
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 18-19, 2003
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on September 18-19, 2003.

Commission:

Present: Frank Kaplan, Chairperson
William E. Weinberger, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Joyce G. Cook (Sept. 18)
Desiree Icaza Kellogg
Edmund L. Regalia

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

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

Consultants: None

Other Persons:

Anne Bernardo, Council of California County Law Librarians, Visalia (Sept. 18)
R. Bradbury Clark, State Bar Business Law Section, Unincorporated Associations
Committee, Los Angeles (Sept. 19)
Hon. Roderic Duncan (ret.), Berkeley (Sept. 18)
Tom Gordon, HALT-An Organization of Americans for Legal Reform, Washington,
DC (Sept. 18)
Annette Heath, Kern County Law Library, Bakersfield (Sept. 18)
Elizabeth Huber, State Bar Business Law Section, Consumer Financial Services
Committee, El Segundo (Sept. 19)
Richard Iamele, Los Angeles County Law Library, Los Angeles (Sept. 18)
David McFadden, Southern California Association of Law Libraries, Los Angeles
(Sept. 18)
Daniel Pone, Judicial Council of California, Sacramento (Sept. 18)
S. Guy Puccio, Executive Council of Homeowners, Inc., Sacramento (Sept. 19)
Lisa A. Runquist, State Bar Business Law Section, Nonprofit Corporations
Committee, Los Angeles (Sept. 19)

Maryruth Storer, Orange County Public Law Library, Santa Ana (Sept. 18)
James F. Sweeney, California Catholic Conference, Sacramento (Sept. 19)
Alicia Tortarolo, Hudson Cook, LLP, El Segundo (Sept. 19)

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MINUTES OF JUNE 6, 2003, COMMISSION MEETING

1 The Commission approved the Minutes of the June 6, 2003, Commission
2 meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

3 **Fiftieth Anniversary of Commission**

4 The Executive Secretary reported that the Commission has now achieved its
5 50th anniversary. The law establishing the Commission became operative on
6 September 9, 1953. The Commission suggested it might be appropriate to mark
7 the milestone with a reception in the capitol rotunda or some other
8 commemoration, perhaps in conjunction with a Commission meeting. The
9 Executive Secretary will explore some of the options and report back.

1 **Commission Membership**

2 The Executive Secretary reported that four Commission terms expire on
3 October 1 — those of Commissioners Cook, Huebner, Kellogg, and the vacancy.
4 Commission members continue to hold office for a period of up to 60 days. If the
5 Governor fails to make a reappointment during that period, the Governor is
6 precluded from reappointing that Commission member for a period of one year.

7 **Budget Issues**

8 The Executive Secretary reported that, while the 2003-2004 budget includes
9 adequate funding for the Commission's operations, additional budget reductions
10 appear imminent that would significantly impact the Commission's productivity.

11 Specifically, the 2003-2004 budget bill requires an additional unallocated
12 reduction in personnel costs, equivalent to 16% of the Commission's budget
13 appropriation. It appears that amount cannot be satisfied from wage and benefit
14 concessions, so it will be necessary to implement personnel reductions. The net
15 effect will be to reduce the Commission to three lawyers and one support staff
16 position for the 2003-2004 fiscal year.

17 Department of Finance also anticipates a further 20% reduction for the 2004-
18 2005 fiscal year. That would be very difficult for the Commission to achieve. The
19 Executive Secretary is currently looking at putting most Commission employees
20 on a part time basis, and trying to shift the burden of some of the Commission's
21 operating expenses. The Executive Secretary will continue to keep the
22 Commission informed on the matter.

23 The Executive Secretary will also investigate the possibility of supplementing
24 state funding with private donations. Concerns about this possibility include the
25 staff time that would be required to engage in fundraising, possible loss of
26 Commission neutrality depending on the source of the donations, and the
27 possibility that public funding would be reduced by the amount of any private
28 funding raised.

29 The Executive Secretary will also consider ways to enhance the Commission's
30 productivity given the decline in resources. For example, the Commission could
31 make greater use of working groups or advisory committees. Some routine
32 matters could be dealt with by teleconference rather than in person meetings.
33 The Commission might also make more extensive use of law student resources in
34 its projects.

1 **Next Meeting**

2 The Commission scheduled its next meeting for November 21, 2003, from 9
3 AM to 5 PM, in the Burbank airport vicinity.

4 **New Topics and Priorities**

5 The Commission considered Memorandum 2003-11, relating to new topics
6 and priorities for Commission study.

7 The Commission decided not to request authority to add any new topics to its
8 calendar in 2004; the Commission's current heavy workload and declining
9 resources preclude it. With regard to the suggested study topics for which the
10 staff has identified an alternative approach, the staff should take the necessary
11 steps to ensure appropriate alternate disposition of the suggestion.

12 With respect to existing study topics, the Commission decided to reactivate
13 the mechanic's lien law study, in response to the Legislature's expressed interest
14 in moving this one along. The Commission also directed the staff to investigate
15 the situation with respect to California's adoption of the Uniform Electronic
16 Transactions Act and possible federal preemption for lack of uniformity.

LEGISLATIVE PROGRAM

17 The Commission considered Memorandum 2003-12, relating to the
18 Commission's 2003 legislative program. The staff orally updated the chart
19 attached to the memorandum with the information that AB 182 (Harman),
20 relating to exemptions from enforcement of money judgments, has been signed
21 by the Governor; it is Chapter 379 of the Statutes of 2003.

STUDY B-400 – FINANCIAL PRIVACY

22 The Commission considered Memorandum 2003-30, relating to financial
23 privacy. The Commission also considered a letter from Elizabeth A. Huber of the
24 Financial Institutions Committee of the Business Law Section of the State Bar
25 Association, a copy of which is attached to the First Supplement to
26 Memorandum 2003-30.

27 The Commission directed the staff to continue to monitor action at the federal
28 and state levels affecting financial privacy issues, particularly with respect to
29 federal preemption of state legislation. The staff should report back to the
30 Commission after the first of the year indicating the state of affairs in this area of

1 law and suggesting a manner of proceeding to enable the Commission to
2 complete its work on this topic and make a timely report to the Legislature. One
3 option the staff should consider is to point out potential problems in
4 interpretation of state law, without necessarily drafting corrective legislation.

5 STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

6 **Comments on Tentative Recommendation**

7 The Commission considered Memorandum 2003-28, discussing public
8 comments on the Commission’s tentative recommendation on *Unincorporated*
9 *Associations* (March 2003). The Commission approved the staff draft
10 recommendation attached to the memorandum as its final recommendation,
11 subject to the following decisions.

12 *Definition of “Unincorporated Association”*

13 Proposed Corporations Code Section 18025 was revised to read as follows:

14 18025. (a) “Unincorporated association” means any
15 unincorporated group of two or more persons joined by mutual
16 consent for a common lawful purpose, whether organized for profit
17 or not.

18 (b) Joint tenancy, tenancy in common, community property, or
19 other form of property tenure does not by itself establish an
20 unincorporated association, even if coowners share ownership of
21 the property for a common purpose.

22 (c) Marriage or creation of a registered domestic partnership
23 does not by itself establish an unincorporated association.

24 Proposed Corporations Code Section 18050 was deleted.

25 *Disposition of Assets of Dissolved Association*

26 The staff will determine whether it is necessary to add language to proposed
27 Code of Civil Procedure Section 18130 to specifically address the disposition of
28 property held subject to a condition requiring its return.

29 *Scope of Liability Limitation Provisions*

30 The Nonprofit Organizations Committee of the Business Law Section of the
31 State Bar will provide further support for its suggestion that the liability
32 provisions of the proposed law be broadened to apply to all unincorporated
33 associations, not just nonprofit associations.

1 *Liability of Member Acting as Agent*

2 Proposed Corporations Code Section 18610 was revised to read as follows:

3 18610. A member of a nonprofit association is not liable for a
4 contractual obligation of the association, except in one of the
5 following circumstances:

6 (a) The member expressly assumes personal responsibility for
7 the obligation.

8 (b) The member expressly authorizes or ratifies the specific
9 contract. This subdivision does not apply if the member authorizes
10 or ratifies a contract solely in the member's capacity as a director,
11 officer, or agent of the association.

12 (c) With notice of the contract, the member receives a benefit
13 under the contract. Liability under this subdivision is limited to the
14 value of the benefit received.

15 The introductory language in proposed Corporations Code Sections 18615
16 and 18620 was revised to conform to the construction used in proposed Section
17 18610 (i.e., "is not liable ..., except").

18 *Enforcement of Judgment Against Unincorporated Association*

19 Proposed Code of Civil Procedure Section 695.080 and proposed
20 Corporations Code Section 18635 were revised to restore the language used in
21 the tentative recommendation:

22 695.080. A money judgment against an unincorporated
23 association, whether organized for profit or not, may be enforced
24 only against the property of the association.

25 18635. (a) A judgment creditor of a member, officer, or agent of
26 a nonprofit association may not levy execution against the assets of
27 the member, officer, or agent to satisfy a judgment based on a claim
28 against the nonprofit association unless a judgment based on the
29 same claim has been obtained against the nonprofit association and
30 one or more of the following conditions is satisfied:

31 (1) A writ of execution on the judgment against the nonprofit
32 association has been returned unsatisfied in whole or in part.

33 (2) The nonprofit association is a debtor in bankruptcy.

34 (3) The member, officer, or agent has agreed that the creditor
35 need not exhaust the assets of the nonprofit association.

36 (4) A court grants permission to the judgment creditor to levy
37 execution against the assets of a member, officer, or agent based on
38 a finding that the assets of the nonprofit association subject to
39 execution are clearly insufficient to satisfy the judgment, that

1 exhaustion of the assets of the nonprofit association is excessively
2 burdensome, or that the grant of permission is an appropriate
3 exercise of the court's equitable powers.

4 (b) Nothing in this section affects the right of a judgment
5 creditor to levy execution against the assets of a member, officer, or
6 agent of a nonprofit association if the claim against the member,
7 officer, or agent is not based on a claim against the nonprofit
8 association.

9 *Definitions*

10 The defined term "governing documents" was replaced with a definition
11 along the following lines:

12 18005. "Governing principles" means the principles stated in a
13 constitution, articles of association, bylaws, or other writing that
14 governs the purpose or operation of an unincorporated association
15 or the rights or obligations of its members. If there is no written
16 provision governing an issue, the association's governing principles
17 regarding that issue may be inferred from its established practices.

18 A provision defining "established practices" was added to the proposed law,
19 along the following lines:

20 "Established practices" means the historical practices used by
21 an association without material change or exception during the
22 most recent five years of its existence or if shorter, the period of its
23 existence.

24 In addition, the staff will prepare definitions of "director" and "officer."

25 *Nondiscrimination Statement*

26 Proposed Corporations Code Section 18835 was revised to include a reference
27 to sexual orientation.

28 **Unincorporated Association Governance**

29 The Commission considered Memorandum 2003-29, discussing suggested
30 default provisions on governance of an unincorporated association. The
31 Commission decided to study the matter further and directed the staff to prepare
32 a staff draft tentative recommendation addressing the issues discussed in the
33 memorandum.

1 may consider a party's refusal to participate in alternative dispute
2 resolution before commencement of the action.

3 The following language will be added to Civil Code Section 1354: "The
4 prevailing party in an action to enforce an association's governing documents
5 shall be awarded reasonable attorney's fees and costs."

6 The question of whether attorney fee shifting should be broadened to include
7 an action to enforce the Davis-Stirling Common Interest Development Act or the
8 Nonprofit Mutual Benefit Corporation Law will be studied on a separate track.

9 *Resolution of Disputes Between Members*

10 The internal dispute resolution provisions were revised to eliminate the
11 requirement that an association make its internal dispute resolution process
12 available for resolution of disputes between members.

13 *Default Meet and Confer Procedure*

14 The default meet and confer procedure was revised to provide that an
15 agreement resulting from that process is only binding on the association if it is
16 consistent with the scope of authority granted to the board of directors'
17 representative before negotiations take place or is ratified by the board of
18 directors afterward.

19 *Deference to Existing Procedure for Assessment Disputes*

20 Proposed Civil Code Section 1363.810 was revised to include the following
21 provision: "This article does not apply to a dispute that is subject to subdivision
22 (c) of Section 1367.1."

23 *Form of Request Invoking Meet and Confer Process*

24 Proposed Civil Code Section 1363.840(b)(1) was revised to require a written
25 request.

26 *No Cost to Participate*

27 Proposed Civil Code Section 1863.830(e) was revised to read: "A member of
28 the association shall not be charged any fee to participate in the process."

29 *CID Information Center*

30 Responsibility for the proposed information center was assigned to the
31 Department of Real Estate. The proposed automated phone answering system
32 was deleted. Funding for the center will be provided by a two dollar addition to

1 the fee for registration of a common interest development with the Secretary of
2 State. The staff will attempt to place the information center proposal in a bill
3 separate from the bill implementing the remainder of the recommendation.

4 STUDY J-503 – DISCOVERY IMPROVEMENTS FROM OTHER JURISDICTIONS

5 The Commission considered Memorandum 2003-17 and its First Supplement,
6 concerning a number of substantive issues relating to the provisions governing
7 civil discovery. For purposes of preparing a tentative recommendation, the
8 Commission made the following decisions:

9 **Presuit Discovery**

10 Code of Civil Procedure Section 2035 should be amended along the following
11 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
21 of 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.

1 (2) The present inability of the petitioner and the petitioner's
2 successor in interest either to bring that action or to cause it to be
3 brought.

4 (3) The subject matter of the expected action and the petitioner's
5 involvement. A copy of any written instrument the validity or
6 construction of which may be called in question, or which is
7 connected with the subject matter of the proposed discovery shall
8 be attached to the petition.

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

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

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

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

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

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

21 The petition shall request the court to enter an order authorizing
22 the petitioner to engage in discovery by the described methods for
23 the purpose of perpetuating the described testimony or preserving
24 the described evidence.

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

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

43 (f) If the court determines that all or part of the discovery
44 requested may prevent a failure or delay of justice, it shall make an
45 order authorizing that discovery. The order shall identify any
46 witness whose deposition may be taken, and any documents,

1 things, or places that may be inspected, and any person whose
2 physical or mental condition may be examined. Any authorized
3 depositions, inspections, and physical or mental examinations shall
4 then be conducted in accordance with the provisions of this article
5 relating to those methods of discovery in actions that have been
6 filed.

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

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

20 Two new safeguards are included to ensure that presuit
21 discovery is conducted only when it is warranted. Under
22 subdivision (d)(2), presuit discovery is permissible only if *both* the
23 petitioner and the petitioner's successor in interest are unable to
24 bring suit. This requirement is drawn from Section 1(a) of the 1959
25 Uniform Perpetuation of Testimony Act. Under subdivision (d)(3),
26 a petition for presuit discovery must include a copy of any written
27 instrument connected with the subject matter of the discovery. This
28 requirement is drawn from Section 1(b) of the 1959 Uniform
29 Perpetuation of Testimony Act.

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

34 **Duty to Automatically Supplement Discovery Response**

35 Further consideration of issues relating to automatic supplementation of
36 discovery responses should be deferred until the Commission studies mandatory
37 pretrial disclosure.

38 **One-Deposition Rule in a Limited Civil Case**

39 Code of Civil Procedure Section 94 should be amended along the following
40 lines:

1 94. Discovery is permitted only to the extent provided by this
2 section and Section 95. This discovery shall comply with the notice
3 and format requirements of the particular method of discovery, as
4 provided in Article 3 (commencing with Section 2016) of Chapter 3
5 of Title 4 of Part 4. As to each adverse party, a party may use the
6 following forms of discovery:

7 (a) Any combination of 35 of the following:

8 (1) Interrogatories (with no subparts) under Section 2030.

9 (2) Demands to produce documents or things under Section
10 2031.

11 (3) Requests for admission (with no subparts) under Section
12 2033.

13 (b) One oral or written deposition under Sections 2025 to 2028,
14 inclusive. For purposes of this subdivision, a deposition of an
15 organization shall be treated as a single deposition even though
16 more than one person may be designated or required to testify
17 pursuant to subdivision (d) of Section 2025.

18 (c) Any party may serve on any person a deposition subpoena
19 duces tecum requiring the person served to mail copies of
20 documents, books or records to the party's counsel at a specified
21 address, along with an affidavit complying with Section 1561 of the
22 Evidence Code.

23 The party who issued the deposition subpoena shall mail a copy
24 of the response to any other party who tenders the reasonable cost
25 of copying it.

26 (d) Physical and mental examinations under Section 2032.

27 (e) The identity of expert witnesses under Section 2034.

28 **Comment.** Subdivision (b) of Section 94 is amended to make
29 clear that the deposition of an organization is to be treated as a
30 single deposition even if the organization designates more than one
31 witness to testify on its behalf under Section 2025(d), or the
32 organization is required to produce more than one witness to
33 testify on its behalf under Section 2025(d).

34 **Equal Right to Video Deposition**

35 Code of Civil Procedure Section 2025 (l)(1) should be amended along the
36 following lines:

37 (l)(1) The deposition officer shall put the deponent under oath.
38 Unless the parties agree or the court orders otherwise, the
39 testimony, as well as any stated objections, shall be taken
40 stenographically. The party noticing the deposition may also record
41 the testimony by audio or video technology if the notice of
42 deposition stated an intention also to record the testimony by either
43 of those methods, or if all the parties agree that the testimony may

1 also be recorded by either of those methods. Any other party, at
2 that party's expense, may make a ~~simultaneous~~ audio or video
3 record of the deposition, provided that other party promptly, and
4 in no event less than three calendar days before the date for which
5 the deposition is scheduled, serves a written notice of this intention
6 to make an audio or video record of the deposition testimony on
7 the party or attorney who noticed the deposition, on all other
8 parties or attorneys on whom the deposition notice was served
9 under subdivision (c), and on any deponent whose attendance is
10 being compelled by a deposition subpoena under Section 2020. If
11 this notice is given three calendar days before the deposition date,
12 it shall be made by personal service under Section 1011.
13 Examination and cross-examination of the deponent shall proceed
14 as permitted at trial under the provisions of the Evidence Code.

15

16 **Comment.** Section 2025(l) is amended to make clear that the
17 right of a non-noticing party to make an audio or video record of
18 deposition testimony is not dependent on the method of recording
19 used by the party noticing the deposition, except as otherwise
20 provided by court order or party stipulation.

21 **Audiotape and Videotape Terminology**

22 Code of Civil Procedure Section 2025(l)(2)(H)-(I) should be amended as
23 follows:

24 (H) At the conclusion of a deposition, a statement shall be made
25 on camera or on the audio recording that the deposition is ended
26 and shall set forth any stipulations made by counsel concerning the
27 custody of the ~~audiotape or videotape~~ audio or video recording
28 and the exhibits, or concerning other pertinent matters.

29 (I) A party intending to offer an audio or video recording of a
30 deposition in evidence under subdivision (u) shall notify the court
31 and all parties in writing of that intent and of the parts of the
32 deposition to be offered within sufficient time for objections to be
33 made and ruled on by the judge to whom the case is assigned for
34 trial or hearing, and for any editing of the recording. Objections to
35 all or part of the deposition shall be made in writing. The court may
36 permit further designations of testimony and objections as justice
37 may require. With respect to those portions of an audio or video
38 record of deposition testimony that are not designated by any party
39 or that are ruled to be objectionable, the court may order that the
40 party offering the recording of the deposition at the trial or hearing
41 suppress those portions, or that an edited version of the deposition
42 recording be prepared for use at the trial or hearing. The original
43 audio or video record of the deposition shall be preserved

1 unaltered. If no stenographic record of the deposition testimony
2 has previously been made, the party offering a ~~videotape or an~~
3 ~~audiotape~~ video or audio recording of that testimony under
4 subdivision (u) shall accompany that offer with a stenographic
5 transcript prepared from that recording.

6

7 **Comment.** Subdivision (l)(2)(H)-(I) of Section 2025 is amended
8 for consistency of terminology. See 2002 Cal. Stat. ch. 1068.

9 Code of Civil Procedure Section 2032(g) should be amended as follows:

10 (g)(1) The attorney for the examinee or for a party producing the
11 examinee, or that attorney's representative, shall be permitted to
12 attend and observe any physical examination conducted for
13 discovery purposes, and to record stenographically or by ~~audiotape~~
14 audio technology any words spoken to or by the examinee during
15 any phase of the examination. This observer may monitor the
16 examination, but shall not participate in or disrupt it. If an
17 attorney's representative is to serve as the observer, the
18 representative shall be authorized to so act by a writing subscribed
19 by the attorney which identifies the representative.

20

21 (2) The examiner and examinee shall have the right to record a
22 mental examination ~~on audio tape~~ by audio technology. However,
23 nothing in this article shall be construed to alter, amend, or affect
24 existing case law with respect to the presence of the attorney for the
25 examinee or other persons during the examination by agreement or
26 court order.

27

28 **Comment.** Subdivision (g)(1)-(2) of Section 2032 is amended for
29 consistency of terminology. See 2002 Cal. Stat. ch. 1068.

30 STUDY J-504 – CIVIL DISCOVERY: NONSUBSTANTIVE REFORM

31 The Commission considered Memorandum 2003-27, concerning comments on
32 the Tentative Recommendation on *Civil Discovery: Nonsubstantive Reform* (Feb.
33 2003) and the Tentative Recommendation on *Civil Discovery: Nonsubstantive*
34 *Reform (Conforming Revisions)* (Feb. 2003). The staff should revise the proposal as
35 follows:

- 36 • Add an uncodified provision, along the following lines:

37 **Uncodified (added). Effect of act**

38 SEC. _____. Nothing in this act is intended to substantively
39 change the law of civil discovery.

- 1 • Add a provision delaying the operative date of the proposed
2 legislation to July 1, 2005.
3 • Make the minor technical revisions recommended at pages 5-8 of
4 Memorandum 2003-27.
5 • Update the proposal to reflect legislation enacted in 2003.

6 Subject to these revisions, the Commission approved the proposal as a final
7 recommendation, for printing and introduction in the Legislature.

STUDY J-651 – AUTHORITY OF COURT COMMISSIONER

8 The Commission considered Memorandum 2003-24 and the accompanying
9 tentative recommendation on authority of a court commissioner. The
10 Commission adopted the tentative recommendation as its final recommendation
11 on the matter, to be printed and submitted to the Legislature.

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

12 The Commission considered Memorandum 2003-15, relating to appellate and
13 writ review of limited civil cases and of misdemeanor and infraction cases under
14 trial court unification.

15 The Commission expressed an interest in revisiting the proposal of the Ad
16 Hoc Task Force on the Superior Court Appellate Divisions to appoint the same
17 judges to sit on the appellate divisions of all superior courts in a particular
18 appellate district. The Commission was attracted by the relative simplicity and
19 ease of implementation of this approach and by the relative lack of additional
20 expense required to implement it.

21 The Commission directed the staff to make further inquiry to the Judicial
22 Council about the prospects of implementing this proposal by court rule. The
23 staff should report back to the Commission on the matter. If it appears there may
24 be problems in implementing the proposal by court rule, the staff should prepare
25 for Commission consideration a prospectus for implementing the proposal by
26 statute.

27 STUDY J-1321 – JURISDICTIONAL LIMITS OF SMALL CLAIMS CASES
28 AND LIMITED CIVIL CASES

29 The Commission considered Memorandum 2003-20 and its First Supplement,
30 concerning comments on the Tentative Recommendation on *Jurisdictional Limits*

1 of *Small Claims Cases and Limited Civil Cases* (Dec. 2002). The Commission also
2 considered Memorandum 2003-22, concerning constitutional issues relating to
3 the proposed increase in the jurisdictional limit of a small claims case. Two
4 documents were distributed at the meeting: a letter from the Contractors State
5 License Board supporting the proposed increase in the small claims limit, and a
6 new empirical report prepared by HALT (Gordon & Dieterich, *The Sky Will Not
7 Fall: The Effect of Raising Jurisdictional Limits on Small Claims Court Caseloads*
8 (Sept. 16, 2003)). See Second Supplement to Memorandum 2003-20.

9 With regard to the proposed increase in the jurisdictional limit of a limited
10 civil case, the Commission directed the staff to explore with stakeholders and
11 other interested persons the possibility of making changes regarding the
12 discovery limits under economic litigation procedures. Any such changes should
13 be consistent with the goal of ensuring that cases for relatively small amounts
14 can be litigated economically. The staff should also investigate means of
15 addressing the concerns raised by law libraries.

16 With regard to the proposed increase in the jurisdictional limit of a small
17 claims case, the Commission directed the staff to contact key stakeholders and
18 investigate ways of addressing their concerns and obtaining greater consensus.
19 The Commission was sympathetic to the concerns relating to law library
20 funding. The staff should report back to the Commission on the results of the
21 efforts to facilitate consensus.

22 The Commission also requested updated information on how the proposed
23 increase would affect the workload and finances of the courts. The
24 Administrative Office of the Courts has not yet completed such an analysis. The
25 Commission expressed interest in possible interplay between the proposed
26 increase in the jurisdictional limit of a limited civil case and the proposed
27 increase in the jurisdictional limit of a small claims case.

28 The Commission deferred consideration of the reforms recommended by the
29 staff in Memorandum 2003-22, relating to the constitutionality of small claims
30 procedures.

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

32 The Commission considered Memorandum 2003-26 and its First Supplement,
33 concerning hearsay issues. The Commission made the following preliminary
34 decisions:

1 **Contemporaneous Statement and Present Sense Impression**

2 A hearsay exception for a present sense impression should be added to the
3 Evidence Code, along the following lines:

4 1240.5. Evidence of a statement is not made inadmissible by the
5 hearsay rule if both of the following conditions are satisfied:

6 (a) The statement is offered to describe or explain an event or
7 condition.

8 (b) The statement was made while the declarant was perceiving
9 the event or condition, or immediately thereafter.

10 **Comment.** Section 1240.5 is drawn from Rule 803(1) of the
11 Federal Rules of Evidence. A present sense impression is
12 sufficiently trustworthy to be considered by the trier of fact for
13 three reasons. First, there is no problem concerning the declarant's
14 memory because the statement is simultaneous with the event.
15 Second, there is little or no time for calculated misstatement. Third,
16 the statement is usually made to one whose proximity provides an
17 immediate opportunity to check the accuracy of the statement in
18 light of the physical facts. Chadbourn, *A Study Relating to the*
19 *Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L.
20 Revision Comm'n Reports 401, 467 (1963); see also Fed. R. Evid. 803
21 advisory committee's note.

22 The staff should examine federal case law to determine whether Evidence Code
23 Section 1241 (contemporaneous statement) would be subsumed in the proposed
24 new exception for a present sense impression. In particular, the staff should
25 confirm that Rule 803(1) of the Federal Rules of Evidence has been interpreted to
26 apply to a statement made while the declarant was experiencing an event or
27 condition, not just a statement made while the declarant was observing another
28 person experience an event or condition. Section 1241 should be repealed if it
29 appears duplicative of the proposed new provision.

30 **Spontaneous Statement and Excited Utterance**

31 Evidence Code Section 1240 should be amended along the following lines:

32 1240. Evidence of a statement is not made inadmissible by the
33 hearsay rule if the statement:

34 (a) ~~Purports to narrate, describe, or explain an act, condition, or~~
35 ~~event perceived by the declarant~~ Relates to a startling event or
36 condition; and

37 (b) Was made spontaneously while the declarant was under the
38 stress of excitement caused by ~~such perception~~ the event or
39 condition.

1 **Comment.** Section 1240 is amended to apply to any statement
2 made under stress of excitement that *relates* to a startling event, not
3 just a statement that “[p]urports to narrate, describe, or explain an
4 act, condition, or event perceived by the declarant.” This conforms
5 to the federal approach. See Fed. R. Evid. 803(2). It is also consistent
6 with judicial interpretations of the previous language. See, e.g.,
7 People v. Arias, 13 Cal. 4th 770, 807-08, 913 P.2d 980, 51 Cal. Rptr.
8 2d 770 (1996) (trial court properly admitted statement in which
9 rape victim reported defendant’s confession to murder made
10 during rape); People v. Farmer, 47 Cal. 3d 888, 903-05, 765 P.2d 940,
11 254 Cal. Rptr. 508 (1989) (trial court properly admitted statement in
12 which declarant identified assailant as acquaintance and drug
13 customer of roommate).

14 **Statement Regarding Declarant’s Then Existing Mental or Physical State**

15 *Evid. C. § 1250. Statement Regarding Declarant’s Then Existing Mental or Physical*
16 *State*

17 Evidence Code Section 1250 should be revised along the following lines:

18 1250. (a) Subject to Section 1252, evidence of a statement of the
19 declarant’s then existing state of mind, emotion, or physical
20 sensation (including a statement of intent, plan, motive, design,
21 mental feeling, pain, or bodily health) is not made inadmissible by
22 the hearsay rule when:

23 (1) The evidence is offered to prove the declarant’s state of
24 mind, emotion, or physical sensation at that time or at any other
25 time when it is itself an issue in the action; or

26 (2) The evidence is offered to prove or explain acts or conduct of
27 the declarant. A declaration of intent to engage in conduct with
28 another person may not be used to prove or explain acts or conduct
29 of the other person.

30 (b) This section does not make admissible evidence of a
31 statement of memory or belief to prove the fact remembered or
32 believed.

33 This amendment would serve to make clear that a court does not have discretion
34 to admit a statement of intent for purposes of proving a nondeclarant’s conduct.
35 The tentative recommendation should include a Note soliciting comment on this
36 approach and on the possibility of requiring the court to give a limiting
37 instruction. The Note should describe the pertinent federal and California case
38 law, and explain the controversy regarding admission of a statement of intent to
39 engage in conduct with another person. The draft should also refer to Evidence

1 Code Section 352, under which the court has discretion to exclude a statement of
2 intent as more prejudicial than probative.

3 *Evid. C. § 1252. Statement Made Under Circumstances Indicating a Lack of*
4 *Trustworthiness*

5 Evidence Code Section 1252 should be retained.

6 *Evid. C. § 1260. Statement Regarding Declarant's Will*

7 Evidence Code Section 1260 should be amended along the following lines:

8 1260. (a) Evidence of a statement made by a declarant who is
9 unavailable as a witness that ~~he~~ the declarant has or has not made a
10 will, or has or has not revoked ~~his~~ a will, or that identifies ~~his~~ the
11 declarant's will or relates to the terms of the declarant's will, is not
12 made inadmissible by the hearsay rule.

13 (b) Evidence of a statement is inadmissible under this section if
14 the statement was made under circumstances such as to indicate its
15 lack of trustworthiness.

16 **Comment.** Section 1260 is amended to apply to a statement
17 relating to the terms of the declarant's will, as well as a statement
18 relating to execution, revocation, or identification of the declarant's
19 will. This conforms to the federal approach. See Fed. R. Evid.
20 803(3).

21 Section 1260 is also amended to use gender-neutral language.

22 The staff should bring this provision back to the Commission for further
23 consideration (including reassessment of the requirement of unavailability) once
24 the State Bar Trusts and Estates Section submits input on the types of
25 testamentary instruments that the provision should cover.

26 **Statement Regarding Declarant's Previously Existing Mental or Physical State**

27 *Evid. C. § 1251. Statement Regarding Declarant's Previously Existing Mental or*
28 *Physical State*

29 California's narrow hearsay exception for evidence of the declarant's
30 previously existing mental or physical state (Evid. Code § 1251) should be
31 retained.

32 *Evid. C. § 1253. Statement By Child Abuse Victim for Purposes of Medical Diagnosis or*
33 *Treatment*

34 Evidence Code Section 1253 should be left as is. It should not be expanded to
35 track the federal approach.

1 **Past Recollection Recorded**

2 Evidence Code Section 1237 should be left as is.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary