A meeting of the California Law Revision Commission was held in Sacramento on June 29, 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
        Amy Ash, Student Legal Assistant
        Curtis Renoe, Student Legal Assistant

Consultants: Keith Honda, Mechanic’s Lien Law
        Gordon Hunt, Mechanic’s Lien Law

Other Persons:

Sam Abdulaziz, Abdulaziz & Grossbart, North Hollywood
Yolanda Benson, Mattos & Associates, Lumber Association of California & Nevada, Sacramento
Sandra Bonato, Executive Council of Homeowners Association, San Jose
Peter C. Freeman, Lumber Association of California & Nevada, Barr Lumber Company, San Bernardino
Joe Furtado, Assemblyman John Dutra’s Office, Sacramento
Ellen Gallagher, Contractors State License Board, Sacramento
Paul R. Geissler, Surety Company of the Pacific, Encino
Charles Egan Goff, Truckee
Fredrick D. Goings, Livingston & Mattesich, Sacramento
Jan Hansen, Lumber Association of California & Nevada, Sacramento
Sam Perroti, Department of Real Estate, Sacramento
S. Guy Puccio, Wallace & Puccio, Sacramento and San Jose
Everett C. Raasch, AARP, Sacramento
S.L. Roullier, Sacramento
Parke D. Terry, California Landscape Contractors Association, Sacramento
Philip M. Vermeulen, Engineering Contractors’ Association, Roseville
Mary Kathleen Weldon, Surety Company of the Pacific, Encino
Norman Widman, Dixieline Lumber, San Diego

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MINUTES OF MAY 18, 2001, COMMISSION MEETING

The Commission approved the Minutes of the May 18, 2001, Commission meeting as submitted by the staff, subject to the following correction:

On page 5, line 8, “SB 562” should be “SB 561”.

ADMINISTRATIVE MATTERS

Election of Officers

expressed his willingness to serve on condition that the matter be revisited in six months’ time, assuming new Commission members will have been appointed and will have some experience by then.

Meeting Schedule

The Commission noted that the September meeting is scheduled for Thursday and Friday, September 20-21. In the event there is insufficient material for a two-day meeting, the Commission directs that the Thursday portion of the meeting should be dropped and the Friday portion retained.

Report of Executive Secretary

The Executive Secretary introduced the Commission’s two summer interns, Stanford Law School students Amy Ash and Curtis Renoe.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 2001-50 and its First Supplement, relating to the Commission’s 2001 legislative program. The staff orally updated the chart attached to the memorandum with the following information:

AB 223 (Frommer) – Unnecessary procedural differences between limited and unlimited civil cases. The hearing has been postponed until July 3.

AB 1103 (Papan) – Law library board of trustees. The Assembly concurred in Senate amendments on June 27.

SB 561 (Morrow) – Administrative rulemaking cleanup. The bill was approved by the policy committee on June 26.

SB 562 (Morrow) – Civil procedure technical corrections. The bill was received by the Governor on June 22.

SB 563 (Morrow) – Rulemaking under Penal Code Section 5058. The bill was approved by the policy committee on June 26.

SCR 13 (Morrow) – Resolution of authority. The bill was approved by the fiscal committee on June 27.

The Commission also took action on the following legislative program matters:

AB 223 (Frommer) – Unnecessary procedural differences between limited and unlimited civil cases. For Commission action on AB 223 (Frommer), see the entry in these Minutes under Study J-1320.
AB 873 (Harman) – Estate planning during dissolution of marriage. For Commission action relating to AB 873 (Harman), see the entry in these Minutes under Study L-910.

AB 1103 (Papan) – Law library board of trustees. For Commission action on AB 1103 (Papan), see the entry in these Minutes under Study J-1307.

SB 562 (Morrow) – Authority to appoint receivers. For Commission action on SB 562 (Morrow), see the entry in these Minutes under Study J-1302.

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

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

STUDY F-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

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

STUDY H-820 – MECHANIC’S LIENS

The Commission considered Memorandum 2001-52, and its First and Second Supplements, concerning the double payment issue in home improvement contracts, and Memorandum 2001-53, and its First Supplement, concerning general revision of the mechanic’s lien statute.

Double Payment Issue

The Commission considered the elements of the staff draft addressing the double payment issue and approved the outlined approach, except that the mandatory 50% payment bond floor set out in draft Civil Code Section 3244.10 should be raised from $5,000 to $10,000. The draft tentative recommendation on this subject will be considered in greater detail at the September meeting, at which time the staff will have fleshed out the preliminary part that explains and justifies the proposed revisions.

The proposed one-year deferred operative date was approved. The other alternatives discussed in Memorandum 2001-52 were viewed as too complex.

The tentative recommendation should discuss any constitutional issues concerning implementation of good-faith payment as a defense to lien claims by subcontractors and suppliers who are not in privity with the owner.
General Revision

The Commission considered the general statutory revisions sampler attached to Memorandum 2001-53. It was recognized that the general statutory revision would need to be scaled to the time available for its completion to meet the deadlines for submitting legislation in 2002.

Schedule

The Commission approved the schedule outlined in Memorandum 2001-53 for completion of the review of the double payment problem and the general revision of the mechanic’s lien statute, as well as preparation of a separate report on other options for addressing the double payment problem. The basic goal is to complete the work that needs to be done to have recommended legislation ready in January 2002.

STUDY H-851 – NONJUDICIAL DISPUTE RESOLUTION UNDER CID LAW

The Commission considered Memorandum 2001-54 and its First and Second Supplements, relating to an administrative hearing procedure for resolving common interest development disputes. The Commission also considered material distributed at the meeting, attached to the Third Supplement to Memorandum 2001-54.

The Commission also considered Memorandum 2001-55, which describes regulatory and statutory procedures governing decisionmaking by a homeowners association and discusses the extent to which “due process” is required in association decisionmaking.

After hearing from interested persons and after discussion of the issues raised in these materials, the Commission decided not to pursue the concept of vesting an administrative agency with authority to resolve common interest development disputes by administrative adjudication. Instead, the Commission directed the staff to review the existing law governing mediation and arbitration of common interest development disputes, and to propose to the Commission any improvements in that law that appear called for.

Consistent with recommendations made in Memorandum 2001-55, the Commission instructed the staff to draft statutory decisionmaking procedures governing: (1) adoption of “operational rules,” and (2) architectural review. The rulemaking procedure should include a provision defining the scope of effect of “operational rules.” The architectural review procedure should be flexible
enough to provide basic due process in disputed cases, without imposing undue procedural burdens in routine cases.

In addition, the Commission will consider the possibility of improving lien foreclosure procedures, such as by imposing a mediation requirement, by precluding lien imposition for fines (as opposed to assessments), by limiting use of nonjudicial foreclosure techniques for non-assessment liens, or some other technique. The Commission will also consider whether there may be an appropriate means of tempering board action, either by some sort of personal responsibility of directors or liability of the association. This would need to be done in such a way as not to discourage able persons from serving on the board or to discourage the board from acting effectively when the need arises.

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

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

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

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

**STUDY J-1302 – AUTHORITY TO APPOINT RECEIVERS**

The Commission considered Memorandum 2001-58, concerning SB 562 (Morrow). As discussed in the memorandum, the Comment to Code of Civil Procedure Section 564 should be revised to read:

**Comment.** For purposes of simplification, Section 564 is broadened to govern appointment of a receiver in all cases, regardless of the jurisdictional classification of the case. Formerly, a separate provision governed appointment of a receiver in a limited civil case. 1998 Cal. Stat. ch. 931, § 29 (former Section 86(a)(8)).

Although Section 564 covers both limited and unlimited civil cases, some of the types of actions listed in the statute may only be brought as an unlimited civil case. For example, Section 564(b)(7) refers to appointment of a receiver where the Public Utilities Commission requests a receiver pursuant to Public Utilities Code Section 855 or 5259.5. Such a proceeding may only be brought as an unlimited civil case. See Section 85 & Comment.

To aid practitioners, subdivision (b)(5) of Section 564 is amended to refer to Section 565 (appointment of receiver on dissolution of corporation).
Subdivision (b)(9) (former subdivision (b)(8)) is amended to delete language authorizing appointment of a receiver “where receivers have heretofore been appointed by the usages of court of equity,” and insert more readily understandable language formerly found in Section 86. This is not a substantive change. The deleted language conferred broad authority to appoint a receiver, but only where other remedies were found to be inadequate. See, e.g., Golden State Glass Corp. v. Superior Court, 13 Cal. 2d 384, 393, 90 P.2d 75 (1939) (superior court should appoint receiver only where necessary to “adequately protect the rights of the parties”); Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 116 Cal. App. 2d 869, 873, 254 P.2d 599 (1953) (where less severe remedy will adequately protect parties, court ordinarily should not appoint receiver); see also Murray v. Murray, 115 Cal. 266, 275, 47 p. 37 (1896) (in equity, receiver may be appointed where plaintiff has equitable claim to property and “receiver is necessary to preserve the same from loss”). Similarly, subdivision (b)(9) authorizes appointment of a receiver only “where necessary to preserve the property or rights of any party.” (Emphasis added.)

As before, the general language of subdivision (b)(9) does not override specific requirements enumerated elsewhere in the statute. See, e.g., Marsch v. Williams, 23 Cal. App. 4th 238, 246 n.8, 28 Cal. Rptr. 2d 402 (1994); Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 237, 133 P. 1155 (1913).


STUDY J-1307 – LAW LIBRARY BOARD OF TRUSTEES

The Commission considered Memorandum 2001-57, concerning AB 1103 (Papan). The Commission ratified the amendment of Business and Professions Code Section 6301.5 that was accepted in the Senate Judiciary Committee:

6301.5. In any county in which there is no county bar association, if the board of supervisors determines that there is not a sufficient number of members of the State Bar residing, and with their principal places of office for the practice of law, in the county eligible for appointment to the board of library trustees by the board of supervisors pursuant to subdivision (d) of Section 6301 for
the constitution of a six-member or seven-member board of library trustees, the board of library trustees may consist of where there are no more than three judges of the superior court, the board of supervisors, with the concurrence of a majority of the incumbent judges of the superior court, may reduce the number of law library trustees to not less than three members.

STUDY J-1320 – UNNECESSARY PROCEDURAL DIFFERENCES BETWEEN LIMITED AND UNLIMITED CIVIL CASES

The staff orally recommended that the Comment to Code of Civil Procedure Section 685.030 (satisfaction of judgment) be revised to delete an obsolete reference to a municipal court provision. The Commission approved the suggested revision:

Comment. Subdivision (e) of Section 685.030 is amended to eliminate that difference in treatment between limited and unlimited civil cases.

For the register of actions in superior court, see Gov’t Code §§ 69845, 69845.5. For the register of actions in municipal court, see Code Civ. Proc. §§ 1052, 1052.1.

A technical change is also made for conformity with preferred drafting style.

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

The Commission considered Memorandum 2001-56, relating to statutes made obsolete by trial court restructuring.

The Commission decided to explore an alternative approach to Court of Appeal appellate jurisdiction. The staff should develop the concept of making the superior court appellate division in effect a division of the Court of Appeal. That division could be staffed by pro tempore appellate judges sitting by assignment from the superior court, depending on the court’s resources and case load. An appropriate name for that division would need to be devised. Presumptively limited civil cases and misdemeanor and infraction cases would be heard in that division, but the Court of Appeal could determine which appeals would go to that division. This would also eliminate the problem of dismissal or transfer between courts of an appeal filed in the wrong court.
The Commission considered Memorandum 2001-51 and its First Supplement, concerning Evidence Code changes required by electronic communications. The draft attached to the memorandum was approved as a tentative recommendation for circulation to interested parties, subject to revisions along the following lines (and conforming revisions of the preliminary part):

**Evid. Code § 912. Waist**

The amendment of Evidence Code Section 912 should be revised to read:

SEC. ____. Section 912 of the Evidence Code is amended to read:

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergymen), or 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has intentionally disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to disclose, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), or 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-
patient privilege), or 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, or sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

Comment. Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. See State Compensation Insurance Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999); O’Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984); see also KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co. of Maryland, 196 F.R.D. 375, 380 (S.D. Cal. 2000); Cunningham v. Connecticut Mutual Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994). Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder’s intent.

Section 912 is also amended to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor, which did not exist when the statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

Evid. Code § 917. Presumption of confidentiality

The amendment of Evidence Code Section 917 should be revised to read:

917. (a) Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) No communication between persons in a relationship listed in subdivision (a) loses its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

(c) For purposes of this section, “electronic” has the meaning provided in Section 1633.2 of the Civil Code.
Comment. Subdivision (a) of Section 917 is amended to make clear that it applies to confidential communication privileges created after its original enactment in 1965. See Sections 1035-1036.2 (sexual assault victim); 1037-1037.7 (domestic violence victim).

Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2000)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. For waiver of privileges, see Section 912 & Comment.

Under subdivision (c), the definition of “electronic” is broad, including any “intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form ....” Uniform Electronic Transactions Act, Comment to Section 2 (enacted as Civil Code Section 1633.2).

For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 6068(e) (attorney had duty to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients”); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 (“Protecting the Confidentiality of Unencrypted E-Mail”); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 (“Inadvertent Disclosure of Confidential Materials”).

For discussion of provisions on the admissibility of electronic communications, see Evid. Code §§ 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); Code Civ. Proc. § 1633.13 (“In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”). See also People v. Martinez, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); People v. Hernandez, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); Aguimatang v. California State Lottery, 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (1991); People v. Lugashi, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

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

The Commission considered the First Supplement to Memorandum 2001-50, discussing Assembly Bill 873 (Harman), which implements two Commission recommendations: Effect of Dissolution Of Marriage on Nonprobate Transfers and Estate Planning During Dissolution Of Marriage. The supplement discusses concerns raised by the Senate Judiciary Committee staff and the California Land
Title Association and sets out proposed amendments to address those concerns. The Commission approved the proposed amendments and the associated Comment revisions.

STUDY L-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

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

☐ APPROVED AS SUBMITTED

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

__________________________  __________________________
Date                          Chairperson

__________________________  __________________________
                  Executive Secretary