#J-103

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Oral Argument in Civil Procedure

June 2005

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **August 31, 2005.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Statutory guidance concerning when oral argument must be allowed in civil practice would be beneficial to both courts and litigants. The Law Revision Commission recommends the following statutory clarifications:

(1) Existing case law pertaining to the right to oral argument should be codified. This will help make the rules transparent and readily accessible to all.

(2) Additional matters on which oral argument is a matter of right should be identified by statute. **The Commission particularly solicits comment on whether the specific matters it has identified are appropriate, and whether there are others it has failed to identify that should also be included in the statutory listing.**

(3) For those matters on which oral argument is not a matter of right, there should be a clear and easy to apply standard for determination of whether oral argument must be allowed in the circumstances of the particular case. It is the Commission's recommendation that oral argument should be granted to the litigants when the court's decision could de jure or de facto terminate the case.

(4) The statutory standards for when oral argument must be allowed should not preclude the court from permitting oral argument in an appropriate case. That may be done by court rule, or by exercise of the court's discretion.

(5) Codification of the oral argument right should not preclude the court from imposing reasonable limitations on exercise of the right. Those limitations may include such matters as time for exercising the right and limits on the length of argument.

ORAL ARGUMENT IN CIVIL PROCEDURE

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ORAL ARGUMENT IN CIVIL PROCEDURE

INTRODUCTION

Background

This study was initiated by a request from the Chair and Vice Chair of the Senate Judiciary Committee that the California Law Revision Commission conduct a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument.[1]

The problem is illustrated by the opinion of the Court of Appeal in *Gwartz v. Superior Court*:[2]

> Sometime ago, a handful of judges on the local superior court bench began deciding summary judgment motions without, according the parties, the benefit of oral argument. The decision to rule from behind closed doors apparently was based on some loose dicta in *Sweat v. Hollister* (1995) 37 Cal.App.4th 603 [43 Cal.Rptr.2d 399] . . . to the effect that law and motion courts may decide motions without hearing oral argument.
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> In *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257 [77 Cal.Rptr.2d 781], this court took a long, hard look at the language of Code of Civil Procedure section 437c, and came to the inescapable conclusion that, as now drafted, it requires oral argument on summary judgment motions. This court held that while trial judges "retain extensive discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures," they may not refuse to hear oral argument. (66 Cal.App.4th at p. 265.)
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> We thought — incorrectly, as it turned out — that the trial courts would simply follow our opinion even if they disagreed with it. Stare decisis and all that stuff. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937] ["Decisions of every division of the District Courts of Appeal are binding upon ... all the superior courts of this state"]; cf. Cal. Code Jud. Conduct, canon 3B.) But sometimes it seems as though we have to remind the lower court there is a judicial pecking order when it comes to the interpretation of statutes. [FN. The Supreme Court has acknowledged our disagreement with *Sweat*, but has not considered the validity of either decision. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1248, fn. 10 [82 Cal.Rptr.2d 85, 970 P.2d 872].) The trial court should reflect, however, that our holding in *Mediterranean* is clear while the language in *Sweat* is dictum.]
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> Here, defendants filed a motion for summary adjudication of issues in a civil action concerning a boundary line dispute. The trial court did not hear oral

1. See Letter from Martha Escutia, Chair, and Bill Morrow, Vice Chair, Senate Judiciary Committee, to Frank Kaplan, Chair, California Law Revision Commission (Aug. 27, 2004), available at <www.clrc.ca.gov/pub/2004/MM04-34.pdf>, Exhibit 6; see also SCR 15 (Morrow, Dunn, Escutia) (2005).

2. 71 Cal. App. 4th 480, 481-82, 83 Cal. Rptr. 2d 865 (1999).

> argument but simply denied the motion. It may well be after hearing oral argument that the trial court will again deny it. But the possible correctness of the court's ruling is not a proper basis on which to ignore the fact that the court was required by Code of Civil Procedure section 437c to hear oral argument and it did not. (*Mediterranean Construction Co. v. State Farm Fire & Casualty Co.*, *supra*, 66 Cal.App.4th at p. 265.)

Recent Developments[3]

In 2000, in response to problems of the type illustrated by *Gwartz*, the Judicial Council amended Rule 324 of the California Rules of Court, governing tentative rulings.[4] The new procedures require a judge to allow oral argument before making a final ruling and issuing an order.[5]

Nonetheless, it is reported that between 2001 and 2004 several judges in San Diego County and Orange County superior courts continued to use the tentative ruling process to deny civil litigants oral hearings on motions.

In response, the Conference of Delegates of the California Bar Association twice passed a resolution advocating enactment of legislation to define "hearing" as used in the Code of Civil Procedure to mean an oral hearing. Senate Bill 1249 (Morrow), introduced in 2004, would have amended Code of Civil Procedure Section 17 to provide that the term "hearing," as applied to a demurrer, motion, or order to show cause, means oral argument by moving and opposing parties on a record amenable to written transcription, unless affirmatively waived by the parties.

The introduction of SB 1249 highlighted the ongoing problem. The Judicial Council contacted the presiding judges of courts not in compliance with Rule 324. The presiding judges met with noncomplying judges to correct their practices, and also amended local court rules on tentative ruling procedures to conform to Rule 324. The presiding judges of the affected courts have provided written assurance to the Administrative Office of the Courts that the practice of individual judges to deny oral argument has been discontinued.

There is no evidence that noncompliance with Rule 324 remains a problem. However, the Senate Judiciary Committee communication to the Law Revision Commission suggests that a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument.

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3. Drawn from Senate Judiciary Committee Analysis of SB 1249 (May 4, 2004), available at <www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1249_cfa_20040505_162538_sen_comm.html>

4. Cal. R. Ct. 324(a).

5. *Id*. ("The tentative ruling . . . shall not become the final ruling of the court until the hearing.")

SCOPE OF STUDY

More than 260 provisions of the Code of Civil Procedure use the term "hearing."[6] More than 12,000 provisions of other codes also use that term. Most of the provisions in other codes deal with administrative hearings. Those that deal with court proceedings are often unique to the procedural context in which they occur. This study focuses on general civil practice, including pre-trial, trial, and post-trial motions. It does not extend to special proceedings, evidentiary hearings, or appellate proceedings for the reasons discussed below.

General Civil Practice in the Courts

In order to structure manageable bounds for this study, the Commission has limited it to general civil practice in the courts. This covers civil actions under the Code of Civil Procedure. Excluded by this limitation are:

- Criminal proceedings.[7]
- Administrative hearings.[8]
- Contractual arbitration.[9]
- Special court procedures provided for under other codes.[10]

Pre-Trial Motions, Trial Motions, Post-Trial Motions

Pre-trial procedures such as a motion for summary judgment, demurrer, or prejudgment remedy (such as attachment or receivership) have been the most recent focus of oral argument concerns. The increased use of in limine motions may introduce a new dynamic that calls for more detailed treatment of oral argument rights. However, this study is not limited to pre-trial motions; it includes trial motions and post-trial motions.

Special Proceedings

This study focuses on civil actions and does not extend to special proceedings. A civil action is generic and is covered by general principles in the Code of Civil Procedure. A special proceeding is ordinarily governed by detailed and unique rules of procedure, even though in some instances the statute governing the specific proceeding may be located in the Code of Civil Procedure. Examples

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6. Many other statutes require the court to "hear" and determine an issue.

7. Case law addresses the right to oral argument in criminal proceedings, but special constitutional considerations may apply to them.

8. Special rules apply in the quasi-adjudicative process. In a local agency quasi-judicial hearing, the agency head must pay attention to the oral argument. See, *e.g.*, Lacy St. Hospitality. Serv. v. Los Angeles, 125 Cal. App. 4th 526, 22 Cal. Rptr. 3d 805 (2004).

9. The right to oral argument in contractual arbitration is within the control of the parties.

10. These procedures are *sui generis* and not readily susceptible to general treatment.

include eminent domain,[11] escheat,[12] and judicial enforcement of arbitration.[13] A special proceeding may incorporate by reference general rules of civil practice (which would include any provisions relating to oral argument).[14]

Evidentiary Hearings

A statute may specify that evidence may be introduced in a hearing orally or in writing or both. This study does not cover a hearing under the Code of Civil Procedure that is evidentiary in nature. The study is concerned with law and motion matters rather than with presentation of evidence.

Appellate Proceedings

The law governing oral argument in appellate court proceedings is clearer and somewhat different from the law governing oral argument in trial court proceedings.

The right of counsel to appear and orally argue is generally recognized in an appeal or original proceeding that is decided on the merits by a written opinion in an appellate court.[15] The right is of constitutional dimension in California due to the requirement that judgment be concurred in by a majority of judges present at the argument.[16]

In a criminal appeal, "The right to oral argument on appeal is recognized in the California Rules of Court, the Penal Code, the state Constitution, and prior decision of [the supreme] court."[17] The appellate oral argument right applies in a civil case as well.[18] Appellate courts may use tentative opinion procedures and other techniques to streamline the appellate process, so long as they do not discourage exercise of the oral argument right.[19]

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11. Code Civ. Proc. §§ 1230.010-1273.070.

12. *Id*. §§ 1410-1431.

13. *Id*. §§ 1280-1294.2.

14. See, *e.g.*, *id*. § 1109 (writ practice).

15. 9 B. Witkin, California Procedure *Appeal* § 663(a), at 696-97 (4th ed. 1997).

16. See Cal. Const. art. VI, § 2 (Supreme Court), § 3 (Court of Appeal). There are limits, however. See, e.g., Metro. Water Dist. v. Adams, 19 Cal. 2d 463, 468, 122 P. 2d 257 (1942):

> But from the constitutional provision concerning argument it does not follow that the parties are entitled to oral argument in all matters passed upon by the court in bank. When not conducting an open session, the court is convened in executive sessions at least two times each week. At these sessions numerous matters are ruled upon, such as applications for writs, petitions for transfer from the District Courts of Appeal, and petitions for rehearing of our own decisions. These matters are disposed of by order of at least four members of the court, but no oral argument thereon is provided for by the Constitution or otherwise permitted, and no grounds for the rulings are stated in writing, except in very rare cases in the discretion of the court.

17. People v. Brigham, 25 Cal. 3d 283, 285, 599 P.2d 100, 157 Cal. Rptr. 905 (1979).

18. Moles v. Regents of the Univ. of Cal., 32 Cal. 3d 867, 654 P.2d 740, 187 Cal. Rptr. 557 (1982).

19. People v. Pena, 32 Cal. 4th 389, 399, 83 P.3d 506, 9 Cal. Rptr. 3d 107 (2004).

The right to oral argument on appeal does not extend to every decision on the merits in the appellate courts. California law does not grant a right to present oral argument in a proceeding for issuance of a peremptory writ of mandate or prohibition in the first instance (as opposed to a proceeding for issuance of an alternative writ or an order to show cause, in which there is a right to oral argument).[20] Nor is there a right to oral argument when the Supreme Court considers an attorney's request for review of a State Bar Court disbarment recommendation.[21]

The right to oral argument on appeal is clear, and is of constitutional dimension. The Commission does not recommend further codification of the law on the matter.

EXISTING LAW[22]

Introduction

Oral argument is deeply ingrained in our legal tradition. Its importance to the legal process has often been noted. It has been said that, "Oral argument may lift up the fallen or cause the tottering to fall."[23] It can "clear the air" and "is often as effective as a catalytic converter."[24] When an attorney appears in a courtroom to advocate a position, according to one judge, "the judicial process loses its arid, abstruse, and remote character. A lively interchange between counsel and the bench, not possible by the submission of written briefs, may lead a judge to rethink his or her position and even alter the outcome of the proceeding."[25] Another judge has poetically noted that, "An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!"[26]

Public Policy and Due Process

Despite the burden of heavy court workloads, recent opinions have emphasized that it is critical that a party have its day in court[27] — "Justice unseen is justice

20. Lewis v. Superior Court, 19 Cal. 4th 1232, 970 P.2d 872, 82 Cal. Rptr. 2d 85 (1999).

21. *In re* Rose, 22 Cal. 4th 430, 993 P.2d 956, 93 Cal. Rptr. 2d 298 (2000).

22. The following overview of existing law is adapted from Thomas, *The Rites and Rights of Oral Arguments*, Cal. Lawyer, Sept. 2004, at 40-41.

23. TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 754, 104 Cal. Rptr. 2d 810 (2001).

24. *TJX Cos.*, 87 Cal. App. 4th at 755.

25. *Lewis*, 19 Cal. 4th at 1266 (Kennard, J., dissenting).

26. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1978).

27. Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 112, 118 Cal. Rptr. 2d 249 (2002).

undone."[28] A court must not only be fair to all litigants but must also appear to be so.[29] Oral argument enhances public visibility and accountability of the judicial process.[30] Although oral argument may not be the sine qua non of accurate judicial decision-making, the quality and appearance of justice is improved when a judge listens before deciding.[31]

Courts have acknowledged that, because of basic due process concerns, a court is on shaky ground when it entirely bars parties from having a say.[32] "It is wise public policy to conduct judicial proceedings in the sunshine, unless there is a very good reason not to do so."[33]

No Automatic Right to Oral Argument

Notwithstanding the policy considerations favoring oral argument, California courts have long held that a party does not have an automatic right to present oral argument on every kind of motion brought before a court.[34] The fact that a statute provides for a "hearing" does not necessarily entitle a party to argue the case orally before a judge.[35]

In the absence of a clear legislative directive regulating oral argument in the case, a court will consider whether the statutory scheme read as a whole, in context, and taking into account its nature and purpose, requires oral argument. That may include analyzing whether the judge acts as a fact finder or adjudicates an issue at the hearing, as well as whether any procedural remedy, such as making an evidentiary objection or orally moving to continue, is provided for during the

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28. *TJX Cos.*, 87 Cal. App. 4th at 755.

29. Solorzano v. Superior Court, 18 Cal. App. 4th 603, 615, 22 Cal. Rptr. 2d 401 (1993). The judge must also pay attention at the hearing. *Cf.* Lacy St. Hospitality Serv. v. Los Angeles, 125 Cal. App. 4th 526, 530, 22 Cal. Rptr. 3d 805 (2004) (dictum):

> Sitting as "judges" in the appeal, the council was obligated to pay attention as is the obligation of sitting members of the judiciary. (Accord, In re Grossman (1972) 24 Cal. App. 3d 624, 629, 101 Cal.Rptr. 176 ["Members of the bar have the right to expect and demand courteous treatment by judges ..."]; Model Code of Judicial Conduct Canon 3(B)(4) (American Bar Association 2000) ["A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity ..."].)

30. Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781 (1998).

31. Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

32. Titmas v. Superior Court, 87 Cal. App. 4th 738, 742, 104 Cal. Rptr. 2d 803 (2001); see also Monarch Healthcare v. Superior Court, 78 Cal. App. 4th 1282, 1286, 93 Cal. Rptr. 2d 619 (2000) (criticizing court orders that "issue like a bolt from the blue out of the trial judge's chambers" (internal quotations and citations omitted)).

33. *TJX Cos.*, 87 Cal. App. 4th at 754.

34. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 P.635 (1894).

35. Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 112-114, 118 Cal. Rptr. 2d 249 (2002).

hearing.[36] A court may consider whether the proceeding involves a critical pretrial matter that is of substantial significance to a party, such as summary judgment.[37] A court may also look to whether the motion or other pretrial proceeding involves a real and genuine dispute or whether oral argument would simply amount to an "empty gesture."[38]

The right to oral argument has been explicitly recognized in the following types of matters:

- Motion to quash or dismiss for lack of jurisdiction.[39]
- Summary judgment motion.[40]
- Demurrer.[41]
- Discovery motion involving attorney-client privilege.[42]
- Motion to treat party as vexatious litigant.[43]
- Motion for pretrial writ of attachment.[44]
- Motion for appointment of receiver.[45]
- Sanctions motion.[46]

Courts have acknowledged the importance of oral argument whenever there is doubt about a relevant matter — that is precisely when oral argument may be most beneficial.[47] Oral argument is also important when a substitute judge is filling in for the judge to whom the matter is regularly assigned.[48]

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36. *In re* Marriage of Dunn, 103 Cal. App. 4th 345, 348, 126 Cal. Rptr. 2d 636 (2002); *TJX Cos.*, 87 Cal. App. 4th at 751; *Titmas*, 87 Cal. App. 4th at 741.

37. See Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 266-67, 77 Cal. Rptr. 2d 781 (1998).

38. See Lewis v. Superior Court, 19 Cal. 4th 1232, 1258-59, 970 P.2d 872, 82 Cal. Rptr. 2d 85 (1999).

39. *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 784, 170 Cal. Rptr. 642 (1980).

40. Brannon v. Superior Court, 114 Cal. App. 4th 1203, 1208-13, 8 Cal. Rptr. 3d 491 (2004); *Mediterranean*, 66 Cal. App. 4th at 265; Gwartz v. Superior Court, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).

41. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 113-15, 118 Cal. Rptr. 2d 249 (2002)(sexual harassment complaint against employer); *TJX Cos.*, 87 Cal. App. 4th at 755 (whether suit should proceed as a class action).

42. Titmas v. Superior Court, 87 Cal. App. 4th 738, 744-45, 104 Cal. Rptr. 2d 803 (2001).

43. Bravo v. Ismaj, 99 Cal. App. 4th 211, 225, 120 Cal. Rptr. 2d 879 (2002).

44. Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).

45. See Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

46. *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

47. *TJX Cos.*, 87 Cal. App. 4th at 755.

48. *Id.* at 755 ("Hearing oral argument is one of the best ways for substitute judges to demonstrate to the satisfaction of the parties and the public that judicial responsibility has been exercised rather than abdicated.").

Although a party has a right to oral argument in connection with the motions listed above, a court retains substantial discretion to impose reasonable limitations, including limiting the time of argument.[49] A court may also refuse to allow a party oral argument against a motion or demurrer if the party fails to timely invoke the procedure or file written opposition to it.[50] After presentation of evidence, argument to the court may be submitted on briefs — oral argument is not a matter of right.[51]

In summary, California law does not recognize an absolute right to oral argument by litigants in its courts, and though specific areas have emerged where the courts agree that a right to oral argument generally exists, courts retain the ability to circumscribe the right by reasonable procedures.

CLARIFICATION OF THE LAW

The Law Revision Commission believes that the approach of the courts to determine whether oral argument must be allowed is generally sound. However, legislative intent is often a matter of dispute. Few if any statutes state explicitly that oral argument must be allowed on a particular matter. The result is that a determination of the right to oral argument in a particular case, which should be routine, may require extensive briefing, examination of legislative history, and resort to public policy arguments.

The Commission believes more precise statutory guidance would be advantageous to both courts and litigants. To this end, the Commission recommends the following statutory clarifications to the law governing oral argument in civil practice:

(1) Existing case law pertaining to the right to oral argument should be codified. This will take advantage of previous judicial review of the matter, and make the rule transparent and readily accessible to all.

(2) Additional matters on which oral argument is a matter of right should be identified by statute. **The Commission particularly solicits comment on whether the specific matters it identifies below are appropriate, and whether there are others that it has failed to identify that should also be included in the statutory listing.**

(3) For those matters on which oral argument is not a matter of right, a clear and easy to apply standard should be provided for determination of whether oral argument must be allowed in the circumstances of the particular case. It is the Commission's recommendation that the right to oral argument should be granted to the litigants if the court's decision will de jure or de facto terminate the case.

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49. *Brannon*, 114 Cal. App. 4th at 1211 (citing *Mediterranean*, 66 Cal. App. 4th at 265); Sweat v. Hollister, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995).

50. *Brannon*, 114 Cal. App. 4th at 1211; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial § 9:168 (Rutter Group 2004).

51. See, e.g., Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 P. 635 (1894) (foreclosure of mechanics lien).

(4) The statutory standards for when oral argument must be allowed should not preclude the court from permitting oral argument in an appropriate case. That may be done by court rule or by exercise of the court's discretion in the circumstances of a particular case.

(5) The statutory standards for when oral argument must be allowed should not preclude the court from imposing reasonable limitations on the exercise of the oral argument right. Those limitations may include such matters as time for exercising the right and limits on the length of argument.

Specific Hearings the Courts Have Addressed

When confronted with a question of the right to oral argument in a particular proceeding, the objective of the court is to ascertain legislative intent on the matter. In the absence of a clear indication of legislative intent the court will apply general standards.[52] General standards developed by the courts have not been grounded in due process of law[53] as much as in general concern about fairness.[54]

Motions on Which Oral Argument May Be Denied

The courts have generally held that oral argument at a hearing on a motion is not a matter of right, but may be allowed in the court's discretion.[55]

Specific motions that have been held not to require oral argument include:

- Motion for dismissal for failure to timely amend.[56]
- Motion to compel discovery.[57]

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52. See, e.g., Titmas v. Superior Court, 87 Cal. App. 4th 738, 742, 104 Cal. Rptr. 2d 803 (2001):

> In the absence of a clear legislative directive for or against oral hearings, we examine the applicable statutory language and consider the context. In particular, we look to the following factors: (1) Does the statutory scheme, read as a whole, encompass an oral hearing? (2) Do the proceedings involve critical pretrial matters of considerable significance to the parties? and (3) Does the motion or other pretrial proceeding involve a real and genuine dispute?

53. Due process requires that a litigant be afforded notice and an opportunity to be heard. Often that means an opportunity for a written submission to the decisionmaker. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 731, 297 P.2d 789 (1956). There are suggestions in the cases that due process may require oral argument where important consequences are at stake. See, e.g., *Mediterranean*, 66 Cal. App. 4th at 266 n.11.

54. Whether or not oral argument is constitutionally guaranteed, most attorneys, and judges, believe that it is desirable. See, *e.g.*, Millar, *Friends, Romans and Judges—Lend Us Your Ears: The Tradition of Oral Argument*, Orange County Lawyer, Jan. 2002, at 10. See also TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 754, 104 Cal. Rptr. 2d 810 (2001) (internal quotations and citations omitted):

> Our own experience with appellate argument confirms its utility. Oral argument may lift up the fallen or cause the tottering to fall. It separates the wheat from the chaff by affording "a direct dialogue between the litigant and the bench ... in ways that cannot be matched by written communication, and for many judges a personal exchange with counsel makes a difference in result."

55. See, e.g., 6 B. Witkin, California Procedure *Proceedings Without Trial* §34(b), at 429 (4th ed. 1997).

56. Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989).

57. *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

- Motion to withdraw motion to vacate default.[58]
- Motion to reopen for additional evidence.[59]
- Motion for new trial.[60]

Motions on Which Oral Argument Must Be Allowed

The courts have explicitly recognized the right to oral argument in the following matters:

- Motion to quash or dismiss for lack of jurisdiction.[61]
- Summary judgment motion.[62]
- Demurrer.[63]
- Motion for pretrial writ of attachment.[64]
- Motion for appointment of receiver.[65]
- Discovery motion involving attorney-client privilege.[66]
- Motion to treat party as vexatious litigant.[67]

There is no single rationale supporting an oral argument right in these matters. The decision that oral argument must be allowed is based on the relative importance of the motion being heard, including whether (1) the motion has the potential to terminate a party's access to court, (2) the motion could result in the granting of a provisional remedy that may as a practical matter effectively end the dispute, (3) the motion would put at risk the ability of parties generally to consult openly with their attorneys, and (4) the motion could limit access to the courts.

Codification of Case Law

The proposed law codifies cases that specify particular motions in which oral argument must be allowed.[68] However, the holdings in the cases are sometimes

58. Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956).

59. Ensher, Alexander & Barsoom, Inc. v. Ensher, 225 Cal. App. 2d 318, 37 Cal. Rptr. 327 (1964).

60. Kimmel v. Keefe, 9 Cal. App. 3d 402, 88 Cal. Rptr. 47 (1970).

61. *Lemen*, 113 Cal. App. 3d at 769.

62. Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); Gwartz v. Superior Court, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).

63. Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 104 Cal. Rptr. 2d 810 (2001) (qualification as class action).

64. Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).

65. Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982).

66. Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001).

67. Bravo v. Ismaj, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (2002).

68. See proposed Section 1044(b)(1)-(7) *infra*.

qualified. Key qualifications — preserved in the proposed law — are discussed below.

Urgent and compelling need. A precedential case on appointment of a receiver states that, "So serious a matter as appointment of a receiver should not be made without a full and complete hearing unless the due administration of justice clearly requires it."[69] The invocation of due administration of justice suggests a situation where time is critical and, in balancing the equities, it appears important to act quickly to grant the provisional remedy. The proposed law recognizes this circumstance by authorizing the court to make a decision without oral argument if there is an urgent and compelling need to do so.[70]

Ex parte hearing. A motion provided for by statute is presumed to require notice and an opportunity for hearing unless the statute expressly provides that the matter is to be heard ex parte.[71] The proposed law makes clear that the codification of motions in which oral argument must be allowed does not override an express statutory provision for an ex parte hearing.[72]

Determination of legal privilege. The case law requirement of oral argument on a discovery motion involving attorney-client privilege is based on the importance of that privilege. There are other important privileges in the law, including the attorney's work product privilege and the mediation communications privilege. The proposed law makes clear that oral argument must be allowed on a motion that would determine whether confidential information is protected by a legal privilege.[73]

Legislative Intent

Existing cases address the oral argument right in a small fraction of statutory hearings. The legislative intent with respect to the remainder of the hearings under the Code of Civil Procedure is indeterminate.

Statutory Construction

A statute may provide for a "hearing" or for the court to "hear" a matter, or that the matter must be "heard." The term itself seems to suggest oral argument, but the courts have rejected that reading.[74]

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69. Cohen v. Herbert, 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922 (1960).

70. See proposed Section 1044(e) *infra*.

71. See, e.g., St. Paul Fire & Marine Ins. Co. v. Superior Court, 156 Cal. App. 3d 82, 202 Cal. Rptr. 571 (1984).

72. See proposed Section 1044(e) i*nfra*.

73. See proposed Section 1044(c)(4) *infra*.

74. See, e.g., Lewis v. Superior Court, 19 Cal. 4th 1232, 1247-1248, 970 P.2d 872, 82 Cal. Rptr. 2d 85 (1999).

One provision of the Code of Civil Procedure makes specific reference to oral argument.[75] Section 661 addresses oral argument on a motion for new trial. The statute is ambiguous. If the motion is heard by a judge other than the trial judge, it "shall be argued orally or shall be submitted without oral argument, as the judge may direct." The implication is that, if heard by the trial judge, there is a right to oral argument on the motion. However, the cases have consistently held that the right to oral argument on a motion for new trial is within the discretion of the judge.[76]

Other provisions of the Code of Civil Procedure are likewise suggestive, but inconclusive, with respect to oral argument. A statute that requires the court to set a date for hearing seems to imply that there will be an actual event at which arguments may be made.[77] A requirement that the judge permit the parties to argue at a hearing,[78] or to appear before the court and make argument,[79] is also suggestive of the intent to allow oral argument.

Motion Procedure Generally

Section 1005.5 of the Code of Civil Procedure provides that upon the due service and filing of a notice of motion, the motion is deemed to have been made and pending before the court, "but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled." *Brannon v. Superior Court* interprets the phrase "hearing of the motion" to mean an oral hearing.[80] Based on this interpretation, the court concludes that the Legislature intended to provide parties to a summary judgment motion the right to oral argument because there is no language to the contrary in the summary judgment statute. The court cautions that

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75. In addition, one statute provides the right to oral argument in arbitration of an international commercial dispute on request of a party. We do not deal with arbitration in this study.

76. See, e.g., Kimmel v. Keefe, 9 Cal. App. 3d 402, 88 Cal. Rptr. 47 (1970).

77. See, e.g., *Lewis*, 19 Cal. 4th at 1249-1250:

> Section 1094's statement that "the court must proceed to hear or fix a day for hearing the argument of the case," and section 1090's provision allowing the court to "postpone the argument" until after a trial of factual issues, both suggest that the hearing of the argument will occur at a specific time. [FN. Because it is written in the disjunctive, section 1094's requirement that "the court must proceed to hear *or* fix a day for hearing the argument of the case" (italics added) arguably contemplates that, under some circumstances, a court may consider written arguments alone, without setting a particular day for the hearing.] Similarly, rule 56(e) specifies that "the return shall be made at least five days before the date set for hearing." If "hearing" simply meant "consideration" of written arguments, there would be no need to select a particular date for considering the arguments. (See *Gulf Coast Investment Corp. v. Nasa 1 Business Center*, *supra*, 754 S.W.2d at p. 153 [where a rule required the court to notify the parties of the "date, time and place of the hearing," the trial court abused its discretion in refusing to hold an oral hearing].)

78. See, e.g., Code Civ. Proc. § 170.3(c)(6) (motion to disqualify judge). *Cf.* Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 422, 285 Cal. Rptr. 659 (1991).

79. See, e.g., Code Civ. Proc. § 259(b) (exception to determinations of court commissioner).

80. 114 Cal. App. 4th 1203, 1209, 8 Cal. Rptr. 3d 491 (2004).

its reasoning with respect to a summary judgment motion cannot necessarily be applied to other prejudgment motions.[81]

Telephone Appearance

An argument on legislative intent can also be derived from statutes governing telephonic court appearances.[82]

Code of Civil Procedure Section 1006.5 requires the Judicial Council to adopt a standard of judicial administration that permits counsel for a party to a civil action to appear by telephone at any hearing of a demurrer, order to show cause, or pretrial motion. The implication of the statute is that it is legislative policy to allow oral argument — either telephonic or in person — in those particular proceedings.

That implication may be inconsistent with Government Code Section 68070.1, which suggests there is an oral argument right by telephone in every law and motion hearing, presumably subject to Judicial Council rules limiting that right.

The Judicial Council has not acted to limit the right. The Rules of Court currently provide that a party "may appear by telephone in any conference or hearing at which witnesses are not expected to be called to testify," except that a personal appearance is required at a settlement or case management conference and any other conference or hearing in which the court determines that "a personal appearance would materially assist in a determination of the proceeding or in resolution of the case."[83] The implication is that oral argument must be allowed, either by telephone or in person.

Evaluation

An argument can be made that the entire scheme of the Code of Civil Procedure points towards oral argument on motions generally. This position is based not just on terminology such as "hearing on the motion" and "appearance at the hearing," but on the legislative intent of such statutes as Code of Civil Procedure Sections 1005.5 (party shall not be deprived of right to hearing on a motion) and 1006.5 (mandating that Judicial Council adopt standard of judicial administration for telephone appearance on demurrer, order to show cause, and pretrial motion), and Government Code Section 68070.1 (providing for telephone appearance in any nonevidentiary law and motion hearing, subject to limitation in Judicial Council rules).

The existing general provisions all stop short of mandating oral argument and ultimately leave the matter in the hands of the courts. That may be the result of concern about the press of business in the trial courts, the need for flexibility in processing litigation, or the perception that the courts may be in the best position

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81. *Id.* at 1211.

82. The definition of a telephonic appearance is unclear, particularly with respect to video conferencing and webcasting. The Commission does not address the issue in this recommendation.

83. Cal. R. Ct. 298(b), (c)(3).

to ascertain the need for and value of oral argument in diverse types of proceedings.

Additional Hearings Where Oral Argument is Appropriate

The Commission has identified specific types of hearings where oral argument is appropriate, even though there is not yet a case law determination of the right. Oral argument may be critical on the following matters, in addition to those already identified by the courts:

- Motion for class certification.[84]
- Motion to dismiss on ground of inconvenient forum.[85]
- Motion to quash service of summons.[86]
- Special motion to strike (anti-SLAPP).[87]
- Motion for summary adjudication.[88]
- Motion for judgment on the pleadings.[89]
- Application for claim and delivery.[90]
- Motion or order to show cause for injunctive relief.[91]
- Motion to dismiss for delay in prosecution.[92]
- Motion for judgment notwithstanding verdict.[93]
- Motion to appoint referee or appraiser.[94]
- Petition to order arbitration.[95]

The Commission solicits comment on this list and on whether oral argument should also be a matter of right in any other hearing.

General Standard for Oral Argument

The failure of the proposed law to single out a particular type of hearing for oral argument should not signal legislative intent to disallow oral argument in that hearing. The law should include a straightforward general standard that applies to

84. See Code Civ. Proc. § 382.
85. See *id.* § 410.30.
86. See *id.* § 418.10.
87. See *id.* § 425.16.
88. See *id.* § 437c(f).
89. See *id.* § 438.
90. See *id.* § 512.020.
91. See *id.* § 526.
92. See *id.* § 583.110.
93. See *id.* § 629.
94. See *id.* § 639.
95. See *id.* § 1281.2.

types of hearings not specifically identified. One inquiry commonly made by the courts in determining whether oral argument is required is whether the decision can have the effect de jure or de facto of resolving the case. The Commission believes this is a sound general standard, and would codify it.[96]

In addition, if the court's decision would result in determination of an issue by a nonjudicial officer, such as an arbitrator, the court's decision should be subject to oral argument by the parties.[97]

Court Discretion

The proposed law would not constrain the court in its discretion from permitting oral argument in other cases.[98] The courts in recent years have developed an extensive body of criteria for determining whether oral argument should be allowed on a particular motion.[99] The factors considered by the courts include:

- Whether the judge acts as a fact finder or adjudicates an issue at the hearing.
- Whether the statute provides the parties procedural remedies at the time of the hearing, such as an evidentiary objection or an oral motion for a continuance.
- Whether the decision involves a critical pretrial matter of considerable significance to the parties.
- Whether the issues are so obvious or well settled that oral argument would amount to an empty gesture.
- The need for a record of the proceedings due to the likelihood of judicial review of the decision.
- Whether the judge is substituting for a judge to whom the judicial proceeding is regularly assigned.
- Whether the judge is in doubt about the proper resolution of an issue in the proceeding.
- Whether oral argument would contribute materially to the quality and appearance of justice in the proceeding.

These considerations are relevant, but the proposed law does not mandate them. The courts should be allowed discretion to permit oral argument in any case where it would materially assist in the proper resolution of the matter, even though not

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96. See proposed Section 1044(c)(2)-(3) *infra*.

97. See proposed Section 1044(c)(5) *infra*.

98. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956).

99. See, e.g., Lewis v. Superior Court, 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872 (1999); *In re* Marriage of Dunn, 103 Cal. App. 4th 345, 126 Cal. Rptr. 2d 636 (2002); TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 751, 755, 104 Cal. Rptr. 2d 810 (2001); Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

statutorily required. Court discretion could be exercised under this general standard, or pursuant to court rules.[100]

Existing court rules mandate oral argument in some circumstances where it is not otherwise required by law. If a court uses a tentative ruling procedure, Rule 324 specifies an oral argument requirement.[101] Court rules are silent concerning the right to oral argument in other circumstances, but the rules appear to assume that oral argument will generally be allowed in law and motion hearings.[102] That is also the conclusion of the court in *Brannon*.[103]

RELATED MATTERS

Exercise of Oral Argument Right

Senate Bill 1249 (Morrow) would have provided for oral argument unless affirmatively waived by the parties. The affirmative waiver requirement is problematic because a hearing would be required even in a case where all the parties agree with a court's tentative ruling but one party fails to notify the court in advance of the scheduled hearing.[104]

On the other hand, an attorney can be exposed to undue pressure to waive an oral argument right if the attorney must act affirmatively in order to exercise the right. This is a particular concern where the attorney must deal with the judge on an ongoing basis.

The proposed law does not address this matter, but leaves it to the courts to determine how the oral argument right is best implemented.

Court Control

The court may impose reasonable limitations on oral argument, such as procedures for exercising the right to present argument and restrictions on the time of argument. Under this authority, a court may refuse to allow oral argument against a motion or demurrer if the opponent fails to timely invoke the procedure or file written opposition to it.[105] The proposed law would codify this principle.

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100. Court rules may not be inconsistent with statute. Cal. Const. art. VI, § 6(d). There is nothing to preclude court rules from offering an oral argument opportunity even though not required by statute, so long as not prohibited by statute.

101. Cal. R. Ct. 324(a)(1).

102. See, *e.g.*, *id*. R. 321 (time of hearing), R. 324.5 (reporting of proceedings).

103. 114 Cal. App. 4th 1203, 1209, 8 Cal. Rptr. 3d 491.

104. Senate Judiciary Committee Analysis of SB 1249 (May 4, 2004), available at <www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1249_cfa_20040505_162538_sen_comm.html>

105. *Brannon*, 114 Cal. App. 4th at 1211; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial § 9:168 (Rutter Group 2004); See also Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781 (1998); Sweat v. Hollister, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995); Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989).

A court may deny oral argument if supporting papers have not been filed. Where the hearing is on short notice,[106] the parties may not have an opportunity to file papers. The proposed law would make that clear that a limitation on exercise of the oral argument right must be reasonable.[107]

Research Attorney

The Commission does not believe a judge's delegation of a matter to a research attorney to hear argument and report back would satisfy an oral argument requirement.[108] The purpose of oral argument is to enable direct interaction with the decisionmaker; argument to a research attorney would not satisfy that objective. Argument should be made to the judge, temporary judge, commissioner, or other judicial officer presiding in the case.

CONCLUSION

The Senate Judiciary Committee's referral of this matter to the Law Revision Commission concludes that, "a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument."[109]

The history of the oral argument issue demonstrates that problems regularly resurface. The pressure of business in the trial courts will continue to fuel efforts to limit oral argument. The *Medix* court[110] highlights the problem:

> We realize that the demands made on busy trial judges approach, if they do not already exceed, the unrealistic. This is particularly true in counties such as Orange County where all civil cases are immediately assigned to direct calendar courts. Judges with heavy case loads are expected to preside over trials, hear law and motion, rule on ex parte applications, conduct settlement and status conferences, and perform additional administrative duties. All this under the requirements of the Trial Court Delay Reduction Act (Gov. Code, 68600 et seq.) and the Standards of Judicial Administration (Cal. Stds. Jud. Admin., 2.3) which include a directive that 90 percent of all civil cases be "disposed of within 12 months after filing ...." (Cal. Stds. Jud. Admin., 2.3(b).)
>
> It is thus no surprise that, in their need for efficiency, trial judges have adopted procedures to streamline litigation. Most of these procedures have beneficial effects, causing disputes to be resolved more quickly and more efficiently without

106. For example, a summary judgment hearing in an unlawful detainer action on five days notice.

107. See proposed Section 1044(f) *infra*.

108. See also Millar, *Friends, Romans and Judges—Lend Us Your Ears: The Tradition of Oral Argument*, Orange County Lawyer, Jan. 2002, at 10 ("Decisions are best formed in the crucible of open discussion, not in shuttered chambers (and, no, a discussion with a research attorney does not count.").

109. Letter from Martha Escutia, Chair, and Bill Morrow, Vice Chair, Senate Judiciary Committee, to Frank Kaplan, Chair, California Law Revision Commission (Aug. 27, 2004), available at <www.clrc.ca.gov/pub/2004/MM04-34.pdf>, Exhibit 6.

110. 97 Cal. App. 4th 109, 111-112, 118 Cal. Rptr. 2d 249 (2002).

> sacrificing the ultimate goal of the judicial process: the delivery of just results. But, in adopting these new, efficient procedures, judges must remember another, equally important goal: preserving a process that not only is just, but also appears to be just. In spite of the need for efficiency, courts should not lose sight of the need that parties be given their "day in court."
>
> The concept of parties being given their day in court has real as well as symbolic meanings. It is much preferred that parties, or more likely their lawyers, be given an opportunity to address the court in person so as to assure themselves that the facts and ideas sought to be communicated have, in fact, been communicated. In this case the parties were not given such an assurance; the ruling on their demurrer was delivered to them very cryptically on the Internet the day before they expected to appear in court. The Internet is a useful tool and serves many purposes; but it is no substitute for judge and lawyer being able to interact in person.

Codification of the circumstances under which oral argument must be allowed would provide guidance to trial courts struggling to manage large calendars. Codification would also provide guidance to attorneys who currently must cope with an ever-expanding body of case law in order to understand which rule applies in their particular circumstances. Laying down the black letter law will help bring certainty to this contentious area.

PROPOSED LEGISLATION

Code Civ. Proc. § 1044 (added). Oral argument in civil action

SECTION 1. Section 1044 is added to the Code of Civil Procedure, to read:

1044. (a) This section governs the right of a party in a civil action under this code to present oral argument to the superior court on a decision by the court. This section does not govern the right to present oral argument in a special proceeding except to the extent incorporated by reference in the statute governing the special proceeding. This section does not govern the right to present oral argument on appeal.

(b) A party has a right to present oral argument on the following matters:

(1) Motion to quash or dismiss for lack of jurisdiction.

(2) Motion for summary judgment or summary adjudication.

(3) General demurrer.

(4) Motion for pretrial writ of attachment.

(5) Motion for appointment of receiver.

(6) Motion for discovery involving attorney-client privilege.

(7) Motion to treat party as vexatious litigant.

(8) Motion for class certification.

(9) Motion to dismiss on ground of inconvenient forum.

(10) Motion to quash service of summons.

(11) Special motion to strike (anti-SLAPP).

(12) Motion for judgment on the pleadings.

(13) Application for claim and delivery.

(14) Motion or order to show cause for injunctive relief.

(15) Motion to dismiss for delay in prosecution.

(16) Motion for judgment notwithstanding verdict.

(17) Motion to appoint referee.

(18) Petition to order arbitration.

(c) Nothing in subdivision (b) limits the right to present oral argument on a matter if any of the following conditions is satisfied:

(1) The applicable statute provides for oral argument.

(2) The court's decision would be dispositive of the case.

(3) The court's decision would as a practical matter irreparably affect the circumstances of the parties.

(4) The court's decision would determine whether confidential information is protected by a legal privilege.

(5) The court's decision would result in determination of an issue in the case by a nonjudicial officer.

(d) The court may permit the parties to present oral argument on a matter for which the right to present oral argument is not otherwise provided by this section if the court in its discretion determines that oral argument would be appropriate.

(e) Notwithstanding any other provision of this section, the court may make a decision without oral argument if there is an urgent and compelling need to do so, including but not limited to decision on a matter in which ex parte action is authorized.

(f) Nothing in this section affects the discretion of the court to impose reasonable limitations on oral argument, including but not limited to the manner of and conditions for exercising the right to present oral argument and restrictions on the time of argument.

(g) As used in this section, the term "oral argument" includes argument made by telephone appearance pursuant to court rules providing for telephone appearance. The term does not include presentation of oral testimony that is evidentiary in nature.

Comment. Section 1044 clarifies circumstances under which a party to a civil action has the right to oral argument before the court makes a decision under this code. As used in this section, "civil action" means an ordinary court proceeding for the declaration, enforcement, or protection of a right, or the redress or prevention of a wrong. See Sections 20 (judicial remedies defined), 21 (division of judicial remedies), 22 (action defined), 24 (kinds of actions), 30 (civil action defined). The section does not apply to a special proceeding, a criminal action, a proceeding in a nonjudicial tribunal, or an appeal. Although the section is by its terms limited to civil actions, it may be incorporated by reference in a special proceeding. See, e.g., Section 1109 (writ practice).

This section does not govern proceedings in the Supreme Court or Courts of Appeal. Oral argument in proceedings in those courts is governed by different standards. See Cal. Const. art. VI, § 2 (Supreme Court), § 3 (Court of Appeal); Moles v. Regents of the Univ. of Cal. 32 Cal. 3d 867, 654 P. 2d 740, 187 Cal. Rptr. 557 (1982).

This section is not limited to pre-trial or in limine matters. It applies to trial motions and post-trial motions as well. *Cf.* Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 P. 635 (1894) (foreclosure of mechanics lien). However, it does not govern the right to present oral testimony in an evidentiary proceeding. See subdivision (g).

Subdivision (a) makes clear that the section governs oral argument "to the superior court." That includes argument before a judge, temporary judge, or subordinate judicial officer presiding and making the decision on the matter. It does not include another court officer or employee such as a clerk or research attorney.

Subdivision (b) codifies the right to oral argument expressed in case law for the following matters:

(1) Motion to quash or dismiss for lack of jurisdiction. See *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

(2) Summary judgment motion. See Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004); Gwartz v. Superior Court, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998). Subdivision (b)(2) extends the oral argument right to a summary adjudication motion. See Code Civ. Proc. § 437c(f).

(3) General demurrer. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 104 Cal. Rptr. 2d 810 (2001) (qualification as class action). Subdivision (b)(3) limits the oral argument right to a general demurrer.

(4) Motion for pretrial writ of attachment. See Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).

(5) Motion for appointment of receiver. See Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982).

(6) Discovery motion involving attorney-client privilege. See Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001).

(7) Motion to treat party as vexatious litigant. See Bravo v. Ismaj, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (2002).

Subdivision (b) also identifies the following matters in which oral argument must be allowed because the court's decision is likely to have a significant impact on the case:

(8) Class certification. See Section 382.

(9) Inconvenient forum. See Section 410.30.

(10) Quash service of summons. See Section 418.10.

(11) Special motion to strike (anti-SLAPP). See Section 425.16.

(12) Judgment on the pleadings. See Section 438.

(13) Claim and delivery. See Section 512.020.

(14) Injunctive relief. See Section 526.

(15) Delay in prosecution. See Section 583.110.

(16) Judgment notwithstanding verdict. See Section 629.

(17) Motion to appoint referee or appraiser. See Section 639.

(18) Petition to order arbitration. See Section 1281.2.

Subdivision (c)(1) codifies the existing rule that the court must ascertain legislative intent to determine whether a particular statute provides for oral argument. While subdivision (b) identifies some statutes that require oral argument, that provision is not intended as a comprehensive listing.

Under subdivision (c)(1), unless a statute expressly provides for oral argument, a reference in the statute to a "hearing," "argument," or "appearance" is not necessarily construed to require oral argument but should be considered by the court in its determination of legislative intent. Courts have determined legislative intent based on the context of the particular statute, taking into consideration such factors as:

(A) Whether the judge acts as a fact finder or adjudicates an issue at the hearing.

(B) Whether the statute provides the parties procedural remedies at the time of the hearing, such as an evidentiary objection or an oral motion for a continuance.

(C) Whether the decision involves a critical pretrial matter of considerable significance to the parties.

(D) Whether the issues are so obvious or well settled that oral argument would amount to an empty gesture.

(E) The need for a record of the proceedings due to the likelihood of judicial review of the decision.

(F) Whether the judge is substituting for a judge to whom the judicial proceeding is regularly assigned.

(G) Whether the judge is in doubt about the proper resolution of an issue in the proceeding.

(H) Whether oral argument would contribute materially to the quality and appearance of justice in the proceeding.

See, e.g., Lewis v. Superior Court, 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872 (1999); Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001); TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 751, 755, 104 Cal. Rptr. 2d 810 (2001); *In re* Marriage of Dunn, 103 Cal. App. 4th 345, 126 Cal. Rptr. 2d 636 (2002); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

Under subdivision (c)(2) the court must allow oral argument in a proceeding in which the court's decision could result directly in dismissal of the case. This generalizes existing rules relating to:

• Motion to quash or dismiss for lack of jurisdiction. See *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

• Motion for summary judgment. See Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004).

• Demurrer. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 755, 104 Cal. Rptr. 2d 810 (2001) (qualification as class action). See subdivision (b).

Under subdivision (c)(3) the court must allow oral argument in a proceeding in which the court's decision could so fundamentally affect the circumstances of the parties that as a practical matter it will resolve the case. This generalizes existing rules relating to prejudgment remedies such as pretrial writ of attachment and appointment of a receiver. See Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999) (pretrial writ of attachment); Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982) (appointment of receiver). See subdivision (b).

Subdivision (c)(4) codifies the holding in *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001) (attorney-client privilege), and extends it to other privileges such as the attorney's work product privilege and the mediation communications privilege.

Subdivision (c)(5) is consistent with the general principle that a court decision that has the effect of denying a party a judicial forum should be subject to oral argument.

Subdivision (d) codifies existing case law providing for court discretion to allow oral argument. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956). Some of the same factors used to determine legislative intent under subdivision (c)(1) may also be relevant to exercise of the court's discretion, such as the possible need for a record due to the likelihood of judicial review, whether the judge is in doubt about the proper resolution of the matter, and whether oral argument would contribute materially to the quality and appearance of justice.

Subdivision (e) codifies the court's authority to abrogate the oral argument requirement in an extraordinary situation. See, e.g., Cohen v. Herbert, 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922 (1960) ("So serious a matter as the appointment of a receiver should not be made without a full and complete hearing unless the due administration of justice clearly requires it.") An urgent and compelling need could arise, for example, in a situation where speed or secrecy is required to protect against imminent loss or injury or because of the likelihood that a party will abscond or assets will otherwise be dissipated. A matter in which ex parte action is authorized would typify this type of decision. It should be noted, however, that the party seeking a decision ex parte must ordinarily make a personal appearance. See Cal. R. Ct. 379(i).

Subdivision (f) codifies the existing rule that trial courts "retain extensive discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures." Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781 (1998). See also Brannon v. Superior Court, 114 Cal. App. 4th 1203, 1211, 8 Cal. Rptr. 3d 491 (2004); Sweat v. Hollister, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995); Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989). A court limitation on exercise of an oral argument right must be reasonable. A limitation denying oral argument if supporting papers have not been filed would not be reasonable, for example, in a case in which there is insufficient time to prepare the papers.

Subdivision (g) makes clear that a provision allowing for telephone appearance would satisfy an oral argument requirement under this section. *Cf*. Section 1006.5 (standard of judicial administration for telephone appearance); Gov't Code § 68070.1 (telephone appearance in nonevidentiary law and motion hearings); Cal. R. Ct. 298 (telephone appearance).

☞ **Note. The Commission particularly solicits comment on whether the specific hearings it has identified in subdivision (b) are appropriate, and whether there are others the Commission has failed to identify that should also be included in the statutory listing.**