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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
NOVEMBER 19, 2004  
BURBANK

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A meeting of the California Law Revision Commission was held in Burbank on November 19, 2004.

**Commission:**

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

*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:**

Sam Abdulaziz, Construction Industry Trade Associations, Los Angeles  
John Jones, Aliso Viejo  
Cila Leshem, Ferguson Enterprises, Canoga Park  
Julian Mack, Buchalter, Nemer, Fields & Younger, San Francisco  
Dick Nash, Building Industry Credit Association, Los Angeles  
Erik Olson, State Bar Litigation Section, Palo Alto  
Debi Pepaj  
Norman Widman, Lumber Association of California & Nevada, San Diego  
Lewis Wong, Lewis Wong & Co., Los Angeles

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MINUTES OF SEPTEMBER 17, 2004, COMMISSION MEETING

1       The Commission approved the Minutes of the September 17, 2004,  
2 Commission meeting as submitted by the staff, subject to the following  
3 correction:

4       On page 6, line 23, after the period insert the following sentence:

5       The Commission was also presented with a letter by Patrick McLane, a copy  
6 of which is attached to the Third Supplement to Memorandum 2004-39.

ADMINISTRATIVE MATTERS

7       **2004-2005 Annual Report**

8       The Commission considered Memorandum 2004-46 and its First Supplement,  
9 relating to the 2004-2005 Annual Report.

10       The Commission approved the Annual Report draft attached to the  
11 memorandum, with the revision set out at page 2 of the memorandum relating to  
12 use of Commission materials in determining legislative intent.

13       A footnote should be added to the report on unconstitutional statutes to the  
14 effect that:

15               The Commission previously reported that AB 1667 (Kehoe) was  
16 pending in response to the decision in *Stogner v. California*. See  
17 *2003-2004 Annual Report*, 33 Cal. L. Revision Comm’n Reports 569,  
18 601 fn. 62 (2003). AB 1667 has been enacted as 2004 Cal. Stat. ch.  
19 368.

1 Commission members will provide information about their Commission-  
2 related activities for inclusion in the report.

3 **Report of Executive Secretary**

4 *Commission Membership*

5 The Executive Secretary reported that there have been no new appointments  
6 to the Commission since the last meeting. The Governor's Office indicates they  
7 are working on filling the vacancies.

8 The term of Ellen Corbett, Assembly Member of the Commission, expires on  
9 November 30, 2004.

10 The new Director of Finance, Tom Campbell, is a former Commission  
11 member. He served as Senate Member of the Commission during 1994.

12 *Fiftieth Anniversary Commemoration*

13 The Executive Secretary reported that former Commission Member Christine  
14 Byrd has offered to spearhead a commemoration of the Commission's 50th  
15 anniversary. The concept is a reunion of present and former Commission  
16 members and staff (and perhaps consultants). She would undertake to ensure  
17 that it is done without cost to the state.

18 The Commission approved the concept. The Commission has in mind a  
19 spring event, to be held in Sacramento in conjunction with a Commission  
20 meeting. A few legislative and other officials might also be invited. The  
21 Commission changed the location of the March 2005 meeting from Burbank to  
22 Sacramento, in case that proves to be a convenient time for the event. The  
23 Commission directed the Executive Secretary to express its appreciation to  
24 Commissioner Byrd and to communicate with her concerning logistics.

LEGISLATIVE PROGRAM

25 The Commission considered Memorandum 2004-47, making a final report on  
26 the Commission's 2004 legislative program. No Commission action was required  
27 or taken in connection with the memorandum.

28 The Commission also considered the First Supplement to Memorandum 2004-  
29 47, relating to Assembly Bill 1836 (Harman). For Commission action on the  
30 matter, see the entry in these Minutes for Study H-851, below.

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STUDY B-501 – UNINCORPORATED ASSOCIATIONS

The Commission considered Memorandum 2004-42 and its First Supplement, discussing the Commission’s tentative recommendation on *Nonprofit Association Tort Liability* (September 2004). The Commission approved the tentative recommendation as its final recommendation, subject to one change. Proposed Corporations Code Section 18620 was revised along the following lines:

18620. A member, director, officer, or agent of a nonprofit association is not liable for injury, damage, or harm caused by an act or omission of the association or an act or omission of a director, officer, or agent of the association, ~~if any~~ unless one or more of the following conditions is satisfied:

- (a) The member, director, officer, or agent expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes the injury, damage, or harm.
- (b) ~~The tortious conduct of the member, director, officer, or agent~~ engages in tortious conduct that causes the injury, damage, or harm.
- (c) The member, director, officer, or agent is otherwise liable under another statute or under the common law.

STUDY H-821 – MECHANICS LIEN LAW

The Commission considered Memorandum 2004-31, its First Supplement, and material distributed at the meeting (attached to the Second Supplement), relating to mechanics lien law. The Commission made the following decisions with respect to the issues raised in the materials.

**“Original Contractor”**

The next draft should substitute the term “direct contractor” for “original contractor”. Although that term is not used in existing law, it is perhaps more descriptive than “original contractor” or “prime contractor”.

**“Owner”**

The Commission was concerned that the staff definition of “owner” could be overbroad in its application. Specifically, a preliminary notice to a lessee should not bind the owner of the fee, but a preliminary notice to an owner of the fee should bind co-owners of the fee.

1 **“Private Work”**

2 The definition of “private work” appears to be overbroad in its coverage,  
3 appearing to include such matters as federal work and native american work.

4 **“Site Improvement”**

5 The definition of “site improvement” should qualify the reference to “other  
6 improvements” by making clear that they relate to improvements of the same  
7 site, such as infrastructure or preparation of the site for construction.

8 **“Stop Notice”**

9 The next draft should use the term “notice to withhold funds” in place of  
10 “stop notice”.

11 **Writing**

12 The Commission agreed that the statute ought not to be expanded to permit  
13 electronic notices. Among the concerns expressed was that a lay person who  
14 receives a written notice by certified mail is likely to accord it greater weight than  
15 an electronic notice. In addition, an electronic notice may get filtered out as spam  
16 and never reach its intended recipient.

17 **Agency**

18 The statute should include a general provision on acts performed by an agent.  
19 It should make clear that the ability of an agent to act on behalf of the principal is  
20 limited to the authority conferred by the agency. Thus to the extent a direct  
21 contractor is deemed to be the agent of the principal for the purpose of engaging  
22 a subcontractor, the scope of the agency does not include other acts such as  
23 compromise of litigation.

24 **Use of Material in Structure**

25 Delivery of materials to the jobsite should create a rebuttable presumption  
26 that the materials were used in the construction, subject to this change being part  
27 of a balanced reform package.

28 **Change Orders**

29 The staff should do further research on the origin and function of the  
30 provision of existing law that requires an owner to notify the original contractor  
31 and construction lender of a change in the original contract if the change  
32 increases the contract amount by 5% or more. See Civ. Code § 3123(c).

1 **Completion Issues**

2 *Substantial Completion*

3 The Commission decided not to investigate the concept of substituting  
4 substantial completion for actual completion. If there is substantial completion  
5 but no actual completion, other events such as cessation of labor will come into  
6 play in triggering the lien claim period.

7 *Certificate of Occupancy*

8 Absent the certificate of occupancy being a matter of public record, it does not  
9 appear feasible to make issuance of it a triggering event for completion.

10 *Acceptance by Public Entity*

11 The staff should research the “acceptance by public entity” trigger for  
12 completion to ascertain whether it is limited to a public work or has been  
13 construed to apply to a private work that includes an element of public  
14 dedication.

15 *Acceptance by Owner*

16 Acceptance by the owner should be eliminated as a trigger for completion, in  
17 favor of the more standardized notice of completion, which is required to be  
18 communicated to potential lien claimants.

19 *Notice of Completion*

20 The staff should draft language to extend the recording period triggered by a  
21 notice of completion on a day-for-day basis in case of a late filing, not to exceed  
22 the time period that would otherwise apply if no notice of completion were filed.

23 Where there are two or more separate contracts on a single job, the filing of a  
24 notice of completion as to one contract should not prejudice the lien rights of  
25 other contractors to the extent the job is a single integrated job. The tentative  
26 recommendation should flag this problem in existing law for comment, possibly  
27 including a discussion of the pros and cons of the provision.

28 *Notice of Cessation*

29 The staff will explore the possibility of merging the notice of completion with  
30 the notice of cessation in the interest of simplification.

31 If a notice of cessation is filed and the job starts up again before the expiration  
32 of 60 days, the notice should be ineffective.

1 *Duty of County Recorder to Give Notice of Recording*

2 The draft should eliminate the provision for filing a preliminary notice with  
3 the county recorder and for the county recorder to notify filers when a notice of  
4 completion or cessation is recorded.

5 **Expungement of False Claim of Lien**

6 The staff should develop remedies for efficient expungement of a false claim  
7 of lien. The remedies might include the following:

- 8 (1) If the lien claimant has failed to take action to enforce the lien  
9 within statutory time limits, the owner should be able to eliminate  
10 the lien by filing a notice of expungement. A court order should be  
11 unnecessary for that purpose.
- 12 (2) The law should make clear that the court release procedure is  
13 available for immediate challenge to an invalid claim.
- 14 (3) If the claim of lien is within small claims or limited civil  
15 jurisdiction amounts, a release order should be obtainable  
16 pursuant to small claims or limited civil procedures.
- 17 (4) The statute should make clear that a release or expungement  
18 notice or order issued pursuant to the statute is a recordable  
19 instrument.
- 20 (5) The staff should investigate the possibility of assessment of a  
21 penalty for recordation of a fraudulent claim of lien.
- 22 (6) The statute should provide for attorneys fees in an expungement  
23 or release proceeding.
- 24 (7) The staff should research whether the contractor's license bond  
25 might be made accessible on a showing of damages caused by a  
26 fraudulent claim of lien.

27 Some of the proposed remedies may involve logistical problems. For  
28 example, it may be necessary to obtain a court clerk's certificate that no action to  
29 enforce a lien has been filed, or to provide that remedies are available only to the  
30 extent no extension of credit has been recorded.

31 **Dismissal for Lack of Prosecution**

32 The statute should preserve the provision of existing law for discretionary  
33 dismissal of a mechanics lien if a lien enforcement action is not brought to trial  
34 within two years after commencement.

1 **Attorneys Fees**

2 A note in the draft should point out that the law allows attorneys fees in some  
3 types of stop notice and payment bond enforcement actions but not in a  
4 mechanics lien enforcement action. The draft should request comment on the  
5 disparity of treatment.

6 **Site Improvement Lien**

7 The statute should maintain existing provisions relating to the site  
8 improvement lien.

9 **Laborer's Compensation Fund**

10 The staff should seek input from labor lawyers expert in the area of lien rights  
11 of a laborer's compensation fund, concerning possible simplification and  
12 standardization of the governing law.

13 **Preliminary Notice**

14 *Busting Up the Section*

15 The preliminary notice statute should be broken into smaller pieces, relocated  
16 to a substantive part of the statute, and the language streamlined and simplified.

17 *Notice From Original Contractor to Construction Lender*

18 The staff should further research subdivision (b) of Section 3097 in an effort to  
19 ascertain what it might have been intended to accomplish. In this connection, the  
20 staff should consult with affected financial institutions.

21 *Disciplinary Action Against Subcontractor Who Fails To Give Preliminary Notice*

22 The draft should eliminate the existing provision of Civil Code Section  
23 3097(h), ¶ 1, to the effect that a subcontractor that fails to give a preliminary  
24 notice where the contract price exceeds \$400 is subject to disciplinary action  
25 under the Contractors State License Law.

26 *Notice of Preliminary Notice Mistakes*

27 The draft should not include a provision that the recipient of the preliminary  
28 notice must notify the lien claimant of errors in the notice.

1 *Discipline for Contractor's Failure to Provide Information*

2 The draft should not provide for Contractors State License Board action  
3 against an original contractor as a remedy for failure to make available to a  
4 person seeking to give a preliminary notice the name and address of the owner  
5 and lender.

6 *Enforcement of Lien*

7 The Comment to Section 3114 or its successor section, which provides that a  
8 lien claimant may not enforce a lien unless the claimant has given the  
9 preliminary notice required by statute, should make clear that the statute does  
10 not require a preliminary notice from an exempted claimant such as a laborer's  
11 construction fund.

12 **Waiver and Release**

13 The language of the waiver and release forms should be improved to, among  
14 other matters, identify progress payments covered by earlier conditional releases  
15 that have not been paid, and to identify the customer to whom labor, service,  
16 equipment, or material was provided.

17 **Priorities**

18 Civil Code Section 3136 or its successor section should be rewritten to make  
19 clear that if a construction loan has priority over mechanics liens, an optional  
20 advance of construction funds by the lender that is used for construction costs  
21 receives the same priority as a mandatory advance of construction funds by the  
22 lender, provided that the total of all advances does not exceed the amount of the  
23 original construction loan.

24 STUDY H-851 – COMMON INTEREST DEVELOPMENT LAW

25 The Commission considered the First Supplement to Memorandum 2004-47  
26 discussing technical changes required as a followup to Assembly Bill 1836  
27 (Harman) (2004 Cal. Stat. ch. 754), which implemented the Commission's  
28 recommendation on *Alternative Dispute Resolution in Common Interest*  
29 *Developments*, 33 Cal. L. Revision Comm'n 689 (2003). The proposed changes  
30 would correct erroneous cross-references to former Code of Civil Procedure  
31 Section 383. The Commission approved the proposed changes as a final  
32 recommendation.

1                   STUDY H-854 – PREEMPTION OF CID ARCHITECTURAL DECISIONS

2           The Commission considered Memorandum 2004-49, discussing the tentative  
3 recommendation on *Preemption of CID Architectural Restrictions* (September 2004).  
4 The Commission approved the tentative recommendation as its final  
5 recommendation, subject to one change. The Comment to Civil Code Section  
6 1378 was revised as follows:

7                   **Comment.** Subdivision (a)(3) of Section 1378 is amended to  
8 make clear that a decision on a proposed change must be consistent  
9 with building codes and other laws relating to land use and public  
10 safety. A restriction that requires violation of such a law is against  
11 public policy and is unenforceable. See *Nahrstedt v. Lakeside*  
12 *Village Condominium Ass’n*, 8 Cal. 4th 361, 382, 878 P.2d 1275, 33  
13 Cal. Rptr. 2d 63 (1994). An association restriction may impose  
14 requirements beyond what is required by the law, so long as those  
15 additional requirements do not conflict with the law. For example,  
16 an association restriction requiring that a fence be five feet in height  
17 would be consistent with a municipal ordinance providing that a  
18 fence may not exceed six feet in height. An association restriction  
19 requiring that the fence be seven feet in height would conflict with  
20 the ordinance and would be unenforceable. The term “law” is  
21 intended to be construed broadly and includes a constitutional  
22 provision, statute, regulation, local ordinance, and court decision.

23                   Subdivision (a)(3) is consistent with other laws that subordinate  
24 an association restriction to important public policies. See, e.g.,  
25 Sections 712 (restraint on display of sign advertising real property  
26 is void), 714 (prohibition of solar energy system is void), 782  
27 (racially restrictive covenant is void), 1353.6 (prohibition on display  
28 of certain noncommercial signs is unenforceable), 1376 (prohibition  
29 on installation of television antenna or satellite dish is void); Health  
30 & Safety Code §§ 1597.40 (restriction on use of home for family day  
31 care is void), 13132.7(l) (rules governing roofing material in very  
32 high fire hazard severity zone supersede conflicting provision of  
33 common interest development’s governing documents).

                          STUDY J-103 – ORAL ARGUMENT IN CIVIL PROCEDURE

34           The Commission considered Memorandum 2004-53, relating to oral argument  
35 in civil procedure. The Commission decided to limit the scope of the project to  
36 hearings on general civil practice matters in superior court.

37           The Commission was concerned about the approach suggested by the staff in  
38 the memorandum of prescribing general standards, due to the likelihood of

1 inconsistency in interpretation and application of the standards from judge to  
2 judge. The Commission felt great certainty and clarity was necessary.

3 The Commission directed the staff to develop an approach that would  
4 identify specific types of hearings in which oral argument is required unless the  
5 parties opt out. These would include hearings that the courts have identified as  
6 requiring oral argument, additional hearings where it is clear that oral argument  
7 is appropriate (such as anti-SLAPP motions, motions in limine, and new trial  
8 motions), and hearings that the Legislature has expressly stated should be oral.

9 The failure of the statute to identify a specific type of hearing should not  
10 signal legislative intent to disallow oral argument. There should be a  
11 straightforward general standard that applies to types of hearings not specifically  
12 identified — e.g., the court’s determination would be dispositive of the case. For  
13 a court determination that is not dispositive, the right to oral argument would  
14 depend on the standards developed by the courts. These would not be codified,  
15 but would be identified in the Comment.

16 The statute should make clear that it does not preclude oral argument in a  
17 case where the legislative intent is to require it, or where the court in its  
18 discretion determines oral argument would be appropriate. The statute should  
19 also recognize that it may be necessary to dispense with oral argument in a case  
20 where immediate action is necessary (e.g., temporary restraining order).

21 Other concerns raised at the meeting included whether hearing of argument  
22 by a research attorney is a hearing by the court, whether it is appropriate to deny  
23 argument on an ex parte application, and whether it is appropriate to deny  
24 argument if papers have not been filed, particularly where the hearing is on short  
25 notice (e.g., summary judgment hearing in an unlawful detainer action on five  
26 days notice).

27 STUDY J-111 – STATUTE OF LIMITATIONS FOR LEGAL  
28 MALPRACTICE

29 The Commission considered Memorandum 2004-50, concerning the statute of  
30 limitations for legal malpractice. The Commission approved the attached draft as  
31 a tentative recommendation to be circulated for comment.

1                   STUDY J-504 – CIVIL DISCOVERY: CORRECTION OF OBSOLETE  
2   CROSS-REFERENCES

3           The Commission considered Memorandum 2004-48, concerning correction of  
4 a cross-reference in Government Code Section 12963.3. The Commission decided  
5 to revise its recommendation on *Civil Discovery: Correction of Obsolete Cross-*  
6 *References* to incorporate the following amendment of that provision:

7           **Gov. Code § 12963.3 (amended). Depositions**

8           SEC. \_\_. Section 12963.3 of the Government Code is amended to  
9 read:

10           12963.3. (a) Depositions taken by the department shall be  
11 noticed by issuance and service of a subpoena pursuant to Section  
12 12963.1. If, in the course of the investigation of a complaint, a  
13 subpoena is issued and served on an individual or organization not  
14 alleged in the complaint to have committed an unlawful practice,  
15 written notice of the deposition shall also be mailed by the  
16 department to each individual or organization alleged in the  
17 complaint to have committed an unlawful practice.

18           (b) A deposition may be taken before any officer of the  
19 department who has been authorized by the director to administer  
20 oaths and take testimony, or before any other person before whom  
21 a deposition may be taken in a civil action pursuant to ~~Section 2025~~  
22 Section 2025.320 or 2026.010(d) of the Code of Civil Procedure. The  
23 person before whom the deposition is to be taken shall put the  
24 witness on oath and shall personally, or by someone acting under  
25 the person's direction and in the person's presence, record the  
26 testimony of the witness. The testimony shall be taken  
27 stenographically and transcribed unless the parties agree otherwise.  
28 All objections made at the time of the examination shall be noted on  
29 the deposition by the person before whom the deposition is taken,  
30 and evidence objected to shall be taken subject to the objections.

31           **Comment.** Subdivision (b) of Section 12963.3 is amended to  
32 reflect revision and relocation of the civil discovery provision  
33 referenced in it (Code Civ. Proc. § 2025, pertaining to a deposition  
34 in California) and the civil discovery provision previously  
35 referenced in it (former Code Civ. Proc. § 2018(a), pertaining to a  
36 deposition outside the state). See 1961 Cal. Stat. ch. 192, § 1 (former  
37 Code Civ. Proc. § 2018); see also 1980 Cal. Stat. ch. 1023, § 5 (earlier  
38 version of Section 12963.3). Former Code of Civil Procedure Section  
39 2018(a) was repealed in 1986 and its substance relocated to Code of  
40 Civil Procedure Section 2026(c). 1986 Cal. Stat. ch. 1334, §§ 1, 2.  
41 Section 12963.3.(b) was not revised at that time to reflect the repeal  
42 of former Code of Civil Procedure Section 2018(a) and the  
43 relocation. In 2004, however, it was revised to refer to the provision

1 governing who is permitted to serve as a deposition officer for an  
2 oral deposition taken in California (Code Civ. Proc. § 2025). 2004  
3 Cal. Stat. ch. ch. 647, § 6. It is now amended to restore the reference  
4 to the provision specifying who is permitted to serve as a  
5 deposition officer for an oral deposition taken outside California,  
6 and to reflect the nonsubstantive reorganization of the civil  
7 discovery provisions operative July 1, 2005. See 2004 Cal. Stat. ch.  
8 182, §§ 22, 23, 23.5, 61, 62; *Civil Discovery: Nonsubstantive Reform*, 33  
9 Cal. L. Revision Comm'n Reports 789 (2003).

10 STUDY K-301 – WAIVER OF PRIVILEGE BY DISCLOSURE

11 The Commission considered Memorandum 2004-54 and its First, Second, and  
12 Third Supplements, concerning *Waiver of Privilege By Disclosure*. The Commission  
13 also considered a letter from the Consumer Attorneys of California and an email  
14 communication from Richard Best. Those materials are attached to the Fourth  
15 Supplement to Memorandum 2004-54, which was prepared after the meeting.

16 The Commission decided not to pursue the staff's suggestion of incorporating  
17 a rebuttable presumption into Evidence Code Section 912(a). The Commission  
18 approved the draft attached to Memorandum 2004-54 as a final recommendation,  
19 for printing and introduction in the Legislature.

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APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary