
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 13, 2002
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on September 13, 2002.

Commission:

Present: David Huebner, Chairperson
Frank Kaplan, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Edmund L. Regalia
Howard Wayne, Assembly Member
William E. Weinberger

Absent: Bill Morrow, Senate Member
Joyce G. Cook
Desiree I. Kellogg
Julia Sylva

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

Consultant: Miguel Méndez

Other Persons:

Saul Bercovitch, State Bar of California, San Francisco
Sandra Bonato, Executive Council of Homeowners, San Jose
Kevin Frederick, Redwood City
Robert G. Harris, Vice Chair, State Bar Insolvency Law Committee, Santa Clara
Charlene Henley, San Jose
Edward Johnson, Sullivan and Cromwell, Palo Alto
Ellen Nudelman, Stanford Law School, Palo Alto
S. Guy Puccio, Executive Council of Homeowners, Wallace & Puccio, Sacramento

1 The Commission discussed ways in which the full impact of the anticipated
2 reductions might be avoided, including among other options, limiting the
3 Commission's meeting time, making use of per diem waivers, seeking a budget
4 augmentation through both the executive and legislative branches, and
5 supplementing the Commission's budget with grants and donations. The
6 Commission directed the Executive Secretary to investigate these options and
7 report back to the Commission at an appropriate time.

8 In the event efforts to mitigate the anticipated reductions fail, it will be
9 necessary to reduce staffing and reclassify some positions. All staff positions
10 other than that of Executive Secretary and Assistant Executive Secretary would
11 go to 3/4 time. The position of Executive Secretary would go to 1/2 time. The
12 position of Assistant Executive Secretary would remain at full time but the entry
13 level salary would be reduced. These changes would occur January 2003 at the
14 earliest, depending on the Governor's action on budget trailer bills.

15 STUDY D-355 – EXEMPTIONS FROM ENFORCEMENT OF MONEY JUDGMENTS:
16 SECOND DECENNIAL REVIEW

17 The Commission considered Memorandum 2002-42 and the staff draft
18 Tentative Recommendation on *Exemptions from Enforcement of Money Judgments:
19 Second Decennial Review*. To expedite getting comments on the Commission's
20 policy decisions in time to seek legislation in 2003, the Commission approved
21 distribution of a "Discussion Draft" including the substance of the draft tentative
22 recommendation, with the revisions noted below. The Commission also
23 expressed a desire to coordinate efforts with the Insolvency Law Committee of
24 the State Bar Business Law Section when the time comes to seek introduction of
25 legislation.

26 **Automatic COLA**

27 The Commission's duty to review exemptions under Code of Civil Procedure
28 Section 703.120(a) every 10 years should be replaced by an automatic triennial
29 cost-of-living adjustment based on the California All Urban Consumers CPI. This
30 COLA should apply to both the exemptions from enforcement of judgments
31 applicable in debt collections and the two exemption slates available in
32 bankruptcy under Code of Civil Procedure Section 703.140. The Commission
33 recognized that this would result in a gradual diversion from the exemption
34 amounts under the federal Bankruptcy Code, which is based on the US All Urban

1 Consumers CPI, but decided that consistency between the two California
2 exemption sets is preferable to consistency between the federal and California
3 bankruptcy-only exemption sets.

4 The Commission approved the mechanism for determining the COLA set out
5 in the memorandum; i.e., to place responsibility with the Judicial Council to
6 make the triennial COLA adjustment under the statutory standard and to
7 publish the adjusted amounts on the exemption claim form.

8 **Inmate Trust Funds**

9 The \$300 limitation on the inmate trust fund exemption in Code of Civil
10 Procedure Section 704.090(b) should be retained, rather than increased to \$350
11 under the COLA, because this is a highly sensitive area to crime victim rights
12 groups and not essential to the purpose of the recommendation.

13 **County Aid Reimbursement**

14 The Commission approved the proposed amendments to Welfare and
15 Institutions Code Section 17409 to double the existing dollar amounts, which
16 have not changed since 1959. This proposal should be circulated to the counties
17 for comment.

18 **STUDY H-850 – COMMON INTEREST DEVELOPMENT LAW**

19 The Commission considered Memorandum 2002-44, concerning comments on
20 the tentative recommendation on *Common Interest Development Law*. See also the
21 entry in these Minutes under Study H-851.

22 With respect to the part of the tentative recommendation that relates to the
23 addition of article and chapter headings to the Davis-Stirling Common Interest
24 Development Act, the Commission approved that part as its final
25 recommendation.

26 **STUDY H-851 – NONJUDICIAL DISPUTE RESOLUTION UNDER CID LAW**

27 The Commission considered Memorandum 2002-44, concerning comments on
28 the tentative recommendation on *Common Interest Development Law*. See also the
29 entry in these Minutes under Study H-850.

30 With respect to the part of the tentative recommendation that relates to
31 procedural fairness in architectural review by a homeowners association, the
32 Commission made two decisions:

1 (1) Proposed Section 1378.040(b) was revised to read: “In making a
2 decision under this chapter, a member of the reviewing body or of
3 the board of directors may consider any relevant information. A
4 member of the reviewing body or of the board of directors is not
5 required to consider information other than that provided by the
6 participants.”

7 (2) Under proposed Section 1378.050(d), an application to make a
8 change to a homeowner’s separate interest property would be
9 “deemed approved” if the reviewing body does not make a
10 decision in the time specified. The Commission reversed that rule,
11 so that an application would be “deemed disapproved” if the
12 reviewing body does not make a decision in the time specified.

13 The Commission will consider Memorandum 2002-44 again at a future
14 meeting. Any remaining unresolved issues will be decided at that time.

15 **STUDY J-504 – REORGANIZATION OF DISCOVERY STATUTE**

16 The Commission considered Memorandum 2002-46, concerning
17 nonsubstantive reorganization of the provisions governing civil discovery (Code
18 Civ. Proc. §§ 2016-2036). The Commission approved the attached draft for
19 circulation as a tentative recommendation, subject to the following revisions:

20 **Technical Matters**

21 The draft should be revised to incorporate conforming revisions and
22 legislation enacted in 2002. The draft should also include a disposition table and
23 possibly the text of the repealed sections.

24 **Preliminary Part**

25 The preliminary part should make clear that the Commission is studying
26 substantive issues relating to civil discovery and may make recommendations on
27 such issues in the future.

28 **Declaration Regarding Attempted Informal Resolution of Discovery Dispute**

29 Proposed Section 2023.060 (good faith declaration) should be revised along
30 the following lines:

31 **Code Civ. Proc. § ____.** Meet and confer declaration

32 _____. A meet and confer declaration in support of a motion shall
33 state facts showing a reasonable and good faith attempt at an
34 informal resolution of each issue presented by the motion.

1 **Comment.** Section ___ is added for drafting convenience. The
2 language is drawn from numerous provisions. See former §§
3 2017(c), (d), 2019(b), 2024(e), 2025(e), (g), (i), (j), (n), (o), (q), 2028(d),
4 2030(e), (l), (m), 2031(f), (m), 2032(c), (d), (h), (j), 2033(e), (l), 2034(e),
5 (i), (k), (l). To eliminate redundancy, these have been revised to
6 refer to Section ___. See §§ 2017.030(a), 2017.040(a), 2019.040(b),
7 2024.050(a), 2025.070(a), 2025.090(c), 2025.120(a), 2025.150(b)(2),
8 2025.210(b), 2025.230(g), 2025.240(e), 2028.040(b), 2028.050(b),
9 2030.090(a), 2030.190(b), 2030.200(b), 2031.060(a), 2031.160(b),
10 2032.070(a), 2032.090(b), 2032.180(a), 2032.210(a), 2033.080(a),
11 2033.170(b), 2034.060(a), 2034.170(b), 2034.190(c), 2034.220(c).

12 The section should be relocated to “Article 1. General Provisions” and
13 renumbered accordingly. The provisions that refer to the section should be
14 revised to refer to “a meet and confer declaration under Section ___.” A Note
15 should solicit comment on this drafting approach.

16 **Monetary Sanctions**

17 Proposed Section 2023.040 (circumstances in which monetary sanction is not
18 required) should be deleted. The provisions that refer to that section should be
19 revised to track the existing statutory text (“[t]he court shall impose a monetary
20 sanction under Section 2023 against any party, person, or attorney who
21 unsuccessfully makes or opposes a [specified motion], unless it finds that the one
22 subject to the sanction acted with substantial justification or that other
23 circumstances make the imposition of the sanction unjust”).

24 **STUDY K-200 – COMPARISON OF EVIDENCE CODE WITH FEDERAL RULES**

25 The Commission considered Memorandum 2002-41 and its First Supplement,
26 concerning comparison of the Evidence Code with the Federal Rules of Evidence
27 (“Federal Rules”). Professor Miguel Méndez of Stanford Law School described
28 his background study for the Commission. The Commission made the following
29 decisions:

30 **Scope of Study**

31 Due to the Commission’s limited resources, the Commission decided to focus
32 on potential reforms that are now incorporated in the Federal Rules. The staff
33 should also alert the Commission to significant differences between the Federal
34 Rules and the Uniform Rules of Evidence (“Uniform Rules”). The staff should not
35 seek out or research other issues unless specifically directed by the Commission.

1 **Hearsay Issues**

2 The Commission began consideration of the issues discussed in Professor
3 Méndez's analysis of hearsay issues (Méndez, *Comparison of Evidence Code with*
4 *Federal Rules: Part I. Hearsay and Its Exceptions* (May 2002)), which is attached to
5 Memorandum 2002-41. The Commission decided to proceed through these issues
6 until it has sufficient material for preparation of a tentative recommendation. At
7 a maximum, this tentative recommendation will cover all of the hearsay issues.
8 The tentative recommendation might cover fewer issues if there is an appropriate
9 breaking point in the hearsay issues.

10 *Implied Assertion Doctrine*

11 Consistent with its decision regarding the scope of this study, the
12 Commission did not discuss hearsay definitions other than those in the Evidence
13 Code, the Federal Rules, and the Uniform Rules.

14 *Burden of Proof Regarding the Declarant's Intent*

15 The Commission discussed who should bear the burden of proving whether
16 conduct (including a verbal act) is intended as an assertion for purposes of the
17 hearsay rule.

18 The Federal Rules favor admissibility in doubtful cases. The burden is on the
19 objecting party to show that the conduct is intended as an assertion and thus
20 should be excluded under the hearsay rule. Fed. R. 801 advisory committee's
21 note.

22 In contrast, California law appears to favor exclusion. The burden appears to
23 be on the proponent of the evidence to show that the conduct is not intended as
24 an assertion and thus should be admitted despite the hearsay rule. Evid. Code §
25 405 Comment.

26 The Commission decided to defer decision on which of these approaches is
27 preferable. The staff should present the issue again after the Commission has
28 considered more hearsay issues and become more familiar with the pertinent
29 policy considerations.

30 *Exemption of Prior Statement By Witness or Admission By Party Opponent*

31 The Commission considered whether to adopt the federal approach of
32 exempting certain types of statements from the definition of hearsay. The
33 Commission decided to stick with the California approach, under which these

1 types of statements are classified as exceptions to the hearsay rule, not as
2 exemptions from the definition of hearsay.

3 “Assertion in the Record”

4 The Commission considered whether to revise Evidence Code section 225 to
5 refer to “an assertion in the record” (as in Uniform Rule of Evidence 801) instead
6 of “written verbal expression.” The Commission decided that such a revision was
7 unnecessary.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary