

Memorandum 2020-25

Emergency-Related Reforms: Commission Authority

At its May meeting, the Commission¹ decided that it would “consider the possibility of requesting a narrow expansion of its authority, to include emergency-related reforms in areas that it is currently authorized to study or was previously authorized to study.”² The notion was that this would allow the Commission to work in areas where it already has some expertise.

The simplest way to achieve such an expansion would be to include language in the Commission’s “resolution of authority” that is currently pending in the Legislature. That resolution, Assembly Concurrent Resolution 173 (Gallagher), was approved by the Assembly and is waiting for assignment to a committee in the Senate. If the Commission decides to request expanded authority, it could ask Assembly Member Gallagher to amend the resolution.

To achieve the modest expansion that the Commission contemplated, the resolution could be amended to add language along these lines:

...and be it further

Resolved, That the Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to provide temporary solutions to practical problems that exist during declared emergencies, in areas of the law that the Commission is currently authorized to study or was authorized to study in the past;

To help the Commission and others understand the effect of such language, the staff has prepared a brief summary of the Commission’s current and former study authority.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (May 2020), p. 3.

Current Study Authority

In addition to codified authority relating to trial court restructuring and technical and minor substantive reforms, the Commission's most recent resolution of authority lists 25 authorized study topics. They are listed below. The topics that are proposed for repeal in ACR 173 are set out in italics.

1. Creditors' Remedies

Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.

2. Probate Code

Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

3. Real and Personal Property

Whether the law should be revised that relates to real and personal property, including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restrictions on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant on assignment, subletting, termination, or abandonment of a lease, and related matters.

4. Family Law

Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.

5. Discovery in Civil Cases

Whether the law relating to discovery in civil cases should be revised.

6. Rights and Disabilities of Minors and Incompetent Persons

Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

7. Evidence

Whether the Evidence Code should be revised.

8. Arbitration

Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.

9. Administrative Law

Whether there should be changes to administrative law.

10. Attorney's Fees

Whether the law relating to the payment and the shifting of attorney's fees between litigants should be revised.

11. Uniform Unincorporated Nonprofit Association Act

Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.

12. Trial Court Unification

Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.

13. Contract Law

Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

14. Common Interest Developments

Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within them, and to determine to what extent they should be subject to regulation.³

3. In connection with this proposed deletion, a reference to common interest developments would be added to the illustrative list in #3, Real and Personal Property.

15. Legal Malpractice Statutes of Limitation

Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.

16. Coordination of Public Records Statutes

Whether the law governing disclosure of public records and the law governing protection of privacy in public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.

17. Criminal Sentencing

Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.

18. Subdivision Map Act and Mitigation Fee Act

Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code), and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters.

19. Uniform Statute and Rule Construction Act

Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or part, and related matters.

20. Place of Trial in Civil Cases

Whether the law governing the place of trial in a civil case should be revised.

21. Charter School as Public Entity

Analysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

22. Fish and Game Code

Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning,

resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law.

23. Mediation Confidentiality

(A) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:

(i) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.

(ii) The availability and propriety of contractual waivers.

(iii) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.

(B) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.

24. California Public Records Act Clean-Up

The Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation as soon as possible, considering the commission's preexisting duties and workload demands, concerning the revision of the portions of the California Public Records Act and related provisions, and that this legislation shall accomplish all of the following objectives:

(A) Reduce the length and complexity of current sections.

(B) Avoid unnecessary cross-references.

(C) Neither expand nor contract the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act.

(D) To the extent compatible with (3), use terms with common definitions.

(E) Organize the existing provisions in such a way that similar provisions are located in close proximity to one another.

(F) Eliminate duplicative provisions.

(G) Clearly express legislative intent without any change in the substantive provisions[.]

25. Toxic Substances

[T]he Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, and related provisions, to improve the organization and expression of the law. Such revisions may include, but are not limited to, grouping similar provisions together, reducing the length and complexity of sections, eliminating obsolete or redundant provisions, and correcting technical errors. The recommended revisions shall not make any substantive changes to the law. The commission's report shall also include a list of substantive issues that the commission identifies in the course of its work, for possible future study[.]

Former Study Authority

Going back to the Commission's creation in 1953, our Annual Reports have included a description of the Commission's study authority, with citations to the authorizing enactments. By reviewing those reports, the staff has been able to compile a list of all of the topics that the Commission has been authorized to study over the course of its existence.

In order to convert that into a list of *former* grants of authority, the staff set aside both of the following:

- Current grants of authority (listed above).
- Narrow grants of authority that were later subsumed within a broader grant.

As an example of the latter, the Commission was once authorized to study the right of a nonresident alien to inherit. That narrow topic is now wholly subsumed within the Commission's broad grant of authority to study any matter addressed by the Probate Code. There have been many instances of that kind of consolidation over the years, especially in the areas of creditor remedies, evidence, property, estate planning, family law, and contracts.

The resulting lists of former grants of authority is set out below, in chronological order (based on the date of authorization):

Formerly Authorized Topic of Study	Authorizing Enactment
1. Recodify Education Code	1953. Cal. Stat. ch. 1953
2. Sale of corporate assets	1955 Cal. Stat. res. ch. 207
3. Planning procedures and the enactment of zoning ordinances when there is no planning commission.	
4. Driving under the influence	1956 Cal. Stat. res. ch. 42
5. Mortgages to secure future advances	
6. Post-conviction sanity hearings	
7. Habeus corpus procedure	
8. Government liability	1956 Cal. Stat. ch. 35
9. Alibi defense, notice to prosecution	1957 Cal. Stat. res. ch. 202
10. Insanity defense	
11. Arson	
12. Juvenile court proceedings, right to counsel	
13. Unlicensed contractor rights	
14. Sovereign immunity	
15. Fictitious business names	
16. Grand juries	1957 Cal. Stat. ch. 266
17. Bail	1957 Cal. Stat. ch. 287
18. Joinder of causes of action	1969 Cal. Stat. res. ch. 224
19. Inverse condemnation	1970 Cal. Stat. res. ch. 46
20. Nonprofit corporations	1970 Cal. Stat. res. ch. 54
21. Prejudgment interest	1971 Cal. Stat. res. ch. 75
22. Child Custody, adoption, guardianship, etc.	1972 Cal. Stat. res. ch. 27
23. Class actions	1975 Cal. Stat. res. ch. 15
24. Joinder	
25. Offers of Compromise	
26. Dismissal for lack of prosecution	1978 Cal. Stat. res. ch. 65
27. Removal of invalid liens	1980 Cal. Stat. res. ch. 37
28. Special assessments for public improvements	
29. Pleadings in civil actions	
30. Statute of limitations for felonies	1981 Cal. Stat. ch. 909
31. Injunctions	1984 Cal. Stat. res. ch. 42
32. Administrative law	1987 Cal. Stat. res. ch. 47
33. Unfair Business Practices	1993 Cal. Stat. res. ch. 31
34. Business Judgment Rule	
35. Tolling statute of limitations	1994 Cal. Stat. res. ch. 81
36. Environmental law recodification	1996 Cal. Stat. res. ch. 38
37. Financial privacy	2002 Cal. Stat. res. ch. 167
38. Oral argument in civil procedure	2006 Cal. Stat. res. ch. 1
39. Mechanics liens	

40. Reorganization of deadly weapons statutes	2006 Cal. Stat. res. ch. 128
41. Recognition of a tribal or foreign court judgment	2014 Cal. Stat. ch. 214

Discussion

The purpose of the table above is to give the Commission a concrete sense of what it would mean to receive authority along the lines discussed on page 1 of this memorandum — authority to study emergency-related reforms in areas of the law that the Commission was *previously* authorized to study.

Having prepared the list, the staff would like to offer a few observations.

First, the current staff does not have direct experience with many of the older grants of authority. This undermines the rationale for requesting such authority.

Many of the former grants seem unlikely to provide fertile ground for emergency-related reforms. They are either too narrow or involve matters that have little apparent connection to emergency conditions or response.

However, there are a few topics that could have some connection to emergency-related law reform. For example:

- Government liability
- Inverse condemnation
- Nonprofit corporations
- Administrative law
- Tolling the statute of limitations

As it turns out, the staff also has some experience with those topics.

In light of the foregoing, the Commission may wish to consider an alternative approach, requesting authority for selected topics from the list of former authority. That might be more easily explained and justified than a broad request for authority to study all previously authorized topics.

Another possibility would be to hold off on requesting any expansion of authority and revisit the matter next year, after we’ve had more experience with this kind of work.

How would the Commission like to proceed?

Respectfully submitted,

Brian Hebert
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