
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 27, 2006
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on October 27, 2006.

Commission:

Present: David Huebner, Chairperson
Sidney Greathouse, Vice Chairperson
Pamela L. Hemminger
Frank Kaplan
Susan Duncan Lee
Edmund L. Regalia, Chairperson
William E. Weinberger

Absent: Diane F. Boyer-Vine, Legislative Counsel
Noreen Evans, Assembly Member
Bill Morrow, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Brian Hebert, Assistant Executive Secretary
Steven Cohen, Staff Counsel
Barbara S. Gaal, Staff Counsel

Consultants: None

Other Persons:

Sam Abdulaziz, Abdulaziz, Grossbart & Rudman
David Bersant, San Francisco
Craig Bronstein, Lanak & Hanna, P.C.
Howard Brown, Manhattan Beach
Frank Collard, Southern California Rock Products Association
Charlotte Ito, State Bar Trusts and Estates Section
John Jones, Aliso Viejo
Shirley L. Kovar, State Bar Trusts and Estates Section
Larry Lubka, Hunt Ortmann Blasco Palffy & Rossell
Dick Nash, Building Industry Credit Association
Debbi Pepaj, Downey
Charles Philipps, Association of California Surety Companies, Surety & Fidelity
Association of America
Bruce Rudman, Abdulaziz, Grossbart & Rudman

J. David Sackman, California State Council of Laborers Legislative Department &
Construction Laborers Trust Funds for Southern California
Mary Pat Toups, Laguna Woods

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MINUTES OF AUGUST 18, 2006, COMMISSION MEETING

The Commission approved the Minutes of the August 18, 2006, Commission meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

Annual Report

The Commission considered Memorandum 2006-35 and its First Supplement, relating to the 2006-2007 Annual Report. The Commission approved the draft attached to the memorandum, subject to the following changes:

- (1) The page 26 was revised to reflect the hiring of Associate Governmental Program Analyst Debora Larrabee.
- (2) The following resolution honoring Nathaniel Sterling was added at page 26:

CALIFORNIA LAW REVISION COMMISSION

RESOLUTION IN HONOR OF

NATHANIEL STERLING

The California Law Revision Commission takes the occasion of the retirement of Nathaniel Sterling as its Executive Secretary to

honor his career in public service to the Commission and the State of California.

Nathaniel Sterling has served the Commission for over 36 years, longer than any other Commission employee or Commissioner. He began work with the Commission as legal counsel in June 1970, was promoted to Assistant Executive Secretary in 1974, and in 1991 became the Commission's third Executive Secretary.

During Nathaniel Sterling's service, the Commission submitted nearly 300 recommendations to the California Legislature, with an enactment rate in excess of 93%; nearly 18,000 statute sections were added, amended, or repealed on recommendation of the Commission.

Significant legal reforms drafted for the Commission by Nathaniel Sterling include:

- Trial Court Unification
- Major Portions of the Probate Code
- Administrative Adjudication by State Agencies
- Eminent Domain Law
- Marketable Title Act
- Quiet Title Act
- Partition Act
- Wage Garnishment Law
- Parol Evidence Rule
- Bond and Undertaking Law
- Commercial Lease Assignment and Sublease
- Marital Property Liability Laws
- Criminal Statutes of Limitation

Significant reforms enacted under Nathaniel Sterling's leadership include the Family Code, Comprehensive Power of Attorney Law, Health Care Decisions Law, and Trial Court Restructuring.

Nathaniel Sterling is an Associate Member of the National Conference of Commissioners on Uniform State Laws and served as Reporter for the Uniform Dormant Mineral Interest Act and the Uniform Multiple-Person Accounts Act.

Nathaniel Sterling's achievements on behalf of the People of California reflect the energy, intellect, creativity, wisdom, political acuity, public spirit, long hours, perseverance, and plain hard work that he has devoted to the Commission. The members and staff of the California Law Revision Commission take pride in the high standards and outstanding reputation he has maintained for the Commission, and are pleased to honor his long and distinguished professional career.

This Resolution adopted by the California Law Revision Commission at its Meeting in Burbank, October 27, 2006.

New Topics and Priorities

The Commission considered Memorandum 2006-36 and its First Supplement, relating to new topics and priorities.

The two new topics assigned by the Legislature — donative transfer restrictions and nonsubstantive reorganization of the weapon statutes — have relatively short deadlines. The Commission decided to give priority to those topics. The Commission declined to undertake any other new topic in the coming year. The new topic suggestions discussed in Memorandum 2006-36 and its First Supplement should be handled as recommended by the staff.

The Commission further decided to adhere to its traditional scheme of priorities in the coming year:

- (1) Matters for the next Legislative session.
- (2) Matters directed by the Legislature.
- (3) Matters for which the Commission has an expert consultant.
- (4) Other matters that have been previously activated but not completed.

These matters are listed at pages 33-35 of Memorandum 2006-36.

The Commission discussed the list of evidence issues attached to the memorandum at Exhibit pages 70-71. Item 8 should be revised to read:

Whether to amend Penal Code Section 11163.3, Evidence Code Section 912 or 917, or other statutes to refer to the human trafficking caseworker-victim privilege.

With this revision, the Commission approved the list for submission to the Judiciary Committees. If there is no objection from those committees, the Commission will begin studying the issues on the list.

The Commission decided to follow the same approach in any future work on the Evidence Code:

- Maintain close contact with the Judiciary Committees.
- Avoid topics of intense controversy.

In the next resolution regarding the Commission's Calendar of Topics, two topics should be dropped: alternative dispute resolution and oral argument in civil procedure. One new topic — a study of the venue statutes — should be added, so that the Commission has authority to undertake such a study when its resources permit.

Personnel Matters

The Commission met in closed session pursuant to Government Code Section 11126(a) to consider a personnel matter. No action was taken.

Report of Executive Secretary

The Executive Secretary reported that the Senate confirmed the Governor's appointment of Commissioners Frank Kaplan, Edmund Regalia, and William Weinberger to another term.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 2006-37, providing a final report on the Commission's 2006 legislative program.

STUDY H-821 – MECHANICS LIEN LAW

The Commission considered Memorandum 2006-39, presenting public comments on the tentative recommendation on *Mechanics Lien Law* (June 2006), and part of Memorandum 2006-43, discussing comments that relate to a private work of improvement.

Except as noted below, the Commission decided to leave the material in pages 1 to 84 of the tentative recommendation as is:

Preliminary Part of Tentative Recommendation

The Commission approved editorial changes to the preliminary part of the tentative recommendation that were proposed by the staff.

Section Numbering

The Commission renumbered the sections of the proposed law that relate to a private work of improvement as Civil Code Sections 8000 to 8848.

Definitions

Claimant

The Commission revised proposed Section 7002 as follows:

§ 7002. Claimant

7002. "Claimant" means a person that has ~~or exercises~~ a right ~~under this part~~ to record a claim of lien under Chapter 4

(commencing with Section 7400) of this part, file a stop payment notice, or assert a claim against a payment bond.

Commencement

The Commission revised proposed Section 7003 as follows:

§ 7003. Commencement

7003. A work of improvement “commences” ~~when~~ on either of the following ~~occurs~~ events:

(a) Delivery to the site of material ~~Material~~ or supplies that are thereafter used, consumed, or incorporated in the work of improvement ~~are delivered to the site~~.

(b) ~~There is actual visible~~ Visible work of a permanent nature on the site.

Comment. Section 7003 is new. It codifies case law. See, e.g., *Walker v. Lytton Sav. & Loan Ass’n*, 2 Cal. 3d 152, 159, 84 Cal. Rptr. 521 (1970); *Halbert’s Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1240-1241, 8 Cal. Rptr. 2d 298 (1992).

Although mere delivery of material or supplies to a site can mark “commencement” of the work of improvement, the person delivering the material or supplies has no lien right until the material or supplies are actually used, consumed, or incorporated in the work of improvement.

See also Section 7038 (“site” defined).

Contract

The staff will evaluate each use of the term “contract” in the proposed law to determine whether the definition provided in proposed Section 7006 is appropriate.

Direct Contractor

The staff will evaluate each use of the term “direct contractor” in the proposed law to determine whether the definition provided in proposed Section 7012 is appropriate.

Labor, Service, Equipment, or Material

The Commission revised the Comment to proposed Section 7016 as follows:

Comment. Section 7016 is a new definition. It is included for drafting convenience. The phrase is intended to ~~encompass all things of value provided for a work of improvement, and replaces~~ replace various phrases used throughout the former law, including “labor or material,” “labor, services, equipment, or materials,” “appliances, teams, or power,” and the like, and is not intended to effect any change in the law. The definition applies to variant

grammatical forms of the phrase used in this part, such as “labor, service, equipment, *and* material.”

The Commission also directed the staff to determine whether inclusion of “construction management” in the definition of “labor, services, equipment, or material” represents a continuation of existing law.

Material Supplier

The Commission approved the presumption contained in proposed Section 7026(b), that material or supplies delivered to a site are used or consumed in the work of improvement, pending further consideration of whether the proposed law as a whole strikes a fair balance among all participants in the construction process.

Work

The Commission added proposed Section 7045:

§ 7045. Work

7045. “Work” means the provision of labor, service, equipment, or material to a work of improvement.

Comment. Section 7045 is a new definition. It is included for drafting convenience.

See also Sections 7016 (“labor, service, equipment, and material” defined), 7046 (“work of improvement” defined).

Filing and Recording of Papers

The Commission revised proposed Section 7056 as follows:

§ 7056. Filing and recording of papers

7056. (a)

(b) If this part provides for recording a notice, claim of lien, release of lien, payment bond, or other paper, the provision is satisfied by filing the paper for record in the office of the county recorder of the county in which the work of improvement or part of it is situated. A paper in otherwise proper form, verified and containing the information required by this part, shall be accepted by the recorder for recording and is deemed duly recorded without acknowledgment.

(c)

Co-Owners

The Commission revised proposed Section 7058 as follows:

§ 7058. Co-owners

7058. (a) An owner may give a notice or execute or file a document under this part on behalf of a co-owner if the owner acts on the co-owner's behalf and includes in the notice or document the name and address of the co-owner on whose behalf the owner acts.

~~(b) Notice to an owner of a leasehold or other interest in property that is less than a fee is not notice to an owner of the fee. Nothing in this subdivision limits the effect of knowledge of an owner, or of notice to a reputed owner where that notice is authorized by statute.~~

Relation to Other Statutes

The Commission revised proposed Section 7062 as follows:

§ 7062. Relation to other statutes

7062. (a) This part does not apply to a transaction governed by the Oil and Gas Lien Act, Chapter 2.5 (commencing with Section 1203.50) of Title 4 of Part 3 of the Code of Civil Procedure.

(b) This part does not ~~limit, and is not affected by,~~ apply to or change improvement security ~~provided~~ under the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code.

Preemption of Laborer Compensation Fund Provisions

The Commission directed the staff to restore existing language in provisions that relate to laborer compensation funds, to the extent necessary to address concern about the possible preemption of those provisions by the federal Employment Retirement Income Security Act of 1974.

Notice

Contents of Notice

The Commission revised proposed Section 7102 as follows:

§ 7102. Contents of notice

7102. (a) Notice under this part shall, in addition to any other information required by statute for that type of notice, include all of the following information to the extent known to the person giving the notice:

...

(6) If the person giving the notice is a claimant:

...

(iii) A statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets.

....

Address at Which Notice is Given

The Commission directed the staff to revise proposed Section 7106 to address notice to a subcontractor, and to a person described in two or more categories of subdivision (a) of the section.

Mailed Notice

The Commission revised proposed Section 7108 as follows:

§ 7108. Mailed notice

7108. (a) Notice ~~given~~ by mail under this part shall be given by ~~(1) first class registered or certified mail, or by (2) Express Mail, or another method of delivery providing for overnight delivery by an express service carrier.~~

~~(b) If notice is given by mail, the affidavit shall be accompanied by one of the following:~~

~~(1) A return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself.~~

~~(2) Proof of mailing certified by the United States Postal Service.~~

~~(3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.~~

~~(c) If notice is given in the form of an electronic record, the affidavit shall also state that the document was served electronically and that no notice of non-transmission was received.~~

Subdivision (b) was moved to proposed Section 7116.

The staff will investigate whether the section should be revised further to better reflect the proof of mailing documentation that is available from the United States Postal Service.

Electronic Notice

The Commission revised proposed Section 7110 as follows:

§ 7110. Electronic notice

7110. (a) As used in this section, “electronic record” has the meaning provided in Section 1633.2.

(b) A notice under this ~~title~~ part may be given to a person in the form of an electronic record if the person has agreed to receive the

~~record by electronic means~~ notice in the form of an electronic record.

(c) If a person that has agreed to receive a ~~record by electronic means~~ notice in the form of an electronic record is a consumer within the meaning of Section 7006 of Title 15 of the United States Code, the person's agreement shall satisfy the requirements of Section 7001 of Title 15 of the United States Code relating to consumer consent to an electronic record.

When Notice Complete

The Commission revised proposed Section 7114 as follows:

§ 7114. When notice complete

7114. Notice under this part is complete and deemed to have been given at the following times:

- (a) If given by personal delivery, when delivered.
- (b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.
- (c) If given by leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action, five days after ~~leaving the notice~~ mailing.
- (d) If given by posting, when displayed.
- (e) If given by recording, when ~~filed for record~~ recorded in the office of the county recorder.
- (f) If given in the form of an electronic record, when the electronic record is transmitted.

Proof of Notice

The Commission revised proposed Section 7116 as follows:

§ 7116. Proof of notice

7116. (a) Proof that notice was given to a person in the manner required by this part shall be made by ~~the a~~ a proof of notice affidavit ~~provided in subdivision (b) and, if given by mail, shall be accompanied by proof in the manner provided in Section 7108.~~

~~(b) A proof of notice affidavit shall show that states~~ all of the following:

- (1) The type or description of the notice given.
- (2) The time, place, and manner of notice, and facts showing that notice was given in the manner required by statute.
- (3) The name and address of the person to which notice was given, and, if appropriate, the title or capacity in which the person was given notice.

(b) If notice is given by mail, the affidavit shall be accompanied by one of the following:

(1) A return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself.

(2) Proof of mailing certified by the United States Postal Service.

(3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.

(c) If notice is given in the form of an electronic record, the affidavit shall also state that the document was served electronically and that no notice of non-transmission was received.

Contract Forms

The Commission revised the Comment to proposed Section 7130 as follows:

Comment. Section 7130 continues the parts of former Section 3097(l)-(m) relating to the content of contracts, deleting the limitation to the owner's residence address. The reference to "written" contract is added to subdivision (b) for consistency with subdivision (a). The reference to "lender or lenders" in subdivision (a) is shortened to "lender" for consistency with subdivision (b). See Section 14 (singular includes plural, and plural includes singular). These and other minor wording changes are technical, nonsubstantive revisions. For the direct contractor's duty to provide information to persons seeking to serve a preliminary notice, see Section 7210.

This section does not require that all contracts between an owner and a direct contractor be in writing.

See also Sections 7004 ("construction lender" defined), 7012 ("direct contractor" defined), 7028 ("owner" defined), 7044 ("subcontractor" defined).

Application of Bond and Undertaking Law

The Commission revised proposed Section 7140 as follows:

§ 7140. Application of Bond and Undertaking Law

7140. The Bond and Undertaking Law, Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, applies to a bond given under this part, except to the extent this part prescribes a different rule or is inconsistent.

Construction of Bond

The Commission revised proposed Section 7144 as follows:

§ 7144. Construction of bond

7144. (a) A bond given under this part shall be construed most strongly against the surety and in favor of the beneficiary.

(b) A surety is not released from liability to the beneficiary by reason of a breach of the contract between the owner and direct contractor or on the part of the beneficiary.

(c) ~~the~~ Except as otherwise provided by statute, the sole conditions of recovery on the bond are that the beneficiary is a person described in Article 1 (commencing with Section 7400) of Chapter 4 and has not been paid the full amount of the claim.

Completion

The Commission revised proposed Section 7150 as follows:

§ 7150. Completion

7150. (a) For the purpose of this part, completion of a work of improvement occurs at the earliest of the following times:

(1) ~~Actual~~ Substantial completion of the work of improvement.

(2) Occupation or use by the owner accompanied by cessation of labor.

(3) Cessation of labor for a continuous period of 60 days.

(4) Recordation of a notice of completion after cessation of labor for a continuous period of 30 days.

(5) Written acceptance of the work of improvement by the owner.

(b) Notwithstanding subdivision (a), if a work of improvement is subject to acceptance by a public entity, completion occurs on acceptance.

The staff will consider whether notice of a written acceptance should be required under proposed Section 7150(a)(5).

STUDY J-505 – CIVIL DISCOVERY

Time Limits for Discovery in an Unlawful Detainer Case

The Commission considered Memorandum 2006-40, discussing comments on the tentative recommendation on *Time Limits for Discovery in an Unlawful Detainer Case* (June 2006). The proposal should be revised to include the following new provision:

§ 1170.9. Judicial Council rules

1170.9. The Judicial Council shall promulgate rules, not inconsistent with statute, prescribing the time for filing and service of opposition and reply papers, if any, relating to a motion under Section 1167.4, 1170.7, or 1170.8.

Comment. Section 1170.9 is new. To prevent confusion and disputes, it directs the Judicial Council to establish briefing schedules for a motion to quash, summary judgment motion, and discovery motion in a summary proceeding for possession of real property. For general guidance on means of service, including service by overnight delivery, see Sections 1010-1020.

The staff should assess whether to refer to any rules of court in the Comment. Subject to this revision, the Commission approved the proposal as a final recommendation, for printing and submission to the Legislature.

The Commission discussed the following suggestions relating to civil discovery:

- The suggestions made by the State Bar Committee on Administration of Justice relating to Code of Civil Procedure Section 2025.270(b). See Memorandum 2006-40, pp. 7-9 & Exhibit p. 16.
- The suggestion made by the California Apartment Association to clarify the extent to which the following types of discovery are available in a summary proceeding for possession of real property: (1) deposition of a non-party, (2) oral deposition outside California, (3) deposition by written questions, (4) physical or mental examination, (5) exchange of expert witness information, (6) presuit discovery, and (7) discovery pending appeal. See Memorandum 2006-40, pp. 9-10 & Exhibit p. 4.
- The suggestions made by Bay Area Legal Aid regarding the interrelationship between the discovery cutoff and the hearing date in a summary proceeding for possession of real property. See Memorandum 2006-40, p. 10 & Exhibit p. 14.
- Attorney Lawrence Jensen's suggestion that a court be required to reserve time on the law and motion calendar for motions made on short notice pursuant to statute. See Memorandum 2006-40, pp. 10-11 & Exhibit p. 12.

The Commission decided to investigate these issues in its ongoing study of civil discovery when time permits.

The Commission also discussed the following suggestions, which do not relate to civil discovery:

- Establish a shortened notice period for a demurrer or a motion to strike in an unlawful detainer case. See Memorandum 2006-40, pp. 11-12 & Exhibit pp. 3-4.
- Shorten the time to file an amended answer in an unlawful detainer case. See Memorandum 2006-40, p. 12 & Exhibit pp. 6-11.

- Extend the notice period for a summary judgment motion in an unlawful detainer case from 5 days to 10 days. See Memorandum 2006-40, pp. 12-13 & Exhibit p. 12.

The Commission decided not to pursue these potentially controversial suggestions.

Deposition in Out-of-State Litigation

The Commission considered Memorandum 2006-41, relating to the procedure for taking a deposition in California for use in an out-of-state case. The Commission made the following decisions:

Proper Tribunal for Resolution of Discovery Dispute

The possibility of seeking relief in the out-of-state tribunal should be referenced in the text of proposed Code of Civil Procedure Section 2029.060, not just in the Comment and preliminary part. The staff should redraft the provision along those lines, perhaps in the following manner:

§ 2029.060. Procedure for resolving discovery dispute

2029.060. (a) If Notwithstanding any right to proceed in courts of the state where the action is pending, if a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction, the deponent or a party to the proceeding may file a petition for a protective order or to compel discovery to obtain other appropriate relief in the superior court of the county in which the deposition is being taken.

“Petition” Terminology

A new subdivision should be added to proposed Section 2029.060, clarifying that if a discovery provision requires filing a “motion” for particular relief, and such relief is sought in the context of an out-of-state case, the proper procedure is to file a “petition” for the relief instead of a “motion.” The portion of the Comment explaining how that principle applies to enforcement of a subpoena for personal records of a consumer should be retained.

Filing Fees

The Commission had no immediate objection to the filing fee approach used in the draft attached to Memorandum 2006-41. The Commission deferred further consideration of the approach, pending receipt of additional input from the Administrative Office of the Courts.

Subsequent Discovery Dispute in Same Case and County

Proposed Code of Civil Procedure Section 2029.070, specifying the procedure for resolving a subsequent discovery dispute in the same county relating to the same out-of-state case, is acceptable as drafted.

Subsequent Discovery Dispute in Another County

The Comment to proposed Code of Civil Procedure Section 2029.070 discusses the possibility of transferring a discovery dispute from one county to another county, to be consolidated with another discovery dispute relating to the same out-of-state case. That discussion and the corresponding discussion in the preliminary part are acceptable as drafted; no further clarification appears necessary.

Review of Superior Court Decision in Discovery Dispute

Proposed Code of Civil Procedure Section 2029.100 is acceptable as drafted.

“Deposition” Terminology

The footnote in the preliminary part explaining California’s usage of the term “deposition” is acceptable; no further clarification appears necessary.

Discovery for Litigation in Another Nation

The Commission discussed whether the legislation proposed in the draft attached to Memorandum 2006-41 would be problematic as applied to discovery for litigation pending in another nation. The Commission did not see any problems in that regard.

Type of Document From Out-of-State Tribunal

The Commission considered what type of document should be required from an out-of-state tribunal to obtain discovery in California:

- Should it be necessary to provide a “mandate, writ, letters rogatory, letter of request, or commission,” as California law currently requires?
- Should it instead be sufficient to provide a subpoena or other “court order regardless of title” requiring a person to submit to discovery, as in NCCUSL’s draft?

The Commission decided that NCCUSL’s approach on this point is preferable. To implement that approach, Code of Civil Procedure Section 2029.010 should be amended along the following lines:

§ 2029.010. Deposition in action pending outside California

2029.010. Whenever any mandate, writ, letters rogatory, letter of request, ~~or~~ commission, subpoena, or other document, however denominated, commanding a person to appear and testify, or to produce documents and things, is issued out of any court of record

Comment. Section 2029.010 is amended to encompass any document, however denominated, that is issued by a court of record of another jurisdiction and commands a person to appear and testify, or to produce documents and things, for purposes of a proceeding pending in that jurisdiction. In the spirit of comity

Inspection of Premises

The Commission's proposal, like NCCUSL's draft, should expressly apply to a request for inspection of premises. To implement that approach, Section 2029.010 should be amended along the following lines:

§ 2029.010. Deposition in action pending outside California

2029.010. Whenever any mandate, writ ... is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition, or a deposition for the inspection and production of documents, tangible things, land, or other property, of a ~~natural~~ person in California, the deponent may be compelled to appear and testify, and to produce ~~documents and things~~ documents, tangible things, land, or other property for inspection, in the same manner, and by the same process as may be employed for the purpose of taking testimony or producing documents, tangible things, land, or other property for inspection in actions pending in California.

Comment. Section 2029.010 is amended to ... make clear that it encompasses (1) a deposition for the production of documents or other items, even if the deponent is not required to testify, and (2) a deposition involving inspection of land or other property.

Filing of an Application

NCCUSL's draft would not require filing of an application to obtain a subpoena from a California court for out-of-state litigation. The Commission discussed whether filing of an application should be necessary. The Commission decided that an application should be required, as detailed in the draft attached to Memorandum 2006-41.

Type of Out-of-State Proceeding Covered

The Commission discussed discovery for an out-of-state arbitration, administrative adjudication, or other proceeding besides litigation. The staff should collect further information on this matter. The Commission specifically considered whether to modify its proposal such that a Californian could be subjected to discovery on the basis of a document issued by an out-of-state arbitrator, as opposed to a document issued by an out-of-state court. The Commission preliminarily rejected that approach.

Details Relating to Issuance of a Subpoena for an Out-of-State Case

Unlike NCCUSL's draft proposal, the draft attached to Memorandum 2006-41 would:

- Expressly permit a California attorney to issue a California subpoena for an out-of-state case in which the attorney has been retained as local counsel.
- Require the Judicial Council to prepare or modify a subpoena form for use in out-of-state litigation.
- Specify that the subpoena must include the caption and case number of the out-of-state case, as well as the name of the court that issues it.

The Commission decided to retain these features of the draft.

Types of Discovery Disputes Covered

Proposed Section 2029.060 would apply "if a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction." The Commission considered whether to replace that phrase with language from a similar provision in NCCUSL's draft, which would apply to "[a]ny motion to enforce, quash, or modify a subpoena issued" for an out-of-state case. The Commission decided to stick with the language in proposed Section 2029.060.

Law Governing Resolution of a Discovery Dispute

The Commission discussed what to say about which law applies when resolving a dispute relating to discovery in California for out-of-state litigation. The Commission did not resolve this point. The staff should seek more information and bring the issue back to the Commission for further consideration.

Use of NCCUSL's Statutory Language and Organizational Scheme

The Commission discussed whether to recast its proposal to track NCCUSL's statutory language and organizational scheme. That probably would entail waiting until early 2008 to introduce legislation. The Commission was tentatively inclined to follow that approach but decided to defer a firm decision on the point until December.

STUDY J-506 – CIVIL DISCOVERY IMPROVEMENTS

See entry in these Minutes for Study J-505, under "Time Limits for Discovery in an Unlawful Detainer Case."

STUDY L-637 – REVISION OF NO CONTEST CLAUSE STATUTE

The Commission considered Memorandum 2006-42 and its First and Second Supplements, discussing issues relating to the enforcement of no contest clauses.

The Commission directed the staff to prepare a memorandum that describes the procedures used in other jurisdictions to determine whether there is probable cause to bring a contest. The staff will also prepare a more detailed discussion of the following alternatives to existing law:

(1) A no contest clause is unenforceable, but costs and fees will be awarded to the prevailing party if a "direct contest" is brought or opposed without reasonable cause. A "direct contest" is a contest based on a claim of revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery.

(2) A no contest clause may only be enforced in a direct contest.

(3) A no contest clause will not be enforced if the contestant has probable cause to bring the contest. The determination of whether probable cause exists would be made after resolution of the contest.

(4) A no contest clause will not be enforced if the contestant has probable cause to bring the contest. The determination of whether probable cause exists would be made before resolution of the contest, and the proceedings up to that point would not constitute a violation of a no contest clause. If the court determines that probable cause does not exist, the contestant would pay the other party's fees and costs up to that point in the proceedings.

STUDY L-3032 – BENEFICIARY DEEDS

The Commission considered Memorandum 2006-38 and its First Supplement, together with material distributed at the meeting (attached to the Second Supplement to Memorandum 2006-38), relating to comments on the tentative recommendation on *Revocable Transfer on Death (TOD) Deed* (August 2006).

The Commission approved the tentative recommendation as its final recommendation, subject to the decisions described below. The staff should defer finalizing the text of the recommendation for 30 days and, if anything material arises during that period that appears to demand further Commission attention, the Executive Secretary in consultation with the Chairperson should bring the matter before the Commission at its December 8 meeting.

Definition of “Revocable TOD Deed”

Section 5614, defining the term “revocable transfer on death deed”, was revised to remove the reference to the time the transfer takes effect; this is governed by a substantive provision.

§ 5614. Revocable transfer on death deed

5614. (a) “Revocable transfer on death deed” means an instrument that makes a donative transfer of real property ~~effective on the death of the transferor~~ under this part.

(b) A revocable transfer on death deed may also be known as a “revocable TOD deed”.

Comment. Section 5614 adopts revocable TOD deed terminology, rather than “beneficiary deed” terminology used in some jurisdictions that have enacted comparable legislation.

A revocable TOD deed may be made for real property or any interest in real property. See Section 5610 (“real property” defined).

The beneficiary must be identified by name in a revocable TOD deed. See Section 5622 (beneficiary).

A revocable TOD deed creates no rights in the beneficiary until the death of the transferor, and is revocable until that time. See Sections 5630 (revocability) and 5650 (effect during transferor’s life).

For a revocable TOD deed statutory form see Section 5642. For construction of a revocable TOD deed see Part 1 (commencing with Section 21101) of Division 11 (rules for interpretation of instruments).

Potential for Fraud

The preliminary part of the recommendation should be expanded to include an explanation that the revocable TOD deed may be less susceptible to

fraudulent abuse than another form of transfer, such as a quitclaim deed, that is effective immediately.

Transfer Subject to Life Estate

The statute should state clearly that a revocable TOD deed may pass the property to a beneficiary subject to a life estate in another beneficiary. The statutory form revocable TOD deed should provide a simple option for a life estate in a surviving spouse. The Comments should indicate that the provision in the statutory form for a spousal life estate does not preclude a transferor from making a revocable TOD deed subject to a nonspousal life estate, or from imposing conditions on the life estate.

Multiple Owners

In the case of a revocable TOD deed jointly executed by co-owners of property, the interest of each co-owner passes to the TOD beneficiary on the death of that owner. As to the interest of the surviving co-owner, the TOD deed should remain revocable. In the case of property held in joint tenancy or as community property with right of survivorship, the statute should make clear that this is a default rule and that the co-owners may draft a deed with different consequences.

§ 5662. Co-owned property

5662. If co-owners of real property join in a revocable transfer on death deed of the property:

(a) The property interest of a co-owner passes to the beneficiary on the death of that co-owner.

(b) A co-owner may revoke the transfer on death deed as to the interest of that co-owner. The revocation does not affect the transfer on death deed as to the interest of another co-owner.

Comment. Section 5662 provides default rules governing a revocable TOD deed joined in by co-owners of the property. The revocation right under subdivision (b) applies before or after the death of another co-owner. The co-owners may provide a different result in the deed.

For supplemental rules applicable to property held in joint tenancy, see Section 5664. For supplemental rules applicable to community property, see Section 5666. For supplemental rules applicable to community property with right of survivorship, see Section 5668.

The default provision should appear in the statutory form deed.

Co-Owners

If you are a co-owner of this property, on your death your interest in the property will pass to the named beneficiary and not to surviving co-owners. IF YOU WANT A DIFFERENT RESULT, SUCH AS PASSAGE OF THE PROPERTY TO SURVIVING CO-OWNERS WITH THE RIGHT TO REVOKE THIS DEED, YOU SHOULD NOT USE THIS FORM BUT SHOULD CONSULT AN ESTATE PLANNING PROFESSIONAL.

Co-owners who prefer that the survivor have possession of the property before it passes to the TOD beneficiary but who wish to use the statutory form deed may select the option of making the transfer subject to a life estate in the survivor. See entry in these Minutes under "Transfer Subject to Life Estate".

Community Property

The general rules otherwise applicable to a nonprobate transfer of community property should be modified so that, in the case of a revocable TOD deed, a spousal consent to or modification or revocation of the deed is ineffective unless recorded. The following community property provision was substituted for the one in the tentative recommendation:

§ 5666. Community property

5666. (a) Chapter 2 (commencing with Section 5010) of Part 1 applies to a revocable transfer on death deed of community property.

(b) For the purpose of application of Chapter 2 (commencing with Section 5010) of Part 1 to a revocable transfer on death deed of community property, written consent to the deed, revocation of written consent to the deed, or modification of the deed, is ineffective unless recorded within the time required by that chapter for execution or service of the written consent, revocation, or modification.

Comment. Subdivision (a) of Section 5666 incorporates the general statutes governing the rights of spouses in a nonprobate transfer of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer apply to a revocable TOD deed. Section 5604(a)(2) (effect of other law).

Under the rules governing a nonprobate transfer of community property, a person has the power of disposition at death of the person's interest in community property without the joinder of the person's spouse. A revocable transfer on death deed of community property joined in by both spouses is effective as to the interests of both spouses. The revocable TOD deed may be subject to subsequent modification or revocation as to the interest of each

spouse. Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.

Subdivision (b) makes clear that the general statute governing the rights of spouses in a nonprobate transfer of community property is qualified by the recording requirement in the case of a revocable TOD deed of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer are subject to a contrary rule in the revocable TOD deed law. See Section 5604(b); see also Section 5011(b) (rights of parties subject to a contrary state statute specifically applicable to the instrument under which the nonprobate transfer is made).

It should be noted that a third party that acts in reliance on apparent spousal rights under a revocable TOD deed is protected in that reliance. Section 5684 (third party protection).

Community Property with Right of Survivorship

A revocable TOD deed of community property with right of survivorship should be subject to the general rules governing severance of a joint tenancy and disposition pursuant to a nonprobate transfer of community property.

§ 5668. Community property with right of survivorship

5668. If a revocable transfer on death deed is made by an owner of community property with right of survivorship:

(a) The death of the transferor terminates the right of survivorship in the same manner as severance of a joint tenancy under Section 5664.

(b) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the community property with right of survivorship. The transfer is subject to Section 5666, relating to a revocable transfer on death deed of community property.

Comment. Section 5668 addresses the effect of a revocable TOD deed on community property with right of survivorship. See Civ. Code § 682.1 (CPWROS).

Subdivision (a) is consistent with Civil Code Section 682.1(a) (termination of survivorship right pursuant to same procedures by which joint tenancy may be terminated). In the case of simultaneous death, Section 223 (joint tenants) controls; the one-half interest of each spouse passes under the revocable TOD deed or other dispositive instrument of that spouse.

On termination of the survivorship right, the property is treated as ordinary community property. A revocable TOD deed of the property is subject to the rules governing a nonprobate transfer of community property. Subdivision (b).

Rights of Creditors

The Commission added constructional language to the Comment to Section 5676 making clear the legislative intent that the general abatement rule extends to property returned to the transferor's estate:

Comment. Section 5676 is drawn from Section 13206, relating to restoration of property to the estate by a decedent's successor who takes real property of small value under the affidavit procedure. The beneficiary of revocable TOD-deeded property that is restored to the transferor's estate under this section is the beneficiary of a specific gift for purposes of abatement under Section 21402.

The Commission also addressed the situation where the beneficiary conveys the property to the transferor's estate voluntarily, under threat of litigation, and there is a surplus after satisfaction of creditor claims:

§ 5676. Return of property to estate for benefit of creditors

5676. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the transferor's estate are commenced each beneficiary is liable for:

(1) The restitution to the transferor's estate of the property the beneficiary received pursuant to the revocable transfer on death deed if the beneficiary still has the property, together with (A) the net income the beneficiary received from the property and (B) if the beneficiary encumbered the property after the transferor's death, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the transferor's estate of the fair market value of the property if the beneficiary no longer has the property, together with (A) the net income the beneficiary received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property the beneficiary received pursuant to the revocable transfer on death deed, less the amount of any liens and encumbrances on the property at the time of the transferor's death.

(b) Subject to subdivision (c), if proceedings for the administration of the transferor's estate are commenced and a beneficiary made a significant improvement to the property received by the beneficiary pursuant to the revocable transfer on death deed, the beneficiary is liable for whichever of the following the transferor's estate elects:

(1) The restitution of the property, as improved, to the estate of the transferor upon the condition that the estate reimburse the beneficiary for (A) the amount by which the improvement increases

the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the beneficiary for principal and interest on any liens or encumbrances that were on the property at the time of the transferor's death.

(2) The restoration to the transferor's estate of the fair market value of the property, determined as of the time of the transferor's death, less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the time of the transferor's death.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the beneficiary to satisfy a liability under Section 5672.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the transferor. ~~In an action to enforce the liability under this section, the court's judgment~~ Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of creditors of the transferor.

(e) An action to enforce the liability under this section is forever barred three years after the transferor's death. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 5676 is drawn from Section 13206, relating to restoration of property to the estate by a decedent's successor who takes real property of small value under the affidavit procedure. The beneficiary of revocable TOD-deeded property that is restored to the transferor's estate under this section is the beneficiary of a specific gift for purposes of abatement under Section 21402.

Subdivision (d) makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the beneficiary.

A parallel change should be made to the comparable provision of Probate Code Sections 13111 (affidavit procedure for personal property in small estate, 13206 (affidavit procedure for real property of small value), and 13562 (passage of property to surviving spouse without administration).

Effectuation of Transfer

The Commission added language to the proposed law that would explicitly empower a beneficiary named in a revocable TOD deed to obtain a copy of the transferor's death certificate:

§ 5680. Beneficiary rights and duties

5680. (a) The beneficiary may establish the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2. For the purpose of this subdivision, the beneficiary is a person empowered by statute to act on behalf of the transferor or the transferor's estate within the meaning of Section 103526 of the Health and Safety Code.

(b) For the purpose of filing the change in ownership statement required by Section 480 of the Revenue and Taxation Code, the beneficiary is a transferee of real property by reason of death.

(c) For the purpose of giving the notice to the Director of Health Services provided for in Section 215, the beneficiary is a beneficiary of the transferor.

(d) The beneficiary is liable to the transferor's estate for prorated estate and generation skipping transfer taxes to the extent provided in Division 10 (commencing with Section 20100).

Comment. Subdivision (a) of Section 5680 establishes that a beneficiary may record an affidavit of death of the transferor to effectuate the transfer. See Section 212 (recordation is prima facie evidence of death to the extent it identifies real property located in the county, title to which is affected by the death). Subdivision (a) authorizes the named beneficiary to obtain a certified copy of the transferor's death certificate under Health and Safety Code Section 103525 for the purpose of effectuating the transfer by revocable TOD deed.

Subdivision (b) cross-references the duty imposed on the beneficiary to file a change of ownership statement with the county recorder or assessor within 150 days after the transferor's death. See Rev. & Tax. Code § 480.

Subdivision (c) cross-references the duty imposed on the beneficiary to give the Director of Health Services notice of the death of a transferor who has received Medi-Cal benefits. See Section 215.

Subdivision (d) is a specific application of Division 10 (commencing with Section 20100), relating to proration of taxes. The beneficiary of a nonprobate transfer, such as a revocable TOD deed, is liable for a pro rata share of estate and generation skipping transfer taxes paid by the transferor's estate. See Sections 20100 et seq. (proration of estate tax), 20200 et seq. (proration of tax on generation-skipping transfer).

A beneficiary may disclaim the property under Section 275 (disclaimer).

Contest of Deed

Venue

The Commission added language to the deed contest provisions to make clear that the correct venue is the county in which administration of the decedent's estate would be proper, rather than the county in which the real property is located:

§ 5690. Contest of transfer

5690. (a) The transferor's personal representative or an interested person may, under Part 19 (commencing with Section 850) of Division 2, contest the validity of a transfer of property by a revocable transfer on death deed.

(b) The proper county for a contest proceeding is the proper county for proceedings concerning administration of the transferor's estate, whether or not proceedings concerning administration of the transferor's estate have been commenced at the time of the contest.

(c) On commencement of a contest proceeding, the contestant may record a lis pendens in the county in which the revocable transfer on death deed is recorded.

Comment. Section 5690 incorporates the procedure of Sections 850-859, relating to a conveyance or transfer of property claimed to belong to a decedent or other person. A person adversely affected by a revocable TOD deed has standing to contest the transfer. Cf. Section 48 ("interested person" defined).

Grounds for contest may include but are not limited to lack of capacity of the transferor (Section 5620), improper execution or recordation (Sections 5622-5624), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350). See also Section 5696 (fraud, undue influence, duress, mistake, or other invalidating cause).

The proper county for proceedings for administration of a decedent's estate is the county of the decedent's domicile or, in the case of a nondomiciliary, the county of the decedent's death or, if the decedent died outside the state, where property of the decedent is located. Prob. Code §§ 7051, 7052.

Recordation of a lis pendens within 40 days after the transferor's death preserves remedies for the contestant. See Section 5694 (remedies).

Statute of Limitations

The Commission extended the statute of limitations for obtaining set aside of a transfer pursuant to a revocable TOD deed from 40 days after the transferor's death to 90 days after the transferor's death.

Statutory Form Deed

The life estate option for a surviving spouse included in the statutory form deed should be more clearly and simply expressed.

The statutory form deed should satisfy a number of formal requirements, including:

- (1) A space for the assessor's parcel number.
- (2) Directions on where to mail the deed after recording and where to send tax statements.
- (3) A block for the recorder's use.

The statutory form deed should include a warning to the transferor that its use will not prevent the state from obtaining Medi-Cal recovery from the property.

The statutory form deed should advise the beneficiary to file a claim for reassessment exclusion under Revenue and Taxation Code Section 63.1, if applicable.

The statutory form deed should include a declaration that, "This deed is exempt from documentary transfer tax under Rev. & Tax. Code § 11930."

The statutory form deed should make clear that, "This deed is exempt from the preliminary change of ownership report under Rev. & Tax. Code § 480.3."

Property Taxation

The statute should include language addressed to the documentary transfer tax and the preliminary change of ownership report:

§ 5656. Property taxation

5656. For the purpose of application of the property taxation and documentary transfer tax provisions of the Revenue and Taxation Code:

(a) Execution and recordation of a revocable transfer on death deed of real property is not a change in ownership of the property and does not require declaration or payment of a documentary transfer tax or filing of a preliminary change of ownership report.

(b) Transfer of real property on the death of the transferor by a revocable transfer on death deed is a change in ownership of the property.

Comment. Section 5656 prescribes the effect of a revocable TOD deed for purposes of property tax reassessment and documentary transfer taxation.

Under subdivision (a), mere recordation of a revocable TOD deed is not a transfer or change in ownership for taxation purposes.

This is an application of existing law. See, e.g., Rev. & Tax Code §§ 480.3 (application of preliminary change of ownership requirement), 11930 (exemption for documentary transfer tax).

Under subdivision (b), a change in ownership pursuant to a revocable TOD deed does not occur until the transferor's death. The TOD beneficiary is responsible for filing the change in ownership statement required by Revenue and Taxation Code Section 480. See Section 5680 (beneficiary rights and duties). Although a transfer of property by a revocable TOD deed is a change in ownership for reassessment purposes, the transfer may qualify for exclusion under the Revenue and Taxation Code, depending on the nature of the parties to the transfer. See, e.g., Rev. & Tax. Code §§ 62-63.1.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary