
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
NOVEMBER 21, 2003
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on November 21, 2003.

Commission:

Present: Frank Kaplan, Chairperson
William E. Weinberger, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel (by teleconference)
Edmund L. Regalia

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

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

Other Persons:

Sandra Bonato, Executive Council of Homeowners, Inc., San Jose
R. Bradbury Clark, State Bar Business Law Section, Unincorporated Associations
Committee, Los Angeles
Carole Hochstatter, Bakersfield
Milt Johns, PCM/Leisure World, Laguna Woods
Nancy A. Levy, San Pedro
Carl Lisman, Joint Editorial Board, National Conference of Commissioners on
Uniform State Laws, Vermont
Chris Neri, Department of Real Estate, Sacramento
Norma J. Walker, Bakersfield
Joshua Weinstein, Judicial Council of California, San Francisco

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MINUTES OF SEPTEMBER 18-19, 2003, COMMISSION MEETING

The Commission approved the Minutes of the September 18-19, 2003, Commission meeting as submitted by the staff, subject to the following correction:

On page 5, line 27, delete “Code of Civil Procedure” and insert “Corporations Code”.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission scheduled its next meeting for February 6, 2004, in Sacramento.

Annual Report

The Commission considered Memorandum 2003-33 and the attached staff draft of the *2003-2004 Annual Report*. The Commission approved the report for printing after making the following changes:

(1) The typographical error in the phrase “court commissioner” on page 3 of the draft should be corrected, along with other typographical errors noted by the staff.

(2) The letterhead on page 7 of the draft should be adjusted to reflect the composition of the Commission as of November 21, 2003.

(3) The listing of Commission personnel on page 26 of the draft should be adjusted to reflect the composition of the Commission as of November 21, 2003. The narrative explanation of changes in Commission membership should be expanded to include changes made by the new Governor.

Report of Executive Secretary

Commission Membership

Since the last Commission meeting, the following changes have occurred in the membership of the Commission:

In October 2003, Governor Gray Davis reappointed Joyce G. Cook, David Huebner, and Desiree Kellogg, as members of the Commission, on expiration of their previous terms.

In October 2003, Governor Gray Davis appointed C. Hugh Friedman as a member of the Commission, filling the vacancy created by the resignation of Julia Sylva.

In November 2003, Governor Arnold Schwarzenegger withdrew the appointments of Commission members Cook, Friedman, Huebner, and Kellogg.

Commission Budget

The Executive Secretary reported that communications with legislative budget committee staff suggests some interest in finding a more stable funding source for the Commission. The staff will keep the Commission informed of any developments along these lines.

The Executive Secretary also reported on the feasibility of establishing a “blind trust” to help maintain Commission impartiality, were private source funding for Commission operations to become available.

Commission Offices

The Executive Secretary reported on progress in migrating the Commission’s offices from the Bay Area to the Sacramento area. The Executive Secretary noted opportunities for construction of facilities that would fully house the Commission. The Commission directed the Executive Secretary to continue these discussions, particularly with respect to timing issues, prospective rental costs, and phased occupancy options.

Law Student Resources

The Executive Secretary reported on efforts to increase law student participation in Commission projects as a way of supplementing Commission legal resources. The Executive Secretary noted that ties have been established with Hastings Law School (Public Law Research Institute), McGeorge Law School (Legislative Practice Institute), Santa Clara Law School (Internship Program), Stanford Law School (Stanford Public Interest Law Foundation), and University of California at Davis Law School (Externship Program). The staff is devising appropriate assignments to make best use of the resources as they become available.

Fiftieth Anniversary Commemoration

The Executive Secretary reported that, in light of the state's difficult fiscal situation, the Commission's Chairperson has concluded it would not be advisable to sponsor a reception in the Capitol Rotunda at this time. If the fiscal situation changes, a reception later in the year might be appropriate. For now, commemoration of the Commission's fiftieth anniversary milestone will be limited to a note in the Commission's annual report.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 2003-34, presenting the final report on the Commission's 2003 legislative program. The staff noted that it is taking steps to have SB 111 (Knight), which is a two year bill, amended and set for hearing in January 2004.

STUDY B-502 – UNINCORPORATED ASSOCIATION GOVERNANCE

The Commission considered Memorandum 2003-35, presenting a staff draft tentative recommendation on basic governance provisions for unincorporated associations. The Commission approved circulation of the draft as a tentative recommendation, with the following changes:

Member Discipline

The staff should consider whether the member discipline rules provided in proposed Corporations Code Section 18720 should be limited to cases where membership in the association is an important economic interest. The staff

should also consider drafting a note asking for comment on whether the member discipline rules would infringe on constitutionally protected rights of association.

Approval of a Merger

The governing documents of an unincorporated association may require the approval of a third party before the association may merge with another entity. Proposed Corporations Code Section 18770 was revised to accommodate such a requirement.

Section 18770 was also revised to require that all members of an unincorporated association approve a merger that would result in personal liability of the members of the merging association. Unanimous member approval would not be required if the merger agreement provides for the purchase, by the association, of the membership interest of a dissenting member.

Other Incidental Changes

The staff may make other incidental changes to the tentative recommendation to address any technical concerns that may be raised by the Nonprofit Organizations Committee of the Business Law Section of the State Bar.

STUDY H-851 – NONJUDICIAL DISPUTE RESOLUTION UNDER CID LAW

Common Interest Development Information Center

The Commission considered Memorandum 2003-40 discussing the concerns of the Department of Real Estate regarding the Commission's recommendation that the department maintain a common interest development information center on its website. The Commission withdrew the recommendation.

Instead, the Commission decided to develop a proposal for the creation of a state office to assist in resolving common interest development disputes. The office would have some authority to enforce the law. The office would be funded by fees assessed against homeowner associations. In addition to its dispute resolution function, the office would provide information of the type that would have been provided by the Department of Real Estate under the Commission's withdrawn recommendation.

Architectural Review Procedure

The Commission considered Memorandum 2003-36 discussing a proposed procedure for homeowner association review of proposed changes to a

homeowner's separate interest property. The Commission approved circulation of a tentative recommendation, with the following changes to proposed Civil Code Section 1378:

1378. (a) If an association's governing documents require association approval before an owner of a separate interest may make physical changes to the owner's separate interest or to the common area, the association shall satisfy the requirements of this section. The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association's governing documents.

~~(b) Except as otherwise provided by an association's declaration, the association's procedure shall satisfy all of the following requirements:~~

~~(1) The association's decision shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors.~~

~~(2) (c) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors at an open meeting of the board.~~

~~(e) A procedure that satisfies the requirements of paragraphs (1) and (2) of subdivision (b) is a fair and reasonable procedure for the purposes of this section. Nothing in this subdivision precludes judicial review of a decision that is unreasonable, arbitrary, capricious, or made in bad faith.~~

~~(d) A decision on a proposed change shall be made in good faith. A decision on a proposed change shall not be unreasonable, arbitrary, or capricious.~~

~~(e) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents or governing law.~~

Comment. Section 1378 is new. Subdivisions (a) and (d) are consistent with existing case law. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious."). Physical changes that might be subject to association approval requirements include structural additions or renovations, landscaping, choice of exterior paint colors or roofing materials, etc.

~~Subdivision (b) provides default rules governing the process for making a decision on a proposed physical change to an owner's separate interest property or the common area. To the extent that these rules conflict with the association's declaration, the terms of the declaration control. For example, if the declaration of an unincorporated homeowners association provides that the association does not have a board of directors, subdivision (b)(2) would not apply.~~

~~Subdivision (c) provides a safe harbor for an association whose decisionmaking procedure satisfies the requirements of subdivision (b)(1) and (2). The requirements of subdivision (b) do not comprise the only possible fair procedure. Other procedures may also be fair and reasonable.~~

Subdivision (c) provides an applicant with the option to seek reconsideration of a disapproval decision, at an open meeting of the board of directors. An applicant preserves other remedies whether or not the applicant seeks reconsideration.

Subdivision (e) makes clear that this section does not authorize physical change to the common area in a manner that is inconsistent with an association's governing documents. In many associations the governing documents require a vote of the membership to approve a change to the common area. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 280 Cal. Rptr. 568 (1991). In other associations, the governing documents may grant easements to make changes to certain features of the common areas (such as common walls, ceilings, or floors) with the approval of the association. In all cases, the requirements of the governing documents control.

In drafting the tentative recommendation, the staff will examine whether any changes to terminology are required to account for the special ownership structure of a stock cooperative.

The tentative recommendation should also include the following amendment of Civil Code Section 1373:

1373. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by its declaration:

- (1) Section 1356.
- (2) Article 4 (commencing with Section 1357.100) of Chapter 2 of Title 6 of Part 4 of Division 2.
- (3) Subdivision (b) of Section 1363.
- (4) Section 1365.
- (5) Section 1365.5.
- (6) Subdivision (b) of Section 1366.

(7) Section 1366.1.

(8) Section 1368.

(9) Section 1378.

(b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in commercial or industrial developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

The Commission will study the general issue of conflict of interest in association decisionmaking at a later date.

STUDY H-852 – UNIFORM COMMON INTEREST OWNERSHIP ACT

The Commission considered Memorandum 2003-37, discussing whether the Uniform Common Interest Ownership Act (UCIOA) should be adopted in California. The Commission decided against recommending the adoption of UCIOA at this time. As the Commission's study of common interest development law proceeds, it will look to UCIOA as a source of ideas. At a later phase of the study, the Commission may reevaluate whether to recommend adoption of UCIOA.

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

The Commission considered Memorandum 2003-38, relating to the Ad Hoc Task Force Proposal on superior court appellate divisions. After hearing from Joshua Weinstein of the Administrative Office of the Courts, and after discussing concerns both about the perception of impropriety of peer review within the appellate division and about the current budgetary and workload constraints confronting the court system, the Commission decided to set aside the matter for the time being. The Commission directed the staff to continue to monitor the situation and to bring the matter back to the Commission's attention if any change in circumstances or new information appears to warrant it.

STUDY K-201 – CONFORMING EVIDENCE CODE TO FEDERAL
RULES OF EVIDENCE

The Commission considered Memorandum 2003-39 and its First Supplement, concerning hearsay issues. The Commission made the following preliminary decisions:

Business Records Exception

Evidence Code Section 1271 should be amended to expressly (1) require a showing of personal knowledge and (2) incorporate the business duty rule. The draft amendment at pages 2-3 of the First Supplement does not make sufficiently clear who must have personal knowledge and who must have a business duty to observe or report. The staff should work on the drafting of this provision and present a new draft to the Commission for review.

As recommended by Prof. Miguel Méndez, the Commission decided not to extend Section 1271 to an opinion or diagnosis. The Commission also decided not to require a showing that it was the regular practice of the business to create the record. The Commission preferred the California approach to the federal approach on these matters.

The Commission also decided to retain the current approach to proof of trustworthiness (Section 1271(d)), instead of adopting the federal approach requiring the opponent of the evidence to show a lack of trustworthiness.

Absence of a Business Record or an Entry in a Business Record

Evidence Code Section 1272 should be amended along the same lines as Section 1271. The provisions should be consistent with regard to the points considered.

Proof of the Absence of a Business Record or Entry in a Business Record By Affidavit

Evidence Code Section 1562 should be amended along the following lines:

1562. If (a) If (i) a copy of a business record is produced under Section 1560 together with an affidavit complying with Section 1561, (ii) the requirements of Section 1271 have been met, and (iii) the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters

stated therein pursuant to Section 1561 and the matters so stated are presumed true.

(b) If (i) an affidavit under Section 1561 states that the business has none of the records described, or only part thereof, and (ii) the requirements of Section 1272 have been met, the affidavit is admissible as evidence of the absence of the records sought and the matters stated in it are presumed true.

(c) When more than one person has knowledge of the facts, more than one affidavit under Section 1561 may be made. The

(d) Each presumption established by this section is a presumption affecting the burden of producing evidence.

Comment. Section 1562 is amended to make clear that an affidavit of a custodian or other qualified witness under Section 1561 may be used to prove the absence of a business record or entry therein, not just the existence or content of a business record. For a similar rule, see Unif. R. Evid. 803(7) & Comment.

Importantly, however, such an affidavit is not admissible if its use would violate a criminal defendant's state or federal constitutional right to cross-examine the prosecution witnesses. See U.S. Const. amend. VI; Cal. Const. art. I, § 15; *People v. Dickinson*, 59 Cal. App. 3d 314, 318-20, 130 Cal. Rptr. 561 (1976) ("in criminal proceedings such evidence would violate the defendant's right to confront witnesses against him guaranteed by the Sixth Amendment of the federal Constitution and by article I, section 15, of the California Constitution"); but see *Ohio v. Roberts*, 448 U.S. 56, 65-66 & n.7 (1980) (hearsay evidence against criminal defendant does not violate constitutional right of confrontation if declarant is unavailable to testify and hearsay statement has sufficient "indicia of reliability" or declarant is available but calling and cross-examining declarant is unlikely to further search for truth); see also *People v. Aguilar*, 16 Cal. App. 3d 1001, 94 Cal. Rptr. 492 (1971) (admission of business records did not violate defendant's constitutional right of confrontation); *People v. Gambos*, 5 Cal. App. 3d 187, 194, 84 Cal. Rptr. 908 (1970) (Sections 1270-1272 "*when properly applied* are without constitutional fault") (emphasis in original).

Official Records Exception

Like the hearsay exception for a business record (Section 1271), Evidence Code Section 1280 should be amended to expressly require a showing of personal knowledge, as along the following lines:

1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule

when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The writing was made by, or from information transmitted by, a person with personal knowledge of the acts, events, or conditions recorded.

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Comment. Section 1280 is amended to make clear that an official record is admissible under this hearsay exception only if it was made by, or from information transmitted by, a person with firsthand knowledge of the acts, events, or conditions recorded. This is consistent with existing interpretations of the statute. See *Jackson v. Department of Motor Vehicles*, 22 Cal. App. 4th 730, 739, 27 Cal. Rptr. 2d 712 (1994) (“The source of the information — firsthand observations by Officer Reyes — indicated trustworthiness”); *Snelgrove v. Department of Motor Vehicles*, 194 Cal. App. 3d 1364, 1375, 240 Cal. Rptr. 281 (1987) (same); Scallen & G. Weissenberger, *California Evidence: Courtroom Manual* 1128 (2000) (“Although there is no express requirement of first-hand knowledge of the subject of the report, a central element of trustworthiness is that the original source of the information must have personal knowledge of the event or condition described in the report, even if the maker of the public record does not.”); 1 B. Witkin, *California Evidence Hearsay* § 249, at 968 (2000) (general tendency of courts is to exclude matters that would not be permitted as testimony if official appeared personally, such as statement containing observations of other persons). See also Section 1271 & Comment (business record).

The provision should not be revised in the other respects discussed in Memorandum 2003-39 (application to a criminal case; inclusion of a conclusion or opinion based on a factual investigation; proof of trustworthiness; regular practice of the public entity). The California approach on these points is preferable to the federal approach.

Absence of an Official Record or an Entry in an Official Record

Evidence Code Section 1284 should be amended along the following lines:

1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, or testimony

by the official custodian, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office, or the nonoccurrence or nonexistence of a matter of which a record was regularly made and preserved by the office.

Comment. Section 1284 is amended to make clear that it extends not only to proof of the absence of a record, but also to proof of the nonoccurrence or nonexistence of a matter that is regularly recorded and preserved by a public office. This conforms to the federal approach. See Fed. R. Evid. 803(10).

Section 1284 is also amended to make clear that either a writing or testimony of the official custodian is acceptable. This conforms to the federal approach. See Fed. R. Evid. 803(10).

STUDY M-1330 – CRIMINAL PROCEDURE UNDER TRIAL COURT UNIFICATION

The Commission considered Memorandum 2003-16, relating to superior court review of a magistrate's decision in the preliminary examination of a felony case. The Commission decided not to take any further action on this subject.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary