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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
MARCH 29-30, 2001  
SACRAMENTO

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A meeting of the California Law Revision Commission was held in Sacramento on March 29-30, 2001.

**Commission:**

*Present:* David Huebner, Chairperson  
Joyce G. Cook, Vice Chairperson  
Sanford M. Skaggs  
Howard Wayne, Assembly Member

*Absent:* Bion M. Gregory, Legislative Counsel  
Bill Morrow, Senate Member

**Staff:** Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary  
Barbara S. Gaal, Staff Counsel  
Brian P. Hebert, Staff Counsel  
Lynne I. Urman, Staff Counsel

**Other Persons:**

Karon D. Cave, Soda Springs (Mar. 30)  
Karen D. Conlon, California Association of Community Managers, Irvine (Mar. 30)  
Kimberley Dellinger, California Building Industry Association, Sacramento (Mar. 30)  
Pamela Fisk, California Official Court Reporter's Association, Redwood City  
(Mar. 30)  
Leigh Anne M. Isgreen, Soda Springs (Mar. 30)  
Naomi L. Myers, Soda Springs (Mar. 30)  
Jeffrey Ogata, State Bar Business Law Section, Non-Profit Committee, Sacramento  
(Mar. 30)  
Susan Penney, California Medical Association, San Francisco (Mar. 29)  
Sam Perrotti, Department of Real Estate, Sacramento (Mar. 30)  
Richard Peters (Mar. 30)  
S. Guy Puccio, Executive Council of Homeowners, Sacramento (Mar. 30)  
Sidney L. Roullier, Sacramento County Superior Court, Sacramento  
Sabrina Spalding, Wallace & Puccio, Sacramento (Mar. 30)  
Donald R. Travers, State Bar Estate Planning, Trust and Probate Law Section,  
Paradise (Mar. 29)  
Richard B. Williams, California Department of Transportation, Sacramento (Mar. 29)

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MINUTES OF FEBRUARY 1-2, 2001, COMMISSION MEETING

1       The Commission approved the Minutes of the February 1-2, 2001,  
2 Commission meeting as submitted by the staff, subject to the following  
3 corrections:

4       On page 1, change “Lynn” to “Lynne”.

5       On page 2, change “California Court Reporters Association” to “California  
6 Official Court Reporters Association”.

7       On page 6, line 31, change “not” to “nor”.

8       On page 14, lines 12 and 13, change “set the filing fee at \$87, instead of \$85” to  
9 “read”.

10      On page 18, lines 35 and 36, delete “, particularly with respect to referees”.

11      On page 19, line 10, change “Commissioner” to “Commission”.

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ADMINISTRATIVE MATTERS

**Meeting Schedule**

The meeting scheduled for May 17 and 18 in Sacramento was changed to a one-day meeting, to be held May 18 in San Diego. The Executive Secretary is to set the time and place of the meeting in consultation with the Chairperson.

**Report of Executive Secretary**

The Executive Secretary reported that the Commission’s budget for the 2001 fiscal year has been approved by the Senate Subcommittee as submitted by the Governor. The matter has not yet been set for hearing in the Assembly.

The Executive Secretary reported on the status of a number of consultant contracts:

David Ross, a consultant on the criminal sentencing project, has retired as a deputy district attorney in Los Angeles County, and has resigned as a Commission consultant. The Commission requested the staff to take steps to replace him with another appropriate consultant from the prosecution side.

Professor Gregory Weber has delivered the background study on possible discovery improvements from other jurisdictions. He is taking steps to have the study published in a law review. The staff will circulate the study among interested persons for their reactions, before scheduling the matter for Commission consideration.

David Gould, our consultant on assignments for benefit of creditors, has completed a substantial amount of work, including a review of the assignment statutes of other jurisdictions, and a prospectus for the project. The Executive Secretary has authorized payment under the contract based on the work in progress. Mr. Gould would like to obtain input of persons in the field before completing the study and delivering it to the Commission, and has developed an exhaustive questionnaire for that purpose. The staff plans to distribute the questionnaire to interested persons under the Commission’s letterhead, requesting their input.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 2001-23, relating to the Commission’s 2001 legislative program. The staff orally updated the chart attached to the memorandum with new and revised hearing dates.

1       **AB 237 (Papan) – Early disclosure of valuation data and resolution of issues**  
2 **in eminent domain.** For Commission action relating to AB 237 (Papan),  
3 concerning early disclosure of valuation data and resolution of issues in eminent  
4 domain, see the entry in these Minutes under Study Em-458.

5       **AB 873 (Harman) – Estate planning and dissolution of marriage.** For  
6 Commission action relating to AB 873 (Harman), concerning estate planning and  
7 dissolution of marriage, see the entry in these Minutes under Study L-910.

8       **AB 1278 (Wayne) – Health Care Decisions Law.** For Commission action  
9 relating to AB 1278 (Wayne), concerning miscellaneous revisions in the Health  
10 Care Decisions Law, see the entry in these Minutes under Study L-4004.

11       **SCR 13 (Morrow) – Resolution of authority.** The staff reported that the  
12 Commission’s resolution of authority — SCR 13 (Morrow) — was approved by  
13 the Senate Judiciary Committee with the following revision:

14               Whether the Subdivision Map Act (Division 2 (commencing  
15 with Section 66410) of Title 7 and the Mitigation Fee Act (Chapter 5  
16 (commencing with Section 6600) Chapter 6 (commencing with  
17 Section 66010), Chapter 7 (commencing with Section 66012),  
18 Chapter 8 (commencing with Section 66016), and Chapter 9  
19 (commencing with Section 66020) of Division 1 of Title 7 of the  
20 Government Code) should be revised to improve their  
21 organization, resolve inconsistencies, ~~fill—gaps,~~ clarify and  
22 rationalize provisions, ~~codify accepted practices and procedures,~~  
23 and related matters;

24       The Commission noted that the concept of codifying accepted practices and  
25 procedures is not to impose uniformity on all entities, but to recognize the  
26 diversity that existing law allows. This probably could be achieved within the  
27 revised scope of the project without imposing uniform procedures on all entities.

28       The Commission also noted that if issues arise that fall within one of the  
29 deleted categories, one approach would be to compile a list of those issues. The  
30 list could be revisited and the Commission’s jurisdiction expanded, if necessary,  
31 or could be passed along to the interested committees and parties for their  
32 attention.

33       **STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT**

34       The Commission considered Memorandum 2001-20 and its First Supplement,  
35 discussing liability issues relating to unincorporated nonprofit associations. The

1 Commission approved the staff recommendations made in the memorandum,  
2 with the following changes:

3 **Corp. Code § 21020. Contract liability of member of nonprofit association**

4 Proposed Section 21020 and its Comment should be revised as follows:

5 21020. A member of a nonprofit association may not be held  
6 personally liable for a contractual obligation of the association,  
7 except in one of the following circumstances:

8 (a) The member expressly assumes personal responsibility for  
9 the obligation.

10 (b) The member expressly authorizes or ratifies the specific  
11 contract. ~~For the purposes of this paragraph, express authorization~~  
12 ~~or ratification of a contract does not include signing of by-laws,~~  
13 ~~election of officers, or participation in a vote in which the member~~  
14 ~~votes against authorization or ratification of the contract.~~

15 (c) With notice of the contract, the member receives a benefit  
16 under the contract. Liability under this subdivision is limited to the  
17 value of the benefit received.

18 **Comment.** Section 21020 is new. It specifies the scope of  
19 personal liability of a member of a nonprofit association for a  
20 contractual obligation of the association.

21 Subdivision (a) provides that a member may be liable where the  
22 member has personally guaranteed a debt or otherwise assumed  
23 responsibility for a contract. A promise to answer for the debt of  
24 another is subject to the statute of frauds. Civ. Code § 1624(a)(2).

25 Subdivision (b) codifies the common law rule that a member of  
26 a nonprofit association may be personally liable for a contractual  
27 obligation that the member has expressly authorized or ratified. See  
28 Security First National Bank of Los Angeles v. Cooper, 62 Cal. App.  
29 2d 653 (1944). Subdivision (b) does not continue the common law  
30 rule that a member may be liable for a contract that the member has  
31 impliedly authorized or ratified. Authorization and ratification may  
32 not be inferred from mere participation in the governance of the  
33 association — express approval of the contract is required. For  
34 example, approval of by-laws, election of officers, or participation  
35 in a vote in which the member votes against authorization or  
36 ratification of a contract would not constitute express authorization  
37 or ratification of a contract.

38 Nothing in this section affects the liability of a member who is  
39 acting as an agent of the association, under the law governing  
40 liability of agents. See Sections 21030, 21050.

41 **Corp. Code § 21040. Tort liability of member of nonprofit association**

42 Proposed Section 21040 and its Comment should be revised as follows:

1           21040. A member of a nonprofit association may not be held  
2 personally liable for an injury caused by an act or omission of the  
3 association or an agent of the association, except in one of the  
4 following circumstances:

5           (a) The member expressly assumes liability for any injury  
6 caused by particular conduct and that conduct causes an injury.

7           (b) ~~The member expressly authorizes conduct that causes an~~  
8 ~~injury. Express authorization of conduct does not include signing of~~  
9 ~~by laws, election of officers, or participation in a vote in which the~~  
10 ~~member votes against authorization of the conduct~~ member's own  
11 tortious conduct causes the injury.

12           **Comment.** Section 21040 is new. It specifies the scope of  
13 personal liability of a member of a nonprofit association for a tort of  
14 the association or of an agent of the association.

15           Subdivision (a) provides that a member may be liable where the  
16 member has personally assumed responsibility for conduct that  
17 causes an injury.

18           Subdivision (b) provides that a member of a nonprofit  
19 association is liable for ~~the conduct of the association and its agents~~  
20 ~~where the member has expressly authorized that conduct. This is~~  
21 ~~consistent with the common law. See Steuer v. Phelps, 41 Cal. App.~~  
22 ~~3d 468 (1974) (liability may be based on authorization of activity~~  
23 ~~that causes injury, under doctrine of respondeat superior). Liability~~  
24 ~~under this section does not depend on authorization of specific~~  
25 ~~wrongful acts or omissions. If a member authorizes an agent's~~  
26 ~~conduct and that agent's negligence causes an injury, the member~~  
27 ~~may be liable despite the fact that the member did not authorize the~~  
28 ~~agent to act negligently. See Civ. Code §§ 2338-2339. Authorization~~  
29 ~~of conduct that causes an injury may not be inferred from mere~~  
30 ~~participation in the governance of the association — express~~  
31 ~~approval of the conduct is required~~ the member's own tortious  
32 conduct.

33           Section 21040 states the circumstances in which a member may  
34 be liable, but these circumstances alone are not sufficient to  
35 establish liability. For example, subdivision (c) provides that a  
36 member may be liable if the member's conduct causes an injury.  
37 However, a member would not be liable to a person injured by the  
38 member's conduct unless the member also owed a duty of care to  
39 the injured person and had breached that duty.

40           Nothing in this section affects the liability of a member who is  
41 acting as an agent of the association, under the law governing  
42 liability of agents. See Sections 21030, 21050.

1 **Corp. Code § 21090. Liability of member of nonprofit medical association**

2 The staff will review Proposed Section 21090 and make any changes,  
3 including possible deletion of Section 21090, necessary to conform to the changes  
4 made to Section 21040.

5 **Corp. Code § 21100. Liability of director or officer of nonprofit medical**  
6 **association**

7 No changes should be made to Proposed Section 21100.

8 **Incorporation of Agency Law**

9 A general provision should be added to the proposed title, along the  
10 following lines:

11 **Corp. Code § 20510. Application of agency law**

12 20510. Except where this title provides a specific rule, the  
13 general law of agency, including Article 2 (commencing with  
14 Section 2019) of Chapter 2 of Title 6 of, and Title 9 (commencing  
15 with Section 2295) of, Part 4 of Division 3 of the Civil Code applies  
16 to unincorporated associations.

17 **Comment.** Section 20510 is new. This section makes clear that  
18 the general agency statutes and the common law of agency apply to  
19 unincorporated associations under this title, except where this title  
20 provides a specific rule.

21 **STUDY D-1003 – DEBTOR-CREDITOR LAW: TECHNICAL REVISIONS**

22 The Commission considered Memorandum 2001-28 and the staff draft  
23 tentative recommendation on *Debtor-Creditor Law: Technical Revisions*. The  
24 Commission approved the tentative recommendation to be distributed for  
25 comment with an early return date so that any comments received can be  
26 reviewed at the May meeting.

27 **STUDY D-1100 – MUNICIPAL BANKRUPTCY**

28 The Commission considered Memorandum 2001-32 and its First Supplement,  
29 concerning reform of California statutes governing municipal bankruptcy and  
30 related provisions. After reviewing the options presented in the background  
31 study prepared by Prof. Frederick Tung and other materials, the Commission  
32 directed the staff to prepare a tentative recommendation making the technical  
33 revisions needed to conform the statutes to the language and scope of the federal

1 Bankruptcy Code. In view of the lack of any consensus of a need for additional  
2 protections or on what protections would be advisable (e.g., gatekeeper official or  
3 committee, post-filing trusteeship, prebankruptcy state insolvency procedures,  
4 class restrictions on types of filers), the Commission decided not to pursue any  
5 deeper reforms at this time.

6 STUDY EM-458 – EARLY DISCLOSURE OF VALUATION DATA AND  
7 RESOLUTION OF ISSUES IN EMINENT DOMAIN

8 In connection with discussion of the legislative program, the staff presented  
9 new issues that have arisen concerning AB 237 (Papan), which would implement  
10 the Commission’s recommendation on early disclosure of valuation data and  
11 resolution of issues in eminent domain. The Commission approved in concept  
12 the staff developing amendatory language relating to the following issues:

13 **(1) Disclosure of prelitigation appraisal.** In response to concerns about  
14 problems that could be caused by delivery of the condemnor’s prelitigation  
15 appraisal to the property owner, the staff should prepare alternate language  
16 specifying the detail required in the condemnor’s summary of the appraisal,  
17 along the lines of the Commission’s tentative recommendation on this matter.  
18 The staff should also consult the implementing regulations of 25 Cal. Code Regs.  
19 § 6182. The statute should make clear that a condemnor may satisfy the summary  
20 requirement by delivering a copy of the appraisal to the property owner.

21 **(2) Procedure for resolving legal issues.** The statute should make clear that  
22 the motion procedure provided in the statute does not preclude use of other  
23 pretrial or trial procedures for resolving legal issues.

24 **(3) Disclosure of prejudgment deposit appraisal.** A provision should be  
25 added to make clear that a property owner who seeks an increase in the amount  
26 of a deposit must disclose facts supporting the increase.

27 **(4) Trial within one year.** The staff should seek to address the concern that  
28 under the bill, with the exchange of valuation data occurring nine months after  
29 filing of the proceeding and 90 days before trial, trial might not commence until  
30 more than a year after the proceeding was filed, which could cause a shift in  
31 valuation date.

32 **(5) Alternative dispute resolution.** The staff should draft Comment language  
33 to make clear that the statutory provision for ADR in eminent domain, and for  
34 the court to waive time limits for ADR in eminent domain, is not intended to

1 imply that ADR is not available, or that the court does not have authority to  
2 waive time limits for ADR, in other proceedings.

3                   STUDY EM-459 – EVIDENCE OF PREJUDGMENT DEPOSIT  
4                   APPRAISAL IN EMINENT DOMAIN

5           The Commission considered Memorandum 2001-24 and its First and Second  
6 Supplements, addressing comments received on the tentative recommendation  
7 relating to evidence of the prejudgment deposit appraisal in eminent domain  
8 proceedings. After considering the letters received and the remarks of interested  
9 persons present at the meeting, the Commission approved the proposal as a final  
10 recommendation, with the clarifications and corrections identified in  
11 Memorandum 2001-24.

12                   STUDY F-910 – EFFECT OF DISSOLUTION OF MARRIAGE  
13                   ON NONPROBATE TRANSFERS

14           See entry in these Minutes under Study L-910.

15                   STUDY F-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

16           See entry in these Minutes under Study L-910.

17                   STUDY H-851 – NONJUDICIAL DISPUTE RESOLUTION UNDER CID LAW

18           The Commission considered Memorandum 2001-31 and its First Supplement,  
19 relating to nonjudicial dispute resolution under common interest development  
20 law. The staff summarized existing California law on this matter, and surveyed  
21 techniques in use in other jurisdictions. After hearing from interested persons  
22 and discussing the pros and cons of different possible approaches on this issue,  
23 the Commission decided on the following direction.

24           The Commission was not interested, at present, in exploring the creation and  
25 funding of new state or local bureaucracies to deal with common interest  
26 development disputes. Rather, the Commission thought it would be worth  
27 exploring whether existing mechanisms and entities could be used more  
28 effectively to address the kinds of problems that have been brought to the  
29 Commission's attention.

1       Also, the Commission's sense was that the types of disputes that have been  
2 identified are not necessarily amenable to standardized treatment. Different  
3 disputes may be more effectively resolved by one technique than another.

4       For example, mediation is not necessarily a panacea — it may be more a  
5 hindrance than a help in resolving issues in some circumstances. This is  
6 particularly true where one of the parties enters mediation without the intention  
7 of settling. In that case, the mediation simply becomes an impediment to  
8 resolving the dispute by adding to the time and cost of its resolution. Likewise, it  
9 may not be profitable to allow one homeowner to trigger a mediation over an  
10 issue that transcends the interests of the individual homeowner and affects the  
11 community generally, such as the appropriate level of maintenance assessments  
12 for the community.

13       Perhaps mediation ought not to be automatically required as a prerequisite to  
14 use of other resolution mechanisms. The staff should consider ways of  
15 distinguishing among the cases in which mediation and other dispute resolution  
16 processes would be beneficial. This might involve categorization of disputes by  
17 type or subject matter. It could involve a process for evaluating and directing  
18 individual disputes to an appropriate resolution mechanism.

19       The Commission also asked the staff to consider the possibility of some sort of  
20 stepped approach to resolving disputes. For example, a med-arb option could  
21 help to efficiently dispose of a dispute by converting a mediation into an  
22 arbitration without loss of the time or money already invested in the dispute  
23 resolution process, in cases where it becomes apparent that mediation is not  
24 going to work.

25       In such a sequence, arbitration probably should be binding. But to ensure  
26 fairness, there would need to be an appropriate level of judicial review of the  
27 arbitrator's decision.

28       Also among the options the staff should investigate is possible expansion of  
29 small claims court jurisdiction. This could offer the opportunity for a relatively  
30 quick and neutral decision in an accessible and lawyer-free environment, at least  
31 with respect to some types of disputes.

32       The Commission noted that some of the association actions that may generate  
33 disputes are quasi-governmental in nature, where the association is in effect  
34 assuming functions that a local public entity might traditionally have performed.  
35 For these sorts of functions, procedures might be imposed that are analogous to  
36 those used in the public arena, including due process and majority control. By

1 parity of reasoning, however, once basic procedural protections have been  
2 satisfied, judicial review would be limited, as it is for comparable public entity  
3 decisions.

4 In this connection, the staff should also consider the option of imposing some  
5 sort of personal responsibility on directors who violate basic due process  
6 requirements in the governance of an association. Such a sanction would need to  
7 be carefully considered so as not to create a further disincentive for homeowners  
8 volunteering to serve on boards. A sanction against a management intermediary  
9 that advises the board might also be an option.

10 With respect to association governance issues, such as meetings, notices,  
11 elections, etc., that come within the ambit of the Nonprofit Mutual Benefit  
12 Corporation Law, the staff should conduct further investigation of the Attorney  
13 General's role. It is possible that invigorating the operations of the Attorney  
14 General in this area could be helpful, either in resolving disputes or in providing  
15 a contact point for people who need information.

16 The Attorney General could provide the function of informing people about  
17 the governing law and about the availability of alternative dispute resolution  
18 processes. Other possibilities for this function could include the Department of  
19 Fair Housing or decentralized county offices. In any event, the Commission's  
20 sense was that it would be helpful to have a clear contact point for information,  
21 perhaps with an associated website or other means of getting information to  
22 people readily and inexpensively. The information should include a plain  
23 English description of options that are available and contact information that will  
24 direct people where to go in order to take advantage of a particular option.

25 STUDY H-910 – EFFECT OF DISSOLUTION OF MARRIAGE  
26 ON NONPROBATE TRANSFERS

27 See entry in these Minutes under Study L-910.

28 STUDY H-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

29 See entry in these Minutes under Study L-910.

30 STUDY J-111 – STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

31 The Commission considered Memorandum 2001-30, concerning the burden of  
32 proving when the plaintiff discovered or should have discovered the facts

1 constituting the alleged malpractice. The Commission expressed tentative  
2 interest in allocating the burden of proof to the plaintiff, as recommended by the  
3 staff. The Commission concluded, however, that it would be helpful to have  
4 further input on this point before deciding how to proceed. Don Travers of the  
5 State Bar Estate Planning, Trust, and Probate Law Section offered to seek  
6 feedback on the issue and report back to the Commission.

7                   STUDY J-901 – AWARD OF COSTS AND CONTRACTUAL  
8                   ATTORNEY’S FEES TO PREVAILING PARTY

9           The Commission considered Memorandum 2001-17 and its First Supplement,  
10 concerning costs and contractual attorney’s fees. The Commission made the  
11 following decisions:

12 **Terminology**

13           The following terminology should be used in the next draft:

- 14           (1) “Costs of suit” means traditional court costs. The definition should  
15           expressly state that attorney’s fees are not “costs of suit.”  
16           (2) “Attorney’s fees” means attorney’s fees awarded pursuant to  
17           contract, statute, or other law.  
18           (3) “Litigation expenses” means costs of suit, attorney’s fees, and all  
19           other expenses incurred in litigation.

20           These definitions should apply to the entirety of the chapter on litigation  
21 expenses (Chapter 6 of Title 14 of Part 2 of the Code of Civil Procedure).  
22 Provisions in the chapter should be revised as necessary to eliminate ambiguity  
23 regarding the expenses to which they pertain. The staff should attempt to avoid  
24 defining a special term to refer to litigation expenses that are neither costs of suit  
25 nor attorney’s fees.

26 **Code Civ. Proc. § 1025. Tender and deposit**

27           Code of Civil Procedure Section 1025 should be broadened to establish a  
28 general rule that where a party tenders the full amount due before a lawsuit is  
29 commenced, and deposits that amount with the court promptly after the suit is  
30 filed, that party is not liable for any costs of suit, attorney’s fees (regardless of  
31 whether attorney’s fees are otherwise authorized by contract, statute, or law), or  
32 other expenses attributable to the litigation. Language in Civil Code Section 1717  
33 relating to tender and deposit should be deleted or revised accordingly.

1 **Determination of Prevailing Party**

2 The next draft should include a statutory procedure for claiming and taxing  
3 costs. Provisions should be revised as necessary to conform to the terminology  
4 for that procedure.

5 **Code Civ. Proc. § 1039.20. Rebuttable presumptions for determining prevailing**  
6 **party for purposes of awarding costs**

7 Proposed Code of Civil Procedure Section 1039.20 should be revised along the  
8 following lines:

9 1039.20. (a) For purposes of awarding costs, a party is rebuttably  
10 presumed to be the prevailing party under the following  
11 circumstances:

12 (1) In a two-party action where the plaintiff obtains a judgment  
13 for all or substantially all of the relief sought, the plaintiff is the  
14 prevailing party.

15 (2) In an action with three or more parties, where the plaintiff  
16 obtains a judgment for all or substantially all of the relief sought  
17 from a particular defendant, the plaintiff is the prevailing party as  
18 to that defendant.

19 (3) In a two-party action where the ~~court finds judgment~~  
20 provides that the defendant is not liable, the defendant is the  
21 prevailing party.

22 (4) In an action with three or more parties, where the ~~court finds~~  
23 judgment provides that a particular defendant is not liable to a  
24 particular plaintiff, that defendant is the prevailing party as to that  
25 plaintiff.

26 (5) Where an action is voluntarily dismissed, other than  
27 pursuant to a settlement agreement, the defendant is the prevailing  
28 party.

29 ~~(6) Where an action is tried to the court, and the court's decision~~  
30 ~~states that a particular party prevailed, that party is the prevailing~~  
31 ~~party.~~

32 (b) A party claiming costs shall specify, on a form approved by  
33 the Judicial Council, which of the presumptions in subdivision (a)  
34 applies, if any. A presumption pursuant to this section is rebuttable  
35 as provided in Section 1039.30.

36 **Code Civ. Proc. § 1039.30. Determination of prevailing party**

37 Proposed Code of Civil Procedure Section 1039.30 should be revised such that  
38 the prevailing party need not in all circumstances be determined by the court  
39 where none of the presumptions in Section 1039.20 applies.

40 Section 1039.30(c) should be revised along the following lines:

1           (c) ... The court shall ~~make a pragmatic assessment of~~ consider  
2           the extent to which each party has succeeded and failed in its  
3           contentions and objectives, and the circumstances of any voluntary  
4           dismissal, and shall determine the prevailing party accordingly.  
5           Where the result ....

6           **Other Issues**

7           Except as indicated above, the Commission did not discuss or resolve (1) the  
8           issues raised in the staff notes on pages 28-49 of the draft attached to  
9           Memorandum 2001-17, or (2) the issues raised in the First Supplement to  
10          Memorandum 2001-17.

11           **STUDY J-1306 – CASES IN WHICH COURT REPORTER IS REQUIRED**

12          The Commission considered Memorandum 2001-33, concerning consolidation  
13          and clarification of the provisions on cases in which a court reporter is required.  
14          Subject to the following revisions, the Commission approved the attached draft  
15          as a revised tentative recommendation, for printing and circulation for comment:

16          **Code Civ. Proc. § 269. Reporting of cases**

17          Code of Civil Procedure Section 269 should be amended along the following  
18          lines:

19               269. (a) ~~The official reporter of a superior court, or any of them~~  
20               ~~where there are two or more, shall, at the request of either party, or~~  
21               ~~of the court in a civil case other than a limited civil case, and on the~~  
22               ~~order of the court, the district attorney, or the attorney for the~~  
23               ~~defendant in a felony case, An official reporter or official reporter~~  
24               pro tempore of the court shall take down in shorthand all  
25               testimony, objections made, rulings of the court, exceptions taken,  
26               all arraignments, pleas, and sentences of defendants in felony cases,  
27               arguments of the prosecuting attorney attorneys to the jury, and all  
28               statements and remarks made and oral instructions given by the  
29               judge. If judge, in the following cases:

30                       (1) In a civil case, on the order of the court or at the request of a  
31                       party.

32                       (2) In a felony case, on the order of the court or at the request of  
33                       the prosecution, the defendant, or the attorney for the defendant.

34                       (3) In a misdemeanor or infraction case, on the order of the  
35                       court.

36                       (b) Where directed by the court, or requested by either a party,  
37                       or where requested by a nonparty with respect to a proceeding to  
38                       which the public is entitled to access, the official reporter or official

1 reporter pro tempore shall, within such reasonable time after the  
2 trial of the case as the court may designate, write the transcripts  
3 out, or the specific portions thereof as may be requested, in plain  
4 and legible longhand, or by typewriter, or other printing machine,  
5 and certify that the transcripts were correctly reported and  
6 transcribed, and when directed by the court, file the transcripts  
7 with the clerk of the court.

8 (b)

9 (c) In any case where a defendant is convicted of a felony, after a  
10 trial on the merits, the record on appeal shall be prepared  
11 immediately after the verdict or finding of guilt is announced  
12 unless the court determines that it is likely that no appeal from the  
13 decision will be made. The court's determination of a likelihood of  
14 appeal shall be based upon standards and rules adopted by the  
15 Judicial Council.

16 ~~(e) Any court, party, or person may request delivery of any~~  
17 ~~transcript in a computer-readable form, except that an original~~  
18 ~~transcript shall be on paper. A copy of the original transcript~~  
19 ~~ordered within 120 days of the filing or delivery of the transcript by~~  
20 ~~the official reporter shall be delivered in computer-readable form~~  
21 ~~upon request if the proceedings were produced utilizing computer-~~  
22 ~~aided transcription equipment. Except as modified by standards~~  
23 ~~adopted by the Judicial Council, the computer-readable transcript~~  
24 ~~shall be on disks in standard ASCII code unless otherwise agreed~~  
25 ~~by the reporter and the court, party, or person requesting the~~  
26 ~~transcript. Each disk shall be labeled with the case name and court~~  
27 ~~number, the dates of proceedings contained on the disk, and the~~  
28 ~~page and volume numbers of the data contained on the disk. Each~~  
29 ~~disk as produced by the court reporter shall contain the identical~~  
30 ~~volume divisions, pagination, line numbering, and text of the~~  
31 ~~certified original paper transcript or any portion thereof. Each disk~~  
32 ~~shall be sequentially numbered within the series of disks.~~

33 **Comment.** Subdivision (a) of Section 269 is amended to  
34 continue former Section 274c without substantive change.

35 Subdivision (a) is also amended to refer to official reporters pro  
36 tempore, as well as official reporters. This is not a substantive  
37 change. See Gov't Code § 69945 (official reporter pro tempore shall  
38 perform same duties as official reporter).

39 Subdivision (a) is further amended to substitute "arguments of  
40 the attorneys" for "arguments of the prosecuting attorney,"  
41 consistent with standard practice. See, e.g., Gov't Code § 72194.5  
42 ("arguments of the attorneys").

43 Similarly, subdivision (a) is amended to substitute  
44 "prosecution" for "district attorney," to reflect that the Attorney  
45 General sometimes acts as prosecutor in place of the district  
46 attorney. See Gov't Code § 12553 (disqualification of district

1 attorney); see also Penal Code § 1424 (motion to disqualify district  
2 attorney).

3 Finally, subdivision (a) is amended to make clear that a felony  
4 defendant, whether represented by counsel or in pro per, is entitled  
5 to a court reporter on request by the defendant personally or by the  
6 defendant's attorney (if any). This is not a substantive change. See  
7 generally *People v. Turner*, 67 Cal. App. 4th 1258, 1266, 79 Cal.  
8 Rptr. 2d 740 (1998) ("a verbatim record is implicitly among the  
9 rights of which a defendant appearing in propria persona must be  
10 apprised"); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041,  
11 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free  
12 verbatim record "in felony proceedings by statute (Code Civ. Proc.,  
13 § 269.)"); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr.  
14 902 (1981) (a "felony defendant is, as a matter of right, entitled to  
15 have 'taken down,' all related testimony and oral proceedings")  
16 (emphasis in original); *People v. Godeau*, 8 Cal. App. 3d 275, 279-  
17 80, 87 Cal. Rptr. 424 (1970) ("In California felony proceedings a  
18 court reporter must be present if requested by the defendant, the  
19 district attorney, or an order of the court. (Code Civ. Proc., § 269.)");  
20 *People v. Hollander*, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917  
21 (1961) (denial of transcript to pro per indigent defendant was  
22 prejudicial error).

23 Subdivision (b) is amended to make clear that a nonparty is  
24 generally entitled to request preparation of a transcript. This is  
25 consistent with longstanding practice and conforms to  
26 constitutional constraints. See, e.g., *Press-Enterprise Co. v. Superior*  
27 *Court*, 478 U.S. 1 (1986) (media request for transcript of preliminary  
28 hearing); *Fisher v. King*, 232 F.3d 391, 397 (4th Cir. 2000) (general  
29 public and press "enjoy a qualified right of access under the First  
30 Amendment to criminal proceedings and transcripts thereof")  
31 (emphasis added); *United States v. Antar*, 38 F.3d 1348, 1360-61 (3d  
32 Cir. 1994) ("First Amendment right of access must extend equally to  
33 transcripts as to live proceedings"); *United States v. Berger*, 990 F.  
34 Supp. 1054, 1057 (C.D. Ill. 1998) (there "is no question that a written  
35 transcript of the Governor's deposition would be made available to  
36 the public upon admission of his testimony before the jury"); *State*  
37 *ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court*  
38 *of Common Pleas*, 73 Ohio St. 3d 19, 21, 652 N.E.2d 179 (1995) (right  
39 of access "includes both the live proceedings and the transcripts  
40 which document those proceedings"); see also *NBC Subsidiary*  
41 *(KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337,  
42 86 Cal. Rptr. 2d 778 (1999) (constitutional right of access applies to  
43 civil as well as criminal cases). A nonparty is entitled to a transcript  
44 of a proceeding that was open to the public, see *Scripps Howard*  
45 *Broadcasting*, 73 Ohio St. 3d at 21, a proceeding that was  
46 erroneously closed to the public, see generally *Press-Enterprise*, 478

1 U.S. at 15, or a proceeding that was properly closed, once “the  
2 competing interests precipitating closure are no longer viable,” see  
3 Phoenix Newspapers, Inc. v. KPNX, 156 F.3d 940, 947-48 (9th Cir.  
4 1998).

5 Subdivision (b) is also amended to refer to official reporters pro  
6 tempore, as well as official reporters.

7 Former subdivision (c) is continued in Section 271 without  
8 substantive change.

9 Section 269 is also amended to make technical changes.

10 **Gov’t Code § 69950. Transcription fee**

11 A conforming revision should be made in Government Code Section 69950:

12 69950. The fee for transcription for original ribbon copy is  
13 eighty-five cents (\$0.85) for each 100 words, and for each copy for  
14 the party person buying the original made at the same time, fifteen  
15 cents (\$0.15) for each 100 words. The fee for a first copy to any other  
16 person shall be twenty cents (\$0.20) for each 100 words, and for  
17 each additional copy, made at the same time, fifteen cents (\$0.15)  
18 for each 100 words.

19 **Comment.** Section 69950 is amended to reflect the practice that a  
20 nonparty is generally entitled to obtain a transcript. See Section 269  
21 & Comment.

22 **STUDY J-1320 – CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION:**  
23 **UNNECESSARY PROCEDURAL DIFFERENCES**

24 The Commission considered Memorandum 2001-35, concerning the study of  
25 unnecessary procedural differences between limited and unlimited civil cases.  
26 No Commission action was required or taken.

27 **STUDY J-1400 – STATUTES MADE OBSOLETE BY TRIAL COURT RESTRUCTURING**

28 **Miscellaneous Issues**

29 The Commission considered Memorandum 2001-34, reporting on  
30 miscellaneous issues concerning statutes made obsolete by trial court  
31 restructuring. No Commission action was required or taken on this matter.

32 **Sheriffs and Marshals**

33 The Commission considered Memorandum 2001-36, relating to statutes that  
34 reference sheriffs and marshals. The Commission approved the staff’s suggested  
35 approach, with the following directions: (1) The county-specific statutes relating

1 to the consolidation of marshals' and sheriffs' offices are to be retained in the  
2 Government Code, subject to each county's review and advisement. (2) The  
3 proposed saving clause relating to the consolidation statutes should be omitted.

4                   STUDY L-605 – RULES OF CONSTRUCTION FOR TRUSTS

5           The Commission considered memorandum 2001-26 and the attached draft  
6 tentative recommendation on rules of construction for trusts and other  
7 instruments. The Commission approved the draft to circulate for comment as a  
8 tentative recommendation, subject to the following revisions.

9   **Prob. Code § 21102. Intention of transferor**

10          Rather than proposing to amend this section, with a note requesting comment  
11 on the proposed amendment, the tentative recommendation should not propose  
12 to amend this section, but a note should request comment on whether the section  
13 needs amendment. The Comment, addressing authority of the court to consider  
14 extrinsic evidence for purposes of reformation and interpretation, should be  
15 preserved.

16   **Prob. Code § 21104. "At death transfer" defined**

17          The draft, which refers to "a transfer ~~in possession or enjoyment~~ that takes  
18 effect in enjoyment at or after death," should be circulated for comment as is,  
19 noting the deletion of the reference to "possession." Before a recommendation is  
20 finalized, however, the staff should conduct further research on whether the  
21 word "possession" is in fact superfluous. Don Travers indicated he would solicit  
22 comment on the point from members of the State Bar committee.

23   **Prob. Code § 21109. Requirement that transferee survive transferor**

24          A note should be added to this section soliciting comment on the question  
25 whether the survival requirement should apply to an irrevocable transfer, such  
26 as an irrevocable trust.

27   **Prob. Code § 21110. Anti-lapse**

28          A note should be added to this section soliciting comment on the question  
29 whether the antilapse statute should apply to an irrevocable transfer, such as an  
30 irrevocable trust.

1 **Prob. Code § 21111 (amended). Failure of transfer**

2 In light of pending legislation recommended by the Commission that treats  
3 this section somewhat differently (see AB 873 (Harman)), the tentative  
4 recommendation should omit the portion of the draft dealing with a transfer of  
5 “all my estate”. Thus the tentative recommendation would deal only with the  
6 future interest issue. At the time the Commission reviews comments on the  
7 tentative recommendation, the staff should present an analysis of the “all my  
8 estate” issue and whether the pending legislation deals with it adequately.

9 **Prob. Code § 21133. Proceeds of specific gift**

10 The introductory clause should be revised to read, “A recipient of a specific  
11 gift has a right to the property specifically given to the extent the property is  
12 owned by the transferor ....” Proposed subdivision (f), incorporating the Uniform  
13 Probate Code’s general presumption against ademption, should be omitted from  
14 the draft.

15 **Commission Comments**

16 The footnote should be omitted that points out that some sections are being  
17 technically amended in order to append a Commission Comment.

18 **STUDY L-910 – EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE**  
19 **TRANSFERS**

20 The Commission considered Memorandum 2001-37, discussing Assembly Bill  
21 873 (Harman), which implements two Commission recommendations: *Effect of*  
22 *Dissolution of Marriage on Nonprobate Transfers and Estate Planning During*  
23 *Dissolution of Marriage*. The memorandum describes amendments made to AB  
24 873 that are inconsistent with the Commission’s recommendations. The  
25 Commission ratified the amendments, and suggested the following additional  
26 changes:

27 **Fam. Code § 2024. Form warning language**

28 The statutory form warning language provided in Family Code Section 2024  
29 should be further clarified, in the following ways:

- 30 (1) The phrase “taken in joint tenancy” should be replaced with  
31 “owned in joint tenancy.”

- 1 (2) It is not sufficiently clear that the phrase “the named beneficiary”  
2 refers to a person’s former spouse. This should be clarified.
- 3 (3) The sentence beginning “Your rights to such things as your  
4 spouse’s will...” should begin a new paragraph.
- 5 (4) The sentence beginning “Your rights to such things as your  
6 spouse’s will...” should be redrafted so that the list of affected  
7 nonprobate transfers is moved to the end of the sentence.
- 8 (5) The verb “changed” should generally be replaced with a more  
9 specific term or phrase.
- 10 (6) Use of the phrase “such things” should be minimized.

11 The staff should make clear to the author and other interested parties that  
12 these are suggestions for improving the clarity of the notice and need not be  
13 made if they are not acceptable.

14 **Fam. Code § 2040. Automatic temporary restraining order**

15 A provision should be added to Section 2040, requiring that any form  
16 describing the automatic temporary restraining order include a reference to the  
17 notice requirements of subdivision (b)(2) & (3) (requiring that notice be filed and  
18 served on a spouse before revoking a nonprobate transfer or terminating a right  
19 of survivorship). Legislative staff should be consulted as to whether it would be  
20 helpful to include a statutory deadline for revision of any form describing the  
21 restraining order.

22 **STUDY L-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE**

23 See entry in these Minutes under Study L-910.

24 **STUDY L-4004 – HEALTH CARE DECISIONS LAW: MISCELLANEOUS REVISIONS**

25 The Commission considered Memorandum 2001-25 and its First and Second  
26 Supplements, concerning the surrogacy duration issue in the recommendation on  
27 *Health Care Decisions Law: Miscellaneous Revisions*. The preprint recommendation  
28 (as set out in the attachment to the First Supplement to Memorandum 2001-25)  
29 will be revised, and the bill implementing the recommendation (AB 1278) will be  
30 amended, to make the following revisions in Probate Code Section 4711:

31 4711. (a) A patient may designate an adult as a surrogate to  
32 make health care decisions by personally informing the supervising  
33 health care provider. ~~An oral~~ The designation of a surrogate shall  
34 be promptly recorded in the patient’s health care record and.

1           **(b) Unless the patient specifies a shorter period, a surrogate**  
2 **designation under subdivision (a) is effective only during the**  
3 **course of treatment or illness or during the stay in the health care**  
4 **institution when the surrogate designation is made, or for 60 days,**  
5 **whichever period is shorter.**

6           **(c) The expiration of a surrogate designation under subdivision**  
7 **(b) does not affect any role the person designated under**  
8 **subdivision (a) may have in making health care decisions for the**  
9 **patient under any other law or standards of practice.**

10           **(d) If the patient has designated an agent under a power of**  
11 **attorney for health care, the surrogate designated under**  
12 **subdivision (a) has priority over the agent for the period provided**  
13 **in subdivision (b), but designation of a surrogate does not revoke**  
14 **the designation of an agent unless the patient communicates the**  
15 **intention to revoke in compliance with subdivision (a) of Section**  
16 **4695.**

17           **Comment.** Section 4711 is amended to clarify the relation  
18 between a surrogate designation under this section and a formal  
19 agent designation in a power of attorney for health care under  
20 Section 4671 and related provisions, and to provide additional  
21 qualifications on surrogacy designations. Both the patient and the  
22 surrogate must be adults. See Sections 4625 (“patient” defined),  
23 4643 (“surrogate” defined). “Adult” includes an emancipated  
24 minor. See Fam. Code § 7002 (emancipation). “Personally  
25 informing,” as used in this section, includes both oral and written  
26 communications.

27           Consistent with the statutory purpose of effectuating patient  
28 intent, subdivision (a) recognizes the patient’s ability to name a  
29 person to act as surrogate health care decisionmaker. As amended,  
30 this section no longer distinguishes between surrogates named  
31 orally and surrogates named in a written communication to the  
32 supervising health care provider. Whether it is communicated to  
33 the supervising health care provider orally or in writing, the  
34 surrogate designation must be promptly recorded in the patient’s  
35 health care record. See also Section 4731 (supervising health care  
36 provider’s duty to record relevant information).

37           Subdivision (b) provides a maximum limit of 60 days on the  
38 duration of surrogate designations under this section. If the patient  
39 has an agent under a power of attorney for health care, the agent’s  
40 authority is suspended during the time the surrogacy is in effect.  
41 See subdivision (d). If the patient names an agent in a power of  
42 attorney for health care executed after making a surrogate  
43 designation, the agent would have priority over the surrogate as  
44 provided in Section 4685 (agent’s priority). As recognized in the  
45 introductory clause, the patient may specify a shorter period for the  
46 surrogate designation, by personally informing the supervising

1 health care provider. A limitation might be phrased in terms of a  
2 period of time or as a condition, such as until the agent designated  
3 in the patient’s power of attorney for health care becomes available.

4 Subdivision (c) makes clear that the limits on the duration of a  
5 surrogacy designation affect only the special surrogate rules in this  
6 section, and not the ability of the person who had been designated  
7 as surrogate to make or participate in making health care decisions  
8 for the patient under other principles. *Cf.* Section 4654 (compliance  
9 with generally accepted health care standards). After expiration of  
10 the period specified in subdivision (b), this section does not affect  
11 who may make health care decisions for adults lacking capacity.

12 Subdivision (d) makes clear that designation of a surrogate  
13 under this section suspends, but does not revoke, the appointment  
14 of an agent under a power of attorney for health care, unless the  
15 patient expresses the intent to revoke the agent’s appointment,  
16 under the terms of the general rule in Section 4695(a). Subdivision  
17 (d) reverses the implication in background material that a surrogate  
18 designation made directly to the supervising health care provider  
19 revoked a previous designation of an agent. See Background from  
20 Uniform Act in Comment to Section 4711 as enacted, 1999 Cal. Stat.  
21 ch. 658, § 39 (operative July 1, 2000).

22 See also Sections 4617 (“health care decision” defined), 4619  
23 (“health care institution” defined), 4635 (“reasonably available”  
24 defined), 4639 (“skilled nursing facility” defined), 4641  
25 (“supervising health care provider” defined).

26 The 30-day period in subdivision (b) in the earlier draft was changed to 60 days,  
27 relying in part on advice from the California Medical Association Council on  
28 Ethical Affairs, which felt that 30 days would be too short to cover some  
29 situations in acute care hospitals. The introductory clause was added in  
30 subdivision (b) to address the concern of the Beverly Hills Bar Association  
31 Probate, Trust and Estate Planning Legislative Committee about surrogate  
32 designations where the patient intends to provide only a temporary surrogate  
33 until the health care agent can arrive. (See Second Supplement to Memorandum  
34 2001-25, Exhibit pp. 1-2.) The Commission also approved the suggestion of Eric  
35 Carlson (see Memorandum 20001-25, Exhibit pp. 1-2) that the fixed time period  
36 in subdivision (b) be phrased as a maximum subject to a shorter duration under  
37 the length of stay or term of illness standard.

1                                    **STUDY M-200 – CRIMINAL SENTENCING STATUTES**

2            The Commission considered Memorandum 2001-27, presenting a draft  
3 tentative recommendation relating to the nonsubstantive reorganization of  
4 statutes providing sentence enhancements for crimes involving weapons or  
5 injuries. The Commission approved circulation of the tentative recommendation  
6 for public comment, subject to the following decisions:

7            **Penal Code § 17500. Purpose of title**

8            Subdivision (a) should be revised to delete the phrase “for prosecutors,  
9 defense attorneys, and judges.”

10           **Penal Code § 17501. Continuation of existing statutes**

11           Proposed Section 17501(b) should be revised along the following lines:

12                    (b) Restatement and continuation of a provision in this title, by  
13                    the bill that added this section, is not intended to ratify or abrogate  
14                    any prior judicial interpretation of that provision.

15           **Penal Code § 17523.030. Schedule 1 1/3-2-3**

16           The schedule of enhancements of 16 months, two years, or three years, should  
17 be designated “Schedule 16-2-3” rather than “Schedule 1 1/3-2-3.”

18           **Penal Code § 17523.100. Schedule 10**

19           A superfluous comma in the Comment should be deleted.

20           **Use of “May”**

21           A number of cross-references to sentence enhancements are phrased to  
22 indicate that a defendant “may be subject to” an applicable enhancement. These  
23 cross-references should be rephrased to indicate that a defendant “is subject to”  
24 the applicable enhancement. This change will avoid any implication that the  
25 Commission is introducing new discretion as to the application of sentence  
26 enhancements.

27           **Scope of Public Review**

28           The period for public review of the tentative recommendation should be  
29 lengthy. Copies of the tentative recommendation should be sent to crime victim  
30 groups and to the Department of Corrections. Staff should contact the Assembly  
31 and Senate Public Safety Committees to inquire whether their mailing lists

1 include organizations that should receive a copy of the tentative  
2 recommendation.

3           **STUDY M-1306 – CASES IN WHICH COURT REPORTER IS REQUIRED**

4           **See entry in these Minutes under Study J-1306.**

APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary