

amount left unsatisfied is an interest deficit of less than $10.[41] This rule initially applied only in municipal court.[42] As presently worded to reflect trial court unification, Code of Civil Procedure Section 685.030(e) applies only in a limited civil case:

> In a limited civil case, the clerk of a court may enter in the Register of Actions a writ of execution on a money judgment as returned wholly satisfied when the judgment amount, as specified on the writ, is fully collected and only an interest deficit of no more than ten dollars ($10) exists, due to automation of the continual daily interest accrual calculation.

The proposal to amend the satisfaction of judgment statute to permit the clerk to ignore a trivial interest deficit in a municipal court case was sponsored by the Administrative Office of the Municipal Courts of Contra Costa County, which explained the need for the proposal as follows:

> Section 685.030(a)(2) currently provides that interest continues to accrue on money judgments until the date the levying officer actually receives the proceeds. Since there is often turnaround time of 2-3 days between the service of the writ and the actual receipt of the proceeds by the levying officer, the amount stated on the writ is often understated by the daily interest amount which continues to accrue during the turnaround period. In these instances, the clerk's office is unable to record in the Register of Actions that the judgment is fully satisfied. Some persistent judgment creditors have returned to the clerk's office seeking the additional interest owing on the writ, which is typically under $10. This statute causes additional workload for the clerk's office with minimal benefit to the judgment creditor.[43]

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41. 1991 Cal. Stat. ch. 1090, § 4.5.

42. *Id.*

43. Memorandum from Kiri Torre, Contra Costa County Municipal Court Administrator, to Claude L. Van Marter, Ass't County Administrator (Jan. 25, 1991). This memorandum is at State Archives in the Assembly Judiciary Com-

The sponsor limited the proposal to municipal court cases because "judgments in superior court are substantially higher and the daily interest accruing is much greater."[44]

The amount of a judgment is irrelevant, however, so long as all that remains unpaid is an interest deficit of $10 or less.[45] Because that situation could arise in a superior court case as well as in a municipal court case, the California State Sheriffs' Association suggested that the proposal "cover all money judgment civil writs issued from both municipal and Superior Courts."[46] The legislative history does not disclose why the Legislature did not adopt that approach.[47]

The underlying policy of Section 685.030(e) seems to be that where the amount outstanding on a judgment is trivial ($10 or less) and the deficit appears to relate to calculation of interest, it is wasteful to expend further effort to collect on the judgment and the matter should be considered closed. This policy would appear to apply equally in a limited as in an unlimited civil case in superior court. Absent a need for a difference in treatment, the statute should be amended to permit the clerk to record a judgment as satisfied whenever the principal is fully paid and only an interest deficit of $10 or

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mittee's file on Assembly Bill 1484 (1991 Cal. Stat. ch. 1090). The explanation in the memorandum is repeated almost verbatim in the Senate Judiciary Committee analysis (July 16, 1991) and the Senate Floor analysis (Aug. 29, 1991) of AB 1484.

44. Memorandum from Kiri Torre, Contra Costa County Municipal Court Administrator, to Claude L. Van Marter, Ass't County Administrator (Jan. 25, 1991). For the location of this memorandum, see *supra* note 43.

45. See Letter from Anthony Pisciotta, California State Sheriffs' Ass'n, to Irene Ishizaka, consultant to Assembly Judiciary Committee (June 5, 1991). This letter is at State Archives in the Assembly Judiciary Committee's file on Assembly Bill 1484 (1991 Cal. Stat. ch. 1090).

46. *Id.*

47. The satisfaction of judgment provision was amended into AB 1484 on July 10, 1991, just before the bill was heard in the Senate Judiciary Committee.

less remains, regardless of the jurisdictional classification of the case.

Undertaking of Creditor in Case of Third-Party Claim (Code Civ. Proc. §§ 720.160, 720.260)

Code of Civil Procedure Sections 720.160[48] and 720.260[49] require a creditor's undertaking to maintain a levy on property where there has been a third-party claim to the property. The amount of the undertaking is $2,500 in a limited civil case and $7,500 in an unlimited civil case (or the creditor can elect to give an undertaking in the amount of twice the enforcement lien). The beneficiary may object to the undertaking as insufficient,[50] and the court may order the undertaking increased if it is shown to be necessary.[51] The principal may not seek a reduction of the undertaking amount.[52]

Before enactment of this scheme in 1982, the law provided for a creditor's undertaking in third-party claim proceedings in an amount twice the value of the property claimed.[53] This was changed in 1982 on recommendation of the Law Revision Commission to a flat amount of $2,500 for actions pending or judgments rendered in municipal court, and $7,500 for

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48. For the text of Code of Civil Procedure Section 720.160, see "Proposed Legislation" *infra*.

49. For the text of Code of Civil Procedure Section 720.260, see "Proposed Legislation" *infra*.

50. Code Civ. Proc. § 995.920.

51. Code Civ. Proc. § 995.960.

52. The court may "order the amount of the undertaking decreased below the amount prescribed by Section 720.160 or 720.260 if the court determines the amount prescribed exceeds the probable recovery of the beneficiary if the beneficiary ultimately prevails in proceedings to enforce the liability on the undertaking." Code Civ. Proc. § 720.770. But the amount of the undertaking "may *not* be decreased on the *principal's* initiative *but only* in a situation where the *beneficiary* has objected and the court finds that it is more than adequate." Code Civ. Proc. § 720.770 Comment (1982) (emphasis added).

53. See 1980 Cal. Stat. ch. 309, §§ 1, 2 (former Code Civ. Proc. §§ 689, 689b).

actions pending or judgments rendered in superior court. The rationale for a flat amount undertaking was that it would eliminate the need for the courts to consider objections to the amount of an undertaking based on the value of the property.[54] The amounts selected were based on the amounts for an attachment undertaking.

Trial court unification led to the current scheme in 1998. The initial undertaking amount now depends on the jurisdictional classification of the case (whether it is a limited civil case or an unlimited civil case), rather than on the type of court in which the case is pending.[55]

To maintain the current pattern, Code of Civil Procedure Sections 720.160 and 720.260 should track the undertaking amount given by a creditor for an attachment. Because the proposed attachment undertaking is $10,000,[56] the same amount should apply to third-party claim situations.

As before, the beneficiary could object to the undertaking amount, but the principal would not be permitted to apply for a reduction of the amount. Allowing such a procedure would be unduly burdensome on the court and the litigants, because the difference between the premium for a $10,000 undertaking and the premium for a smaller undertaking is not likely to be substantial, as compared to the costs inherent in reviewing the size of the undertaking.

Confession of Judgment (Code Civ. Proc. § 1134)

Code of Civil Procedure Section 1134 establishes fees for filing a confession of judgment that differ depending on the

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54. See *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001, 1021-22, 1146-48 (1982).

55 See *Revision of Codes*, *supra* note 6, at 64-65, 204-06.

56. See discussion of "Undertaking for Writ of Attachment or Protective Order" *supra*.

jurisdictional classification of the case. The filing fee is $15 except in a limited civil case, where the filing fee is $10.[57]

The drafting of this provision is anomalous. Technically, a confession of judgment in an amount of $25,000 or less cannot be "in a limited civil case," because no case is actually filed. Before 1998, the statute provided a lower fee in municipal and justice courts; the 1998 substitution of the reference to a "limited civil case" was made to accommodate trial court unification.[58] At a minimum, this section requires correction to refer to a fee of $10 where the amount confessed does not exceed $25,000.

This appears to be an instance, however, where procedures may be simplified and unified without substantial loss. The $5 fee differential depending on whether a judgment is over or under $25,000 could easily be eliminated. It is not clear why there should be a differential at all, because the work of the court clerk in endorsing and entering judgment is the same, regardless of amount.

Historically, the $15 fee was charged in superior court and the $10 fee was charged in municipal court. While it is possible there once was a fiscal justification for this differential, the actual costs now involved to process the filing of a con-

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57. The statute provides:

> 1134. In all courts the statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of the court for the amount confessed with the costs hereinafter set forth. At the time of filing, the plaintiff shall pay as court costs that shall become a part of the judgment the following fees: fifteen dollars ($15) or in a limited civil case ten dollars ($10). No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which a confession of judgment is filed for the law library fund nor for services of any court reporter. The statement and affidavit, with the judgment endorsed thereon, becomes the judgment roll.

The affidavit mentioned in the last sentence of the provision evidently refers to the defendant's verification by oath required by Code of Civil Procedure Section 1133.

58. *Revision of Codes*, *supra* note 6, at 217.

fession of judgment are independent of the jurisdictional classification of the case.

As a matter of policy, there may be a sentiment that in a smaller case, the costs charged against the parties should remain proportionately smaller. When the fee structure was enacted in 1872, the differential may have been significant. At that time, there was a proliferation of trial courts, including district courts, county courts, and justice courts. The general fee for filing a confession of judgment at that time was $10; in justice courts the fee was $3.[59] The equivalents in current dollars would be about $135 and $40, respectively.[60]

That fee structure remained unchanged for 85 years until the 1950s, when the fees were changed to $10 in superior court, $9 in municipal court, and $5 in justice court.[61] In the 1970s the fees were raised to what they are today ($15 in superior court and $10 in municipal court).[62] The $5 difference in filing fees in today's dollars is so small that it is not worth maintaining.

While a lower fee in smaller cases may be viewed as a populist measure, this is illusory. The law on confessions of judgment has evolved to the point that as a practical matter the confession of judgment is no longer of any use for a small claim. A confession of judgment is not valid unless an attorney, independently representing the defendant, signs a certificate that the attorney has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of

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59. 1872 Code Civ. Proc. §§ 1134, 1135.

60. These amounts were determined using "The Inflation Calculator," *supra* note 40.

61. 1957 Cal. Stat. ch. 1982, §§ 1, 2.

62. 1974 Cal. Stat. ch. 1285, § 1; 1975 Cal. Stat. ch. 766, § 1; 1977 Cal. Stat. ch. 1257, § 37. The justice court filing fee was increased to $10 (1977 Cal. Stat. ch. 1257, § 37), and then eliminated when the justice court was abolished in 1995.

judgment procedure and has advised the defendant to utilize the confession of judgment procedure.[63] The cost of obtaining the attorney's certificate renders the confession of judgment procedure practically useless for a claim for a small amount.[64] Whether the filing fee were $15 as opposed to $10 would make no difference, because the cost of the attorney's certificate, not the nominal filing fee, is prohibitive for such a claim.

In the interest of simplicity, the Commission recommends elimination of the filing fee differential, and adoption of a standard $15 filing fee for all confessions of judgment.[65] Because an attorney's certificate is now a prerequisite to entry of a confession of judgment, the proposed amendment of Section 1134 would also require that the certificate be made part of the judgment roll.

Filing Fee for First Paper in a Limited Civil Case

Government Code Section 72055 specifies the fee for filing the first paper in a limited civil case. The amount of the fee depends on the amount of the demand:

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

63. Code Civ. Proc. § 1132.

64. See *Recommendation Relating to Confessions of Judgment*, 15 Cal. L. Revision Comm'n Reports 1053 (1980).

65. The real question, perhaps, is whether the $15 fee ought to be increased to a more realistic level. It can be argued that the fee ought to be kept low, to encourage the parties to proceed without resort to court processes other than enforcement. In any event, assessing the merits of increasing the fee is beyond the scope of the current project, which is to simplify procedures under unification.

It is appropriate to examine whether the seven-dollar difference ($90 versus $83) between the fee where the demand exceeds $10,000, and the fee where the demand is $10,000 or less, is warranted.[66]

The differentiation between larger and smaller limited civil cases is of recent origin. Until 1992, the fee for filing the first paper in a civil case in municipal court was set by the board of supervisors, but Government Code Section 72055 limited this fee to a maximum of either $40 or $29, depending on whether a fee was collected for the court reporter fund.[67] In 1992, the statute was amended to establish a uniform $80 fee for filing the first paper in a civil case in municipal court.[68] Not until 1997 was the amount of the fee linked to the amount demanded. In that year the Legislature enacted the Lockyer-Isenberg Trial Court Funding Act, which made major reforms relating to trial court funding but also amended Section 72055. Effective January 1, 1998, the fee for filing the first paper in a civil case in municipal court was raised to $83 where the demand is $10,000 or less and $90 where the demand exceeds $10,000.[69] To accommodate trial court unification, the provision was further amended the following year, to apply to limited civil cases rather than municipal court cases.[70]

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66. This issue arose in the context of this study because Government Code Section 72055 as presently drafted would conflict with the Commission's proposed amendment of Code of Civil Procedure Section 425.10 (the requirement that the amount of the demand be stated on the first page of the first pleading in a limited civil case would conflict with the proposal to extend the prohibition on pleading personal injury or wrongful death damages to a limited civil case). See "Pleading Personal Injury and Wrongful Death Damages" *supra*. Other issues relating to simplification of filing fees are being studied in other contexts.

67. 1983 Cal. Stat. ch. 969, § 10.

68. 1992 Cal. Stat. ch. 696, § 73.

69. 1997 Cal. Stat. ch. 850, § 37.

70. 1998 Cal. Stat. ch. 931, § 315; see also *Revision of Codes*, *supra* note 6, at 377-78.

It is not clear why the provision was amended to distinguish between cases based on the amount of the demand. The bill analyses for the Lockyer-Isenberg Trial Court Funding Act focus on more significant aspects of that legislation and do not address this point.

Court personnel have reported, however, that differentiating between limited civil cases where the demand is $10,000 or less, and limited civil cases where the demand exceeds $10,000, creates problems. The increased complexity makes it more difficult for court clerks to determine what fee is due and harder for the Judicial Council and Administrative Office of the Courts to develop forms that clearly identify what fee should be charged. Trial court unification has exacerbated these problems, because in a unified superior court the clerks collect filing fees for unlimited civil cases (for which the initial filing fee is $185),[71] as well as for both categories of limited civil cases.

Amending Section 72055 to set a uniform fee for filing the first paper in a limited civil case would alleviate the administrative burdens and potential for confusion in applying the statute. According to the Administrative Office of the Courts, if the fee were set at $87 such an amendment probably would neither increase nor decrease the revenue of the courts.[72]

The statute should be further amended to delete the requirement that the amount of the demand be stated on the first page of the first paper immediately below the caption. If the same filing fee were charged for all limited civil cases, that requirement would no longer be necessary, because the amount of the demand would no longer affect the amount due under the statute.[73] To permit differentiation between limited

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71. Gov't Code § 26820.4.

72. The Commission has not independently analyzed this point.

73. Eliminating the requirement that the demand be stated on the first page of the first pleading in a limited civil case would also eliminate the conflict

and unlimited civil cases, however, a plaintiff in a limited civil case would still be required to state in the caption that the case is a limited civil case.[74]

between Government Code Section 72055 and the proposal to extend to a limited civil case the prohibition in Code of Civil Procedure Section 425.10 on pleading personal injury or wrongful death damages. See *supra* notes 27, 66.

74. Code Civ. Proc. § 422.30.

PROPOSED LEGISLATION

Code Civ. Proc. § 425.10 (amended). Contents of complaint

SECTION 1. Section 425.10 of the Code of Civil Procedure is amended to read:

425.10. A complaint or cross-complaint shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages ~~be~~ *is* demanded, the amount ~~thereof~~ *demanded* shall be stated, unless the action is brought ~~in the superior court~~ to recover actual or punitive damages for personal injury or wrongful death, in which case the amount ~~thereof~~ *demanded* shall not be stated, ~~except in a limited civil case~~ *but the caption shall comply with Section 422.30*.

Comment. Section 425.10 is amended to conform the pleading requirements in limited and unlimited civil cases. In an action for personal injury or wrongful death, the amount demanded should not be stated in the complaint, but if the case is a limited civil case the caption of the complaint must identify it as such as required by Section 422.30. Technical changes are also made for conformity with preferred drafting style.

Code Civ. Proc. § 425.11 (amended). Statement of damages

SEC. 2. Section 425.11 of the Code of Civil Procedure is amended to read:

425.11. (a) As used in this section:

(1) "Complaint" includes a cross-complaint.

(2) "Plaintiff" includes a cross-complainant.

(3) "Defendant" includes a cross-defendant.

(b) When a complaint is filed in an action ~~in the superior court~~ to recover damages for personal injury or wrongful death, the defendant may at any time request a statement

setting forth the nature and amount of damages being sought~~, except in a limited civil case~~. The request shall be served upon the plaintiff, who shall serve a responsive statement as to the damages within 15 days. In the event that a response is not served, the ~~party~~ *defendant*, on notice to the plaintiff, may petition the court in which the action is pending to order the plaintiff to serve a responsive statement.

(c) If no request is made for the statement referred to in subdivision (a), the plaintiff shall serve the statement on the defendant before a default may be taken.

(d) The statement referred to in subdivision (b) shall be served in the following manner:

(1) If a party has not appeared in the action, the statement shall be served in the same manner as a summons.

(2) If a party has appeared in the action, the statement shall be served upon ~~his or her~~ *the party's* attorney, or upon the party if ~~he or she~~ *the party* has appeared without an attorney, in the manner provided for service of a summons or in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(e) The statement referred to in subdivision (b) may be combined with the statement described in Section 425.115.

Comment. Section 425.11 is amended to conform to the pleading requirements of limited and unlimited civil cases. See Section 425.10. Technical changes are also made for conformity with preferred drafting style.

Code Civ. Proc. § 489.220 (amended). Undertaking for writ of attachment or protective order

SEC. 3. Section 489.220 of the Code of Civil Procedure is amended to read:

489.220. (a) Except as provided in subdivision (b), the amount of an undertaking filed pursuant to this article shall be ~~two thousand five hundred dollars ($2,500) in a limited civil~~

~~case, and seven thousand five hundred dollars ($7,500) otherwise~~ *ten thousand dollars ($10,000)*.

(b) If, upon objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, it shall order the amount of the undertaking increased to the amount it determines to be the probable recovery for wrongful attachment if it is ultimately determined that the attachment was wrongful.

Comment. Section 489.220 is amended to provide for the same attachment undertaking, regardless of the jurisdictional classification of the case. Formerly, the amount of the initial undertaking depended on whether the case was a limited civil case or an unlimited civil case. 1998 Cal. Stat. ch. 931, § 74.

Code Civ. Proc. § 685.030 (amended). Satisfaction of judgment

SEC. 4. Section 685.030 of the Code of Civil Procedure is amended to read:

685.030. (a) If a money judgment is satisfied in full pursuant to a writ under this title, interest ceases to accrue on the judgment:

(1) If the proceeds of collection are paid in a lump sum, on the date of levy.

(2) If the money judgment is satisfied pursuant to an earnings withholding order, on the date and in the manner provided in Section 706.024 or Section 706.028.

(3) In any other case, on the date the proceeds of sale or collection are actually received by the levying officer.

(b) If a money judgment is satisfied in full other than pursuant to a writ under this title, interest ceases to accrue on the date the judgment is satisfied in full.

(c) If a money judgment is partially satisfied pursuant to a writ under this title or is otherwise partially satisfied, interest ceases to accrue as to the part satisfied on the date the part is satisfied.

(d) For the purposes of subdivisions (b) and (c), the date a money judgment is satisfied in full or in part is the earliest of the following times:

(1) The date satisfaction is actually received by the judgment creditor.

(2) The date satisfaction is tendered to the judgment creditor or deposited in court for the judgment creditor.

(3) The date of any other performance that has the effect of satisfaction.

(e) ~~In a limited civil case, the~~ *The* clerk of a court may enter in the ~~Register of Actions~~ *register of actions* a writ of execution on a money judgment as returned wholly satisfied when the judgment amount, as specified on the writ, is fully collected and only an interest deficit of no more than ten dollars ($10) exists, due to automation of the continual daily interest accrual calculation.

Comment. Subdivision (e) of Section 685.030 is amended to eliminate the difference in treatment between limited and unlimited civil cases.

For the register of actions in superior court, see Gov't Code §§ 69845, 69845.5. For the register of actions in municipal court, see Code Civ. Proc. §§ 1052, 1052.1.

A technical change is also made for conformity with preferred drafting style.

Code Civ. Proc. § 720.160 (amended). Undertaking by creditor where third party claims ownership or possession

SEC. 5. Section 720.160 of the Code of Civil Procedure is amended to read:

720.160. (a) If the creditor files with the levying officer an undertaking that satisfies the requirements of this section within the time allowed under subdivision (b) of Section 720.140:

(1) The levying officer shall execute the writ in the manner provided by law unless the third person files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims of the third person for which the creditor has given the undertaking.

(b) Subject to Sections 720.770 and 996.010, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be in the amount of:

~~(1) Except as provided in paragraph (2), seven thousand five hundred dollars ($7,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.~~

~~(2) In a limited civil case, two thousand five hundred dollars ($2,500),~~ *ten thousand dollars ($10,000),* or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(c) An undertaking given by the creditor under this chapter shall:

(1) Be made in favor of the third person.

(2) Indemnify the third person against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

(3) Be conditioned on a final judgment that the third person owns or has the right of possession of the property.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

Comment. Section 720.160 is amended to provide for an undertaking of $10,000 (or twice the amount of the execution lien, whichever is less), regardless of the jurisdictional classification of the case. The $10,000 undertaking amount is the same as the amount of an attachment undertaking. See Section 489.220 (attachment undertaking).

Code Civ. Proc. § 720.260 (amended). Undertaking by creditor where third party claims security interest or lien

SEC. 6. Section 720.260 of the Code of Civil Procedure is amended to read:

720.260. (a) If the creditor within the time allowed under subdivision (b) of Section 720.240 either files with the levying officer an undertaking that satisfies the requirements of this section and a statement that satisfies the requirements of Section 720.280 or makes a deposit with the levying officer of the amount claimed under Section 720.230:

(1) The levying officer shall execute the writ in the manner provided by law unless, in a case where the creditor has filed an undertaking, the secured party or lienholder files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims or liens of the secured party or lienholder for which the creditor has given the undertaking or made the deposit.

(b) Subject to Sections 720.770 and 996.010, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be in the amount of:

~~(1) Except as provided in paragraph (2), seven thousand five hundred dollars ($7,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.~~

~~(2) In a limited civil case, two thousand five hundred dollars ($2,500),~~ *ten thousand dollars,* or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(c) An undertaking given by the creditor under this chapter shall:

(1) Be made in favor of the secured party or lienholder.

(2) Indemnify the secured party or lienholder against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

(3) Be conditioned on a final judgment that the security interest or lien of the third person is entitled to priority over the creditor' s lien.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

Comment. Section 720.260 is amended to provide for an undertaking of $10,000 (or twice the amount of the execution lien, whichever is less), regardless of the jurisdictional classification of the case. The $10,000 undertaking amount is the same as the amount of an attachment undertaking. See Section 489.220 (attachment undertaking).

Code Civ. Proc. § 1134 (amended). Entry of judgment

SEC. 7. Section 1134 of the Code of Civil Procedure is amended to read:

1134. ~~In all courts the~~ *(a) The* statement *required by Section 1133* must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of the court for the amount confessed with the costs ~~hereinafter set forth~~ *provided in subdivision (b)*.

(b) At the time of filing, the plaintiff shall pay as court costs that shall become a part of the judgment ~~the following fees:~~ *a fee of* fifteen dollars ($15) ~~or in a limited civil case ten dollars ($10)~~. No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which a confession of judgment is filed for the law library fund nor for services of any court reporter.

(c) The statement and affidavit, with the judgment endorsed thereon, *together with the certificate filed pursuant to Section 1132,* becomes the judgment roll.

Comment. Section 1134 is amended to divide the section into subdivisions and to eliminate the $10 filing fee for a limited civil case. Under this amendment, the filing fee is $15 regardless of the jurisdictional classification of the case.

The reference to "all courts" in subdivision (a) is deleted as obsolete. It derived from an era when a confession of judgment might have been entered in any of several courts, depending on the amount of the judgment and the jurisdiction of the court. *Cf.* Section 1132(a) ("Such judgment may be entered in any court having jurisdiction for like amounts.").

The attorney's certificate is made part of the judgment roll in subdivision (c). The certificate is a prerequisite to entry of judgment and must be filed with the defendant's written and verified statement. Section 1132(b).

Gov't Code § 72055 (amended). First filing fee in limited civil case

SEC. 8. Section 72055 of the Government Code is amended to read:

72055. *(a)* The total fee for filing of the first paper in a limited civil ~~case~~, *case* shall be ~~ninety dollars ($90), except that in cases where the amount demanded, excluding attorney's fees and costs, is ten thousand dollars ($10,000) or less, the fee shall be eighty-three dollars ($83). The amount of the demand shall be stated on the first page of the paper immediately below the caption~~ *eighty-seven dollars ($87).*

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

(c) The term "total fee" as used in this section and Section 72056 includes any amount allocated to the Judges' Retirement Fund pursuant to Section 72056.1, any automation fee imposed pursuant to Section 68090.7, any construction fee

imposed pursuant to Section 76238, and the law library fee established pursuant to Article 2 (commencing with Section 6320) of Chapter 5 of Division 3 of the Business and Professions Code. The term "total fee" as used in this section and Section 72056 also includes any dispute resolution fee imposed pursuant to Section 470.3 of the Business and Professions Code, but the board of supervisors of each county may exclude any portion of this dispute resolution fee from the term "total fee."

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

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

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

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

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Civil Procedure: Technical Corrections

February 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Civil Procedure: Technical Corrections*, 30 Cal. L. Revision Comm'n Reports 479 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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February 2, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

The Law Revision Commission recommends the following technical reforms relating to civil procedure:

(1) The jurisdictional classification of a proceeding to release a mechanic's lien should be clarified (Civ. Code § 3154; Code Civ. Proc. § 86).

(2) The jurisdictional classification of a petition for relief from claim-filing requirements of the Tort Claims Act should be clarified (Gov't Code § 946.6).

(3) The codes should be revised to reflect that trial courts no longer maintain a record denominated a "docket" in civil cases.

(4) A provision on statutory interpretation should be added to negate any implied limitation on court authority in limited and unlimited civil cases (Proposed Code Civ. Proc. § 89).

These revisions would not be a substantive change in the law.

This recommendation was prepared pursuant to Government Code Section 70219.

Respectfully submitted,

David Huebner
Chairperson

CIVIL PROCEDURE: TECHNICAL CORRECTIONS

At the direction of the Legislature, the Law Revision Commission is reexamining civil procedure in light of trial court unification.[1] In connection with this study, the Commission has been alerted to ambiguities relating to the jurisdictional classification of certain proceedings. The Commission recommends statutory reforms to clarify these points. The Commission also recommends that obsolete references to a trial court record known as the "docket" be deleted from the codes, and a provision on interpretation of certain statutes relating to court authority be added.

CLARIFICATION OF JURISDICTIONAL CLASSIFICATION

The "jurisdictional classification" of a civil case means its classification as a limited civil case or an unlimited civil case.[2] A limited civil case is subject to economic litigation and other traditional municipal court procedures; an unlimited civil case is subject to traditional superior court procedures.[3]

Under Code of Civil Procedure Section 85, a case is to be treated as a limited civil case if and only if all of the following conditions are met:

(1) The amount in controversy does not exceed $25,000.

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1. Gov't Code § 70219; see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-83 (1998). Much of this work is being pursued as a joint study with the Judicial Council. The instant proposal was developed by the Commission independently.

2. Code Civ. Proc. § 32.5.

3. See, e.g., Code Civ. Proc. §§ 85 & Comment (limited civil cases), 91 (application of economic litigation procedures), 904.1 (taking appeal), 904.2 (taking appeal in limited civil case); see also *Revision of Codes, supra* note 1, at 64-65.

(2) The relief sought is a type that may be granted in a limited civil case.[4]
(3) The relief sought is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited civil case or that provide that an action or special proceeding is within the original jurisdiction of the municipal court.

Although this statute provides general guidance, some provisions require revision to clarify the jurisdictional classification of the actions to which they pertain. These include the provision governing a petition to release a mechanic's lien[5] and the provision governing a petition for relief from claim-filing requirements of the Tort Claims Act.[6]

Petition to Release Mechanic's Lien (Civ. Code § 3154)

Civil Code Section 3154 prescribes a procedure for obtaining the release of a mechanic's lien where the lien has expired and no action to enforce the lien has been filed. The provision directs the property owner to petition the "proper court" for a decree to release the property from the lien, but it does not define "proper court" nor does it directly specify whether such a petition is a limited civil case.

Code of Civil Procedure Section 86(a)(6) does specify that an action to enforce and foreclose a mechanic's lien of $25,000 or less is a limited civil case. Before municipal courts were eliminated through trial court unification,[7] such an

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4. For restrictions on the relief awardable in a limited civil case, see Code Civ. Proc. § 580(b).

5. Civ. Code § 3154.

6. Gov't Code § 946.6. It may also be appropriate to clarify the jurisdictional classification of a proceeding to discharge the trustee and distribute the proceeds of a sale under a deed of trust (Civ. Code § 2924j). See Tentative Recommendation on *Civil Procedure: Technical Corrections* (October 2000). The Commission has not included such a reform in this proposal, because it is still studying other aspects of the pertinent statute.

7. The trial courts in Kings County unified on February 8, 2001, eliminating the last municipal courts in California. For background on trial court unification,

action was triable in municipal court.[8] But there was confusion regarding the "proper court" for a petition for release of a mechanic's lien of $25,000 or less, because such a petition is not an action to enforce and foreclose a mechanic's lien.

It is thus unclear whether a petition to release a mechanic's lien of $25,000 or less is to be treated as a limited civil case. To prevent confusion, Section 86(a)(6) should be amended to state that where the amount of the lien is $25,000 or less, a proceeding to release a mechanic's lien is a limited civil case. This would parallel the treatment of an action to foreclose a mechanic's lien.[9]

Petition for Relief from Requirements of Tort Claims Act (Gov't Code § 946.6)

If a public entity rejects an application to file a late claim under the Tort Claims Act, Government Code Section 946.6 permits the claimant to petition the court for relief from the requirement that the claim be presented to the public entity before filing suit. The proper court for filing the petition is "a court which would be a competent court for the trial of an action on the cause of action to which the claim relates and which is located in a county or judicial district which would be a proper place for the trial of the action."

This terminology may be confusing, because it does not directly state whether a proceeding for relief from the claim-filing requirement is a limited civil case or an unlimited civil case. The language is also outdated. Now that the trial courts in all counties have unified, there is only one trial court in each county and judicial districts no longer exist.

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see *Revision of Codes*, *supra* note 1; see also *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994).

8. See 1997 Cal. Stat. ch. 527, § 2 (former Code Civ. Proc. § 86); see also Code Civ. Proc. § 85 Comment.

9. The proposed amendment of Section 86 would also delete obsolete references to the municipal courts.

To improve clarity, the statute should be amended to make clear that the jurisdictional classification of a proceeding for relief from the claim-filing requirement is the same as the jurisdictional classification of a suit on the cause of action in the underlying claim. The provision should be further amended to delete the language that is obsolete due to trial court unification.

OBSOLETE REFERENCES TO DOCKET

The term "docket" is obsolete insofar as it is used to refer to a record kept by a trial court in a civil case. Municipal courts and justice courts no longer exist, and superior courts keep a "register of actions" in civil cases, not a "docket."[10] The codes should be revised to delete obsolete references to a "docket" in a civil case, and insert references to the "register of actions" where appropriate.[11]

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10. Gov't Code §§ 69845 (clerk of superior court may keep register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Formerly, justice courts were required to maintain a "docket" in civil cases. 1953 Cal. Stat. ch. 206, § 1 (former Gov't Code § 71614); 1959 Cal. Stat. ch. 671, § 2 (former Gov't Code § 71614.5). In 1977, these provisions were repealed and there ceased to be a statutory requirement for any trial court to maintain a record known as a "docket" in civil cases. 1977 Cal. Stat. ch. 1257, §§ 71, 72.

11. See proposed Code Civ. Proc. §§ 472b, 638, 912, 1206, *infra*; proposed Food & Agric. Code § 11937, *infra*; proposed Veh. Code §§ 16370, 16373, 16370, *infra*. Similar revisions may be appropriate in the following provisions: Code Civ. Proc. §§ 396a, 398, and 631. The Commission has not included these provisions in this proposal, because it is still studying other aspects of them. Criminal statutes are beyond the scope of this study, but will be addressed in the Commission's general study of statutes made obsolete by trial court restructuring. See Gov't Code § 71674.

IMPLIED COURT AUTHORITY IN LIMITED AND UNLIMITED CIVIL CASES

Some statutes expressly relate to court authority in a limited civil case or an unlimited civil case. For example, Code of Civil Procedure Section 402.5 permits a unified superior court to transfer a limited civil case to another branch or location of that court:[12]

> 402.5. The superior court in a county in which there is no municipal court may transfer a limited civil case to another branch or location of the superior court in the same county.

The provision is silent as to transfer of an unlimited civil case. Thus, it might be interpreted, by negative implication, to mean that a unified superior court is not permitted to transfer an unlimited civil case to another branch or location of that court. Similarly, if a statute confers authority in an unlimited civil case, it might be inferred merely from the existence of the statute that the court lacks such authority in a limited civil case.

Such interpretations may be wholly unwarranted. For example, Section 402.5 was added in 1998 to implement trial court unification.[13] The purpose of the provision was to underscore that unification would not undercut existing authority to transfer a traditional municipal court case (now known as a limited civil case) within a county:

> In specified circumstances, existing law allows transfer of a case from one municipal court to another municipal court in the same county. In a county with a unified superior court, there are no municipal court districts; the proposed

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12. Similarly, Code of Civil Procedure Section 116.620 provides for payment of a small claims judgment in installments. A small claims case is a limited civil case but special rules apply. See Code Civ. Proc. § 87 (limited civil case in small claims division).

13. 1998 Cal. Stat. ch. 931, § 68; see *Revision of Codes*, *supra* note 1, at 71, 181.

> law would preserve the ability of the court to transfer a case from one location to another location within the county.[14]

The provision was not intended to imply anything, one way or the other, about a superior court's authority to transfer a traditional superior court case (now known as an unlimited civil case) from one location to another within the county.

To guard against improper negative inferences under circumstances such as these, a provision should be added to the Code of Civil Procedure clarifying that the existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case. The provision should further direct that the existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same authority does or does not exist in a limited civil case.

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14. *Revision of Codes*, *supra* note 1, at 71 (footnotes omitted).

PROPOSED LEGISLATION

Code Civ. Proc. § 86 (amended). Miscellaneous limited civil cases

SECTION 1. Section 86 of the Code of Civil Procedure is amended to read:

86. (a) The following civil cases and proceedings are limited civil cases:

(1) Cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to twenty-five thousand dollars ($25,000) or less. This paragraph does not apply to cases that involve the legality of any tax, impost, assessment, toll, or municipal fine, except actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant.

(2) Actions for dissolution of partnership where the total assets of the partnership do not exceed twenty-five thousand dollars ($25,000); actions of interpleader where the amount of money or the value of the property involved does not exceed twenty-five thousand dollars ($25,000).

(3) Actions to cancel or rescind a contract when the relief is sought in connection with an action to recover money not exceeding twenty-five thousand dollars ($25,000) or property of a value not exceeding twenty-five thousand dollars ($25,000), paid or delivered under, or in consideration of, the contract; actions to revise a contract where the relief is sought in an action upon the contract if the action otherwise is a limited civil case.

(4) Proceedings in forcible entry or forcible or unlawful detainer where the whole amount of damages claimed is twenty-five thousand dollars ($25,000) or less.

(5) Actions to enforce and foreclose liens on personal property where the amount of the liens is twenty-five thousand dollars ($25,000) or less.

(6) Actions to enforce and foreclose*, or petitions to release,* liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under the provisions of Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code, or to enforce and foreclose an assessment lien on a common interest development as defined in Section 1351 of the Civil Code, where the amount of the liens is twenty-five thousand dollars ($25,000) or less. However, where an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or where the total amount of the liens sought to be foreclosed against the same property aggregates an amount in excess of twenty-five thousand dollars ($25,000), the action is not a limited civil case~~, and if the action is pending in a municipal court, upon motion of any interested party, the municipal court shall order the action or actions pending therein transferred to the proper superior court. Upon making the order, the same proceedings shall be taken as are provided by Section 399 with respect to the change of place of trial~~.

(7) Actions for declaratory relief when brought pursuant to either of the following:

(A) By way of cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case.

(B) To conduct a trial after a nonbinding fee arbitration between an attorney and client, pursuant to Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, where the amount in controversy is twenty-five thousand dollars ($25,000) or less.

(8) Actions to issue temporary restraining orders and preliminary injunctions, to take accounts, and to appoint receivers where necessary to preserve the property or rights of

any party to a limited civil case; to appoint a receiver and to make any order or perform any act, pursuant to Title 9 (commencing with Section 680.010) of Part 2 (enforcement of judgments) in a limited civil case; to determine title to personal property seized in a limited civil case.

(9) Actions under Article 3 (commencing with Section 708.210) of Chapter 6 of Division 2 of Title 9 of Part 2 for the recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor where the interest claimed adversely is of a value not exceeding twenty-five thousand dollars ($25,000) or the debt denied does not exceed twenty-five thousand dollars ($25,000).

(10) Arbitration-related petitions filed pursuant to either of the following:

(A) Article 2 (commencing with Section 1292) of Chapter 5 of Title 9 of Part 3, except for uninsured motorist arbitration proceedings in accordance with Section 11580.2 of the Insurance Code, if the petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under paragraphs (1) to (9), inclusive, of subdivision (a) or if the petition is filed after the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within paragraphs (1) to (9), inclusive, of subdivision (a).

(B) To confirm, correct, or vacate a fee arbitration award between an attorney and client that is binding or has become binding, pursuant to Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, where the arbitration award is twenty-five thousand dollars ($25,000) or less.

(b) The following cases in equity are limited civil cases:

(1) Cases to try title to personal property when the amount involved is not more than twenty-five thousand dollars ($25,000).

(2) Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.

(3) Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

Comment. Subdivision (a)(6) of Section 86 is amended to clarify the jurisdictional classification of a petition to release a mechanic's lien. This is declaratory of existing law. See Code Civ. Proc. § 85 (limited civil cases) & Comment. See also Code Civ. Proc. § 88 (unlimited civil case).

Subdivision (a)(6) is also amended to reflect elimination of the municipal courts as a result of unification with the superior courts pursuant to Article VI, Section 5(e), of the California Constitution. For reclassification of an action in a unified superior court, see Sections 403.010-403.090.

Code Civ. Proc. § 89 (added). Implied authority in limited and unlimited civil cases

SEC. 2. Section 89 is added to the Code of Civil Procedure, to read:

89. (a) The existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case.

(b) The existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same authority does or does not exist in a limited civil case.

Comment. Section 89 is added to provide guidance in interpreting statutory provisions that expressly authorize particular conduct in a limited civil case but are silent as to an unlimited civil case, or vice versa. See, e.g., Section 402.5 (transfer of limited civil case).

Code Civ. Proc. § 472b (amended). Running of time following decision on demurrer

SEC. 3. Section 472b of the Code of Civil Procedure is amended to read:

472b. When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order, unless the notice is waived in open court, and the waiver entered in the minutes ~~or docke~~t. When an order sustaining a demurrer without leave to amend is reversed or otherwise remanded by any order issued by a reviewing court, any amended complaint shall be filed within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur.

Comment. Section 472b is amended to delete the reference to a "docket," because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Because the minutes are the proper record for reflecting a waiver in open court, and Section 472b already refers to the minutes, the reference to the "docket" may be deleted without substituting a reference to the register of actions.

Code Civ. Proc. § 638 (amended). Reference by agreement

SEC. 4. Section 638 of the Code of Civil Procedure is amended to read:

638. A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes ~~or in the docke~~t, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision ~~thereon~~.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.

(c) In any matter in which a referee is appointed pursuant to this section, a copy of the order shall be forwarded to the office of the presiding judge. The Judicial Council shall, by rule, collect information on the use of these referees. The Judicial Council shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature by January 1, 2003. This subdivision shall become inoperative on January 1, 2004.

Comment. Section 638 is amended to delete the reference to a "docket," because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Because the minutes are the proper record for reflecting an agreement in open

court, and Section 638 already refers to the minutes, the reference to the "docket" may be deleted without substituting a reference to the register of actions.

A technical change is also made for conformity with preferred drafting style.

Code Civ. Proc. § 912 (amended). Certification to trial court of result on appeal

SEC. 5. Section 912 of the Code of Civil Procedure is amended to read:

912. Upon final determination of an appeal by the reviewing court, the clerk of the court shall remit to the trial court a certified copy of the judgment or order of the reviewing court and of its opinion, if any. The clerk of the trial court shall file the certified copy of the judgment and opinion of the reviewing court, shall attach the same to the judgment roll if the appeal was from a judgment, and shall enter a note of the judgment of the reviewing court stating whether the judgment or order appealed from has been affirmed, reversed or modified, in the margin of the original entry of the judgment or order, and also in the register of actions ~~or docket~~.

Comment. Section 912 is amended to delete the reference to a "docket," because courts no longer maintain a record denominated a "docket" in civil cases. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code §§ 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841

(1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court).

Code Civ. Proc. § 1206 (amended). Asserting preferred labor claim in connection with writ of attachment or execution

SEC. 6. Section 1206 of the Code of Civil Procedure is amended to read:

1206. *(a)* Upon the levy under a writ of attachment or execution not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer or other person who has performed work or rendered personal services for the defendant within 90 days prior to the levy may file a verified statement of the claim therefor with the officer executing the writ, file a copy thereof with the court that issued the writ, and give copies thereof, containing his or her address, to the plaintiff and the defendant, or any attorney, clerk or agent representing them, or mail copies to them by registered mail at their last known address, return of which by the post office undelivered shall be deemed a sufficient service if no better address is available, and that claim, not exceeding nine hundred dollars ($900), unless disputed, must be paid by the officer, immediately upon the expiration of the time for dispute of the claim as prescribed in Section 1207, from the proceeds of the levy remaining in the officer's hands at the time of the filing of the statement or collectible by the officer on the basis of the writ.

(b) The court issuing the writ must make a notation ~~on its docket~~ *in the register of actions* of every preferred labor claim of which it receives a copy and must endorse on any writ of execution or abstract of judgment issued subsequently in the case that it is issued subject to the rights of a preferred labor claimant or claimants ~~thereunder~~ and giving the names and amounts of all preferred labor claims of which it has notice. In levying under any writ of execution the officer making the

levy shall include in the amount due under the execution any and all preferred labor claims that have been filed in the action and of which the officer has notice, except any claims that may have been finally disallowed by the court under the procedure provided for herein and of which disallowance the officer has actual notice. The amount due on preferred labor claims that have not been finally disallowed by the court shall be considered a part of the sum due under any writ of attachment or execution in augmentation of the amount thereof and it shall be the duty of any person, firm, association or corporation on whom a writ of attachment or execution is levied to immediately pay to the levying officer the amount of the preferred labor claims, out of any money belonging to the defendant in the action, before paying the principal sum called for in the writ.

(c) If any claim is disputed within the time, and in the manner prescribed in Section 1207, and a copy of the dispute is mailed by registered mail to the claimant or the claimant's attorney at the address given in the statement of claim and the registry receipt is attached to the original of the dispute when it is filed with the levying officer, or is handed to the claimant or the claimant's attorney, the claimant, or the claimant's assignee, must within 10 days after the copy is deposited in the mail or is handed to the claimant or the claimant's attorney petition the court having jurisdiction of the action on which the writ is based, for a hearing before it to determine the claim for priority, or the claim to priority is barred. If more than one attachment or execution is involved, the petition shall be filed in the court having jurisdiction over the senior attachment or execution. The hearing shall be held within 20 days from the filing of the petition unless the court continues it for good cause. Ten days' notice of the hearing shall be given by the petitioner to the plaintiff and the defendant, and to all parties claiming an interest in the

property, or their attorneys. The notice may be informal and need specify merely the name of the court, names of the principal parties to the senior attachment or execution and name of the wage claimant or claimants on whose behalf it is filed but shall specify that the hearing is for the purpose of determining the claim for priority. The plaintiff or the defendant, or any other party claiming an interest may contest the amount or validity of the claim in spite of any confession of judgment or failure to appear or to contest the claim on the part of any other person.

(d) There shall be no cost for filing or hearing the petition and the hearing on the petition shall be informal but all parties testifying must be sworn. Any claimant may appear on the claimant's own behalf at the hearing and may call and examine witnesses to substantiate his or her claim. An appeal may be taken from a judgment in a proceeding under this section in the manner provided for appeals from judgments of the court where the proceeding is had, in an action of the same jurisdictional classification.

(e) The officer shall retain in possession until the determination of the claim for priority so much of the proceeds of the writ as may be necessary to satisfy the claim, and if the claim for priority is allowed, the officer shall pay the amount due, including the claimant's cost of suit, from such proceeds, immediately after the order allowing the claim becomes final.

Comment. Section 1206 is amended to replace the term "docket" with "register of actions," because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions

taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court).

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

Food & Agric. Code § 11937 (amended). Certification to director of result in court

SEC. 7. Section 11937 of the Food and Agricultural Code is amended to read:

11937. Upon the expiration of 30 days after any judgment becomes final, which is not stayed or satisfied in any action which results in a judgment for damages, the clerk of a court~~, or the judge of a court which has no clerk~~, shall forward to the director a certified copy of the judgment or a certified copy of the ~~docket entries in the action~~ *register of actions*, and a certificate of facts relative to ~~such~~ *the* judgment, on a form which is provided by the director.

Comment. Section 11937 is amended to delete the reference to "docket entries," and substitute a reference to the register of actions, because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court).

The amendment also deletes the clause authorizing the judge to substitute for the clerk if there is no clerk. That provision is obsolete because every superior court has a clerk. See Gov't Code §§ 24000(c) (county clerk), 26800 (county clerk as clerk of superior court). Additionally, a judge has authority to perform any act that a court clerk is allowed to perform. Code Civ. Proc. § 167.

Gov't Code § 946.6 (amended). Petition following public entity's rejection of application to present late claim

SEC. 8. Section 946.6 of the Government Code is amended to read:

946.6. (a) Where an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. The proper court for filing the petition is ~~a court which would be a competent~~ *a superior court that would be a proper* court for the trial of an action on the cause of action to which the claim relates ~~and which is located in a county or judicial district which would be a proper place for the trial of the action, and if~~ . *If* the petition is filed in a court which is not a proper court for the determination of the matter, the court, on motion of any party, shall transfer the proceeding to a proper court. *Where an action on the cause of action to which the claim relates would be a limited civil case, a proceeding pursuant to this section is a limited civil case.*

(b) The petition shall show each of the following:

(1) That application was made to the board under Section 911.4 and was denied or deemed denied.

(2) The reason for failure to present the claim within the time limit specified in Section 911.2.

(3) The information required by Section 910.

The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6.

(c) The court shall relieve the petitioner from Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from Section 945.4.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(d) A copy of the petition and a written notice of the time and place of hearing ~~thereof~~ shall be served before the hearing as prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure on (1) the clerk or secretary or board of the local public entity, if the respondent is a local public entity, or (2) the Attorney General, if the respondent is the state. However, if the petition involves a claim arising out of alleged actions or inactions of the Department of Transportation, service of the petition and notice of the hearing shall be made on the Attorney General or the Director of Transportation. Service on the Attorney General may be accomplished at any of the Attorney General's offices in Los

Angeles, Sacramento, San Diego, or San Francisco. Service on the Director of Transportation may be accomplished only at the Department of Transportation's headquarters office in Sacramento.

(e) The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.

(f) If the court makes an order relieving the petitioner from Section 945.4, suit on the cause of action to which the claim relates shall be filed with the court within 30 days thereafter.

Comment. Section 946.6 is amended to reflect elimination of the municipal courts as a result of unification with the superior courts pursuant to Article VI, Section 5(e), of the California Constitution, and the consequent elimination of associated judicial districts. See Section 38 (judicial districts).

Section 946.6 is also amended to clarify the jurisdictional classification of a proceeding for relief from the requirements of Section 945.4 following rejection of an application for leave to present a late claim. This is declaratory of existing law. See Code Civ. Proc. § 85 (limited civil cases) & Comment. See also Code Civ. Proc. § 88 (unlimited civil case).

Veh. Code § 16370 (amended). Failure to satisfy judgment for damage from operation of motor vehicle

SEC. 9. Section 16370 of the Vehicle Code is amended to read:

16370. The department shall suspend the privilege of any person to operate a motor vehicle upon receiving a certified copy of a judgment, or a certified copy of the ~~docket entries~~ *register of actions (or a comparable court record of another jurisdiction)* in an action resulting in a judgment for damages, and a certificate of facts relative to the judgment, on a form provided by the department, indicating that the person has failed for a period of 30 days to satisfy a judgment rendered against him or her.

Comment. Section 16370 is amended to delete the reference to "docket entries," and substitute a reference to the register of actions, because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Section 16370 is amended to refer not only to the register of actions but also to a comparable court record of another jurisdiction, because the provision applies to judgments rendered by courts in other states, not just judgments rendered by the California courts. See Section 16250 ("judgment" defined); see also Section 16251 ("cause of action" defined).

Veh. Code § 16373 (amended). Certification to judgment creditor

SEC. 10. Section 16373 of the Vehicle Code is amended to read:

16373. (a) The clerk of a court~~, or the judge of a court which has no clerk~~, shall, subject to subdivision (b), issue upon the request of a judgment creditor a certified copy of any judgment or a certified copy of the ~~docket entries~~ *register of actions (or a comparable court record of another jurisdiction)* in an action resulting in a judgment for damages, and a certificate of facts relative to the judgment on a form provided by the department.

(b) The judgment creditor may pay the required fees and request the documents specified in subdivision (a) upon the expiration of 30 days after the judgment has become final, if the judgment has not been stayed or satisfied within the

amounts specified in this chapter as shown by the records of the court. The court shall determine the required fees, which shall be commensurate with the cost incurred by the court in carrying out this section.

Comment. Section 16373 is amended to delete the reference to "docket entries," and substitute a reference to the register of actions, because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Section 16373 is amended to refer not only to the register of actions but also to a comparable court record of another jurisdiction, because the provision applies to judgments rendered by courts in other states, not just judgments rendered by California courts. See Section 16250 ("judgment" defined); see also Section 16251 ("cause of action" defined).

The amendment also deletes the clause authorizing the judge to substitute for the clerk if there is no clerk. That provision is obsolete because every superior court has a clerk. See Gov't Code §§ 24000(c) (county clerk), 26800 (county clerk as clerk of superior court). Additionally, a judge has authority to perform any act that a court clerk is allowed to perform. Code Civ. Proc. § 167.

Veh. Code § 16379 (amended). Payment of judgment in installments

SEC. 11. Section 16379 of the Vehicle Code is amended to read:

16379. (a) The department shall not suspend a license and shall restore any suspended license following nonpayment of a final judgment when the judgment debtor gives proof of financial responsibility for future damages and when the trial

court in which the judgment was rendered orders the payment of the judgment in installments and while the payment of any installment payment is not in default.

(b) Whenever the trial court orders the payment of a judgment in installments as provided in this section, upon payment of the required fees by the judgment creditor, it shall forward a certified copy of the order to the department, together with a certified copy of *the* judgment or *a* certified copy of the ~~docket entries~~ *register of actions (or a comparable court record of another jurisdiction)* in an action resulting in a judgment for damages and a certificate of facts relative to the judgment on a form provided by the department.

(c) The court shall determine the required fees, which shall be commensurate with the cost incurred by the court in carrying out the provisions of this section.

Comment. Section 16379 is amended to amended to delete the reference to "docket entries," and substitute a reference to the register of actions, because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov't Code § 69844; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Section 16379 is amended to refer not only to the register of actions but also to a comparable court record of another jurisdiction, because the provision applies to judgments rendered by courts in other states, not just judgments rendered by California courts. See Section 16250 ("judgment" defined); see also Section 16251 ("cause of action" defined).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REPORT

Trial Court Unification: Issues Identified for Future Study

February 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Cite this report as *Trial Court Unification: Issues Identified for Future Study*, 30 Cal. L. Revision Comm'n Reports 507 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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February 2, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This report gives a status update on a number of studies assigned to the Law Revision Commission pursuant to Government Code Section 70219.

Respectfully submitted,

David Huebner
Chairperson

TRIAL COURT UNIFICATION: ISSUES IDENTIFIED FOR FUTURE STUDY

In its recommendation on revision of the codes to implement trial court unification, the Commission identified a number of issues for future study.[1] The Legislature directed the Commission to undertake primary responsibility for some of these studies, in consultation with the Judicial Council.[2] The Legislature assigned other studies to the Judicial Council, to conduct in consultation with the Commission.[3] The Legislature also directed the Commission and the Judicial Council to jointly reexamine civil procedure in light of unification.[4]

The following is an update, as of February 2001, on the status of the studies for which the Commission has primary responsibility.[5] This update does not cover the studies assigned to the Judicial Council or the joint study of civil procedure.

Obsolete Statutes Relating to Expired Programs

The Commission is responsible for studying obsolete statutes relating to expired pilot projects or other expired programs. The Commission has approved a final recommenda-

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1. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

2. Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, *supra* note 1, at 83, 85-86.

3. Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, *supra* note 1, at 83-85.

4. Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, *supra* note 1, at 82-83.

5. The Commission consulted with the Judicial Council on these studies by providing tentative recommendations and staff memorandums to the Judicial Council and considering any input that the Judicial Council provided.

tion on this topic.[6] Legislation to implement this recommendation is pending (Senate Bill 153 (Knight)).

Appointment of Receiver

The Commission is responsible for studying whether to conform the statutory procedures on circumstances for appointment of a receiver.[7] The Commission approved a final recommendation on this topic in February 2000.[8] The proposed legislation was included in the Assembly Judiciary Committee omnibus civil practice bill last session (AB 1669), but later deleted as too substantive for that type of bill. The Commission revised its recommendation in February 2001.[9] Legislation to implement its revised recommendation is pending (Senate Bill 562 (Morrow)).

Good Faith Improver Claims

The Commission is responsible for studying the procedure for good faith improver claims, particularly the jurisdictional classification of a good faith improver cross-complaint.[10] The Commission approved a final recommendation on this topic.[11] The proposed legislation was enacted.[12]

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6. *Expired Pilot Projects*, 30 Cal. L. Revision Comm'n Reports 327 (2000).

7. *Compare* Code Civ. Proc. § 86(a)(8) (appointment of receiver in limited civil case) *with* Code Civ. Proc. § 564 (appointment of receiver in unlimited civil case).

8. Preprint Recommendation on *Authority to Appoint Receivers* (February 2000) (on file with California Law Revision Commission).

9. Revised Recommendation on *Authority to Appoint Receivers*, 30 Cal. L. Revision Comm'n Reports 291 (2000).

10. Code Civ. Proc. § 871.3.

11. *Jurisdictional Classification of Good Faith Improver Claims*, 30 Cal. L. Revision Comm'n Reports 281 (2000).

12. 2000 Cal. Stat. ch. 688, § 7.

Stay of Mechanic's Lien Foreclosure Action Pending Arbitration

The Commission is responsible for studying the procedure for stay of a mechanic's lien foreclosure action pending arbitration.[13] The Commission approved a final recommendation on this topic.[14] Legislation to implement this recommendation is pending (Senate Bill 562 (Morrow)).

Counsel for Defendant in Criminal Case

The Commission is responsible for studying the provisions on obtaining counsel for a defendant in a criminal case. A number of these provisions appear to conflict with a defendant's constitutional right of self-representation,[15] which applies in both capital and noncapital cases.[16] The Commission decided not to propose legislation in this area, because such a proposal would go beyond the scope of the technical clean-up originally envisioned when the Commission proposed this study.

Court Reporter in Unified Superior Court

The Commission is responsible for studying the role of a court reporter in a unified superior court. The Commission circulated a tentative recommendation on this topic.[17] On considering the comments on the tentative recommendation, the Commission decided to prepare and circulate a revised tentative recommendation.

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13. Code Civ. Proc. § 1281.5.

14. *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307 (2000).

15. Penal Code §§ 686, 686.1, 859, 859a, 987.

16. See Faretta v. California, 422 U.S. 806 (1975) (noncapital case); People v. Kirkpatrick, 7 Cal. 4th 988, 874 P.2d 248, 30 Cal. Rptr. 2d 818 (1994) (capital case); People v. Superior Court (George), 24 Cal. App. 4th 350, 29 Cal. Rptr. 2d 305 (1994) (capital case).

17. Tentative Recommendation on *Cases in Which Court Reporter Is Required* (August 2000).

Appealability of Order of Recusal in Criminal Case

The Commission studied and proposed legislation on the appealability of an order of recusal in a criminal case. The proposed legislation has been enacted.[18]

Publication of Legal Notice in County with Unified Superior Court

The Commission is responsible for studying issues relating to publication of legal notice in a county with a unified superior court.[19] The Commission is deferring work on this study until interested parties gain experience with legal publication in a unified superior court.

Numbering Conflict in Government Code

The Commission is responsible for studying a numbering conflict in the Government Code.[20] Legislation on this topic is unnecessary, because the conflict was eliminated in Legislative Counsel's 1998 bill to maintain the codes.[21]

Default in Unlawful Detainer Case

The Commission studied and proposed legislation on default in an unlawful detainer case. The proposed legislation has been enacted.[22]

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18. 1999 Cal. Stat. ch. 344, § 25 (conforming Penal Code § 1238 to Penal Code § 1424(a)(2)); *Report of the California Law Revision Commission on Chapter 344 of the Statutes of 1999 (Senate Bill 210)*, 29 Cal. L. Revision Comm'n Reports 657, 664 (1999).

19. See Gov't Code § 71042.5 (preservation of judicial districts for purpose of publication).

20. In 1997, the Legislature enacted two Chapters 2.1 (commencing with Section 68650) of Title 8 of the Government Code, one entitled "Trial Court Personnel" (1997 Cal. Stat. ch. 857, § 1) and the other entitled "California Habeas Resource Center" (1997 Cal. Stat. ch. 869, § 3).

21. 1998 Cal. Stat. ch. 485, §§ 94-100.5.

22. 1999 Cal. Stat. ch. 344, § 19 (correcting cross-references in Code Civ. Proc. § 1167.3); *Report of the California Law Revision Commission on Chapter 344 of the Statutes of 1999, supra* note 18, at 663.

Affidavit Pursuant to Fish and Game Code Section 2357

The Commission studied Fish and Game Code Section 2357, which concerned carrying of trout into an area where the season is closed. The Commission approved a final recommendation to repeal the statute.[23] The proposal was enacted.[24]

23. *Trout Affidavit*, 30 Cal. L. Revision Comm'n Reports 319 (2000).

24. 2000 Cal. Stat. ch. 167, § 1.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Improving Access to Rulemaking Information Under the Administrative Procedure Act

February 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Improving Access to Rulemaking Information Under the Administrative Procedure Act*, 30 Cal. L. Revision Comm'n Reports 517 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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ASSEMBLY MEMBER HOWARD WAYNE, Chairperson
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DAVID HUEBNER

February 11, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

The Law Revision Commission recommends a number of minor changes to the rulemaking provisions of the Administrative Procedure Act that would significantly improve public access to information regarding a proposed rulemaking action:

(1) The notice of proposed rulemaking action should include an explanation of how to obtain a copy of an agency's final statement of reasons for the proposed rulemaking action.

(2) If an agency decides not to proceed with a rulemaking action it has previously commenced, notice of that decision should be published in the California Regulatory Notice Register.

(3) If an agency maintains an Internet website, the text of a proposed regulation, the initial statement of reasons, the final statement of reasons, and any notice of a decision not to proceed should be published on the website.

(4) The existing practice of publishing detailed summaries of regulation decisions in the California Regulatory Notice Register should be ratified.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

Howard Wayne
Chairperson

IMPROVING ACCESS TO RULEMAKING INFORMATION UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA) governs the adoption of regulations by state agencies.[1] The rulemaking process is publicly open — interested members of the public are entitled to advance notice of agency rulemaking,[2] and all of the documents prepared by an agency in the course of rulemaking are part of the public record.[3] The California Law Revision Commission recommends a number of minor changes to the rulemaking provisions of the APA that would improve public access to information regarding agency rulemaking. The proposed changes are discussed below.

Access to Final Statement of Reasons

Existing law requires that a notice of proposed rulemaking action refer to the availability of the agency's initial statement of reasons for the proposed action.[4] However, the notice is not required to refer to the availability of the agency's final statement of reasons. An agency's final statement of reasons contains important information regarding a proposed rulemaking action, including reasons why proposed alternatives were rejected and agency responses to public comments[5] — matters of interest to a person who is following a proposed rulemaking action. The notice of proposed rulemaking action

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1. Gov't Code §§ 11340-11359. All further statutory references are to the Government Code.

2. Section 11346.4. The notice includes detailed information regarding the proposed regulation. See Section 11346.5

3. Section 11347.3.

4. Section 11346.5(a)(15).

5. See Section 11346.9(a).

should include instructions on how to obtain a copy of the final statement of reasons.[6]

Notice of Decision Not To Proceed

Under existing law, an agency is required to provide public notice when it commences rulemaking,[7] but is not required to provide any notice if it decides not to proceed with a rulemaking action that it has already commenced. A person who is interested in a proposed rulemaking action will not realize that the proposal has been abandoned until the one-year time limit on the rulemaking process[8] has run without the rulemaking action being completed. A person who is interested in a proposed rulemaking action would find it useful to know that the agency has decided not to proceed. An agency should be required to submit written notice of a decision not to proceed with a rulemaking action to the Office of Administrative Law, for publication in the California Regulatory Notice Register.[9]

Internet Publication

In a previous recommendation, the California Law Revision Commission proposed that an agency that maintains an Internet website should publish its rulemaking notices on its website.[10] In order to further enhance public access to rulemaking information, the text of a proposed regulation, the initial and final statements of reasons, and any notice of a decision not to proceed with a proposed rulemaking action, should also be published on the Internet.[11]

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6. See proposed amendment of Section 11346.5(a)(18).

7. Section 11346.4.

8. See Section 11346.4(b).

9. See proposed Section 11347.

10. *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999).

11. See proposed Section 11340.8(c).

Publication of Regulation Decisions of the Office of Administrative Law

Existing law requires that regulation decisions of the Office of Administrative Law be published in the California Regulatory Notice Register.[12] In practice, the Office of Administrative Law publishes detailed summaries of these decisions in the California Regulatory Notice Register and makes the full decisions, which can be lengthy, available on request. This practice is efficient and should be ratified.

12. Section 11344.1.

PROPOSED LEGISLATION

Gov't Code § 11340.8 (added). Electronic communication

SECTION 1. Section 11340.8 is added to the Government Code, to read:

11340.8. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter, by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment or petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a comment or petition by means of electronic communication.

(c) An agency that maintains an Internet website or other similar forum for the electronic publication or distribution of written material shall publish the following materials on that website or other forum:

(1) Any public notice required by this chapter or by a regulation implementing this chapter. For the purposes of this

paragraph, "public notice" means a notice that is required to be given by an agency to persons who have requested notice of the agency's regulatory actions.

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed regulation or instructions on how to obtain a copy of the text.

(d) Publication under subdivision (c) supplements any other required form of publication or distribution. Subdivision (c) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material. Failure to comply with subdivision (c) is not ground for disapproval of a proposed regulation.

(e) Nothing in this section precludes the office from requiring that material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

Comment. Section 11340.8 is new. Subdivision (b) authorizes the use of electronic communications in adopting a regulation under this chapter.

Subdivision (c) requires electronic publication of certain rulemaking documents by an agency that maintains a website or similar electronic communication forum. Provisions requiring a "public notice" as defined in paragraph (1) include Sections 11346.4 (notice of proposed action), 11346.8(a) (notice of hearing), 11346.8(b) (notice of continuance or postponement of hearing), and Section 44 of Title 1 of the California Code of Regulations (notice of changes to proposed regulation).

Use of electronic communications pursuant to this section supplements other required forms of publication or distribution. See subdivisions (b)(2) & (d). See also Section 11342(b) ("office" means Office of Administrative Law).

☞ **Note.** Proposed Section 11340.8 was previously recommended by the Commission in a slightly different form. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999).

Gov't Code § 11344.1 (amended). California Regulatory Notice Register

SEC. 2. Section 11344.1 of the Government Code is amended to read:

11344.1. The office shall do all of the following:

(a) Provide for the publication of the California Regulatory Notice Register, which shall be an official publication of the State of California and which shall contain the following:

(1) Notices of proposed action prepared by regulatory agencies, subject to the notice requirements of this chapter, and which have been approved by the office.

(2) A summary of all regulations filed with the Secretary of State in the previous week.

(3) ~~All~~ *Summaries of all* regulation decisions issued in the previous week detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing an emergency regulation. The California Regulatory Notice Register shall also include a quarterly index of regulation decisions.

(4) The Governor's action in reviewing the disapprovals of the office, the decisions to repeal, the agency's request for review, the office's response thereto, and the decisions of the Governor's office, as required by Section 11349.7.

(5) Determinations issued pursuant to Section 11340.5.

(b) Establish the publication dates and manner and form in which the California Regulatory Notice Register shall be prepared and published and ensure that it is published and distributed in a timely manner to the presiding officer and rules committee of each house of the Legislature and to all subscribers.

Comment. Subdivision (a)(3) of Section 11344.1 is amended to ratify the existing practice of publishing detailed summaries of regulation decisions, rather than the decisions themselves. The complete decisions are public documents and can be obtained from the Office of Administrative Law.

☞ **Note.** The Commission's previous rulemaking recommendation proposed technical changes to Section 11344.1. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999). For the sake of clarity, those changes are not reflected here.

Gov't Code § 11346.5 (amended). Contents of notice of proposed action

SEC. 3. Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest containing a concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action. The informative digest shall be drafted in a format similar to the Legislative Counsel's digest on legislative bills.

(A) If the proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes.

(B) If the proposed action affects small business, the informative digest shall also include a plain English policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt or amend any administrative regulation, determines that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: "The (name of agency) finds that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to

submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses."

(8) If a state agency, in adopting or amending any administrative regulation, determines that the action will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this determination, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that finding.

An agency's determination and declaration that a proposed regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A statement of the potential cost impact of the proposed action on private persons or businesses directly affected, as considered by the agency during the regulatory development process.

For purposes of this paragraph, "cost impact" means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private

person or business necessarily incurs in reasonable compliance with the proposed action.

(10) A statement of the results of the assessment required by subdivision (b) of Section 11346.3.

(11) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, determines that the action would have an effect. In addition, the agency officer designated in paragraph (13), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

(12) A statement that the adopting agency must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

(13) The name and telephone number of the agency officer to whom inquiries concerning the proposed administrative action may be directed.

(14) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

(15) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

(16) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the

close of the written comment period, a public hearing pursuant to Section 11346.8.

(17) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

(18) A statement explaining how to obtain a copy of the final statement of reasons once it has been prepared pursuant to subdivision (a) of Section 11346.9.

(19) If the agency maintains an Internet website or other similar forum for the electronic publication or distribution of written material, a statement explaining how materials published or distributed through that forum can be accessed.

(b) The agency officer designated in paragraph (13) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The officer shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action.

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

Comment. Section 11346.5 is amended to provide that the notice of proposed action must include statements explaining how to obtain the final statement of reasons and any electronically published documents. See also Sections 11340.8(c) (electronic publication of rulemaking materials), 11342(b) ("office" means Office of Administrative Law).

☞ **Note.** The Commission's previous rulemaking recommendation proposed a number of technical changes to Section 11346.5. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999). For the sake of clarity, those changes are not reflected here.

Gov't Code §11347 (added). Notice of decision not to proceed

SEC. 4. Section 11347 is added to the Government Code, to read:

11347. (a) If, after publication of a notice of proposed action pursuant to Section 11346.4, but before the notice of proposed action becomes ineffective pursuant to subdivision (b) of Section 11346.4, an agency decides not to proceed with the proposed action, it shall deliver notice of its decision to the office for publication in the California Regulatory Notice Register.

(b) Publication of a notice under this section terminates the effect of the notice of proposed action referred to in the notice. Nothing in this section precludes an agency from proposing a new regulatory action that is similar or identical to a regulatory action that was previously the subject of a notice published under this section.

Comment. Section 11347 is new. The purpose of this section is to require notice where an agency decides to completely abandon a proposed regulatory action. A decision not to proceed with part of a proposed regulatory action, while proceeding with the remainder, would not require notice under this section. See also Section 11342(b) ("office" means Office of Administrative Law).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Rulemaking Cleanup

February 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm'n Reports 533 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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February 1, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Chapter 1060 of the Statutes of 2000 implemented two Law Revision Commission recommendations regarding rulemaking procedure under the Administrative Procedure Act. Chapter 1059 of the Statutes of 2000 also made changes to the rulemaking procedure. This recommendation would correct two technical problems resulting from these bills:

(1) The bills each added a section governing use of electronic communications in the rulemaking process. The requirements of these sections are mostly duplicative, with only a few minor differences. The Commission recommends that the requirements of these sections be harmonized and combined in a single section.

(2) Chapter 1059 added a definition of "proposed action" that is technically defective. The Commission recommends that the defect be corrected.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

ADMINISTRATIVE RULEMAKING CLEANUP

Chapter 1060 of the Statutes of 2000[1] implemented two Law Revision Commission recommendations regarding rulemaking procedure under the Administrative Procedure Act.[2] Chapter 1059 of the Statutes of 2000[3] also made changes to the rulemaking procedure. This recommendation would correct two technical problems resulting from these bills.

Duplicative Electronic Communication Requirements

Chapters 1059 and 1060 each added a section governing use of electronic communication in the rulemaking process (Government Code Sections 11340.8 and 11340.85, respectively). The requirements of these sections are duplicative, with only a few minor differences. The Commission recommends that the requirements of these sections be harmonized and combined in a single section. Also, surplus language relating to publication of "public notices" should be deleted.

Definition of "Proposed Action"

Chapter 1059 added Government Code Section 11342.595, defining "proposed action" as "the regulatory action submitted to the office for publication in the California Regulatory Notice Register."

Technically, a regulatory action is not submitted to the Office of Administrative Law for publication. A notice of proposed action is published in the California Regulatory Notice Register, but not the proposed action itself.[4] The

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1. AB 1822 (Wayne).

2. *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999); *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm'n Reports 517 (2000).

3. AB 505 (Wright).

4. See Gov't Code § 11344.1(a) (contents of California Regulatory Notice Register).

Commission recommends that the definition be amended to correct this defect.

PROPOSED LEGISLATION

Gov't Code § 11340.8 (repealed). Electronic communication

SECTION 1. Section 11340.8 of the Government Code is repealed.

~~11340.8. In order to make the regulatory process more user friendly and to improve communication between affected businesses and the regulatory agencies, each state agency that proposes regulations pursuant to this chapter shall do all of the following:~~

~~(a) Accept comments from interested parties by facsimile and electronic mail.~~

~~(b) Post on its Internet website, if the agency has an Internet website, information regarding the proposed regulation or proposed regulatory repeal or amendment that includes, but is not limited to, all of the following:~~

~~(1) Notice of the proposed action.~~

~~(2) Initial statement of reasons for the regulation or proposed repeal or amendment.~~

~~(3) Text of the proposed regulation or proposed amendment to the regulation or instructions on how to obtain the text.~~

~~(4) Final statement of reasons.~~

~~(5) If applicable, a dated notice of the intent of the agency to discontinue the proposed action.~~

~~(6) The office's decisions on the regulation, proposed regulation, or proposed amendment or repeal of a regulation.~~

~~(7) The date the regulation was filed with the Secretary of State.~~

~~(8) The effective date of the regulation.~~

~~(9) A statement to the effect that a business or person submitting a comment to a proposed regulation or proposed amendment or repeal of a regulation has the right to request a copy of the final statement of reasons.~~

~~(c) Publication under subdivision (b) supplements any other required form of publication or distribution. The failure to comply with this section is not grounds for disapproval of a proposed regulation. Subdivision (b) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.~~

Comment. Section 11340.8 is repealed. Those of its provisions that duplicate the requirements of Section 11340.85 are redundant and have not been continued. Those provisions that are not duplicative have been continued as follows: The introductory statement of intent is continued in Section 11340.85(f) without substantive change. The mandatory aspect of subdivision (a), requiring an agency to accept comments submitted by facsimile or email, is continued in Section 11340.85(b)(4). Subdivision (b)(6)-(9) is continued in Section 11340.85(c)(6)-(9) without substantive change.

Gov't Code § 11340.85 (amended). Electronic communication

SEC. 2. Section 11340.85 of the Government Code is amended to read:

11340.85. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person

has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment ~~or petition~~ regarding a regulation may be delivered to an agency by means of electronic communication.

(5) A petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a ~~comment or~~ petition by means of electronic communication.

(c) An agency that maintains an Internet website or other similar forum for the electronic publication or distribution of written material shall publish the following materials on that website or other forum:

(1) Any public notice required by this chapter or by a regulation implementing this chapter. ~~For the purposes of this paragraph, "public notice" means a notice that is required to be given by an agency to persons who have requested notice of the agency's regulatory actions.~~

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed regulation or instructions on how to obtain a copy of the text.

(6) A statement of any decision made by the office regarding a proposed action.

(7) The date a rulemaking action is filed with the Secretary of State.

(8) The effective date of a rulemaking action.

(9) A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons.

(d) Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with ~~subdivision (c)~~ *this section* is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

(f) This section is intended to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies.

Comment. Section 11340.85 is amended to harmonize its requirements with those of former Section 11340.8.

Subdivision (b)(4) is amended to provide that agencies are required to accept comments by facsimile or electronic mail. The mandatory aspect of this rule is drawn from former Section 11340.8(a). Subdivision (b)(5) makes clear that an agency is not required to accept rulemaking petitions by facsimile or electronic mail.

Subdivision (c)(1) is amended to delete surplus language. This is a nonsubstantive change.

Subdivision (c)(6)-(9) continues former Section 11340.8(b)(6)-(9) without substantive change.

Subdivision (f) continues the introductory statement of intent in former Section 11340.8 without substantive change.

Gov't Code § 11342.595 (amended). "Proposed action"

SEC. 3. Section 11342.595 of the Government Code is amended to read:

11342.595. "Proposed action" means the regulatory action, *notice of which is* submitted to the office for publication in the California Regulatory Notice Register.

Comment. Section 11342.595 is amended to correct a technical defect. It is the notice of proposed action, not the proposed action itself, that is

published in the California Regulatory Notice Register. See Section 11344.1(a) (contents of California Regulatory Notice Register).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Rulemaking Under Penal Code Section 5058

October 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Rulemaking Under Penal Code Section 5058*, 30 Cal. L. Revision Comm'n Reports 545 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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ASSEMBLY MEMBER HOWARD WAYNE

October 6, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

As a general matter, rulemaking by a state agency is governed by the Administrative Procedure Act. Penal Code Section 5058 provides special procedures for rulemaking by the Department of Corrections. The Law Revision Commission has studied the provisions of Section 5058 that govern pilot program regulations and emergency rulemaking, and recommends a number of minor improvements to those provisions. The recommended changes would do the following:

(1) Define "pilot program" for the purposes of the special procedures governing pilot programs.
(2) Make it clear that the special procedures for adopting a pilot program regulation also apply to the amendment or repeal of a pilot program regulation.
(3) Require that the Department explain in writing why its operational needs require emergency rulemaking, where the Department proceeds with emergency rulemaking on the basis of its operational needs, rather than on the basis of an emergency.
(4) Extend the period for review of an emergency regulation by the Office of Administrative Law, where the Department proceeds with emergency rulemaking on the basis of its operational needs, rather than on the basis of an emergency.
(5) Make it clear that the procedures for emergency adoption of a regulation also apply to the emergency amendment or repeal of a regulation.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

RULEMAKING UNDER PENAL CODE SECTION 5058

As a general matter, rulemaking by a state agency is governed by the Administrative Procedure Act.[1] Penal Code Section 5058 provides special procedures for rulemaking by the Department of Corrections ("Department"). In the course of studying administrative rulemaking, the Law Revision Commission received comments suggesting that there are problems with the provisions of Section 5058 that govern pilot program regulations and emergency rulemaking. The Commission has investigated these suggestions and recommends a number of minor changes to improve rulemaking under Section 5058.

PILOT PROGRAMS

Existing Law

Under Section 5058, regulations implementing Department "pilot programs" are exempt from most rulemaking procedures. The Department conducts a fiscal impact analysis of a proposed regulation,[2] then submits the regulation to the Office of Administrative Law (OAL) for filing with the Secretary of State and publication in the California Code of Regulations. The regulation takes effect immediately.[3]

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1. Gov't Code §§ 11340-11359.

2. Penal Code Section 5058(c)(2) and (d)(1) require completion of an estimate of fiscal impact pursuant to "Section 6055, and following, of the State Administrative Manual dated July 1986." The provisions of the State Administrative Manual governing fiscal analysis of regulations have been revised and renumbered since 1986. The proposed law corrects these references. See proposed amendment of Penal Code § 5058(c)(2), and proposed Penal Code § 5058.1(a)(5), *infra*.

3. Penal Code § 5058(d)(1).

There are three limitations on the exemption:

(1) The director of the Department must certify that a regulation adopted under the exemption relates to a "legislatively mandated or authorized pilot program or a departmentally authorized pilot program."
(2) A pilot program may not affect more than 10% of the inmate population (measured by reference to the gender of the affected population, i.e. 10% of men if only men are affected, or women if only women are affected, or both if both are affected).
(3) A regulation adopted under the exemption lapses by operation of law two years after adoption.

Definition of "Pilot Program"

Existing law does not define "pilot program" for the purposes of Section 5058. There does not appear to be any general definition of "pilot program" or any similar term in any of the codes. This may make it difficult to determine whether a particular program qualifies for the exemption. However, a survey of statutes establishing pilot programs reveals certain common characteristics: experimental purpose and limited duration and scope.[4] The proposed law includes a definition of "pilot program" that is consistent with this general usage: "a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information."[5] In order to help evaluate whether a particular program is a pilot program subject to the exemption, the proposed law would require the

4. See, e.g., Bus. & Prof. Code § 3537.15 (limited implementation "to test the validity and effectiveness" of program before full implementation); Fam. Code § 3032 (findings as to measurable success of program to be reported to Legislature). See also Third New International Dictionary 1716 (1971) ("pilot" means "serving on a small scale … in checking technique or cost preparatory to full scale activity").

5. See proposed Penal Code § 5058.1(a) *infra*.

Department to describe the program in writing when adopting implementing regulations.[6]

Amendment or Repeal of Pilot Program Regulation

Existing law does not state whether the pilot program exemption also applies to the amendment or repeal of a pilot program regulation. The proposed law would make clear that the exemption applies to the adoption, amendment, and repeal of a pilot program regulation.[7] This would give the Department necessary flexibility in the administration of its pilot programs.

EMERGENCY RULEMAKING

Existing Law

Under the Administrative Procedure Act, an agency may adopt a regulation on an expedited basis, without prior public notice and comment, where the regulation is shown to be "necessary for the immediate preservation of the public peace, health and safety or general welfare."[8] A decision to do so is subject to review by OAL, which will block adoption of the regulation if the showing of emergency is insufficient.[9] An emergency regulation lapses by operation of law after 120 days, unless the agency adopts it under the regular rulemaking procedure before that date.[10]

Under Section 5058, the Department does not need to show the existence of an emergency in order to adopt an emergency regulation. Instead, the Department need only certify that "the operational needs of the department require adoption of the

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6. See proposed Penal Code § 5058.1(b)(2) *infra*.
7. See proposed Penal Code § 5058.1(b)-(d) *infra*.
8. Gov't Code § 11346.1(b).
9. Gov't Code § 11349.6(b).
10. Gov't Code § 11346.1(e).

regulation on an emergency basis."[11] The certification is not subject to substantive review by OAL.[12] This relaxed emergency rulemaking procedure is intended to "authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require."[13]

Asserted Overuse of Emergency Rulemaking Procedure

Section 5058 clearly authorizes the Department to use emergency rulemaking in a broader set of circumstances than is generally permitted. By its own figures, the Department uses emergency rulemaking, on the basis of operational necessity rather than on the basis of emergency, in about two-thirds of its rulemaking activity.[14] Some commentators believe that this constitutes overuse.[15] This proposition is difficult to evaluate, as it involves a policy judgment about which circumstances fall within the "operational needs" of the Department for expedited rulemaking. Critics of the Department's use of emergency rulemaking point to cases where emergency rulemaking has been used to adopt a regulation years after the need for the regulation arose. In such cases, the need for expedited rulemaking procedures is questionable.[16]

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11. Penal Code § 5058(e)(2).

12. However, OAL does review whether required procedures have been followed and whether the regulation satisfies the general standards stated in Government Code Section 11349.1. Gov't Code § 11349.6(b).

13. Penal Code § 5058(e).

14. According to Department records, it used the emergency rulemaking procedure on the basis of operational necessity in 66% of its rulemaking actions for the period from 1997 to 1999. See Letter from C.A. Terhune, Department of Corrections, to Brian Hebert (December 13, 1999) (attached to Memorandum 2000-28, on file with Commission).

15. See, e.g., Letter from Senator Richard G. Polanco, Chair of Joint Legislative Committee on Prison Construction and Operations, to Brian Hebert (August 16, 1999) (attached to Memorandum 99-70, on file with Commission).

16. For example, in February 1998 the Department used the emergency rulemaking procedure to amend Section 3097 of Title 15 of the California Code of Regulations, relating to withholding of prisoner wages and trust account funds to

Ultimately, the Commission did not reach a conclusion as to whether the Department's use of emergency rulemaking has exceeded the level of use intended by the Legislature. Nonetheless, the Commission has identified a few minor changes to Section 5058 that would improve the emergency rulemaking process and should allay concerns about the frequency of its use by the Department. These changes are described below.

Statement of Rationale for Emergency Rulemaking

If the Department bases its use of emergency rulemaking on its operational needs, rather than on the existence of an actual "emergency," the proposed law would require that the Department explain, in writing, its operational need to use emergency rulemaking.[17] Such an explanation would help answer public concerns regarding the propriety of a decision to use emergency rulemaking. In addition, requiring a written justification of an agency decision often improves the quality of agency decisionmaking, as the agency is forced to anticipate and consider likely arguments against its intended action.

The explanation would not be required if the Department proceeds on the basis of an actual emergency, pursuant to the regular emergency rulemaking procedure,[18] or if the Department acts in response to "imminent danger."[19]

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pay restitution fines and restitution orders. The amendment was in response to the 1994 amendment of Penal Code Section 2085.5. Thus, the emergency rulemaking took place four years after the need for amendment of the regulation arose. See Letter from Keith Wattley, Prison Law Office, to Commission (February 23, 2000) (attached to Memorandum 2000-28, on file with Commission).

17. See proposed Penal Code § 5058.3(a)(2) *infra.*

18. Gov't Code § 11346.1(b)-(h).

19. See proposed Penal Code § 5058.2 *infra.*

Extended Review by the Office of Administrative Law

Under existing law, OAL reviews proposed emergency regulations to ensure that the rulemaking agency has followed required procedures and that the regulation satisfies applicable statutory standards (including necessity, consistency with governing law, authority to adopt the regulation, and clarity).[20] The period for this review is very short. The Office of Administrative Law has only 10 calendar days to complete its review,[21] and accepts public comments for only the first five calendar days of that period.[22] Considering that about two-thirds of the Department's regulations are first adopted as emergency regulations, most of the Department's regulations are subject to only minimal review before they become effective.

The Commission recommends that the period for review of an emergency regulation adopted on the basis of the Department's operational needs be extended from 10 to 20 days. The period for public comment to OAL regarding such a regulation would be extended from five to 10 days.[23] This would result in only a modest delay in implementing such regulations, but would double the time available for their review.

There would be no extension of the review period if the Department proceeds on the basis of an actual emergency, pursuant to the regular emergency rulemaking procedure,[24] or if the Department acts in response to "imminent danger."[25]

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20. Gov't Code § 11349.6(b).
21. *Id.*
22. 1 Cal. Code Regs. § 55.
23. See proposed Penal Code § 5058.3(a)(3) *infra*.
24. Gov't Code § 11346.1(b)-(h).
25. See *supra* note 22.

Emergency Amendment or Repeal

Existing law is unclear with regard to whether the special emergency rulemaking procedure applies to the amendment or repeal of a regulation, as well as the adoption of a regulation. The proposed law would make clear that the procedure also applies to the emergency amendment or repeal of a regulation.[26] This is consistent with the change proposed for the provisions governing pilot program regulations and with the Commission's general recommendation on administrative rulemaking.[27]

26. See proposed Penal Code § 5058.3(a) *infra*.

27. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459, 470-71 (1999); AB 1822 (Wayne) (1999-2000 Reg. Sess.).

PROPOSED LEGISLATION

Penal Code § 5058 (amended). Administration of prisons and parole

SECTION 1. Section 5058 of the Penal Code is amended to read:

5058. (a) The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section *and Sections 5058.1 to 5058.3, inclusive.* All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

For any rule or regulation filed as regular rulemaking as defined in paragraph (5) of subdivision (a) of Section 1 of Title 1 of the California Code of Regulations, copies of the rule or regulation shall be posted in conspicuous places throughout each institution and shall be mailed to all persons or organizations who request them no less than 20 days prior to its effective date.

(b) The director shall maintain, publish and make available to the general public, a compendium of the rules and regulations promulgated by the director ~~or director's designee~~ pursuant to this section *and Sections 5058.1 to 5058.3, inclusive*.

(c) The following are deemed not to be "regulations" as defined in subdivision (b) of Section 11342 of the Government Code:

(1) Rules issued by the director ~~or by the director's designee~~ applying solely to a particular prison or other correctional facility, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.

(2) Short-term criteria for the placement of inmates in a new prison or other correctional facility, or subunit thereof, during its first six months of operation, or in a prison or other correctional facility, or subunit thereof, planned for closing during its last six months of operation, provided that the criteria are made available to the public and that an estimate of fiscal impact is completed pursuant to ~~Section 6055, and following~~, *Sections 6650 to 6670, inclusive,* of the State Administrative Manual ~~dated July 1986~~.

(3) Rules issued by the director ~~or director's designee~~ that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code.

~~(d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:~~

~~(1) Regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:~~

(A) A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.

(B) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this subdivision.

(C) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Action or actions, or policies implementing them, taken by the department and based upon a determination of imminent danger by the director or the director's designee that there is a compelling need for immediate action, and that unless that action is taken, serious injury, illness, or death is likely to result. The action or actions, or policies implementing them, may be taken provided that the following conditions shall subsequently be met:

(A) A written determination of imminent danger shall be issued describing the compelling need and why the specific action or actions must be taken to address the compelling need.

~~(B) The written determination of imminent danger shall be mailed within 10 working days to every person who has filed a request for notice of regulatory actions with the department and to the Chief Clerk of the Assembly and the Secretary of the Senate for referral to the appropriate policy committees.~~

~~Any policy in effect pursuant to a determination of imminent danger shall lapse by operation of law 15 calendar days after the date of the written determination of imminent danger unless an emergency regulation is filed with the Office of Administrative Law pursuant to subdivision (e). This section shall in no way exempt the department from compliance with other provisions of law related to fiscal matters of the state.~~

~~(e) Emergency regulations shall be adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:~~

~~(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for emergency regulations shall be 160 days.~~

~~(2) No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis.~~

~~(3) This subdivision shall apply only to the adoption and one readoption of any emergency regulation.~~

~~It is the intent of the Legislature, in authorizing the deviations in this subdivision from the requirements and procedures of Chapter 3.5 (commencing with Section 113340) of Part 1 of Division 3 of Title 2 of the Government Code, to authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require.~~

Comment. Section 5058 is amended to facilitate revision and reorganization of pilot program and emergency rulemaking provisions. Subdivisions (a) and (b) are revised to refer to the new sections.

Subdivision (c)(2) is amended to correct an obsolete reference to the State Administrative Manual.

Former subdivision (d)(1) is superseded by Section 5058.1 (pilot program regulations). Former subdivision (d)(2) is continued in Section 5058.2 (imminent danger) without substantive change.

Former subdivision (e) is superseded by Section 5058.3 (emergency rulemaking).

The superfluous phrase "or the director's designee" is deleted from the section. This is a nonsubstantive change. The director has general authority to delegate statutory responsibilities. See Section 5055. See also Gov't Code § 11343 (director or director's designee may certify regulation for filing with Secretary of State). Use of the phrase in only some of the provisions of Section 5058 could create an implication that the director's power to delegate is limited in provisions that do not use the phrase.

Penal Code § 5058.1 (added). Pilot program regulations

SEC. 2. Section 5058.1 is added to the Penal Code, to read:

5058.1. (a) For the purposes of this section, "pilot program" means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information.

(b) The adoption, amendment, or repeal of a regulation by the director to implement a legislatively mandated or authorized pilot program or a departmentally authorized pilot program, is exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the following conditions are met:

(1) A pilot program affecting male inmates affects no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates affects no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates affects no more than 10 percent of the total state inmate population.

(2) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this section. The certification shall include a description of the pilot program and of the methods the department will use to evaluate the results of the pilot program.

(3) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (3) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

(4) An estimate of fiscal impact is completed pursuant to Sections 6650 to 6670, inclusive, of the State Administrative Manual.

(c) The adoption, amendment, or repeal of a regulation pursuant to this section becomes effective immediately upon filing with the Secretary of State.

(d) A regulation adopted pursuant to this section is repealed by operation of law, and the amendment or repeal of a regulation pursuant to this section is reversed by operation of law, two years after the commencement of the pilot program being implemented, unless the adoption, amendment, or repeal of the regulation is promulgated by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purpose of this subdivision, a pilot program commences on the date the first regulatory change implementing the program is filed with the Secretary of State.

Comment. Section 5058.1 continues former subdivision Section 5058(d)(1) without substantive change, except as described below:

Subdivision (a) defines "pilot program" for the purposes of this section. While there is no general statutory definition of "pilot program," a survey of statutes establishing pilot programs reveals certain common characteristics: experimental purpose and limited duration and scope. See, e.g., Bus. & Prof. Code § 3537.15 (limited implementation "to test validity and effectiveness" of program before full implementation); Fam. Code § 3032 (evaluation of program to be reported to Legislature). See

also Third New International Dictionary 1716 (1971) ("pilot" means "serving on a small scale … in checking technique or cost preparatory to full scale activity"). Subdivision (a) is consistent with this common usage. Pilot programs may include programs initiated by the Department of Corrections in response to a court order or negotiated settlement directing the department to establish the program.

Subdivisions (b)-(d) provide that the exemption for regulations implementing a pilot program applies to amendment and repeal of a regulation, and not just adoption.

Subdivision (b)(1) requires that the certification that a regulation relates to a pilot program include a description of the pilot program and of the method by which the results of the pilot program will be evaluated.

Subdivision (b)(3) corrects an erroneous reference to Section 6(b)(3)(F) of Title 1 of the California Code of Regulations.

Subdivision (b)(4) corrects an obsolete reference to the State Administrative Manual.

Subdivision (d) makes clear that the duration of a rulemaking action implementing a pilot program is two years from the date that the pilot program commenced, regardless of when the rulemaking action is taken. Thus, a change to the regulations implementing a pilot program does not extend the two-year maximum duration of the program.

The superfluous phrase "or the director's designee" is not continued. This is a nonsubstantive change. The director has general authority to delegate statutory responsibilities. See Section 5055. See also Gov't Code § 11343 (director or director's designee may certify regulation for filing with Secretary of State). Use of the phrase in only some of the provisions of Section 5058 could create an implication that the director's power to delegate is limited in provisions that do not use the phrase.

Penal Code § 5058.2 (added). Imminent danger

SEC. 3. Section 5058.2 is added to the Penal Code, to read:

5058.2. (a) Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a department action or policy implementing an action, that is based on a determination by the director that there is a compelling need for immediate action, and that unless the action is taken, serious injury, illness, or death is likely to result. The action, or the policy implementing the action, may be taken provided that the following conditions shall subsequently be met:

(1) A written determination of imminent danger shall be issued describing the compelling need and why the specific action or actions must be taken to address the compelling need.

(2) The written determination of imminent danger shall be mailed within 10 working days to every person who has filed a request for notice of regulatory actions with the department and to the Chief Clerk of the Assembly and the Secretary of the Senate for referral to the appropriate policy committees.

(b) Any policy in effect pursuant to a determination of imminent danger shall lapse by operation of law 15 calendar days after the date of the written determination of imminent danger unless an emergency regulation is filed with the Office of Administrative Law pursuant to Section 5058.3. This section shall in no way exempt the department from compliance with other provisions of law related to fiscal matters of the state.

Comment. Section 5058.2 continues former Section 5058(d)(2) without substantive change. The first sentence of subdivision (a) has been revised to eliminate a superfluous and ungrammatical reference to "imminent danger." The cross-reference in subdivision (b) has been revised to reflect the reorganization of provisions formerly in Section 5058.

The superfluous phrase "or the director's designee" is not continued. This is a nonsubstantive change. The director has general authority to delegate statutory responsibilities. See Section 5055. See also Gov't Code § 11343 (director or director's designee may certify regulation for filing with Secretary of State). Use of the phrase in only some of the provisions of Section 5058 could create an implication that the director's power to delegate is limited in provisions that do not use the phrase.

Penal Code § 5058.3 (added). Emergency rulemaking

SEC. 4. Section 5058.3 is added to the Penal Code, to read:

5058.3. (a) Emergency adoption, amendment, or repeal of a regulation by the director shall be conducted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for an emergency adoption, amendment, or repeal of a regulation shall be 160 days.

(2) Notwithstanding subdivision (b) of Section 11346.1 of the Government Code, no showing of emergency is necessary in order to adopt, amend, or repeal an emergency regulation if the director instead certifies, in a written statement filed with the Office of Administrative Law, that operational needs of the department require adoption, amendment, or repeal of the regulation on an emergency basis. The written statement shall include a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure. This paragraph provides an alternative to filing a statement of emergency pursuant to subdivision (b) of Section 11346.1 of the Government Code. It does not preclude filing a statement of emergency. This paragraph only applies to the initial adoption and one readoption of an emergency regulation.

(3) Notwithstanding subdivision (b) of Section 11349.6 of the Government Code, the adoption, amendment, or repeal of a regulation pursuant to paragraph (2) shall be reviewed by the Office of Administrative Law within 20 calendar days after its submission. In conducting its review, the Office of Administrative Law shall accept and consider public comments for the first 10 calendar days of the review period. Copies of any comments received by the Office of Administrative Law shall be provided to the department.

(b) It is the intent of the Legislature, in authorizing the deviations in this section from the requirements and procedures of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, to authorize the department to expedite the exercise of its power

to implement regulations as its unique operational circumstances require.

Comment. Section 5058.3 continues former Section 5058(e) without substantive change, except as described below:

The introductory clause of subdivision (a) provides that the special emergency rulemaking procedure applies to amendment and repeal of a regulation, and not just adoption.

Note that the 160-day effective period provided in subdivision (a)(1) applies to all emergency rulemaking by the department, regardless of whether the director files a statement of emergency or a statement of operational need.

Subdivision (a)(2) requires a written explanation of the need for emergency rulemaking where the Department proceeds with emergency rulemaking on the basis of operational necessity, rather than on the basis of emergency. The written explanation is not required if the agency follows the general emergency rulemaking procedure and makes a showing of emergency pursuant to Government Code Section 11346.1(b).

The option of filing a statement of operational need, rather than a statement of emergency, only applies to the initial adoption and one readoption of an emergency regulation. This continues former Section 5058(e)(3). Note that readoption of emergency regulations is governed generally by Government Code Section 11346.1(h).

Subdivision (a)(3) extends the period for review of an emergency regulation by the Office of Administrative Law, where the Department proceeds with emergency rulemaking on the basis of operational necessity pursuant to subdivision (e)(2), rather than on the basis of emergency. The review period is not extended if the Department follows the general emergency rulemaking procedure and makes a showing of emergency pursuant to Government Code Section 11346.1(b). *Cf*. Gov't Code § 11349.6(b) (review period for emergency rulemaking in general).

The superfluous phrase "or the director's designee" is not continued. This is a nonsubstantive change. The director has general authority to delegate statutory responsibilities. See Section 5055. See also Gov't Code § 11343 (director or director's designee may certify regulation for filing with Secretary of State). Use of the phrase in only some of the provisions of Section 5058 could create an implication that the director's power to delegate is limited in provisions that do not use the phrase.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

October 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain*, 30 Cal. L. Revision Comm'n Reports 567 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

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October 5, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This recommendation proposes a number of statutory improvements intended to facilitate resolution of eminent domain cases without the need for trial. Specific proposals include requiring an exchange of valuation data 90 days before trial coupled with a process enabling early resolution of legal disputes and authorization of voluntary alternative dispute resolution. To the same end, the recommendation requires more detailed disclosure of prelitigation appraisal information together with disclosure of positions on loss of business goodwill.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN

BACKGROUND

In almost all condemnation cases, the primary issue is the amount of compensation. Evidence is introduced in support of each party's contention of the value of the property taken and damages to the remainder. Valuation disputes may arise from such matters as differing interpretations of sales data and differing opinions of highest and best use, probability of changes in zoning, probability of dedication, feasibility of development, and legal compensability of loss.[1]

Existing law seeks to encourage settlement of eminent domain valuation disputes by requiring the parties to make their final offers and demands before the commencement of trial.[2] Attorney fees and other litigation expenses may be awarded to the property owner if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor was unreasonable.[3]

Other settlement inducements include special provisions for exchange of valuation data by the parties. As a general rule, conventional discovery techniques have been of little value in generating useful information concerning the key points of disagreement between the parties. This is because the critical evidence in eminent domain proceedings is expert opinion testimony, and valuation experts who may be called to testify at trial resist formulating an opinion for that purpose until the time of trial. For this reason, California has adopted special

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1. See, e.g., Matteoni, *Trial Preparation and Trial*, in 1 Condemnation Practice in California § 9.2, at 364 (Cal. Cont. Ed. Bar, 2d ed. 2000).

2. Code Civ. Proc. § 1250.410(a).

3. Code Civ. Proc. § 1250.410(b).

discovery rules for eminent domain proceedings, which provide for an early exchange of valuation data on demand of a party.[4]

While the parties do not always take advantage of the exchange procedure for various tactical reasons, there is a strong incentive to use it due to the operation of the litigation expense statute.[5] Because an award of litigation expenses is predicated on the reasonableness of the parties' valuation determinations, each party must make a good faith effort to understand and respond to the other's case. A party who does not seek to review the opponent's case in advance of trial is at risk of being determined not to have acted reasonably in the proceeding.

The various incentives for the parties to resolve the eminent domain dispute without the need for a lengthy and expensive trial have been reasonably successful. During the three-year period from July 1, 1996, to June 30, 1999, for example, there were 3,783 eminent domain cases filed statewide.[6] Of the 3,477 pending eminent domain cases disposed of statewide during that period, 3,200 (92%) were either disposed of before trial or after trial as uncontested matters. Only 277 (8%) were disposed of after trial as contested matters.

The governing statutes, while salutary, are not free of problems. In particular, the provisions applicable to the exchange of valuation data could be improved, as well as pretrial procedures for resolving legal disputes affecting valuation. The Law Revision Commission proposes in this recommendation

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4. Code Civ. Proc. §§ 1258.210-1258.300.

5. Code Civ. Proc. § 1250.410(a).

6. These numbers are drawn from Judicial Council statistics for the three-year period ending fiscal year 1998-99. See Judicial Council of California, Administrative Office of the Courts, 1999 Court Statistics Report 124-25 (1999); supplemental unpublished information provided by statistical staff of the Administrative Office of the Courts. All percentages are rounded to the nearest whole.

a number of revisions of the law intended to facilitate resolution of eminent domain cases without the need for trial.

MORE DETAILED PRETRIAL APPRAISAL INFORMATION

There are two statutorily-required appraisals performed by the condemnor before the litigation positions of the parties are solidified in their final pretrial offers and demands:

- Under the Relocation Assistance Act, before a condemnor commences proceedings it must appraise the property and provide the owner a written statement of, and summary of the basis for, the amount it offers as just compensation.[7]
- After the proceeding is commenced, the condemnor ordinarily makes a prejudgment deposit of probable compensation, based on the condemnor's appraisal of the property.[8] The condemnor must give the property owner notice of the deposit and "a written statement or summary of the basis for the appraisal."[9]

The data provided to the property owner in these two instances lacks sufficient detail to enable a property owner to evaluate and act rationally in response to the condemnor's offer. For example, most condemning agencies do not provide a list or representative number of comparable sales. A requirement that the condemning agency provide the elementary data supporting the appraisal would engage the parties in early discussion, with a greater chance for a negotiated settlement.

Prelitigation Appraisal

Existing law requires that, in the case of a prelitigation offer, in addition to providing the statement and summary, the

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7. Gov't Code §§ 7267.1–7267.2.
8. *Cf.* Code Civ. Proc. § 1255.010(a).
9. Code Civ. Proc. § 1255.020(a)-(b).

condemnor must also allow the property owner to review a copy of the appraisal itself.[10] The review right is limited, however, to appraisals of owner-occupied residential property of not more than four dwelling units.

The small residential limitation substantially undercuts the usefulness of the review right. Valuation of small residential properties is the least difficult and least contested of eminent domain issues. The review right would be more useful if applied in the valuation of large residential and commercial properties. Those types of properties are more difficult to value, and full disclosure of appraisal information would assist in the understanding of opposing parties' positions.

Moreover, the scope of the "review" right is unclear. May the reviewing party make a copy of the appraisal?

The Commission recommends that a copy of the prelitigation appraisal be provided to the property owner outright, regardless of the type of property involved. To ensure that the condemnor is not harmed by this disclosure, the Commission further recommends that the appraisal be inadmissible as evidence of value or as an admission of the condemnor. Its use at trial would be strictly limited to impeachment of an expert who prepared the appraisal.

In the interest of full and open negotiations with a view towards settlement, the property owner should likewise be encouraged to share all appraisal information the property owner has developed. Just as with the condemnor's appraisal, a valuation opinion expressed by or on behalf of the property owner that is prepared for the purpose of negotiation should be inadmissible as evidence of value or as an admission of the property owner. Use of this type of material at trial should likewise be strictly limited to impeachment of the person who prepared the valuation, if called as a trial witness.

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10. Gov't Code § 7267.2(a).

Prejudgment Deposit Appraisal

More adequate information about the basis of the prejudgment deposit appraisal is also appropriate. The summary of the appraisal prepared by the condemnor should contain basic information — the highest and best use of the property on which the appraisal is based, key comparable sales on which the appraisal is based, and if there are damages to the remainder, an explanation and calculations illustrating how the compensation for damages and offsetting benefits to the remainder were determined. The law should be revised to require this basic information.

EXCHANGE OF VALUATION DATA

The valuation exchange statute was first enacted in 1967 on recommendation of the Law Revision Commission.[11] The Commission pointed out the unique problems of eminent domain discovery, the effective use of exchange procedures in Los Angeles, and the need for uniformity throughout the state. The Commission explained that an early exchange of valuation data would provide a relatively inexpensive means of eminent domain discovery, reduce the necessity for interrogatories and depositions, and provide a number of other advantages:

> First, it will tend to assure the reliability of the data upon which the appraisal testimony is based. The parties will have had an opportunity to test the data through investigation prior to trial. The opportunity for pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference may serve a more useful function. Having checked the supporting data in advance, the parties may be able to stipulate at the pretrial conference to highest and best use, to the comparability of other sales, to the admis-

11. 1967 Cal. Stat. ch. 1104, § 2.

sibility of other evidence, and perhaps even to the amounts of certain items of damage.[12]

Timing of Data Exchange

Since enactment of the valuation data exchange statute, there has been a consistent trend to push the data exchange ever earlier in the proceedings. As originally enacted, the statute provided for an exchange 20 days before trial[13] — too close to the time of trial to be of practical use to the parties. The defect was corrected in 1975, providing for a mutual exchange 40, rather than 20, days before trial.[14]

Legislation enacted in 1999 pushes the exchange back to 60 days before trial.[15] The time period was extended to give both parties an adequate opportunity to examine each other's valuation data and depose expert witnesses before making a final pretrial offer or demand. The intent was to facilitate reasonable offers and demands, resulting in a greater number of settlements; it could also yield reduced court costs.[16]

The purpose of the pretrial exchange of valuation data — to provide each party with the relevant facts on which the opposition will base its valuation opinion — is not always accomplished. Critics have noted a number of obstacles to effective exchange of data, including that further discovery following an exchange is ordinarily necessary. However, because the exchange does not occur until late in the pretrial process, dis-

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12. *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 Cal. L. Revision Comm'n Reports 19, 21 (1967)

13. Former Code Civ. Proc. § 1272.01(d) (repealed by 1975 Cal. Stat. ch. 1275, § 1).

14. Code Civ. Proc. § 1258.220.

15. 1999 Cal. Stat. ch. 102, § 2 (amending Code Civ. Proc. § 1258.220).

16. See Senate Rules Committee, Floor Analysis of SB 634, as amended June 9, 1999 (June 18, 1999).

covery may be needed very close to the commencement of trial.[17]

Proposed Revision

While the 60-day period allows more time for the parties to make an evaluation of the case and addresses some of the defects that have been noted in the exchange statute, the 60-day period does not allow adequate time for application of pretrial resolution techniques such as judicial determination of valuation-related legal issues and use of alternative dispute resolution.

The Commission recommends that the presumptive date for exchange of valuation data should be 90 days before trial. This period should more adequately facilitate pretrial resolution of eminent domain cases. In addition, absent pretrial resolution, the longer period will allow the parties to make better-reasoned final offers and demands.

In some cases, the 90-day exchange could occur so early in the proceedings that the parties will not have had sufficient time to retain appraisal experts, complete initial discovery, and obtain appraisals from their expert witnesses. To guard against that possibility, all parties should be provided a minimum of nine months after the case is filed before they may be required to exchange valuation data. The court should retain authority to provide further relief from the 90-day limit if the facts in the case so warrant.

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17. See, e.g., Matteoni, *supra* note 1, § 9.14, at 389-90; Kanner, *Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 Loy. L.A. L. Rev. 447 (1973).

BUSINESS GOODWILL ISSUES[18]

Exchange of Valuation Data

Where there is a pretrial exchange of valuation data, the parties must provide a statement of valuation data for each witness who will testify on (1) the value of the property taken, (2) any damage or benefit to the remainder, or (3) the amount of "any other compensation required to be paid" by specified statutes, including Chapter 9 (commencing with Section 1263.010).[19] Chapter 9 includes provisions that require compensation to be paid for loss of business goodwill.[20]

Thus the statutes on their face require goodwill valuation data to be included in the data exchange. However, a Court of Appeal opinion suggests that the statutes might be made clearer on this point. In *City of Fresno v. Harrison*,[21] the city argued that its failure to provide goodwill valuation data did not violate the statute, "since it was ambiguous whether the special eminent domain discovery statutes applied to cases for recovery of goodwill under section 1263.510."[22] This interpretation derived from the city's observation that the specific types of information required to be exchanged (which are listed in Code of Civil Procedure Section 1258.260) include factors more relevant to valuing tangible than intangible property and damage.

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18. This discussion duplicates the Commission's recommendation relating to claimed loss of business goodwill. *Compensation for Loss of Business Goodwill in Eminent Domain: Selected Issues*, 29 Cal. L. Revision Comm'n Reports 719 (1999).

19. Code Civ. Proc. § 1258.250(a)-(d).

20. Code Civ. Proc. §§ 1263.510-1263.530.

21. 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

22. 154 Cal. App. 3d at 302.

Code of Civil Procedure Section 1258.260 provides:

> 1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:
>
> (1) The interest being valued.
>
> (2) The date of valuation used by the witness.
>
> (3) The highest and best use of the property.
>
> (4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.
>
> (5) The sales, contracts to sell and purchase, and leases supporting the opinion.
>
> (6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.
>
> (7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.
>
> (8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.
>
> (b) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (a), the statement of valuation data shall give:
>
> (1) The names and business or residence addresses, if known, of the parties to the transaction.
>
> (2) The location of the property subject to the transaction.
>
> (3) The date of the transaction.
>
> (4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

> (5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.
>
> (6) The total area and shape of the property subject to the transaction.
>
> (c) If any opinion referred to in Section 1258.250 is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.
>
> (d) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (e), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.
>
> (e) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

The *Harrison* decision notes that, of the factors listed in this section, those which may apply to goodwill are (1) the interest being valued, (2) the date of valuation, (3) the gross income, deductions and net income, and (4) the rate of capitalization and resulting value. The court states:[23]

> It is likely that section 1258.260 was written without contemplation of business goodwill valuation problems. If it is not explicit on the subject, as the trial court thought, it should be amended. However ill-fitting the words may be, the intent is clearly to expose fully the expert's opinion on the subject concerned.

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23. *Id.* at 302-03.

It is a straightforward matter to remove any uncertainty, and the Commission recommends that this be done.

Calculation of Loss of Goodwill

There is no fixed method for valuing goodwill. The cases have held that the following techniques, among others, may be used:

- Market analysis.[24]
- "Excess income" method.[25]
- Capitalized value of net income or profits of business, or some similar method of calculating present value of anticipated profits.[26]

It would be helpful to require that, in the exchange of valuation data, a goodwill valuation expert identify the method used to determine goodwill and summarize the data supporting the opinion.

Offer and Demand

The Eminent Domain Law requires that at least 20 days before trial, the parties file and serve on each other their final offers and demands of compensation in the proceeding.[27] The statute does not define what is included in the meaning of the term "compensation." If the plaintiff's offer is unreasonable and the defendant's demand reasonable in light of the evidence admitted and the compensation awarded in the proceeding, the defendant is entitled to litigation expenses.[28]

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24. Community Dev. Comm'n v. Asaro, 212 Cal. App. 3d 1297, 261 Cal. Rptr. 231 (1989).

25. People *ex rel.* Dep't of Transp. v. Muller, 36 Cal. 3d 263, 681 P.2d 1340, 203 Cal. Rptr. 772 (1984).

26. People *ex rel.* Dep't of Transp. v. Leslie, 55 Cal. App. 4th 918, 64 Cal. Rptr. 2d 252 (1997).

27. Code Civ. Proc. § 1250.410(a).

28. Code Civ. Proc. § 1250.410(b).

At least two appellate cases have indicated that the compensation referred to in this section does not include prejudgment interest (or ordinary costs).[29] Unfortunately, these cases also include loose language (dictum) to the effect that the provision is not intended "to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder."[30] This interpretation would seem to exclude from coverage of the section compensation for loss of goodwill.

Notwithstanding the language in the cases, the law intends that the offer and demand include compensation for loss of goodwill. The statute should be revised to make clear that the final offer and demand should include all compensation required by the Eminent Domain Law, including compensation for loss of goodwill. For purposes of clarity, each offer and demand should also indicate whether or not interest and costs are included.

EARLY RESOLUTION OF LEGAL ISSUES

Existing Law

It should become apparent at the pretrial conference whether there are questions of law on which the parties disagree that affect valuation of the property. Resolution of matters such as contentions over what constitutes the larger parcel, whether or not there is an impairment of access, or the probability of a zoning change, must be resolved before the jury trial on valuation. The pretrial conference can isolate many of these questions and provide for their determination

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29. Coachella Valley County Water Dist. v. Dreyfuss, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); People *ex rel.* Dep't of Transp. v. Gardella Square, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

30. *Dreyfuss*, 91 Cal. App. 3d at 954; *Gardella Square*, 200 Cal. App. 3d at 568.

before trial and, ideally, before valuation data are exchanged and final offers and demands filed.[31]

Early resolution of legal issues can be accommodated because legal issues are for court rather than jury determination. Under existing law, bifurcation of legal issues may be achieved through the use of various procedural devices.[32] The Eminent Domain Law provides structurally for early resolution of right to take issues.[33] However, there is nothing in the statute providing for early resolution of legal disputes affecting valuation.

It is common for courts to establish local rules to require that *in limine* motions to exclude evidence be filed and served in advance of the trial date. To expedite testimony before a jury, courts routinely conduct hearings *in limine* to determine the admissibility of evidence.[34] However, some courts resist *in limine* motions and bifurcation, preferring to hear the matter only once and sort things out at trial.[35] While this may be efficient for the judge hearing the case, it does not save the jury time, and does not foster early resolution of disputes and settlement of cases.

Statutory Procedure

The Law Revision Commission recommends an express statutory provision for early resolution of legal issues affecting valuation in an eminent domain case.

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31. See Matteoni, *supra* note 1, § 9.12, at 384-85.

32. See, e.g., Code Civ. Proc. §§ 598 (court may order precedence in order of trial of issues where economy and efficiency of handling litigation would be promoted), 1048 (court may order separate trial of issues where conducive to expedition and economy, preserving the right to jury trial); Evid. Code § 320 (court's power to regulate order of proof). *Cf.* Code Civ. Proc. §§ 588-592 (trial of issues of law and fact).

33. Code Civ. Proc. § 1260.110.

34. For example, Rule 16.10(b)(4) of the Los Angeles County Superior Court rules endorses the process of a hearing before impaneling the jury.

35. See Matteoni, *supra* note 1, §§ 9.24-9.25, at 402-05.

A model for this approach already exists in the Eminent Domain Law, although its application is narrow. An "improvement pertaining to the realty" is an improvement installed for use on property taken by eminent domain that cannot be removed without a substantial economic loss; improvements pertaining to the realty must be taken into account in determining compensation.[36] The Eminent Domain Law provides for early resolution of a dispute over whether a particular improvement should be characterized as an improvement pertaining to the realty for compensation and other purposes.[37]

The Commission recommends addition of a parallel but more general provision for disputes over legal issues affecting valuation. The procedure should be limited to resolution of legal issues that may affect compensation, such as what constitutes the larger parcel, or the probability of a zoning change; it should not be used to ascertain just compensation.[38]

Timing Issues

There must be sufficient time for the parties to examine any valuation data exchanged, focus on the nature of their dispute, and obtain judicial resolution of any irreconcilable disagreements over legal issues. Resolution of legal issues in a timely fashion will help pave the way for a resolution of the proceeding without the need for a trial.

Assuming an exchange of valuation data 90 days before trial, a motion for resolution of legal issues should be permitted 30 days thereafter — i.e., 60 days before trial. There should be enough time during the 30-day period for the par-

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36. Code Civ. Proc. §§ 1263.205-1263.210.

37. Code Civ. Proc. § 1260.030.

38. *Cf.* Cal. Const. art. I, § 19 (just compensation ascertained by jury unless waived).

ties to complete expert witness depositions and other necessary discovery, before the motion to resolve legal issues must be made.

With standard notice, preparation, and hearing times, in routine cases the resolution of legal issues will be completed well before the valuation trial. Ordinarily, this should leave sufficient time for the parties to prepare and exchange new appraisal data, and to develop their final offers and demands.

However, where the issues are complex, this schedule may not be possible to meet. The proposed statute would allow the court to extend time for trial, and for submission of final offers and demands, to the extent warranted by the court's resolution of legal issues.

Trial Judge

The legal issues involved in eminent domain valuation are highly technical and fact-oriented and require specialized knowledge. For this reason, resolution of the legal issues on the trial court's law and motion calendar may not be appropriate. The proposed law seeks to ensure an appropriate resolution of these legal issues by assigning them to the trial judge in the case.

ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution techniques, particularly mediation, may provide a constructive means for the parties to conclude the case without the time and expense of an eminent domain trial. The Law Revision Commission believes the law should foster use of alternative dispute resolution if mutually agreed to by the parties. The Commission has identified three potential impediments to use of alternative dispute resolution in eminent domain that should be addressed by statute — (1) condemnor reluctance to use alternative dispute resolution, (2) limited time available for alternative dispute

resolution, and (3) concern that a jury trial may be constitutionally required.

Condemnor Reluctance To Use ADR

Historically, some public agencies have resisted alternative dispute resolution.[39] This may in part be due to agency uncertainty whether it is permissible to relinquish control of public decision-making authority to a nonjudicial process.

Existing law explicitly establishes the authority of a public entity to engage in binding arbitration.[40] However, the law is silent as to mediation and nonbinding arbitration.

The proposed law makes clear that public agency condemnors may, but are not required to, agree to an alternative dispute resolution process, including mediation, binding arbitration, and nonbinding arbitration. This is analogous to the rule applicable in administrative adjudication involving state agencies.[41]

Limited Time Available for ADR

In order for mediation to be effective in eminent domain proceedings, it is important that pretrial discovery and resolution of legal issues first be completed. Mediation takes time, and the amount of time remaining after completion of these pretrial procedures may be inadequate for this purpose.

The proposed law would allow the court to waive fast track and other trial setting rules if the parties are actively engaged in alternative dispute resolution and agree that additional time would be beneficial.

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39. The Commission's experience in its administrative procedure study was that state agencies may be unsure whether they have authority to engage in alternative dispute resolution, for various reasons. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55, 109-10 (1995).

40. Code Civ. Proc. §§ 1273.010-1273.050 (arbitration of compensation in acquisitions of property for public use).

41. Gov't Code § 11420.10.

Constitutional Requirement of Jury Trial

The California Constitution requires that just compensation in an eminent domain proceeding be determined by a jury, unless waived.[42] Consistent with the waiver clause of the Constitution, the proposed law makes clear that alternative dispute resolution is available only by agreement of the parties.

42. Cal. Const. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.").

PROPOSED LEGISLATION

Heading of Article 6 (commencing with Section 1250.410) (amended)

SECTION 1. The heading of Article 6 (commencing with Section 1250.410) of Chapter 5 of Title 7 of Part 3 of the Code of Civil Procedure is amended to read:

Article 6. Settlement Offers *and Alternative Dispute Resolution*

Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers

SEC. 2. Section 1250.410 of the Code of Civil Procedure is amended to read:

1250.410. (a) At least 20 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. *The offer and the demand shall include all compensation required pursuant to this title, including compensation for loss of goodwill if any, and shall state whether interest and costs are included.* Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.

(c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

Comment. Subdivision (a) of Section 1250.410 is amended to counteract dictum in cases to the effect that the provision is not intended to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder. See, e.g., Coachella Valley County Water Dist. v. Dreyfuss, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); People *ex rel.* Dep't of Transp. v. Gardella Square, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

The amendment makes clear that the final offer and demand should include all elements of compensation, including compensation for loss of goodwill. Although interest and costs are not covered by this provision, the amendment also requires, for the purpose of clarity, that each offer and demand also indicate whether or not interest and costs are included.

It should be noted that subdivision (b) requires the prelitigation offer made by the plaintiff pursuant to Government Code Section 7267.2 to be considered in determining the amount of litigation expenses. In making the determination, the court should discount differences between that offer and the final offer under subdivision (a), to the extent matters such as claimed loss of business goodwill or eventual interest and costs in the proceeding would not have been known to the plaintiff at the time of the earlier offer.

Code Civ. Proc. § 1250.420 (added). ADR authorized

SEC. 3. Section 1250.420 is added to the Code of Civil Procedure, to read:

1250.420. The parties may by agreement refer a dispute that is the subject of an eminent domain proceeding for resolution by any of the following means:

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator. The arbitration is subject to Chapter 12 (commencing with Section 1273.010).

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator's decision a party moves the court for a trial of the eminent domain proceeding. If the judgment in the eminent domain proceeding is not more favorable to the moving party, the moving party shall, notwithstanding any other statute, pay the costs and litigation expenses of the parties in the eminent domain proceeding.

Comment. Section 1250.420 is drawn from Government Code Section 11420.10 (ADR authorized in administrative adjudication). This section is intended to remove any question about the authority of a public entity to refer an eminent domain dispute for alternative dispute resolution. Alternative dispute resolution pursuant to this section is optional, applicable only on agreement of the parties.

Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21.

Standard protections of confidentiality of communications made in alternative dispute resolution apply to alternative dispute resolution pursuant to this section. See, e.g., Evid. Code §§ 703.5 (testimony by arbitrator or mediator), 1115-1128 (mediation).

Code Civ. Proc. § 1250.430 (added). Stay of trial during ADR

SEC. 4. Section 1250.430 is added to the Code of Civil Procedure, to read:

1250.430. Notwithstanding any other statute or rule of court governing the date of trial of an eminent domain proceeding, on motion of a party the court may postpone the date of trial for a period that appears adequate to enable resolution of a dispute pursuant to alternative resolution procedures, if it is demonstrated to the satisfaction of the court that all of the following conditions are satisfied:

(a) The parties are actively engaged in alternative resolution of the dispute pursuant to Section 1250.420.

(b) The parties appear to be making progress toward resolution of the dispute without the need for a trial of the matter.

(c) The parties agree that additional time for the purpose of alternative dispute resolution is desirable.

Comment. Section 1250.430 is intended to allow waiver of trial court delay reduction programs and other case processing requirements in order to facilitate productive alternative dispute resolution. This provision may be applied to foster resolution of some or all of the issues between the parties.

Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation

SEC. 5. Section 1255.010 of the Code of Civil Procedure is amended to read:

1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. *The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including but not limited to all of the following information:*

(1) The highest and best use on which the appraisal of the property is based.

(2) If the appraisal is based on market data, the principal transactions supporting the appraisal.

(3) If the appraisal includes compensation for damages to the remainder, the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

Comment. Subdivision (b) of Section 1255.010 is amended to prescribe the contents of the written statement or summary of the basis for the deposit appraisal. The requirement in subdivision (b)(3) that the statement or summary include detail relating to damages to the remainder applies equally in a situation where no compensation for damages to the remainder is provided due to a complete offset by benefits to the remainder.

Code Civ. Proc. § 1258.220 (amended). Date of exchange

SEC. 6. Section 1258.220 of the Code of Civil Procedure is amended to read:

1258.220. *(a)* For the purposes of this article, the "date of exchange" is the date agreed to for the exchange of their lists of expert witnesses and statements of valuation data by the party who served a demand and the party on whom the demand was served or, failing ~~such~~ agreement, a date ~~60~~ *90* days prior to commencement of the trial on the issue of

compensation or the date set by the court on noticed motion of either party establishing good cause therefor.

(b) Unless otherwise agreed to by the parties, the date of exchange shall not be earlier than nine months after the date of commencement of the proceeding.

Comment. Section 1258.220 is amended to make the exchange date 90, rather than 60, days before trial on the issue of compensation (but not earlier than nine months after the case was filed). As used in subdivision (b), "months" refers to calendar months. See Section 17(4).

The statutory exchange date of 90, rather than 60, days before trial remains subject to the authority of the court to provide relief on motion of a party and showing of good cause. The practicalities of preparing sufficiently to enable a fair exchange within the prescribed period may, in the circumstances of a particular case, constitute good cause for a later exchange date.

Code Civ. Proc. § 1258.260 (amended). Contents of statement of valuation data

SEC. 7. Section 1258.260 of the Code of Civil Procedure is amended to read:

1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each ~~such~~ matter upon which ~~he~~ *the witness* will give an opinion, what that opinion is and the following items to the extent that the opinion ~~on such matter~~ is based ~~thereon~~ *on them:*

(1) The interest being valued.

(2) The date of valuation used by the witness.

(3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in ~~such~~ zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or

obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements ~~thereon~~, and the estimated gross rental income and deductions ~~therefrom~~ upon which ~~such~~ *the* reasonable net rental value is computed; the rate of capitalization used; and the value indicated by ~~such~~ *the* capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(9) If the opinion concerns loss of goodwill, the method used to determine the loss and a summary of the data supporting the opinion.

(b) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (a), the statement of valuation data shall give:

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(6) The total area and shape of the property subject to the transaction.

(c) If any opinion referred to in Section 1258.250 is based in whole or in substantial part upon the opinion of another

person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(d) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (e), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(e) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

Comment. Paragraph (9) is added to Section 1258.260(a) to make clear that the basis for an opinion as to loss of goodwill is to be included in the exchange of valuation data. This codifies the rule in *City of Fresno v. Harrison*, 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

Technical revisions are also made for consistency with contemporary statutory drafting techniques.

Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation

SEC. 8. Section 1260.040 is added to the Code of Civil Procedure, to read:

1260.040. (a) If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.

(b) Notwithstanding any other statute or rule of court governing the date of final offers and demands of the parties and the date of trial of an eminent domain proceeding, the court may postpone those dates for a period sufficient to

enable the parties to engage in further proceedings before trial in response to its ruling on the motion.

Comment. Section 1260.040 is intended to provide a mechanism by which a party may obtain early resolution of an *in limine* motion or other dispute affecting valuation. It should be noted that the procedure provided in this section is limited to resolution of legal issues that may affect compensation, such as what constitutes the larger parcel, or the probability of a zoning change; it may not be used to ascertain just compensation. *Cf.* Cal. Const. art. I, § 19 (just compensation ascertained by jury unless waived).

Nothing in this section precludes the use of other procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial procedure pursuant to court rule.

Gov't Code § 7267.1 (amended). Negotiations

SEC. 9. Section 7267.1 of the Government Code is amended to read:

7267.1. (a) The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation.

(b) Real property shall be appraised before the initiation of negotiations, and the owner, or the owner's designated representative, shall be given an opportunity to accompany the appraiser during his or her inspection of the property. However, the public entity may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(c) The public entity's appraisal, and any other valuation opinion expressed by or on behalf of a party prepared for the purpose of negotiation pursuant to this chapter, is inadmissible in evidence in the trial of the issue of just compensation to the following extent:

(1) The appraisal or other opinion may not be given in evidence or referred to, nor shall the appraisal or other opinion be considered to be an admission of a party.

(2) On objection of a party, the person who prepared the appraisal or expressed the opinion on behalf of that party

may not be called at trial by an adverse party to give an opinion as to compensation. If the person who prepared the appraisal or expressed the opinion is called at trial to give an opinion as to compensation, the appraisal or other opinion may be used for impeachment of the witness.

Comment. Subdivision (c) of Section 7267.1 does not affect admissibility of offers and demands of the parties in determining the amount of litigation expenses, to the extent provided in Code of Civil Procedure Section 1250.410.

Gov't Code § 7267.2 (amended). Precondemnation offer

SEC. 10. Section 7267.2 of the Government Code is amended to read:

7267.2. (a) Prior to adopting a resolution of necessity pursuant to Section 1245.230 *of the Code of Civil Procedure* and initiating negotiations for the acquisition of real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established, unless the owner cannot be located with reasonable diligence. The offer may be conditioned upon the legislative body's ratification of the offer by execution of a contract of acquisition or adoption of a resolution of necessity or both. In no event shall the amount be less than the public entity's approved appraisal of the fair market value of the property. Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for the improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, shall be disregarded in determining the compensation for the property. ~~The~~

(b) The public entity shall provide the owner of real property to be acquired with *a copy of the appraisal on which*

the offer is based. The appraisal shall also include a written statement of, and summary of the basis for, the amount it established as just compensation. ~~Where the property involved is owner occupied residential property and contains no more than four residential units, the homeowner shall, upon request, be allowed to review a copy of the appraisal upon which the offer is based.~~ Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

~~(b)~~

(c) Notwithstanding subdivision (a), a public entity may make an offer to the owner or owners of record to acquire real property for less than an amount which it believes to be just compensation therefor if (1) the real property is offered for sale by the owner at a specified price less than the amount the public entity believes to be just compensation therefor, (2) the public entity offers a price which is equal to the specified price for which the property is being offered by the landowner, and (3) no federal funds are involved in the acquisition, construction, or project development.

~~(c)~~

(d) As used in subdivision ~~(b)~~ *(c)*, "offered for sale" means any of the following:

(1) Directly offered by the landowner to the public entity for a specified price in advance of negotiations by the public entity.

(2) Offered for sale to the general public at an advertised or published, specified price set no more than six months prior to and still available at the time the public entity initiates contact with the landowner regarding the public entity's possible acquisition of the property.

Comment. Section 7267.2 is amended to expand the requirement that the public entity provide the owner of property to be acquired with a copy of the appraisal. Under subdivision (b), the public entity must provide the owner of any type of property, not limited to owner-occupied

residential property, with a copy of the appraisal. The appraisal is protected from admissibility in evidence under Section 7267.1.

Subdivision (b) is also amended to make the written statement and summary a part of the appraisal. As such, the written statement and summary are protected from admissibility under Section 7267.1 to the same extent as the appraisal.

It should be noted that the written statement and summary required by this section are in addition to the other statutory requirements for the appraisal — a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information. See Section 7260(k).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Estate Planning During Marital Dissolution

October 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Estate Planning During Marital Dissolution*, 30 Cal. L. Revision Comm'n Reports 603 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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October 5, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Existing law imposes an automatic temporary restraining order ("ATRO") on both parties in a proceeding for dissolution or annulment of marriage, or legal separation. Except as necessary to pay attorney's fees or ordinary expenses, the order restrains either party from transferring or in any way disposing of any property without the written consent of the other party or an order of the court. The extent to which the restraining order affects estate planning changes that only affect the disposition of property on death is not clear.

The Law Revision Commission recommends that Family Code Section 2040 be amended to clarify the scope of the restraining order, consistent with the following principles:

(1) The ATRO should not restrain changes that cannot dispose of the other spouse's property. These include the following:

- Creation, modification, or revocation of a will.
- Revocation of a nonprobate transfer.
- Creation of an unfunded trust.
- Execution of a disclaimer.

(2) The ATRO should restrain changes that could dispose of the other spouse's property. These include the following:

- The creation of a nonprobate transfer (other than an unfunded trust).

- Modification of a nonprobate transfer if the modification will affect the disposition of property.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

ESTATE PLANNING DURING MARITAL DISSOLUTION

Existing law imposes an automatic temporary restraining order (ATRO) on both parties in a proceeding for dissolution or annulment of marriage, or legal separation (hereinafter "dissolution"). Except as necessary to pay attorney's fees or ordinary expenses, the ATRO restrains the parties from "transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court."[1] The extent to which the ATRO restrains estate planning changes during a dissolution proceeding is not clear. The Commission has been informed that different trial courts interpret the ATRO differently — some interpret the ATRO as restraining estate planning changes while others do not.[2]

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1. See Fam. Code § 2040(a)(2).

2. This uncertainty is reflected in a standard family practice treatise and in a recent publication of the California State Bar Family Law Section. See W. Hogoboom & D. King, California Practice Guide: Family Law ¶ 1:394.1 (1999) (cautioning that severance of a joint tenancy "may well" violate the ATRO); Moore, Selected Estate Planning Issues for Family Lawyers, Family Law News, California State Bar Family Law Section, Winter 1996, at 12-13 (discussing uncertainty as to whether ATRO applies to severance of joint tenancy and revocation of trust).

Courts in other states have interpreted similar provisions restraining the disposal of property during a marital dissolution proceeding, with varying results. See, e.g., Lindsey v. Lindsey, 492 A.2d 396 (Pa. Super. 1985) (change of beneficiary designation on life insurance policies not conveyance of asset because beneficiary designation vests nothing in beneficiary during lifetime of insured — beneficiary has mere expectancy); Lonergan v. Strom, 700 P.2d 893 (Ariz. 1985) (severance of joint tenancy by means of straw transfer violated ATRO, but did not violate purpose of ATRO — to protect marital estate from dissipation or removal beyond reach of divorce court); Willoughby v. Willoughby 758 F. Supp. 646 (D. Kan. 1990) (change of life insurance beneficiary was disposition of property in violation of restraining order). See generally Chapus, Annotation, *Divorce and Separation: Effect of Court Order Prohibiting Sale or Transfer of*

In a recent decision, *Estate of Mitchell*, the court held that revocation of a joint tenancy is not restrained by the ATRO, because unilateral severance does not involve a transfer and because severance only disposes of an expectancy, not property.[3] This is a reasonable interpretation of Family Code Section 2040. However, the opinion does not consider other types of estate planning changes, such as creation, modification, or revocation of a trust. The applicability of the ATRO to these other types of changes should also be clarified.

PROBLEMS WITH EXISTING LAW

Uncertainty

Uncertainty as to whether the ATRO restrains estate planning changes can create a trap for unwary parties and inexperienced practitioners. For example, if a party makes an estate planning change during a dissolution proceeding without first obtaining spousal consent or the permission of the court, and the court interprets the ATRO as restraining such a change, the change may be ineffective and the party may be held in contempt.[4]

Unintended Transfers

A change in a person's life as significant as dissolution of marriage will often lead to changes in that person's testamentary intentions. If the ATRO prevents a person from making an intended estate planning change and the person dies during the dissolution proceeding, the person's estate will pass in an unintended way. For example, suppose a husband and wife

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Property on Party's Right to Change Beneficiary of Insurance Policy, 68 A.L.R. 4th 929 (Westlaw 1999).

3. Estate of Mitchell, 76 Cal. App. 4th 1378, 91 Cal. Rptr. 2d 192 (1999).

4. See Civ. Code § 2224 ("One who gains a thing by … wrongful act, is … an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."); Code Civ. Proc. § 1209(a)(5) (contempt includes disobedience of lawful court order).

convey their community property into a trust that names the survivor of them as beneficiary and is unilaterally revocable by either. The wife later files for dissolution of marriage and decides to revoke the trust and execute a will devising her share of the community property to her children. Before she can obtain a court order permitting the estate planning changes, she dies, and contrary to her wishes, her husband receives the entire property.

Inefficiency

It appears that a principal purpose of the ATRO provision is to conserve judicial resources by making automatic those types of restraints that are commonly sought and granted in dissolution proceedings.[5] However, if parties to a dissolution routinely wish to make estate planning changes during the proceeding, then judicial efficiency is not served by an automatic restraint of such changes. In fact, estate planning changes during dissolution of marriage appear to be commonplace. In one appellate decision, the court suggests that family law attorneys risk malpractice liability if they do not advise their clients of the need to make estate planning changes during a dissolution proceeding in order to avoid an

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5. See, e.g., Assembly Committee on Judiciary analysis of Assembly Bill 1905, May 4, 1989, at 6:

> Proponents state that the restraining orders contained in this proposal are granted routinely by courts following the filing of an Order to Show Cause (OSC). One of the elements presently contributing to court congestion in family law courts is the routine filing of such OSC's simply to obtain these standard orders, with the attendant court time necessary for perfunctory hearings or, as is usual, signing in chambers. One or both parties usually seek at least one of these restraining orders soon after filing the family law action.
>
> This proposal would save court time without diminishing the parties' right to a hearing. Either party always would have the option of filing a motion to request that the orders be dissolved.

unintended transfer if the client dies during the proceeding.[6] Similar advice is provided in standard family law practice treatises.[7] Considering that careful attorneys will seek spousal consent or an order of the court before taking such actions, the court will be required to hear numerous requests that would be granted in many cases — an apparent waste of judicial resources.

Disproportionate Effect on Respondent Spouse

The ATRO takes effect on service of the summons in a proceeding for dissolution of marriage.[8] A petitioner can effectively avoid the ATRO by making any desired estate planning changes before filing. A respondent who is unaware of a pending summons cannot avoid the ATRO in this way. The problems associated with the ATRO provision disproportionately affect respondents.

PROPER SCOPE OF RESTRAINING ORDER

As a general matter, it is inequitable and inefficient to require that a party to a dissolution proceeding obtain spousal consent or an order of the court before making estate planning changes that do not affect the rights of the other spouse. Such a restraint also exceeds the proper purpose of the ATRO —

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6. See Estate of Blair, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627, 631 (1988).

7. See W. Hogoboom & D. King, California Practice Guide: Family Law ¶¶ 1:367-369, 390 (suggesting that it is the duty of family law attorneys to promptly inquire whether their clients wish to sever joint tenancy in order to avoid unintended transfer if client dies during proceeding); K. Kirkland et al., California Family Law Practice and Procedure § 20.12[4][a][iv] (2d ed. 1999) (suggesting that clients should be advised to sever joint tenancy on commencing family law proceeding in order to avoid possible unintended transfer to other spouse). Although these examples focus on joint tenancy survivorship, the same concerns are raised by other instruments that transfer property on death.

8. See Fam. Code § 233(a).

protecting marital assets from dissipation or concealment. As stated in an Arizona case interpreting a similar provision:

> In our opinion, it is not the purpose of [the ATRO] to freeze each party's estate plan as of the date of the filing of the petition for dissolution and thus insure that it will be effectuated without alteration in the event one of the parties dies before entry of a final decree. The statutory intent is to forbid actions by either party that would dissipate the property of the marital estate or place it beyond the court's adjudicatory power in the dissolution proceeding.[9]

Whether different types of estate planning changes could "dissipate the property of the marital estate or place it beyond the court's adjudicatory power" is discussed below.

Transaction Involving a Will

The beneficiary of a will has no vested property interest in the will during the testator's life. Thus, a decision by one spouse to create, modify, or revoke a will during a dissolution proceeding does not affect the rights of the other spouse and should not be automatically restrained. This is consistent with the holding in *Estate of Mitchell* that the ATRO does not restrain termination of an expectancy.[10]

Of course, spouses may agree by contract to make a particular testamentary disposition by will. In such a case, the contract itself serves to restrain modification or revocation of the agreed-upon will provision.[11] It is not necessary that all estate planning changes involving wills be automatically restrained during dissolution proceedings in order to protect these contractual agreements.

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9. Lonergan v. Strom, 700 P.2d 893, 898 (Ariz. 1985).

10. See *supra* note 3.

11. See, e.g., Redke v. Silvertrust, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971) (enforcing oral agreement to maintain particular testamentary provision).

Revocation of Nonprobate Transfer

Many people choose to use a "nonprobate transfer" (such as a revocable trust, joint tenancy title, or a pay-on-death (P.O.D.) account in a financial institution), in order to pass property on death outside of the probate process. Revocation of a revocable nonprobate transfer is similar to revocation of a will in that it terminates a mere expectancy.[12] There does not appear to be any reason to automatically restrain the revocation of a nonprobate transfer during a dissolution proceeding.[13] Again, this is consistent with the holding in *Estate of Mitchell.*[14]

Modification of Nonprobate Transfer

Modification of a nonprobate transfer during a dissolution proceeding can result in an unauthorized transfer of community property. This is because a nonprobate transfer, unlike a will, can be used to dispose of both spouses' shares of the community property, so long as both spouses have consented to the transfer.[15]

If, during a dissolution proceeding, one party modifies an instrument making a nonprobate transfer of community property without the consent of the party's spouse, the spouse's share of the property may be transferred contrary to the spouse's wishes. For example, suppose that a husband, with his wife's consent, deposits community funds in a

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12. See, e.g., *In re* Marriage of Hilke, 4 Cal. 4th 215, 222, 841 P.2d 891, 896, 14 Cal. Rptr. 2d 371, 376 (1992) ("severance of a joint tenancy — by eliminating the survivorship characteristic of the joint tenancy form of ownership — theoretically affects the expectancy interest of the other joint tenant, but does not involve a diminution of his or her present vested interest").

13. Life insurance presents a special case and is discussed separately. See *infra* text accompanying notes 20-21.

14. See *supra* note 3.

15. See Prob. Code §§ 5020 (spousal consent required for nonprobate transfer of community property), 6101 (will may only dispose of testator's half of community property).

P.O.D. account, naming their children as beneficiaries. Later, during a proceeding to dissolve their marriage, the husband changes the account to name his brother as beneficiary, without his wife's consent. The husband then dies and his brother withdraws all of the funds, including the wife's share of the community property.[16] This is exactly the sort of dissipation of marital assets that the ATRO is intended to prevent. Thus, modification of a nonprobate transfer, in a manner that will affect the disposition of community property, should be restrained by the ATRO.[17]

Modification of a nonprobate transfer of separate property does not present the same risk. However, characterization of property as community or separate often involves a complex legal and factual determination that is probably best left to the courts. For this reason, the restraint on modification of a nonprobate transfer should apply to both community and separate property. This is consistent with existing law, which restrains transactions involving either community or separate property.[18]

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16. See Prob. Code §§ 5403 (P.O.D. account paid to P.O.D. payee on proof of death of original payee), 5405 (payment pursuant to Section 5403 discharges financial institution of all claims regardless of whether payment was consistent with beneficial ownership of account).

17. Modifications that would be restrained as affecting the disposition of property include a change of beneficiary or of a power of appointment. Modifications that would not be restrained include naming a new trustee or successor trustee (so long as the change does not affect the trustee's powers or duties with respect to disposition of trust property).

Note that a rule permitting revocation of a nonprobate transfer, but requiring spousal consent or a court order in order to modify a nonprobate transfer, is consistent with the rule governing a trust containing community property — either spouse can unilaterally revoke such a trust, but the consent of both spouses is required in order to modify it. See Fam. Code § 761.

18. See Fam. Code § 2040(a)(2).

Creation of Nonprobate Transfer

Creation of a nonprobate transfer can also pose a risk of unauthorized transfer of community property. For example, one spouse may use community funds to establish a P.O.D. account, without the consent of the other spouse, naming a third party as P.O.D. payee. On the account holder's death, the funds, including the nonconsenting spouse's share, would be paid to the third party. Thus, for the same reasons that modification of a nonprobate transfer should be restrained, creation of a nonprobate transfer should also be restrained.

However, there should be an exception for creation of an unfunded trust.[19] So long as no property is transferred to the trust, mere creation of a trust does not pose any risk of unauthorized disposition of community property. Creation of an unfunded trust during marital dissolution would allow a party to establish a detailed instrument to eventually replace any estate planning instrument that is revoked. The unfunded trust could be funded by property that is released from restraint or by a pour-over provision in a will. Allowing creation of an unfunded trust, without spousal consent or an order of the court, also preserves the confidentiality of the terms of the trust.

Life Insurance

Under existing law, the ATRO expressly restrains cancellation or modification of any type of insurance during a dissolution proceeding.[20] This preserves the status quo in important ways, such as preventing the cancellation of health insurance coverage of a spouse. It also helps avoid the problem of an unauthorized transfer of community property to a third party. Finally, it preserves an asset that the court can use in fashioning a support order — it is fairly common for the court to

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19. See proposed Fam. Code § 2040(b)(4) *infra*.

20. See Fam. Code § 2040(a)(3).

order the obligor spouse to maintain life insurance for the benefit of the supported spouse, to provide support in the event of the obligor's death.[21] The court's ability to make such an order might be compromised if the policy were canceled. For all of these reasons, the existing restraint on cancellation or modification of insurance policies should be maintained.

Disclaimer

Under existing law, a person may disclaim an interest in property received pursuant to a testamentary or inter vivos instrument or by operation of law.[22] Such a disclaimer could be considered a disposition of property, subject to restraint under the ATRO. Because property subject to a disclaimer would otherwise be the disclaimant's separate property,[23] there is no risk that a disclaimer will dispose of the other spouse's property. Under the proposed law, execution of a disclaimer is not restrained.[24]

RECOMMENDED REVISIONS

The Commission recommends that Family Code Section 2040 be amended to clarify the scope of the ATRO, consistent with the following principles:

(1) The ATRO should not restrain changes that cannot dispose of the other spouse's property. These include the following:

- Creation, modification, or revocation of a will.

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21. See Fam. Code § 4360 (support order may include amount sufficient to maintain insurance on life of support obligor, for benefit of supported spouse).

22. See Prob. Code § 260-295.

23. See Fam. Code § 770(a)(2) (separate property includes "all property acquired by the person after marriage by gift, bequest, devise, or descent).

24. See proposed Fam. Code § 2040(a)(5) *infra*.

- Revocation of a nonprobate transfer (other than life insurance).[25]
- Creation of an unfunded trust.
- Execution of a disclaimer.

(2) The ATRO should restrain changes that could dispose of the other spouse's property. These include the following:

- The creation of a nonprobate transfer (other than an unfunded trust).
- Modification of a nonprobate transfer if the modification will affect the disposition of property.

25. See proposed Fam. Code § 2040(d) (definition of "nonprobate transfer" excludes insurance) *infra*.

PROPOSED LEGISLATION

Fam. Code § 2040 (amended). Automatic temporary restraining order

SECTION 1. Section 2040 of the Family Code is amended to read:

2040. (a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order:

(1) Restraining both parties from removing the minor child or children of the parties, if any, from the state without the prior written consent of the other party or an order of the court.

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party.

Notwithstanding the foregoing, nothing in the restraining order shall preclude a party from using community property, quasi-community property, or the party's own separate property to pay reasonable attorney's fees and costs in order to retain legal counsel in the proceeding. A party who uses community property or quasi-community property to pay his or her attorney's retainer for fees and costs under this provision shall account to the community for the use of the property. A party who uses other property that is subsequently determined to be the separate property of the other party to pay his or her attorney's retainer for fees and costs under this

provision shall account to the other party for the use of the property.

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability held for the benefit of the parties and their child or children for whom support may be ordered.

(4) Restraining both parties from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court.

(b) *Nothing in this section restrains any of the following:*

(1) Creation, modification, or revocation of a will.

(2) Revocation of a nonprobate transfer, including a revocable trust.

(3) Elimination of a right of survivorship.

(4) Creation of an unfunded trust.

(5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

(c) In all actions filed on and after January 1, 1995, the summons shall contain the following notice:

> "WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property

presumption to be written into the recorded title to the property."

(d) For the purposes of this section:

(1) "Nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay-on-death account in a financial institution, Totten trust, transfer-on-death registration of personal property, or other instrument of a type described in Section 5000 of the Probate Code.

(2) "Nonprobate transfer" does not include a provision for the transfer of property on death in an insurance policy or other coverage held for the benefit of the parties and their child or children for whom support may be ordered, to the extent that the provision is subject to paragraph (3) of subdivision (a).

Comment. Section 2040 is amended to clarify the scope of the automatic temporary restraining order with respect to estate planning changes.

Subdivision (a)(4) restrains modification of a nonprobate transfer "in a manner that affects the disposition of property subject to the transfer." Modifications that are restrained as affecting the disposition of property include a change of beneficiary and a donor's modification of the terms of a power of appointment (this would not include exercise of a power of appointment by a donee). Modifications that are not restrained include naming a new trustee or successor trustee (so long as the change does not affect the trustee's powers or duties with respect to disposition of trust property).

Subdivision (b)(2) provides that the restraining order does not restrain revocation of a nonprobate transfer. This does not mean that a nonprobate transfer is necessarily subject to revocation by one party without the consent of the other party. The question of whether a nonprobate transfer is subject to unilateral revocation is governed by the terms of the nonprobate transfer and applicable substantive law. See, e.g., Prob. Code § 5506 (action by all surviving joint owners required to cancel beneficiary registration of jointly-owned security); 31 C.F.R. § 353.51 (2000) (restricting changes in ownership of jointly-owned Series EE savings bond).

Subdivision (b)(3) provides that the restraining order does not restrain elimination of a right of survivorship. This codifies *Estate of Mitchell*, 76

Cal. App. 4th 1378, 91 Cal. Rptr. 2d 192 (1999) (restraining order does not restrain severance of joint tenancy).

Subdivision (b)(4) provides that the restraining order does not restrain creation of one or more revocable or irrevocable unfunded trusts. However, the transfer of property to fund a trust would be restrained under subdivision (a)(2). An unfunded trust created during a dissolution proceeding could serve as a receptacle for property subject to a pour-over provision in a will. Such a trust could also be funded by property that has been released from restraint by the restraining order.

Subdivision (d) defines "nonprobate transfer" for the purposes of this section. The definition expressly incorporates instruments described in Probate Code Section 5000, including a "marital property agreement." Thus, an agreement between spouses as to how to divide community property between them on either of their deaths is a nonprobate transfer for the purposes of this section. See Prob. Code § 100(b) (agreement as to division of community property on death of spouse).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Health Care Decisions Law: Miscellaneous Revisions

March 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Health Care Decisions Law: Miscellaneous Revisions*, 30 Cal. L. Revision Comm'n Reports 621 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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March 29, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This recommendation proposes a number of minor substantive and technical revisions as a follow-up to the Health Care Decisions Law enacted in 1999 on recommendation of the Law Revision Commission:

(1) The definition of "capacity" to make health care decisions would be generalized to cover execution and revocation of advance directives.
(2) The patient's designation of a surrogate health care decisionmaker would not revoke a prior designation of an agent in a power of attorney for health care unless the patient expresses the intention to remove the agent.
(3) The duration of an informal surrogate designation would be limited to 60 days maximum, but expiration of the designation would not affect health care decisionmaking under other law or standards of practice.
(4) The health care agent would not be automatically liable for the costs of disposition of the principal's remains, but only where the agent agrees to assume liability or makes decisions resulting in costs that are not paid out of the decedent's estate under other law.
(5) The grounds for petitioning the court would be amended to include a petition to compel a third person to honor the authority of a health care agent or surrogate.
(6) The rules limiting who can act as agent would be amended to make clear that a supervising health care

provider can never act as agent for his or her patient, even if related to the patient by blood, marriage, adoption, or registered domestic partnership, or where they are coworkers.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

HEALTH CARE DECISIONS LAW: MISCELLANEOUS REVISIONS

The Health Care Decisions Law was enacted in 1999 on recommendation of the Law Revision Commission.[1] As health care institutions and professional groups have begun to study and implement the new law, the Commission has learned of several problems that need further attention. This recommendation proposes a number of minor substantive and technical revisions as a follow-up to the 1999 legislation.

Definition of Capacity

Capacity is a fluid concept. Its meaning varies depending on the circumstances and the nature of the action an individual wishes to take. In the Power of Attorney Law, which included the durable power of attorney for health care, the Commission did not attempt to flesh out the meaning of capacity, but adopted the general rule that a "natural person having the capacity to contract may execute a power of attorney."[2]

In the new Health Care Decisions Law, the Commission included a definition of capacity based on Health and Safety Code Section 1418.8 and the Uniform Health-Care Decisions Law of 1993. The new definition was crafted to apply in the health care decisionmaking context: "'Capacity' means a

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1. 1999 Cal. Stat. ch. 658 (AB 891, Alquist) (operative July 1, 2000). For the Commission's original recommendation, see *Health Care Decisions for Adults Without Decisionmaking Capacity*, 29 Cal. L. Revision Comm'n Reports 1 (1999). The law as enacted, with revised Comments, is included in *2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports 1 (2000).

2. Prob. Code § 4120 & Comment. This is consistent with the general agency rule in Civil Code Section 2296. See also Civ. Code § 1556 ("All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.").

Unless otherwise indicated, all further statutory references are to the Probate Code.

patient's ability to understand the nature and consequences of proposed health care, including its significant benefits, risks, and alternatives, and to make and communicate a health care decision."[3]

A technical problem has been noted in the application of this definition where there is no "proposed health care" at the time the individual's capacity is relevant. This would commonly be the situation where a person is filling out an advance health care directive to appoint a health care agent or to give future health care instructions.[4] The "capacity" definition can still work in these cases, because the other prong of the test would apply — the "ability to make and communicate a health care decision."[5] It would be better, of course, if the statute were not phrased in a way that might cause confusion or mislead.

In effect, both the health care decisionmaking standard and the instrument execution standard are aspects of the same rule: the person must have the ability to understand the nature and consequences of the decision or action and be able to communicate it. Accordingly, the Commission recommends generalizing and rewording the capacity definition to avoid the technical problem where there is no "proposed" health care.[6] In effect, this would return the law concerning capacity to execute a power of attorney for health care to the rule in effect under the Power of Attorney Law.[7] This standard

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3. Section 4609.

4. See Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4623 ("individual health care instruction" defined), 4629 ("power of attorney for health care" defined), 4670 *et seq.* (provisions governing advance health care directives).

5. Definitions in the Health Care Decisions Law govern its construction "unless the context otherwise requires." See Section 4603.

6. See proposed amendment to Section 4609 *infra*.

7. See, e.g., Hellman Commercial Trust & Sav. Bank v. Alden, 206 Cal. 592, 603, 275 P. 974 (1929) (discussing "nature, purposes, and effect" of the

would also be applied to selecting or disqualifying a surrogate.[8]

The helpful language in the existing section concerning the person's ability to understand the significant benefits, risks, and alternatives of proposed health care would be retained as an application of the general capacity standard in the context of making health care decisions.

Patient's Designation of Surrogate

The Health Care Decisions Law includes provisions recognizing the patient's right to designate a "surrogate" by personally informing the supervising health care provider, orally or in writing.[9] While designation of an agent under a power of attorney for health care is preferred, recognition of the clinical reality of surrogate designations affirms the fundamental principle of patient autonomy. Due to concerns about the possibility of giving effect to obsolete oral statements in the patient's record, the effectiveness of oral surrogate designations under Section 4711 was limited to the "course of treatment or illness or during the stay in the health care institution when the designation is made."[10] A surrogate designation communicated to the supervising health care provider in writing would not be subject to this limitation.

Two concerns have arisen in applying Section 4711: (1) The default rule that a surrogate designation, whether oral or written, would act as a revocation of the appointment of an agent

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action); Burgess v. Security-First Nat'l Bank, 44 Cal. App. 2d 808, 816, 113 P.2d 298 (1941). The specialized rules for determining capacity under the Due Process in Competence Determinations Act (Sections 810-813) are applicable in judicial determination. See Sections 811(e), 813.

8. See Section 4711. A "surrogate" is an adult, other than an agent or conservator, authorized to make health care decisions for the patient. See Section 4643.

9. Sections 4711-4715 & Comments.

10. See second sentence of Section 4711 & Comment.

under a power of attorney for health care[11] is too harsh and may actually defeat a patient's intent. (2) Particularly in the nursing home setting, the restriction on the duration of oral surrogate designations to the "stay in the health care institution" is not a meaningful limitation. Further analysis also suggests that the "course of treatment or illness" rule would not provide any real limit where the patient has diabetes or some other chronic condition.

The Commission recommends amending Section 4711 to address these problems and provide additional statutory guidance on surrogate designations:[12]

(1) Relation of Surrogate Designation to Health Care Agent

The presumption that a surrogate designation revokes the appointment of a health care agent should be reversed. Designating a surrogate should act as a revocation of the agency only if the patient expresses that intention in compliance with the general rule governing powers of attorney for health care.[13] A patient may want the surrogate to act in place of an agent named in a power of attorney for any number of reasons, without intending to permanently replace the agent. The agent may be unavailable because he or she is on a vacation or otherwise unavailable when the patient is hospitalized. Or

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11. The statute does not provide explicitly that the surrogate designation revokes the agent's authority, but the Uniform Health-Care Decisions Act comment incorporated as background in the Commission's Comment to Section 4711 states that an "oral designation of a surrogate made by a patient directly to the supervising health-care provider revokes a previous designation of an agent." The uniform act comment does not suggest the effect of a written surrogate designation, but there is no reason to think it would have a less significant effect than an oral communication to the supervising health care provider. See also Section 2(b) (provisions drawn from uniform acts to be construed to make law uniform in enacting states).

12. See proposed amendment of Section 4711 *infra*. In addition, the proposed amendments eliminate any difference in treatment between oral and written communications to the supervising health care provider.

13. See Section 4695(a).

the named agent may be experiencing health or personal problems that impel the patient to seek someone else as a temporary surrogate.

(2) Duration of Surrogate Designation

A surrogate designation should be effective for no more than 60 days.[14] This rule preserves the authority of the formally designated agent under a power of attorney for health care, but recognizes patient autonomy and the potential need for a surrogate where the agent can't act. It also bolsters the power of attorney for health care by making clear that informal surrogate designations, while entitled to respect as expressions of the patient's wishes, are not an alternative to complying with statutory formalities. A patient may not have time to execute a power of attorney for health care, so it is appropriate to recognize the need for surrogate designations. But after a sufficient time has passed, such as 60 days, the person should consider executing a formal advance directive and not rely on statements made in the hospital and the recording of those statements in the person's medical record.

(3) Effect of Surrogacy Expiration

There is a danger that terminating the authority of statutory surrogates under Section 4711 might be read too broadly. Consequently, the proposed law makes clear that the duration limit is intended to affect only the special statutory surrogate rules, and not the ability of a designated surrogate to make or participate in making health care decisions for the patient under other principles.[15]

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14. The designation may terminate sooner under the existing standard providing that surrogate designations are effective "during the course of treatment or illness or during the stay in the health care institution." Section 4711.

15. *Cf.* Section 4654 (compliance with generally accepted health care standards). See proposed Section 4711(d) *infra*.

Agent's Liability for Disposition of Remains

The Health and Safety Code sets up a detailed scheme defining rights, duties, and liabilities of surviving family members and other persons, including agents and public guardians, pertaining to disposition of remains.[16] An agent under a power of attorney for health care has priority over all others to control the disposition of a decedent's remains.[17] The statutory scheme also includes provisions making it a misdemeanor to fail to perform the statutory duty and providing liability for treble damages.[18]

The top priority for health care agents was added to the law by an amendment of Health and Safety Code Section 7100 in 1998.[19] The 1998 legislation focused on the problem of a person charged with the decedent's murder having priority in disposition of the remains.[20] The legislative committee analyses do not discuss or recognize the potential effect of the amendment on the liability of attorneys-in-fact, nor is the purpose of adding attorneys-in-fact explained.

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16. See generally Health & Safety Code §§ 7100-7117.

17. Health & Safety Code § 7100. This section was amended in 1998 to provide that an attorney-in-fact under a durable power of attorney has the top priority to control disposition of remains. See 1998 Cal. Stat. ch. 253, § 1 (SB 1360). The liability and duty provisions were already in place. In 1999, this section was amended to conform to the terminology of the Health Care Decisions Law. See 1999 Cal. Stat. ch. 658, § 5.5 (AB 891). The latter amendment was made on Commission recommendation as a conforming revision, but the Commission did not reexamine the language or underlying policy of Section 7100 at that time.

18. Health & Safety Code § 7103. In addition, Section 7105(a) provides that a cemetery authority has a cause of action against a person with a duty of interment.

19. 1998 Cal. Stat. ch. 253, § 1 (SB 1360).

20. See, e.g., Senate Committee on Business and Professions, Analysis of SB 1360, as amended April 1, 1998 (hearing date April 13, 1998); Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development, Analysis of SB 1360, as amended June 10 1998 (hearing date June 23, 1998); Senate Rules Committee, Floor Analysis of SB 1360, as amended July 2, 1998.

The Commission has received reports that some potential agents, when informed of the apparent liability under the Health and Safety Code, are reluctant to agree to act as agents, and persons preparing powers of attorney for health care are worried about imposing such a liability on their relatives or friends whom they want to name as agents.[21] Clarifying the relation between the Health and Safety Code provisions and the Probate Code, and resolving internal inconsistencies in the Health and Safety Code provisions, are outside the scope of this recommendation.[22] But it is important to insulate agents under powers of attorney for health care from this apparently unintended imposition of liability, which can act to defeat the fundamental purpose of the Health Care Decisions Law of effectuating patient autonomy through the use of advance health care directives.

Accordingly, the Commission recommends that Health and Safety Code Section 7100 be amended to make clear that, unless they agree otherwise, agents do not have an enforceable duty to direct the disposition of the principal's remains and are not liable under that section for failure or refusal to act. Furthermore, in a case where an agent does exercise the

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21. See, e.g., Letter from Theresa Drought, Ph.D., RN, Ethics Committee Chair, Kaiser Oakland Medical Center, to Stan Ulrich (Oct. 5, 2000) (attached to Third Supplement to Commission Staff Memorandum 2000-62, Oct. 5, 2000).

22. Some of these provisions, including Section 7100, may be misleading when read in isolation. The decedent's estate is primarily liable, and some courts have declined to apply the literal statutory rule. See *In re* Kemmerrer, 114 Cal. App. 2d 810, 251 P.2d 345 (1952); Benbough Mortuary v. Barney, 196 Cal. App. 2d Supp. 861, 16 Cal. Rptr. 811 (1961). Section 7100(d) provides that liability for the reasonable cost of final disposition "devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent." If the decedent has given instructions for disposition, the cost is payable from designated funds or the decedent's estate, as provided in Section 7100.1. See also Prob. Code §§ 11421(a) (funeral expenses as priority claim on decedent's estate), 11446 (funeral expenses charged against estate, not community share of surviving spouse, notwithstanding any other statute or whether spouse or "any other person is also liable for the expenses").

authority to direct disposition of remains, the agent should be liable only for reasonable costs that cannot be satisfied out of the principal's estate or other appropriate fund. The proposed liability limitation would apply only to the person when acting as agent and not in situations where the statute imposes liability based on some other relationship, such as a spouse, child, or parent.

Scope of Petition

The Health Care Decisions Law, like its predecessor, provides an expeditious procedure for obtaining judicial review in appropriate situations. The grounds for a petition are broad, but not unlimited, and include determining (1) whether the patient has capacity to make health care decisions, (2) whether an advance health care directive is in effect, and (3) whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.

The Commission proposes to permit a petition requiring third persons to honor the agent's authority under the power of attorney for health care.[23] This would include health care decisions,[24] as well as decisions concerning disposition under the Uniform Anatomical Gift Act, authorizing an autopsy, and directing disposition of remains,[25] or making personal care decisions.[26] The petition should also be available to compel a third person to honor the authority of a surrogate, i.e., a

23. See proposed amendment to Section 4766 *infra*.

24. See Section 4615 ("health care" defined).

25. See Section 4683 (scope of agent's authority). See also Sections 4678 (right to health care information), 4690 (agent's right of consultation and to receive information).

26. See Section 4671(b).

person (other than an agent or conservator) with the authority to make health care decisions for an adult under the Health Care Decisions Law.

Supervising Health Care Provider as Agent

The Health Care Decisions Law carried forward the limitations on who can be designated as a health care agent and the exceptions to the limitations, which were enacted in the 1980s.[27] Section 4659 now provides that the patient's supervising health care provider or an employee of the health care institution cannot act as an agent or surrogate health care decisionmaker. However, subdivision (b) of Section 4659 provides an exception to this limitation, which permits employees who are related to the patient by blood, marriage, or adoption, or who are employed by the same health care institution, to act as the relative's or coworker's health care agent. Thus, if a patient is employed by the same institution as his or her doctor, or is related to the doctor and the doctor is an employee, the exception to the statutory prohibition would literally seem to apply.

It does not appear that this statute ever intended to permit the treating physician (included within the term "supervising health care provider") to serve as the patient's health care agent, but this construction is possible under a literal reading of the statute in circumstances where the physician falls into the class of employees and the patient is a relative or coworker.

The proposed amendment makes clear that a supervising health care provider cannot make decisions as a health care agent for his or her patient in any circumstances.[28] Under this rule, if a doctor wants to act as the agent for his or her spouse,

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27. Section 4659 restates former Section 4702 (enacted as part of the Power of Attorney Law, 1994 Cal. Stat. ch. § 16), which continued former Civil Code Section 2432.5 (enacted by 1984 Cal. Stat. ch. 312, § 4).

28. See proposed amendment to Section 4659 *infra*.

for example, the doctor would need to decline to act as the supervising health care provider.

The statute should also be amended to add registered domestic partners[29] to the list of excepted classes in existing law, which currently includes persons related to the patient by blood, marriage, or adoption.

29. For provisions governing domestic partner registration, see Fam. Code § 297 *et seq.*

PROPOSED LEGISLATION

Health & Safety Code § 7100 (amended). Right to control disposition of remains

SECTION 1. Section 7100 of the Health and Safety Code is amended to read:

7100. (a) The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided, unless other directions have been given by the decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named:

(1) An agent under a power of attorney for health care governed by Division 4.7 (commencing with Section 4600) of the Probate Code. *Unless the agent specifically agrees, the agent does not have a duty or liability under this section. If the agent assumes the duty under this section, the agent is liable only for the reasonable costs incurred as a result of the agent's decisions, to the extent that the decedent's estate or other appropriate fund is insufficient.*

(2) The competent surviving spouse.

(3) The sole surviving competent adult child of the decedent, or if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children. However, less than one-half of the surviving adult children shall be vested with the rights and duties of this section if they have used reasonable efforts to notify all other surviving competent adult children of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving competent adult children.

(4) The surviving competent parent or parents of the decedent. If one of the surviving competent parents is absent, the remaining competent parent shall be vested with the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving competent parent.

(5) The surviving competent adult person or persons respectively in the next degrees of kindred. If there is more than one surviving competent adult person of the same degree of kindred, the majority of those persons. Less than the majority of surviving competent adult persons of the same degree of kindred shall be vested with the rights and duties of this section if those persons have used reasonable efforts to notify all other surviving competent adult persons of the same degree of kindred of their instructions and are not aware of any opposition to those instructions on the part of one-half or more of all surviving competent adult persons of the same degree of kindred.

(6) The public administrator when the deceased has sufficient assets.

(b)(1) If any person to whom the right of control has vested pursuant to subdivision (a) has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death and those charges are known to the funeral director or cemetery authority, the right of control is relinquished and passed on to the next of kin in accordance with subdivision (a).

(2) If the charges against the person are dropped, or if the person is acquitted of the charges, the right of control is returned to the person.

(3) Notwithstanding this subdivision, no person who has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death to whom the right of control has not been returned pursuant to

paragraph (2) shall have any right to control disposition pursuant to subdivision (a) which shall be applied, to the extent the funeral director or cemetery authority know about the charges, as if that person did not exist.

(c) A funeral director or cemetery authority shall have complete authority to control the disposition of the remains, and to proceed under this chapter to recover usual and customary charges for the disposition, when both of the following apply:

(1) Either of the following applies:

(A) The funeral director or cemetery authority has knowledge that none of the persons described in paragraphs (1) to (5), inclusive, of subdivision (a) exists.

(B) None of the persons described in paragraphs (1) to (5), inclusive, of subdivision (a) can be found after reasonable inquiry, or contacted by reasonable means.

(2) The public administrator fails to assume responsibility for disposition of the remains within seven days after having been given written notice of the facts. Written notice may be delivered by hand, U.S. mail, facsimile transmission, or telegraph.

(d) The liability for the reasonable cost of final disposition devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent. However, if a person accepts the gift of an entire body under subdivision (a) of Section 7155.5, that person, subject to the terms of the gift, shall be liable for the reasonable cost of final disposition of the decedent.

(e) This section shall be administered and construed to the end that the expressed instructions of the decedent or the person entitled to control the disposition shall be faithfully and promptly performed.

(f) A funeral director or cemetery authority shall not be liable to any person or persons for carrying out the

instructions of the decedent or the person entitled to control the disposition.

(g) For purposes of this section, "adult" means an individual who has attained 18 years of age, "child" means a natural or adopted child of the decedent, and "competent" means an individual who has not been declared incompetent by a court of law or who has been declared competent by a court of law following a declaration of incompetence.

Comment. Subdivision (a)(1) of Section 7100 is amended to make clear that an agent under a power of attorney for health care is not automatically liable for the costs of disposition of remains. Nor does the agent have a duty greater than that agreed to under the Health Care Decisions Law, Probate Code Section 4600 *et seq*. Even if the agent assumes the duty to make decisions under this section, the agent is not liable unless the estate or other fund is insufficient. See Section 7100.1; see also Prob. Code §§ 11421 (payment of funeral expenses from estate), 11446 (funeral expenses from estate, not community property). The limitation on liability in subdivision (a)(1) applies only to the person when acting as agent and not where the statute imposes liability based on some other relationship, such as a spouse under subdivision (a)(2) or child under subdivision (a)(3).

Prob. Code § 4123 (technical amendment). Permissible purposes of general power of attorney

SEC. 2. Section 4123 of the Probate Code is amended to read:

4123. (a) In a power of attorney *under this division*, a principal may grant authority to an attorney-in-fact to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, ~~health care~~, or any other matter.

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property, whether owned by the principal at the time of the execution of the power of

attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

(c) With regard to personal care, a power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.

Comment. Subdivision (a) of Section 4123 is amended to recognize the limitations on the scope of this division. Powers of attorney for health care are governed by the Health Care Decisions Law, Division 4.7 (commencing with Section 4600). This division — the Power of Attorney Law, Division 4.5 (commencing with Section 4000) — does not apply to powers of attorney for health care. See Section 4050 (types of powers of attorney governed by this division).

Prob. Code § 4609 (amended). "Capacity"

SEC. 3. Section 4609 of the Probate Code is amended to read:

4609. "Capacity" means a ~~patient's~~ *person's* ability to understand the nature and consequences of *a decision and to make and communicate a decision, and includes, in the case of* proposed health care, ~~including~~ *the ability to understand* its significant benefits, risks, and alternatives~~, and to make and communicate a health care decision~~.

Comment. Section 4609 is amended to generalize the capacity definition to avoid the implication that the definition would only apply in situations where there is proposed health care. Thus, the definition applies to an individual's capacity to make or revoke an advance health care directive, as well as to the making of a health care decision. In the latter case, the final clause provides additional guidance on the application of the capacity standard.

For provisions invoking capacity definition, see Sections 4651 (authority of person having capacity not affected), 4658 (determination of capacity and other medical conditions), 4670 (authority to give individual health care instruction), 4671 (authority to execute power of attorney for health care), 4682 (when agent's authority effective), 4683

(scope of agent's authority), 4695 (revocation of power of attorney for health care), 4715 (disqualification of surrogate).

See also Sections 4657 (presumption of capacity), 4732 (duty of primary physician to record relevant information), 4733 (obligations of health care provider), 4766 (petition as to durable power of attorney for health care).

Prob. Code § 4659 (technical amendment). Limitations on who may act as agent or surrogate

SEC. 4. Section 4659 of the Probate Code is amended to read:

4659. (a) Except as provided in subdivision (b), none of the following persons may make health care decisions as an agent under a power of attorney for health care or a surrogate under this division:

(1) The supervising health care provider or an employee of the health care institution where the patient is receiving care.

(2) An operator or employee of a community care facility or residential care facility where the patient is receiving care.

(b) The prohibition in subdivision (a) does not apply to the following persons:

(1) An employee, *other than the supervising health care provider*, who is related to the patient by blood, marriage, or adoption, *or is a registered domestic partner of the patient.*

(2) An employee, *other than the supervising health care provider,* who is employed by the same health care institution, community care facility, or residential care facility for the elderly as the patient.

(c) A conservator under the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code) may not be designated as an agent or surrogate to make health care decisions by the conservatee, unless all of the following are satisfied:

(1) The advance health care directive is otherwise valid.

(2) The conservatee is represented by legal counsel.

(3) The lawyer representing the conservatee signs a certificate stating in substance:

> "I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and the principal or patient was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive."

Comment. Section 4659 is amended to clarify an ambiguity that existed in prior law. See former Section 4702. As amended, the exception in subdivision (b) does not apply to supervising health care providers. Consequently, the bar on supervising health care providers acting as agents or surrogates for their patients, as provided in subdivision (a), is absolute. If a supervising health care provider is the spouse of a patient, he or she would need to cease acting as the patient's primary physician or other supervising health care provider in order to undertake responsibilities as an agent under a power of attorney for health care or as a surrogate health care decisionmaker. The extension of the relationship exception in subdivision (b)(1) to include registered domestic partners is new. See Fam. Code § 297 *et seq.* (domestic partner registration).

Prob. Code § 4711 (amended). Patient's designation of surrogate

SEC. 5. Section 4711 of the Probate Code is amended to read:

4711. *(a)* A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. ~~An oral~~ *The* designation of a surrogate shall be promptly recorded in the patient's health care record ~~and~~.

(b) Unless the patient specifies a shorter period, a surrogate designation under subdivision (a) is effective only during the course of treatment or illness or during the stay in

the health care institution when the *surrogate* designation is made, *or for 60 days, whichever period is shorter*.

(c) The expiration of a surrogate designation under subdivision (b) does not affect any role the person designated under subdivision (a) may have in making health care decisions for the patient under any other law or standards of practice.

(d) If the patient has designated an agent under a power of attorney for health care, the surrogate designated under subdivision (a) has priority over the agent for the period provided in subdivision (b), but designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.

Comment. Section 4711 is amended to clarify the relation between a surrogate designation under this section and a formal agent designation in a power of attorney for health care under Section 4671 and related provisions, and to provide additional qualifications on surrogacy designations. Both the patient and the surrogate must be adults. See Sections 4625 ("patient" defined), 4643 ("surrogate" defined). "Adult" includes an emancipated minor. See Fam. Code § 7002 (emancipation). "Personally informing," as used in this section, includes both oral and written communications.

Consistent with the statutory purpose of effectuating patient intent, subdivision (a) recognizes the patient's ability to name a person to act as surrogate health care decisionmaker. As amended, this section no longer distinguishes between surrogates named orally and surrogates named in a written communication to the supervising health care provider. Whether it is communicated to the supervising health care provider orally or in writing, the surrogate designation must be promptly recorded in the patient's health care record. See also Section 4731 (supervising health care provider's duty to record relevant information).

Subdivision (b) provides a maximum limit of 60 days on the duration of surrogate designations under this section. If the patient has an agent under a power of attorney for health care, the agent's authority is suspended during the time the surrogacy is in effect. See subdivision (d). If the patient names an agent in a power of attorney for health care executed after making a surrogate designation, the agent would have priority over the surrogate as provided in Section 4685 (agent's priority).

As recognized in the introductory clause, the patient may specify a shorter period for the surrogate designation, by personally informing the supervising health care provider. A limitation might be phrased in terms of a period of time or as a condition, such as until the agent designated in the patient's power of attorney for health care becomes available.

Subdivision (c) makes clear that the limits on the duration of a surrogacy designation affect only the special surrogate rules in this section, and not the ability of the person who had been designated as surrogate to make or participate in making health care decisions for the patient under other principles. *Cf.* Section 4654 (compliance with generally accepted health care standards). After expiration of the period specified in subdivision (b), this section does not affect who may make health care decisions for adults lacking capacity.

Subdivision (d) makes clear that designation of a surrogate under this section suspends, but does not revoke, the appointment of an agent under a power of attorney for health care, unless the patient expresses the intent to revoke the agent's appointment, under the terms of the general rule in Section 4695(a). Subdivision (d) reverses the implication in background material that a surrogate designation made directly to the supervising health care provider revoked a previous designation of an agent. See Background from Uniform Act in Comment to Section 4711 as enacted, 1999 Cal. Stat. ch. 658, § 39 (operative July 1, 2000).

See also Sections 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4635 ("reasonably available" defined), 4639 ("skilled nursing facility" defined), 4641 ("supervising health care provider" defined).

Heading of Chapter 3 (commencing with Section 4765) (technical amendment)

SEC. 6. The heading of Chapter 3 (commencing with Section 4765) of Part 3 of Division 4.7 of the Probate Code is amended to read:

CHAPTER 3. PETITIONS, *AND* ORDERS~~, APPEALS~~

Comment. The chapter heading is amended to accurately reflect the contents of the chapter. Appeals under the Probate Code are governed generally by Part 3 (commencing with Section 1300) of Division 3. See Section 1302.5 (grounds for appeal under Health Care Decisions Law).

Prob. Code § 4766 (amended). Purposes of petition

SEC. 7. Section 4766 of the Probate Code is amended to read:

4766. A petition may be filed under this part for any one or more of the following purposes:

(a) Determining whether or not the patient has capacity to make health care decisions.

(b) Determining whether an advance health care directive is in effect or has terminated.

(c) Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.

(d) Declaring that the authority of an agent or surrogate is terminated, upon a determination by the court that the agent or surrogate has made a health care decision for the patient that authorized anything illegal or upon a determination by the court of both of the following:

(1) The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistent with the patient's desires or, where the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest.

(2) At the time of the determination by the court, the patient lacks the capacity to execute or to revoke an advance health care directive or disqualify a surrogate.

(e) Compelling a third person to honor individual health care instructions or the authority of an agent or surrogate.

Comment. Section 4766 is amended to add the grounds for a petition specified in subdivision (e). This subdivision is consistent with the provision applicable to compel compliance with powers of attorney for property matters in Section 4541(f). The remedy provided by this

subdivision would be appropriate where the third person has a duty to honor the authority of an agent or surrogate. See, e.g., Sections 4685 (agent's priority), 4733 (duty of health care provider or institution to comply with health care instructions and decisions).

The extent to which a third person may be compelled to comply with decisions of an agent or surrogate is subject to other limitations in this division. See, e.g., Sections 4652 (excluded acts), 4653 (mercy killing, assisted suicide, euthanasia not approved), 4654 (compliance with generally accepted health care standards), 4734 (right to decline for reasons of conscience or institutional policy), 4735 (right to decline to provide ineffective care).

An advance health care directive may limit the authority to petition under this part. See Sections 4752 (effect of provision in advance directive attempting to limit right to petition), 4753 (limitations on right to petition).

See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4609 ("capacity" defined), 4613 ("conservator" defined), 4623 ("individual health care instructions" defined), 4629 ("power of attorney for health care" defined), 4633 ("principal" defined), 4643 ("surrogate" defined).

Prob. Code § 4769 (amended). Notice of hearing

SEC. 8. Section 4769 of the Probate Code is amended to read:

4769. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the petitioner shall serve notice of the time and place of the hearing, together with a copy of the petition, on the following:

(1) The agent or surrogate, if not the petitioner.

(2) The patient, if not the petitioner.

(b) In the case of a petition to compel a third person to honor *individual health care instructions or* the authority of an agent or surrogate, notice of the time and place of the hearing, together with a copy of the petition, shall be served on the third person in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

Comment. Subdivision (b) of Section 4769 is amended for consistency with Section 4766(e) (petition to compel third person to honor health care instructions or authority of agent or surrogate).

See also Sections 4607 ("agent" defined), 4623 ("individual health care instructions" defined), 4625 ("patient" defined), 4633 ("principal" defined), 4643 ("surrogate" defined).