9/22/77

Memorandum 77-64

Subject: New Topics

We have received quite a few letters in response to the request for suggested topics for Commission study which was sent to law professors in California and published in various legal newspapers. The suggested topics are discussed below. The first part of this memorandum discusses topics that the Commission currently has authority to study and the second part deals with suggested topics that would require legislative authorization.

If the Commission decides that it will request authority at the 1978 session to study any of the new topics discussed in this memorandum, the staff will prepare an appropriate description of the new topic for inclusion in the Annual Report and will present the description for Commission review at the November meeting.

TOPICS WITHIN CURRENT AUTHORIZATION

Evidence--Videotape Discovery

The Commission may be interested in studying the use of videotape in discovery. In Bailey v. Superior Court, 65 Cal. App.3d 539 (1976) (hearing granted February 23, 1977), the court of appeal upheld the superior court's order compelling the plaintiff in a personal injury case to submit to videotaped discovery proceedings. The majority relied on the general principles of statutory construction and applied the broad definition of "writing" found in the Evidence Code to the discovery provisions in Code of Civil Procedure Section 2019.

The dissenting opinion differed with the majority on the application of the principles of statutory construction and also suggested that, in view of the many difficult problems associated with the use of videotape, this is a matter that should be determined by the Legislature:

> A number of aspects of this new technology should be governed by appropriate standards. A few of the matters requiring investigation and the enactment of suitable regulations that have been mentioned are: the development of minimum standards pertaining to the qualifications and responsibility of the television technicians who are to operate the cameras and for the audio operators used in video taping depositions; the development of a type of video tape camera and microphone

equipment required for accurate recordation; the number of cameras and microphones necessary to effectively record what takes place; whether a portion of the testimony of a witness should be authorized, and whether the faces of both the interrogating counsel and the witness should be visible; whether a stenographic record should be required in addition to the video tape. There also exists a myriad of problems dealing with cost of the deposition; procurement of copies; provisions for reviewing the video tape by the witness; methods of accomplishing revisions and corrections; whether the video taping is restricted to certain types of actions and to certain witnesses; provisions for the certification of the correctness of the tapes and storage of the tapes.

The mere listing of these problems makes manifest that the legislative body, as distinguished from the courts, is the proper body to make the initial policy decision of whether video taped depositions are to be allowed; and if they are to be allowed, to develop the answers to the aforementioned problems and to establish appropriate standards and guidelines for video tape use. Unlike the courts, the Legislature, through its committee structure and investigative procedures available to it, can seek out various viewpoints and draw upon the advice and assistance of all segments of society and interested parties, including the legal profession, the judiciary and experts in the video tape industry in arriving at appropriate choices, compromises and decisions.

The Commission has received prior suggestions that this topic be studied but has determined that the study should be made by the Judicial Council. If such a study were undertaken by the Law Revision Commission, consideration might be given to proposing a pilot program of limited scope before legislation of general application is enacted. The Legislature has taken the pilot program approach in other areas, such as small claims court procedure. The staff believes that the problems involved in a study of this topic are practical ones that would best be resolved by the Judicial Council, but we nevertheless bring this case to your attention in the event the Commission concludes this would be a matter that would be appropriate and desirable for Commission study. The Commission already is authorized to study both evidence and discovery in civil cases.

Evidence--Decedent's Hearsay Exception

Mr. John H. Welborne, in Decedents' Hearsay: Time for a New California Exception, 16 Cal. Trial Law. J. 49 (1977), makes the following recommendation:

California's limited rules admitting certain declarations of a deceased person about his will or in regard to a claim against his estate are operating successfully. A broader rule admitting the statements of all deceased persons works well in other jurisdictions.

The exception proposed in this article is a compromise which would admit statements only from deceased declarants. It does not extend to all unavailable declarants. The proposed exception also contains cautionary language excluding statements prepared at the behest of insurance investigators or attorneys and thereby addresses the objections of California opponents when a similar step was considered for this state in 1962.

Creation of an exception to admit all reliable statements of recent perceptions made by deceased declarants would provide California civil courts with increased access to relevant evidence. Nearly forty years ago, Wigmore wrote of the future of hearsay that "the next and needed step in the liberalization of the Rule is the adoption of the general exception for all statements of deceased persons . . . This general exception . . . should receive universal recognition." It is time for California to take that next and needed step. [Id. at 66 (footnote omitted).]

Does the Commission believe this matter merits further study as a part of the review of experience under the Evidence Code?

Evidence--Blood Tests to Determine Paternity

Professor Robert W. Peterson, University of Santa Clara Law School, makes the following comment:

Evidence Code Section 895, which was adopted in 1953, excluded a sentence from the Uniform Act on Blood Tests to Determine Paternity which would have allowed test results to show paternity if the blood characteristics coming from the father is rare. This omission has caused writers to declare that such evidence is inadmissible in California. Witkin, California Evidence § 660. In 1976 California adopted the Uniform Parentage Act (Civil Code §§ 7000-18), but again failed to adopt similar language in that Act. California cases have not directly considered the statute, but one case suggested that such evidence might sometimes be admissible. Huntingdon v. Crowley, 64 Cal.2d 647, 51 Cal. Rptr. 254 n.3 (1965); See Kusior v. Silver, 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 n.1 (1960); But see Hodge v. Gould, 79 Cal. Rptr. 245, 274 Cal. App.2d 806 (1969). One writer has said that the evidence has been accepted at the trial level in non-jury cases. Comment, The Use of Blood Tests to Prove Paternity in California, 3 U.S.F.L. Rev. 297, 298 n.8 (1969).

There is no reason why such evidence should not be admissible. There are so many genetically transferred characteristics which may now be routinely tested, that a simple and reliable calculation of the probability of the defendant's paternity can be made. The

evidence is routinely accepted in all the Nordic countries (Denmark, Sweden, Norway and Finland), Germany and England. (See attached certificates) Several states admit it because they adopted one or the other of the Uniform Acts unchanged. I just returned from 5 days with the head of the government paternity testing laboratory in Stockholm, and in my view California should remove this ambiguity in its law and adopt a system for calculating the probability of parternity modeled after the Nordic system.

The sentence of the Uniform Act on Paternity that is excluded in Evidence Code Section 895 reads as follows:

> If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

It appears that blood type evidence may be used to show the possibility of paternity under the statutes of Hawaii, Kentucky, Louisiana, Maine, Montana, New Hampshire, North Dakota, Oregon, Utah, and Washington.

The Legislature considered this matter in 1976 and refused to adopt the provision of the Uniform Paternity Act suggested by Professor Peterson. In view of this recent legislative decision, the staff recommends against studying this matter.

Marketable Title, Title Insurance

Professor Jerome J. Curtis, McGeorge School of Law, suggests that the Commission study "whether the law of title assurance (i.e. title insurance and title covenants) should be revised" and has sent us his article on this subject, Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants With Suggested Reforms, 7 Pac. L.J. 1 (1976). This article recommends certain changes in coverage of title insurance and the resurrection of common law covenants of title. Consider the following excerpts from the article:

> The first statutory proposal is intended to require title companies insure not only against matters of record which are not excepted to in the policy, but also against matters actually or constructively known to them and which are not discoverable in the official records or excepted to in the policy.
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> * * * * *
>
> Since the typical purchaser of title insurance seldom distinguishes the marketability of title form [sic] the marketability of

land, the law should give effect to his reasonable expectation that both are insured.

* * * * *

Because there are no legitimate reasons to preclude the assignment of title policies, a statute making them assignable is suggested . . . .

* * * * *

The . . . proposal would expose title insurers to tort liability for negligent misrepresentations of the state of title and thereby recognize that title insurers in California have assumed the role of title abstractors as well as insurers. . . . Although California law permits the inclusion of the English covenants in any deed, a search of any recorder's office will disclose few deeds wherein the grantor gives anything beyond the limited covenants implied in a grant deed.

These covenants are merely that the grantor has not conveyed away the estate described in the deed or any interest therein and that he or any person claiming through him has not encumbered the property. Thus, under a grant deed, the grantor warrants only that the title has not been impaired by his own act or that of his successor; he does not warrant the legitimacy of the title itself. Indeed, the grantor may not even breach these implied warranties by purporting to convey a title which he has never owned, for so long as he or his successors have not conveyed to another or encumbered this nonexistent title, there would be no breach of the implied covenants. By comparison, the common law covenants, which are customarily given in deeds executed in many American jurisdictions, guarantee the title itself and not merely the previous acts of the grantor and his successors.

* * * * *

Two of the major theses of this article are that common law methods of title assurance should be revived in California and that remote grantees ought to receive the benefit of such covenants. [Footnotes omitted.]

These recommendations are related to the subject of marketable title which is on the Commission's agenda. Further consideration of this subject is awaiting the report of a committee established by the California Land Title Association to analyze the marketable title provisions of the Uniform Simplification of Land Transfers Act. When this report is received and the Commission begins its consideration of this topic, it would be the opportune time to consider expanding the scope of the study to deal with the matters raised by Professor Curtis.

Bankruptcy Related Revisions

Professor Richard M. Buxbaum, Boalt Hall, suggests that the Commission consider the changes in California law that will be necessary, particularly in the area of creditors' remedies, upon the eventual enactment of the new bankruptcy act (H.R. 8200). The staff believes that this should be done but would restrict the project to amendments of legislation that has been enacted on the recommendation of the Commission. The new bankruptcy act would, of course, be taken into consideration in drafting the comprehensive statute relating to enforcement of judgments.

Antideficiency Legislation

Professor Robert Ellickson, Stanford Law School, suggests the simplification of Code of Civil Procedure Section 580b, which he terms a "terribly confused partial ban on deficiency judgments for mortgages." Section 580b precludes deficiency judgments upon a default on a purchase money mortgage or deed of trust although a third-party lender is so restricted only where the property in question is a dwelling for not more than four families which is occupied at least in part by the purchaser. Professor Hetland has suggested that it is unnecessary to provide deficiency protection to commercial purchasers and that "it seems likely that the legislature will take the next step and withdraw the commercial purchaser entirely from the protection of the act." J. Hetland, Secured Real Estate Transactions § 9.20, at 205 (Cal. Cont. Ed. Bar 1974). The staff agrees that this is an area in need of study, but we think that a more comprehensive consideration of the entire area of foreclosure of mortgages and deeds of trust, default, power of sale, and antideficiency provisions is in order and would not suggest merely redrafting these confusing provisions. See Civil Code §§ 2924-2924h; Code Civ. Proc. §§ 580a-580d, 726-730. Several years ago, Professor William D. Warren, then a Commission consultant on creditors' remedies, now Dean of U.C.L.A. Law School, urged the Commission to undertake a study of this subject. Although the staff believes this is a topic needing attention, we suggest that commencement of a comprehensive study should not start until the work on the enforcement of judgments recommendation is near completion.

Revision of Lanterman-Petris-Short Act

Professor Grant H. Morris, University of San Diego School of Law, has suggested that the Commission consider whether the Lanterman-Petris-Short Act (Welf. & Inst. Code §§ 5000-5401) should be revised. At the September meeting, the Commission decided, during the discussion of the guardianship and conservatorship draft statute, that as a general policy the substance of the Lanterman-Petris-Short Act should not be altered. See the Minutes for the September meeting.

Reciprocal Enforcement of Visitation Rights

Mr. Richard P. Roggia suggests that the Commission study visitation rights where the custodial parent has removed the child from California. (See Exhibit 1.) Mr. Roggia suggests that visitation rights be made reciprocal in a manner analogous to the reciprocal enforcement of support. The authorization to study child custody and related matters would seem to comprehend this topic, and the staff suggests that consideration of this subject await the normal course of events in the progress of the child custody study. This would appear to be a matter that could be satisfactorily dealt with only in a Uniform Act.

Vested Rights and Land Use Controls

Mr. Richard S. Volpert has forwarded a note of the decision in Raley v. California Tahoe Regional Planning Agency, 68 Cal. App.3d 965 (1977), which held that neither the doctrines of equitable estoppel nor vested rights prevented the agency from revoking approval for a shopping center development where the developer had spent $150,000 in preparation for the project but had not begun actual construction. This decision relied on Avco Community Developers, Inc. v. South Coast Regional Com., 17 Cal.3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). Mr. Volpert would have the Commission study land use policy, apparently with the hope of changing the rules supporting decisions such as Raley. This subject is highly controversial and is somewhat related to the "down zoning" problem in inverse condemnation and might be studied in connection with down zoning if the Commission later decides that it will study this aspect of inverse condemnation law.

Community or Separate Nature of Money Loaned and Installment Purchases

Professor A. L. Jordan, Hastings College of the Law, suggests the Commission study "whether the inconsistency in community property law between installment transactions (Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (1926)) and borrowed money (Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 653 (1953)) should be reconciled by statute." Vieux holds that, where a spouse acquires equitable ownership of property before marriage but payments are made out of community funds after marriage, the community has an interest in the property which is in the same proportion as the amount contributed to the purchase price. Gudelj states that a loan based on the credit of separate property (as opposed to personal credit) is separate property and that the character of property sold upon credit depends upon whether the seller relied upon the purchaser's separate property or the community property in extending credit. The rules stated in Gudelj do not appear to grant any significance to the source of the funds used to repay the loan, contrary to Vieux. Does the Commission wish to study this matter?

Equal Management and Control of Community Property

Professor A. L. Jordon, Hastings College of the Law, suggests that the Commission study "whether the law regarding equal management and control of community property by husband and wife should be clarified a) between husband and wife or b) between the marriage and third party creditors." See Civil Code §§ 5125, 5127. One writer concludes that the Legislature intentionally left to the courts the delineation of the duties of each spouse in managing the property. See Comment, California's New Community Property Law--Its Effect on Interspousal Mismanagement Litigation, 5 Pac. L.J. 723 (1974). Other writers have urged legislative clarification. See Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1013-22 (1975); Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Cal. L. Rev. 1610, 1621-34 (1975). The experience in several other community property states which have enacted equal management and control legislation would provide

useful background in view of the lack of judicial guidelines in California should the Commission be interested in studying this topic. The staff believes it is better not to take on this subject at least until the courts have had a chance to deal with it.

Credit for Payments on Community Obligations Out of Separate Property

Mr. Thomas L. Simpson suggests that the Commission attempt to clarify the rules concerning the division of property where one spouse has used separate property to satisfy community obligations, particularly after separation but before trial. (See Exhibit 2.) In See v. See, 64 Cal.2d 778, 785, 415 P.2d 776, 51 Cal. Rptr. 888 (1966), the court stated:

> [A] husband who elects to use his separate property instead of community property to meet community expenses cannot claim reimbursement. In the absence of an agreement to the contrary, the use of his separate property by a husband for community purposes is a gift to the community. . . . The basic rule is that the party who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement between the parties to that effect.

In Beam v. Bank of America, 6 Cal.3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971), however, the court found the "basic rule" to be inapplicable since the husband had not consciously chosen to use his separate property, as opposed to available community property, to pay living expenses, the husband having assumed that all of the funds were his separate property.

The suggested study would be rather complicated inasmuch as it could involve the various presumptions concerning the nature of property, the principles of tracing, and the meaning of the principle of equal division of property.

Dismissal for Lack of Prosecution

Last year, Judge Philip M. Saeta suggested that the Commission study the provisions pertaining to dismissal for lack of prosecution:

> For some time now, I have thought that the dismissal sections of the Code of Civil Procedure need some working over. Sometimes cases on one section will be construed to be applied to other sections, and sometimes not. An example of a potential conflict is a comparison of CCP § 583(e) with § 581(a) and (b). Sometimes

there are exceptions to the application of the statute, and sometimes there are no exceptions, etc.

Has the Commission done anything, or, if not, could it be interested in redrafting all of these failure-to-prosecute dismissal sections?

At the September 1976 meeting, the Commission expressed interest in this topic but deferred considering it until it was determined whether the State Bar Committee on the Administration of Justice thought such a study was needed and, if so, whether CAJ would prefer to make the study or refer it to the Commission. We are informed that CAJ will consider this matter at their October 1977 meeting. If CAJ believes this is an appropriate matter for Commission consideration, does the Commission wish to undertake the study?

Contract Law

Professor Roscoe L. Barrow, Hastings College of the Law, makes the following suggestion:

> I should like to suggest a broad reexamination of the legislation relating to Contracts which was enacted in 1872 and based on the Field Code.
>
> As a newcomer to California, and a teacher of Contracts, it appears to me that the Field Code is outmoded. Changes in business institutions and the modes of contracting have resulted in interpretations of the Code which are the opposite of the language of the statute. Such judging wastes time for judges and lawyers and leaves parties in grave doubt as to their contractual relationship.
>
> It is appreciated that, in the case of uniform code law, such as the Uniform Commercial Code, coordination with other states is necessary to maintain uniformity. The standing committee for the UCC is helpful in that respect.
>
> We need something similar in the Field Code area.

The Civil Code in general and the contract provisions in particular have been subject to vigorous critical attack since as early as 1884 when John Norton Pomeroy wrote a series of articles on the Civil Code:

> A great source of doubt, uncertainty and possible error had been created, declared Pomeroy, by the Code Commission's "constant, but wholly unnecessary practice, of abandoning well-known legal terms and phrases, the signification, force and effect of which had long been settled and certain, and of adopting instead thereof an unknown and hitherto unused language and terminology"; by the incomplete and partial nature of the Code, which was limited on the whole to statements of general definitions and general doctrines, leaving unformulated the great mass of special rules applicable

> to particular circumstances; and by the "extreme conciseness and brevity" of expression uniformly employed by the codifiers—a technique which, to Pomeroy, "left it often very doubtful *what* doctrines and rules they intend to state." The absence of any amplifications, explanations, or illustrations of the various doctrines and rules "laid down in the most abstract manner" meant that "matters of the greatest importance are constantly left as inferences, and often as doubtful inferences."
>
> Buttressing his position with references to numerous specific provisions of the Code, Pomeroy further stated that there was "hardly a definition, or a statement of doctrine in the whole work, the full meaning, force and effect of which can be apprehended or understood without a previous *accurate* knowledge of the common law doctrines and rules on the same subject matter." Indeed, the preoccupation of the authors with abstract doctrines to the exclusion of the special detailed rules obtaining in varied factual circumstances meant that "the great mass of actual, practical rules of law and equity which immediately guide the courts in their work of adjudicating" were not expressed in the Code and frequently were not even included by necessary implication in what was expressed. "For such rules," he proclaimed, "the courts must go outside of the Code, and must find them in the pre existing and still existing common law or equity untouched or unaltered by the Code."
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> [Van Alstyne, The California Civil Code, in 6 West's Annotated California Codes, Civil Code 30 (1954) (footnotes omitted).]

As Professor Barrow points out, the law of contracts has continued to develop during the years since 1872 when the Field Code contract provisions were enacted. A review of a sample of contract cases by the Executive Secretary reveals that the courts appear to have relied much more heavily on the Restatement of Contracts in determining the California law of contracts than on the statutory provisions. In some areas, for example, the statutory provisions do not reflect developments in the law, such as the rules relating to third-party beneficiaries, and the courts have adopted the Restatement principles even though those principles are not reflective of the statutory provisions.

The Executive Secretary has long been of the view that the field of contract law is one that the Commission should study. The result of such a study would, however, not necessarily require a codification of all the rules of contract law in the statute. A possible alternative approach would be to provide that, except as otherwise provided by statute, the law of contracts is governed by the rules set out in the Restatement of Contracts. This scheme would not place any greater

burden on the statute user than the present provisions, which now require the user to resort to the Restatement in almost every case because the statutes lack detail and use 1872 concepts of contract law.

A study of California contract law would involve an examination of each of the Restatement rules, a determination whether the rule is consistent with California law, and, if the rule is not consistent with California law, whether the California law should be retained by specific provision or should be changed to adopt the Restatement rule. The American Law Institute is now engaged in preparing a new Restatement of Contracts and has already published tentative drafts of portions of the new Restatement. Accordingly, this is an appropriate time to request authorization of this study as a long-range, nonpriority study. The staff believes that the Commission could make a significant contribution in this area--one that would be as important as the well-received Evidence Code (which substituted modern evidence rules for the 1872 Field Code evidence rules). We also believe that the study would be an interesting one for the Commission and that there would be a number of law professors who would be more than willing to serve as consultants. Also the study would result in a modernization of a significant portion of the Civil Code--a necessary step if California is to ever have complete, substantive recodification of the Civil Code.

Statutory Construction Act

Mr. Lawrence Silver, of Loeb and Loeb, who teaches a course in legislation at Southwestern University School of Law, suggests that the Commission consider recommending a statutory construction act. This possibility was discussed at the September 1977 meeting when it was noted that the four basic codes--the Civil Code, Code of Civil Procedure, Probate Code, and Penal Code--lack the preliminary provisions and general definitions found in the other codes produced by the California Code Commission.

Government Code Section 9603 states that the "general rules for the construction of statutes are contained in the preliminary provisions of the different codes," so it does not appear that there are any statutes generally applicable to statutory construction in California. This might be a useful project, but the application of general provisions and

definitions to the four basic codes would require a section-by-section check to determine whether the use of the definitions in those codes would change the existing law.

Antenuptial Agreements

In Antenuptial Agreements Under California Law: An Examination of the Current Law and In re Marriage of Dawley, 11 U.S.F. L. Rev. 317 (1977), John G. Brance and Marc I. Steinberg suggest the liberalization of the law concerning antenuptial agreements. The authors note that the California Supreme Court's decision in Dawley has gone part way toward liberalizing the use of antenuptial agreements by disapproving dictum in an earlier decision that stated that, to be valid, an antenuptial agreement had to be made in contemplation that the marriage relation will continue until the parties are separated by death. The authors suggest that the strong public policy against agreements facilitating divorce is outmoded. In Dawley, the court relied upon an analysis of the objective terms of the agreement rather than the subjective intent of the parties, which may have contemplated a temporary marriage. The authors state that it is unclear whether Dawley permits any more than the definition by the parties of property rights upon dissolution. Important issues arise concerning the obligation of support and the custody of children. Is the Commission interested in studying this subject?

Insurance Law

Professor J. W. Whelan, Hastings College of the Law, suggests that the Commission study:

1. Whether the powers of the Insurance Department to regulate pricing and provisions of insurance policies should be increased.

2. Whether the California Insurance Code should be revised to improve its coherence and organization.

This study might be an appropriate one for the Law Revision Commission. Similar suggestions have been made in the past that the Commission study insurance law. The New York Law Revision Commission has, for a number of years, been engaged in a project to revise the insurance laws of the State of New York. A large amount of money has already been devoted to the New York project, but it is not yet near to completion according to the latest information we have received from New York.

The staff recommends against requesting authority to study the insurance law at this time. The primary reason is that the Department of Insurance during the last year has been subject to attack for its practices, and legislative hearings on these practices have been held and charges and countercharges have been made. The political and emotional factors that now exist would complicate an objective study and might cast a cloud of doubt concerning the Commission's motive in requesting authority to make the study. The staff believes that an appropriate time to request authority to make such a study, if such authority is to be requested, would be when the New York legislation has been enacted. We could then profit from the work of the New York Law Revision Commission and, by then, the present political problems should be resolved.

Enforcement of Restraining Orders to Curtail Domestic Violence

Mr. Arthur M. Bodin has suggested that the Commission consider the enforcement of restraining orders issued to curtail threatened violence in domestic relationships, specifically by adding a provision in the order directing any peace officer to enforce the order. The staff notes that Assembly Bill 1019 which deals with this subject matter was recently signed by the Governor. In view of the fact that the Legislature has just considered and acted on this subject, it does not appear to be an area where the Commission could hope to achieve new reforms.

Improvement Acts

California law contains many overlapping and inconsistent acts governing municipal improvements and the formation of special districts. In Kennedy v. City of Ukiah, 59 Cal. App.3d 545, 550 (1977), the court stated:

> The Legislature has set forth a variety of alternative methods for the establishment, maintenance and operation of municipal sewer systems. These include the Municipal Improvement Act of 1913, the Improvement Bond Act of 1915, the Community Facilities Law of 1911, the Revenue Bond Law of 1941, and the Sewer Revenue Bonds provisions of the Health and Safety Code. . . . In referring to these various acts, the court in Dawson v. Town of Los Altos Hills, (1976) 16 Cal.3d 676, 686 [129 Cal. Rptr. 97, 547 P.2d 1377], stated: "In summary, although the bewildering array of acts governing special assessments in general and sewer improvements in particular, each with its own distinctive scheme of procedure, might

well benefit from a comprehensive legislative reexamination with a view to simplification and unification, we find nothing in the present cluster of statutes which would preclude a local legislative body from proceeding in this area under any of the available acts. . . ."

This might be an area where a Commission study would be useful.

Absolute Devise and Purported Limitation

Professor Jesse Dukeminier, U.C.L.A. Law School, makes the following suggestion:

> An old rule of property law, set down by Chancellor Kent is: "A gift over on failure to alienate, following a gift of land in fee simple or of an otherwise absolute interest in personalty, is void; the prior gift is absolute." L. Simes, Future Interests 250 (2d ed. 1966). Hence a bequest of property "to A, but whatever is left at A's death to B" is an absolute gift to A. B's interest is void.
>
> This rule serves no modern purpose, and is only a trap for the will draftsman. See the dissent of Vanderbilt, C.J., in Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950). The legislature should clean out these traps for lawyers, which may well result in malpractice suits. I recommend this rule be abolished.

Vanderbilt's dissent in Fox v. Snow, supra, quotes Professor Gray as follows:

> It is often a question of the greatest difficulty to determine whether a testator has given a devisee a life estate with general power of appointment, or whether he has given him a fee with an executory devise over in case the first taker shall not dispose of his interest. If it were not for this rule, that question would almost never become material. But now that a testator's intention, if expressed in one form, cannot be carried out, while it can be, if expressed in another, the question becomes of vital importance, and consequently this arbitrary rule is responsible for an enormous amount of litigation.

Is the Commission interested in considering this matter?

Out-of-State Declarations Under Penalty of Perjury

Mr. Jordan A. Dreifus suggests that the Commission review the legislation relating to out-of-state declarations under penalty of perjury.

There are two possible defects in this legislation. First, the legislation permits use of an out-of-state declaration only if the law

of the state where the declaration is executed provides for the use of such declarations. This requires knowledge of the law of the various states and may preclude use of out-of-state declarations in California merely because the law of another state (the state where the declaration is executed) does not permit use of such declarations in that state. A federal tax return may be signed in a foreign country under penalty of perjury; it matters not what the law relating to declarations under penalty of perjury in that country is. It would greatly simplify the statute if use of out-of-state declarations under penalty of perjury were permitted in California without regard to the law of the state where executed.

The second problem is the sanction to be applied if a false declaration is used in California. The California statute apparently assumes that the prosecuting authorities in the state where the declaration was executed will prosecute the criminal action for perjury. Mr. Dreifus suggests that consideration be given to making it a California crime where the declaration is used, intended for use, or appears likely to be used under California law, or any rule, regulation, etc., made under California law.

The staff believes these problems merit study. See Exhibit 3 for Mr. Dreifus' letter containing further discussion.

Administrative Procedure Act

Mr. Herbert W. Nobriga, Director of the Office of Administrative Hearings, has forwarded copies of a report of his office (copy attached) and suggests that the Commission may be interested in studying the Administrative Procedure Act with a view toward extending its provisions to all state agencies. The staff thinks that this project, involving the interrelations between state agencies, involves policy issues the resolution of which would not be influenced by a Commission study and recommendation.

Attorney's Fees

Professor Paul Horton, University of San Diego Law School, suggests the following subject for Commission study:

> CCP § 1021 sets forth California's version of the general "American Rule" concerning allocation of attorneys fees among litigants in civil litigation. Since D'Amico v. Board of Medical

Examiners (1974) 11 Cal.3d 1, that statute has figured prominently in several important cases largely addressed to "equitable exceptions" to the American Rule.

I think CCP § 1021--and the "American Rule" in general--raises constitutional and administration-of-justice issues in California. Alaska, Washington and Oregon have abolished the "American Rule" by statute. The Law Revision Commission would do great service in studying CCP § 1021 and other attorneys-fees statutes with a view to their possible revision.

Section 1021 provides in relevant part:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties.

D'Amico discusses the "common fund" and "substantial benefit" exceptions to this rule and reserves the question whether the courts have the inherent power to award attorney's fees for oppressive and vexatious conduct by the other party. Following the decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), California courts have refused to recognize the private attorney general doctrine as the basis for an award of attorney's fees where no fund in created, stating that the recognition of the new principle is up to the Legislature or the Supreme Court. See Menge v. Farmers Ins. Group, 50 Cal. App.3d 143, 123 Cal. Rptr. 265 (1975); 4 B. Witkin, California Procedure Judgment § 134 (2d ed. Supp. 1977).

Limitations on Nuisance Actions

Professor Robert Ellickson, Stanford Law School, considers Code of Civil Procedure Section 731a to be "an overly onerous barrier to nuisance remedies." Section 731a reads as follows:

> 731a. Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply

> to the regulation and working hours of canneries, fertilizing plants, refineries and other similar establishments whose operation produce offensive odors.

Similarly, conduct done under the authority of a statute may not generally be held to be nuisance. See Civil Code § 3482. Section 731a has, for example, been successfully invoked as a defense in cases involving a cemetery and a drop forging plant (although in the latter case it was said that damages should be given to homeowners whose homes were damaged by the vibrations). The provision was unsuccessful to prevent injunctions against a music studio in a private residence or a chemical plant which permitted the escape of chlorine fumes. See generally 7 B. Witkin, Summary of California Law Equity § 107 (8th ed. 1974).

In view of the broad authority of the Joint Legislative Committee on Tort Liability, the staff does not believe that the Commission should study this topic.

Interpreters for Indigent Litigants

Professor Henry W. McGee Jr., U.C.L.A. Law School, makes the following suggestion:

> I believe the problem of interpreters in civil and criminal proceedings for indigent litigants requires study and a comprehensive statutory framework to resolve the problems caused by an increasing number of Spanish-speaking litigants.

He refers the Commission to Jara v. Municipal Court, 68 Cal. App.3d 673, 137 Cal. Rptr. 533 (1977) (hearing granted, May 26, 1977), which held that the due process and equal protection clauses of the state and federal constitutions require the appointment of an interpreter at public expense for an indigent civil defendant. Jara involved an action for damages growing out of an automobile accident. This topic is one that has been and is under active study by the Legislature and the Judicial Council. Accordingly, the staff recommends against the Commission becoming involved in the area, primarily because the basic problem appears to be a fiscal one. In fact, Governor Brown recently vetoed Assembly Bill 1599--a bill to establish a statewide training program for court interpreters and set up certification standards. "Adding another layer of bureaucracy to the Judicial Council, with annually esculatory costs, has not been justified," Governor Brown said in his veto message.

Verification of Pleadings

The principle of Federal Rule of Civil Procedure 11, which eliminates the requirement that pleadings be verified, was adopted in the new Eminent Domain Law in Section 1250.330, which provides:

> 1250.330. Where a party is represented by an attorney, his pleading need not be verified but shall be signed by the attorney for the party. The signature of the attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge, information, and belief there is ground to support it. If the pleading is not signed or is signed with intent to defeat the purposes of this section, it may be striken.

The Executive Secretary suggests that the Commission undertake a study to determine whether the substance of Section 1250.330 should be made applicable to civil actions generally. The drafting of a recommendation would be a fairly simple task. The decision whether to submit such a recommendation to the Legislature would be a controversial policy decision to be made after consideration of the comments of all interested persons and organizations.

Budgetary Regulations

Professor J. W. Whelan, Hastings College of the Law, suggests that the Commission study "whether there is a need to amend the California Government Code to reflect controls imposed by the Federal Government on states and localities under regulations such as the Federal Management Circular 74-7 (now under revision by the Office of Management and Budget) and other regulations." This does not appear to be a subject appropriate for Commission study.

Government Procurement

Professor W. Noel Keyes, Pepperdine University School of Law, has forwarded a copy of the Model Procurement Code for State and Local Governments--Preliminary Working Paper No. 2 and suggests that "law revision in the field of public procurement is vitally needed in California at both state and local levels." This would be a major study outside of the customary subject matter with which the Commission deals.

Local Government Law

Professor Joe H. Munster Jr., Hastings College of the Law, suggests a "complete revision of laws relating to local government units" and the

location of relevant provisions in one place in the codes. This would be a study of substantial magnitude and would require considerable resources and substantial Commission time over a period of many years. We are not persuaded that the objective sought to be achieved justifies expenditure of the time and resources required.

Judicial Qualifications and Removal

Professor William Weiner, Golden Gate University School of Law, suggests that the Commission study "upgrading the quality of the Bench and removal of incompetent judges." The staff does not believe that this is an appropriate subject for Commission consideration, particularly in light of the existence of the Commission on Judicial Appointments, the Commission on Judicial Performance, and the Commission on Judicial Qualifications. The State Bar also has an interest in this matter. Further, we doubt that the problem, if one exists, is a problem that will be solved by additional legislation, especially since both the State Bar and Judicial Council have had little success in obtaining legislative approval of recently sponsored bills relating to this matter.

Affidavit of Prejudice

Judge Vincent S. Dalsimer suggests that the Commission study Code of Civil Procedure Section 170.6 pertaining to affidavits of prejudice.

> This section has been abused in my opinion by certain public law offices in two separate ways. One is by ordering all deputies to affidavit a particular judge and thus putting that judge out of the criminal field. This also subjects that deputy to a charge of filing a false affidavit. Secondly, some offices require their deputies to obtain permission to file such affidavits.

The Commission has not been involved in the criminal procedure area since this area has been under study for many years by a joint legislative committee.

Employment of Temporary Teachers

Professor Jay E. Grenig, Pepperdine University School of law, suggests that the Commission consider studying the following topic:

> Education Code section 44917 through 44921, relating to the employment of temporary teachers, should be revised in order to remove the ambiguities and inconsistencies. For example, section 44920 provides that a temporary teacher employed for one complete school

year and reemployed for the following school year in a vacant position requiring certification is to be classified as a probationary teacher. Section 49918 contemplates reemployment of a temporary teacher for more than one year without granting probationary status.

The staff does not think this is a subject requiring Commission study. In 1976, the Education Code was completely reorganized (1976 Cal. Stats., Ch. 1010) and has been the subject of later amendments (1976 Cal. Stats., Ch. 1011; 1977 Cal. Stats., Ch. 36); it would be inappropriate to become involved in this subject at this time. We could send this suggestion to the Assemblyman who has been active in this area.

Zoning Law

Mr. E. Stanley Weissburg requests the Commission to consider legislation that would enable local governmental units to abolish zoning. See Exhibit 4. The staff does not believe this is a subject that is appropriate for Commission study primarily because it is of an exceedingly controversial nature, and a Commission study and recommendation in line with the suggestion would be unlikely to have much influence on the Legislature.

Unemployment Insurance Code

Miss Wanda Underhill suggests that the Commission study the Unemployment Insurance Code in an effort to reform provisions concerning retraining and to improve the clarity of forms under that code. She also suggests that a manual outlining state and federal unemployment insurance laws be prepared. This is a subject which would be better handled by the agencies that administer the Unemployment Insurance Code.

Appellate Procedure

Mr. George I. Hoffman has suggested that the Commission study ways to speed up the appellate process and also suggests that the constitutionality of statutes be determined immediately after enactment. (See Exhibit 5.) The staff does not believe that the Commission is the appropriate agency to attempt to deal with the pervasive problem of court congestion. We believe that the Judicial Council is the appropriate agency to make the suggested study.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

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JESS JOSEPH AGUILAR
LOUIS A. BASILE
RICHARD P. ROGGIA
KENNETH W. ROBINSON

August 1, 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

I understand you are soliciting suggestions from the Bar as to areas which may be ripe for legislative review.

As a lawyer who practices occasionally in the field of child custody and child visitation, I feel that legislation is in order specifying the rights and duties of the parties where the custodial parent has removed himself or herself from California, thus effectively denying visitation rights to the non-custodial parent, and petitions for support under the Uniform Reciprocal Enforcement of Support Act in some other state. In California, the Uniform Reciprocal Enforcement of Support Act is codified in Sections 1650 through 1697 of the Code of Civil Procedure. The Act provides that the denial of visitation is specifically not a grounds for reduction or suspension of child support payments. (CCP Section 1695).

The situation often arises when the custodial parent flees California with the children, does not advise the non-custodial parent of their whereabouts, forbids visitation and subsequently demands support under the reciprocal statutes. The California parent is thus obligated to pay support to an individual who has effectively denied him the opportunity to visit with his children and frustrated the purpose of the California Courts in awarding visitation rights to the non-custodial parent.

It is difficult to explain to a client how the States have entered into an agreement relating to the reciprocal enforcement

California Law Revision Commission
Stanford Law School

of support, but not as to the reciprocal enforcement of visitation rights. California Courts have attempted to rectify this and achieve an equitable solution, but are constrained by the provisions of this Statute. I believe that legislation alleviating this problem would be most helpful to the citizens of California.

Very truly yours,

RICHARD P. ROGGIA

RPR:df

cc: California Family Law Report
P. O. Box 2377
San Francisco, Calif. 94126

EXHIBIT 2

LAW OFFICES

Eldred & O'Rourke

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July 13, 1977

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Sir or Madam:

It has come to my attention, through the California Family Law Report, that you are seeking suggestions for statutory changes in the domestic relations area.

My entire practice is devoted to family law; and one of the most frequently encountered legal and practical problems is in the area of credit for payment made on community obligations through the use of separate property funds.

Obviously, these payments are most often made during the period from separation date to trial. It can, and does, take the form of mortgage payments, consumer credit payments, business obligation payments, etc.

Many of the judges and commissioners simply do not allow such credit to the paying spouse, and some do. Thus, the careful practitioner must advise his or her client not to make any such payments in the absence of a stipulation that credit can be given at trial. Yet, harassment from creditors or foreclosure is a most certain result.

To fill this apparent void in the statutory law, the trial lawyer must then meticulously trace each payment made from separation date; elicit testimony as to whether payments were voluntary; and then fit the evidence within the hazy parameters of See v See, In re Jafeman, and In re Mix. Given the broad discretion allowed under the Family Law Act, the judge decides whether to assign credit to "equalize the division of property", hardly a recognizable standard.

Again, this is an extremely common and practical situation which appears in every dissolution case. It seems ripe for legislative direction and any help from your organization would be appreciated by lawyers and litigants alike.

Yours very truly,

LAW OFFICES OF ELDRED & O'ROURKE

By: _____
Thomas L. Simpson

TLS/fa
cc: California Family Law Report

EXHIBIT 3

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CABLE ADDRESS: SCHWARD

June 27, 1977

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Use of Declarations Under Penalty of Perjury Executed Outside of California

Dear Mr. DeMoully:

Thank you for your letter of June 13, 1977.

I am aware of the amendment of CCP §2015.5. However, 28 USC §1746 (enacted by PL 94-550) emanated from a different California State Bar Committee, namely the Committee on Federal Courts of which I am currently an Adviser and was formerly the Chairman.

As you will note from the State Bar Committee Report to the Board of Governors, which is reprinted in the excerpt of the Congressional Committee Hearing I sent to you, the Committee on Federal Courts pointed out specifically that the federal perjury statute 18 USC §1621 expressly applies extraterritorially. The phrase: "This section is applicable whether the statement or subscription is made within or without the United States" was added by PL 88-619, 78 Stat. 995, the Act of October 3, 1964, which comprehensively amended various provisions of Title 28, U.S. Code to rationalize international judicial process and procedure.

I believe that the recent amendment of CCP §2015.5 is not a solution. For example, suppose a declarant in South Carolina signs a declaration to be used under California law or in a California court. It is ridiculous to assume the appropriate prosecuting authorities in South Carolina would devote time and resources to prosecuting such a false declaration even assuming that South Carolina had the counterpart of CCP §2015.5 and the counterpart of Penal Code §118. The ancient rule that one sovereign does not enforce penal laws of another expresses the common sense of the situation. South Carolina would have no interest whatsoever as a practical matter in perjury committed

in violation of California law (it is a somewhat different matter when an oath is administered by an officer of South Carolina; in that case, a false oath is a matter of interest to the law of South Carolina).

Turn the matter around the other way, and assume a declaration is executed in California for use in a court of another state in which California has no interest at all. Does the sanction of Penal Code §118 apply? I doubt it. Perhaps a California penal law could apply as a matter of constitutional power, but I doubt very much whether the terms of Penal Code §118 do in fact apply to such a case because the word "law" used in that section probably refers only to California law and not to the law of other sovereigns.

A better example is to consider a tax return signed in a foreign country. The concept of dispensing with an oath originated with collection of individual income taxes. 26 USC §§6065 and 7206 are the progenitors of CCP §2015.5, Penal Code §118 and PL 94-550. (The revenue code provision originated in the Individual Income Tax Act of May 1944, 58 Stat. 231, §11.) Suppose a Form 1040 fraudulently is signed in a foreign country. Certainly it is punishable under U. S. law and not under the law of the foreign country. Why should a false declaration in a judicial or other action be treated differently?

It is my opinion that the new provision in CCP §2015.5 is not very useful. Regarding declarations in fact executed in some other state for use in California, there may well be no sanction to assure truthfulness applicable to such declarations.

It would be much more sensible to broaden Penal Code §118 to extraterritorial application (beyond the limits of §27) where the declaration is used, intended for use, or appears likely to be used under California law, or any rule, regulation, etc., made under California law.

Very truly yours,

JORDAN A. DREIFUS

JAD:kl

EXHIBIT 4

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2 AUGUST 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

The Orange County Bar Bulletin for JULY 1977, carried your invitation for law revision commission study topics. I submit the following:

AMENDMENT TO THE GOVERNMENT CODE which will permit any general law or chartered city, city and county, or county, to abolish zoning, that is, regulation of private land use by government agency.

In support of this proposal consider the following:

State law makes zoning mandatory. The settled and unchallenged dogma is that government planning of land use is so vital to the public health, safety and welfare, and its benefits so obvious that no other system is tenable in this State.

The leading case, City of Euclid v. Ambler, was only decided in 1926. Since nearly all zoning regulation in California obtained real vitality in the era following World War II, one may question how the great cities of history and indeed of California, flowered and prospered without zoning. One may wonder whether a city or county in California which elected to abolish zoning, would end up more vital, prosperous, beautiful, proud and economically sensible than its sisters? Under current law one may not know the answer. Bernard Siegan in his study Land Use Without Zoning, a comparison of Dallas, zoned, and Houston, unzoned, suggests that Houston would prevail.

His conclusion does not surprise me. I have been a city and county planner and zoning administrator, a planning commissioner, a student, teacher, writer and lawyer in this general field. My personal conviction is that the arrogation to itself by government at all levels and ever increasingly at higher levels, of the power to dictate what is, in the final analysis, the exercise of taste as to the use of real property, is the single most stultifying and threatening force in American life today. The evidence is everywhere that a new feudalism is upon us under which the erstwhile freeholder must now go with hat in hand to innumerable public agencies which may, in the exercise of more and more nearly absolute discretion, confer upon the petitioner, after payment of extortionate money and time, a privilege to do with his land far less than was his absolute right only a few years ago. This quiet revolution is sapping the nation's fundamental creativity and depriving its citizens of civil liberty, such as to make the gains under the Warren Court on the criminal side of the justice scale inconsequential.

The rationale for conferring great powers on planning commissions and their staffs is that they have some special expertise. This is nonsense. There is no area of expertise in city planning as any practicing "professional" will admit in candor. Today's accursed urban sprawl is merely yesterday's planned neighborhood unit.

Lewis Mumford has called planning, "the modern corruption," but that is not the principle objection. Every age will have its bribe-taking Spiro Agnews. The corruption that is malignant is that government will not pay for what it can take for nothing. Power unrestrained produces tyranny. The last bastion of a freeholder is to exercise his own taste in the use of his property, so long as nothing more substantial than the contradictory tastes of society are affected.

Government has long since trespassed this boundary: It now imposes its collective and mediocre taste in architecture, in living arrangements, in "life style," in "open space," and even to the extent of freezing citizens in status quo by restricting their mobility as in Petuluma and San Juan Capistrano. Land tenure and dictation of its use is returning to the barony of government. Already in California half of the state is owned by the federal government. Further feudalization stultifies the creativity of a vigorous people who are manning the great and emerging Pacific Coast of the United States at a critical time in its history. The shift of national fortune to this coast anticipates the determinative role that it will play in our nation's history. If the vitality of this coast (California in particular) is to be sapped only a hundred-odd years after its birth at the very time when Japan and China are beginning to flex the technology, this nation is heading for trouble.

Urban planners of today give no heed to such matters. They have no training in economics. They are civil servants, fat and lazy. They toady to their masters, city councils and boards of supervisors, whose natural bent for power and influence makes them easy prey to the planner's subtle argument that the planners know the answers, and therefore should have veto power coupled with ad hoc discretion over every land use determination. Meanwhile, the planners spin out a mystique of "orderly" growth, "planned" development, ever more complex and unreadable zoning regulations, coupled with the exactions of ever greater amounts of tribute, accompanied by the litany that the emperor is getting gorgeous new clothes. In fact, the emperior is naked. In fact, far-sighted planning has been abandoned in favor of myopic and minute regulation and strangulation of creativity. Repression is the order of the day.

No committee ever wrote a symphony. The greatness and strength of America has come from individual freedom on the land. Notwithstanding popular propaganda about smog, pollution, density, congestion, conservation, waste, and other guilt-laden preoccupations, it is doubtful that any people at any time in human history have ever been

healthier or more prosperous than we in California. Governmentally imposed constipation can take no credit for it. In an earlier time, the great California water project and freeway system proved that a confident and far-seeing people can wisely provide for the future. Those two projects must surely be counted among the great engineering feats on this planet. We must have more of the same if we are not to be dubbed by history "a generation of pikers."

The best test of the truth is the power of an idea to get itself accepted in the free market place of ideas. In California, however, no challenge may be given to the orthodoxy that without zoning, without father-knows-best, our great cities would crumble to chaos and ruin. Ask not how they got so beautiful before there ever was zoning!

Such enabling legislation could permit enactment either by referendum, or ordinance followed by referendum, of the abolition of land use regulations. A decade or two of study and contrast thereafter should prove instructive.

Respectfully submitted,

E. STANLEY WEISSBURG
Attorney at Law

ESW:clp

Memorandum 77-64

EXHIBIT 5

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TELEPHONE
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July 11, 1977

Mr. Nat Sterling
Assistant Executive Secretary
California Law Revision Commission
School of Law
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Stanford, California 94305

I am writing, Mr. Sterling, at your suggestion after our talk by phone this morning.

I would like to call the Commission's attention to an area which I believe deserves priority attention.

I refer to creating a faster procedure for considering appellate matters. For example, in Sunday's Examiner there appeared an article on the Chowchilla kidnapping trial which has been delayed for nearly a year pending motions for a change of venue, etc. I understand that you have considered doing something like this in the condemnation field, viz. intermediate review of the right to take.

A closely related subject would be the early determination of the constitutionality of a statute. I feel that the constitutionality of a statute should be determined immediately after its enactment by way of a special assignment to appellate justices. Retired judges or justices might serve for this

purpose, as well as for the other purpose of determining intermediate appellate questions.

If I cannot persuade you to consider these subjects of primary importance, rather than put them off I wish to suggest that they nevertheless be referred to some auxiliary research team. I have access to a fund which might be available to provide some financial assistance.

I am that keen about this that I would be willing to meet with you for further discussions in this very important need for reform.

Thank you,

GEORGE I. HOFFMAN

GIH:tjd

CRISIS IN COURTS— NEW MOVES TO SPEED UP JUSTICE

A lawsuit these days can involve years of delays plus spectacular costs. Now, a potent alliance is working to streamline the legal system.

Congress, the Justice Department and the legal profession are combining in a drive to help the nation's courts cope with the growing tendency of Americans to sue.

The goal is to afford all citizens access to cheaper, speedier and more-efficient justice. Courts at State and federal levels would be streamlined, with some kinds of disputes bypassing the courthouse completely.

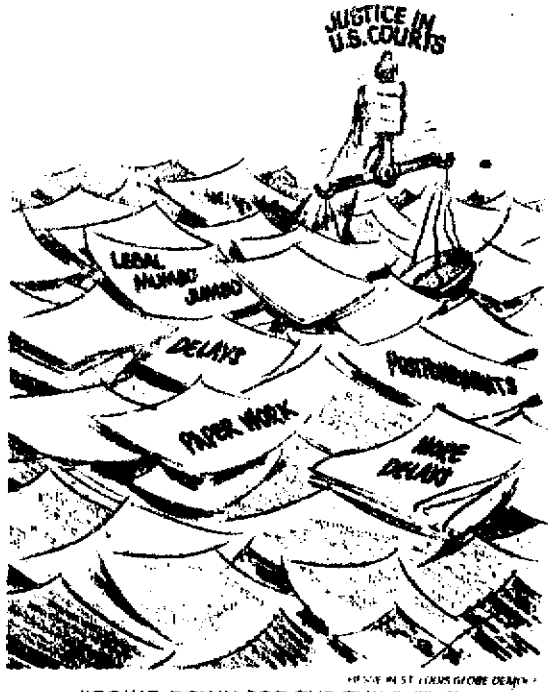
Chief Justice Warren Burger, who has been warning for years of a crisis in the courts, now has a formidable ally in Attorney General Griffin Bell. Congress also is showing new interest in pleas for more judges and more money to finance the federal judiciary.

Signs that the court-reform movement is picking up speed—

- Senate passage of a bill adding 148 judges to the federal district and appellate courts. The House is expected to pass a similar bill, possibly with somewhat fewer new judgeships.
- Bell's creation of a special branch in the Justice Department to concentrate on improving and speeding the delivery of justice.
- Continued funding of test programs in the State systems through the Law Enforcement Assistance Administration. Courts had been virtually shut out of LEAA programs until last year.
- Naming by President Carter of special commissions to select candidates for appeals-court vacancies on the basis of merit. First nominations are expected within weeks.
- Justice Department backing for bills in Congress that would expand the jurisdiction of federal magistrates, leaving judges free to handle the most important cases.
- Active support from the American Bar Association for court reform. The ABA sponsored a recent conference on resolving minor disputes without resort to formal court procedures.

For the courts, help is looming at a critical point. Especially in large cities, judges at all levels of the State and federal systems face backlogs of cases that could take years to come to trial.

Delay and failure to resolve disputes "can create festering social sores and undermine confidence in society," Chief Justice Burger recently told the ABA. In fact, say legal authorities, court procedures have become so complex and the accompanying delays so costly that justice too often has been priced out of reach for the average individual.



"GOING DOWN FOR THE THIRD TIME."

"The general public is keenly aware of the shortcomings of the justice system," Attorney General Bell said in a recent speech to trial lawyers. "In the civil area, many are denied meaningful access to justice by outmoded procedures and a court structure no longer adequate."

Waiting 21 months. Statistics compiled by State and federal court systems support Bell's claim. In Boston, Philadelphia and parts of New York City, personal-injury cases filed in State courts take four years to come to trial. The average plaintiff in Chicago must wait 27 months before a State court will hear his case. Houston residents face a year's delay. But the national average is 21 months.

Illinois courts experienced a 6 per cent increase in civil suits in 1975, reaching a total of 3.4 million, including traffic offenses. California courts reported five lawsuits filed for every 100 State residents in 1975.

Federal courts fare no better. Burger has contended for years that all courts, including his own Supreme Court, are overworked.

Pending appeals rose 11 per cent in federal circuit courts in 1976. District courts incurred a record 17 per cent increase last year in civil cases alone, continuing a long-term trend. In some areas of the country, a plaintiff must wait a year for his case to come to trial in federal court and another two years if the verdict is appealed.

Some judges predict that unless these burdens on State and federal courts are alleviated, there is a real danger that routine civil suits will never be heard.

James R. Browning, chief judge of the federal appeals court on the West Coast, recently told Congress that "in the foreseeable future" civil cases that aren't given special priority by law won't be heard on appeal in his court.

William P. Hogoboom, who runs a 171-judge city court in Los Angeles, says that no civil case will be heard in his system by 1978 unless some means is found "to avert a complete breakdown in our civil courts."

Criminal cases also crowd court dockets but are given priority because of the constitutional requirement of a speedy trial, pushing the noncriminal suits further behind.

Many reasons are offered for America's growing trend to sue.

"We're getting so many things in courts now we didn't used to get," laments an Illinois court official. Chief Justice Burger says that "issues are being daily presented to and decided by courts that 20 years ago—or even 10—were rare or unknown."

Social Security complaints and suits seeking access to government files are increasing rapidly. Federal and State environmental laws have resulted in a new wave of litigation unheard of a decade ago. Individuals are filing more claims involving race, sex and age discrimination. Civil-rights cases alone now account for 10 per cent of the federal court load.

Outlook in Congress. Major help for the federal bench is in sight as the bill setting up more judgeships moves through Congress.

With a Democratic President holding power in the White House, the Democratic Congress is now more inclined to add judges for federal courts than it had

been through the eight years of Republican Administrations.

Most, but not all, of the new district judges will be selected in the traditional political fashion as Senators reward friendly lawyers for past political support with lifetime appointments to the federal bench. Senators from 14 States, however, have agreed to set up advisory panels to recommend candidates on the basis of merit. Carter has initiated similar panels of lawyers and laymen in the 11 appeals-court jurisdictions to select nominees for circuit judgeships.

These panels already have recommended three to five names for several circuit vacancies. The White House has yet to select any for formal nomination, but a Justice Department source says that the lists include "excellent" candidates from both political parties. The source adds that names forwarded by Senators for district-court vacancies generally reflect concern for quality.

Role of magistrates. If Congress approves a Justice Department proposal introduced in mid-May, federal magistrates will have expanded powers to rule in disputes involving money and in virtually all criminal-misdemeanor cases where maximum sentences are jail terms of less than one year.

Magistrates are lawyers who can be hired without special permission from Congress. They are paid less than judges and presently can rule only in minor cases or issue warrants. Attorney General Bell estimates that, with broadened authority, they can relieve judges of about 16,000 cases annually.

But the most acute problems in overcrowding are in the 50 State court systems and in thousands of city and county jurisdictions. Bell estimates that 95 per cent of all cases are heard there. Permanent relief must come from State legislatures. Bell believes that the Justice Department should take a leadership role at the local level by emphasizing the importance of court reform and setting an example for States to follow.

More directly, Bell's special branch for improving the courts has completed plans for experimental neighborhood justice centers. These will be financed by the Federal Government in three major cities. Their progress will be monitored by the Justice Department. If they are successful, they will be duplicated elsewhere.

Assistant Attorney General Daniel Meador, who heads the branch on judicial improvements, says these centers will divert disputes from the courts. They will house neutral decision makers—both lawyers and laymen—to help resolve informally consumer complaints and neighborhood disputes without the time and cost of a trial. Neither side in a dispute could be represented by a lawyer—which should permit rapid, face-to-face settlements.

Informal means of settling disputes are a major subject when court reform is discussed. Legal experts contend that the nation can't continue meeting the problems of crowded courts simply by hiring more judges.

"This country already has more judges and more courts than anyone else in the world," says Maurice Rosenberg, professor of law at Columbia University. "We can't increase the courts in an unbounded way without cheapening the currency of the process."

"The harsh truth." Small-claims courts have provided some relief for settling small disputes. But they, too, have become encrusted with costly and time-consuming procedures. "The harsh truth is," Chief Justice Burger told the ABA, "that unless we devise substitutes for the courtroom processes, we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated."

While there is great enthusiasm for removing disputes from the courtroom's formality, there also is fear of creating a dual system of justice—one for citizens who can afford a full-scale trial and another for those who cannot.

Meador, as one responsible for the Justice Department's judicial policy, believes that such fears are legitimate. But he concludes that the nation "must distinguish between access to justice and access to courts. If the only access is in a courtroom, a person may not get justice at all because of expense and delay."