
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 6, 2004
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on February 6, 2004.

Commission:

Present: Frank Kaplan, Chairperson
William E. Weinberger, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
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
Adam Arant, Student Extern
Jeff Vize, Student Legal Assistant

Consultants: None

Other Persons:

Sam Abdulaziz, Construction Industry Trade Associations, Los Angeles
Eddie Bernacchi, National Electrical Contractors Association, Sacramento
Sandra Bonato, Executive Council of Homeowners, San Jose
Oliver Burford, Executive Council of Homeowners, San Jose
Karen D. Conlon, California Association of Community Managers, Irvine
Shirley David, Council of California County Law Librarians and Sacramento County
Public Law Library, Sacramento
John Doherty, Office of Assemblywoman Sally J. Lieber, Sacramento
Denise Duncan, Mattos & Associates, Sacramento
Sandra Duval, Lumber Association of California & Nevada, Sacramento
Michele Finerty, McGeorge Law School Library, Sacramento
John D. Garvic, Executive Council of Homeowners, San Mateo
Roger Gillerstrom, Sacramento
Jan Hansen, Lumber Association of California & Nevada, Sacramento
Annette Heath, Council of California County Law Librarians and Kern County Law
Library, Bakersfield
Carole Hochstatter, Bakersfield

Elizabeth A. Huber, State Bar Business Law Section, Consumer Financial Services
Committee, El Segundo
Kathleen Kemp, Pittsburg
Nancy A. Levy, San Pedro
Joanne McNabb, Office of Privacy Protection, Department of Consumers Affairs,
Sacramento
Lawrence R. Meyer, San Bernardino County Law Library, San Bernardino
Marjorie Murray, Congress of California Seniors, Sacramento
Dick Nash, Building Industry Credit Association, Los Angeles
Chris Neri, Department of Real Estate, Sacramento
Daniel Pone, Office of Governmental Affairs, Judicial Council, Sacramento
S.L. Roullier, Auburn
Mike Stevens, Pittsburg
Norma J. Walker, Bakersfield
Dana Winterrowd, Office of Privacy Protection, Department of Consumer Affairs,
Sacramento
Norman Widman, Dixieline Lumber Company, San Diego

C O N T E N T S

| | |
|--|----|
| Minutes of November 21, 2003, Commission Meeting | 2 |
| Administrative Matters | 2 |
| 2004 Meeting Schedule | 2 |
| Report of Executive Secretary | 3 |
| Legislative Program | 4 |
| Study B-400 – Financial Privacy | 4 |
| Study B-501 – Unincorporated Associations | 5 |
| Study H-821 – Mechanics Lien Law | 5 |
| Study H-851 – Common Interest Development Law | 5 |
| Study J-503 – Discovery Improvements from Other Jurisdictions | 8 |
| Study J-504 – Civil Discovery: Nonsubstantive Reform | 8 |
| Study J-1321 – Jurisdictional Limits of Small Claims Cases and Limited Civil Cases | 8 |
| Study K-301 – Waiver of Privilege By Disclosure | 9 |
| Study L-1064 – Ownership of Amounts Withdrawn from Joint Account | 10 |
| Study N-308 – Judicial Review of Emergency Rulemaking | 10 |

MINUTES OF NOVEMBER 21, 2003, COMMISSION MEETING

- 1 The Commission approved the Minutes of the November 21, 2003,
- 2 Commission meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

3 **2004 Meeting Schedule**

- 4 The Commission considered Memorandum 2004-1, relating to the
- 5 Commission’s meeting schedule for 2004. The Commission adopted the

1 following reduced meeting schedule, consistent with the reduction in the
2 Commission's resources in the current budget crisis:

| | | |
|----|-----------------------|--------------------|
| 3 | April 2004 | Sacramento |
| 4 | Apr. 15 (Thur.) | 10:00 am – 4:00 pm |
| 5 | June 2004 | Sacramento |
| 6 | June 10 (Thur.) | 10:00 am – 4:00 pm |
| 7 | September 2004 | Oakland |
| 8 | Sept. 17 (Fri.) | 9:30 am – 5:00 pm |
| 9 | November 2004 | Burbank |
| 10 | Nov. 19 (Fri.) | 9:30 am – 4:00 pm |

11 **Report of Executive Secretary**

12 *Membership of Commission*

13 The Executive Secretary reported no new information from the Governor's
14 office concerning appointments to fill the four vacancies on the Commission.

15 *Commission Staff*

16 The Executive Secretary introduced two University of California at Davis law
17 students in attendance at the meeting who are working with the Commission.
18 Jeff Vize has been employed by the Commission during the past year in the work
19 study program. Adam Arant is working during the current semester in UCD
20 Law School's externship program.

21 *Commission Workload*

22 In response to requests from budget analysts and others, the Executive
23 Secretary is developing a matrix that seeks to quantify the Commission's
24 workload in terms of available resources for the number and size of legislatively
25 assigned projects. Preliminary calculations suggest that at the Commission's
26 current staffing level, which is one-half normal, currently active projects will
27 require 4.8 years to complete. Projects expected to be activated this year due to
28 receipt of background studies will require an additional 1.4 years. Other projects
29 scheduled but not yet activated will take 5.6 years to complete. These times
30 would be cut in half if the Commission were staffed at its normal level.

LEGISLATIVE PROGRAM

1 The Commission considered Memorandum 2004-2 and its First Supplement,
2 reporting on the Commission's 2004 legislative program. No Commission action
3 was required on Memorandum 2004-2. For Commission action on the First
4 Supplement to Memorandum 2004-2, please refer to the discussion in these
5 Minutes under Study B-501 (unincorporated associations).

STUDY B-400 – FINANCIAL PRIVACY

6 The Commission considered Memorandum 2004-9 and its First Supplement,
7 relating to financial privacy. The Commission directed the staff to prepare, for
8 consideration at the next Commission meeting, a draft tentative recommendation
9 on financial privacy. The draft should review the background of the
10 Commission's involvement in this matter, the current status of financial privacy
11 law in California, and ongoing developments affecting the law in the area. The
12 draft should include the following features:

13 (1) The draft should analyze SB 1 (Speier) in light of the Legislature's charge
14 to the Commission. The draft should note that enactment of SB 1 largely satisfies
15 the purposes of the Legislature's charge, and that the Commission would not
16 propose adjustments in the new law until it has had a chance to operate and
17 actual experience under the statute is available.

18 (2) The draft should analyze the effect of federal preemption on SB 1. The
19 draft should note that Gramm-Leach-Bliley preemption does not appear to be a
20 problem, nor does it appear necessary for California to apply to the Federal
21 Trade Commission for a preemption determination based on a "greater
22 protection" analysis. With respect to Fair Credit Reporting Act and National
23 Bank Act preemption, the draft should note that it is premature to determine or
24 act upon the potential preemptive effect of these statutes on SB 1.

25 (3) The draft should attempt to integrate SB 1 with existing California statutes,
26 in the manner set out in the memorandum. With respect to the proposed "weak
27 presumption" in favor of the statute providing greater privacy protection for a
28 consumer, the Commission was particularly interested in obtaining public
29 comment on the proposal.

30 (4) The draft should note the need for further work to fully integrate SB 1 with
31 existing California privacy statutes. The draft should define the scope of the
32 further work. The draft should identify entities that might appropriately perform

1 the work, such as the Attorney General or the Office of Privacy Protection. The
2 draft should indicate that the Law Revision Commission could perform the work
3 if its authority in this area were extended, but should identify the additional
4 resources that would be necessary if this were assigned to the Commission.

5 The staff should ensure that the Attorney General and other key stakeholders
6 are included on the distribution list for the tentative recommendation.

7 STUDY B-501 – UNINCORPORATED ASSOCIATIONS

8 In connection with its consideration of the 2004 legislative program, the
9 Commission considered the First Supplement to Memorandum 2004-2,
10 proposing changes to the Commission’s recommendation on *Unincorporated*
11 *Associations* (September 2003). The Commission approved the changes.

STUDY H-821 – MECHANICS LIEN LAW

12 The Commission considered Memorandum 2004-4 relating to reactivation of
13 the study of mechanics lien law. The Commission decided to take a “moderate”
14 approach to general revision of the mechanics lien law. This will involve
15 clarification and simplification of the existing law along the lines set out in the
16 two-year old staff draft. If an opportunity for radical simplification arises in a
17 particular area, the Commission will explore it.

18 The staff should update and complete the old staff draft, and present it for
19 Commission consideration, perhaps at the June 2004 Commission meeting (staff
20 workload permitting). If proceedings become bogged down at the Commission
21 meeting, the Commission will revisit the concept of convening a working group
22 in an effort to achieve a consensus draft.

23 STUDY H-851 – COMMON INTEREST DEVELOPMENT LAW

24 The Commission considered Memorandum 2004-5 and its First Supplement,
25 reviewing comments on the tentative recommendation on *Common Interest*
26 *Development Law: Architectural Review and Decisionmaking* (November 2003). The
27 Commission approved the tentative recommendation as its final
28 recommendation, with the following changes:

29 **Architectural Review**

30 Proposed Civil Code Section 1378 was revised to read:

1 1378. (a) This section applies if an association’s governing
2 documents require association approval before an owner of a
3 separate interest may make a physical change to the owner’s
4 separate interest or to the common area. In reviewing and
5 approving or disapproving a proposed change, the association shall
6 satisfy the following requirements:

7 (1) The association shall provide a fair, reasonable, and
8 expeditious procedure for making its decision. The procedure shall
9 be included in the association’s governing documents.

10 (2) A decision on a proposed change shall be made in good faith
11 and shall not be unreasonable, arbitrary, or capricious.

12 (3) A decision on a proposed change shall be in writing. If a
13 proposed change is disapproved, the written decision shall include
14 both an explanation of why the proposed change is disapproved
15 and a description of the procedure for reconsideration of the
16 decision by the board of directors.

17 (4) If a proposed change is disapproved, the applicant is entitled
18 to reconsideration by the board of directors of the association that
19 made the decision, at an open meeting of the board. This paragraph
20 does not require reconsideration of a decision that is made by the
21 board of directors at an open meeting of the board.

22 (b) Nothing in this section authorizes a physical change to the
23 common area in a manner that is inconsistent with an association’s
24 governing documents or governing law.

25 **Comment.** Section 1378 is new. Paragraphs (1) and (2) of
26 subdivision (a) are consistent with case law. See *Ironwood Owners*
27 *Ass’n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18
28 (1986) (“When a homeowners’ association seeks to enforce the
29 provisions of its CCRs to compel an act by one of its member
30 owners, it is incumbent upon it to show that it has followed its own
31 standards and procedures prior to pursuing such a remedy, that
32 those procedures were fair and reasonable and that its substantive
33 decision was made in good faith, and is reasonable, not arbitrary or
34 capricious.”). Nothing in this section is intended to shift the existing
35 burden of proof as to the validity of an association’s governing
36 documents.

37 Physical changes that might be subject to association approval
38 requirements include additions or renovations, landscaping, choice
39 of exterior paint colors, coverings, or roofing materials, changes to
40 windows and balconies, and other such changes to the structure or
41 appearance of the property.

42 Subdivision (a)(4) provides an applicant with the option to seek
43 reconsideration of a disapproval decision, at an open meeting of the
44 board of directors. Nothing in this subdivision is intended to imply
45 that a board meeting required under another provision is not open.
46 See Section 1363.05 (Common Interest Development Open Meeting

1 Act). An applicant preserves other remedies whether or not the
2 applicant seeks reconsideration. The right of reconsideration by the
3 board only applies if the initial decision is made by an entity other
4 than the board of directors.

5 The requirements of this section apply regardless of any
6 contrary provision in an association's governing documents.
7 Nothing in this section affects the limitation on director liability
8 provided in Section 1367.5 or in Corporations Code Section 7231.

9 Subdivision (b) makes clear that this section does not authorize
10 physical change to the common area in a manner that is
11 inconsistent with an association's governing documents or the
12 governing law. In many associations the governing documents
13 require a vote of the membership to approve a change to the
14 common area. See, e.g., Posey v. Leavitt, 229 Cal. App. 3d 1236, 280
15 Cal. Rptr. 568 (1991). In other associations, the governing
16 documents may permit changes to certain features of the common
17 areas (such as common walls, ceilings, floors, and exclusive use
18 common areas) with the approval of the association. See Civ. Code
19 § 1351(i) ("exclusive use common area" defined). In all cases, the
20 requirements of the governing documents control.

21 **Nonresidential Common Interest Developments**

22 The proposed amendment of Civil Code Section 1373 was revised to read:

23 1373. (a) The following provisions do not apply to a common
24 interest development ~~that is limited to industrial or commercial~~
25 ~~uses by zoning or by its declaration~~ in which lots or other interests
26 are limited to industrial or commercial uses by zoning or are
27 limited to industrial or commercial uses by a declaration of
28 covenants, conditions, and restrictions that has been recorded in the
29 official records of each county in which the common interest
30 development is located:

31 (1) Section 1356.

32 (2) Article 4 (commencing with Section 1357.100) of Chapter 2 of
33 Title 6 of Part 4 of Division 2.

34 (3) Subdivision (b) of Section 1363.

35 (4) Section 1365.

36 (5) Section 1365.5.

37 (6) Subdivision (b) of Section 1366.

38 (7) Section 1366.1.

39 (8) Section 1368.

40 (9) Section 1378.

41 (b) The Legislature finds that the provisions listed in
42 subdivision (a) are appropriate to protect purchasers in residential
43 common interest developments, however, the provisions may not
44 be necessary to protect purchasers in commercial or industrial

1 developments since the application of those provisions could result
2 in unnecessary burdens and costs for these types of developments.

3 **Comment.** The introductory clause of subdivision (a) of Section
4 1373 is amended to more closely parallel the language used in
5 Business and Professions Code Section 11010.3 (exemption of
6 nonresidential subdivision from laws governing subdivided land).
7 This is a nonsubstantive change.

8 Subdivision (a)(9) is added to exempt a nonresidential common
9 interest development from the statutory provision governing
10 review of a proposed physical change to property within the
11 development. Nothing in this section affects the application of a
12 common law requirement governing association review of a
13 proposed property change. An industrial or commercial common
14 interest development that is subject to such a requirement remains
15 subject to the requirement.

16 STUDY J-503 – DISCOVERY IMPROVEMENTS FROM OTHER JURISDICTIONS

17 The Commission considered Memorandum 2004-11, which presents a draft of
18 a tentative recommendation proposing a number of minor improvements of civil
19 discovery provisions. The Commission approved the draft as a tentative
20 recommendation to be circulated for comment.

21 STUDY J-504 – CIVIL DISCOVERY: NONSUBSTANTIVE REFORM

22 The Commission considered Memorandum 2004-13 and its First Supplement,
23 concerning the conforming revisions to the following provisions: Bus. & Prof.
24 Code § 25009; Code Civ. Proc. §§ 1283, 1991.2; Educ. Code § 44944; Gov't Code §§
25 12963.3, 68097.6; Health & Safety Code § 1424.1; Ins. Code § 11580.2. The
26 Commission directed the staff to remove these provisions from the Commission's
27 proposed nonsubstantive reorganization and study them further, because it
28 appears that they were never conformed to reflect enactment of the Civil
29 Discovery Act of 1986. The Commission also directed the staff to remove the
30 conforming revision of Code of Civil Procedure Section 1741 from the proposal,
31 because that provision sunsetted on January 1, 2004.

32 STUDY J-1321 – JURISDICTIONAL LIMITS OF SMALL CLAIMS CASES
33 AND LIMITED CIVIL CASES

34 The Commission considered Memorandum 2004-3, reporting on the staff's
35 efforts to seek consensus on increasing the jurisdictional limits of a small claims

1 case and a limited civil case. The Commission adopted the staff's
2 recommendation to put this study on hold, and directed the staff not to spend
3 any significant amount of time on it without first seeking Commission approval.

4 The staff should keep the Commission posted on the position and progress of
5 the Judicial Council. In particular, the staff should notify the Commission if there
6 is any meaningful progress regarding a modest increase in the small claims limit.

7 STUDY K-301 – WAIVER OF PRIVILEGE BY DISCLOSURE

8 The Commission considered Memorandum 2004-8, concerning revision of the
9 discussion draft on *Waiver of Privilege By Disclosure* (March 2002). Due to the
10 support expressed for the proposal (see pp. 5-8 of the memorandum), the
11 Commission decided to continue working on this study. The Commission
12 directed the staff to prepare a new draft of the proposal, along the lines discussed
13 in the memorandum.

14 With regard to civil discovery provisions on waiver of a privilege by failure to
15 comply with discovery obligations (see pp. 32-46 of the memorandum), the
16 Commission decided that the following provisions should be left as is: Code Civ.
17 Proc. §§ 2025(m)(1) (oral deposition), 2030(k) (interrogatories), 2031(l) (inspection
18 demand), and 2033(k) (requests for admission). The Commission considered it
19 important to maintain incentives for complying with discovery obligations.

20 The Commission further decided that the provision pertaining to a deposition
21 by written questions (Code Civ. Proc. § 2028(d)(2)) should be amended to follow
22 the same approach used for other forms of written discovery. Specifically,
23 Section 2028(d)(2) should be amended along the following lines:

24 (2) A party who objects to any question on the ground that it
25 calls for information that is privileged or is protected work product
26 under Section 2018 shall serve a specific objection to that question
27 on all parties entitled to notice of the deposition within 15 days
28 after service of the question. A party who fails to timely serve that
29 objection waives it. The court, on motion, may relieve that party
30 from this waiver on its determination that the party has
31 subsequently served an objection that is in substantial compliance
32 with this paragraph, and the party's failure to serve a timely
33 objection was the result of mistake, inadvertence, or excusable
34 neglect.

35 The party propounding any question to which an objection is
36 made on ~~these~~ grounds of privilege or work product may then
37 move the court for an order overruling that objection. This motion

1 shall be accompanied by a declaration stating facts constituting a
2 reasonable and good faith attempt at an informal resolution of each
3 issue presented by the objection and motion. The deposition officer
4 shall not propound to the deponent any question to which a written
5 objection on those grounds has been served unless the court has
6 overruled that objection.

7 The court shall impose a monetary sanction under Section 2023
8 against any party, person, or attorney who unsuccessfully makes or
9 opposes a motion to overrule an objection, unless it finds that the
10 one subject to the sanction acted with substantial justification or
11 that other circumstances make the imposition of the sanction
12 unjust.

STUDY L-1064 – OWNERSHIP OF AMOUNTS WITHDRAWN FROM JOINT ACCOUNT

13 The Commission considered Memorandum 2004-10 and its First Supplement,
14 relating to ownership of amounts withdrawn from a joint account. The
15 Commission approved circulation of a tentative recommendation implementing
16 the staff's recommendations in the memorandum for clarifying language in the
17 California Multiple-Party Accounts Law to overturn the interpretation of *Lee v.*
18 *Yang*, 111 Cal. App. 4th 481, 3 Cal. Rptr. 3d 819 (2003).

19 STUDY N-308 – JUDICIAL REVIEW OF EMERGENCY RULEMAKING

20 The Commission considered Memorandum 2004-12 and its First Supplement,
21 presenting a staff draft tentative recommendation relating to *Judicial Review of*
22 *Emergency Rulemaking*. The Commission approved circulation of the staff draft as
23 a tentative recommendation, with the change proposed in the First Supplement.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary