Admin. October 25, 2002

# Second Supplement to Memorandum 2002-38

## New Topics and Priorities

### PROBATE CODE TECHNICAL CORRECTIONS

In Memorandum 2002-38, the staff notes two instances of technical corrections that should be made to the Probate Code. See discussion of "Share of Omitted Spouse" at pp. 18-19 of that memorandum.

We have now received from John Hanft, Director of the Witkin Legal Institute, a list of about a dozen erroneous section references he has discovered in the Probate Code. He notes, "I've been doing a fair amount of work on the Probate Code recently. I don't know if the Commission has any plans for a clean up bill, but I've been keeping the enclosed notes for you on suggested changes just in case."

This would be a simple matter to take care of. It would require little staff or Commission resources, and could be squeezed in easily among larger projects. It would make a nice, modest Probate Code cleanup package that would require minimal work but would be helpful to practitioners. It probably could be done in time for the 2003 session. **The staff recommends that the Commission take care of this matter.**

### MEDI-CAL LIEN ON PROPERTY PASSING BY JOINT TENANCY

The First Supplement to Memorandum 2002-38 notes the suggestion of Richard Haeussler that recordation of an affidavit of death of a joint tenant should trigger a process whereby the Department of Health Services (DHS) receives notice and is required to file any Medi-Cal lien claims. The staff's reaction is that, while the suggestion makes some sense, the Commission has too many other projects on its platter at the moment. The staff proposes to forward Mr. Hauessler's suggestion to DHS, which may well want to pursue the concept.

We have received a followup email from Mr. Haeussler (9/10/02): "I hope that the commission will consider it, and discuss the issue with the DHS as they

have a job which I think is based upon Federal Law without the tools to implement it."

## PROTECTION OF PERSONAL INFORMATION

In the First Supplement to Memorandum 2002-38, we note the passage of ACR 125 and the funding for the financial privacy study. We also note the need to tie the funding to the study. Attached as Exhibit p. 1 is a copy of a letter we have received from Assemblymember Lou Papan, outgoing Chair of the Assembly Banking and Finance Committee, making that connection.

The staff has suggested elsewhere that we initiate this project with a one-day session devoted exclusively to the matter. See Memorandum 2002-49 (meeting schedule).

## ATTORNEY-CLIENT PRIVILEGE

Memorandum 2002-38 reviews the suggestion of Gerald H. Genard that the Commission resolve the inconsistency between Business and Professions Code Section 6068(e), which requires an attorney to maintain the confidentiality of client information, and Evidence Code Sections 956 and 956.5, which provide exceptions to the attorney-client privilege. The staff in the memorandum suggests that clarification is unnecessary (although at least one appellate court has noted the facial inconsistency).

As it turns out, this issue has received recent attention in an MCLE ethics article — Selegue, "Ethics 2000", *California Lawyer* 41-43 (October 2002). The article points out the broad confidentiality mandate of the State Bar Act and the narrower scope of the evidentiary privilege. A copy of the article is attached as Exhibit pp. 2-4. The article notes changes in ABA Model Rules of Professional Conduct, which would expand the situations in which an attorney could disclose client information to protect third parties from death or bodily injury.

## SCOPE OF MOTION TO SUPPRESS EVIDENCE (PENAL CODE § 1538.5)

Memorandum 2003-38 reviews Judge Stirling's suggestion that Penal Code Section 1538.5 be broadened beyond its Fourth Amendment limitation. He would permit the defense to raise any suppression of evidence issues resting on Fifth and Sixth Amendment or other constitutional grounds under that procedure, and

not limit it to a Section 995 motion. The staff in the memorandum expresses apprehension about this project.

We have received an email from Judge Stirling (9/25/02) making the pitch for the Commission to take up the matter:

> 1538 is limited in its application to search and seizure evidence issues.
>
> It is a wonderful mechanism because it is a noticed motion and gives the defense an early opportunity to challenge, usually dispositively, important, and mostly the only, evidence.
>
> The prosecution is benefited by early resolution also. Our City Attorney and District Attorney have hundreds of thousands of cases to process. Early resolution is helpful to them to because if they win the motion, they are more likely to obtain a settlement than have to go to trial months later.
>
> Everyone wins including most importantly justice.
>
> However, for some reason that I cannot fathom, 1538 is not available for Miranda Issues and other constitutional issues. It should be.
>
> Miranda can now only be challenged three ways: First and most commonly through the backdoor via a 995 motion which is really to challenge the sufficiency of the preliminary hearing.
>
> 995 is an old superior court check on the municipal court magistrates. 995 only gets to Miranda issues by challenging the preliminary hearing itself.
>
> That means it is only for felonies (for the most part) and the resolution must await the prelim and the 995 motion opportunity that doesn't occur until even later. This is unnecessary delay.
>
> Miranda and any other constitutional evidentiary issues should be just as addressable in a timely manner as search and seizure.
>
> The other two ways are: as a common law motion which most lawyers probably don't know about or via an in limine motion at trial.
>
> This is the entire issue. I know of no downside.
>
> If you recommend adding the option, there is no mandate that any attorney or agency change anything that they are doing.
>
> If they don't want to take advantage of the availability of a mature process, that is up to them.

## CRIME VICTIMS RESTITUTION (PENAL CODE § 1202.4 ET AL.)

Memorandum 2002-38 reviews the suggestion of Judge Stirling that the Commission revise the various victims' restitution laws. The staff suggests in the memorandum that this is an important project, but due to current workload, it

may be wiser to revisit the matter in a few years — perhaps by then someone else will have done the necessary clean up job.

In this connection, it is noteworthy that legislation was enacted this session to address procedures of the California Victim Compensation and Government Claims Board. The legislation was developed by Professor Kelso's Capital Center for Government Law and Policy. Among other matters, the legislation revises criteria for application and verification processes, the scope of compensation for emergency awards, procedures for hearings, and provisions relating to publicizing the program.

## WRITS OF ASSISTANCE IN EMINENT DOMAIN

Under eminent domain law, a condemnor may obtain an order before or after judgment entitling it to possession of the property. If the property owner does not relinquish possession, the order is enforceable by ordinary civil process, i.e., a writ.

We have received a letter from the California State Sheriffs' Association noting that the ministerial duties of a levying officer, when executing a writ of assistance issued in an eminent domain lawsuit, are not adequately codified. "There are no statutory provisions governing the form or content of a writ of assistance, the manner of giving notice, the method of enforcement or even the designation of a levying officer." Exhibit p. 5.

The Sheriffs' Association has drafted several proposals intended to address the concerns of both the levying officer and the parties to an eminent domain proceeding. However, the Association believes the Commission is best suited to act in this area, and requests that the Commission recommend appropriate legislation to improve the procedural framework for the execution of a writ of assistance by a levying officer.

The staff notes that this proposal touches on two areas of historical involvement by the Commission — eminent domain law and enforcement of judgments. In fact, we have recently completed projects for technical and minor substantive cleanup of both areas.

The staff's concerns with the present proposal are twofold — (1) limited resources, and (2) whether the magnitude of the problem is sufficiently great in light of our limited resources. That having been said, this would not be a major project to undertake, particularly with the active involvement and assistance of

the Sheriffs' Association. Our contacts with practitioners suggest that this problem arises only in a small percentage of cases, but when it does it is difficult to deal with. **The staff suggests that the Commission consider the matter on a low priority basis.**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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# Assembly
# California Legislature

LOUIS J. PAPAN
ASSEMBLYMEMBER, NINETEENTH DISTRICT

COMMITTEES:
CHAIRMAN
BANKING AND FINANCE
MEMBER
APPROPRIATIONS
BUDGET
UTILITIES & COMMERCE

October 2, 2002



Mr. David Huebner, Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Chairman Huebner:

Please see the enclosed copy of ACR 125 (Papan), Resolution Chapter 167, Statutes of 2002, which asks your commission to study and make recommendations related to the protection of non-public personal financial information. Financing for the study is found in Section 22 of the budget trailer bill AB 1768 which increases the amount appropriated in Item 8830-001-0001/ Schedule 1 of the Budget Act of 2002 (AB 425) from $570,000 to $645,000. The additional $75,000 is for the first year implementation of ACR 125.

It is the Legislature's intent to appropriate an additional $75,000 in the 2003 - 2004 budget year to cover the second year of the study. If you have any questions, please contact me or Bill George of my staff at (916) 319-3081. Thank you for your assistance with this very important topic.

Sincerely,

Louis J. Papan

cc: Nathaniel Sterling, Executive Secretary
Patricia Wiggins, Chairwoman, Assembly Banking and Finance Committee

EX 1

# Ethics 2000

BY SEAN M. SELEGUE

**It can be difficult to keep up with all of the** changes and proposed changes to the ethics rules governing our profession. The American Bar Association Ethics 2000 commission conducted a sweeping study of the ABA Model Rules of Professional Conduct, leading to the ABA's official approval of a revised edition last February. Although California's ethics rules are often different or even conflicting, California lawyers can nonetheless be affected by the ABA Model Rules because California courts may look to them for guidance when there is no direct authority in California and no conflict with California public policy. *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 656. In addition, California's Commission for the Revision of the Rules of Professional Conduct is studying the new ABA rules with the aim, among others, of eliminating "unnecessary differences" in professional responsibility standards between California and other states. Furthermore, California lawyers who work on matters in other states can find themselves subject to those states' versions of the ABA rules.

## CONFIDENTIALITY

California law is more protective of client confidentiality and attorney-client privilege than many other states and the federal court system. A California lawyer's ethical duty of confidentiality is governed by section 6068(e) of the Business and Professions Code, which among other things requires an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." That statutory duty has no express exceptions, unlike the attorney-client privilege (see Evid C §§956–962). The duty of confidentiality governs a lawyer's conduct in all contexts, whereas the attorney-client privilege is a more narrow rule that permits a lawyer and a client to refuse to reveal privileged communications when called to do so under subpoena or other legal compulsion.

The Ethics 2000 commission proposed a number of significant amendments to Model Rule 1.6, the ABA equivalent of section 6068(e). Some of them were not controversial and, in fact, updated or clarified the rule, typical of Ethics 2000's changes. For instance, new rule 1.6(b)(2) codifies the long-standing consensus that an attorney may seek legal advice about his or her own ethical duties even if the attorney must divulge confidential information to the attorney's own lawyer.

However, Ethics 2000's proposals concerning disclosure of confidential information by attorneys to protect third parties from harm led to a vigorous debate at the ABA House of Delegates, which must approve changes to the ABA Model Rules. Ethics 2000 proposed to expand the situations in which an attorney governed by the Model Rules could disclose client information to protect third parties from death or bodily injury. Under the then-existing rule 1.6, an attorney could reveal such information only to prevent a client from committing a criminal act that the attorney believed would result in imminent death or substantial bodily injury.

The commission sought to eliminate *imminence* and *criminality* as limitations to an attorney's power to disclose, replacing those tests with one permitting disclosure if the attorney believes it necessary to prevent "reasonably certain death or substantial bodily harm." The proposal posited as an example an attorney who learns that a client has contaminated the environment. Under the Ethics 2000 proposal, rule 1.6 would permit the attorney to breach confidentiality to protect the public from a substantial risk, even though the contamination is not the result of a criminal act. Opponents of the change contended that the revised rule would transform lawyers into undercover informants, thus impairing the willingness of clients to confide in their attorneys, and that the rule handed over too much power to the attorney, who could make a disclosure based on incorrect conclusions. After debate, the House adopted the commission's proposed change by a margin of only a few votes. ABA Model Rule 1.6(b)(1).

Sean M. SeLegue is a shareholder at Rogers Joseph O'Donnell and Phillips in San Francisco.

The Ethics 2000 commission also recommended changing Rule 1.6 to permit an attorney to reveal confidential information to prevent a client from committing financial fraud. The House voted that down by a two-thirds margin. The commission then withdrew an even broader proposal to permit attorneys to "mitigate or rectify" prior frauds by breaching confidentiality.

It is unclear what effect the new ABA rule on confidentiality will have, in light of the confusing patchwork of rules on this topic currently in force around the country. Many states already permit a lawyer to make a disclosure in certain circumstances to protect third parties from death or serious bodily injury, as does ABA Model Rule 1.6(b)(1). A few states actually require such disclosure. See, for example, Connecticut Rule Prof Cond 1.6(b); Texas Discip Rule Prof Cond 1.05(e). Many states already permit lawyers to reveal confidential information to prevent the client from committing any crime, which would include a criminal fraud. See New York Discip Rule 4-101(c)(3). Most states follow the ABA proposals generally but amend particular rules, and the confidentiality rule is the one most often tweaked on a state-by-state basis. See Morgan & Rotunda, *Selected Standards of Prof. Resp.* (Foundation Press) (summary of state confidentiality rules).

Even while the new ABA Model Rules are being considered by the states, the proponents of relaxed confidentiality have gained strength in a new forum: Congress. The Sarbanes-Oxley Act of 2002, also known as the Accounting Reform Act, includes some last-minute provisions affecting lawyers, including one requiring corporate counsel to report violations of securities law to top officials in the corporation. Pub L No. 107-204, §307. That does not imperil client confidentiality, because the required disclosure remains within the corporation, but the legislation also calls on the Securities and Exchange Commission to promulgate new standards of conduct for attorneys practicing before that agency. See In House, "Full Disclosure," this issue.

Here in California, it is settled that section 6068(e) prohibits a lawyer from disclosing confidential client information to protect a third party from a client's planned or already-completed financial fraud. State Bar Formal Ethics Op No. 1996-146. But it is less clear whether a California lawyer may ethically disclose information to protect third parties from death or serious bodily injury. Under Evidence Code section 956.5 "[t]here is no [attorney-client] privilege if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." That is an exception to the attorney-client privilege, which normally comes into play only when a lawyer or client is called to give testimony. Three times since 1993 the California Supreme Court has rejected a proposed ethics rule that would have incorporated an exception to the duty of confidentiality along the lines of section 956.5. Most observers believe that the high court was concerned about adopting a rule that would conflict with the statutory duty of confidentiality in section 6068(e).

The only court decision to interpret section 956.5 is *People v Dang* (2001) 93 CA4th 1293. There, the court of appeal applied section 956.5 to overrule a criminal defendant's objection to his former defense attorney's testimony. The attorney reported the client's threats to harm witnesses and himself to the district attorney and was relieved as counsel. The court of appeal affirmed the trial court's decision to admit the attorney's testimony about the threats, reasoning that section 956.5 expressly permitted the testimony.

*Dang* did not address the propriety of the attorney's original disclosure of his client's threats but stated in dicta that the various statutory exceptions to privilege apply to the duty of confidentiality. 93 CA4th at 1298–1299. If taken to its logical extreme, *Dang*'s dicta would drastically alter the duty of confidentiality in California and overrule the express position of the State Bar Ethics Committee (Formal Ethics Op No 1996-146).

**If taken to its logical extreme, *People v Dang* would drastically alter the duty of confidentiality in California.**

## FALSE TESTIMONY

Litigators face a special problem when they believe that a client has given false testimony, because the lawyer has a duty not to mislead the judge or jury with a false statement of law or fact (see Cal Rule Prof Cond 5-200). The lawyer should counsel the client to correct the testimony and, if the client refuses, the lawyer should seek to withdraw. If the lawyer's effort to withdraw is unsuccessful, then the lawyer should avoid participating in or relying on the false testimony. For instance, the lawyer may not rely on the false testimony in arguing to the court or jury. *People v Gadson* (1993) 19 CA4th 1700, 1710–1711 & n6.

Special rules apply to criminal cases, in which the courts recognize a tension between the defendant's right to testify in his or her own defense and a lawyer's duty to avoid presenting false evidence. Recent California cases discourage defense counsel from withdrawing, preferring instead that defense counsel allow the client to testify using a narrative approach that does not make the lawyer a participant in the client's false testimony. See *People v Johnson* (1998) 62 CA4th 608; *Gadson*, 19 CA4th 1700; MCLE, "The Ethics of Criminal Defense," January 2001. The ABA rules, by contrast, prohibit a lawyer from putting a criminal defendant on the stand if the lawyer *knows* that the testimony will be false. A *reasonable belief* in falsity is not enough to refuse to call the client. ABA Model Rule 3.3, comm 7 & 9.

California and the ABA differ over what a lawyer should do when he or she learns that the client has given false testimony. In California a lawyer facing this problem may not disclose the lawyer's view about the testimony to the opposing party or the court. *Johnson*, 62 CA4th at 623–624. The ABA approach is quite different. If the lawyer's client, or any witness called by the lawyer, has submitted evidence that the lawyer learns is false, revised ABA Model Rule 3.3 requires the lawyer to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

## CONFLICTS OF INTEREST

The ABA House of Delegates considered several significant changes to the rules about conflicts of interest. The House adopted the commission's proposal that clients' informed consents under rules 1.7 and 1.9 be "confirmed in writing." That means that the attorney's disclosure of the conflict to the client and the client's consent may both be given orally, so long as the attorney sends a confirming letter to the client. Under the old Model Rules, most disclosures and consents to conflicts could be entirely oral. Thus, the ABA moved closer to the California conflicts rules, which require all disclosures and consents to be written. However, the California rules are much more specific about when disclosure and consent are required. Compare ABA Model Rule 1.7(b) with Cal Rules of Prof Cond 3-310(B), (C).

Second, the House debated whether to change the ABA's view that a parent corporation and its subsidiaries are generally deemed to be separate entities for conflicts purposes "unless the circumstances are such that the affiliate should also be considered a client of the lawyer, [or] there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client." See ABA Model Rule 1.7, comm 34. The House voted by a sizable majority to retain that view.

In California a parent corporation and its subsidiary are generally considered to be separate entities for conflicts analysis. As to the exceptions, one appellate opinion states that parents and subsidiaries are considered separate entities for conflicts purposes unless one is the alter ego of the other. *Brooklyn Navy Yard Cogeneration Partners v Superior Court* (1997) 60 CA4th 248. Another decision looked to the ABA approach for guidance, stating that a parent and its subsidiary are considered one and the same for conflicts purposes if they share a "unity of interests," which is a broader exception. *Morrison Knudsen Corp. v Hancock, Rothert & Bunshoft* (1999) 69 CA4th 223. One federal district court has followed *Morrison Knudsen*, stating that *Morrison Knudsen* is the more appropriate test when a lawyer has obtained confidential information pertinent to the new matter. *Huston v Imperial Credit Comm. Mortgage Inv. Co.* (CD Cal 2001) 179 F Supp 2d 1157, 1175.

Third, the House rejected the commission's proposal to permit law firms to use ethics walls to handle conflicts arising from lateral attorneys who move from one private firm to another. Model Rule 1.10 does not permit ethics walls as a means to control the automatic imputation of conflicts from one attorney at a firm to all attorneys in a firm, although some courts have recognized such walls as a defense to disqualification motions.

California does not have a rule of professional conduct on imputed conflicts. Instead, the issue is governed by case law. A brand-new court of appeal decision acknowledges that law firms may establish an ethics wall around a new attorney to prevent that attorney's conflicts from being imputed to the new firm. *Panther v Park* (2002) 123 Cal Rptr 2d 599. *Panther* follows on the heels of a similar Ninth Circuit decision. *In re County of Los Angeles* (2000) 223 F3d 990, 995. Both *Panther* and the Ninth Circuit pointed to the California Supreme Court's decision in *People ex rel Dep't of Corps. v Speedee Oil Change Systems, Inc.* (1999) 20 C4th 1135, 1151, which hinted that ethics walls might serve the same prophylactic purpose as imputed disqualification.

These recent decisions call into question some older court of appeal decisions that held that firms could not unilaterally establish ethics walls to prevent having conflicts imputed from one attorney to the rest of the firm. See *Rosenfeld Constr. Co. Inc. v Superior Court* (1991) 235 CA3d 566; *Henriksen v Great American Sav. & Loan Ass'n* (1992) 11 CA4th 109, 115–116. Under these older cases, the recognized exceptions pertained mainly to former government attorneys. See *Higdon v Superior Court* (1991) 227 CA3d 1667, 1680.

*Panther* noted that a rigid rule prohibiting ethics walls "does not comport with the realities of today's legal world and the increased mobility of lawyers among firms and can cause unnecessary serious hardship for the lawyer, the firm, and particularly the firm's clients, who bear the burden of losing the counsel of their choice when the firm is vicariously disqualified." This is a developing area in California and one likely to be examined closely by our own Commission for the Revision of the Rules.

## NEW RULES

The ABA House of Delegates approved several brand-new rules, some of which reflect the increasing tendency of the ABA Model Rules to be a minitreatise on the law governing lawyers, in contrast to the more narrowly written California rules, which are intended to serve primarily as disciplinary rules. New ABA rule 1.18 provides that a prospective client who interviews but does not retain a lawyer will receive some but not all of the protection afforded clients and former clients.

And the House approved a new version of rule 2.4, which requires lawyers who serve as third-party neutrals, such as mediators and arbitrators, to make sure their neutral status is understood. For new California ethics rules applying to mediators and arbitrators, see Cal Rules of Court, Appendix, Div VI. For new California rules applying to court-appointed referees, see MCLE, "Referees Under New Rules," February 2002.

What's next? It appears likely that states will continue to adopt the ABA rules, with variations, especially on hot-button issues such as confidentiality, conflicts of interest, and screening.

# California State Sheriffs' Association

*Organization Founded by the Sheriffs in 1894*

September 20, 2001

Law Revision Commission
RECEIVED
SEP 21 2001
File:

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Attn: Nathaniel Sterling,
Executive Secretary

Dear Mr. Sterling:

The ministerial duties of a levying officer, when executing a writ of assistance issued in an eminent domain lawsuit, are not adequately codified. There are no statutory provisions governing the form or content of a writ of assistance, the manner of giving notice, the method of enforcement or even the designation of a levying officer. California State Sheriffs' Association's (CSSA) civil procedure committee has drafted several proposed law revisions (attached) that address the concerns of both the levying officer and the litigant in an eminent domain action. However, the Law Revision Commission is best suited to research the issues, seek feedback from the public and draft enabling legislation. Consequently, it is requested that the Law Revision Commission consider the proposed law revisions and seek legislation to improve the procedural framework for the execution of a writ of assistance by a levying officer.

CSSA's civil procedures committee provides support to sheriff and marshal personnel throughout the state on matters relating to civil law enforcement. The committee is composed of eleven members from sheriff and marshal offices with extensive backgrounds in civil procedure and is responsible for maintaining and updating the *Civil Procedural Manual*, which is widely used by attorneys as well as levying officers.

If you have any questions please feel free to contact the committee secretary Sgt. Michael Torres, Civil Advisor Section, 4000 S. Fremont Avenue, Unit 9, Alhambra, CA 91803; 626-300-3128.

Sincerely,

Harold N. Barker
Sheriff, El Dorado County
Civil Procedure Committee Chair



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# Proposed Amendments/Additions The Code Of Civil Procedure, Part 3, Title 7 Of The Eminent Domain Law.

## CHAPTER 6.
## DEPOSIT AND WITHDRAWAL OF PROBABLE COMPENSATION; POSSESSION PRIOR TO JUDGMENT

### ARTICLE 3. POSSESSION PRIOR TO JUDGMENT *(shown in part)*

**1255.460**. (a) Upon ex parte application, the court shall make an order authorizing the plaintiff to take possession of the property if the court determines that the plaintiff has deposited probable compensation pursuant to Article 1 (commencing with Section 1255.010) and that each of the defendants entitled to possession has done either of the following:

(1) Expressed in writing his willingness to surrender possession of the property on or after a stated date.

(2) Withdrawn any portion of the deposit.

(b) The order for possession shall:

(1) Recite that it has been made under this section.

(2) Describe the property to be acquired, which description may be by reference to the complaint.

(3) State the date after which plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the date stated by the defendant or, if a portion of the deposit is withdrawn, the earliest date on which the plaintiff would be entitled to take possession of the property under subdivision (c) of Section 1255.450.

SECTION 1255.465 IS ADDED AS FOLLOWS:

**1255.465**. (a) The plaintiff shall serve a copy of the order for possession upon each defendant and his attorney, either personally or by mail:

(1) At least 30 days prior to the date possession is to be taken of property lawfully occupied by a person dwelling thereon or by a farm or business operation.

(2) At least 10 days prior to the date possession is to be taken in any case not covered by paragraph (1).

(b) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

(c) If any of the defendants or occupants holding under the defendants do not vacate the property within the time prescribed in (1) or (2) of subdivision (a) of this section, the plaintiff may apply for a writ of assistance requiring the sheriff or marshal to remove the defendants and occupants from the property as directed by the writ and place the plaintiff in possession. The writ of assistance shall be directed to the sheriff or marshal of the county where the real property is located and shall contain the following information:

(1) The date of issuance of the writ of assistance.

(2) The title of the court, the cause and number of the action.

(3) The name and address of the plaintiff and the name an last know address of defendant.

(4) The date of issuance of the writ.

(5) A description of the real property which is to be delivered plaintiff in the action.

(6) A statement that if the real property is not vacated within five days from the date of service of a copy of the writ on the occupant or, if the copy of the writ is posted, within five days from the date a copy of the writ is served on the defendant, the levying officer will remove the occupants from the real property and place the plaintiff in possession.

(7) A statement that any personal property remaining on the real property after the plaintiff has been placed in possession will be sold or otherwise disposed of in accordance with Section 1174 of the Code of Civil Procedure unless the defendant or other owner pays the plaintiff the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the real property. Personal property remaining on the real property after the plaintiff is placed into possession pursuant to the writ is governed by subdivisions (e) to (m), inclusive, of Section 1174. For this purpose, references in Section 1174 and in provisions incorporated by reference in Section 1174 to the "landlord" shall be deemed to be references to the plaintiff and references to the "tenant" shall be deemed to be references to the defendant or other occupant.

SECTION 1255.467 IS ADDED AS FOLLOWS:

**1255.467**. To execute the writ of assistance:

(a) The levying officer shall serve a copy of the writ of assistance on one occupant of the property. Service on the occupant shall be made by leaving the copy of the writ with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found upon the property when service is attempted who is either an employee or agent of the occupant or a member of the occupant's household.

(b) If unable to serve an occupant described in subdivision (a) at the time service is attempted, the levying officer shall execute the writ of assistance by posting a copy of the writ in a conspicuous place on the property and serving a copy of the writ of assistance on the judgment debtor. Service shall be made personally or by mail. If the judgment debtor's address is not known, the copy of the writ may be served by mailing it to the address of the property.

(c) If the judgment debtor, members of the judgment debtor's household, and any other occupants holding under the judgment debtor do not vacate the property within five days from the date of service on an occupant pursuant to subdivision (a) or on the judgment debtor pursuant to subdivision (b), the levying officer shall remove the occupants from the property and place the judgment creditor in possession. The provisions of Section 684.120 extending time do not apply to the five-day period specified in this subdivision.

**1255.470**. By taking possession pursuant to this chapter, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

**1255.480**. Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.

## CHAPTER 11. POST JUDGMENT PROCEDURE

### ARTICLE 3. POSSESSION AFTER JUDGMENT

**1268.210**. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, apply ex parte to the court for an order for possession, and the court shall authorize the plaintiff to take possession of the property pending conclusion of the litigation if:

(1) The judgment determines that the plaintiff is entitled to take the property; and

(2) The plaintiff has paid to or deposited for the defendants, pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 or Article 2 (commencing with Section 1268.110), an amount not less than the amount of the award, together with the interest then due thereon.

(b) The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Where deposit is made, the order shall state such fact and the date and the amount of the deposit.

(c) Where the judgment is reversed, vacated, or set aside, the plaintiff may obtain possession of the property only pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6.

SECTION 1268.220 IS AMENDED AS FOLLOWS:

**1268.220**. (a) The plaintiff shall serve a copy of the order for possession upon each defendant and his attorney, either personally or by mail:

(1) At least 30 days prior to the date possession is to be taken of property lawfully occupied by a person dwelling thereon or by a farm or business operation.

(2) At least 10 days prior to the date possession is to be taken in any case not covered by paragraph (1).

(b) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

(c) If any of the defendants or occupants holding under the defendants do not vacate the property within the time prescribed in (1) or (2) of subdivision (a) of this section, the plaintiff may apply for a writ requiring the assistance of the sheriff or other law enforcement officer to remove the defendants and occupants from the property as directed by the writ and place the plaintiff in possession. The writ shall be directed to the law enforcement officer required to enforce it. Personal property remaining on the real property after the plaintiff is placed into possession pursuant to the writ is governed by subdivisions (e) to (m), inclusive, of Section 1174. For this purpose, references in Section 1174 and in provisions incorporated by reference in Section 1174 to the "landlord" shall be deemed to be references to the plaintiff and references to the "tenant" shall be deemed to be references to the defendant or other occupant.

SECTION 1268.225 IS ADDED AS FOLLOWS:

**1268.225**. To execute the writ of assistance:

(a) The levying officer shall serve a copy of the writ of assistance on one occupant of the property. Service on the occupant shall be made by leaving the copy of the writ with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found upon the property when service is attempted who is either an employee or agent of the occupant or a member of the occupant's household.

(b) If unable to serve an occupant described in subdivision (a) at the time service is attempted, the levying officer shall execute the writ of assistance by posting a copy of the writ in a conspicuous place on the property and serving a copy of the writ of assistance on the judgment debtor. Service shall be made personally or by mail. If the judgment debtor's address is not known, the copy of the writ may be served by mailing it to the address of the property.

(c) If the judgment debtor, members of the judgment debtor's household, and any other occupants holding under the judgment debtor do not vacate the property within five days from the date of service on an occupant pursuant to subdivision (a) or on the judgment debtor pursuant to subdivision (b), the levying officer shall remove the occupants from the property and place the judgment creditor in possession. The provisions of Section 684.120 extending time do not apply to the five-day period specified in this subdivision.

**1268.230.** By taking possession pursuant to this article, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

**1268.240.** Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.