

Minutes

October 15, 2015

Memorandum 2015-39

Minutes of Meeting on October 8, 2015 (Draft)

The California Law Revision Commission¹ held a meeting on October 8, 2015. A draft of Minutes for that meeting is attached for Commissioners to review.

The attached draft will be deemed final after it is approved by a vote of the Commission. When voting, the Commission may make specific changes to the Minutes. If so, those changes will be memorialized in the Minutes for the meeting at which the vote occurred.

Respectfully submitted,

Brian Hebert
Executive Director

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

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

DRAFT MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 8, 2015
DAVIS

A meeting of the California Law Revision Commission was held in Davis on October 8, 2015.

Commission:

Present: Taras Kihiczak, Chairperson
Crystal Miller-O'Brien, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Damian Capozzola
Victor King
Susan Duncan Lee

Absent: Assembly Member Ed Chau
Senator Richard D. Roth

Staff: Brian Hebert, Executive Director
Barbara Gaal, Chief Deputy Counsel
Kristin Burford, Staff Counsel
Steve Cohen, Staff Counsel

Consultants: None

Other Persons:

Heather Anderson, Judicial Council
Andrea Bari, CLRC law student extern
J. Felix De La Torre, Public Employment Relations Board
Paul Dubow
Rachel Ehrlich, Ehrlich Mediation
Jim Ewert, California Newspaper Publishers Association
Brian Flemmer, Office of Senator Roth
Heather Falkenthal, Office of Senator Wieckowski
Daniel Felizzatto, Los Angeles County District Attorney's Office
Robert Flack, California Dispute Resolution Council
Ron Kelly
Erin King, California Self Storage Association
Janet Martinez, Stanford Law School
Nicole Moore, California Newspaper Publishers Association
Nancy Peverini

1 The Commission decided to move the location of its December 2015 meeting
2 to Los Angeles. (*Commissioner Miller-O'Brien voted against this decision.*)

3 **Election of Officers**

4 The Commission considered Memorandum 2015-26, relating to the election of
5 Commission officers. The Commission elected Taras Kihiczak as Chairperson
6 and Crystal Miller-O'Brien as Vice Chairperson, for terms commencing
7 immediately and ending August 31, 2016.

8 2015 LEGISLATIVE PROGRAM

9 The Commission considered Memorandum 2015-42, reporting on the
10 Commission's 2015 legislative program. No Commission action was required or
11 taken.

12 STUDY D-1200 — RECOGNITION OF TRIBAL AND FOREIGN COURT MONEY JUDGMENTS

13 The Commission considered Memorandum 2015-38, discussing the degree of
14 judicial discretion afforded to courts when deciding whether to recognize a
15 foreign judgment under the Uniform Foreign-Country Money
16 Judgments Recognition Act.

17 With respect to the issues discussed in the memorandum, the Commission
18 decided not to make any changes to the related California statutes.

19 The staff will contact the Uniform Law Commission to discuss the different
20 considerations that may bear on how a court decides to exercise its discretion.
21 When the staff prepares a draft tentative recommendation for this study, the staff
22 will include Comment language that discusses the exercise of judicial discretion.

23 STUDY J-1314 — TRIAL COURT UNIFICATION: PUBLICATION OF LEGAL NOTICE

24 The Commission considered Memorandum 2015-44, presenting a staff draft
25 recommendation on *Trial Court Unification: Publication of Legal Notice*.

26 The Commission decided to replace the district descriptions for San
27 Bernardino and San Diego counties with the district descriptions set out on pages
28 10-12 of Memorandum 2015-44.

29 With those changes and any necessary conforming revisions, the Commission
30 approved the draft as a final recommendation.

1 Nothing in this section is intended to affect the extent to which a
2 mediator is, or is not, immune from liability under existing law.

3 **Timing of the Alleged Misconduct**

4 The Commission reconsidered its August 7 decision that the proposed new
5 exception “should apply regardless of whether the alleged misconduct occurred
6 during a mediation.” See Minutes (Aug. 7, 2015), p. 5. The Commission decided
7 that the exception should only apply to evidence of misconduct that allegedly
8 occurred in the context of a mediation. This would include misconduct that
9 allegedly occurred at *any* stage of the mediation process (encompassing the full
10 span of mediation activities, such as a mediation consultation, a face-to-face
11 mediation session, a mediation brief, a mediation-related phone call, or other
12 mediation-related activity). The key consideration is whether the misconduct
13 allegedly occurred in a mediation context, not the time and date of the alleged
14 misconduct.

15 **Types of Proceedings in Which the Exception Would Apply**

16 Commissioner King moved for reconsideration of the Commission’s August 7
17 decision that the proposed new exception should apply in a State Bar
18 disciplinary proceeding and a legal malpractice case. See Minutes (Aug. 7, 2015),
19 p. 5. More precisely, he moved that the exception should only apply in a State
20 Bar disciplinary proceeding. His motion failed because it was not seconded.

21 The Commission also specifically considered whether the proposed new
22 exception should apply in a proceeding relating to enforcement of a mediated
23 settlement agreement (e.g., a proceeding to rescind a mediated settlement
24 agreement or a proceeding to enforce such an agreement). The Commission
25 decided that the exception should not apply in that type of proceeding.
26 (*Commissioner Boyer-Vine abstained from this decision.*)

27 The Commission deferred decision on how to handle disputes relating to
28 attorney-client fee agreements (see Memorandum 2015-45, pp. 23-25; First
29 Supplement to Memorandum 2015-45, p. 3 & Exhibit pp. 3, 4, 6). The
30 Commission asked the staff to provide further analysis of that matter for another
31 meeting.

32 **Purpose for Invoking the Exception**

33 The Commission considered whether the proposed new exception should
34 refer to “reporting” of professional malfeasance, not just proving or disproving

1 such malfeasance (see Memorandum 2015-45, pp. 26, 27). The Commission
2 decided that a reference to “reporting” is not necessary.

3 **Limitation on Extent of Disclosure of Mediation Communications**

4 The Commission decided that the proposed new exception should include a
5 provision similar to Uniform Mediation Act Section 6(d), which provides:

6 (d) If a mediation communication is not privileged under
7 subsection (a) or (b), only the portion of the communication
8 necessary for the application of the exception from nondisclosure
9 may be admitted. Admission of evidence under subsection (a) or
10 (b) does not render the evidence, or any other mediation
11 communication, discoverable or admissible for any other purpose.

12 **Particular Types of Mediation Communications**

13 The Commission considered whether to restrict the proposed new exception
14 to a particular type of mediation communication, such as a private attorney-
15 client discussion (see Memorandum 2015-45, pp. 31-33). The Commission
16 decided not to impose such a restriction; the exception should apply to all types
17 of mediation evidence.

18 **In Camera Screening Process**

19 The Commission did not discuss the details of the in camera screening
20 process for the proposed new exception (see Memorandum 2015-45, pp. 27-30,
21 33-41). The Commission asked the staff to provide further analysis of that matter
22 for another meeting.

23 **Mediator Testimony**

24 The Commission considered whether to propose any revision of Evidence
25 Code Section 703.5, relating to mediator testimony (see Memorandum 2015-45,
26 pp. 41-43). The Commission decided to leave Section 703.5 as is. (*Commissioner*
27 *Capozzola voted against this decision.*)

28 **Consequences of Invoking the New Exception and Losing**

29 The Commission considered the possibility of specifying a sanction for a
30 court to impose on a party who:

- 31 • seeks admission or disclosure of mediation evidence pursuant to
- 32 the proposed new exception,
- 33 • causes others to incur expenses or expend effort in response, and

- 1 • ultimately fails to prevail (either because the court concludes the
2 evidence is not admissible or subject to disclosure, or because the
3 evidence is admitted or disclosed but the party’s claim turns out to
4 be meritless).

5 See Memorandum 2015-45, pp. 43-44.

6 The Commission decided not to specify a particular sanction to impose in
7 those circumstances. (*Commissioner Boyer-Vine was not present for this decision.*)

8 **Retroactivity**

9 The Commission decided that the proposed new exception should only apply
10 to evidence from a mediation that commences after the exception becomes
11 operative. (*Commissioner Boyer-Vine was not present for this decision.*)

12 STUDY M-301 — DEADLY WEAPONS: MINOR CLEAN-UP ISSUES

13 The Commission considered Memorandum 2015-43 presenting a draft
14 tentative recommendation proposing minor clean-up of various Penal Code
15 provisions relating to deadly weapons.

16 The Commission approved the draft tentative recommendation, with one
17 revision. On page 4, line 17, “subdivision” was replaced with “subdivisions.”

18 STUDY R-100 — FISH AND GAME LAW

19 The Commission considered Memorandum 2015-40, presenting a staff draft
20 recommendation on *Fish and Game Law: Technical Revisions and Minor Substantive*
21 *Improvements (Part 2)*. The Commission approved the staff draft as a final
22 recommendation.

23 The Commission also considered Memorandum 2015-41 and its First
24 Supplement, presenting a draft of commercial fishing provisions. The
25 Commission made the following decisions:

- 26 • The staff should further research whether the definition of “far
27 offshore fishery” in Fish and Game Section 8111 should be revised
28 to eliminate possible ambiguity regarding use of the word
29 “fishery.” The staff should also solicit public comment on the issue
30 in a Staff Note and report on whatever is learned.
- 31 • The staff should present further discussion of Fish and Wildlife
32 Code Section 10905, on the issue raised in the Staff Note following
33 that section, after allowing time for public comment.

- 1 Finally, the Commission decided to conduct a separate study to identify and
- 2 correct cross-reference errors in Health and Safety Code Section 131052.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Director