Admin. November 23, 2016

Memorandum 2016-53

New Topics and Priorities

Annually, the Commission[1] reviews its current program of work, determines what its priorities will be for the next year, and decides whether to request that topics be added to or deleted from its legislatively enacted Calendar of Topics Authorized for Study ("Calendar of Topics"). The Commission generally undertakes this analysis after the Legislature has adjourned for the year.

To assist the Commission in that process, this memorandum summarizes the status of the topics that the Legislature has directed the Commission to study, the other topics that the Commission is actively studying, the topics that the Commission has previously expressed an interest in studying, and the new topics suggestions received in the last year. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

At the Commission meeting, the staff does not plan to discuss each of the many topics described in this memorandum. A Commissioner or other interested person who believes a topic warrants discussion should be prepared to raise it at the meeting. Absent discussion, the staff will handle the topic as recommended in this memorandum.

The following email communications and other materials are attached to and discussed in this memorandum:

Exhibit p.

- Damian D. Capozzola (9/22/16, 10/27/16) 1
- Trevor Joyner, Bidwell Title (11/2/16) 6
- Robert D. Schwartz (8/9/16) 10
- Alan D. Weinfeld (5/26/16) 11
- Projected Completion of Active Studies — 2017/2018 13

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

PREFATORY NOTE

In reviewing this memorandum, Commissioners and other persons should bear in mind that the Commission's resources are very limited and its existing workload is substantial.

The Commission's current staff is small. The staff includes four attorneys, only two of whom are full-time. In addition, the Commission staff includes a secretary and a half-time administrative analyst. The Commission also receives some assistance from externs and other law students, particularly from UC Davis School of Law. In accordance with a recent change in Commission practice, the law students are assigned "relatively modest and uncontroversial law reform projects, within the Commission's study authority."[2]

While its staff resources are quite limited, the Commission must nonetheless continue to demonstrate its value to the state by producing high quality reports that significantly improve the law and benefit the citizens of California. To accomplish this goal, **the Commission must use its resources wisely, focusing on projects that serve the Legislature's needs or appear likely to lead to helpful changes in the law.**

Similarly, the Legislature has made clear that it wants the Commission to focus its efforts on such projects. For example, it has directed the Commission to notify the judiciary committees upon commencing a new study. A recent bill analysis explains the purpose of that requirement:

> Given the limited resources of the commission which has suffered budget cuts in past years, early communication to the Legislature of proposed topics of study would allow legislative input on whether a particular proposed topic would likely be controversial and thus perhaps avoided by the commission so that it may devote its limited resources to other, more productive studies.[3]

COMMISSION AUTHORITY

The Commission's enabling statute recognizes two types of topics the Commission is authorized to study: (1) those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and (2)

2. Minutes (Apr. 2015), p. 3.
3. Assembly Committee on Judiciary Analysis of SCR 83 (Jun. 6, 2014), p. 3 (emphasis added).

those that the Legislature assigns to the Commission directly, by statute or concurrent resolution.[4]

In the past, the bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Once the Commission identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the Commission to conduct the study.

Direct legislative assignments have become much more common in recent years. Currently, all of the Commission's active studies are direct assignments from the Legislature.[5]

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. One of these assignments, relating to the California Public Records Act, came out of the 2016 legislative session. All of the current legislative assignments are described below.

California Public Records Act

In August 2016, the Legislature approved Assembly Concurrent Resolution 148 (Chau).[6] This resolution includes the following new assignment from the Legislature:

> [T]he Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation as soon as possible, considering the commission's preexisting duties and workload demands, concerning the revision of the portions of the California Public Records Act and related provisions, and that this legislation shall accomplish all of the following objectives:
>
> (1) Reduce the length and complexity of current sections.
>
> (2) Avoid unnecessary cross-references.
>
> (3) Neither expand nor contract the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act.
>
> (4) To the extent compatible with (3), use terms with common definitions.
>
> (5) Organize the existing provisions in such a way that similar provisions are located in close proximity to one another.

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4. Gov't Code § 8293.
5. See discussion of "Current Legislative Assignments" *infra*.
6. 2016 Cal. Stat. res. ch. 150.

(6) Eliminate duplicative provisions.

(7) Clearly express legislative intent without any change in the substantive provisions[.]

Although this new study assignment does not have a specified deadline, the Legislature has requested that the Commission undertake this study "as soon as possible" given the Commission's current duties and workload demands. Typically, the Commission will accord high priority to a legislative assignment, particularly one where the Legislature itself indicates that the work should receive priority. **The staff recommends that the Commission begin work on this study in 2017.**

Transfer on Death Deeds

In August 2016, the Governor signed Assembly Bill 1779 (Gatto),[7] which expanded the Commission's previously-assigned[8] study on Transfer on Death Deeds. With the 2016 amendment, the Commission is directed to

> … study the effect of California's revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.
>
> … [T]he commission shall address all of the following:
>
> (1) Whether the revocable transfer on death deed is working effectively.
>
> (2) Whether the revocable transfer on death deed should be continued.
>
> (3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.
>
> (4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.
>
> (5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.
>
> (6) Whether it is feasible and appropriate to expand the revocable transfer on death deed to include the following:
>
> (A) The transfer of stock cooperatives or other common interest developments.
>
> (B) Transfers to a trust or other legal entity.

7. 2016 Cal. Stat. ch. 179.
8. 2015 Cal. Stat. ch. 293.

This study is a direct legislative assignment with a specified deadline. Typically, the Commission gives highest priority to such a study.

In 2015, the Commission decided to delay most of the work in this study, in order to provide as much time as possible for the development of experience with the new law.[9] The staff would immediately solicit information from stakeholder groups, but analysis would not begin in earnest until 2018 or 2019.

However, the staff recently received information that might warrant more immediate attention. Trevor Joyner of Bidwell Title writes to describe a possible problem relating to recordation of a revocable transfer on death deed (hereafter "RTODD").[10]

While it is clear that an RTODD must be recorded in order to be valid,[11] it is not clear whether *all pages* of the statutory RTODD form must be recorded. More specifically, it is not clear whether the purely advisory "common questions" page must be recorded.

The first page of the statutory form provides fields for the entry of necessary information about the transferor, the affected property, and the beneficiaries. It also provides space for signature and notarization.[12] Obviously, that page must be recorded. It identifies the affected property and memorializes the transferor's intentions. But the form also includes one or more additional pages of answers to "common questions about the use of this form."[13] That page (or pages) does not contain any fillable fields or space to sign or initial. It is provided only as background information for persons executing an RTODD.

Mr. Joyner indicates that the "vast majority of the [transfer on death deeds] recorded in Butte County have been recorded incorrectly and are uninsurable for title insurance purposes" because the recorded document does NOT include the "common questions" page.[14]

Confusion on this issue could cause serious problems. If the "common questions" page is not recorded, a court might conclude that the RTODD is invalid. Moreover, title insurers may refuse to issue policies for property transferred by RTODD, if the "common questions" page is not recorded. In that situation, a beneficiary might need to commence a quiet title action (which

9. See Memorandum 2015-53; Minutes (Dec. 2015), p. 5.
10. See Exhibit pp. 6-9.
11. Prob. Code § 5626(a).
12. Prob. Code § 5642(a).
13. Prob. Code § 5642(b).
14. Exhibit p. 6.

would undermine the purpose of the RTODD as a means of transferring property without court involvement).

The staff recommends that the Commission study this issue on an expedited basis in the coming year. It seems likely such a study would not require a significant commitment of resources. The sooner the scope of the recordation requirement is clarified in the law, the better.

Recognition of Tribal and Foreign Court Judgments

In August 2014, the Governor signed Senate Bill 406 (Evans) into law.[15] This bill directs the Commission to:

> … within existing resources, conduct a study of the standards for recognition of a tribal court or a foreign court judgment, under the Tribal Court Civil Money Judgment Act (Title 11.5 (commencing with Section 1730) of Part 3 of the Code of Civil Procedure) and the Uniform Foreign-Country Money Judgments Recognition Act (Chapter 2 (commencing with Section 1713) of Title 11 of Part 3 of the Code of Civil Procedure). On or before January 1, 2017, the California Law Revision Commission shall report its findings, along with any recommendations for improvement of those standards, to the Legislature and the Governor.[16]

In addition to making this assignment, the bill establishes the Tribal Court Civil Money Judgment Act ("Tribal Court Judgment Act") to govern the process of recognizing and enforcing tribal court civil money judgments.[17] By its own terms, the Tribal Court Judgment Act sunsets on January 1, 2018, unless a later enacted statute deletes or extends that date. [18]

The Legislature requires the Commission to report its findings "[o]n or before January 1, 2017." This date was specifically selected to ensure that the Legislature would have time to act, with the benefit of the Commission's report, prior to the 2018 sunset date of the Tribal Court Judgment Act.[19]

The Commission approved a final recommendation in this study at its September 2016 meeting.[20] **The staff will seek implementing legislation in 2017.**

15. 2014 Cal. Stat. ch. 243.
16. 2014 Cal. Stat. ch. 243, § 1.
17. 2014 Cal. Stat. ch. 243, § 4.
18. 2014 Cal. Stat. ch. 243, §§ 2, 3, 4.
19. See Assembly Committee on Judiciary Analysis of SB 406 (June 13, 2014), p. 8.
20. See Minutes (Sept. 2016), p. 4.

Electronic Communications: State and Local Agency Access to Customer Information from Communications Service Providers & Government Interruption of Communication Services

In September 2013, Senate Concurrent Resolution 54 (Padilla) was adopted. This resolution directs the Commission to:

> … report to the Legislature recommendations to revise statutes governing access by state and local government agencies to customer information from communications service providers in order to do all of the following:
>
> (a) Update statutes to reflect 21st Century mobile and Internet-based technologies.
>
> (b) Protect customers' constitutional rights, including, but not limited to, the rights of privacy and free speech, and the freedom from unlawful searches and seizures.
>
> (c) Enable state and local government agencies to protect public safety.
>
> (d) Clarify the process communications service providers are required to follow in response to requests from state and local agencies for customer information or in order to take action that would affect a customer's service, with a specific description of whether a subpoena, warrant, court order, or other process or documentation is required[.][21]

In accordance with that authorization, the Commission has studied two topics: (1) Government Access to Electronic Communications and (2) Government Interruption of Communications.[22] These two topics are discussed in turn below.

In general, although SCR 54 does not set a deadline for completion of the assignment, the consistent legislative attention indicates that these topics are priority issues. **The Commission should continue to give these topics high priority, as appropriate.**

Government Access to Electronic Communications

In 2015, as the Commission was nearing the point of developing reform recommendations in this study, Senator Leno introduced Senate Bill 178. That bill addressed most of the same substance as the Commission's study. In response to the introduction of SB 178, the Commission decided to postpone the development of proposed legislation. Instead, it finalized an informational report

21. 2013 Cal. Stat. res. ch. 115.
22. See Minutes (Feb. 2015), p. 4.

on *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements* (Aug. 2015).[23]

Senate Bill 178 was enacted, establishing the California Electronic Communications Privacy Act ("Cal-ECPA").[24] The Commission suspended further work on the study of government access to electronic communications, to give the new law time to develop and settle.[25]

In 2016, multiple bills were enacted to address issues relating to the meaning and effect of Cal-ECPA.[26] It seems likely that further issues will be identified and addressed in 2017. **Because the law is still in a state of flux, the staff recommends against reactivating the study of government access to electronic communications in 2017.**

Government Interruption of Communications

The Commission made significant progress on the Government Interruption of Electronic Communications study in 2016.[27] The Commission will be considering a revised draft recommendation at its December 2016 meeting.[28]

If the Commission approves a final recommendation in December, the staff will seek implementing legislation in 2017. If a recommendation is not approved, work on this topic will need to continue in 2017.

Fish and Game Law

In January 2012, the Commission received a letter jointly signed by the Chair of the Senate Natural Resources and Water Committee (Senator Fran Pavley) and the Chair of the Assembly Water, Parks, and Wildlife Committee (now former Assembly Member Jared Huffman), urging the Commission to conduct a comprehensive review of the Fish and Game Code.[29] The same year, the Legislature granted the necessary authority to conduct the study:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete

23. See generally Memorandum 2015-51.
24. 2015 Cal. Stat. ch. 651.
25. See Minutes (Dec. 2015), pp. 4-5.
26. See, e.g., 2016 Cal. Stat. ch. 511 (AB 1924 (Low)), 2016 Cal. Stat. ch. 541 (SB 1121 (Leno)).
27. See, e.g., Memorandum 2015-18.
28. See Memorandum 2016-56.
29. See Memorandum 2012-5, Exhibit pp. 32-33.

> provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law ….[30]

Although the resolution does not set a deadline for completion of the study, the Legislature presumably would like the work completed promptly.

The Commission made significant progress on this topic in 2016. The staff is in the process of preparing a lengthy tentative recommendation, which will be composed of the Commission's work on this project to date.

While the Commission made significant progress on this topic in 2016, much work remains to complete the entire recodification. **The Commission should continue to give this topic high priority.**

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

In 2012, Assembly Member Wagner introduced a bill to create a new exception to the law governing the confidentiality of mediation communications. Under that bill as introduced, confidentiality would not apply to:

> The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.[31]

During the legislative session, the bill was amended to remove its substance and instead require the Commission to study the matter. The bill was not enacted. Instead, the resolution relating to the Commission's Calendar of Topics was amended to authorize the proposed Commission study, thus:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> (a) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:

30. 2012 Cal. Stat. res. ch. 108.
31. AB 2025 (Wagner), as introduced Feb. 23, 2012.

(1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.

(2) The availability and propriety of contractual waivers.

(3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.

(b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.[32]

The Commission has devoted significant time to this topic in 2016, however there is still much to be done before the study is completed. **While the resolution does not set a deadline for completion of the study, the Commission should consider this a legislative priority and continue to prioritize work on this topic.**

Deadly Weapons

In 2006, the Legislature directed the Commission to study the statutes relating to control of deadly weapons.[33] The objective was to propose legislation that would clean up and clarify the statutes, without making substantive changes. The Commission completed its final report on this topic in compliance with the due date of July 1, 2009. Two voluminous bills[34] and some follow-up legislation[35] have since been enacted, fully implementing the recodification.

32. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).
33. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)).
34. See 2010 Cal. Stat. ch. 178 (SB 1115 (Committee on Public Safety)); 2010 Cal. Stat. ch. 711 (SB 1080 (Committee on Public Safety)).
35. See 2013 Cal. Stat. ch. 76, §§ 145.5, 147.3, 153.5 (AB 383 (Wagner)); 2012 Cal. Stat. ch. 162, §§ 12-14, 203, 227 (SB 1171 (Harman)); 2011 Cal. Stat. ch. 285 (AB 1402 (Committee on Public Safety)).

In addition to the recodification, the 2009 report included a list of "Minor Clean-Up Issues for Possible Future Legislative Attention."[36] The Legislature authorized the Commission to study those issues.[37]

In 2014, the Legislature enacted Assembly Bill 1798, which implements a Commission recommendation addressing some of the minor clean-up issues.[38]

In 2015, the Commission approved a final recommendation addressing additional clean-up items. **The staff will seek introduction of implementing legislation in 2017.**

As time permits, the Commission should continue to consider the minor clean-up matters identified in its earlier report.

Trial Court Unification Follow-Up Studies

Government Code Section 70219 directs the Commission and the Judicial Council to study certain topics identified in the Commission's report on *Trial Court Unification: Revision of Codes*.[39] The Commission was given primary responsibility for some of those topics, the Judicial Council was given primary responsibility for other topics, and a few topics were jointly assigned to the Commission and the Judicial Council.

Topics For Which the Commission Has Primary Responsibility

In 2016, the Legislature enacted Assembly Bill 2881,[40] which, among other things, implements the Commission's recommendation on *Trial Court Unification: Publication of Legal Notice*.

With the conclusion of the Commission's work on the publication of legal notice, the Commission has completed work on all of the topics for which it has primary responsibility.

Topics Jointly Assigned to the Commission and the Judicial Council

As discussed in a prior memorandum,[41] work on the topics jointly assigned to the Commission and the Judicial Council has either been completed or has been on hiatus for more than a decade. **At this point, it seems reasonable to consider**

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36. *Nonsubstantive Reorganization of Deadly Weapon Statutes,* 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009).
37. See 2010 Cal. Stat. ch. 711, § 7.
38. See *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013); 2014 Cal. Stat. ch. 103.
39. 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998)
40. 2016 Cal. Stat. ch. 703.
41. See Memorandum 2014-41, p. 9.

these matters closed (subject to possible reopening if appropriate circumstances arise).

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of statutes that have become obsolete due to trial court restructuring (unification, state funding, and employment reform).[42] In response to this directive, the Commission has done a vast amount of work. Six bills and a constitutional measure implementing revisions recommended by the Commission have become law, affecting over 1,700 sections throughout the codes.[43]

More work needs to be done to complete the assigned task of revising the codes to reflect trial court restructuring. **In the coming year, the Commission may wish to dedicate some level of staff resources to this topic.**

Enforcement of Money Judgments

Code of Civil Procedure Section 681.035 authorizes the Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from time to time under this authority.

There are currently no active studies focusing on this topic.

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature.[44] The Commission exercises this authority from time to time.

In 2015, the Commission, in conjunction with preparing a final recommendation on Fish and Game Law,[45] uncovered several cross-reference errors in a section of the Health and Safety Code.[46] The cross-reference errors were not limited to provisions that relate to fish and game. Therefore, the

42. See Gov't Code § 71674.
43. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43; 2008 Cal. Stat. ch. 56; 2010 Cal. Stat. ch. 212, §§ 2, 3, 6, 7, 8, 10, 11, 12; 2012 Cal. Stat. ch. 470; 2002 Cal. Stat. ch. 88 (ACA 15), approved by the voters Nov. 5, 2002 (Prop. 48).
44. Gov't Code § 8298.
45. See Memorandum 2015-40, pp. 8-9.
46. Health & Safety Code § 131052.

Commission decided to conduct a separate study to identify and correct the remaining cross-reference errors in the Health and Safety Code provision.[47]

The staff has assigned this work to a law student extern.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court.[48] The Commission fulfills this directive annually in its Annual Report, identifying statutes that have been held unconstitutional or impliedly repealed and recommending that they be repealed (to the extent that the problematic defect has not been addressed).[49] The Commission does not ordinarily propose specific legislation to effectuate that general recommendation. However, the staff found a case this year that may warrant further attention from the Commission.

In *Property Reserve, Inc. v. Superior Court*, the California Supreme Court concluded that the pre-condemnation entry and testing statutes in California's Eminent Domain Law were constitutionally deficient in that they do not "afford a property owner the right to have a jury determine the amount of compensation within the precondemnation proceeding itself."[50] Rather than invalidate the statute as unconstitutional, the Court "reformed" it to provide for the option of a jury trial.[51] As a result of that reformation, the text of the statute is now materially inconsistent with its substantive effect.

The statute at issue was enacted on the Commission's recommendation.[52] **For that reason, the Commission may wish to address the problem described above, by recommending revision of the statute to codify the effect of Court's reformation.** This might be a relatively straightforward reform.

47. See Memorandum 2015-40, pp. 8-9; Minutes (Oct. 2015), p. 8.
48. Gov't Code § 8290.
49. See draft Annual Report attached to Memorandum 2016-52, p. 28.
50. 1 Cal. 5th 151, 208, 375 P.3d 887, 204 Cal. Rptr. 3d 770 (2016).
51. *Id.*
52. See *Recommendation Proposing The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1741-42 (1974) (proposed Code of Civil Procedure Section 1245.060).

Calendar of Topics

The Commission's Calendar of Topics currently includes 24 topics.[53] The next section of this memorandum reviews the status of each topic listed in the Calendar. On a number of the listed topics, the Commission has completed work, but the topic is retained in the Calendar in case corrective legislation is needed in the future.

In a number of instances, we also describe some possible areas of future work, which have been raised in previous years and retained for further consideration. New suggestions are discussed later in this memorandum.

1. Creditors' Remedies

Beginning in 1971, the Commission has made a series of recommendations covering specific aspects of creditors' remedies. In 1982, the Commission obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of this statute, the Commission has submitted a number of narrower recommendations on this topic to the Legislature.

A possible subject for study under this topic is discussed below.

Judicial and Nonjudicial Foreclosure of Real Property Liens

The Commission has long recognized that foreclosure is a topic in need of work. Nevertheless, the Commission has consistently deferred undertaking a project on this subject, because of the magnitude, complexity, and controversy involved in that area of the law.

Previously, the Commission has received suggestions from a number of sources regarding foreclosure procedure.[54] The Commission has not pursued any of those suggestions, but has kept them on hand.

In recent years, the Legislature has enacted several foreclosure-related reforms,[55] and the federal government has also pursued reforms in this area.[56] In

53. See 2016 Cal. Stat. res. ch. 150.

54. See, e.g., Memorandum 2006-36, pp. 21-22 & Exhibit pp. 44-60; Memorandum 2005-29, p. 20; Memorandum 2002-17, p. 5 & Exhibit p. 47; Memorandum 2001-4, Exhibit pp. 1-2.

55. See, e.g., 2012 Cal. Stat. ch. 86 (AB 278 (Eng)); 2012 Cal. Stat. ch. 87 (SB 900 (Leno)); 2012 Cal. Stat. ch. 562 (AB 2610 (Skinner)); 2012 Cal. Stat. ch. 569 (AB 1950 (Davis)); 2012 Cal Stat. ch. 568 (AB 1474 (Hancock)); 2012 Cal. Stat. ch. 201 (AB 2314 (Carter)); 2013 Cal. Stat. ch. 65 (SB 426 (Corbett)); 2013 Cal. Stat. ch. 251 (SB 310 (Calderon)); 2014 Cal. Stat. ch. 198 (SB 1051(Galgiani)).

56. See, e.g., P.L. 110-289 (Secure and Fair Enforcement for Mortgage Licensing Act of 2008); P.L. 111-22 (Protecting Tenants at Foreclosure Act of 2009, law sunsetted as of Dec. 31, 2012); P.L. 111-203 (2010), P.L. 110-343 (2008); see also http://www.consumerfinance.gov/mortgage-rules-at-a-glance/ (Summary of Consumer Financial Protection Bureau Mortgage Rules).

2016, the California Supreme Court decided two cases focused on foreclosure-related issues on the merits.[57] **Given the changing policy landscape on this topic, unless the Legislature affirmatively seeks the Commission's assistance, it does not appear to be a good time for the Commission to commence a study of foreclosure.**

2. Probate Code

The Commission drafted the current version of the Probate Code in 1990. The Commission continues to monitor experience under the code, and make occasional recommendations.

The Commission has initiated or previously expressed interest in studying a number of probate-related topics, as discussed below.

Creditor Claims, Family Protections, and Nonprobate Assets

A few years ago, the Commission accepted an offer from its former Executive Secretary, Nathaniel Sterling, to prepare a background study on the liability of nonprobate transfers for creditor claims and family protections. In other words, if a decedent's property passes outside of probate (e.g., by a trust, joint tenancy, or transfer-on-death beneficiary designation), to what extent should that property be liable to satisfy the decedent's creditors (including persons who are entitled to the "family protections" applicable in probate)? And what procedures should be used to address any such liability?

Mr. Sterling summarizes the underlying problem as follows:

> The move from a probate-based system for transfer of wealth at death to a nonprobate system has left California law in disarray. The policy of the law to require payment of a decedent's just debts and to protect a decedent's surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.[58]

In 2010, the Commission circulated the background study for a 120-day public comment period.[59] Copies of the study were sent, with a request for

57. See Coker v. JP Morgan Chase Bank, N.A., 62 Cal. 4th 667, 364 P.3d 176, 197 Cal. Rptr. 3d 131 (2016); Yvanova v. New Century Mortgage Corp., 62 Cal. 4th 919, 365 P.3d 845, 199 Cal. Rptr. 3d 66 (2016); see also First Cal. Bank v. McDonald, 366 P.3d 528, 199 Cal. Rptr. 3d 561 (2016) (review dismissed and case remanded for reconsideration); Castro v. IndyMac INDX Mortgage Loan Trust 2005-AR21, 2016 Cal. LEXIS 2420 (2016) (transferring case to appellate court with directions to vacate decision and reconsider in light of *Yvanova v. New Century Mortgage Corp*).

58. See Memorandum 2012-45, Exhibit p. 2.

59. See Memorandum 2010-27; Minutes (June 2010), p. 7.

review and comment, to a number of interested groups and individuals. No detailed comments were received in response to that request. The Commission did not follow up at that time, because new assignments from the Legislature had pushed the matter to the back burner.

In June 2013, the Commission considered a memorandum introducing this study and approved the general approach to the study outlined in that memorandum.[60] The study was to have a very narrow scope, focusing solely on codifying the general principle that property transferred outside of probate is liable for creditor claims and family protection claims. However, further work on the topic was suspended due to other demands on staff resources.

While the Commission gives some priority to active studies and studies for which we have an expert consultant, we have generally given higher priority to direct legislative assignments. **The Commission may wish to reactivate this study in 2017.**

Presumptively Disqualified Fiduciaries

A number of years ago, the Legislature directed the Commission to study the operation and effectiveness of Probate Code provisions that establish a statutory presumption of fraud and undue influence when a person makes a gift to a "disqualified person" (i.e., the drafter of the donative instrument, a fiduciary who transcribed the donative instrument, or the care custodian of a transferor who is a dependent adult). After studying the topic, the Commission recommended a number of improvements to those provisions.[61] Legislation to implement that recommendation was introduced as SB 105 (Harman) in 2009.

The same year, the Commission began studying a related matter — whether the statutory presumption described above should also apply to an instrument naming a fiduciary. In other words, should there be a presumption of fraud or undue influence when an instrument names a "disqualified person" as the fiduciary of the person executing the instrument?

Because of the functional interrelationship between the two studies (both would apply the same factual predicate and evidentiary rules in defining the scope and effect of the presumption), the Commission decided to table the latter study until after the Legislature decided the fate of SB 105.

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60. Memorandum 2013-25; Minutes (June 2013), p. 14.
61. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008).

In 2010, the Legislature enacted SB 105, with amendments.[62] **With that matter settled, the Commission could return to this topic at any time. However, the topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.**

Uniform Custodial Trust Act

In 2000, the Commission decided to study the Uniform Custodial Trust Act on a low priority basis. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act.

California has not yet adopted the Uniform Custodial Trust Act, so the matter remains an appropriate topic for study. However, **this topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.**

3. Real and Personal Property

The study of property law was authorized by the Legislature in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

One topic under this umbrella authority is discussed below.

Mechanics Lien Law

Several years ago, the Commission recommended a complete recodification of mechanics lien law. The laws implementing the recodification of mechanics lien law became operative on July 1, 2012.[63]

In preparing the recommendation and seeking its enactment, the Commission deferred consideration of several possible substantive improvements to existing mechanics lien law. The Commission's overall view was that the recodification should be addressed separately from any significant substantive changes, which may be appropriate for future work by the Commission.

As discussed below, the Commission undertook work in 2016 on the application of mechanics lien law to common area property.[64]

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62. 2010 Cal. Stat. ch. 620; Prob. Code §§ 21360-21392.
63. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); 2011 Cal. Stat. ch. 44 (SB 190 (Lowenthal)).
64. See discussion of "14. Common Interest Developments" *infra*.

The staff is not currently aware of any other high priority issues on this topic. The Commission may wish to return to this topic after the Commission's higher priority workload eases.

4. Family Law

The Family Code was drafted by the Commission in 1992. Since then, the general topic of family law has remained on the Commission's agenda for ongoing review.

One aspect of this topic, which the Commission has kept in mind for possible future study, is discussed below.

Marital Agreements Made During Marriage

California has enacted the Uniform Premarital Agreements Act, as well as detailed provisions concerning agreements relating to rights on death of one of the spouses. Yet there is no general statute governing marital agreements made during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues.

In 2012, the Uniform Law Commission ("ULC") approved the Uniform Premarital and Marital Agreements Act. Any Commission study of this topic should begin by examining the uniform act.

If the Commission decides to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements.[65] In particular, the Commission could study circumstances in which the right to support can be waived.[66]

This is an appropriate topic for Commission study, however it does not appear to be as pressing as some of the other topics awaiting the Commission's attention.

5. Discovery in Civil Cases

Some time ago, the Commission undertook a study of civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. A number of reforms were enacted, including the Commission's recommendation on *Deposition in Out-of-State Litigation,* which

65. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36.
66. See In re Marriage of Pendleton & Fireman, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).

was enacted in 2008.[67] Due to higher priority projects, the Commission has not worked on civil discovery since then.

While it was actively working on civil discovery, the Commission received numerous suggestions from interested persons, which the staff has kept on hand. The Commission also identified other discovery topics it might address. The staff could provide further details about these matters if the Commission so requests.

In addition, the Commission has gotten several new suggestions relating to civil discovery. Those suggestions are discussed later in this memorandum, together with other suggestions submitted in the past year.[68]

Thus far, the Commission's work on civil discovery has focused on relatively noncontroversial issues of clarification. This approach has been successful and may be more productive than investigating a major reform that might not be politically viable.

This might be an appropriate time for the Commission to reactivate the discovery study, perhaps focusing first on addressing the new suggestions received this year, which are discussed later in this memorandum.

6. Rights and Disabilities of Minor and Incompetent Persons

Since authorization of this study in 1979, the Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons. There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case such a proposal is presented in the future.**

7. Evidence

The Evidence Code was enacted in 1965 on recommendation of the Commission. Since then, the Commission has had continuing authority to study issues relating to the Evidence Code. The Commission has made numerous recommendations on evidence issues, most of which have been enacted.

The Commission has on hand an extensive background study prepared by Prof. Miguel Méndez,[69] which is a comprehensive comparison of the Evidence

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67. 37 Cal. L. Revision Comm'n Reports 99 (2007); see 2008 Cal. Stat. ch. 231.
68. See discussion of "Discovery in Civil Cases" *infra*.
69. The background study consists of a series of reports prepared by Prof. Méndez. See http://www.clrc.ca.gov/Menu3_reports/bkstudies.html.

Code and the Federal Rules of Evidence. A number of years ago, the Commission began to examine some topics covered in the background study, but encountered resistance from within the Legislature and suspended its work in 2005.

The staff later compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial.[70] The Commission directed the staff to seek guidance from the judiciary committees regarding whether to pursue those issues. The staff explored this matter to some extent, without a clear resolution. **Unless the Commission otherwise directs, the staff will raise the matter with the judiciary committees again, but not until the Commission's higher priority workload eases.**

8. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961, on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

At this time, the Commission is not actively working on any proposal pursuant to that grant of authority. **However, the topic should be retained on the Calendar of Topics, in case such work appears appropriate in the future.** For instance, the Commission's ongoing study of mediation confidentiality discussed above might alert the Commission to other aspects of alternative dispute resolution that warrant attention.

9. Administrative Law

This topic was authorized for Commission study in 1987, both by legislative initiative and at the request of the Commission. After extensive studies, a number of bills dealing with administrative adjudication and administrative rulemaking were enacted.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case any adjustments are needed in the laws enacted on Commission recommendation.**

At the time the reports were prepared, Prof. Méndez served as a Professor of Law at Stanford Law School and UC Davis School of Law. He is currently Emeritus Professor of Law at both UC Davis School of Law and Stanford Law School.

70. See Memorandum 2006-36, Exhibit pp. 70-71.

10. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988, pursuant to a suggestion of the California Judges Association ("CJA"). The staff did a substantial amount of preliminary work on the topic in 1990, but the work was suspended pending guidance from CJA on specific problems requiring attention, which were never identified.

In 1999, the Commission began studying one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission considered a number of issues and drafts, but had to put the matter on the back burner in 2001 due to other demands on staff and Commission time.

The Commission has also considered studying the possibility of standardizing various attorney's fee statutes.

The Commission might want to turn back to the topic of attorney's fees at some time in the future, after its higher priority workload eases.

11. Uniform Unincorporated Nonprofit Association Act

In 1993, the Commission was authorized to study whether California should enact the Uniform Unincorporated Nonprofit Association Act. The Commission ultimately decided not to recommend enactment, but made other recommendations to clarify the status and governance of unincorporated associations, which were enacted.

In 2008, the ULC revised the Uniform Unincorporated Nonprofit Association Act. At some point, it may be appropriate to examine the revised act and consider whether to adopt any aspect of it in California. In any event, **the Commission should retain the topic on its Calendar of Topics, in case issues arise relating to provisions enacted on its recommendation**.

12. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. Constitutional amendments and legislation recommended by the Commission have since been enacted.

Further work still needs to be done, as discussed above under "Trial Court Restructuring."

The Commission also did extensive work on two other projects: (1) appellate and writ review under trial court unification (Study J-1310), and (2) equitable relief in a limited civil case (Study J-1323). The Commission tabled those projects

years ago for budgetary reasons,[71] and the attorney who handled them has since retired. We have not received any communications urging the Commission to reactivate these studies. **At this point, it seems appropriate to regard these matters closed** (subject to possible reopening if appropriate circumstances arise).

13. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, which includes a study of the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters. In this regard, for the past decade or so the staff has been lightly monitoring developments relating to the Uniform Electronic Transactions Act ("UETA"), including possible preemption of California's version of UETA by the federal Electronic Signatures in Global and National Commerce Act.[72] **The staff will continue to monitor this situation, but does not recommend commencing a project in this area until the courts have offered more guidance on the preemption issue.**

14. Common Interest Developments

Common interest development ("CID") law was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission studied various aspects of this topic since that time, and has issued several recommendations, most of which have been enacted.

In 2013, the Legislature enacted Commission recommendations to (1) recodify the Davis-Stirling Common Interest Development Act,[73] and (2) create a new and separate act for commercial and industrial common interest developments.[74]

In 2016, the Commission undertook work related to the application of mechanics lien law to common area property. The Commission will be considering a revised draft recommendation on this topic at its December 2016 meeting.[75] **If the Commission approves the revised draft recommendation, the staff will seek implementing legislation in 2017.**

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71. See Memorandum 2008-40, pp. 3-4.
72. See Memorandum 2014-41, p. 19.
73. See 2012 Cal. Stat. ch. 180 (AB 805 (Torres)); 2012 Cal. Stat. ch. 181 (AB 806 (Torres)); see also 2013 Cal. Stat. ch. 183 (clean-up legislation) (SB 745 (Committee on Transportation and Housing)).
74. 2013 Cal. Stat. ch. 605 (SB 752 (Roth)).
75. See Memorandum 2016-55.

The Commission has a long list of possible future CID study topics.[76] For example, the Commission previously decided to address miscellaneous other areas of CID law in which the application of the Davis-Stirling Act appears inappropriate or unclear — e.g., a stock cooperative without a declaration, a homeowner association organized as a for-profit association, or a subdivision with a mandatory road maintenance association that is not technically a CID.[77]

Given our extensive work in this area of law, it would make sense to return to such matters eventually. However, this topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.

15. Statute of Limitations for Legal Malpractice

A number of years ago, the Commission did extensive work on the statute of limitations for legal malpractice. After circulating both a tentative recommendation and a revised tentative recommendation, the Commission decided that further work probably would be unproductive and discontinued the study without issuing a final recommendation. **The topic remains on the Commission's Calendar of Topics, in case future developments make it worthwhile to recommence work in this area.**

16. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The objectives are to coordinate the public records law with laws protecting personal privacy, and to update the public records law in light of electronic communications and databases.

While this is an important study, we have not given it priority. **In light of current constraints on Commission and staff resources, the staff does not recommend that the Commission undertake a project of this scope and complexity at this time.**

17. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission

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76. The staff has added suggestions received in the last year to this list. See Letter from Pih-Hsien Ho to California Law Revision Commission (Nov. 14, 2016) (on file with Commission).

77. See Minutes (Oct. 2008).

began to work on this matter, but received negative input and the proposal was tabled.

In 2006, the Legislature directed the Commission to study and report on a nonsubstantive reorganization of the statutes governing deadly weapons, which include criminal sentencing enhancements relating to the possession or use of deadly weapons. That study has now been completed, but follow-up work is still in progress.[78] **In light of its possible relevance to the deadly weapons study, the existing authority to study criminal sentencing should be retained.**

18. Subdivision Map Act and Mitigation Fee Act

In 2001, a study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics, at the request of the Commission. The objective of the study would be a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

This project would be a massive, mostly nonsubstantive recodification. Recent experience shows that such projects can take several years to complete and the results may be difficult to enact. **In light of current limitations on Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.**

19. Uniform Statute and Rule Construction Act

In 2003, a study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics, at the request of the Commission.

The Commission has previously indicated its intention to give this study a low priority. **The staff does not recommend that the Commission undertake this project at this time.**

20. Venue

In 2007, the Calendar of Topics was revised at the Commission's request, to add a study of "[w]hether the law governing the place of trial in a civil case should be revised."[79] That request was prompted by an unpublished decision in which the Second District Court of Appeal noted that Code of Civil Procedure

78. See discussion of "Deadly Weapons" *supra*.
79. 2007 Cal. Stat. res. ch. 100.

Section 394, a venue statute, was a "mass of cumbersome phraseology," and that there was a "need for revision and clarification of the venue statutes."[80] The court of appeal was sufficiently concerned about this matter to direct its clerk to send a copy of its opinion to the Office of Legislative Counsel, which in turn alerted the Commission.

The Commission may wish to begin work in this area, as time permits.

21. Charter School as a Public Entity

In 2009, the Legislature directed the Commission to analyze "the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code," which governs claims and actions against public entities and public employees.[81] The Commission issued its final report on that topic in 2012.[82] No further work on this topic is currently pending. **Nonetheless, it would be prudent to preserve our existing authority, in case any future questions arise that the Commission needs to address**.

22. Fish and Wildlife Law

See discussion of this topic under "Current Legislative Assignments," above.

23. Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

See discussion of this topic under "Current Legislative Assignments," above.

24. California Public Records Act

See discussion of this topic under "Current Legislative Assignments," above.

CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

When it considered last year's memorandum on new topics, the Commission retained several suggestions for future reconsideration. Those carryover suggestions are briefly described below; further detail is available in the sources cited. Given the Commission's current slate of legislative assignments, **the staff**

80. See Memorandum 2005-29, Exhibit p. 59.
81. See 2009 Cal. Stat. res. ch. 98.
82. See *Charter Schools and the Government Claims Act,* 42 Cal. L. Revision Comm'n Reports 225 (2012).

expects that the Commission will again lack the resources to undertake work on any of these carryover suggestions.

Generally, the carryover topics appear to be issues that the Commission is well-suited to address. **The staff recommends that these issues be retained for future consideration by the Commission once the Commission's higher priority workload eases.**

Intestate Inheritance by a Half-Sibling[83]

Marlynne Stoddard of Newport Beach asked the Commission to study intestate inheritance by a half-sibling who lacks a familial relationship with the decedent.[84] Currently, California's law on intestate succession provides that "relatives of the halfblood inherit the same share they would inherit if they were of the whole blood."[85] Ms. Stoddard provides the example of the estate of her brother, who died intestate; Ms. Stoddard, who "had a very close relationship" with her brother, and two estranged half-siblings each received a one-third share of her brother's estate.[86] Ms. Stoddard indicated that "the current half-blood statute … produces grossly unfair and irrational results in cases like mine."[87]

Homestead Exemption — Challenge to Existence of a Dwelling[88]

Attorney John Schaller, of Chico, raised the issue of the lack of "procedure in the Code for a creditor who levies on real property to get rid of falsely recorded homestead filings in the situation where there is no dwelling on the property."[89] Based on the staff's preliminary research, Mr. Schaller appears to be correct that the Code of Civil Procedure does not provide clear guidance on what procedure to follow when there is a dispute over the existence of a dwelling on the debtor's property (as opposed to a dispute regarding whether a dwelling is the debtor's homestead, and thus qualifies for the homestead exemption). Mr. Schaller's issue would be a relatively narrow matter of clarification, which relates to the Commission's previous work on enforcement of judgments and the homestead exemption.

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83. See full analysis in Memorandum 2013-54, pp. 22-23.
84. See Memorandum 2012-5, Exhibit pp. 48-51.
85. Prob. Code § 6406.
86. See Memorandum 2012-5, Exhibit pp. 48-51.
87. *Id.* at 50.
88. See full analysis in Memorandum 2013-54, pp. 23-24.
89. *Id.*

California Tribal Governments and California Indians[90]

Several years ago, the California Association of Tribal Governments ("CATG"), the non-profit statewide association of federally recognized California Indian tribes,[91] requested that the Commission "add to its agenda of active studies an examination of California law concerning California tribal governments and California Indians."[92] However, CATG did not provide any specific examples of issues warranting the Commission's attention, instead suggesting that any questions be directed to its Executive Director. Previously, the staff invited CATG to provide further information regarding the types of issues that it would like the Commission to address.[93] The Commission has not received further correspondence from CATG.

However, in its recent work, the Commission has addressed a number of issues affecting California tribes. In doing so, the Commission has received input from tribes, the Judicial Council's Tribal Court-State Court Forum, and California Indian Legal Services. Specifically, the Commission encountered tribal law issues in its recent work on UAGPPJA[94] and the Fish and Game Code.[95] And, the Commission has completed a study addressing the recognition of certain tribal court civil money judgments.[96] The Commission has also adopted a tribal consultation policy, which requires notice to be provided to tribes when the Commission commences a new study.[97]

The Commission welcomes input from tribes and tribal members on its studies, as well as specific suggestions for new study topics. **In the absence of a specific suggestion for study from CATG, the staff recommends that this item be removed from the list of carryover topics.**

Civil Procedure: Stay of Trial Court Proceeding During Appeal[98]

Attorney H. Thomas Watson suggested that the Commission consider a proposed amendment[99] of Code of Civil Procedure Section 916 that "seeks to resolve the anomalous split of authority" on whether a trial court retains

90. See full analysis in Memorandum 2013-54, pp. 25-26.
91. Memorandum 2012-5, Exhibit p. 34.
92. *Id.*
93. Memorandum 2012-45, p. 26.
94. Memorandum 2013-8, pp. 2-4, 7-10; Memorandum 2013-40, pp. 6-7; Memorandum 2013-45.
95. See generally Memorandum 2016-48.
96. See discussion of "Recognition of Tribal and Foreign Court Judgments" *supra*.
97. See Memorandum 2016-42; Minutes (Sept. 2016), p. 3.
98. See full analysis in Memorandum 2013-54, p. 27.
99. First Supplement to Memorandum 2012-5, Exhibit p. 12.

jurisdiction to resolve a motion for judgment NOV while a case is stayed during an appeal.[100] His proposed amendment was offered to ensure the trial court "retain[s] jurisdiction to rule on all post-trial motions regardless of whether a notice of appeal is perfected."[101]

If Mr. Watson wants to pursue the matter more expeditiously, he might consider contacting an appropriate section or committee of the State Bar.

Uniform Trust Code[102]

Nathaniel Sterling, the Commission's former Executive Secretary, wrote on behalf of the California Commission on Uniform State Laws, to request that the Law Revision Commission "make a study to determine whether the Uniform Trust Code should be enacted in California, in whole or in part."[103]

Social Security Number Disclosure Requirement in Probate Code[104]

Attorneys Peter Stern and Jennifer Wilkerson shared a concern about Probate Code Section 1841, which requires that the conservatorship petition include the social security number of the proposed conservatee if that person is an absentee. Mr. Stern further indicated that social security numbers are generally not used in any non-confidential pleadings or filings. The staff, in reviewing the issue, found another section of the Probate Code (Section 3703), which requires a social security number of an absentee to be included in a court filing.

The State Bar Trusts and Estates Section may be in a position to address this matter more expeditiously.

Revocability of Trusts by Surviving Co-Trustee & Disposition of Trust Assets[105]

Attorney Beverley Pellegrini wrote to request statutory clarification as to the meaning of the "joint lifetimes of the trustors" when that phrase is used in trust documents.[106] In particular, Ms. Pellegrini believes that the phrase is ambiguous as it could mean either the time period when *all* trustors are alive (i.e., until the

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100. *Id.* at 12-13.
101. *Id.* at 13.
102. See full analysis in Memorandum 2013-54, pp. 32-33.
103. *Id.* at Exhibit p. 36.
104. See full analysis in Memorandum 2014-41, pp. 26-29.
105. See full analysis in Memorandum 2015-47, pp. 27-29; see also First Supplement to Memorandum 2015-47, p. 2.
106. Memorandum 2015-47, Exhibit pp. 28-29.

first trustor dies) or the time period when *any* trustor is alive (i.e., until all trustors are deceased).[107]

Ms. Pellegrini's concern relates to the ability of co-Trustors to achieve their intended result during the survivorship period (i.e., after the first Trustor is deceased) with respect to both the revocation and disposition of trust property. For instance, should a marital trust that provides for revocability during the "joint lifetimes" of the Trustors permit the surviving spouse to revoke as to the entire property or only that spouse's share of the property?[108] To the extent that the surviving spouse has the power to revoke the entire trust corpus, does that spouse also control the disposition of that property?[109]

The staff has received additional correspondence from Ms. Pellegrini reiterating the importance of addressing these issues.[110]

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107. *Id.* at Exhibit p. 28.

108. Generally, the answer to this question would be determined according to Probate Code Section 15401. In relevant part, that section reads:

> (b) (1) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in Section 761 of the Family Code [which permits either spouse to unilaterally revoke the trust as to community property while both spouses are living].
> (2) Notwithstanding paragraph (1), a settlor may grant to another person, including, but not limited to, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.

109. Generally, the answer to this question would be determined according to Probate Code Section 15410. In relevant part, that section reads:

> At the termination of a trust, the trust property shall be disposed of as follows:
> (a) In the case of a trust that is revoked by the settlor, the trust property shall be disposed of in the following order of priority:
> (1) As directed by the settlor.
> (2) As provided in the trust instrument.
> (3) To the extent that there is no direction by the settlor or in the trust instrument, to the settlor, or his or her estate, as the case may be.
> (b) In the case of a trust that is revoked by any person holding a power of revocation other than the settlor, the trust property shall be disposed of in the following order of priority:
> (1) As provided in the trust instrument.
> (2) As directed by the person exercising the power of revocation.
> (3) To the extent that there is no direction in the trust instrument or by the person exercising the power of revocation, to the person exercising the power of revocation, or his or her estate, as the case may be.
> ….

110. Email from Beverly Pellegrini to Kristin Burford and Brian Hebert (Nov. 2, 2016) (on file with Commission).

Bond and Undertaking Law[111]

Attorney Frank Coats raised concerns that recent changes to California's Bond and Undertaking Law do not adequately account for the operation of the law in non-litigation matters.[112] Perhaps the most troubling issue raised by Mr. Coats is that the recent amendments could be read to only permit the use of bonds or notes as a deposit in lieu of an appeal bond and, thus, to preclude the deposit of bonds or notes in lieu of a bond required as a condition of a permit or contract.[113]

If Mr. Coats wants to pursue this matter more expeditiously, perhaps the California Conference of Bar Associations, the sponsor of the recent legislation, would be in a position to address the issue.

In addition, Mr. Coats identifies a few provisions in the current law that may cause confusion.[114] These issues may be appropriate to address if the Commission chooses to work on the issue discussed above.

Timing Rules for Service by Mail and Email[115]

Attorney Joshua Merliss expressed concern about differing judicial interpretations of the rules governing the timing of service by mail (Code Civ. Proc. § 1013) and service by email (Code Civ. Proc. § 1010.6(a)(4)).[116] Each provision extends litigation deadlines, notice periods, and the like for a certain number of days after service occurring by the specified means (mail or email).

However, the statutes do not expressly say who can take advantage of the extension of time. With respect to whether a person other than a recipient of the service is entitled to the extension of time, Mr. Merliss indicated that two appellate courts have reached differing conclusions.[117]

Given the similarities between Sections 1010.6 and 1013, the differing interpretations as to who is entitled to a time extension seem problematic and potentially confusing. Addressing this issue would clarify the applicable

111. See full analysis in Memorandum 2015-47, pp. 30-31; see also First Supplement to Memorandum 2015-47, p. 1.
112. Memorandum 2015-47, Exhibit pp. 1-2.
113. See Code Civ. Proc. § 995.710(a)(2).
114. See Memorandum 2015-47, Exhibit pp. 1-2; see also First Supplement to Memorandum 2015-47, Email from Frank Coats to Brian Hebert (Sept. 16, 2015) (on file with Commission).
115. See full analysis in Memorandum 2015-47, pp. 31-32.
116. *Id.* at Exhibit pp. 6-27.
117. *Id.* at Exhibit pp. 6-7. The cases are *Westrec Marina Management v. Jardine Ins. Brokers Orange County*, 85 Cal. App. 4th 1042, 102 Cal. Rptr. 2d 673 (2000) and *Kahn v. The Dewey Group*, 240 Cal. App. 4th 227, 192 Cal. Rptr. 3d 679 (2015); see also Memorandum 2015-47, Exhibit pp. 8-27.

deadlines and help to avoid inadvertent late filings, which could have significant legal consequences.

If Mr. Merliss wants to pursue this matter more expeditiously, perhaps the Litigation Section of the State Bar would be in a position to address the issue.

SUGGESTED NEW TOPICS

During the past year, the Commission received several new topic suggestions from various sources. Most of those suggestions are discussed below. A few suggestions do not warrant discussion in this memorandum, because they clearly are a poor fit for the Commission's expertise, or obviously should be resolved by elected representatives rather than Commission appointees.

Discovery in Civil Cases

The Commission has received two new topics suggestions that fall within the Commission's existing authority to study the law governing Discovery in Civil Cases. These suggestions are discussed below.

"Declaration of Necessity" to Propound More Than 35 Special Interrogatories or Requests for Admission

Attorney Alan Weinfeld is a colleague of William Weinberger, who served on the Law Revision Commission from 2002-2009. Mr. Weinfeld "believe[s] there is a hole in California discovery law regarding motions for protective orders to challenge "Declarations of Necessity" to propound more than 35 special interrogatories or requests for admission."[118]

Under the Civil Discovery Act, a party may propound to another party 35 "specially prepared interrogatories that are relevant to the subject matter of the pending action."[119] The same numerical limit applies to requests for admission (other than requests relating to the genuineness of documents).[120] To propound more than 35 special interrogatories or requests for admission, a party must submit a "Declaration for Additional Discovery" (also known as a "Declaration of Necessity"), which contains specified information regarding the need for such discovery.[121]

118. Exhibit p. 11.
119. Code Civ. Proc. § 2030.030(a)(1).
120. See Code Civ. Proc. § 2033.030(a).
121. See Code Civ. Proc. §§ 2030.030(c), 2030.050, 2033.030(b), 2033.050.

A party receiving more than 35 special interrogatories or requests for admission may challenge the "Declaration of Necessity" by filing a motion for a protective order.[122] As Mr. Weinfeld points out, however, the party "must first meet and confer with the propounding party,"[123] so it "could take a couple of weeks before the motion could be prepared and filed."[124]

That delay can be problematic, as Mr. Weinfeld explains:

> The major problem is that even after going through the meet and confer process and preparing and filing the motion, the responding party still has to respond (or at least object) to the discovery, because **the filing of the motion for protective order does not stay the discovery or extend the response deadline.** Rather, after filing the motion, the responding party still must either (1) ask the propounding party for a voluntary extension to respond until the court rules on the motion (which is unlikely when the propounding party propounds hundreds or even thousands of requests for the purpose of driving up the responding party's litigation costs) or (2) make an additional court appearance by applying ex parte for an order extending the response deadline until the motion for protective ruling (which is costly and is not guaranteed to succeed).[125]

Mr. Weinfeld says that he recently had this type of problem in a case where "the opposing party served more than **3,000** interrogatories and requests for admission on [his] clients, and refused to extend the response deadline …."[126] In his experience, "'Declarations of Necessity' almost never get challenged …, and attorneys know they can get away with propounding hundreds or thousands of discovery requests with virtually no chance of negative repercussions."[127]

Mr. Weinfeld suggests a possible solution to that problem: He proposes to amend Code of Civil Procedure Sections 2030.090 and 2033.080 to state that filing a motion for a protective order to challenge a "Declaration of Necessity" *automatically stays the deadline to respond* to the challenged interrogatories or requests for admission until the court rules on the motion.[128] He points out certain advantages of that approach,[129] and notes that a similar rule already

122. See Code Civ. Proc. §§ 2033.090(b)(2), 2033.080(b)(2).
123. Exhibit p. 11; see Code Civ. Proc. §§ 2033.090(a), 2033.080(a).
124. Exhibit p. 11.
125. Exhibit p. 11 (emphasis in original).
126. Exhibit p. 11 (emphasis in original).
127. Exhibit p. 12.
128. See *id.*
129. See *id.*

exists for a motion to quash or modify a subpoena.[130] He urges the Commission to consider his proposed approach.[131]

This would be a relatively narrow project, similar to the types of discovery topics that the Commission has successfully handled in the past. **It might be a good fit for the Commission to study in the coming year, on a low priority basis.**

Who Bears the Burden of Seeking a Court Order When a Person Objects to the Taking of a Deposition?

At the Commission's July and September meetings, Commissioner Damian Capozzola explained that there is some confusion regarding who bears the burden of seeking a court order when a person objects to the taking of a deposition. He suggested that the Commission look into the matter, and he has since provided the staff with a written description of the problem.[132]

He frames the issue as follows:

> If a party notices a deposition of a party witness, or if a party notices a deposition of a non-party witness and subpoenas that witness to appear for deposition, and the witness or counsel for the witness or another party in the case wishes to contest that deposition going forward, *whose initial burden is it to go through the time and expenses of seeking an order from the Court?* Is it sufficient for the witness or another party to simply serve an objection, forcing the *deposing counsel* to seek an immediate order *enforcing* the deposition notice or subpoena, *or* is it incumbent upon the *witness or other party* to immediately seek an order from the Court *shutting down* the deposition, whether as a motion for protective order or motion to quash?[133]

Commissioner Capozzola further explains that some of the problem is due to a difference in the treatment of (1) a motion to quash a deposition notice and (2) a motion for a protective order pertaining to a deposition.[134] Both types of motion must be accompanied by a meet and confer declaration,[135] which shows "a reasonable and good faith attempt at an informal resolution of each issue presented by the motion."[136] But filing a motion to quash in compliance with

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130. See *id.* (referring to Code Civ. Proc. §§ 1985.3(g), 1985.6(f)(3)).
131. See Exhibit p. 12.
132. See Exhibit pp. 1-22.
133. Exhibit p. 1 (emphasis added).
134. See *id.*
135. See Code Civ. Proc. §§ 2025.410(c), 2025.420(a).
136. Code Civ. Proc. § 2016.040.

Code of Civil Procedure Section 2025.410(c) automatically stays the taking of the deposition until the court rules on the motion.[137] In contrast, filing a motion for a protective order under Code of Civil Procedure Section 2025.420 does *not* automatically stay the taking of the deposition.[138]

That difference in treatment is not the only potential source of confusion. As Commissioner Capozzola points out, it comes into play only if "the witness or other non-deposing party files a motion at all."[139]

In his experience, "often what happens in actual practice" is that "counsel for the witness simply serves objections and sends a letter or an e-mail saying that the witness will not appear …."[140] He asks what rule applies in that situation: "Is the deposition still on calendar, potentially subjecting the witness and his counsel to sanctions for nonappearance?"[141] Commissioner Capozzola says there is confusion on this point:

> In practice this all tends to be somewhat unclear and usually gets resolved based on the relationships among counsel and/or the demeanor of the judge. There does not seem to be consistency, despite what statutes that do exist.[142]

He thus thinks "it may be worth study and input from the litigation community as to whether a more precisely and better coordinated statutory regime would create helpful consistency for counsel and courts to follow."[143]

This appears to be a relatively narrow issue of clarification. It should not be too divisive, because plaintiffs and defendants both need to take depositions and defend them. Preliminary staff research suggests that (1) under existing law, it is incumbent on both the deponent and the deposing party to act reasonably and in good faith to resolve an objection to the taking of a deposition,[144] (2) both sides

137. See Code Civ. Proc. § 2025.410(c).
138. See Code Civ. Proc. § 2025.420; see also Robert Weil & Ira Brown, Jr., Civil Procedure Before Trial *Discovery* § 8:514, at 8E-31 (Rutter Group 2016).
139. Exhibit p. 1.
140. Exhibit pp. 1-2.
141. Exhibit p. 2.
142. *Id.*
143. *Id.*
144. See Code Civ. Proc. §§ 2025.410(c) (meet and confer requirement for motion to stay taking of deposition and quash deposition notice), 2025.420(a) (meet and confer requirement for motion for protective order relating to taking of deposition), 20205.450(b)(2) (when deponent fails to attend deposition, motion to compel shall be accompanied by "declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance"); Leko v. Cornerstone Bldg. Inspection Serv., 86 Cal. App. 4th 1109, 1124, 33 Cal. Rptr. 2d 858 (2001) ("Implicit in the requirement that counsel contact the deponent to inquire about the nonappearance is a

proceed to some extent at their peril if they are unable to resolve such an objection (whether they will be sanctioned depends largely on whether the court views their conduct as reasonable and in good faith),[145] and (3) greater clarity on this matter could be helpful, even if it might only involve expressly stating some points that are implicit in the existing statutory scheme. **The topic might thus be suitable for the Commission to study in the coming year, on a low priority basis.**

Evidence

The Commission has received one new topics suggestion that primarily falls within the Commission's authority to study Evidence, but also could involve the Commission's authority to study Discovery in Civil Cases. This suggestion is discussed below.

Production of Writing Used to Refresh Witness Memory

Evidence Code Section 771(a) provides:

> [I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.[146]

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requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue.").

145. See Code Civ. Proc. §§ 2025.410(d) ("The court shall impose a monetary sanction … against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."), 2025.420(h) ("The court shall impose a monetary sanction … against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."), 2025.440(b) ("If a deponent on whom a deposition subpoena has been served fails to attend a deposition or refuses to be sworn as a witness, the court may imose on the deponent the sanctions described in Section 2020.240."), 2025.450(g)(1) (If court grants motion to compel after party fails to appear for deposition without having served valid objection, "the court shall impose a monetary sanction … in favor of the party who noticed the deposition and against the deponent …, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."); *Leko,* 86 Cal. App. 4th at 1122-24 (upholding sanctions on deposing counsel for unreasonably failing to resolve dispute over nonappearance of deponent). See also Code Civ. Proc. § 2025.410(b) ("Any deposition taken after the service of a written objection shall not be used against the objecting party under Section 2025.620 if the party did not attend the deposition and if the court determines that the objection was a valid one.").

146. Section 771(c) excuses production of the writing and avoids strickening the testimony where the document:

Commissioner Damian Capozzola suggests that the Commission clarify how that rule would operate if the writing is privileged or is attorney work product.[147]

What is the effect of using a privileged writing (or a writing that is attorney work product) to refresh a witness' recollection? Initial staff research indicates that the answer is unclear.

Two California appellate cases involve review of a privileged document by a witness and reach different results. In *Kerns Construction Company v. Superior Court*, the court required disclosure of an attorney-client privileged writing used by a witness when providing deposition testimony. In that case, the witness had no present recollection of the events recorded in the writing and was essentially testifying as to the content of the writing.[148] The court concluded that claims of work product and privilege had been waived.[149] However, in *Sullivan v. Superior Court*,[150] the court held that the use of a written transcript of a tape-recorded attorney-client interview, to refresh witness recollection, before deposition testimony, did not waive the attorney-client privilege as to the transcript.[151]

Read together, these cases indicate that *sometimes, but not always*, use of a privileged document to refresh a witness' recollection will constitute a waiver of the privilege. It is not, however, obvious whether waiver is a general rule, an exception, or simply the result of fact-specific inquiry in the individual cases.

On a related point, Commissioner Capozzola wonders whether an attorney's decisions on which documents to use for the purpose of refreshing witness memory might, by itself, make those writings work product.[152] Some federal courts have accepted such an argument and accorded work product protection to documents selected by counsel for a witness' review.[153] The California Rutter Guide notes that no California case has considered the argument.[154]

In general, it would be worthwhile to provide clarity on these matters. However, issues involving the scope of privileges are often controversial and

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(1) [i]s not in the possession or control of the witness or the party who produced his testimony concerning the matter; and

(2) Was not reasonably procurable by such party through the use of the court's process or other available means.

147. See Exhibit pp. 3-5.
148. 266 Cal. App. 2d 405 (1968).
149. See *id.* at 410, 411, 413-414.
150. 29 Cal. App. 3d 64 (1972).
151. See *id.* at 74.
152. See Exhibit pp. 3, 4, 5.
153. See Exhibit p. 4 (quoting James M. Wagstaffe, Federal Civil Procedure Before Trial, *Disclosure and Discovery* § 11:970, at 11-144 to 11-145 (Rutter Guide 2016).
154. See *id*. (quoting R. Weil & I. Brown, Jr., *supra* note 138, *Depositions* § 8:724.3, at 8E-113).

may turn on fundamentally political considerations. **Given the Commission's current workload and the likelihood of controversy around this issue, the staff is inclined against undertaking a study of this issue at this time.**

Probate Code

The Commission, in its work on revocable transfer on death deeds, identified a possible new topic that falls within the Commission's authority to study the Probate Code.

Ability of Nonprobate Transfer Beneficiary to Contest Revocation or Modification of Nonprobate Instrument

Earlier this year, the Commission considered Memorandum 2016-36, which summarized case law in other states involving revocable transfer on death deeds ("RTODD"). From those cases, the staff identified a variety of questions about the operation of an RTODD in California, to be examined in the Commission's follow-up study on California's RTODD statute. However, the staff noted two questions that could also apply to *other* types of nonprobate transfer instruments (e.g., pay-on-death accounts, life insurance). The Commission directed the staff to conduct a quick survey to determine whether the following issues might warrant fuller study:

- Is a beneficiary of a nonprobate instrument an "interested person" for estate planning proceedings generally?
- Does a beneficiary of a nonprobate instrument have standing to contest a revocation or modification of the instrument? [155]

Having conducted an initial inquiry, the staff did not reach any clear conclusion. This analysis focuses on nonprobate instruments other than RTODD[156] and trusts.[157]

As to whether a beneficiary of a nonprobate instrument is an "interested person," the Probate Code's existing definition of "interested person" includes a "beneficiary," but it also may require that the beneficiary have a right in or claim

155. Minutes (July 2016), p. 5.
156. RTODD will be looked at in detail in the course of the Commission's follow-up study. See discussion of "Transfer on Death Deeds" *supra*.
157. Trusts are excluded from the analysis, as the statutory and case law on trusts is significantly more developed than for other nonprobate instruments. As the discussion indicates, the Probate Code's definition of "interested person" would appear to include a beneficiary with a right to or claim against the decedent's trust estate. See Prob. Code § 48(a)(1). Further, the Probate Code includes provisions that establish a general mechanism for trust contests. See Prob. Code §§ 17200-17211.

against the decedent's "trust estate" or "the estate of the decedent."[158] If a beneficiary of a nonprobate transfer has no interest under a trust or will, it is not clear that the beneficiary would be an "interested person." This analysis is complicated by a provision stating that "[t]he meaning of 'interested person' as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding."[159] It simply is not clear whether a court would construe the definition of "interested person" broadly or narrowly as it might apply to a beneficiary of a nonprobate transfer.

As to whether a beneficiary could contest changes to a nonprobate instrument, the Probate Code provisions addressing nonprobate transfers do not provide a general mechanism for contests.[160] Nor do the Probate Code provisions on particular types of nonprobate instruments provide such a mechanism.[161] This contrasts with the well-developed statutory and case law pertaining to will and trust contests.[162]

In some circumstances, a contest of the revocation or modification of a nonprobate transfer could perhaps be brought under Probate Code Section 850. This provision provides for, among other things, an action to determine the ownership of property, if the decedent had possession of or title to the property at the time of death.[163] However, such an action can only be brought by the decedent's personal representative or an "interested person." As discussed above, it is not clear that the beneficiary of a nonprobate transfer would be an "interested person." Moreover, it is not clear that Section 850 would address all situations in which nonprobate transfer contests might arise.

158. See Prob. Code § 48(a)(1) ("interested person" includes "[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding."). It is unclear whether the requirement of a property right or claim modifies the entire list or only the last item on the list ("any other person").
159. Prob. Code § 48(b).
160. See Prob Code §§ 5000-5048.
161. See Prob. Code §§ 5100-5407 (multiple-party accounts), 5500-5512 (TOD security registration),
162. See generally California Trust and Probate Litigation, Chapters 17 (Will Contests) and 20 (Trust Contests) (CEB 2016).
163. See generally *id.* at § 19.4 (noting that a probate court can address joint tenancy disputes and totten trust disputes in such proceedings). In the cases noted, the claimed beneficiary of the nonprobate transfer was not the party who brought the action. See Estate of Fisher, 198 Cal. App. 3d 418 (1988); Estate of Gebert, 95 Cal. App. 3d 370 (1979).

The staff intends to raise these issues with the Trusts and Estates Section of the State Bar. They should be able to provide insight into how these matters are handled in practice. If the results of that inquiry and any subsequent staff analysis indicate that there is a problem with existing law, the staff will present those issues to the Commission for further consideration.

Other Suggestions

The Commission has received two new topics suggestions that do not appear to fall within the Commission's existing study authority. These suggestions are discussed in turn below.

Publication of Notice

Attorney Robert D. Schwartz writes with concern that the publication of notices for probate matters and other civil matters "is archaic and probably no longer complies with due process requirements."[164] He requests that the law be amended to "creat[e] a web portal for statewide legal notices, and require that all legal notices be posted to such web-portal for specified periods of time before hearings and/or events."[165] Mr. Schwartz suggests that this online notice portal supplement, rather than supplant, current laws that require the publication of legal notices in a newspaper of general circulation.[166]

With the Internet's increasing ubiquity, the Legislature has considered modifying the legal notice publication requirements to permit publication online, in lieu of publication in a physical newspaper.[167] Mr. Schwartz's suggestion is somewhat different, in that it would effectively require notices to be both published and made available online. Further, it would make the state government the host for the online notices.

The Commission does not currently have authority to study this matter. **Nor does the staff recommend that the Commission request such authority.** The question of whether to require publication of legal notices online is fundamentally political. It is not the sort of question that the Commission is well-equipped to answer.

As a practical matter, the staff is aware of an existing online resource, which may be helpful to those interested in electronic access to legal notices. The

164. Exhibit, p 10.
165. *Id*.
166. *Id*.
167. See, e.g., AB 642 (Rendon) (2013-2014); AB 1902 (Jones) (2011-2012).

California newspaper industry is already operating a website that posts copies of legal notices submitted for publication in hard copy newspapers.[168]

Sanctions for False Statements in Pleadings

Last year, Attorney Beverly Pellegrini requested that the Commission consider recommending an express prohibition on the inclusion of false statements in pleadings.[169] This suggestion was noted in a supplement to last year's New Topics Memorandum, but the staff did not have time to fully analyze the suggestion at that time and committed to addressing the suggestion in this year's New Topics memorandum.

As noted last year, Code of Civil Procedure Section 128.7 appears to address Ms. Pellegrini's concern, at least in part. Subdivision (b) of Section 128.7 provides, in relevant part:

> By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:
>
> …
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

For certain violations of this subdivision, the court is authorized to impose sanctions and punitive damages.[170] This section does not apply to "disclosures and discovery requests, responses, objections, and motions."[171]

In addition to these remedies provided in the Code of Civil Procedure, false statements may also be subject to criminal prosecution as perjury.[172] Specifically, Penal Code Section 118(a) provides, in part:

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168. See http://capublicnotice.com/.
The staff is unsure about the scope of notices currently available in the online database. The site notes that "[o]ur goal is to have every public notice published in California on this site in the near future."
169. See generally Second Supplement to Memorandum 2015-47, pp. 2-3.
170. Code Civ. Proc. § 128.7(c)-(f).
171. Code Civ. Proc. § 128.7(g).
172. See generally Pen. Code §§ 118-129.

> Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.[173]

As indicated by this language, perjury requires a willful, knowingly false statement of any material matter made under oath. Case law indicates that perjury can still arise in situations where a knowingly false statement of opinion or belief is made.[174]

In addition to these statutory provisions, the staff also notes that Business and Professions Code Section 6068(d) specifies that an attorney's duties include never "seek[ing] to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

It appears that these different provisions, taken together, would effectively prohibit false statements in pleadings. The statutes are not, on their face, clearly legally deficient or inadequate. **For this reason, the staff sees no need for the Commission to study this issue.**

AVAILABLE RESOURCES

A chart attached to this memorandum shows the staff's best estimates as to the projected completion of our currently active studies.[175]

The chart makes the following assumptions about the allocation of staff in 2017:

- The Commission will continue to allocate one attorney to the ongoing study of Mediation Confidentiality.
- The Commission will continue to allocate one attorney to the ongoing study of Fish and Wildlife Law.
- The study of Government Interruption of Communications will be concluded at the December meeting or shortly thereafter.

173. See also Pen. Code § 118a (false statement in affidavit as perjury).
174. See generally People v. Dixon, 99 Cal. App. 2d 94, 221 P.2d 198 (1950); People v. Webb, 74 Cal. App. 4th 688, 88 Cal. Rptr. 2d 259 (1999).
175. Exhibit p. 13.

- The study of Mechanics Liens in Common Interest Developments will be concluded at the December meeting or shortly thereafter.
- The main work of the RTODD study will not begin until 2018. Regardless of whether the Commission seeks to clarify the recordation requirement (as suggested by Mr. Joyner and discussed previously),[176] this study will consume only a small amount of staff resources in 2017.

If all of those assumptions are borne out, approximately two attorneys will be free for assignment to new work in 2017.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2017. Traditionally, the Commission's highest priority has been assisting with legislation to implement recently-completed Commission recommendations. That activity typically consumes substantial staff resources, but requires little of the Commission's time.

The highest priority for study work has been matters that the Legislature has indicated should receive a priority and other matters that the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to studies for which a consultant has delivered a background report, because it is desirable to take up the matter before the research goes stale and while the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

To summarize, the traditional scheme of priorities for Commission work is:

(1) Managing the Commission's legislative program.
(2) Studies assigned by the Legislature and other matters the Commission has concluded deserve immediate attention.
(3) Studies for which the Commission has an expert consultant.
(4) Studies that have been previously activated but not completed.
(5) New topics that appear appropriate for the Commission to study.

In addition, the Commission staff and student employees[177] typically address technical and minor substantive issues within the Commission's authority as resources permit.

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176. See Exhibit pp. 6-9 and discussion of "Transfer on Death Deeds" *supra*.
177. Minutes (Apr. 2015), p. 3.

This priority scheme has worked well over the years. Generally, the staff recommends that the Commission continue to follow it in 2017, as detailed below.

Legislative Program for 2017

In 2017, the **Commission's legislative program will likely include legislation on all of the following topics**:

- Deadly Weapons: Minor Clean-Up Issues
- Recognition of Tribal and Foreign Court Money Judgments

In addition, if the Commission approves the draft recommendations that will be before it at the December 2016 meeting, the **Commission's legislative program will also likely include legislation on the following topics:**

- Common Interest Developments: Mechanics Liens and Common Area[178]
- Government Interruption of Communication Services[179]

Managing this legislative program will consume some staff resources in 2017 but should not require much attention from the Commission.

Legislative Assignments and Other Matters Deserving Immediate Attention

The Commission should continue its work on the other legislative assignments for which work is ongoing: (1) fish and wildlife law and (2) the relationship between mediation confidentiality and attorney malpractice and other misconduct. As noted above, under "Available Resources," these studies would occupy two of the Commission's four attorneys in 2017.

There are also two pending studies that may be completed in December: (1) Common Interest Developments: Mechanics Liens and Common Area and (2) Government Interruption of Communication Services. **If those studies are not completed this year, the Commission should allocate staff to completing them in 2017.**

In addition, the Legislature has just directed the Commission to undertake a new study to recodify the California Public Records Act and related law "as soon as possible, considering the commission's preexisting duties and workload

178. See Memorandum 2016-55.
179. See Memorandum 2016-56.

demands."[180] **Given that statement of urgency, the staff recommends that the Commission begin this study in 2017 and allocate one attorney to the task.** That would leave one attorney unassigned.

The staff also recommends that the Commission undertake an expedited study of the narrow issue relating to the recordation of RTODD forms, as that issue seems urgent and should not require much in the way of staff resources.

In addition to preceding issues, **the Commission may want to consider reactivating its study of trial court restructuring to proceed with narrow elements of the remaining work**.

Consultant Studies

For some studies, the Commission has the benefit of a consultant's assistance. In particular, the Commission is fortunate to have Mr. Sterling's extensive background study on *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (June 2010). The Commission began this work in 2013, but had to put it on hold due to other higher priority work. **The Commission may wish to return to this topic in 2017.** Given the relatively narrow focus of the study, reasonable progress on this topic could probably be achieved with the assignment of less than a full attorney position.

The Commission also has background studies on the following topics, which it has already studied to some extent:

- Common interest development law (background study prepared by Prof. Susan French of UCLA Law School).
- Civil discovery (background study prepared by Prof. Gregory Weber of McGeorge School of Law).
- Review of the California Evidence Code (background study prepared by Prof. Miguel Méndez of Stanford Law School and UC Davis School of Law).

Those broad topics do not appear to be as pressing at this time, but should be addressed when resources permit.

Other Activated Studies

The Commission has previously activated studies on two topics: attorney's fees and presumptively disqualified fiduciaries. Those studies are currently on

180. See 2016 Cal. Stat. res. ch. 150.

hold, and, while they should be addressed when resources permit, they do not appear to be particularly pressing at this time.

New Topics

Even if the Commission agrees with the staff recommendations set out above, it would still have the staff resources available to conduct one or possibly two new studies, if those studies are sufficiently narrow. **The following seem like good possibilities:**

- The civil discovery issue raised by Commissioner Capozzola (perhaps combined with the somewhat related discovery issue raised by Mr. Weinfeld).
- Codification of the California Supreme Court's reformation of the pre-condemnation statute (to provide a jury trial option).

The Commission could instead choose from among the topics discussed in this memorandum, keeping in mind the limited resources available.

The staff does not recommend seeking any new authority at this time.

Summary

If the Commission approves the staff recommendations made in this memorandum, the Commission's priorities for 2017 would include:

- Manage the 2017 legislative program.
- Continue the study on fish and wildlife law.
- Continue the study on the relationship between mediation confidentiality and attorney malpractice and other misconduct.
- Begin the study on the California Public Records Act and related laws.
- Clarify the recordation requirement for transfer on death deeds.

This would leave one attorney position unassigned. That position could be divided between one or more studies from the list below. If multiple studies are activated (or reactivated) they would need to be suitably narrow in scope. The possibilities include:

- Creditor claims against nonprobate assets, focusing on the narrow issue previously identified for initial study.
- The civil discovery issues raised by Commissioner Capozzola (and perhaps Mr. Weinfeld).
- Selected trial court restructuring issues.

- Codification of the California Supreme Court's reformation of the pre-condemnation statute (to provide a jury trial option).
- Other topics discussed in this memorandum.

With one attorney available, the staff believes that it could make good progress on two (and perhaps three) narrow topics in the coming year.

How would the Commission like to proceed?

Respectfully submitted,

Kristin Burford
Staff Counsel

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM DAMIAN D. CAPOZZOLA (9/22/16)

Brian and Barbara,

As we discussed in our previous meeting and again briefly today, as a practicing litigator I often find that there is confusion with regard to depositions. If a party notices a deposition of a party witness, or if a party notices a deposition of a non-party witness and subpoenas that witness to appear for deposition, and the witness or counsel for the witness or another party in the case wishes to contest that deposition going forward, whose initial burden is it to go through the time and expenses of seeking an order from the Court? Is it sufficient for the witness or another party to simply serve an objection, forcing the deposing counsel to seek an immediate order enforcing the deposition notice or subpoena, or is it incumbent upon the witness or other party to immediately seek an order from the Court shutting down the deposition, whether as a motion for protective order or motion to quash?

Relevant statutes of course include CCP Sections 1985 et seq. and 2025.010 et seq., and I'd also direct you to the Rutter Guide (Weil & Brown, Civil Procedure Before Trial) Chapter 8(E) on Depositions (Section 8:414 et seq.).

Perhaps the source of the confusion that is often encountered in actual practice arises from this discrepancy between a motion to quash and a motion for protective order, referenced at Section 8:513 et seq. of the Rutter Guide:

(2) [8:513] **Motion to quash depo notice:** After serving written objections, the objecting party may move for an order staying the deposition and quashing the deposition notice.

Such motion must be accompanied, however, by a declaration of *"reasonable and good faith attempt" to resolve the issues informally*. (This clearly requires you to call the defect to opposing counsel's attention and give him or her the opportunity to send out proper notice, as discussed below.) [CCP § 2025.410(c)] (The "attempt to resolve informally" requirement is discussed in more detail at ¶*8:1158 ff*.)

➪ [8:513.1] ***PRACTICE POINTER:*** *Consider alternative procedures discussed at ¶8:787.1.*

(a) [8:514] **Effect—deposition automatically stayed:** Filing the motion to quash *automatically* stays the taking of the deposition until the matter is determined. No court order is required. [CCP § 2025.410(c)]

Compare: A motion for *protective order* will *not* automatically stay a deposition; notice and hearing are required (*see* ¶*8:687*).

But this still assumes that the witness or other non-deposing party files a motion at all. What if, for example, counsel for the witness simply serves objections and sends a

letter or an e-mail saying that the witness will not appear, which is often what happens in actual practice. Is the deposition still on calendar, potentially subjecting the witness and his counsel to sanctions for nonappearance? In practice this all tends to be somewhat unclear and usually gets resolved based on the relationships among counsel and/or the demeanor of the judge. There does not seem to be consistency, despite what statutes that do exist.

Thus, I think it may be worth study and input from the litigation community as to whether a more precisely and better coordinated statutory regime would create helpful consistency for counsel and courts to follow. Maybe the conclusion will ultimately be that the statutes as drafted are fine and the problem is with the counsel and courts who don't understand them or don't follow them. But I do think this is an issue worth looking at and considering for further study and application of the CLRC's resources.

Thank you for considering these issues.

--Damian

EMAIL FROM DAMIAN D. CAPOZZOLA (10/27/16)

Brian and Barbara,

Here is another area that is full of confusion where some clarity in the Civil Procedure Code and/or Evidence Code would be great – to what degree must a witness (especially in deposition) produce documents reviewed to refresh recollection for testimony even if those documents were selected for review by counsel (arguably showing work product) or are otherwise privileged? See excerpts from state and federal Rutter Guides below.

Thanks.

--Damian

(c) [8:724.3] **Objection as to DOCUMENTS REVIEWED:** A common question in deposing an adversary is: "What documents did you review to refresh your memory in preparation for your testimony today?" Or, "Did your lawyer show you any documents to refresh your recollection for this deposition; if so, what were they?"

The first question is unobjectionable. The second question invades attorney work product and possibly attorney-client privileges.

· *Examiner's right to inspect, in general:* If a witness "either while testifying *or prior thereto*, uses a writing to refresh his memory with respect to any matter about which he testifies, *such writing must be produced* … at the request of an adverse party …" [Ev.C. § 771 (emphasis added)]

Thus, opposing counsel cannot properly refuse to produce documents shown to the deponent (party or nonparty) to refresh his or her recollection in preparation for the deposition. [*International Ins. Co. v. Montrose Chemical Corp. of Calif.* (1991) 231 CA3d 1367, 1372-1373, 282 CR 783, 786]

· *Privileged documents:* Privileged documents do not lose their protected status because reviewed by the client in advance of a deposition. [*Sullivan v. Sup.Ct. (Spingola)* (1972) 29 CA3d 64, 68, 105 CR 241, 243-244]

Exception: If the client claims *no present memory* of the events recorded in a statement given to his or her attorney, *and uses that statement in order to testify*, it would be "unconscionable" to prevent the adverse party from seeing it. Any privilege is waived. [*Kerns Const. Co. v. Sup.Ct. (Southern Calif. Gas Co.)* (1968) 266 CA2d 405, 410, 72 CR 74, 76]

· *Attorney work product?* Where the documents reviewed were *selected by the deponent's counsel*, arguably they reflect that counsel's opinion as to what is and is not

important … and hence should be absolutely protected from discovery as "opinion work product" (CCP § 2018.030(a), *see ¶8:225.1*).

No known California case has considered this argument. But several federal cases have accepted it! [See *Sporck v. Peil* (3rd Cir. 1985) 759 F2d 312, 316; and *Shelton v. American Motors Corp.* (8th Cir. 1986) 805 F2d 1323, 1328]

For whatever it is worth here are excerpts from the federal Rutter Guide

(d) [11:684] **Attorney-client privilege waived by using privileged communications to prepare for deposition:** FRE 612(2) provides that if a witness reviews privileged documents to refresh his or her memory before a deposition, disclosure is required if "the court in its discretion determines it is necessary in the *interests of justice*." [*Thomas v. Euro RSCG Life* (SD NY 2010) 264 FRD 120, 122 (emphasis added)—disclosure required where deponent *testified she would have had difficulty remembering* conversations involved without reviewing her privileged communications with counsel]

In determining whether production of those documents will be required, courts consider whether (i) the witness used the document to refresh memory, (ii) the document was used for the purpose of testifying, and (iii) the interests of justice compel its disclosure. (Courts have employed various balancing tests to resolve this issue.) [See *Nutramax Labs., Inc. v. Twin Labs. Inc.* (D MD 1998) 183 FRD 458, 469-470]

Compare—during deposition: Opposing counsel has the absolute right to look at whatever documents the deponent is using to refresh his or her memory *during* a deposition (i.e., no "interests of justice" limitation).

(b) [11:970] **Documents selected by counsel:** The identity and organization of documents the attorney chose to review with a witness in preparation for deposition or response to other discovery requests *may* constitute work product. The selection may reflect the attorney's *opinion* as to what is and is not important (hence completely privileged). [*Sporck v. Peil* (3rd Cir. 1985) 759 F2d 312, 317-318—counsel selected a few documents out of thousands; *Shelton v. American Motors Corp.* (8th Cir. 1986) 805 F2d 1323, 1329—"selection and compilation of documents often more crucial than legal research"; see *Nutramax Laboratories, Inc. v. Twin Laboratories Inc.* (D MD 1998) 183 FRD 458, 469-470—enumerating factors considered]

Comment: A *Sporck* objection to production of documents is more likely to prevail if the requesting party *already has all of the documents*, because then the only purpose of obtaining opposing counsel's compilation is to gain access to attorney work product. [See *FDIC v. Wachovia Ins. Services, Inc.* (D CT 2007) 241 FRD 104, 107]

Contra: There is contrary authority. [See *Northern Natural Gas Co. v. Approximately 9117.53 Acres in Pratt, Kingman, & Reno Counties, Kan.* (D KS 2013) 289 FRD 644, 647-650 (collecting cases)—attorney's selection of previously produced documents for deponent to review in advance of deposition not attorney work product]

(c) [11:971] **Compare—documents used to refresh recollection:** But where the witnesses admit that documents shown to them have *refreshed their memory*, claims of work product protection are not likely to be upheld. [See FRE 612—"If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying or before testifying … an adverse party is entitled to have the writing produced …"; and *In re Rivastigmine Patent Litig. (MDL No. 1661)* (SD NY 2007) 486 F.Supp.2d 241, 243-244; *United States ex rel. Bagley v. TRW, Inc.* (CD CA 2003) 212 FRD 554, 565 (citing text)]

• [11:972] Plaintiffs' attorney assembled binders with relevant documents. He reviewed these with Plaintiffs to refresh their recollections before their depositions. Although the binder was work product, the protection had been waived: "Plaintiff's counsel made a decision to educate their witnesses by supplying them with the binders, and the (defendants) are entitled to know the content of that education." [*James Julian, Inc. v. Raytheon Co.* (D DE 1982) 93 FRD 138, 146 (parentheses added); see also *Auto Owners Ins. Co. v. Totaltape, Inc.* (MD FL 1990) 135 FRD 199, 202]

➪ [11:973] ***PRACTICE POINTER:*** In deposing an adverse party or witness, some of your first questions should be:

"*Did you look at* any documents in preparation for this deposition?"

"What are those documents?"

"Did any such document *refresh your memory* as to any matter involved in this case?"

If the answer to this last question is "Yes," ask for the document on the theory that any work product protection has been waived!

If you represent the party or witness who is being deposed, DO NOT SHOW THEM PRIVILEGED DOCUMENTS before their depositions. The better practice is to summarize or *read* pertinent passages from the document to your client. Your reading and commentary is probably protected under the attorney-client privilege.

Of course, if the witness is not your client, no attorney-client privilege is available. Some lawyers ask favorable witnesses *to retain them for the purpose of the deposition*, hoping to invoke the attorney-client privilege. (But this may have drawbacks: Representing a nonparty witness may conflict with representing your client. Also, it may impair the credibility of any favorable testimony given by the witness by making it appear that he or she is allied with your client.)

EMAIL FROM TREVOR JOYNER, BIDWELL TITLE (11/2/16)

Dear Mr. Hebert,

As a local title company owner in Chico, Butte County, California I take great pride and responsibility to help protect and serve the people in my communities in regards to title and real estate items.

There are some serious problems with the TODD that I would like you to know about for your study.

The last time I ran a report, a vast majority of the TODD's recorded in Butte County have been recorded incorrectly and are uninsurable for title insurance purposes!

I have already had the challenges of dealing with clients who were under the assumption their TODD deeds were recorded correctly and now that the grantor has deceased the deeds were not recorded properly and they are having to go through other legal channels to try to clear title.

The law states both pages need to be recorded in substantially the same format. The Common Questions second page normally being the issue. I have had several people including people from the legal fields told by our Butte County Recorder that the second page did not need to be recorded. According to the title insurance companies I am underwritten by, if this second page is not recorded, the documents legality is questionable and is potentially uninsurable.

I have been in contact with our county recorder on several occasions and after their discussions with other county recorders throughout the state, were not going to require or change their position on allowing these documents to record incorrectly and have apparently continued to sway the public to record the documents without the second page, “In order to save on recording fees” according to one paralegal I spoke with.

I have been able to convince some of the local attorneys who were incorrectly recording the deeds to change their policies. Even the Sacramento County Public Law Library has misleading info on the proper preparation of the deeds.

My suggested solution is to eliminate the requirement for the second page, include notice of the requirement on this second page or to clarify in the law the need for the awkward second page.

The second issue we are concerned with is the elder abuse situation. It has become obvious the potential for caregivers to take advantage of their relationship with the grantors. This is going to be a big challenge as the transfers start occurring.

Thank you for hearing my suggestions. I am available to discuss any questions you may have.

Sincerely,
Trevor Joyner

California has a new option to keep your home out of probate

People often want to add others, frequently their children, to the title of their house as joint tenants, so they can inherit the family home without probate. This works, but because the kids become full owners immediately, it can create a host of problems, from higher taxes to liens from the kids' creditors.

Revocable transfer on death deeds take effect in California on Jan. 1

A living trust is a great way to avoid probate, but if your home is your main asset, it may not be worth the hassle and expense.

Now there is an easy, inexpensive way to deed your house to your kids (or anyone) without probate and without the complications of a joint tenancy: the ***revocable transfer on death (TOD) deed,*** also called a ***beneficiary deed.***

TOD deeds are now legal in 27 states, including California. By filling out a simple form, notarizing it, and recording it with the County Recorder's Office, you name a person or people to receive the property upon your death – the beneficiaries. Unlike a joint tenant deed, the TOD deed can be revoked if you change your mind.

TOD deed aka beneficiary deed

It is crucial to fill out and record the TOD form correctly. Luckily, it is also pretty simple.

The TOD deed requires very specific language to be effective. If any requirements are missing or incorrect, your deed may be invalid or have unpredicted results. The requirements include:

1. All owners must fill out their own TOD deeds. This means that a married couple, for instance, must fill out and record two separate TOD deeds.
2. Each form must be notarized.
3. The TOD form must be recorded within 60 days of being signed and notarized.
4. The property description and your name must match the title documents (usually your current deed) exactly.
5. You must list the beneficiaries by name, and state their relationship to you (spouse, son, daughter, friend, etc.),

Read the TOD deed carefully before signing.

The form should include important information about the effect of the deed, and about your right to revoke it if you change your mind. As always, be sure you understand what you are signing. If you feel pressured to sign, don't do it! Contact another family member or even the district attorney.

EX 8

What if I change my mind?

You can revoke your TOD deed at any time by notarizing and recording a ***Revocable of Revocable Transfer on Death Deed.*** This form is very similar to the TOD deed itself. It must be recorded prior to your death to be effective.

How do my beneficiaries receive the property?

If you are the only owner, or if your co-owner has already passed away, your heirs receive the property. In order to put their name on the title, they notarize and record a simple form called ***Affidavit of Death of Transferor under TOD Deed,*** along with a death certificate.

NOTE: If you co-own the property as joint tenancy or community property with right of survivorship, the other owner receives your share of the property upon your death. The TOD deed has no effect unless you outlive your co-owner. (That's why co-owners have to sign separate TOD deeds if they both want the same beneficiaries.)

Download the TOD Deed, Revocation, and Affidavit of Death

www.saclaw.org/legal-forms

Why is a TOD deed better than adding your kids as joint tenants?

Until now, a popular way to avoid probate was adding your child or children to the deed as joint tenants. While this works, it can cause serious problems, which the revocable TOD avoids.

Revocable any time, and you still own the property

You can revoke the revocable transfer on death deed at any time. The joint tenancy deed makes your intended beneficiaries *full legal owners immediately.* This can cause problems selling or refinancing; your kids' debts could cause liens; and you can't change your mind. The beneficiary or TOD deed does not give the kids any immediate rights to the property, so it avoids these problems.

No tax complications

The IRS considers adding a joint tenant a gift, so you must file a gift tax return. The transfer may also result in higher taxes in the future. TOD deeds do not.

When might a joint tenancy still be the right choice?

If you intend to give other person current ownership interest, a joint tenancy lets you do that but still retain an ownership interest yourself. For example, you might agree to add them if they are helping you pay for the property, or if having them on title helps with getting a loan, or if they are actually living there and you want to make their ownership official.

How can the Sacramento County Public Law Library help me?

The Sacramento County Public Law Library offers free public access to a substantial collection of do-it-yourself legal books, as well as more in-depth practice guides, books, and databases, all designed to assist our patrons in their legal transactions and court affairs.

A team of highly skilled reference librarians can recommend the books and material you need to answer your legal questions.

Lawyers in the Library

Our Lawyers in the Library Program offers free 20-minute consultations with a volunteer attorney on any topic. A lottery for appointments starts at 5:15 p.m.

The program is held every Monday night. A bilingual Spanish-speaking attorney is available on the first and third Monday of the month.

Sacramento County Public Law Library
609 9th Street
Sacramento, CA 95814
www.saclaw.org

EX 9

Transfer on Death Deed

A free informational guide courtesy of the Sacramento County Public Law Library.

This pamphlet is intended for general educational use only, and is not intended as legal advice or as a substitute for your own legal research or consultation with an attorney.

EMAIL FROM ROBERT D. SCHWARTZ
(8/9/16)

Greetings:

I am an attorney specializing in litigation for trust and estates and civil matters. I have come to realize that the publication for notices for probate matters and even civil matters (such as Notice of Default/Sale, Summons etc.) is archaic and probably no longer complies with due process requirements because the amount of people in the State of California who reads newspapers declines every year. Thus, the state legislature should enact a law creating a web portal for statewide legal notices, and require that all legal notices be posted to such web-portal for specified periods of time before hearings and/or events. To satisfy the interests of certain parties, publication should still be required. In fact, the publishers could offer to post the legal notices for the plaintiff or petitioner for a small fee. The State should also create a small fee to parties who are required to publish to pay for the system. The web portal can be a page added to the California government website. This suggestion gives all persons in the State of California access legal notices. While I do not know the data, I am willing to bet that more people have internet access or the ability to access the internet than have the ability to access newspapers. Regardless, this will only increase notice as I have proposed because publication the old fashioned way will still be required.

Thank you,

Robert D. Schwartz

EMAIL FROM ALAN D. WEINFELD (5/26/16)

Mr. Hebert,

I work with Bill Weinberger, who formerly served on the California Law Revision Commission. I am writing because I believe there is a hole in California discovery law regarding motions for protective orders to challenge "Declarations of Necessity" to propound more than 35 special interrogatories or requests for admission.

Under current law, a party who receives more than 35 special interrogatories or requests for admission can challenge the "Declaration of Necessity" by filing a motion for protective order pursuant to CCP sections 2030.090(b)(2) and 2033.080(b)(2). Before the responding party can file such a motion for protective order, he/she/it must first meet and confer with the propounding party. It thus could take a couple of weeks before the motion could be prepared and filed.

The major problem is that even after going through the meet and confer process and preparing and filing the motion, the responding party still has to respond (or at least object) to the discovery, because **the filing of the motion for protective order does not stay the discovery or extend the response deadline**. Rather, after filing the motion, the responding party still must either (1) ask the propounding party for a voluntary extension to respond until the court rules on the motion (which is unlikely when the propounding party propounds hundreds or even thousands of requests for the purpose of driving up the responding party's litigation costs) or (2) make an additional court appearance by applying ex parte for an order extending the response deadline until the motion for protective ruling (which is costly and is not guaranteed to succeed).

I recently had this problem in one of my cases when the opposing party served more than **3,000** interrogatories and requests for admission on my clients, and refused to extend the response deadline (for a motion for protective order or otherwise).

Weil & Brown recognizes the problem:

"[8:1021] **Disadvantages:** Seeking a protective order frequently entails significant burdens and disadvantages:

> **Costly and cumbersome:** A noticed motion with supporting declarations and proposed order must be filed; and a court hearing is required. Also, you may need an additional trip to court to obtain an order shortening notice or extending the time to respond (see below).
>
> **Time pressures:** Protective orders usually are sought "under the gun" because responses are due. If the opposing side is unwilling to stipulate to an extension, you may have to obtain a court order shortening the time for hearing or extending

the time to respond until after the hearing on the protective order (in order to avoid waiver of any objections; *see* ¶*8:1030*)."

Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 8:1021, p. 8F-31.

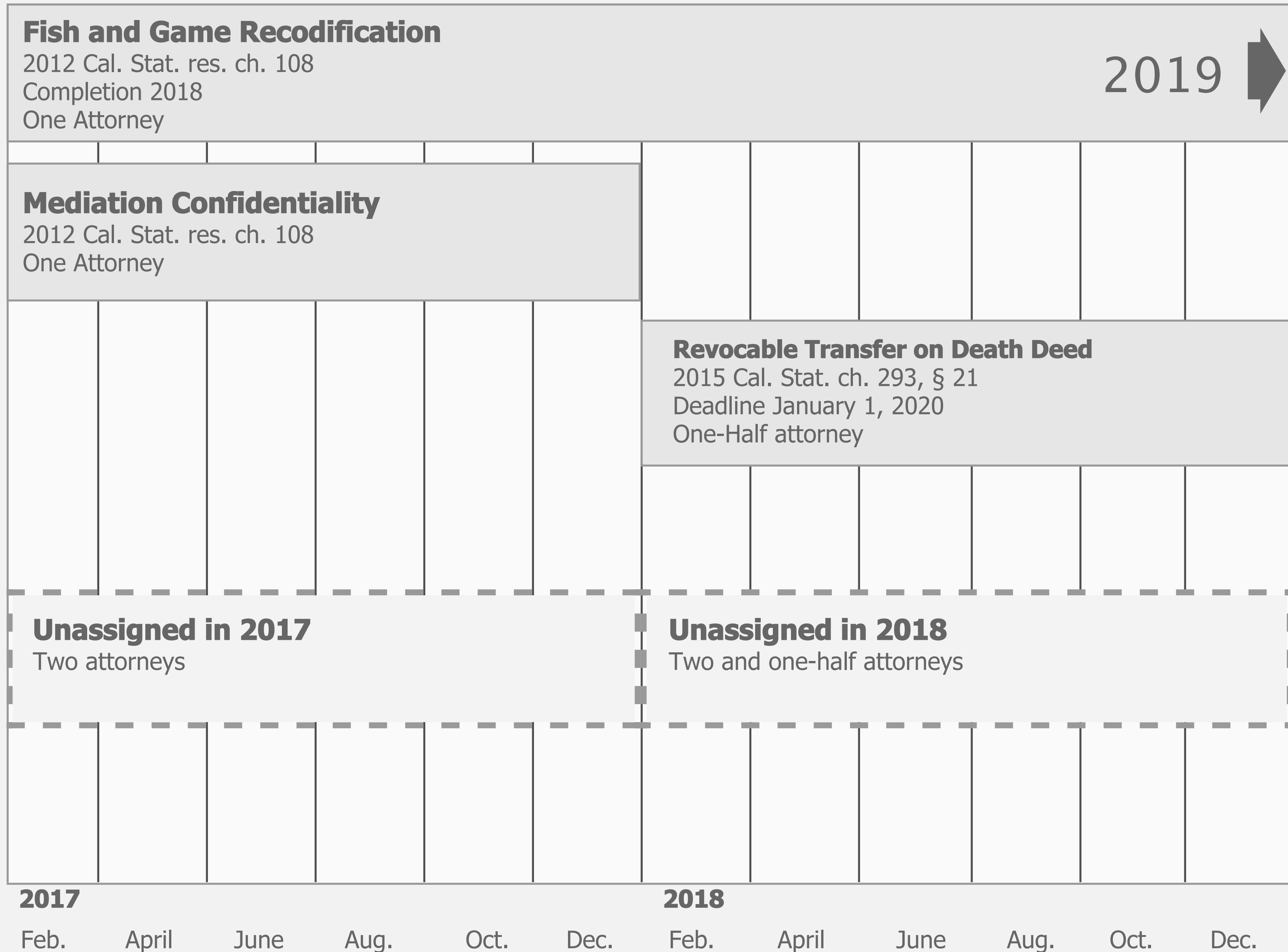
In my experience, this type of motion for protective order is extremely rare, and it appears that the statutes providing for the motion are of little use. "Declarations of Necessity" almost never get challenged (no matter how many hundreds of requests are propounded), and attorneys know they can get away with propounding hundreds or thousands of discovery requests with virtually no chance of negative repercussions.

There is a simple fix for this problem—**amend CCP sections 2030.090 and 2033.080 to provide that a motion for protective order to challenge a "Declaration of Necessity" automatically stays the deadline to respond to the interrogatories or requests for admission at issue until the court rules on the motion.** This will likely lead to a *reduction* in litigation costs and the volume of discovery motions, because a party who wants to burden the opposing party with lots of discovery will be incentivized to *avoid* the motion for protective order and meet and confer in good faith to reduce the number of requests. Otherwise, if the motion for protective order is filed, all of the propounding party's discovery will be delayed for several months until court rules on the motion for protective order.

This type of rule already exists for another type of discovery device--a motion to quash or modify a subpoena automatically stays the obligation to respond to the subpoena until the court rules on the motion. *See* CCP sections 1985.3(g) and 1985.6(f)(3).

I would greatly appreciate your consideration of this proposal and would be happy to answer any questions you or any other Commission members may have.

Alan D. Weinfeld
Attorney-at-Law


Projected Completion of Active Studies — 2017 / 2018
Fish and Game Recodification
2012 Cal. Stat. res. ch. 108
Completion 2018
One Attorney
2019
Mediation Confidentiality
2012 Cal. Stat. res. ch. 108
One Attorney
Revocable Transfer on Death Deed
2015 Cal. Stat. ch. 293, § 21
Deadline January 1, 2020
One-Half attorney
Unassigned in 2017
Two attorneys
Unassigned in 2018
Two and one-half attorneys
2017
2018
Feb.
April
June
Aug.
Oct.
Dec.
Feb.
April
June
Aug.
Oct.
Dec.