A meeting of the California Law Revision Commission was held in Sacramento on March 7, 2003.

Commission:

Present:  David Huebner, Chairperson
          Frank Kaplan, Vice Chairperson
          Diane F. Boyer-Vine, Legislative Counsel
          Joyce G. Cook
          Desiree Icaza Kellogg
          Edmund L. Regalia
          William E. Weinberger

Absent:  Ellen Corbett, Assembly Member
         Bill Morrow, Senate Member

Staff:  Nathaniel Sterling, Executive Secretary
        Barbara S. Gaal, Staff Counsel
        Brian P. Hebert, Staff Counsel
        Lynne I. Urman, Staff Counsel

Consultants:  Miguel Méndez, Evidence Code

Other Persons:

          Catherine Lawson, Executive Committee, State Bar Trusts and Estates Section, Cameron Park
          Kia Jorgensen, Wallace, Puccio & Garrett, Executive Council of Homeowners, Sacramento
          Vernon Pierson, Amador County District Attorney’s Office, California District Attorneys Association, Jackson
Minutes of February 7, 2003, Commission Meeting

The Commission approved the Minutes of the February 7, 2003, Commission meeting as submitted by the staff.

Administrative Matters

Appointment of Assemblymember Ellen Corbett

The Executive Secretary reported that the Speaker of the Assembly has appointed Assemblymember Ellen Corbett as a member of the Law Revision Commission, replacing former Assemblymember Howard Wayne. Ms. Corbett is Chair of the Assembly Judiciary Committee. Her appointment was effective February 11, 2003.

Passing of Former Executive Secretary John H. DeMoully

The Executive Secretary reported the death of the Commission’s former Executive Secretary, John H. DeMoully, in Oregon on February 13, 2003. Mr. DeMoully was a key force in the development of the Commission and establishment of its reputation for excellence. He directed the Commission for 32 years, from 1959 until his retirement in 1991.
Budget Report

The Executive Secretary reported developments on the Commission’s budget for 2003-2004.

A pre-hearing conference for the Senate subcommittee hearing suggests there is solid Senate support for funding the Commission’s operations at an adequate level. The Senate subcommittee hearing is scheduled for March 13, 2003.

The Assembly subcommittee hearing is scheduled for March 19, 2003. We do not yet have a clear indication of the positions of subcommittee members, but there is strong support for funding the Commission’s operations at an adequate level among members of the Assembly budget committee as a whole.

As a result of the Senate pre-hearing conference, the staff will attempt to quantify for Department of Finance, Legislative Analyst, committee consultants, and others, the monetary value of contributions by Commission members, consultants, and others involved in the Commission’s work. This information will be useful not only for persons involved in the budget hearing process, but also will be an informative document for legislators and legislative staff generally.

Commission Member Per Diem Allowances

The Executive Secretary reported that every Commission member entitled to a per diem allowance pursuant to Government Code Section 8282 for attending a Commission meeting has waived the allowance for the current meeting, the previous meeting, and any subsequent meeting attended during the fiscal year.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 2003-2, relating to the Commission’s 2003 legislative program. The staff orally updated the chart attached to the memorandum with the information that AB 182 (Harman), relating to exemptions from enforcement of money judgments, has been approved by the Assembly Judiciary Committee, and that SB 113 (Ackerman), relating to stay of mechanic’s lien enforcement pending arbitration, has been put over to March 18.
AB 286 (Dutra) — Double Liability Problem in Home Improvement Contracts

For Commission action relating to AB 286 (Dutra), concerning the double liability problem in home improvement contracts, see entry in these Minutes under Study H-820.

AB 903 (Steinberg) — Construction Defect Cases

The staff brought to the Commission’s attention AB 903 (Steinberg). The measure, as introduced, would direct the Commission to conduct a study to determine if the goal of achieving a more fair and prompt resolution of construction defect cases has resulted from enactment of 2002 legislation on the matter. The report would be due by March 1, 2004.

SB 113 (Ackerman) — Stay of Mechanic’s Lien Enforcement Pending Arbitration

For Commission action relating to SB 113 (Ackerman), concerning stay of a mechanic’s lien enforcement action pending arbitration, see entry in these Minutes under Study J-1304.

STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

The Commission considered Memorandum 2003-6, presenting a staff draft tentative recommendation on unincorporated associations. The Commission approved the draft for circulation as a tentative recommendation.

STUDY H-820 – MECHANIC’S LIEN LAW

In connection with the Commission’s discussion of its 2003 legislative program (above), the staff reported that at the November 2002 meeting, the Commission had decided to seek an author to introduce the Commission’s recommendation on the double liability problem in home improvement contracts, in the form in which it was originally proposed. Minutes (Nov. 2002), p. 4. After that meeting, however, it became clear that Assemblymember Dutra intended to introduce legislation on the subject, which would not necessarily track the Commission’s original proposal. In accordance with Commission procedure, the staff consulted Chairperson Huebner regarding whether to seek an author to introduce a competing bill, or simply track the progress of Assemblymember Dutra’s efforts. Chairperson Huebner opted for the latter course.
The staff further reported that Assemblymember Dutra has introduced AB 286 (Dutra), which is similar to the Commission’s recommendation but differs in the following respects:

1. The proposed statute would apply to a home improvement contract for $20,000, instead of $15,000 as in the Commission’s recommendation.
2. The proposed statute includes language addressing the effect of a preliminary 20-day notice. The Commission’s recommendation does not include such language.
3. The proposed statute uses a setoff approach, whereas the Commission’s recommendation is cast as a limitation on enforcement of mechanic’s liens and stop notices.
4. The proposed statute treats change orders differently than the Commission’s recommendation.

The staff reported that there is a strong likelihood that AB 286 (Dutra) will be amended to apply to a home improvement contract for $15,000 as in the Commission’s recommendation. The Commission considered whether to treat the bill as a Commission proposal if that occurred. The Commission did not make a decision on that point, but directed the staff to obtain more information regarding why the bill uses a setoff approach, instead of a limitation on enforcement as in the Commission’s recommendation. The Commission noted that its proposal limits the amount of mechanic’s liens and stop notices that may be enforced “to the amount remaining unpaid to the original contractor under the contract.” The setoff approach of AB 286 includes no comparable limitation on the amount of mechanic’s liens and stop notice claims.

The staff also reported that Assemblymember Dutra’s office has requested that the staff attend the Assembly Judiciary Committee hearing on AB 286 and testify regarding the process that the Commission used in developing its recommendation. The staff indicated its intention to comply with that request.

STUDY J-651 – AUTHORITY OF COURT COMMISSIONER

The Commission considered Memorandum 2003-8, relating to the authority of a court commissioner. The staff reported that feedback from Los Angeles Superior Court suggests that insertion of the constitutional standard for appointment of a court commissioner as a temporary judge into the Code of Civil Procedure appears appropriate. This is the approach of the draft tentative
recommendation attached to the memorandum. The Commission approved the
draft for circulation for public comment.

STUDY J-1304 – STAY OF MECHANIC’S LIEN ENFORCEMENT PENDING ARBITRATION

In connection with the Commission’s discussion of its 2003 legislative
program (above), the Commission approved the updated version of its
recommendation on stay of mechanic’s lien enforcement pending arbitration,
attached to Memorandum 2003-2. The updated recommendation includes the
revision discussed at page 2 of the memorandum — i.e., the last sentence of Code
of Civil Procedure Section 1281.5(a) should state that “Any party may file a
motion for relief from the stay” instead of “A party may object to arbitration by
filing a motion for relief from the stay.”

STUDY J-1401 – STATUTES MADE OBSOLETE BY TRIAL COURT RESTRUCTURING

The Commission considered Memorandum 2003-5 and its First Supplement
regarding comments on the Tentative Recommendation on Statutes Made Obsolete
by Trial Court Restructuring: Part 2 (December 2002). The Commission approved
the recommendation for printing and submission to the Legislature, subject to
the following revisions.

Bail
Penal Code § 1269b. Bail

The Commission approved the proposed revision to the second sentence of
subdivision (d) of Section 1269b, as set out in the First Supplement to
Memorandum 2003-5:

(d) A court may by local rule prescribe the procedure by which
the uniform countywide schedule of bail is prepared, adopted, and
annually revised by the judges. If a court does not adopt a local
rule, the uniform countywide schedule of bail shall be prepared,
adopted, and annually revised by a majority of the judges.

The staff informed the Commission that the Trial Court Presiding Judges
Executive Committee and the Joint Legislation Subcommittee would like “may”
in the first sentence of subdivision (d) replaced with “shall,” while retaining the
default procedure in the second sentence. This proposal would make it
mandatory for each superior court to adopt a local rule prescribing the procedure
by which the uniform countywide schedule of bail is prepared, adopted, and
annually revised. The Commission did not adopt this proposal.

Penal Code § 1463.28. Revenue from increase in bail schedules

The Commission adopted the staff’s recommendation to remove Section
1463.28 from the recommendation.

Judges
Gov’t Code § 68079. Provision of superior court seal

The Commission decided to recommend deletion of the last sentence of
Section 68079, referring to a judge’s or clerk’s private seal. As revised, Section
68079 would read:

68079. A court for which the necessary seal has not been
provided, or the judge or judges of that court, shall provide it. The
expense shall be an item of court operations. Until the seal is
provided the clerk or judge of each court may use his or her private
seal whenever a seal is required.

The Commission directed the staff to discuss further clarification or
elimination of the first sentence of Section 68079 with the Administrative Office
of the Courts.

Jury Commissioners
Funding of Grand Jury

The Commission considered the proposal of the California Grand Jurors’
Association to amend Government Code Section 77003(a)(7) to delete grand jury
expenses and operations from the list of expenses that are not court operations.
The Commission decided not to proceed with the Association’s proposal.


The Commission agreed that Section 235 should not be included in the
recommendation.

Penal Code § 903.2. Jury commissioner’s powers and duties

The Commission adopted the staff’s recommendation to remove Section 903.2
from the recommendation.
Sessions

Gov’t Code § 24250.1. Sheriff office in city where court facility located

The Commission approved the revised treatment of Section 24250.1 to reflect the fact that court-related services may not be performed by the sheriff in all counties. As revised, Section 24250.1 would read:

24250.1. Sheriffs and clerks shall also have offices in each city in which they perform court-related services and a regular session facility of the superior court is held pursuant to law located. This section does not authorize the establishment of offices in cities in which extra sessions of the superior court are held.

The Commission decided to study Government Code Sections 24250, 24252, 24253, 24254, and 24254.5 for possible inclusion in subsequent legislation on trial court restructuring.

Gov’t Code § 68108. Unpaid furlough days

The Commission adopted the staff recommendation to include Section 68108 in the recommendation, as drafted in Memorandum 2003-5. As revised, the section would read:

68108. (a) To the extent that a Memorandum of Understanding for trial court employees designates certain days as unpaid furlough days for employees assigned to regular positions in the superior court, the court shall not be in session on those days except as ordered by the presiding judge upon a finding by the presiding judge of a judicial emergency as defined in Chapter 1.1 (commencing with Section 68115). On these furlough days, although if the court clerk’s office shall not be open to the public, each court shall permit documents to be filed at a drop box pursuant to subdivision (b), and . If the court is not in session on a furlough day, an appropriate judicial officer shall be available to conduct arraignments and examinations as required pursuant to Section 825 of the Penal Code, and to sign any necessary documents on an emergency basis.

(b) A drop box shall provide for an automated, official time and date stamping mechanism or other means of determining the actual date on which a document was deposited in the drop box.

Gov’t Code §§ 69640-69650. Superior court districts

The Commission decided to proceed with the proposed repeal of Article 4 (Gov’t Code §§ 69640-69650), pertaining to superior court districts. The Commission also decided to include a new Article 4 in the recommendation:
Article 4. Superior Court Districts in Los Angeles County

69640. (a) The superior court in Los Angeles County may by local rule establish superior court districts within which one or more sessions of the court shall be held.

(b) The superior court districts established by county ordinance and in effect as of January 1, 2003, shall continue to be recognized as the superior court districts until the court enacts a local rule as provided in subdivision (a).

Gov’t Code §§ 69790-69800. Extra sessions

The Commission decided to propose the repeal of Article 6 (Gov’t Code §§ 69790-69800) pertaining to extra sessions.


The Commission adopted the staff recommendation to include technical revisions to Code of Civil Procedure Section 431.30 and Government Code Section 68620 in the recommendation. The proposed revisions would replace an obsolete reference to Chapter 5 with a reference to Chapter 5.1.

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

The Commission considered Memorandum 2003-7 and its First Supplement, concerning hearsay issues. The Commission made the following decisions:

Comparable Federal and California Provisions

The Commission considered how to handle provisions in the Evidence Code and the Federal Rules of Evidence that are substantively comparable but worded differently. Should the California provision be revised to conform to the federal language, or should it be left as is? The Commission decided that it would be better to leave the California provision alone under such circumstances.

Victims’ Bill of Rights

The Commission discussed the Truth-in-Evidence provision of the Victims’ Bill of Rights (Cal. Const. art. I, § 28(d)) and its effect on the Evidence Code and on this study. In effect, the Truth-in-Evidence provision creates two separate sets of evidentiary rules:

(1) The Evidence Code as it reads on its face, applicable in civil cases.
(2) The Evidence Code as modified by the Truth-in-Evidence provision and subject to the limitations of other constitutional restrictions (e.g., due process and the right of confrontation). This set of evidentiary principles applies in criminal cases.

The same section of the Evidence Code can have different meanings in a criminal case and in a civil case.

The Commission discussed whether this situation creates problems and whether any steps should be taken to improve clarity, such as creating separate civil and criminal evidence codes, conforming the evidentiary rules for civil cases to those for criminal cases, or specifying that proposed amendments will only take effect if passed by a two-thirds vote in each house of the Legislature. Because most attorneys handle either civil or criminal cases rather than a mixture, the likelihood of confusion is not as great as it might initially appear.

The Commission decided that in reviewing the Evidence Code, it would consider issues relating to the Truth-in-Evidence provision as they arise in specific contexts and perhaps also take a more comprehensive look at Truth-in-Evidence issues after completing its review of the entire code or of a particular area. The Commission’s consultant, Prof. Miguel Méndez, will attempt to flag such issues as he prepares the remainder of his background study. The staff may also do further research and analysis relating to the Truth-in-Evidence provision as this study progresses and a need appears.

**Definition of Unavailability**

Evidence Code Section 240 should be amended to expressly recognize that a witness who refuses to testify is unavailable. Section 240 should also be amended to expressly refer to a witness who cannot testify due to a failure of recollection. The Comment should make clear that this is not intended to have any impact on the doctrine of *People v. Green*, 3 Cal. 3d 981, 479 P. 2d 998, 92 Cal. Rptr. 494 (1971).

Section 240(a)(2), relating to a witness who is disqualified, should be retained despite the lack of a comparable provision in the Federal Rules of Evidence. Section 240(c), regarding the impact of expert testimony concerning physical or mental trauma resulting from an alleged crime, should also be left as is.

These decisions would be implemented by amending Section 240 along the following lines:
240. (a) Except as otherwise provided in subdivision (b), “unavailable as a witness” means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.

(6) Present at the hearing but persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.

(7) Present at the hearing but testifies to a lack of memory of the subject matter of the declarant’s statement.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant circumstance described in subdivision (a) was brought about by the procurement or wrongdoing of the proponent of his or her the declarant’s statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Comment. Paragraph (6) is added to Section 240(a) to codify case law recognizing that a witness who refuses to testify is unavailable. See People v. Rojas, 15 Cal. 3d 540, 547-53, 542 P.2d 229, 125 Cal. Rptr. 357 (1975); People v. Francis, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (1988); People v. Walker, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983); People v. Sul, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981). The language is drawn from Rule 804(a)(2) of the Federal Rules of Evidence. Before making a finding of unavailability, a court must take reasonable steps to induce the
witness to testify, unless it is obvious that such steps would be unavailing. Francis, 200 Cal. App. 3d at 584, 587; Walker, 145 Cal. App. 3d at 894; Sul, 122 Cal. App. 3d at 365.

Paragraph (7) is added to Section 240(a) to codify case law recognizing that a witness who credibly testifies to a total lack of memory concerning the subject matter of an out of court statement is unavailable to testify on that subject. See People v. Alcala, 4 Cal. 4th 742, 778, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992). The language is drawn from Rule 804(a)(3) of the Federal Rules of Evidence.

[Insert discussion of People v. Green, 3 Cal. 3d 981, 479 P. 2d 998, 92 Cal. Rptr. 494 (1971).]

Subdivision (b) is amended to encompass the revisions of subdivision (a).

Prior Inconsistent Statement

Evidence Code Sections 770 (extrinsic evidence of prior inconsistent statement) and 1235 (hearsay exception for prior inconsistent statement) should be left as is.

Prior Consistent Statement

Evidence Code Sections 791 (extrinsic evidence of prior consistent statement) and 1236 (hearsay exception for prior consistent statement) should be left as is.

Prior Statement Identifying a Person

Evidence Code Section 1238 (hearsay exception for prior statement identifying a person) should be left as is.

Opponent’s Own Statement

Evidence Code Section 1220 (hearsay exception for opponent’s own statement) should be left as is.

Adoptive Admission

Evidence Code Section 1221 (hearsay exception for adoptive admission) should be left as is.

Authorized Admission

Evidence Code Section 1222 (hearsay exception for authorized admission) should be amended to make clear that it applies regardless of whether the statement in question was made to a third person, to the party who authorized the statement, to a co-worker, or to someone else:
Evid. Code § 1222 (amended). Authorized admission

SEC. ____. Section 1222 of the Evidence Code is amended to read:

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:

(a) The statement was made by a person authorized by the party to make the statement or statements for him concerning the subject matter of the statement; and a statement concerning the subject.

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.

Comment. Subdivision (a) of Section 1222 is amended to make clear that the provision applies regardless of whether the statement in question was made to a third person, to the party who authorized the statement, to a co-worker, or to someone else. The language is drawn from Rule 801(d)(2)(C) of the Federal Rules of Evidence. For further discussion, see Fed. R. Evid. 801 advisory committee’s note.

Subdivision (a) is also amended to delete surplusage. See Section 10 (singular includes plural).

Section 1222(b) provides useful guidance and should not be deleted as unnecessary. The Commission deferred consideration of other issues relating to Section 1222(b) pending completion of Prof. Méndez’s analysis of the role of judge and jury.

Statements by a Party’s Agent or Servant

The staff should conduct further research on whether a provision like Federal Rule of Evidence 801(d)(2)(D) (statement by party’s agent or servant) should be adopted in California.

Coconspirator’s Declaration

Unlike the corresponding federal provision, Evidence Code Section 1223 (hearsay exception for coconspirator declaration) expressly applies to a statement that a coconspirator made before the party that the statement is being introduced against joined the conspiracy. This aspect of the California provision should be retained. The Commission deferred consideration of other issues relating to Section 1223 pending completion of Prof. Méndez’s analysis of the role of judge and jury.
Statement of Declarant Whose Liability or Breach of Duty Is in Issue

The Commission decided to defer consideration of how to treat Evidence Code Sections 1224-1227 until after the staff has completed further research and analysis on whether a provision like Federal Rule of Evidence 801(d)(2)(D) (statement by party’s agent or servant) should be adopted in California.

STUDY L-2011 – PROBATE CODE TECHNICAL CORRECTIONS

The Commission considered Memorandum 2003-4, relating to comments on the Probate Code technical corrections tentative recommendation. The Commission approved the tentative recommendation as its final recommendation, with the following revisions.

Correction of Erroneous Section References

The final recommendation should include the corrections to Probate Code Section 2356.6 set out in the memorandum.

Clarification or Repeal of “Date of Death” Valuation

The date of death valuation provision of Probate Code Sections 21612 and 21623 should be clarified rather than repealed. Each of the two provisions should be revised to read, “The proportion of each beneficiary’s share that may be taken pursuant to this subdivision shall be determined based on values as of the date of the decedent’s death.”

The staff should schedule for Commission review when it determines new topics and priorities the question whether to engage in more fundamental reform of these statutes.

Community Property Transaction Involving Separate Property Interest

The final recommendation should include the proposed revisions to Probate Code Sections 3121 and 3144 set out in the Memorandum, relating to procedures for authorizing a community property transaction that involves a separate property interest.

STUDY N-50 – OBSOLETE REPORTING REQUIREMENTS

The Commission considered Memorandum 2003-3, presenting a staff draft recommendation on obsolete reporting requirements. The Commission approved the draft as its final recommendation, with one qualification. For any provision
affecting a report due after December 31, 1999, the staff will use the Legislative
Counsel list of agency reports (www.agencyreports.ca.gov) to verify that the
report was filed as required. Any such reports that were not filed as required will
be removed from the recommendation.

☐ APPROVED AS SUBMITTED

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

__________________________________________ Date

Chairperson

__________________________________________ Executive Secretary