
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 11, 2002
SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on February 11, 2002.

Commission:

Present: Joyce G. Cook, Chairperson
Howard Wayne, Assembly Member, Vice Chairperson
David Huebner

Absent: Bill Morrow, Senate Member

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

Consultants: James E. Acet, Mechanic's Lien Law
Gordon Hunt, Mechanic's Lien Law

Other Persons:

Jeffrey P. Carr, San Diego County Court Employees Association, California
Independent Public Employees Legislative Counsel
Frank Collard, Catalina Pacific Concrete, Glendora
Gary Cramer, California Court Reporters Association, Service Employees
International Union, Los Angeles County Court Reporters Association
Mary Ann Egan, State Bar Real Estate Section, Construction & Development
Subsection, Palm Springs
Peter C. Freeman, Lumber Association of California & Nevada, Barr Lumber
Company, San Bernardino
Jan Hansen, Lumber Association of California & Nevada, Sacramento
Marvie McDonald, California Official Court Reporters Association, San Diego
Dick Nash, Building Industry Credit Association, Los Angeles
Claudia Ortega, Administrative Office of the Courts, San Francisco
Bruce Rudman, Abdulaziz & Grossbart, North Hollywood
Paul Runyon, Los Angeles Superior Court, Los Angeles
Norm Widman, Building Industry Credit Association, Lumber Association, San
Diego
Mark Wyland, Del Mar
Pat Zongker, Dixieline Lumber, San Diego

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MINUTES OF NOVEMBER 15-16, 2001, COMMISSION MEETING

1 The Commission approved the Minutes of the November 15-16, 2001,
2 Commission meeting as submitted by the staff.

MINUTES OF NOVEMBER 30, 2001, COMMISSION MEETING

3 The Commission approved the Minutes of the November 30, 2001,
4 Commission meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

6 **Report of Executive Secretary**

7 The Executive Secretary reported on recent efforts that have been made to
8 obtain appointments to fill vacancies on the Commission.

9 The Executive Secretary reported that the Governor’s budget for 2002-03
10 would reduce the Commission’s allocation by 15%, on top of the 5% reduction in
11 place for the current fiscal year, as part of an across-the-board reduction for all
12 state agencies. This will necessitate laying off our administrative assistant by the
13 end of the current fiscal year and will preclude us hiring a new attorney when
14 the Assistant Executive Secretary retires this fall. Budget hearings have not yet
15 started, and we do not have a sense whether the budget subcommittees would be
16 amenable to moderating the proposed reduction for the Commission. Nor do we
17 have a sense of the attitude of Department of Finance toward a possible
18 exemption for the Commission from the statewide hiring freeze. The Executive
19 Secretary will remain alert to these matters and take appropriate action if it
20 appears feasible to obtain the same action in both the Assembly and Senate.

21 The Executive Secretary reported that after cancellation of the January
22 meeting, we have looked into the possibility of video teleconferencing in a case

1 where it is not possible to obtain a live quorum and Commission action is
2 necessary. Costs of video teleconferencing are high, but can be reduced by use of
3 the California State University's system. We will keep this in mind as an option
4 for the future.

5 The Executive Secretary relayed compliments the Commission has received
6 for its work in progress on the trial court restructuring project.

7 **LEGISLATIVE PROGRAM**

8 The Commission considered Memorandum 2002-11, relating to the
9 Commission's 2002 legislative program. The staff orally updated the
10 memorandum with the information that the recommendation on cases in which a
11 court reporter is required has been introduced as SB 1371 (Morrow).

12 **AB 1857 (Wayne) – Administrative Procedure.** For Commission action
13 relating to AB 1857, concerning administrative rulemaking refinements, please
14 refer to the entry in these Minutes under Study N-307.

15 **SB 1316 (Senate Judiciary Committee) – Trial Court Restructuring.** For
16 Commission action relating to SB 1316, concerning trial court restructuring,
17 please refer to the entry in these Minutes under Study J-1400.

18 **STUDY H-820 – MECHANIC'S LIENS**

19 **Double Liability in Home Improvement Contracts**

20 The Commission considered Memorandum 2002-7, and its First Supplement,
21 concerning the double liability problem in home improvement contracts and
22 reviewing comments received on the Discussion Draft on *Consumer Protection*
23 *Options Under Home Improvement Contracts* (December 2001). Following the
24 discussion and extensive comments from interested persons in attendance, the
25 Commission adopted the good-faith payment rule and approved the draft
26 recommendation attached to the memorandum, with the following revisions:

- 27 (1) *Cap Amount:* The protection for good-faith payments should apply
28 to home improvement contracts under \$15,000. This amount is a
29 compromise figure within the range most commonly discussed at
30 past meetings (\$10,000-25,000).
- 31 (2) *Extras:* The cap should apply to the whole contract including extras
32 and change orders. If the amount under the contract goes over the
33 cap, the protection of good-faith payments would not apply. This

1 rule is intended to avoid manipulation of the protection intended
2 for smaller contracts.

3 The cap is applied to the whole contract, rather than to the individual
4 subcontractor or supplier's work under the contract, because the intent of the
5 proposal is to protect homeowners on smaller jobs, not to eliminate lien rights of
6 the smaller subcontractors and suppliers. From the perspective of the
7 homeowner, a total contract cap is easier to understand and apply.

8 The Commission declined to implement a direct payment notice scheme as
9 part of the good-faith payment proposal, in the interest of keeping the statute
10 simple and avoiding complications that have arisen when this approach was
11 considered in prior meetings. It was also emphasized that the good-faith
12 payment rule would not apply to any contractor or supplier who has a contract
13 with the homeowner.

14 With the revisions noted above, the recommendation should be prepared for
15 printing and the staff will seek introduction of a bill or amendment of the
16 proposal into an existing bill, most likely AB 568 (Dutra).

17 **Report to Legislature**

18 The Commission considered Memorandum 2002-8 and the attached draft
19 preliminary report to the Legislature on *Mechanic's Lien Law Reform*. The
20 Commission noted that the draft report needed to be revised and updated before
21 delivery to the Legislature. The general reform discussion should be moved to
22 the first part of the report, followed by the discussion of approaches to the
23 double liability problem. The discussion of several options that were considered
24 in detail during this study should be recast to better indicate why the
25 Commission rejected them. Commissioners will provide the staff with any
26 editorial suggestions they may have and the preliminary report will be revised
27 and circulated for review. If there are no objections to the revised draft after a
28 five-day review period, it will be submitted to the Legislature, but if any
29 Commissioner has a concern with the revised report, it will be placed on a
30 meeting agenda for further consideration. At the suggestion of the staff, the
31 Commission agreed that the preliminary report should not be printed at this
32 time, but should be delivered to the interested legislative committees and made
33 available on the Commission's website when it is finalized.

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

2 The Commission considered Memorandum 2002-3 and its First Supplement,
3 relating to statutes made obsolete by trial court restructuring. The Commission
4 took action on the following matters.

5 **Compensation of Judges**

6 Government Code Section 68202, relating to compensation of judges, should
7 be amended to remove the reference to compensation of municipal court judges,
8 but should not be amended to update the provision relating to compensation of
9 superior court judges. This is intended to avoid opening a discussion of the
10 appropriate level of compensation for superior court judges.

11 **Compensation of Official Reporter**

12 The statutes relating to compensation of official reporters in superior courts
13 should be removed from the Commission's recommendation and from the bill
14 implementing it. The purpose of the removal is to allow the Commission and
15 interested parties to continue to work on the matter.

16 The staff should schedule another working group session on it, if we can get
17 assurance from the interested parties that they are interested in achieving
18 resolution of the issue and will be represented at the session by persons
19 authorized to negotiate and bind them to an agreement. The session should be
20 scheduled for late April or early May, to allow AOC sufficient time to poll courts
21 around the state as to their circumstances. The staff should report back to the
22 Commission at the next meeting concerning progress on the matter.

23 With respect to Government Code Section 73691, relating to official reporter
24 compensation in the former Consolidated Fresno Judicial District, that statute
25 should be removed, for now, from the recommendation and bill. The parties to
26 the Fresno County MOU should be informed that its removal is intended to
27 facilitate their working out appropriate amendatory language for their MOU or
28 some other accommodation, and that the Commission intends to restore that
29 provision to the bill, or an agreed-upon alternative, during the legislative
30 process.

31 **State Mandated Local Program**

32 The proposed amendment to Penal Code Section 1203.7, which would shift
33 the duty to provide probation officer books of record from the county clerk to the

1 probation department, should be omitted from the recommendation and deleted
2 from the bill. This is intended to avoid triggering a “state mandated local
3 program” tag on the bill.

4 STUDY K-500 – EVIDENCE CODE CHANGES REQUIRED BY
5 ELECTRONIC COMMUNICATIONS

6 The Commission considered Memorandum 2002-5 and its First Supplement,
7 concerning comments on the Tentative Recommendation on *Electronic*
8 *Communications and Evidentiary Privileges* (June 2001). The Commission approved
9 the proposal as a final recommendation, subject to the following revisions:

10 **Evid. Code § 917. Confidentiality of communications**

11 Proposed new subdivision (b) of Evidence Code Section 917 should be
12 revised as follows:

13 (b) A communication between persons in a relationship listed in
14 subdivision (a) does not lose its privileged character ~~for the sole~~
15 ~~reason that~~ solely because it is communicated by electronic means
16 or because persons involved in the delivery, facilitation, or storage
17 of electronic communication may have access to the content of the
18 communication.

19 The first paragraph of the Comment should also be revised:

20 **Comment.** Subdivision (a) of Section 917 is amended to make
21 clear that it also applies to confidential communication privileges
22 created after its original enactment in 1965. See Sections 1035-1036.2
23 (sexual assault victim), 1037-1037.7 (domestic violence victim). The
24 presumption set forth in subdivision (a) applies regardless of how a
25 communication is transmitted. In each instance, the opponent of the
26 claim of privilege has the burden of proof to establish that the
27 communication was not confidential.

28 With these revisions, the amendment of Section 917 reads:

29 917. (a) Whenever a privilege is claimed on the ground that the
30 matter sought to be disclosed is a communication made in
31 confidence in the course of the lawyer-client, physician-patient,
32 psychotherapist-patient, clergyman-penitent, ~~or~~ husband-wife,
33 sexual assault victim-counselor, or domestic violence victim-
34 counselor relationship, the communication is presumed to have
35 been made in confidence and the opponent of the claim of privilege

1 has the burden of proof to establish that the communication was
2 not confidential.

3 (b) A communication between persons in a relationship listed in
4 subdivision (a) does not lose its privileged character solely because
5 it is communicated by electronic means or because persons
6 involved in the delivery, facilitation, or storage of electronic
7 communication may have access to the content of the
8 communication.

9 (c) For purposes of this section, “electronic” has the meaning
10 provided in Section 1633.2 of the Civil Code.

11 **Comment.** Subdivision (a) of Section 917 is amended to make
12 clear that it also applies to confidential communication privileges
13 created after its original enactment in 1965. See Sections 1035-1036.2
14 (sexual assault victim), 1037-1037.7 (domestic violence victim). The
15 presumption set forth in subdivision (a) applies regardless of how a
16 communication is transmitted. In each instance, the opponent of the
17 claim of privilege has the burden of proof to establish that the
18 communication was not confidential.

19 Subdivision (b) is drawn from New York law (N.Y. C.P.L.R.
20 4548 (McKinney 2001)) and from language formerly found in
21 Section 952 relating to confidentiality of an electronic
22 communication between a client and a lawyer. For waiver of
23 privileges, see Section 912 & Comment.

24 Under subdivision (c), the definition of “electronic” is broad,
25 including any “intangible media which are technologically capable
26 of storing, transmitting and reproducing information in human
27 perceivable form.” Unif. Electronic Transactions Act, § 2 comment
28 (1999) (enacted as Civil Code Section 1633.2).

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

38 For examples of provisions on the admissibility of electronic
39 communications, see Evid. Code §§ 1521 & Comment (Secondary
40 Evidence Rule), 1552 (printed representation of computer
41 information or computer program), 1553 (printed representation of
42 images stored on video or digital medium); Code Civ. Proc. §
43 1633.13 (“In a proceeding, evidence of a record or signature may
44 not be excluded solely because it is in electronic form.”). See also
45 *People v. Martinez*, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d
46 687 (2000); *People v. Hernandez*, 55 Cal. App. 4th 225, 63 Cal. Rptr.

1 2d 769 (1997); *Aguimatang v. California State Lottery*, 234 Cal. App.
2 3d 769, 286 Cal. Rptr. 57 (1991); *People v. Lugashi*, 205 Cal. App. 3d
3 632, 252 Cal. Rptr. 434 (1988).

4 **Evid. Code § 912. Waiver**

5 The staff should attempt to obtain further input on the proposed revisions
6 relating to inadvertent disclosure, particularly from the Attorney General and the
7 California District Attorneys Association. These revisions should not be included
8 in the final recommendation, but might be approved later.

9 The Commission approved the other revisions of Evidence Code Section 912,
10 relating to the privilege for communications between a domestic violence victim
11 and counselor:

12 912. (a) Except as otherwise provided in this section, the right of
13 any person to claim a privilege provided by Section 954 (lawyer-
14 client privilege), 980 (privilege for confidential marital
15 communications), 994 (physician-patient privilege), 1014
16 (psychotherapist-patient privilege), 1033 (privilege of penitent),
17 1034 (privilege of clergyman), or 1035.8 (sexual assault victim-
18 counselor privilege), or 1037.5 (domestic violence victim-counselor
19 privilege) is waived with respect to a communication protected by
20 such privilege if any holder of the privilege, without coercion, has
21 disclosed a significant part of the communication or has consented
22 to such disclosure made by anyone. Consent to disclosure is
23 manifested by any statement or other conduct of the holder of the
24 privilege indicating consent to the disclosure, including failure to
25 claim the privilege in any proceeding in which the holder has the
26 legal standing and opportunity to claim the privilege.

27 (b) Where two or more persons are joint holders of a privilege
28 provided by Section 954 (lawyer-client privilege), 994 (physician-
29 patient privilege), 1014 (psychotherapist-patient privilege), or
30 1035.8 (sexual assault victim-counselor privilege), or 1037.5
31 (domestic violence victim-counselor privilege), a waiver of the right
32 of a particular joint holder of the privilege to claim the privilege
33 does not affect the right of another joint holder to claim the
34 privilege. In the case of the privilege provided by Section 980
35 (privilege for confidential marital communications), a waiver of the
36 right of one spouse to claim the privilege does not affect the right of
37 the other spouse to claim the privilege.

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

40 (d) A disclosure in confidence of a communication that is
41 protected by a privilege provided by Section 954 (lawyer-client
42 privilege), 994 (physician-patient privilege), 1014 (psychotherapist-

1 patient privilege), or 1035.8 (sexual assault victim-counselor
2 privilege), or 1037.5 (domestic violence victim-counselor privilege),
3 when such disclosure is reasonably necessary for the
4 accomplishment of the purpose for which the lawyer, physician,
5 psychotherapist, or sexual assault counselor, or domestic violence
6 counselor was consulted, is not a waiver of the privilege.

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

12 **Scope of Study**

13 The Commission decided not to study authentication of electronic
14 communications at this time. The Commission also decided not to address
15 privileges other than the confidential communications privileges.

16 **STUDY N-307 – ADMINISTRATIVE RULEMAKING REFINEMENTS**

17 The Commission considered Memorandum 2002-4 and its First and Second
18 Supplements, discussing comments regarding the Tentative Recommendation on
19 *Administrative Rulemaking Refinements* (November 2001). The Commission
20 approved the tentative recommendation as its final recommendation, subject to
21 the following changes:

22 **Fish & Game Code § 202. Regulations**

23 The following provision should be added to the recommendation:

24 **Fish & Game Code § 202 (amended). Regulations**

25 202. The commission shall exercise its powers under this article
26 by regulations made and promulgated pursuant to this article.
27 Regulations adopted pursuant to this article shall not be subject to
28 the time periods for the adoption, amendment, or repeal of
29 regulations prescribed in Sections 11343.4, 11346.4, and 11346.8, and
30 11347.1 of the Government Code.

31 **Comment.** Section 202 is amended to make clear that the Fish
32 and Game Commission is not subject to the time period provided in
33 Government Code Section 11347.1. That section merely elaborates
34 the requirements of Government Code Section 11346.8(d).

1 **Gov't Code § 11340.85. Internet publication of rulemaking documents**

2 Subject to possible nonsubstantive changes by the staff, in consultation with
3 Assembly Member Wayne, the proposed addition to Section 11340.85(d) should
4 be revised to read as follows:

5 A document that is required to be posted pursuant to
6 subdivision (c) shall be posted within a reasonable time after
7 creation of the document and shall remain posted until at least 15
8 days after the rulemaking action is filed with the Secretary of State
9 or after publication of notice of a decision not to proceed pursuant
10 to Section 11347.

11 **Gov't Code § 11346.2. Internet publication of rulemaking documents**

12 Proposed subparagraph (C) of Section 11346.2(b)(3) should be revised to read
13 as follows:

14 (C) It is not the intent of this paragraph to require the agency to
15 Notwithstanding subparagraph (A) or (B), an agency is not
16 required to artificially construct alternatives, describe unreasonable
17 alternatives, or to justify why it has not identified described
18 alternatives.

19 **Gov't Code § 11346.5. Content of notice of proposed action**

20 The proposed addition to Section 11346.5(b) should be revised to read as
21 follows:

22 If the representative receives an inquiry regarding the proposed
23 action that the representative cannot answer, the representative
24 shall refer the inquiry to another person in the agency for a prompt
25 response.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary