

Memorandum 2005-40

Technical and Minor Substantive Statutory Corrections

At the September meeting, the Commission decided to conduct a low priority study of issues it could investigate pursuant to its statutory authority to correct technical and minor substantive defects (Gov't Code § 8298). This memorandum discusses a number of such issues. The Commission needs to decide how it wants to treat each issue for purposes of a tentative recommendation. After the Commission reaches tentative decisions on these issues and additional issues to be addressed in future memoranda, the staff will prepare a draft of a tentative recommendation for the Commission to review.

CLAUSE AUTHORIZING JUDGE TO SUBSTITUTE FOR CLERK

Several statutes delegate a described ministerial task to a court clerk, and further provide, in slightly varying language, that "where there is no clerk," the task may be performed by a judge. For example, Code of Civil Procedure Section 222(a) provides that "when an action is called for trial by jury, the clerk, **or the judge where there is no clerk**, shall randomly select the names of the jurors for voir dire, until the jury is selected or the panel is exhausted."

Statutes containing this referenced language were for the most part drafted more than fifty years ago, when some smaller counties or courts may not have had a court clerk. However, all trial courts now have the statutory authority to appoint any clerks deemed necessary. See Gov't Code § 71620(a). Moreover, Code of Civil Procedure Section 167 provides that "Any act required or permitted to be performed by the clerk of a court may be performed by a judge thereof."

Staff therefore recommends deletion of the referenced surplus language from various listed statutes as indicated in the attached Exhibit.

OBSOLETE CROSS REFERENCES

Several years ago, John Jones alerted the Commission to two statutory provisions that cross-refer to repealed statutes. See Memorandum 2001-4,

Exhibit p. 4 (available from the Commission, www.clrc.ca.gov). Those provisions are discussed below.

Code of Civil Procedure Section 904

Code of Civil Procedure Section 904 provides as follows, with the obsolete cross-references highlighted in bold:

904. An appeal may be taken in a civil action or proceeding as provided in Sections 904.1, 904.2, **904.3, 904.4** and 904.5.

The versions of Sections 904.3 and 904.4 which existed when Section 904 was enacted in 1968 related to appeals from justice and small claims courts. These versions of Sections 904.3 and 904.4 were repealed in 1976. Justice courts no longer exist, and appeals from small claims courts are now governed by Section 904.5.

In 1984 and 1988 respectively, statutes relating to different subject matter were enacted and numbered Sections 904.3 and 904.4. These statutes have also since been repealed. These latter versions of Sections 904.3 and 904.4 related respectively to appearances by corporations in small claims court appeals, and a pilot program in San Diego County on appealable judgments.

Recommendation

Staff recommends revising Section 904 by deleting the cross-references to Sections 904.3 and 904.4:

Code Civ. Proc. § 904 (amended). Appeal in a civil action or proceeding

904. An appeal may be taken in a civil action or proceeding as provided in Sections 904.1, 904.2, ~~904.3, 904.4~~ and 904.5.

Comment. Section 904 is amended to delete obsolete cross-references. Former Sections 904.3 and 904.4, relating to appeals from justice and small claims courts, were repealed by 1976 Cal. Stat. ch. 1288, §§ 13, 14.

Code of Civil Procedure Section 12a

Code of Civil Procedure section 12a provides as follows, with the obsolete cross-references highlighted in bold:

12a. (a) If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day which is not a holiday. For purposes of this section, "holiday" means all day on Saturdays, all holidays

specified in Section 135 and, to the extent provided in Section 12b, all days which by terms of Section 12b are required to be considered as holidays.

(b) This section applies also to Sections 659, 659a, **946, and 974 to 982**, inclusive, and the periods of time severally therein prescribed or provided for, and to all other provisions of law, however stated or wherever expressed, providing or requiring an act to be performed on a particular day or within a specified period of time. The mention of these sections is not intended and shall not be construed to exclude the application of this section to any other provisions of law, whether the latter are expressed in this or any other code or statute, ordinance, rule, or regulation.

Section 946, which was repealed in 1968, set forth various deadlines relating to a stay of proceedings following the perfection of an appeal. These deadlines, to the extent they still exist, are now generally continued in Section 921.

Sections 974 through 982, which were repealed in 1964, related to appeals from justice and police courts. Neither justice nor police courts exist any longer.

Recommendation

The staff offers three alternative proposals for revising Section 12a.

The most straightforward but perhaps ultimately least satisfying revision would simply be to replace the cross-reference to Section 946 with a cross-reference to Section 921, and delete the cross-references to Sections 974 to 982. The amendment would read:

Code Civ. Proc. § 12a (amended). Calculation of time

12a. (a) If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day which is not a holiday. For purposes of this section, "holiday" means all day on Saturdays, all holidays specified in Section 135 and, to the extent provided in Section 12b, all days which by terms of Section 12b are required to be considered as holidays.

(b) This section applies also to Sections 659, 659a, ~~946, and 974 to 982~~, and 921, inclusive, and the periods of time severally therein prescribed or provided for, and to all other provisions of law, however stated or wherever expressed, providing or requiring an act to be performed on a particular day or within a specified period of time. The mention of these sections is not intended and shall not be construed to exclude the application of this section to any other provisions of law, whether the latter are expressed in this or any other code or statute, ordinance, rule, or regulation.

Comment. Subdivision (b) of Section 12a is amended to correct the cross-reference to former Section 946, which was repealed by 1968 Cal. Stat. ch. 385, § 1. The relevant substance of former Section 946 is continued in Section 921.

Subdivision (b) is further amended to delete the cross-references to former Sections 974 to 982. Those provisions have been repealed. See 1963 Cal. Stat. ch. 871, § 15. Justice and police courts no longer exist, so there are no corresponding new provisions.

Alternatively, the Commission could seek comment on a slightly more ambitious revision of Section 12a, which still would not substantively change the statute. The language of subdivision (b) makes abundantly clear that **all** cross-references in subdivision (b) were originally included only for illustrative purposes. This broader revision would therefore delete the two remaining illustrative cross-referenced statutes that have not been repealed, and would indicate in one sentence that the statute is applicable to **all** provisions of law, wherever expressed.

This more ambitious amendment of Section 12a would read:

Code Civ. Proc. § 12a (amended). Calculation of time

12a. (a) If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day ~~which that~~ is not a holiday. For purposes of this section, "holiday" means all day on Saturdays, all holidays specified in Section 135 and, to the extent provided in Section 12b, all days ~~which that~~ by terms of Section 12b are required to be considered as holidays.

~~(b) This section applies also to Sections 659, 659a, 946, and 974 to 982, inclusive, and the periods of time severally therein prescribed or provided for, and to all other provisions of law, however stated or wherever expressed, to all provisions of law providing or requiring an act to be performed on a particular day or within a specified period of time. The mention of these sections is not intended and shall not be construed to exclude the application of this section to any other provisions of law, whether the latter are, whether expressed in this or any other code or statute, ordinance, rule, or regulation.~~

Comment. Subdivision (b) of Section 12a is amended to delete cross-references that were included in the statute for illustrative purposes. This is not a substantive change. Several of the deleted cross-references are not only surplusage, but are also obsolete. See 1968 Cal. Stat. ch. 385, § 1 (repealing Section 946); 1963 Cal. Stat. ch. 871, § 15 (repealing Sections 974 to 982).

Section 12a is also amended to make grammatical corrections.

Finally, the Commission could solicit comments on both of the alternatives described above. As between these three possibilities, the staff does not have a strong preference.

Respectfully submitted,

Steve Cohen
Staff Counsel



Exhibit

CLAUSE AUTHORIZING JUDGE TO SUBSTITUTE FOR CLERK

Bus. & Prof. Code § 21710 (amended). Enforcement of owner's lien

SEC. _____. Section 21710 of the Business and Professions Code is amended to read:

21710. If a declaration in opposition to the lien sale is received prior to the date set forth in the notice of lien sale, the owner may enforce the lien as follows:

(a) An action to enforce the owner's lien shall be commenced by the filing of a verified complaint setting forth the facts upon which the claim of lien is based. The summons and complaint may be served by certified mail, postage prepaid, addressed to the occupant at his or her last known address, in which case service shall be deemed completed on the fifth day after the mailing, or in any other manner authorized by Chapter 4 (commencing with Section 413.10) of Title 2 of Part 2 of the Code of Civil Procedure.

(b) The occupant shall have 10 days in which to respond to the complaint after service of the summons is completed, which time may be extended for good cause shown.

(c) If the occupant has not responded to the complaint by answer or demurrer within the time allowed after service is completed, the clerk, ~~or the judge if there is no clerk,~~ upon application of the owner, shall enter the default of the occupant, and thereafter, the owner may apply to the court for judgment in the amount of the lien, including costs.

(d) Any judgment entered on the action on the lien in favor of the owner may be enforced by sale of the property by the owner. The sale shall be conducted in a commercially reasonable manner, and shall take place 10 days or more from the entry of judgment, unless within that time period, or at any time prior to the sale, the occupant pays to the owner the full amount of the judgment.

(e) Enforcement of the judgment may be stayed, pending appeal, by the posting of a bond by the occupant in an amount one and one-half times the amount of the judgment, in which case the property may be released to the occupant.

Comment. Subdivision (c) of Section 21710 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Civ. Code § 3154 (amended). Petition to release property from lien

SEC. _____. Section 3154 of the Civil Code is amended to read:

3154. (a) At any time after the expiration of the time period specified by Section 3144 with regard to the period during which property is bound by a lien after recordation of a claim of lien, where no action has been brought to enforce that lien, the owner of the property or the owner of any interest therein may petition the proper court for a decree to release the property from the lien.

(b) The petition shall be verified and shall allege all of the following:

(1) The date of recordation of the claim of lien.

(2) The legal description of the property affected by the claim of lien.

(3) That no action to foreclose the lien is pending, or that no extension of credit has been recorded, and that the time period during which suit can be brought to foreclose the lien has expired.

(4) That the lien claimant is unable or unwilling to execute a release of the lien or cannot with reasonable diligence be found.

(5) That the owner of the property or interest in the property has not filed for relief under any law governing bankruptcy, and that there exists no other restraint to prevent the lien claimant from filing to foreclose his or her lien. A certified copy of the claim of lien shall be attached to the petition. The petition shall be deemed controverted by the lien claimant.

(c) Upon the filing of the petition, and before any further proceedings are had, the clerk, ~~or if there is no clerk, the judge~~ shall set a date for the hearing not more than 30 days following the filing of the petition. The court may continue the hearing beyond the 30-day period, but good cause shall be shown for any continuance.

(d) A copy of the petition and the notice setting the date for the hearing shall be served upon the lien claimant at least 10 days prior to the date set for hearing, in the manner in which a summons is required to be served, or by certified or registered mail, postage prepaid, return receipt requested, addressed to the lien claimant at the claimant's address as shown on any of the following:

(1) The preliminary 20-day notice served by the claimant pursuant to Section 3097.

(2) In the records of the registrar of contractors.

(3) The contract on which the lien is based.

(4) The claim of lien itself.

(e) When service is made by mail as provided in this section, service is complete on the fifth day following the day of the deposit of the mail. No decree shall issue in favor of the petitioner unless the petitioner proves that service of the petition and the order fixing the date for hearing was made in compliance with this subdivision. The issue of compliance with this subdivision shall be deemed controverted by the lien claimant.

(f) In the event judgment is rendered in favor of the petitioner, the decree shall indicate all of the following:

- (1) The date the lien was recorded.
- (2) The county and city, if any, in which the lien was recorded.
- (3) The book and page of the place in the official records where the lien is recorded.
- (4) The legal description of the property affected. Upon the recordation of a certified copy of the decree, the property described in the decree shall be released from the lien.
- (g) The prevailing party shall be entitled to attorneys' fees not to exceed two thousand dollars (\$2,000).
- (h) Nothing in this section shall be construed to bar any other cause of action or claim for relief by the owner of the property or an interest in the property, nor shall a decree canceling a claimant's lien bar the lien claimant from bringing any other cause of action or claim for relief, other than an action foreclosing the lien. However, no other action or claim shall be joined with the claim for relief established by this section.
- (i) The provisions of Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure do not apply to causes commenced pursuant to this section.

Comment. Subdivision (c) of Section 3154 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Code Civ. Proc. § 222 (amended). Selection of juror names

SEC. _____. Section 222 of the Code of Civil Procedure is amended to read:

222. (a) Except as provided in subdivision (b), when an action is called for trial by jury, the clerk, ~~or the judge where there is no clerk,~~ shall randomly select the names of the jurors for voir dire, until the jury is selected or the panel is exhausted.

(b) When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list.

Comment. Section 222 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Code Civ. Proc. § 573. Custody of deposit

☛ **Staff Note.** This provision has similar unnecessary language. However, the provision also has language which may require revision in the context of the Commission's continuing work on trial court restructuring. Staff will defer recommending revision to this provision at this time.

Code Civ. Proc. § 585 (amended). Judgment by default

SEC. _____. Section 585 of the Code of Civil Procedure is amended to read:

585. Judgment may be had, if the defendant fails to answer the complaint, as follows:

(a) In an action arising upon contract or judgment for the recovery of money or damages only, if the defendant has, or if more than one defendant, if any of the defendants have, been served, other than by publication, and no answer, demurrer, notice of motion to strike (of the character hereinafter specified), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10, or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed with the clerk or judge of the court within the time specified in the summons, or ~~such~~ within further time as may be allowed, the clerk, ~~or the judge if there is no clerk,~~ upon written application of the plaintiff, and proof of the service of summons, shall enter the default of the defendant or defendants, so served, and immediately thereafter enter judgment for the principal amount demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for in Section 425.115, or a lesser amount if credit has been acknowledged, together with interest allowed by law or in accordance with the terms of the contract, and the costs against the defendant, or defendants, or against one or more of the defendants. If, by rule of court, a schedule of attorneys' fees to be allowed has been adopted, the clerk may include in the judgment attorneys' fees in accordance with ~~such~~ the schedule (1) if the contract provides that attorneys' fees shall be allowed in the event of an action thereon, or (2) if the action is one in which the plaintiff is entitled by statute to recover attorneys' fees in addition to money or damages. The plaintiff shall file a written request at the time of application for entry of the default of the defendant or defendants, to have attorneys' fees fixed by the court, whereupon, after the entry of the default, the court shall hear the application for determination of the attorneys' fees and shall render judgment for ~~such~~ the attorneys' fees and for the other relief demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for in Section 425.115, or a lesser amount if credit has been acknowledged, and the costs against the defendant, or defendants, or against one or more of the defendants.

(b) In other actions, if the defendant has been served, other than by publication, and no answer, demurrer, notice of motion to strike (of the character hereinafter specified), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10 or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed with the clerk or judge of the

court within the time specified in the summons, or ~~such~~ within further time as may be allowed, the clerk, ~~or the judge if there is no clerk,~~ upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for ~~such sum~~ that relief (not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115), as appears by ~~such~~ the evidence to be just. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. If the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved by a reference as above provided.

(c) In all actions where the service of the summons was by publication, upon the expiration of the time for answering, and upon proof of the publication and that no answer, demurrer, notice of motion to strike (of the character hereinafter specified), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10, or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed, the clerk, ~~or the judge if there is no clerk,~~ upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; and the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for ~~such sum~~ that relief (not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for in Section 425.115), as appears by ~~such~~ the evidence to be just. If the defendant is not a resident of the state, the court shall require the plaintiff, or his or her agent, to be examined, on oath, respecting any payments that have been made to the plaintiff, or to anyone for his or her use, on account of any demand mentioned in the complaint, in the statement required by Section 425.11, or in the statement provided for in Section 425.115, and may render judgment for the amount which he or she is entitled to recover. In all cases affecting the title to or possession of real property, where the service of the summons was by publication and the defendant has failed to answer, no judgment shall be rendered upon proof of mere occupancy, unless ~~such~~ the occupancy ~~shall have~~ has continued for the time and ~~shall have~~ has been of the character necessary to confer title by prescription. In all cases where the plaintiff bases his or her claim upon a paper title, the court shall require evidence establishing plaintiff's equitable right to judgment before rendering judgment. In actions involving only the possession of real property where the complaint is verified and shows by proper allegations that no party to the action claims title to the real property involved,

either by prescription, accession, transfer, will, or succession, but only the possession thereof, the court may render judgment upon proof of occupancy by plaintiff and ouster by defendant.

(d) In the cases referred to in subdivisions (b) and (c), or upon an application to have attorneys' fees fixed by the court pursuant to subdivision (a), the court in its discretion may permit the use of affidavits, in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received, or heard in ~~such~~ those cases. The facts stated in ~~such~~ the affidavit or affidavits shall be within the personal knowledge of the affiant and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto.

(e) If a defendant files a cross-complaint against another defendant or the plaintiff, a default may be entered against that party on that cross-complaint if the plaintiff or that cross-defendant has been served with that cross-complaint and he or she has failed to file an answer, demurrer, notice of motion to strike of the character specified in subdivision (f), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10, or notice of the filing of a petition for a writ of mandate as provided in Section 418.10 within the time specified in the summons, or ~~such~~ within other time as may be allowed. However, no judgment may separately be entered on that cross-complaint unless a separate judgment may, in fact, be properly awarded on that cross-complaint and the court finds that a separate judgment on that cross-complaint would not substantially delay the final disposition of the action between the parties.

(f) A notice of motion to strike within the meaning of this section is a notice of motion to strike the whole or any part of a pleading filed within the time which the moving party is required otherwise to plead to ~~such~~ that pleading. The notice of motion to strike shall specify a hearing date set in accordance with Section 1005. The filing of a notice of motion does not extend the time within which to demur.

Comment. Section 585 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Section 585 is also amended to make stylistic revisions.

Code Civ. Proc. § 618 (amended). Receipt of verdict

SEC. _____. Section 618 of the Code of Civil Procedure is amended to read:

618. When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read to the jury by the clerk, ~~or by the court, if there be no clerk,~~ and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is ~~his~~ the juror's verdict. If upon ~~such~~ the

inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no ~~such~~ disagreement ~~be~~ is expressed, the verdict is complete and the jury discharged from the case.

Comment. Section 618 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Section 618 is also amended to make stylistic revisions and make the statute gender neutral.

☞ **Staff Note.** Staff is doing further research on a revision of the term “foreman.”

Code Civ. Proc. § 644 (amended). Decision of referee or commissioner

SEC. _____. Section 644 of the Code of Civil Procedure is amended to read:

644. (a) In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, ~~or with the judge where there is no clerk,~~ judgment may be entered thereon in the same manner as if the action had been tried by the court.

(b) In the case of all other references, the decision of the referee or commissioner is only advisory. The court may adopt the referee’s recommendations in whole or in part after independently considering the referee’s findings and any objections and responses thereto filed with the court.

Comment. Section 644 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Code Civ. Proc. § 990 (amended). Summons

SEC. _____. Section 990 of the Code of Civil Procedure is amended to read:

990. The summons specified in Section 989 shall be issued by the clerk, ~~or by the judge if there be no clerk,~~ upon presentation of the affidavit specified in Section 991, ~~and~~ . The summons must describe the judgment, and require the person summoned to show cause why ~~he~~ the person should not be bound by it, and must be served in the same manner, and returnable no later than ninety (90) days after the time specified for the return of the original summons. It is not necessary to file a new complaint.

Comment. Section 990 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Section 990 is also amended to make stylistic revisions and make the statute gender neutral.

Code Civ. Proc. § 995.160 (amended). Definition of officer

☞ **Staff Note.** This provision contains similar apparently unnecessary language. However, the context of the language requires further research as to whether deletion would cause a substantive change. Staff will defer recommending revision to this provision at this time.

Code Civ. Proc. § 1011 (amended). Service of papers

SEC. _____. Section 1011 of the Code of Civil Procedure is amended to read:

The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

(a) If upon an attorney, service may be made at the attorney's office, by leaving the notice or other papers in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or with a person having charge thereof. When there is no person in the office with whom the notice or papers may be left for purposes of this subdivision at the time service is to be effected, service may be made by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office, or, if the attorney's office is not open so as to admit of that service, then service may be made by leaving the notice or papers at the attorney's residence, with some person of not less than 18 years of age, if the attorney's residence is in the same county with his or her office, and, if the attorney's residence is not known or is not in the same county with his or her office, or being in the same county it is not open, or there is not found thereat any person of not less than 18 years of age, then service may be made by putting the notice or papers, enclosed in a sealed envelope, into the post office or a mail box, subpost office, substation, or mail chute or other like facility regularly maintained by the Government of the United States directed to the attorney at his or her office, if known and otherwise to the attorney's residence, if known. If neither the attorney's office nor residence is known, service may be made by delivering the notice or papers to the address of the attorney or party of record as designated on the court papers, or by delivering the notice or papers to the clerk of the court, ~~or to the judge where there is no clerk,~~ for the attorney.

(b) If upon a party, service shall be made in the manner specifically provided in particular cases, or, if no specific provision is made, service may be made by leaving the notice or other paper at the party's residence, between the hours of eight in the morning and six in the evening, with some person of not less than 18 years of age. If at the time of attempted service between those hours a person 18 years of age or older cannot be found at the party's residence, the notice or papers may be served by mail. If the party's residence is not known, then service may be made by delivering the notice or papers to the clerk of the court ~~or the judge, if there is no clerk,~~ for that party.

Comment. Section 1011 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Code Civ. Proc. § 1015 (amended). Service on nonresident party

SEC. _____. Section 1015 of the Code of Civil Procedure is amended to read:

1015. When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on

the clerk of the court ~~or on the judge where there is no clerk~~, for ~~him~~ that party. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring ~~him~~ the party into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If ~~his~~ the party's sole attorney has no known office in this State, notices and papers may be served by leaving a copy thereof with the clerk of the court ~~or with the judge where there is no clerk~~, unless ~~such~~ the attorney ~~shall have~~ has filed in the cause an address of a place at which notices and papers may be served on ~~him~~ the attorney, in which event they may be served at ~~such~~ that place.

Comment. Section 1015 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Section 1015 is also amended to make stylistic revisions and make the statute gender neutral.

Code Civ. Proc. § 1169 (amended). Default and default judgment

SEC. _____. Section 1169 of the Code of Civil Procedure is amended to read:

1169. If at the time appointed any defendant served with a summons does not appear and defend, the clerk, ~~or the judge if there is no clerk~~, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon. The application for default judgment and the default judgment shall include a place to indicate that the judgment includes tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises. Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, including the costs, against the defendant, or defendants, or against one or more of the defendants.

Comment. Section 1169 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Code Civ. Proc. § 1986 (amended). Obtaining of subpoena

SEC. _____. Section 1986 of the Code of Civil Procedure is amended to read:

1986. A subpoena is obtainable as follows:

(a) To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, it is obtainable from the clerk of the court in which the action or proceeding is pending, ~~or if there is no clerk then from a judge or justice of such court.~~

(b) To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined.

(c) To require attendance out of court, in cases not provided for in subdivision (a), before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is obtainable from the judge, justice, or other officer before whom the attendance is required.

If the subpoena is to require attendance before a court, or at the trial of an issue therein, it is obtainable from the clerk, as of course, upon the application of the party desiring it. If it is obtained to require attendance before a commissioner or other officer upon the taking of a deposition, it must be obtained, as of course, from the clerk of the superior court of the county wherein the attendance is required upon the application of the party requiring it.

Comment. Section 1986 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Penal Code § 1196 (amended). Issuance of bench warrant outside county

SEC. _____. Section 1196 of the Penal Code is amended to read:

1196. (a) ~~The clerk, or the judge or justice, if there is no clerk,~~ must at any time after the order issue a bench warrant into one or more counties.

(b) ~~The clerk, or the judge or justice,~~ shall require the appropriate agency to enter each bench warrant issued on a private surety-bonded felony case into the national warrant system (National Crime Information Center (NCIC)). If the appropriate agency fails to enter the bench warrant into the national warrant system (NCIC), and the court finds that this failure prevented the surety or bond agent from surrendering the fugitive into custody, prevented the fugitive from being arrested or taken into custody, or resulted in the fugitive's subsequent release from custody, the court having jurisdiction over the bail shall, upon petition, set aside the forfeiture of the bond and declare all liability on the bail bond to be exonerated.

Comment. Section 1196 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Penal Code § 1205. Imprisonment in lieu of fine

☞ **Staff Note.** This provision has similar unnecessary language. However, the provision also has language which may require revision in the context of the Commission's continuing work on trial court restructuring. Staff will defer recommending revision to this provision at this time.

Penal Code § 1207 (amended). Entry of judgment

SEC. _____. Section 1207 of the Penal Code is amended to read:

1207. When judgment upon a conviction is rendered, the clerk, ~~or if there is no clerk, the judge,~~ must enter the same judgment in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if any. A copy of the judgment of conviction shall be filed with the papers in the case.

Comment. Section 1207 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Section 1207 is also amended to make a stylistic revision.

Penal Code § 1213 (amended). Furnishing of probationary order or judgment

SEC. _____. Section 1213 of the Penal Code is amended to read:

1213. When a probationary order or a judgment, other than of death, has been pronounced, a copy of the entry of that portion of the probationary order ordering the defendant confined in a city or county jail as a condition of probation, or a copy of the entry of the judgment, or, if the judgment is for imprisonment in the state prison, either a copy of the minute order or an abstract of the judgment as provided in Section 1213.5, certified by the clerk of the court, ~~or by the judge, if there is no clerk,~~ and a Criminal Investigation and Identification (CII) number shall be forthwith furnished to the officer whose duty it is to execute the probationary order or judgment, and no other warrant or authority is necessary to justify or require its execution.

If a copy of the minute order is used as the commitment document, the first page or pages shall be identical in form and content to that prescribed by the Judicial Council for an abstract of judgment, and ~~such~~ other matters as appropriate may be added thereafter.

Comment. Section 1213 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Section 1213 is also amended to make a stylistic revision.

Penal Code § 1326 (amended). Subpoenaing of witnesses

SEC. _____. Section 1326 of the Penal Code is amended to read:

1326. (a) The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by any of the following:

(1) A magistrate before whom a complaint is laid or his or her clerk, the district attorney or his or her investigator, or the public defender or his or her investigator, for witnesses in the state.

(2) The district attorney, his or her investigator, or, upon request of the grand jury, any judge of the superior court, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried.

(3) The district attorney or his or her investigator, the public defender or his or her investigator, or the clerk of the court in which a criminal action is to be tried, ~~or, if there is no clerk, the judge of the court.~~ The clerk ~~or judge~~ shall, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him or her, for witnesses in the state, as the defendant may require.

(4) The attorney of record for the defendant.

(b) A subpoena issued in a criminal action that commands the custodian of records or other qualified witness of a business to produce books, papers, documents, or records shall direct that those items be delivered by the custodian or qualified witness in the manner specified in subdivision (b) of Section 1560 of the Evidence Code. Subdivision (e) of Section 1560 of the Evidence Code shall not apply to criminal cases.

(c) In a criminal action, no party, or attorney or representative of a party, may issue a subpoena commanding the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies thereof, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in subdivision (b) of Section 1560 of the Evidence Code. When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents. The court may not order the documents disclosed to the prosecution except as required by Section 1054.3.

(d) This section shall not be construed to prohibit obtaining books, papers, documents, or records with the consent of the person to whom the books, papers, documents, or records relate.

Comment. Section 1326 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Veh. Code § 1803.3 (amended). Notification of reversal of conviction or dismissal

SEC. _____. Section 1803.3 of the Vehicle Code is amended to read:

1803.3. (a) The clerk, ~~or judge if there is no clerk,~~ of any court which reverses a conviction for an offense described in subdivision (a) of Section 1803, which is not exempted under subdivision (b) of that section, shall prepare and forward to the department at its office in Sacramento an abstract of the record of the court covering the case in which the conviction was reversed. In addition, if a court dismisses a charge of a violation of Section 40508 for which a notice was given to

the department pursuant to Section 40509 or 40509.5, the court shall notify the department of the dismissal.

(b) The abstract shall be forwarded within 30 days of the date the judgment of reversal becomes final. The notice of dismissal shall be given to the department not later than 30 days after the dismissal. Within 30 days of receiving the abstract or notice, the department shall remove any record of that conviction, or notice received pursuant to Section 40509 or 40509.5, from the driver's record.

(c) As used in this section, "reverse" includes any action by which a conviction is nullified or set aside.

Comment. Section 1803.3 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Veh. Code § 23140 (amended). Driving under the influence by person under 21

SEC. _____. Section 23140 of the Vehicle Code is amended to read:

23140. (a) It is unlawful for a person under the age of 21 years who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

(b) A person may be found to be in violation of subdivision (a) if the person was, at the time of driving, under the age of 21 years and under the influence of, or affected by, an alcoholic beverage regardless of whether a chemical test was made to determine that person's blood-alcohol concentration and if the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle while having a concentration of 0.05 percent or more, by weight, of alcohol in his or her blood.

(c) Notwithstanding any provision of law to the contrary, upon a finding that a person has violated this section, the clerk of the court, ~~or judge if there is no clerk,~~ shall prepare within 10 days after the finding and immediately forward to the department an abstract of the record of the court in which the finding is made. That abstract shall be a public record and available for public inspection in the same manner as other records reported under Section 1803.

Comment. Subdivision (c) of Section 23140 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Veh. Code § 23229.1. (amended). Operating limousine for hire containing alcoholic beverage

SEC. _____. Section 23229.1 of the Vehicle Code is amended to read:

23229.1. (a) Subject to subdivision (b), Sections 23223 and 23225 do apply to any charter-party carrier of passengers, as defined in Section 5360 of the Public Utilities Code, operating a limousine for hire when the driver of the vehicle transports any passenger under the age of 21.

(b) For purposes of subdivision (a), it is not a violation of Section 23225 for any charter-party carrier of passengers operating a limousine for hire which is licensed pursuant to the Public Utilities Code to keep any bottle, can, or other receptacle containing any alcoholic beverage in a locked utility compartment within the area occupied by the driver and passengers.

(c) In addition to the requirements of Section 1803, every clerk of a court, ~~or judge if there is no clerk,~~ in which any driver in subdivision (a) was convicted of a violation of Section 23225 shall prepare within 10 days after conviction, and immediately forward to the Public Utilities Commission at its office in San Francisco, an abstract of the record of the court covering the case in which the person was convicted. If sentencing is not pronounced in conjunction with the conviction, the abstract shall be forwarded to the commission within 10 days after sentencing, and the abstract shall be certified, by the person required to prepare it, to be true and ~~correct.~~

~~For correct.~~ For the purposes of this subdivision, a forfeiture of bail is equivalent to a conviction.

~~(d) This section shall become operative on July 1, 1989.~~

Comment. Subdivision (c) of Section 23229.1 is amended to delete unnecessary language authorizing the judge to substitute for the clerk if there is no clerk. See Code Civ. Proc. § 167 (judge may perform any act court clerk may perform); Gov't Code §§ 69840-69848 (duties of clerk of superior court), 71620(b) (executive or administrative officer has authority of clerk of court).

Subdivision (c) is also amended to make a stylistic revision.

Subdivision (d) is deleted as obsolete.