

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

Authority of Court Commissioner

September 2003

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. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Authority of Court Commissioner*, 33 Cal. L. Revision Comm'n Reports 673 (2003). This is part of publication #218 [2003-2004 Recommendations].

STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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September 18, 2003

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

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

This recommendation was prepared pursuant to Government Code Section 8298.

Respectfully submitted,

Frank Kaplan  
*Chairperson*



## AUTHORITY OF COURT COMMISSIONER

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

### OBSOLETE PROVISIONS

Code of Civil Procedure Section 259 has an ancient lineage, dating from 1872. It still includes provisions that suggest that the position of court commissioner is a county rather than a court position and is funded out of county rather than court funds.<sup>1</sup> The statute also purports to require a court commissioner to maintain an official seal distinct from that of the court.<sup>2</sup> In addition, the statute suggests that a court commissioner performs notarial acts,<sup>3</sup> but a court commissioner no longer performs those functions. Rather, a court commissioner acts as a subordinate judicial officer.<sup>4</sup>

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 and should be repealed:

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1. See Code Civ. Proc. § 259(i) (deposit of fees in general fund of county).
  2. The statute also refers to the seal as “engraved” and requires that the seal identify the county where the commissioner resides rather than the county where the commissioner performs duties. Code Civ. Proc. § 259(j).
  3. See Code Civ. Proc. § 259(d), (i), (k).
  4. See Cal. Const. art. VI, § 22 (subordinate judicial functions).
  5. Other statutes provide independent authority for a court commissioner to administer oaths and affirmations and take affidavits and depositions. See Code Civ. Proc. § 2093(a) (“every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths and affirmations”); Civ. Code § 1181 (listing various officers authorized to take proof or acknowledgment of instrument, including court clerks, court commissioners, judges, district attorneys, county counsels, etc.).

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

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

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

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

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

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

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

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

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

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

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

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

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

#### COURT COMMISSIONER AS TEMPORARY JUDGE

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

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

Article VI, Section 21, of the California Constitution provides for appointment of a temporary judge “on stipulation of the parties litigant.” Cases applying the constitutional

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

provision have approved appointment of a temporary judge without stipulation of any party. This has occurred where both parties are present in court, a temporary judge acts, and no one objects. In that circumstance there is an “implied” or “tantamount” stipulation.<sup>7</sup>

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

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

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

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7. See, e.g., *In re Brittany K.*, 96 Cal. App. 4th 805, 813, 117 Cal. Rptr. 2d 813 (2002), *Walker v. San Francisco Housing Authority*, 100 Cal. App. 4th 685, 691, 122 Cal. Rptr. 2d 758 (2002), *cert. denied*, 537 U.S. 1009.(2002). A discussion of the implied stipulation doctrine appears in *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995).

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

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

temporary judge on consent of “an” appearing party would appear to be inconsistent with the Constitution.

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

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

The 1989 language appears to have precisely captured the state of the law at the time. However, that language was believed to be defective because it was too narrowly drawn. Under it, a temporary judge could only be authorized where there was a hearing in open court at which a party gave written consent. This failed to cover the situation in which there is written consent but no hearing in open court because the matter is submitted by the parties in writing. By implication, a temporary judge could not act in that case.

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

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of the party appearing at the hearing where the action is either uncontested or the other party or parties are in default *an appearing party.* While acting as temporary

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10. 1989 Cal. Stat. ch. 1105, § 5.

11. 1990 Cal. Stat. ch. 411, § 5.

judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

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

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

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

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

Section 259(e) would be amended to read:

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

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

...

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, ~~or by written consent of an appearing party~~ *on stipulation of the parties*

*litigant*. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

....

**Comment.** Subdivision (e) of Section 259 is amended to replace the provision for appointment of a commissioner as temporary judge on written consent of an appearing party with the constitutional standard for appointment of a temporary judge. See Cal. Const. art. VI, § 21. Under the Constitution, written consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the Constitution, whether the stipulation of a party is required for designation of a temporary judge is determined by the party’s status as a “litigant,” not by whether the party is “an appearing party.” See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P.2d 53, 118 Cal. Rptr. 21 (1974); *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).

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## PROPOSED LEGISLATION

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

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

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

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

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

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

(e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, ~~or by written consent of an appearing party~~ *on stipulation of the parties litigant*. While acting as temporary judge the commissioner

shall receive no compensation therefor other than compensation as commissioner.

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

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

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

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

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

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

**Comment.** Former subdivisions (d), (i), (j), and (k) of Section 259 are repealed as obsolete. The repeal of these provisions does not preclude a court commissioner from administering an oath or affirmation, or from taking proof or acknowledgment of an instrument. See Code Civ. Proc. § 2093(a) ("every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths and affirmations"); Civ. Code § 1181 (officers authorized to take proof or acknowledgment of instrument include court commissioner).

Former subdivision (e) is amended to replace the provision for appointment of a commissioner as temporary judge on written consent of an appearing party with the constitutional standard for appointment of a temporary judge. See Cal. Const. art. VI, § 21. Under the Constitution, written consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the Constitution, whether the stipulation of a party is required for designation of a temporary judge is determined by the party’s status as a “litigant,” not by whether the party is “an appearing party.” See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P.2d 53, 118 Cal. Rptr. 21 (1974); *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).

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