

Admin.

April 6, 2020

## Memorandum 2020-19

**Pandemic Response: Possible Actions**

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In addition to continuing the Commission's<sup>1</sup> regular program of work, the staff has been giving thought to whether the Commission could turn part of its resources toward providing assistance in the current public health crisis.

For that work to have the greatest usefulness, it would need to leverage the special expertise and resources that the Commission can bring to bear, without duplicating work that is likely to be done by others.

Another constraint on such work is the urgency created by the current crisis. For the work to be useful, the Commission would need to act quickly and focus on proposals that could be enacted expeditiously, with little need for extended analysis or complicated policy balancing. The proposals would need to have obvious merit and be mostly uncontroversial.

If the Commission is interested in spending part of its resources on such work, the staff would distribute notice to all of its mailing list subscribers, inviting suggestions on possible reforms. The notice would make clear that good reform suggestions would meet all of the following criteria:

- (1) The reform would address an immediate need related to the pandemic.
- (2) The reform would be mostly uncontroversial (to make expedited enactment practicable).
- (3) The reform would address a problem that is unlikely to be addressed by other entities.

The Commission could serve as a clearing house for such ideas, leveraging its expertise in law reform to vet and facilitate enactment of any proposals that seem sound and practicable. Some examples of possible reforms are given below.

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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](http://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.

## EXAMPLES

### **Sunset Date Extension**

The Legislature has taken an emergency recess. It is not clear when it will reconvene this year. When it does, it is possible that it will concentrate only on urgent matters related to the pandemic. All other legislation might be postponed.

One problem that would result from such a chain of events is that pending legislation to repeal or extend sunset dates might not be enacted in time to prevent the operation of the sunset dates.

This occurred to the staff because one of the pending Commission-recommended bills presents this problem. SB 1305 (Roth) would, among other things, extend the sunset date on the revocable transfer on death deed (“RTODD”) statute. If the bill is tabled this year, that statute will be repealed by operation of law on January 1, 2021. That would create needless confusion and risk of error for persons who attempt to execute RTODDs next year.

It would be possible to propose legislation that would extend sunset dates that would otherwise operate in 2021. That could be done globally or selectively.

A global approach would be simple to effectuate. A provision could be enacted that provides as follows:

Any statute or regulation that would repeal another provision by operation of law on January 1, 2021, shall instead be construed as operating on January 1, 2022.

The problem with such a broad approach is that it might sweep in provisions that *should* be sunsetted, because there is no need for the sunset to be extended.

That could be avoided by using a selective approach, which would only affect a specified list of sunset provisions. Which provisions should be on the list?

One possible starting point would be to include sunset provisions that would be extended or repealed by legislation that has already been introduced in 2020. Presumably, there is a good argument for extending or repealing those sunset provisions, sufficient to justify a one-year extension to temporarily preserve the status quo. For example, SB 1305 (Roth) proposes extending the sunset on the RTODD statute. For that reason, that sunset provision would be included on the list of provisions to be extended. This approach would require some modest research to identify all pending bills that would affect an existing sunset provision.

## **Common Interest Development Meetings**

Governor Newsom has issued executive orders that allow state and local government bodies to conduct public meetings entirely by teleconference, without any location held open for public attendance.

Because of our prior work on common interest development law, it occurred to the staff that a similar approach might make sense for common interest developments. This would allow them to continue operating, without requiring that they hold in-person meetings.

This could be achieved by adding a provision along the following lines to the Civil Code:

### **Civ. Code § 4825. Use of teleconference meetings during infectious disease emergency**

4825. (a) This section only applies to a common interest development that is located in an area where a public health authority has imposed or recommended social distancing practices, in order to slow the spread of an infectious disease.

(b) Notwithstanding any contrary provision of law or of the association's governing documents, an association may conduct a meeting entirely by audio or video teleconferencing, provided that all of the following conditions are satisfied:

(1) The teleconference is open to participation by any person who would have been entitled to participate had the meeting been held in person.

(2) Participants are able to hear the proceedings and have the same opportunity to speak and vote that would have been afforded had the meeting been held in person.

(3) Any notice given for the meeting includes instructions on how to participate.

(4) If the meeting is held by video conference, participants have the option to participate by telephone.

(5) Any vote is conducted by one of the following methods, or a combination of both:

(A) A roll call vote.

(B) An electronic voting system that allows votes to be recorded.

(6) The minutes of the meeting state that the meeting was held pursuant to this section.

(c) A person who participates by teleconference shall be counted as present for the purposes of a quorum.

(d) Nothing in this section precludes either of the following:

(1) Imposing practical limitations on how the meeting is conducted, including limits on the timing and duration of comment, so as to keep order and ensure that all participants have a reasonable opportunity to be heard.

(2) Preventing participation in a lawful executive session by those who would have been excluded from the executive session, had the meeting been held in person.

### **Corporate Meetings**

On thinking through the issue discussed above, it occurred to the staff that a similar provision might be helpful for corporations (perhaps especially nonprofit corporations).

This could be addressed by adding a provision along the following lines to the Corporations Code:

#### **Corp. Code § 25. Use of teleconference meetings during infectious disease emergency**

25. (a) This section applies to an entity formed pursuant to this code, during a period in which a public health authority has imposed or recommended social distancing practices in the jurisdiction in which the entity was formed, in order to slow the spread of an infectious disease.

(b) Notwithstanding any contrary provision of law or of the entity's articles, by-laws, or other governing document, the entity may conduct a meeting entirely by audio or video teleconferencing, provided that all of the following conditions are satisfied:

(1) The teleconference is open to participation by any person who would have been entitled to participate had the meeting been held in person.

(2) Participants are able to hear the proceedings and have the same opportunity to speak and vote that would have been afforded had the meeting been held in person.

(3) Any notice given for the meeting includes instructions on how to participate.

(4) If the meeting is held by video conference, participants have the option to participate by telephone.

(5) Any vote is conducted by one of the following methods, or a combination of both:

(A) A roll call vote.

(B) An electronic voting system that allows votes to be recorded.

(c) A person who participates by teleconference shall be counted as present for the purposes of a quorum.

(6) The minutes of the meeting state that the meeting was held pursuant to this section.

(d) Nothing in this section precludes either of the following:

(1) Imposing practical limitations on how the meeting is conducted, including limits on the timing and duration of comment, so as to keep order and ensure that all participants have a reasonable opportunity to be heard.

(2) Preventing participation in a lawful executive session by those who would have been excluded from the executive session, had the meeting been held in person.

### **Execution of Estate Planning Documents**

In the current emergency, it seems likely that many people will be giving thought to executing a power of attorney (especially a durable power of attorney for health care) or estate planning instruments (such as a will or trust).

During a period of social distancing, witnessing and notarization requirements may be difficult or risky to satisfy. For example, the rule on witnessing wills requires that two witnesses be “present at the same time” and witness the signature of the will.<sup>2</sup>

It might be good policy to relax such requirements during an infectious disease emergency. For example, a provision along the following lines could be added to the Probate Code:

#### **Prob. Code § 15. Witnessing and acknowledgement during infectious disease emergency**

15. (a) This section applies during a period in which a public health authority has imposed or recommended social distancing practices, either statewide or in the jurisdiction in which a person is located, in order to slow the spread of an infectious disease.

(b) Notwithstanding any law to the contrary, an instrument governed by this code may be witnessed by means of video teleconference, provided that the following conditions are met:

(1) Each witness was given a copy of the instrument in advance.

(2) The instrument includes the following attestation for each witness:

“I declare under penalty of perjury under the laws of the State of California that the following is true and correct:

a. On the date written below the maker of this instrument declared to us that this instrument was [type of instrument] and requested us to act as witnesses to it.

b. I understand this is the maker's [type of instrument].

c. The maker signed this [type of instrument] before me, during a video teleconference authorized by Probate Code Section 15.

d. I now sign below as witness.

e. I believe the maker is of sound mind.

f. I believe that this [type of instrument] was not procured by duress, menace, fraud or undue influence.

g. The maker is age 18 or older.

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2. See Prob. Code § 6110(c)(1).

h. I am now age 18 or older, am a competent witness, and reside at the address set forth after my name.”

i. The quality of the video teleconference was sufficient for me to identify the maker.”

(3) Each witness reads the attestation aloud and signs a copy of the instrument.

(4) A copy of each instrument signed by a witness is returned to the person who executed the instrument and kept together with the original. Electronic transmission of a copy is sufficient for this paragraph. Delivery of the original instrument signed by the witness is not required.

(c) Notwithstanding any law to the contrary, an instrument governed by this code may be acknowledged by a notary by means of video teleconference, without fingerprinting, provided that all of the following requirements are met:

(1) The notary attests that the quality of the video teleconference was sufficient to enable the notary to examine the identification of the person who executed the instrument and confirm that person’s identity.

(2) The notary executes a written acknowledgement and delivers it to the person who executed the instrument that was acknowledged. Electronic transmission of a copy of the acknowledgment sufficient for this paragraph. Delivery of the original signed by the notary is not required.

The staff suspects that the language set out above may need further refinement (especially the notary provision), but it is sufficient to illustrate the concept.

#### CONCLUSION

If the Commission is interested in the general concept of vetting pandemic-related reforms of the type discussed in this memorandum, the staff will take the following steps:

- (1) Distribute an invitation to all persons on the Commission’s mailing lists, asking for reform proposals of the type discussed above.
- (2) Contact the Governor’s office and legislative leadership to ask how best to transmit any reform proposals that the Commission finds to be sound.

**Would the Commission like to proceed with the work described above?**

Respectfully submitted,

Brian Hebert  
Executive Director