
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JULY 11-12, 2002
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on July 11-12, 2002.

Commission:

Present: Joyce G. Cook, Chairperson
Howard Wayne, Assembly Member, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
David Huebner
Frank Kaplan
Desiree I. Kellogg
Edmund L. Regalia
Julia Sylva
William E. Weinberger

Absent: Bill Morrow, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary (July 11)
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Lynne I. Urman, Staff Counsel
Nick Gonzalez, Student Intern
Ellen Nudelman, Student Legal Intern

Consultants: Gerald F. Uelmen, Criminal Procedure Under Trial Court Unification

Other Persons:

Sandra Bonato, Executive Council of Homeowners, San Jose (July 12)
Oliver Burford, Executive Council of Homeowners, San Jose (July 12)
Tony Gonzales, Rose & Kindel, Sacramento (July 11)
Sam Perrotti, Department of Real Estate, Sacramento (July 12)
S. Guy Puccio, Executive Council of Homeowners, Wallace & Puccio, Sacramento (July 12)
S.L. Roullier, Sacramento (July 11)
Joshua Weinstein, Judicial Council of California, San Francisco (July 11)

1 event, the recognition of service of the retiring Assistant Executive Secretary,
2 tentatively scheduled for the evening of September 12, would be shifted to noon
3 on September 13.

4 **Legislative Intent and CLRC Recommendations**

5 The Commission considered Memorandum 2002-27, relating to legislative
6 intent and Commission recommendations. The Commission approved the
7 boilerplate language set out in the memorandum for inclusion in Commission
8 recommendations. The language should be augmented by a note referring to a
9 discussion of cases that will be included in the Commission's annual report.

10 **Report of Executive Secretary**

11 *Student Interns*

12 The Executive Secretary introduced the student interns working for the
13 Commission this summer. Ellen Nudelman has completed one year of Stanford
14 Law School; she is working in our Palo Alto office under the auspices of the
15 work-study program and the Stanford Public Interest Law Foundation. Nick
16 Gonzalez has completed one year of undergraduate work at UC Berkeley; he is
17 working in our Sacramento office under the auspices of the "Cal in Sacramento"
18 program. They have been quite helpful to us on projects this summer.

19 *Budget*

20 The Executive Secretary reported that a budget for the state's 2002-03 fiscal
21 year has not yet been adopted. The current version of the budget bill would
22 appropriate for the Commission the amount proposed in the Governor's budget.
23 An earlier version had included an augmentation by the budget conference
24 committee for a proposed study of protection of personal information in financial
25 transactions, but that augmentation has been deleted by a more recent conference
26 committee action.

27 *Disclosure of Mailing List*

28 The Executive Secretary reported on the results of our initiative to obtain a
29 legal opinion on whether the Commission's mailing list must be made available
30 to persons requesting it. The staff has obtained an opinion from the Attorney
31 General to the effect that there is a balancing test between the policies of the
32 Public Records Act requiring disclosure and the Information Practices Act

1 requiring protection of personal information. The determination is to be made by
2 the agency based on the circumstances of the particular case.

3 The Executive Secretary also indicated that Commissioner Wayne has
4 obtained a Legislative Counsel's opinion on the same matter. The Legislative
5 Counsel's opinion is consistent with the Attorney General's opinion, and
6 concludes that in the circumstances of the particular request for the
7 Commission's mailing list that generated this inquiry, the law clearly favors
8 nondisclosure and protection of personal information.

9 These legal opinions are consistent with the Commission staff's reading of the
10 law as well. The Executive Secretary indicated his continued intention not to
11 disclose the Commission's mailing list.

12 LEGISLATIVE PROGRAM

13 The Commission considered Memorandum 2002-28, relating to the
14 Commission's 2002 legislative program. The staff orally updated the chart
15 attached to the memorandum with the information that ACR 123 (Wayne) — the
16 Commission's resolution of authority — is set for hearing on August 5.

17 **ACA 15 (Wayne) — Trial Court Restructuring (Constitutional Amendment)**

18 Commissioner Wayne noted that the trial court restructuring constitutional
19 amendment will appear on the November ballot as Proposition 48. An opposition
20 argument has been received, which will require a rebuttal.

21 **SB 1316 (Senate Judiciary Committee) — Trial Court Restructuring (Statutory 22 Revision)**

23 The Commission approved the proposed amendments and revised
24 Comments to SB 1316 set out in the memorandum.

25 **ACR 125 (Papan) — Protection of Personal Information**

26 The study authorized by this resolution is dependent on either a budget
27 appropriation or private funding being made available for it. With the removal of
28 the proposed appropriation from the Commission's budget, that raises the
29 possibility that private funding would be made available for the study.

30 The Commission discussed ways to try to protect the Commission's neutrality
31 if funding is forthcoming from stakeholders interested in the study. There was a
32 concern that any gift to the state would be a public record and therefore could
33 taint any Commission proposals that affected the donor. (It was suggested that

1 funds could be channeled through another intermediary, such as the State Bar.)
2 Also, even if the Commission could be insulated from knowledge of the identity
3 of the donors, there would be an assumption that funding came from financial
4 institutions, thereby prejudicing the effect of any recommendations.

5 If the measure clears the Senate, Commission staff should make immediate
6 inquiry with the Department of Finance to determine what, if anything, could be
7 done to help insulate the Commission from inappropriate influence or the
8 appearance of such influence.

9 **AB 2238 (Dickerson) — Public Safety Official's Home Information**

10 The staff alerted the Commission to AB 2238 (Dickerson), which would
11 require a report on how to protect a public safety official's home information
12 from public disclosure. The Commission has been contacted about the possibility
13 of it conducting such a study.

14 The study would not be inconsistent with the Commission's general authority
15 to study Public Records Act and privacy and electronic communications issues,
16 but the short term study contemplated by the bill would be impossible for the
17 Commission with current workload and resources, and we have so informed the
18 author's office.

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

20 The Commission considered Memorandums 2002-25 and 2002-36, relating to
21 the law governing unincorporated associations. The Commission made the
22 following decisions:

23 **Distribution of Assets of Dissolved Unincorporated Association**

24 Subdivisions (c) and (d) were deleted from proposed Corporations Code
25 Section 18125. The following language was added to the Comment to that
26 section:

27 Section 18060 provides that a statute specific to a particular type
28 of unincorporated association prevails over a provision of this title,
29 to the extent of any inconsistency. Accordingly, any statutory rule
30 governing disposition of the property of a dissolved cemetery
31 association would prevail over provisions of this section, to the
32 extent of any inconsistency. See, e.g., Health & Safety Code §§ 7925
33 (limitation on proceeds of sale of cemetery land), 8825-8829
34 (dedication of pioneer memorial park).

1 **Recovery of Distributed Assets**

2 The staff will draft a section providing for creditor recovery of assets that
3 were distributed to members on dissolution of an unincorporated association.
4 The provision will be similar to Corporations Code Sections 8721(a) and
5 8723(a)(1), which provide for recovery of assets distributed to a dissolved
6 nonprofit corporation. In drafting the provision, the staff will consider whether
7 there should be time limits on the recovery of distributed assets.

8 **Ownership of Association Property**

9 The staff will draft a section providing that property acquired by an
10 unincorporated association is property of the unincorporated association and not
11 of its members individually, regardless of how title is held.

12 **Technical Defect in Partnership Law**

13 The staff will draft a revision of Corporations Code Section 16202(b) making
14 clear that “partnership” does not include a business association formed pursuant
15 to case law.

16 **Application of Unincorporated Associations Law**

17 The staff will investigate whether there is a need to add language making
18 clear that the proposed law does not apply to a marriage or domestic
19 partnership.

20 The staff will also investigate whether there is a need for language governing
21 application of the proposed law to an unincorporated association that operates
22 outside of California.

23 **Recorded Statement of Authority**

24 Language will be added to proposed Corporations Code Section 18115 to
25 permit revocation or amendment of a recorded statement of authority.

26 **Definitions**

27 The following provisions were added to the proposed law:

28 **Corp. Code § 18007 (added). “Governing document” defined**

29 18007. “Governing document” means a constitution, articles of
30 association, bylaws, or other writing that governs the purpose or
31 operation of an unincorporated association or the rights or
32 obligations of its members.

1 **Comment.** Section 18007 is new. See also Section 8 (“writing”
2 defined).

3 **Corp. Code § 18010 (added). “Member” defined**

4 18010. (a) If the governing documents of an unincorporated
5 association define who is a member of the association, “member”
6 has the meaning provided in the governing documents.

7 (b) If the governing documents of an unincorporated association
8 do not define who is a member of the association, “member” means
9 a person who, under the rules or practices of the unincorporated
10 association, may participate in the selection of persons authorized
11 to manage the affairs of the unincorporated association or in the
12 development of policy of the unincorporated association, but does
13 not include a person who participates solely as an agent of the
14 association.

15 **Comment.** Section 18010 is new.

16 Subdivision (a) recognizes the authority of an unincorporated
17 association to determine its own membership requirements.
18 Nothing in this subdivision is intended to authorize unlawful
19 discrimination by an unincorporated association in its membership
20 policy.

21 Subdivision (b) is similar to Section 1(1) of the Uniform
22 Unincorporated Nonprofit Association Act. However, subdivision
23 (b) adds an exception for a person who participates in association
24 decisionmaking solely as an agent of the association. This does not
25 preclude an agent from being a member, if the agent qualifies as a
26 member for other reasons. For example, if an association hires a
27 consultant to assist in developing association policy, the
28 consultant’s involvement in policy development does not make the
29 consultant a member of the association. The fact that the consultant
30 is serving as an agent of the association does not prevent the
31 consultant from also being a member of the association under the
32 association’s general membership rules and practices.

33 **Lawful Purpose**

34 The staff will consider whether the purpose of an unincorporated association
35 should be expressly limited to a lawful purpose.

36 **Distribution of Tentative Recommendation**

37 When a tentative recommendation is circulated for public comment, it should
38 be sent to a variety of unincorporated associations for review. The staff will select
39 appropriate groups from a number of sources, including the Secretary of State’s
40 registry of unincorporated associations that have designated an agent for service
41 of process.

1 **Capacity to Sue**

2 Section 7(a) of the Uniform Unincorporated Nonprofit Association Act,
3 relating to the capacity of an unincorporated association to sue and be sued in its
4 name, should not be adopted in California.

5 **Representative Action on Behalf of Members**

6 Section 7(b) of the Uniform Unincorporated Nonprofit Association Act,
7 providing for representative suit by an unincorporated association on behalf of
8 its members, should not be adopted in California.

9 **Abatement of Action on Change in Membership**

10 Section 11 of the Uniform Unincorporated Nonprofit Association Act,
11 providing that a claim for relief against an unincorporated association is not
12 abated by a change in the association's membership, should not be adopted in
13 California.

14 **Service of Process**

15 The following provisions were added to the proposed law:

16 **Corp. Code § 16309 (added). Designation of agent for service of**
17 **process**

18 16309. (a) The statement of partnership authority may designate
19 an agent for service of process. The agent may be an individual
20 residing in this state or a corporation that has complied with
21 Section 1505 and whose capacity to act as an agent has not
22 terminated. If an individual is designated, the statement shall
23 include that person's complete business or residence address in this
24 state.

25 (b) An agent designated for service of process may file with the
26 Secretary of State a signed and acknowledged written statement of
27 resignation as an agent. On filing of the statement of resignation,
28 the authority of the agent to act in that capacity shall cease and the
29 Secretary of State shall give written notice of the filing of the
30 statement of resignation by mail to the partnership, addressed to its
31 principal executive office.

32 (c) If an individual who has been designated agent for service of
33 process dies or resigns or no longer resides in the state, or if the
34 corporate agent for that purpose resigns, dissolves, withdraws from
35 the state, forfeits its right to transact intrastate business, has its
36 corporate rights, powers, and privileges suspended, or ceases to
37 exist, the partnership or foreign partnership shall promptly file an
38 amended statement of partnership authority, designating a new
39 agent.

1 **Comment.** Section 16309 is new. Similar provisions govern
2 designation of an agent for service of process by other types of
3 unincorporated business entities. See Sections 15627(d) (limited
4 partnership), 16962(a) (limited liability partnership), 17061(d)
5 (limited liability company).

6 **Corp. Code § 16310 (added). Service of process on designated**
7 **agent**

8 16310. (a) If a partnership has designated an agent for service of
9 process, process may be served on the partnership as provided in
10 this section and in Chapter 4 (commencing with Section 413.10) of
11 Title 5 of Part 2 of the Code of Civil Procedure.

12 (b) Personal service of a copy of any process against the
13 partnership by delivery to an individual designated by it as agent,
14 or if the designated agent is a corporation, to a person named in the
15 latest certificate of the corporate agent filed pursuant to Section
16 1505 at the office of the corporate agent, shall constitute valid
17 service on the partnership.

18 (c) No change in the address of the agent for service of process
19 or appointment of a new agent for service of process shall be
20 effective until an amendment to the statement of partnership
21 authority is filed.

22 (d)(1) If an agent for service of process has resigned and has not
23 been replaced, or if the designated agent cannot with reasonable
24 diligence be found at the address designated for personal delivery
25 of the process, and it is shown by affidavit to the satisfaction of the
26 court that process against a partnership cannot be served with
27 reasonable diligence upon the designated agent by hand in the
28 manner provided in Section 415.10, subdivision (a) of Section
29 415.20, or subdivision (a) of Section 415.30 of the Code of Civil
30 Procedure, the court may make an order that the service shall be
31 made on a partnership by delivering by hand to the Secretary of
32 State, or to any person employed in the Secretary of State's office in
33 the capacity of assistant or deputy, one copy of the process for each
34 defendant to be served, together with a copy of the order
35 authorizing the service. Service in this manner shall be deemed
36 complete on the 10th day after delivery of the process to the
37 Secretary of State.

38 (2) Upon receipt of the copy of process and the fee for service,
39 the Secretary of State shall give notice of the service of the process
40 to the partnership, at its principal executive office, by forwarding to
41 that office, by registered mail with request for return receipt, the
42 copy of the process.

43 (3) The Secretary of State shall keep a record of all process
44 served on the Secretary of State under this section and shall record
45 therein the time of service and the action taken by the Secretary of

1 State. A certificate under the Secretary of State's official seal,
2 certifying to the receipt of process, the giving of notice to the
3 partnership, and the forwarding of the process pursuant to this
4 section, shall be competent and prima facie evidence of the service
5 of process.

6 **Comment.** Section 16310 is new. Similar provisions govern
7 service of process on other types of unincorporated business
8 entities. See Sections 15627(a)-(b) (limited partnership), 16962(b)-(f)
9 (limited liability partnership), 17061(a)-(c) (limited liability
10 company).

11 Code of Civil Procedure Section 416.40 should be revised as follows:

12 **Code Civ. Proc. § 416.40 (amended). Service on unincorporated**
13 **association**

14 416.40. A summons may be served on an unincorporated
15 association (including a partnership) by delivering a copy of the
16 summons and of the complaint:

17 (a) If the association is a general or limited partnership to the
18 person designated as agent for service of process ~~as provided in~~
19 ~~Section 24003 of the Corporations Code~~ or to a general partner or
20 the general manager of the partnership;

21 (b) If the association is not a general or limited partnership, to
22 the person designated as agent for service of process as provided in
23 Section 24003 of the Corporations Code or to the president or other
24 head of the association, a vice president, a secretary or assistant
25 secretary, a treasurer or assistant treasurer, a general manager, or a
26 person authorized by the association to receive service of process;

27 (c) When authorized by Section 15700 ~~or 24007~~ of the
28 Corporations Code, as provided by ~~the applicable~~ that section.

29 Language along the following lines should be added to Corporations Code
30 Section 24003:

31 (g) Notwithstanding Section 18055, a statement filed under this
32 section before [the operative date of the proposed law] is subject to
33 [this article].

34 **Place of Trial**

35 Code of Civil Procedure Section 395.2 should be revised as follows:

36 **Code Civ. Proc. § 395.2 (amended). Place of trial in action against**
37 **unincorporated association**

38 395.2. If an unincorporated association has filed a statement
39 with the Secretary of State pursuant to ~~Section 24003 of the~~
40 ~~Corporations Code listing~~ statute, designating its principal office in

1 this state, the proper county for the trial of an action against such
2 unincorporated association is the same as it would be if the
3 unincorporated association were a corporation and, for the purpose
4 of determining such county, the principal place of business of the
5 unincorporated association shall be deemed to be the principal
6 office in this state listed in the statement.

7 Corporations Code Sections 15621, 16303, 16953, and 17060 should be revised
8 to permit the designation of a principal place of business in this state.

9 **Enforcement of Judgments**

10 Corporations Code Section 24002 should be revised and renumbered, along
11 the following lines:

12 **Code Civ. Proc. § 695.080 (added). Enforcement against**
13 **unincorporated association**

14 695.080. A money judgment against an unincorporated
15 association, whether organized for profit or not, may be enforced
16 only against the property of the association.

17 **Comment.** Section 695.080 continues former Corporations Code
18 Section 24002 without substantive change.

19 STUDY D-355 – EXEMPTIONS FROM ENFORCEMENT OF MONEY JUDGMENTS:
20 SECOND DECENNIAL REVIEW

21 The Commission considered Memorandum 2002-29 concerning revision of
22 exemptions from enforcement of money judgments pursuant to the statutory
23 duty in Code of Civil Procedure Section 703.120(a). The Commission directed the
24 staff to prepare a draft tentative recommendation for the next meeting,
25 implementing the following policies:

26 *Adjustment of exempt amounts.* All of the personal property monetary
27 exemptions, as set out in the table on page 7 of the memorandum, should be
28 increased by the applicable cost of living adjustment factor from the California
29 Consumer Price Index. The homestead exemption would not be adjusted because
30 it was recently increased and is frequently addressed by the Legislature.

31 *Inmate trust funds.* In addition to increasing the general exemption for inmate
32 trust funds to account for inflation since 1995, the \$300 limitation on the inmate
33 trust fund exemption in Code of Civil Procedure Section 704.090(b) should be
34 examined, with a view toward broadening it to cover all claims by victims of
35 crimes committed by the inmate, not just the special restitution or other claims

1 listed in the statute. The staff should confer with appropriate crime victims
2 groups on these matters.

3 *Periodic review.* The Commission's duty to review exemptions under Code of
4 Civil Procedure Section 703.120(a) every 10 years should be revised to provide
5 for review every three years and a duty to report to the judiciary committees of
6 the Assembly and Senate. This would not limit the Commission's discretion to
7 recommend legislation, but would provide a mechanism for bringing the cost of
8 living matter to the attention of the relevant committees even though the
9 Commission does not intend to sponsor a bill. Coincidentally, if this change
10 becomes operative in 2004, the triennial duty would coincide with the triennial
11 review under the alternate bankruptcy exemptions incorporated by Section
12 703.140(c).

13 *Legislative intent.* The draft legislation should also include a statement of
14 legislative intent that the dollar amount of exemptions from enforcement of
15 money judgments should be adjusted to take account of changes in the cost of
16 living, in general conformance with the alternate bankruptcy exemptions. The
17 triennial review and the statement of legislative intent would be a substitute for
18 implementing an automatic cost of living adjustment, which is less practicable in
19 the enforcement of judgments context than in bankruptcy.

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

21 The Commission considered Memorandum 2002-10 and its First and Second
22 Supplements, discussing issues relating to alternative dispute resolution in
23 common interest development disputes. The Commission made the following
24 decisions on the issues raised.

25 **Mandatory ADR in Governing Documents**

26 The Commission discussed whether the law should make clear that a
27 mandatory arbitration clause is or is not permissible as part of the governing
28 documents of an association. The Commission tentatively decided not to further
29 address this issue. However, the Commission may wish to revisit the matter
30 when it has completed its review of other ADR issues.

31 **Procedures Provided in Governing Documents**

32 The Commission considered the question whether an association should be
33 required to provide, in its governing documents, an internal dispute resolution

1 procedure within the association. For example, some larger communities use a
2 “covenants committee” composed of disinterested homeowners, to resolve
3 disputes within the association.

4 The Commission tentatively concluded that every association should offer an
5 internal dispute resolution mechanism at no cost to the parties. A homeowner
6 would not be required to participate in that process, but on demand of a
7 homeowner, the association would be required to participate in the process. This
8 would supplement and not replace the regular Civil Code Section 1354(b)
9 dispute resolution procedure involving use of a neutral.

10 If an association fails to provide such an internal dispute resolution
11 mechanism, the statute should provide a default mechanism that would apply.
12 As an initial approach, the staff should draft a meet and confer process, in which
13 a board member is delegated authority to deal with the homeowner and settle
14 the matter on behalf of the board. The staff might refer to a parallel process used
15 in employment disputes under the Labor Code.

16 **ADR Prerequisite to Litigation (Civ. Code § 1354(b))**

17 In connection with the existing Civil Code Section 1354(b) provisions, the
18 Commission approved a number of improvements. The Commission directed the
19 staff, in drafting language to implement these revisions, to recast the section in a
20 clear and simple form.

21 *Statute of Limitations*

22 The statute of limitations provision of Section 1354(b) should be revised to
23 provide that a statute of limitations that would otherwise expire within the ADR
24 period is tolled until 120 days after service of the Request for Resolution:

25 ~~Unless the applicable time limitation for commencing the action~~
26 ~~would run within 120 days, prior to~~ Before the filing of a civil
27 action by either an association or an owner or a member of a
28 common interest development solely for declaratory relief or
29 injunctive relief, or for declaratory relief or injunctive relief in
30 conjunction with a claim for monetary damages, other than
31 association assessments, not in excess of five thousand dollars
32 (\$5,000), related to the enforcement of the governing documents,
33 the parties shall endeavor, as provided in this subdivision, to
34 submit their dispute to a form of alternative dispute resolution such
35 as mediation or arbitration.

36 If the applicable time limitation for commencing the action
37 would run within 120 days after service of the Request for

1 Resolution, the time limitation is extended to the 120th day after
2 service.

3 [A conforming revision would be required in Section 1354(c).]

4 *Scope of Requirement*

5 The Section 1354(b) ADR requirement should not be limited to declaratory
6 and injunctive relief actions to enforce the governing documents, but should be
7 recast along the following lines:

8 Before the filing of a civil action by either an association or an
9 owner or a member of a common interest development solely for
10 declaratory relief ~~or injunctive~~ , injunctive, or writ relief, or for
11 declaratory relief ~~or injunctive~~ , injunctive, or writ relief in
12 conjunction with a claim for monetary damages, other than
13 association assessments, not in excess of five thousand dollars
14 (\$5,000), related to the enforcement of the governing documents,
15 the Nonprofit Mutual Benefit Corporation Law (Part 3,
16 commencing with Section 71110, of Division 2 of the Corporations
17 Code), or this title, the parties shall endeavor, as provided in this
18 subdivision, to submit their dispute to a form of alternative dispute
19 resolution such as mediation or arbitration.

20 [A conforming revision would be required in Section 1354(c).]

21 *Disputes Between Members*

22 The existing statute applies to disputes between an association and its
23 members as well as to disputes between members within an association. The
24 Commission asked the staff to further research whether there is any reason to
25 eliminate disputes between members from coverage of the statute, so long as the
26 enforcement of governing documents language is kept in the statute.

27 *\$5,000 Limit*

28 The Commission requested further legislative history on the \$5,000 monetary
29 damages limit in Section 1354(b). The particular concern was that any person
30 who wants to avoid the ADR requirement could easily do so by including a claim
31 for damages in excess of \$5,000.

32 *Disputes Involving Small Amounts*

33 The Commission declined to add language to the statute making clear that an
34 ADR offer under Section 1354(b) is not required for a small claims case. That

1 appears to be reasonably clear on the face of the statute, and may become even
2 more clear when the staff recasts and reorganizes the statute.

3 *Type of ADR*

4 The Commission agreed that Section 1354(b) should make clear that ADR,
5 within the meaning of the statute, can encompass a range of nonjudicial dispute
6 resolution processes, but they are intended to be processes that involve a neutral
7 party:

8 the parties shall endeavor, as provided in this subdivision, to
9 submit their dispute to a form of alternative dispute resolution such
10 as mediation or arbitration, conciliation, or other nonjudicial
11 procedures that involve a neutral party in the decisionmaking
12 process. The form of alternative dispute resolution chosen may be
13 binding or nonbinding at the option of the parties.

14 *Manner of Service*

15 The provisions for service of the Request for Resolution should be broadened
16 along the following lines:

17 Service of the Request for Resolution shall be ~~in the same~~
18 ~~manner as prescribed for service in a small claims action as~~
19 ~~provided in Section 116.340 of the Code of Civil Procedure by~~
20 personal delivery, first class mail, facsimile transmission, or other
21 means reasonably calculated to provide actual notice of the Request
22 for Resolution.

23 The staff should examine the notice of motion statutes for other appropriate
24 means of service.

25 *Time for Completing ADR*

26 The statute should be revised to provide for tolling the statute of limitations
27 during the period of a stipulated extension of the time for completing ADR:

28 If the applicable time limitation for commencing the action
29 would run within 120 days after service of the Request for
30 Resolution, the time limitation is extended to the 120th day after
31 service. If the parties stipulate to an extension of the alternative
32 dispute resolution period beyond the 120th day after service, a time
33 limitation that would run during the alternative dispute resolution
34 period is extended to the end of the stipulated period.

1 The staff should check to see, when the statute is assembled, that it is clear that a
2 written stipulation is referred to in this provision. If not, that should be included
3 in the provision.

4 *Rejection of Request for ADR*

5 The Commission decided to hold off on a decision whether to require ADR on
6 demand of a party until the results of the two pilot programs in California
7 involving mandatory mediation in civil cases become available. The Judicial
8 Council report on the pilot programs is expected to be available by the end of
9 2002.

10 **ADR for Assessment Disputes on Demand (Civ. Code § 1366.3)**

11 The Commission suggested no changes to Section 1366.3, except in connection
12 with attorneys fees (see below).

13 **Voluntary ADR (Civ. Code § 1354(d))**

14 The Commission agreed to expand the coverage of the voluntary ADR
15 provision along the following lines:

16 (d) Once a civil action specified in subdivision (a) ~~to enforce the~~
17 ~~governing documents~~ (b) has been filed by either an association or
18 an owner or member of a common interest development, upon
19 written stipulation of the parties the matter may be referred to
20 alternative dispute resolution and stayed. The costs of the
21 alternative dispute resolution shall be borne by the parties. During
22 this referral, the action shall not be subject to the rules
23 implementing subdivision (c) of Section 68603 of the Government
24 Code.

25 In this connection, the staff should research the question whether subdivision
26 (a) of Section 1354 requires revision to make clear that an association member is
27 entitled to enforce bylaws. As the section is currently written, there may be a
28 negative implication derived from the provision for enforcement of CC&Rs.

29 **Attorney's Fees (Civ. Code § 1354(f))**

30 The Commission concluded that the attorney's fee provision of Section 1354 is
31 intended to apply to subdivision (b) rather than subdivision (a), and should be
32 revised accordingly:

33 (f) In any action specified in subdivision (a) ~~to enforce the~~
34 ~~governing documents~~ (b), the prevailing party shall be awarded
35 reasonable attorney's fees and costs. Upon motion by any party for

1 attorney's fees and costs to be awarded to the prevailing party in
2 these actions, the court, in determining the amount of the award,
3 may consider a party's refusal to participate in alternative dispute
4 resolution prior to the filing of the action.

5 [The application of this provision to Section 1366.3, related to alternative
6 dispute resolution in assessment disputes, remains unclear.]

7 **Confidentiality of ADR Communications (Civ. Code § 1354(g)-(h))**

8 Section 1354(g)-(h), providing for confidentiality of alternative dispute
9 resolution communications, should be replaced by a reference to the general
10 Evidence Code protections for mediation communications. The general Evidence
11 Code protections should apply to forms of alternative dispute resolution other
12 than arbitration.

13 ~~(g) Unless consented to by both parties to alternative dispute~~
14 ~~resolution that is initiated by a Request for Resolution under~~
15 ~~subdivision (b), evidence of anything said or of admissions made in~~
16 ~~the course of the alternative dispute resolution process shall not be~~
17 ~~admissible in evidence, and testimony or disclosure of such a~~
18 ~~statement or admission may not be compelled, in any civil action in~~
19 ~~which, pursuant to law, testimony can be compelled to be given.~~

20 ~~(h) Unless consented to by both parties to alternative dispute~~
21 ~~resolution that is initiated by a Request for Resolution under~~
22 ~~subdivision (b), documents prepared for the purpose or in the~~
23 ~~course of, or pursuant to, the alternative dispute resolution shall~~
24 ~~not be admissible in evidence, and disclosure of these documents~~
25 ~~may not be compelled, in any civil action in which, pursuant to law,~~
26 ~~testimony can be compelled to be given.~~

27 (g) Notwithstanding the express application of Chapter 2
28 (commencing with Section 1115) of Division 9 of the Evidence Code
29 to mediation, alternative dispute resolution initiated by a Request
30 for Resolution under subdivision (b), other than arbitration, is
31 subject to Chapter 2 (commencing with Section 1115) of Division 9
32 of the Evidence Code.

33 **Informing Homeowners (Civ. Code § 1354(i)-(j))**

34 Memorandum 2002-10 suggests technical revisions relating to the provision of
35 Section 1354 requiring that members of a homeowners association be annually
36 provided information about the availability of ADR for dispute resolution:

37 ~~(i) Members of the An association shall annually be provided~~
38 ~~provide its members a summary of the provisions of this section,~~
39 ~~which specifically references a copy of this section.~~

1 The Commission deferred consideration of these changes until the section itself
2 has been recast.

3 **Preliminary Evaluation and Referral of Disputes**

4 The Commission considered the concept of creating an ombudsman or some
5 other governmental entity that could perform a preliminary evaluation of a CID
6 dispute and determine whether it is appropriate to send the dispute to a
7 particular form of alternative dispute resolution or simply allow normal
8 litigational processes to take their course. An alternative would be to use an
9 existing mechanism such as the court clerk's office.

10 The Commission was not interested in further exploration of these options at
11 present. If, at the end of the CID study, the Commission revisits the concept of an
12 ombudsman or other governmental entity, this could be an appropriate function
13 for such an entity.

14 **Med-Arb Agreements**

15 The Commission decided not to further explore med-arb agreements within
16 the CID dispute resolution context.

17 **Improving Arbitration**

18 The Commission has a general study of arbitration law on its calendar of
19 topics, to be activated in 2003. The Commission decided not to try to fix problems
20 with arbitration in the context of the CID study, but to address them as part of
21 the general study.

22 **Funding the Cost of ADR**

23 The Commission reviewed various options for funding the cost of ADR, set
24 out in the memorandum. The Commission was not inclined to making any
25 change to the current system of shared costs between the parties to ADR.

26 **ADR Information**

27 The Commission directed the staff to further develop the concept of a central
28 state location where interested persons could get information about CID law and
29 dispute resolution. There could be an "800" number or a website or both where
30 the information would be readily obtained. The staff should make further inquiry
31 as to an appropriate entity to manage such a program. Prime candidates include
32 the Attorney General, the state Department of Consumer Affairs, the
33 Administrative Office of the Courts, and the state Department of Fair Housing.

1 **Small Claims Jurisdiction**

2 Rather than seeking to send assessment enforcement actions through the
3 small claims court, the Commission will look into the assessment lien process to
4 see whether any improvements can be made from a perspective of alternative
5 dispute resolution.

6 **Association Decisionmaking Process**

7 The Commission decided not to give further attention to the concept of
8 requiring a specific association decisionmaking process before an association
9 may bring an action against a member. The various alternative dispute resolution
10 mechanisms we have been examining are enough, without further burdening the
11 process.

12 **Director Liability**

13 The Commission decided not to pursue the concept of providing special rules
14 governing director liability for breach of fiduciary duties. The general law on this
15 matter would control.

16 **Attorney Opinion**

17 The Commission decided not to investigate the suggestion that if the board
18 becomes involved in a dispute with a homeowner, it must seek a legal opinion on
19 the matter from its attorney.

20 **Enforcement of ADR Agreements**

21 The Commission discussed the problem of parties failing to abide by an
22 agreement that is reached through an ADR process. It was suggested that
23 mechanisms could be provided to make enforcement easier if a party fails to
24 comply. For example, the ADR agreement could include a stipulation for entry of
25 judgment or a stipulation for injunctive relief. The staff should consider
26 including a reference to this possibility in the redraft of Civil Code Section 1354.

27 **STUDY J-503 – DISCOVERY IMPROVEMENTS FROM OTHER JURISDICTIONS**

28 The Commission considered Memorandum 2002-33, concerning civil
29 discovery. The Commission made the following decisions:

1 **Nonsubstantive Reform**

2 The staff should continue to work on the draft attached to Memorandum
3 2002-33. Obviously duplicative provisions should be eliminated.

4 **Duty to Automatically Supplement Discovery Response**

5 The staff should follow-up on Commissioner Best's suggestion to seek
6 information from Judge David Levy or others regarding empirical evidence and
7 experience with automatic supplementation of discovery responses in federal
8 court.

9 **Presuit Discovery**

10 The Commission tentatively decided that the provision governing presuit
11 discovery (Code Civ. Proc. § 2035) should be amended along the following lines:

12 2035. (a) One who expects to be a party or expects a successor in
13 interest to be a party to any action that may be cognizable in any
14 court of the State of California, whether as a plaintiff, or as a
15 defendant, or in any other capacity, may obtain discovery within
16 the scope delimited by Section 2017, and subject to the restrictions
17 set forth in Section 2019, for the purpose of perpetuating that
18 party's person's own testimony or that of another natural person or
19 organization, or of preserving evidence for use in the event an
20 action is subsequently filed. One shall not employ the procedures of
21 this section for the purpose either of ascertaining the possible
22 existence of a cause of action or a defense to it, or of identifying
23 those who might be made parties to an action not yet filed.

24 (b) The methods available for discovery conducted for the
25 purposes set forth in subdivision (a) are (1) oral and written
26 depositions, (2) inspections of documents, things, and places, and
27 (3) physical and mental examinations.

28 (c) One who desires to perpetuate testimony or preserve
29 evidence for the purposes set forth in subdivision (a) shall file a
30 verified petition in the superior court of the county of the residence
31 of at least one expected adverse party, or, if no expected adverse
32 party is a resident of the State of California, in the superior court of
33 a county where the action or proceeding may be filed.

34 (d) The petition shall be titled in the name of the one who
35 desires the perpetuation of testimony or the preservation of
36 evidence. The petition shall set forth all of the following:

37 (1) The expectation that the petitioner or the petitioner's
38 successor in interest will be a party to an action cognizable in a
39 court of the State of California.

40 (2) The present inability of the petitioner either to bring that
41 action or to cause it to be brought.

1 (3) The subject matter of the expected action and the petitioner's
2 involvement.

3 (4) The particular discovery methods described in subdivision
4 (b) that the petitioner desires to employ.

5 (5) The facts that the petitioner desires to establish by the
6 proposed discovery.

7 (6) The reasons for desiring to perpetuate or preserve these facts
8 before an action has been filed.

9 (7) The name or a description of those whom the petitioner
10 expects to be adverse parties so far as known.

11 (8) The name and address of those from whom the discovery is
12 to be sought.

13 (9) The substance of the information expected to be elicited from
14 each of those from whom discovery is being sought.

15 The petition shall request the court to enter an order authorizing
16 the petitioner to engage in discovery by the described methods for
17 the purpose of perpetuating the described testimony or preserving
18 the described evidence.

19 (e) The petitioner shall cause service of a notice of the petition to
20 be made on each natural person or organization named in the
21 petition as an expected adverse party. This service shall be made in
22 the same manner provided for the service of a summons. The
23 service of the notice shall be accompanied by a copy of the petition.
24 The notice shall state that the petitioner will apply to the court at a
25 time and place specified in the notice for the order requested in the
26 petition. This service shall be effected at least 20 days prior to the
27 date specified in the notice for the hearing on the petition.

28 If after the exercise of due diligence, the petitioner is unable to
29 cause service to be made on any expected adverse party named in
30 the petition, the court in which the petition is filed shall make an
31 order for service by publication. If any expected adverse party
32 served by publication does not appear at the hearing, the court
33 shall appoint an attorney to represent that party for all purposes,
34 including the cross-examination of any person whose testimony is
35 taken by deposition. The court shall order that the petitioner pay
36 the reasonable fees and expenses of any attorney so appointed.

37 (f) If the court determines that all or part of the discovery
38 requested may prevent a failure or delay of justice, it shall make an
39 order authorizing that discovery. The order shall identify any
40 witness whose deposition may be taken, and any documents,
41 things, or places that may be inspected, and any person whose
42 physical or mental condition may be examined. Any authorized
43 depositions, inspections, and physical or mental examinations shall
44 then be conducted in accordance with the provisions of this article
45 relating to those methods of discovery in actions that have been
46 filed.

1 (g) If a deposition to perpetuate testimony has been taken either
2 under the provisions of this section, or under comparable
3 provisions of the laws of ~~another state~~ the state in which it was
4 taken, or the federal courts, or a foreign nation in which it was
5 taken, that deposition may be used, in any action involving the
6 same subject matter that is brought in a court of the State of
7 California, in accordance with subdivision (u) of Section 2025
8 against any party, or the successor in interest of any party, named
9 in the petition as an expected adverse party.

10 **Comment.** Subdivisions (a) and (d) of Section 2035 are amended
11 to permit a person to take presuit discovery in anticipation of a suit
12 by the person's successor in interest, so long as the statutory
13 requirements for such discovery are satisfied.

14 Subdivision (g) is revised to make clear that a deposition to
15 perpetuate testimony may be used in California only if it was taken
16 under this section or under a comparable provision of the federal
17 courts or of the jurisdiction in which it was taken.

18 **STUDY J-1310 – APPELLATE AND WRIT REVIEW UNDER TRIAL COURT UNIFICATION**

19 The Commission considered Memorandum 2002-32, developing the concept
20 of having superior court commissioner decisions reviewed in the superior court
21 appellate division and superior court judge decisions reviewed in the court of
22 appeal.

23 Discussion at the meeting suggested that, in terms of formulating this
24 proposal, the most practical approach appears to be to have misdemeanor
25 appeals and limited civil appeals go to the court of appeal (these are cases most
26 typically heard by judges), while infraction appeals and small claims appeals
27 would remain in the superior court.

28 One concern with this structure is that the court of appeal workload would
29 increase significantly. The point was made, however, that an increase of the court
30 of appeal caseload would not necessarily result in an equal increase in workload.
31 That is because many of these smaller cases are routine and can be readily
32 dispensed with.

33 Another concern was the potential loss of access to local justice for review of
34 misdemeanor and limited civil cases. The point was made that those matters
35 most in need of local justice — pro per cases — tend to be infraction and small
36 claims cases, which would remain in the superior court. Also, most filings and
37 other appeal procedures can largely be done at a distance; typically there is only
38 one personal appearance for oral argument, if that.

1 An issue was also raised concerning cost implications for smaller cases in the
2 court of appeal, including court-appointed attorneys in misdemeanor cases.

3 The Commission decided to suspend work on this matter pending the
4 Judicial Council's survey of attorney perceptions of impropriety in the existing
5 system. The Commission will revisit the matter when the survey results become
6 available.

7 Meanwhile, the Commission agreed to pursue the technical corrections
8 identified by the staff in the memorandum:

- 9 • As part of the trial court restructuring cleanup, we should circulate
10 for comment the concept of cleaning out of Code of Civil
11 Procedure Section 259 provisions relating to the court
12 commissioner's seal and associated provisions concerning a court
13 commissioner's notarial authority.
- 14 • Also as part of the cleanup, we should circulate proposed
15 correction of "traffic hearing officer" references to "juvenile
16 hearing officer", consistent with current terminology.
- 17 • SB 1316 should be amended to correct the reference in Government
18 Code Section 71601(i) from "juvenile referee" to "juvenile court
19 referee".

20 STUDY J-1401 – STATUTES MADE OBSOLETE BY
21 TRIAL COURT RESTRUCTURING: PART 2

22 The Commission considered Memorandum 2002-34, which presented four
23 alternative approaches for dealing with the large number of references to
24 "jurisdiction" in the codes. After discussion, the Commission approved the "no
25 review and very limited treatment" approach — staff should skip a systematic
26 review of jurisdiction provisions and revise or delete specific jurisdiction
27 references only if the staff is made aware of problems relating to them.
28 Commission members emphasized the need to review all superior court
29 references in the codes to uncover statutes requiring a jurisdictional classification
30 provision as a result of trial court unification.

31 STUDY K-301 – WAIVER OF PRIVILEGE BY DISCLOSURE

32 The Commission considered Memorandum 2002-31, concerning comments on
33 the discussion draft on *Waiver of Privilege by Disclosure* (March 2002). The
34 Commission directed the staff to further explore the following points:

- 1 • Whether the proposed revisions of Evidence Code Section 912 are
2 properly coordinated with provisions in the Civil Discovery Act
3 specifying consequences of failing to assert an objection.
- 4 • Whether language on the effect of failing to claim a privilege
5 should be added to the proposed Section 912 Comment.
- 6 • Whether the last sentence of Section 912(a) should be revised in a
7 different manner than in the discussion draft, which would revise
8 that sentence as follows: “Consent to disclosure is manifested by
9 any statement or other conduct of the holder of the privilege
10 indicating ~~consent to~~ intent to permit the disclosure, including
11 failure to claim the privilege in any proceeding in which the holder
12 has the legal standing and opportunity to claim the privilege.”
- 13 • Whether and to what extent a lawyer’s conduct can be imputed to
14 a client in determining whether a privilege has been waived.
- 15 • Whether it is necessary to differentiate between the lawyer-client
16 privilege and any of the other privileges mentioned in Section 912
17 (e.g., the clergyman-penitent privileges) in determining whether a
18 privilege has been waived.
- 19 The staff should also delete the last sentence of the proposed Section 912
20 Comment (relating to employer monitoring of email), and add parentheses to
21 the citations in that Comment.

22 STUDY M-1330 – CRIMINAL PROCEDURE UNDER TRIAL COURT UNIFICATION

23 The Commission considered Memorandum 2002-30, concerning Professor
24 Gerald Uelmen’s background study on *California Criminal Procedure and Trial*
25 *Court Unification* (March 2002). The Commission instructed the staff to prepare a
26 draft tentative recommendation implementing Professor Uelmen’s
27 recommendations regarding superior court review of the decisions of a
28 magistrate.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary