

Memorandum 2017-18

Minutes of Meeting on April 13, 2017 (Draft)

The California Law Revision Commission¹ held a meeting on April 13, 2017. 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
APRIL 13, 2017
OAKLAND

A meeting of the California Law Revision Commission was held in Oakland on April 13, 2017.

Commission:

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

Absent: Assembly Member Ed Chau
Senator Richard D. Roth
Taras Kihiczak

Staff: Brian Hebert, Executive Director
Barbara Gaal, Chief Deputy Counsel
Kristin Burford, Staff Counsel
Steve Cohen, Staff Counsel
Victoria Matias, Secretary
Greg Gonzalez, Law Student Extern
Elisa Shieh, Law Student Extern

Other Persons:

Heather Anderson, Judicial Council of California
Robert Flack
Ron Kelly
Hon. David W. Long (ret.), California Judges Association
Phyllis G. Pollack, PGP Mediation
Lorraine Walsh, State Bar Mandatory Fee Arbitration Committee
John S. Warnlof, California Dispute Resolution Council

1 **Format of Tentative Recommendation**

2 The three-part format used in the draft attached to Memorandum 2017-19 is
3 acceptable.

4 **Placement of *Lee v. Hanley* Quotations in Proposed Comment**

5 The revisions of the Comment to proposed Evidence Code Section 1120.5 that
6 are shown at the top of page 3 of Memorandum 2017-20 (inserting quotations
7 from *Lee v. Hanley*, 61 Cal. 4th 1225, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015)) are
8 acceptable.

9 **Types of Disputes in Which the New Exception Would Apply**

10 Proposed Evidence Code Section 1120.5 should be revised as follows:

11 **Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when**
12 **representing client in mediation context**

13 SEC. ____. Section 1120.5 is added to the Evidence Code, to read:

14 1120.5. (a) A communication or a writing that is made or
15 prepared for the purpose of, or in the course of, or pursuant to, a
16 mediation or a mediation consultation, is not made inadmissible, or
17 protected from disclosure, by provisions of this chapter if both of
18 the following requirements are satisfied:

19 (1) The evidence is relevant to prove or disprove an allegation
20 that a lawyer breached a professional requirement when
21 representing a client in the context of a mediation or a mediation
22 consultation.

23 (2) The evidence is sought or proffered in connection with, and
24 is used solely in resolving, one of the following:

25 (A) A complaint against the lawyer under the State Bar Act,
26 Chapter 4 (commencing with Section 6000) of the Business and
27 Professions Code, or a rule or regulation promulgated pursuant to
28 the State Bar Act.

29 (B) A cause of action for damages against the lawyer based
30 upon alleged malpractice.

31 (C) A dispute between a lawyer and client concerning fees,
32 costs, or both including a proceeding under the State Bar Act,
33 Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business &
34 Professions Code Sections 6200-6206.

35 (b)

36 The staff should make conforming revisions in the corresponding Comment and
37 the preliminary part.

38 (*Commissioners King, McAllister, and Miller-O'Brien voted against this decision.*)

1 **Notice Provision**

2 The notice provision in proposed Evidence Code Section 1120.5 (new
3 subdivision (d)) and the corresponding portion of the Comment (shown on page
4 8 of Memorandum 2017-19) are acceptable.

5 **Mediator Testimony and Other Requests for Evidence From a Mediator**

6 Proposed Evidence Code Section 1120.5 should be revised to expressly state
7 how it applies to a request for evidence from a mediator.

8 Under that section, a request for written evidence from a mediator should be
9 treated the same way as a request for oral testimony from a mediator. Both types
10 of requests should be subject to the same general rule and exceptions as in
11 Evidence Code Section 703.5.

12 Proposed Section 1120.5 should expressly state that it does not alter or affect
13 Section 703.5.

14 The staff should draft language to implement this approach and present it for
15 the Commission's approval at the June meeting.

16 In a cover memorandum, the staff should discuss how to handle an attempt
17 to obtain evidence of a mediator's communications from a source other than the
18 mediator, such as another mediation participant or an Internet service provider.

19 **Ron Kelly's Proposed Warning**

20 The draft tentative recommendation should not include a warning
21 requirement like the one proposed by Ron Kelly (shown on page 11 of
22 Memorandum 2017-19).

23 The staff should revise the preliminary part and Comment to proposed
24 Evidence Code Section 1120.5 to emphasize that the discovery standard under
25 that provision is stricter than the usual standard for obtaining discovery.

26 **STUDY L-3032.1 — REVOCABLE TRANSFER ON DEATH DEED: FOLLOW-UP STUDY**

27 The Commission considered Memorandum 2017-12 and its First and Second
28 Supplements, presenting a draft tentative recommendation addressing the
29 statutory requirement that a revocable transfer on death deed be recorded, in
30 order to be valid. The Commission approved the draft as its final
31 recommendation, in order to facilitate the possible introduction of implementing
32 legislation this year. The staff will exercise discretion to make minor technical

1 revisions to the narrative part of the recommendation, to reflect its character as a
2 final recommendation.

3 STUDY R-100 — FISH AND GAME LAW

4 The Commission considered Memoranda 2017-15, 2017-16 and its First
5 Supplement, and 2017-17, relating to the Commission’s proposed recodification
6 of the Fish and Game Code. The Commission made the following decisions:

- 7 • The Commission approved the draft attached to Memorandum
8 2017-15 for circulation as a tentative recommendation.
- 9 • The Commission approved the draft attached to Memorandum
10 2017-16, with the addition proposed in the First Supplement to
11 that memorandum, for inclusion in a future tentative
12 recommendation.
- 13 • The Commission approved the draft attached to Memorandum
14 2017-17, for inclusion in a future tentative recommendation.

<input type="checkbox"/> APPROVED AS SUBMITTED	_____	Date
<input type="checkbox"/> APPROVED AS CORRECTED (for corrections, see Minutes of next meeting)	_____	Chairperson
	_____	Executive Director