
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JUNE 10, 2004
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on June 10, 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
Jeff Vize, Student Legal Assistant

Consultant: Miguel Méndez, Evidence Code

Other Persons:

Sil Reggiardo, State Bar Trusts and Estates Section, Executive Committee,
Sacramento

CONTENTS

Minutes of April 15, 2004, Commission Meeting	2
Administrative Matters	2
Election of Officers	2
2004 Strategic Plan	2
Report of Executive Secretary	2
Legislative Program	3
Study B-501 – Unincorporated Associations	3
Study H-851 – Common Interest Development Law	4
Study J-503 – Civil Discovery: Statutory Clarification and Minor Substantive Improvements	4
Study J-1323 – Equitable Relief in a Limited Civil Case	5
Study K-201 – Conforming the Evidence Code to the Federal Rules: Hearsay Issues	6
Study K-202 – Conforming Evidence Code to Federal Rules: Role of Judge and Jury	13

Study K-301 – Waiver of Privilege By Disclosure	13
Study L-1064 – Ownership of Amounts Withdrawn from Joint Account	14
Study N-308 – Judicial Review of Emergency Rulemaking	15

MINUTES OF APRIL 15, 2004, COMMISSION MEETING

1 The Commission approved the Minutes of the April 15, 2004, Commission
2 meeting as submitted by the staff, subject to the following correction:
3 On page 6, line 26, “reactive” should be “reactivate”.

ADMINISTRATIVE MATTERS

4 **Election of Officers**

5 The Commission considered Memorandum 2004-25, relating to election of
6 officers of the Commission, for the term commencing September 1, 2004. The
7 Commission elected William Weinberger as chairperson, to succeed Frank
8 Kaplan. The Commission elected Ed Regalia as vice chairperson, to succeed
9 William Weinberger. The term of the new officers runs from September 1, 2004,
10 to August 31, 2005.

11 **2004 Strategic Plan**

12 The Commission considered Memorandum 2004-26, relating to the
13 Commission’s strategic plan. The Commission adopted the staff draft of the plan
14 attached to the memorandum, subject to adjustment by the Executive Secretary
15 to reflect final action on the 2004-05 budget.

16 **Report of Executive Secretary**

17 *Budget*

18 The Executive Secretary reported favorable action by the legislative budget
19 committees and the budget conference committee on the Commission’s budget.
20 Assuming the Legislature adopts the budget as agreed to by the conference
21 committee, the focus of attention will shift to the Governor’s office.

22 *California Performance Review*

23 The Executive Secretary noted that the Governor has established the
24 California Performance Review to advise him on state government
25 reorganization. The report is due June 30, 2004. We do not yet know its potential
26 impact, if any, on the Commission.

1 *Staff Leave*

2 The Executive Secretary reviewed plans for covering any issues that may arise
3 during staff vacations this summer.

4 *Commission's 50th Anniversary*

5 The Executive Secretary reported that we have received an offer of assistance
6 from a former Commissioner to contact all former Commission members, should
7 we decide to proceed with a 50th anniversary reception. The Commission noted
8 that this fall would not be an opportune time; it would have to wait until
9 February, if we proceed.

LEGISLATIVE PROGRAM

10 The Commission considered Memorandum 2004-27, relating to the
11 Commission's 2004 legislative program. The staff orally updated the chart
12 attached to the memorandum with the information that AB 1836 (Harman) and
13 SB 111 (Knight) have been approved by the relevant policy committees. SB 1225
14 (Morrow) has passed both houses and gone to the Governor for his signature. AB
15 3081 (Assembly Judiciary Committee) had passed both houses but was recalled
16 for double-jointing amendments.

17 For Commission action on other items in the 2004 legislative program, please
18 refer to the entries in these Minutes for Study B-501 (unincorporated
19 associations) and Study H-851 (common interest development law).

STUDY B-501 – UNINCORPORATED ASSOCIATIONS

20 The Commission considered the First Supplement to Memorandum 2004-27,
21 reporting on legislative changes to SB 1746 (Ackerman), which would implement
22 the Commission's recommendation on *Unincorporated Associations*, 33 Cal. L.
23 Revision Comm'n Reports 729 (2003). The Commission approved the proposed
24 Comment revisions, with one change. The Comment to Corporations Code
25 Section 18610 was revised to include language making clear that subdivision (b)
26 requires written evidence of the act of authorization or ratification of a contract,
27 rather than of the contract that is authorized or ratified.

STUDY H-851 – COMMON INTEREST DEVELOPMENT LAW

1 The Commission considered the Second Supplement to Memorandum 2004-
2 27, discussing legislative changes to two bills that would enact Commission
3 recommendations:

- 4 • AB 1836 (Harman) would implement the recommendation on
5 *Alternative Dispute Resolution in Common Interest Developments*, 33
6 Cal. L. Revision Comm’n Reports 689 (2003).
- 7 • AB 2376 (Bates) would implement the recommendation on
8 *Common Interest Development Law: Architectural Review and*
9 *Decisionmaking*, 34 Cal. L. Revision Comm’n Reports __ (2004).

10 The Commission approved the staff recommendations, with one change. The
11 Comment to Civil Code Section 1363.820(b) was revised to refer to “maximum
12 reasonable use of local dispute resolution programs.” Contrary to what is
13 reported in the memorandum, the Assembly Judiciary Committee had approved
14 AB 1836 with the understanding that “maximum reasonable use” of local dispute
15 resolution resources would be required.

STUDY J-503 – CIVIL DISCOVERY: STATUTORY CLARIFICATION AND
MINOR SUBSTANTIVE IMPROVEMENTS

16 The Commission considered Memorandum 2004-30, concerning comments on
17 the tentative recommendation on *Civil Discovery: Statutory Clarification and Minor*
18 *Substantive Improvements* (February 2004). To further address the concerns raised
19 by the State Bar Committee on Administration of Justice regarding presuit
20 discovery on behalf of a petitioner’s successor in interest, the Commission
21 decided that Code of Civil Procedure Section 2035(f) should be amended along
22 the following lines:

23 (f) If the court determines that all or part of the discovery
24 requested may prevent a failure or delay of justice, it shall make an
25 order authorizing that discovery. The In determining whether to
26 authorize discovery by a petitioner who expects a successor in
27 interest to be a party to an action, the court shall consider, in
28 addition to other appropriate factors, whether the requested
29 discovery could be conducted by the petitioner’s present or
30 expected successor in interest, instead of by the petitioner. If the
31 court authorizes all or part of the requested discovery, the order
32 shall identify any witness whose deposition may be taken, and any
33 documents, things, or places that may be inspected, and any person

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

6 Corresponding revisions should be made as needed in the proposed Comment to
7 Section 2035 and the preliminary part (narrative portion) of the draft. Subject to
8 these revisions, the Commission approved the draft as a final recommendation,
9 for printing and submission to the Legislature.

STUDY J-1323 – EQUITABLE RELIEF IN A LIMITED CIVIL CASE

10 The Commission considered Memorandum 2004-22, relating to equitable
11 relief in a limited civil case. The Commission made the decisions reported below
12 with respect to the issues raised in the memorandum.

13 In connection with these decisions, the staff should investigate possible use of
14 language such as “a matter within the jurisdictional limit of a limited civil case”
15 or other general terminology, rather than “a case in which the amount involved
16 does not exceed \$25,000.” The objective would be to avoid having to amend
17 numerous statutes in the future when the Legislature increases the jurisdictional
18 limit for a limited civil case to an amount such as \$50,000.

19 **Permanent Injunction**

20 The Commission was concerned about the proposal to allow for permanent
21 injunctive relief when the amount involved does not exceed \$25,000. Among the
22 concerns expressed were the difficulty of determining potential damages to the
23 defendant of injunctive relief, the differing effects of mandatory and prohibitory
24 injunctions, the opportunity to “game the system” by including in the complaint
25 a spurious claim for permanent injunctive relief, and the potential for frequent
26 litigation over reclassification motions. The Commission concluded not to further
27 investigate this matter.

28 **Title to Real Property**

29 The Commission was interested in pursuing the concept of authorizing the
30 court to try title to real property when the amount involved does not exceed
31 \$25,000. The authority could be particularly useful in cases involving a less than
32 fee interest such as an easement, reserved mineral interest, or use restriction. The
33 Commission directed the staff to further develop the concept, paying attention to

1 issues such as the effect on an encumbrance or security interest in determining
2 the \$25,000 value limitation, and whether in rem relief would be authorized.

3 **Enforcement of Order Under Family Code**

4 The Commission directed the staff to make inquiry of family law practitioners
5 regarding whether the existing restriction on enforcement of orders under the
6 Family Code in a limited civil case serves a useful purpose.

7 **Declaratory Relief**

8 The Commission saw benefits and detriments to extending declaratory relief
9 authority to a limited civil case. On one hand, it may be useful to have a simple
10 procedure for declaratory relief in a smaller case. On the other hand, that could
11 increase the potential for abusive manipulation of the process. The Commission
12 concluded that it would be useful to obtain broader input on this issue through
13 the tentative recommendation process.

14 **Good Faith Improver Claim**

15 The Commission approved the concept of allowing a good faith improver
16 claim in a limited civil case where the amount involved is under \$25,000.

17 **Small Claims**

18 The Commission declined to investigate the possibility of expanding small
19 claims procedures to more comprehensively resolve a surety bond action.

STUDY K-201 – CONFORMING THE EVIDENCE CODE TO THE FEDERAL
RULES: HEARSAY ISSUES

20 ***Crawford v. Washington***

21 The Commission considered Memorandum 2004-28, concerning the impact of
22 *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004), on this study. The
23 Commission decided that the Comment to the previously approved amendment
24 of Evidence Code Section 1562 should be revised to delete the second paragraph,
25 relating to the constitutional right of confrontation. With that revision, the
26 proposed amendment and Comment read as follows:

27 1562. If (a) If (i) a copy of a business record is produced under
28 Section 1560 together with an affidavit complying with Section
29 1561, (ii) the requirements of Section 1271 have been met, and (iii)

1 the original records would be admissible in evidence if the
2 custodian or other qualified witness had been present and testified
3 to the matters stated in the affidavit, and if the requirements of
4 Section 1271 have been met, the copy of the records is admissible in
5 evidence. The affidavit is admissible as evidence of the matters
6 stated therein pursuant to Section 1561 and the matters so stated
7 are presumed true.

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

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

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

17 **Comment.** Section 1562 is amended to make clear that an
18 affidavit of a custodian or other qualified witness under Section
19 1561 may be used to prove the absence of a business record or entry
20 therein, not just the existence or content of a business record. For a
21 similar rule, see Unif. R. Evid. 803(7) & Comment.

22 Other Hearsay Issues

23 The Commission considered Memorandum 2004-18 and its First Supplement,
24 concerning hearsay issues. The Commission made the following preliminary
25 decisions:

26 *Proposed Comments*

27 Some of the proposed Comments previously approved by the Commission
28 describe the effect of a proposed amendment and then state: "This conforms to
29 the federal approach. See Fed. R. Evid. ____." The staff should revise these
30 Comments to make clear that the proposed amendment conforms the provision
31 to the federal approach on the particular point in question, not necessarily to all
32 aspects of the corresponding federal rule.

33 *Statement Regarding Declarant's Will*

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

35 1260. (a) Evidence of a statement made by a declarant who is
36 unavailable as a witness that he the declarant has or has not made
37 or revoked a will or other instrument defined in Section 45 of the
38 Probate Code, or has or has not revoked his will, or that identifies

1 his will or relates to the terms of the declarant's will or other
2 instrument defined in Section 45 of the Probate Code, is not made
3 inadmissible by the hearsay rule.

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

7 **Comment.** Section 1260 is amended to apply to any donative
8 instrument, not just a will.

9 Section 1260 is also amended to apply to a statement relating to
10 the terms of a donative instrument, as well as a statement relating
11 to execution, revocation, or identification of such a document. This
12 conforms to the federal approach on the types of statements
13 covered. See Fed. R. Evid. 803(3).

14 Section 1260 is further amended to use gender-neutral language.

15 *Judgment of Conviction*

16 To clarify its interrelationship with Evidence Code Section 1300, Evidence
17 Code Section 452.5 should be amended along the following lines:

18 452.5. (a) The official acts and records specified in subdivisions
19 (c) and (d) of Section 452 include any computer-generated official
20 court records, as specified by the Judicial Council which relate to
21 criminal convictions, when the record is certified by a clerk of the
22 superior court pursuant to Section 69844.5 of the Government Code
23 at the time of computer entry.

24 (b) An official record of conviction certified in accordance with
25 subdivision (a) of Section 1530 is admissible pursuant to Section
26 1280 and, subject to Section 1300, it may be used to prove the
27 commission, attempted commission, or solicitation of a criminal
28 offense, prior conviction, service of a prison term, or other act,
29 condition, or event recorded by the record.

30 **Comment.** Subdivision (b) of Section 452.5 is amended to clarify
31 its interrelationship with Section 1300 (hearsay exception for
32 evidence of judgment of conviction offered to prove fact essential to
33 that judgment).

34 Section 1280 creates a hearsay exception for a record that was
35 made by and within the scope of duty of a public employee, at or
36 near the time of the events recorded, under circumstances that
37 indicate its trustworthiness. Section 452.5(b) serves to make clear
38 that an "official record of conviction" certified under Section
39 1530(a) is admissible under Section 1280 to prove the fact of
40 conviction, or another event recorded by a public employee
41 pursuant to an official duty at or near the time of the event.

42 If, however, the record is offered to prove the underlying
43 misconduct (i.e., "the commission, attempted commission, or

1 solicitation of a criminal offense”), it is in substance a record of a
2 statement by the court in the prior case, being offered as proof of
3 the minimum evidence the prosecution had to offer to make out a
4 prima facie case. M. Méndez, *Evidence: The California Code and*
5 *the Federal Rules Exceptions to the Hearsay Rule: Learned Treatises,*
6 *Commercial Lists, and Judgments* § 12.03, at 290 (1999); *see also* Section
7 1300 Comment. To be used for this purpose, it is not sufficient that
8 the record is admissible under Section 1280, as provided in Section
9 452.5. *See People v. Wheeler*, 4 Cal. 4th 284, 300, 841 P.2d 938, 14
10 Cal. Rptr. 2d 418 (1992). The record must also satisfy the
11 requirements of Section 1300. The amendment of Section 452.5
12 serves to make that point clear, and to disapprove contrary dictum
13 in *People v. Duran*, 97 Cal. App. 4th 1448, 1460, 119 Cal. Rptr. 2d 272
14 (2002) (Section 452.5 “allow[s] admission of qualifying court
15 records to prove not only the fact of conviction, but also that the
16 offense reflected in the record occurred.”).

17 Evidence Code Section 1300 should be amended along the following lines:

18 1300. Evidence (a) In a civil action, evidence of a final judgment
19 adjudging a person guilty of a crime punishable as a felony is not
20 made inadmissible by the hearsay rule when offered in a civil
21 action to prove any fact essential to the judgment whether or not
22 the judgment was based on a plea of nolo contendere.

23 (b) In a criminal action, evidence of a final judgment adjudging
24 a person guilty of a crime punishable as a felony is not made
25 inadmissible by the hearsay rule when offered in either of the
26 following circumstances to prove any fact essential to the judgment
27 whether or not the judgment was based on a plea of nolo
28 contendere:

29 (1) The defendant offers the evidence.

30 (2) The prosecution offers the evidence and the evidence is of a
31 final judgment adjudging the defendant guilty of a crime
32 punishable as a felony.

33 **Comment.** Section 1300 is amended to apply in a criminal as
34 well as a civil case, with limitations to protect the defendant’s
35 constitutional right of confrontation (U.S. Const. art. VI; Cal. Const.
36 art. I, § 15). This conforms to the federal approach on the types of
37 cases to which this hearsay exception applies. *See Fed. R. Evid.*
38 *803(22) & advisory committee’s note.*

39 If Section 1300 is amended in this manner, evidence of a judgment based on a
40 plea of nolo contendere would be admissible in a criminal action in California,
41 under the circumstances specified in proposed paragraphs (b)(1) and (b)(2). Such
42 evidence is not admissible under the corresponding federal rule. A Note in the

1 tentative recommendation should point this out and solicit comment on the
2 merits of the proposed approach. The Note should also solicit comment on the
3 effect of a pending appeal from a judgment of conviction — i.e., whether Section
4 1300 should only apply to evidence of a final conviction in a case that has been
5 fully resolved, or also to evidence of a final conviction that is pending on appeal.

6 *Judgment Against a Person Entitled to Indemnity or Protected By a Warranty*

7 For purposes of eliciting comment, the tentative recommendation that the
8 Commission is preparing on hearsay issues should propose that Evidence Code
9 Section 1301 be repealed:

10 ~~1301. Evidence of a final judgment is not made inadmissible by~~
11 ~~the hearsay rule when offered by the judgment debtor to prove any~~
12 ~~fact which was essential to the judgment in an action in which he~~
13 ~~seeks to:~~

14 ~~(a) Recover partial or total indemnity or exoneration for money~~
15 ~~paid or liability incurred because of the judgment;~~

16 ~~(b) Enforce a warranty to protect the judgment debtor against~~
17 ~~the liability determined by the judgment; or~~

18 ~~(c) Recover damages for breach of warranty substantially the~~
19 ~~same as the warranty determined by the judgment to have been~~
20 ~~breached.~~

21 **Comment.** Section 1301 is repealed to promote conformity with
22 the Federal Rules of Evidence, which do not include a comparable
23 exception to the hearsay rule. The provision also appears to be little
24 used and its theoretical basis is debatable.

25 The repeal of this section does not affect the use of a judgment
26 for purposes of establishing res judicata or collateral estoppel in an
27 indemnity or warranty situation. When the requirements for
28 application of one of those doctrines are met, the judgment is
29 conclusive on the matter. See, e.g., Civil Code Section 2778 (if
30 indemnitor neglects to defend action after request by indemnitee,
31 recovery against indemnitee is conclusive against indemnitor);
32 Code Civ. Proc. § 1912 (principal bound if surety bound and
33 principal had notice of action and opportunity to join in defense).
34 Former Section 1301 did not apply in those circumstances; it only
35 applied when the prerequisites for res judicata or collateral
36 estoppel were lacking and evidence of a judgment was introduced
37 for its persuasive value. See former Section 1301 Comment (1965).

38 The repeal of this section does not preclude admission of
39 evidence of a judgment under Section 1280, which creates an
40 exception to the hearsay rule for a record made by a public
41 employee. If a court admits evidence of a judgment pursuant to
42 Section 1280, the evidence may be used to show that the judgment

1 was entered, not to prove the underlying events. For a provision
2 authorizing a court to take judicial notice of a judgment, see Section
3 452.

4 The tentative recommendation should include a Note soliciting comment on the
5 merits of this approach. The staff should draft the Note in consultation with
6 Commissioner Regalia. The tentative recommendation should also include a
7 conforming revision of Civil Code Section 2778, along the following lines:

8 2778. In the interpretation of a contract of indemnity, the
9 following rules are ~~to be applied~~ apply, unless a contrary intention
10 appears:

11 1. (a) Upon an indemnity against liability, expressly, or in other
12 equivalent terms, the person indemnified is entitled to recover
13 upon becoming ~~liable~~; liable.

14 2. (b) Upon an indemnity against claims, or demands, or
15 damages, or costs, expressly, or in other equivalent terms, the
16 person indemnified is not entitled to recover without payment
17 ~~thereof~~; thereof.

18 3. (c) An indemnity against claims, or demands, or liability,
19 expressly, or in other equivalent terms, embraces the costs of
20 defense against such claims, demands, or liability incurred in good
21 faith, and in the exercise of a reasonable ~~discretion~~; discretion.

22 4. (d) The person indemnifying is bound, on request of the
23 person indemnified, to defend actions or proceedings brought
24 against the ~~latter person indemnified~~ in respect to the matters
25 embraced by the indemnity, but the person indemnified has the
26 right to conduct such ~~those~~ defenses, if ~~he~~ the person indemnified
27 chooses to do so; so.

28 5. (e) If, after request, the person indemnifying neglects to
29 defend the person indemnified, a recovery against the ~~latter~~ the
30 ~~person indemnified~~ suffered by ~~him~~ that person in good faith, is
31 conclusive in ~~his~~ favor of the person indemnified against the
32 ~~former~~; person indemnifying.

33 6. (f) If the person indemnifying, whether ~~he~~ that person is a
34 principal or a surety in the agreement, has not received reasonable
35 notice of the action or proceeding against the person indemnified,
36 or is not allowed to control its defense, judgment against the ~~latter~~
37 ~~is only presumptive~~ person indemnified is not evidence against the
38 ~~former~~; person indemnifying.

39 7. (g) A stipulation that a judgment against the person
40 indemnified shall be conclusive upon the person indemnifying, is
41 inapplicable if ~~he~~ the person indemnified had a good defense upon
42 the merits, which by want of ordinary care ~~he~~ the person
43 indemnified failed to establish in the action.

1 **Comment.** New subdivision (f) (former subdivision (6)) of
2 Section 2778 is amended to reflect the repeal of Evidence Code
3 Section 1301. For further explanation, see former Section 1301
4 Comment (200x).

5 Section 1260 is further amended to use gender-neutral language,
6 improve clarity, and conform to modern drafting conventions.
7 These are nonsubstantive revisions.

8 *Judgment Against a Third Person Whose Liability, Obligation, or Duty Is In Issue in a*
9 *Civil Action*

10 For purposes of eliciting comment, the tentative recommendation that the
11 Commission is preparing on hearsay issues should propose that Evidence Code
12 Section 1302 be repealed:

13 ~~1302. When the liability, obligation, or duty of a third person is~~
14 ~~in issue in a civil action, evidence of a final judgment against that~~
15 ~~person is not made inadmissible by the hearsay rule when offered~~
16 ~~to prove such liability, obligation, or duty.~~

17 **Comment.** Section 1302 is repealed to promote conformity with
18 the Federal Rules of Evidence, which do not include a comparable
19 exception to the hearsay rule. The provision also appears to be little
20 used and its theoretical basis is debatable.

21 The repeal of this section does not affect the use of a judgment
22 for purposes of establishing res judicata or collateral estoppel.
23 When the requirements for application of one of those doctrines are
24 met, the judgment is conclusive on the matter. Former Section 1302
25 did not apply in those circumstances; it only applied when the
26 prerequisites for res judicata or collateral estoppel were lacking and
27 evidence of a judgment was introduced for its persuasive value.

28 The repeal of this section does not preclude admission of
29 evidence of a judgment under Section 1280, which creates an
30 exception to the hearsay rule for a record made by a public
31 employee. If a court admits evidence of a judgment pursuant to
32 Section 1280, the evidence may be used to show that the judgment
33 was entered, not to prove the underlying events. For a provision
34 authorizing a court to take judicial notice of a judgment, see Section
35 452.

36 The tentative recommendation should include a Note soliciting comment on the
37 merits of this approach, which the staff should draft in consultation with
38 Commissioner Regalia.

STUDY K-202 – CONFORMING EVIDENCE CODE TO FEDERAL RULES: ROLE
OF JUDGE AND JURY

1 The Commission considered Memorandum 2004-19, discussing the role of the
2 judge and jury in determining the admissibility of evidence. The Commission
3 instructed the staff to prepare a draft tentative recommendation, consistent with
4 the following decisions:

5 **Application of Rules of Evidence to Judicial Determination of Preliminary Fact**

6 In determining a preliminary fact under Evidence Code Section 405, a judge
7 should not be bound by the rules of evidence, except for the rules relating to
8 privilege. The staff will provide additional analysis of whether the court should
9 be permitted to rely exclusively on proffered evidence to prove the admissibility
10 of the proffered evidence (a practice known as “bootstrapping”).

11 **Secondary Evidence: Claim that Original Never Existed**

12 An objection to the introduction of secondary evidence on the grounds that
13 the original never existed should be determined as a matter of authentication,
14 rather than as an objection to the use of secondary evidence. The proposed
15 language to that effect provided in the memorandum should be relocated and
16 revised to improve clarity.

17 **Secondary Evidence: Dispute as to Accuracy of Material Terms**

18 The staff will draft Comment language to emphasize that a dispute as to the
19 accuracy of material terms does not alone justify exclusion of secondary evidence
20 under Evidence Code Section 1521(a)(1); the court must also find that it would be
21 unfair under the circumstances to admit the secondary evidence.

22 **Evidentiary Hearing Conducted out of Presence and Hearing of Jury**

23 A hearing to determine whether to admit a confession or admission in a
24 criminal case should be conducted out of the presence and hearing of the jury,
25 regardless of whether a party so requests.

STUDY K-301 – WAIVER OF PRIVILEGE BY DISCLOSURE

26 The Commission considered Memorandum 2004-17, concerning the draft
27 recommendation on *Waiver of Privilege By Disclosure* attached to the
28 memorandum. The Commission directed the staff to informally solicit comment

1 on the draft from persons and organizations interested in this study. The
2 Commission decided not to expand the scope of this study to cover use of the
3 fruits of an unauthorized disclosure of privileged information.

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

4 The Commission considered Memorandum 2004-32, concerning comments on
5 the tentative recommendation relating to *Ownership of Amounts Withdrawn from*
6 *Joint Account* (February 2004).

7 The Commission approved the recommendation for printing and submission
8 to the Legislature as a final recommendation, with one change. The following
9 clarification should be added to the proposed legislation, as suggested in the
10 memorandum:

11 **Prob. Code § 5401 (amended). Rights of financial institution**

12 5401. (a) Financial institutions may enter into multiple-party
13 accounts to the same extent that they may enter into single-party
14 accounts. Any multiple-party account may be paid, on request and
15 according to its terms, to any one or more of the parties or agents.

16 (b) The terms of the account or deposit agreement may require
17 the signatures of more than one of the parties to a multiple-party
18 account during their lifetimes or of more than one of the survivors
19 after the death of any one of them on any check, check
20 endorsement, receipt, notice of withdrawal, request for withdrawal,
21 or withdrawal order. In such case, the financial institution shall pay
22 the sums on deposit only in accordance with such terms, but those
23 terms do not limit the right of the sole survivor or of all of the
24 survivors to receive the sums on deposit.

25 (c) A financial institution is not required to do any of the
26 following pursuant to Section 5301, 5303, or any other provision of
27 this part:

28 (1) Inquire as to the source of funds received for deposit to a
29 multiple-party account, or inquire as to the proposed application of
30 any sum withdrawn from an account, for purposes of establishing
31 net contributions.

32 (2) Determine any party's net contribution.

33 (3) Limit withdrawals or any other use of an account based on
34 the net contribution of any party, whether or not the financial
35 institution has actual knowledge of each party's contribution.

36 (d) All funds in an account, unless otherwise agreed in writing
37 by the financial institution and the parties to the account, remain
38 subject to liens, security interests, rights of setoff, and charges,
39 notwithstanding the determination or allocation of net
40 contributions with respect to the parties.

1 **Comment.** Subdivision (c) of Section 5401 is amended to state
2 expressly that a financial institution has no duty with respect to
3 tracing net contributions of a party under either Section 5301
4 (ownership during lifetime) or 5303 (right of survivorship and
5 terms of account). This is not a change in, but is declarative of,
6 existing law.

STUDY N-308 – JUDICIAL REVIEW OF EMERGENCY RULEMAKING

7 The Commission considered Memorandum 2004-29, discussing the
8 Commission’s tentative recommendation on *Emergency Rulemaking Under the*
9 *Administrative Procedure Act* (February 2004). The Commission approved the
10 tentative recommendation as its final recommendation.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary