A meeting of the California Law Revision Commission was held in Sacramento on March 17-18, 2005.

Commission:

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

Absent: Bill Morrow, Senate Member

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

Consultants: Roger Alford, Arbitration
Miguel Méndez, Evidence Code

Other Persons:
Sam Abdulaziz, Construction Industry Trade Associations, North Hollywood
Sandra Bonato, Executive Council of Homeowners, San Jose
Donne Brownsey, California Dispute Resolution Council, Sacramento
Oliver Burford, Executive Council of Homeowners, San Jose
William D. Collette, Rocklin
Karen D. Conlon, California Association of Community Managers, Irvine
Edward Joel Dodge, Sacramento
Denise Duncan, Mattos & Associates, Sacramento
Lisa M. Engel, Assembly Housing Committee, Sacramento
John D. Garvic, San Mateo
Beth Grimm, Concord
John Handel, California Association of Community Managers, Irvine
Steven Ingram, Consumer Attorneys of California, Sacramento
Bonnie Laderman, Rocklin
Cila Leshem, Ferguson Enterprises, San Fernando Valley
Pat March, Rocklin
Milena Marsico, Executive Council of Homeowners, San Mateo
Terry M. McGann, Executive Council of Homeowners, Sacramento
Gretel McLane, Lincoln
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MINUTES OF JANUARY 21, 2005, COMMISSION MEETING

The Commission approved the Minutes of the January 21, 2005, Commission meeting as submitted by the staff, subject to the following correction:

On page 4, line 18, the word “meeting” should be “meetings”.

ADMINISTRATIVE MATTERS

Reproduction of Comments

The Commission considered Memorandum 2005-8, discussing the Commission’s policy on reproduction of public comments. The Commission approved the following statement of policy for inclusion in the Handbook of Practices and Procedures:
A written communication to the Commission that is relevant to matters currently under consideration may be attached as an exhibit to a staff memorandum. A communication that is off-topic, defamatory, obscene, invasive of personal privacy or confidentiality, or that is otherwise inappropriate for republication will not be reproduced as an exhibit unless it is redacted to eliminate the inappropriate material. Any redaction shall be clearly indicated. A communication that is not reproduced as an exhibit may be summarized in a staff memorandum.

Report of Executive Secretary

Commission Membership

The Executive Secretary reported that there have been no appointments to fill the current vacancies on the Commission.

New Topics

The Executive Secretary reported that he had been contacted informally by legislative staff about the possibility of a Commission study to revamp the firearms registration statutes. The contemplated study would be nonsubstantive, intended to make a complex statutory scheme more understandable and usable.

Legislative Program

The Commission considered Memorandum 2005-9 and the First Supplement to Memorandum 2005-9, relating to the Commission’s 2005 legislative program. For Commission action in connection with the 2005 legislative program, see the entry under Study H-854 in these Minutes.

Study A-100 – Contractual Arbitration Improvements from Other Jurisdictions

The Commission considered Memorandum 2005-13, concerning Prof. Alford’s background study on contractual arbitration and the comments on that background study. Prof. Alford presented his background study to the Commission. David DeRubertis of the California Employment Lawyers Association, Donne Brownsey of the California Dispute Resolution Council, and Steve Ingram of the Consumer Attorneys of California participated in the discussion. Commissioner Kaplan recused himself from participating in the discussion and voting on this matter due to a potential conflict of interest arising
from his law practice involving litigation over enforceability of arbitration agreements.

The Commission directed the staff to convene a half-day meeting with stakeholders to explore whether there are areas of the law relating to contractual arbitration that the Commission could productively study. The staff should give the participants an opportunity to submit written comments before the meeting. The staff should circulate these comments to the other participants before the meeting, so that the participants have some time to consider the points raised before they have to state their views. The Commission did not think it would be productive for the Commission to pursue anything that would dampen the protections that have been developed under case law for particular kinds of arbitrations.

STUDY F-1301 – ENFORCEMENT OF MONEY JUDGMENT UNDER FAMILY CODE

The Commission considered Memorandum 2004-51 and its First and Second Supplements, discussing the period of enforcement of a money judgment under the Family Code.

The Commission instructed the staff to prepare a draft tentative recommendation proposing that any type of money judgment or judgment for possession or sale of property under the Family Code be made enforceable until satisfied.

STUDY H-821 – MECHANICS LIEN LAW

The Commission considered Memorandum 2005-12, relating to mechanics lien law. The Commission made the following decisions in connection with issues raised in the memorandum.

Contract Forms

The Commission decided not to deal with the form and content of home improvement and swimming pool contracts since those are already extensively regulated by the Contractors License Law. See Bus. & Prof. Code § 7150 et seq.

Mailed Notice

The draft should expand the methods of proof of service of notice beyond the return receipt or returned envelope, to include proof of mailing certified by the United States Postal Service. The draft should also expand the methods of service
to include delivery by a commercial delivery service, with an appropriate affidavit or other documentation of service. The draft should call attention to these changes and solicit comment on them.

**Notice of Nonresponsibility**

The Commission decided not to attempt to codify the doctrine of owner participation, but to leave it to continued case law development.

**Notice of Claim of Lien**

The statute should require the lien claimant to notify the owner, direct contractor, and construction lender on recording a claim of lien. The notice should include the recording identification number if available. The recorded claim of lien should include a declaration of service.

The Commission deferred decision on the remedy for failure of a lien claimant to give notice, pending staff research on the general law of damages for failure to release an invalid lien.

The staff should look into the possibility of automatic cancellation of a recorded lien if no lis pendens or extension of credit is recorded within 90 days, so that a title insurer could insure title without the need to wait for a full year to elapse.

**Notice of Completion**

The statute should require the owner to send a copy of the notice of completion, rather than a copy of the preliminary notice, simultaneously with recordation of the notice of completion. The recorded notice of completion should include a declaration of service.

Failure to notify a potential lien claimant of the recording of a notice of completion should have the effect of allowing the lien claimant up to 90 days after completion of the work of improvement to record a claim of lien.

**Recommencement of Work after Notice of Completion**

The Commission decided to remove from the draft the provision that notice of completion based on cessation of labor is ineffective if labor recommences before the lien claim period has expired.
**Waiver and Release**

The staff draft of the waiver and release forms set out at Exhibit pp. 1-4 should be incorporated into the tentative recommendation. The “Date” label on the progress payment forms should be a “Through Date” or “As of Date” or something like that.

**Design Professionals Lien**

The draft should not incorporate the design professionals lien into the mechanics lien law.

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**STUDY H-850 – COMMON INTEREST DEVELOPMENT LAW**

The Commission considered Memorandum 2005-3 discussing which subject area the Commission should address next in its study of common interest development law. The Commission decided to work next on clarification and simplification of existing common interest development law. Minor substantive issues will be addressed as they arise in the course of the statutory revision.

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**STUDY H-853 – STATE ASSISTANCE TO COMMON INTEREST DEVELOPMENTS**

The Commission considered Memorandum 2005-10 and its First and Second Supplements. The memorandum and its supplements discuss a staff draft recommendation on *State Assistance to Common Interest Developments* and describe an informational hearing on the topic that was held on March 9, 2005, by the Assembly Housing and Community Development Committee and the Assembly Business and Professions Committee. The Commission approved a final recommendation based on the staff draft recommendation, subject to the following changes:

**Ombudsperson**

The proposed Common Interest Development Bureau was renamed the Common Interest Development Ombudsperson.

**Enforcement Powers**

Provisions relating to law enforcement and election supervision were deleted from the recommendation. Instead, the Ombudsperson would be required to make recommendations to the Legislature, within three years, on whether the
Ombudsperson’s powers should include law enforcement and supervision of elections.

**Fee Provisions**

The Ombudsperson was authorized to adopt a regulation making clear which association must pay the fee for a separate interest when that separate interest is part of more than one association.

The Ombudsperson was authorized to adopt a regulation imposing a filing fee of not more than $25 for mediation of a dispute.

The staff will inquire whether the per-unit fee charged to CID s in Nevada is applied to undeveloped lots.

**Certification that Governing Law and Documents Have Been Read**

The definition of “managing agent” in proposed Civil Code Section 1380.230 was revised so as not to exclude full-time employees of an association.

**Contracting**

The Ombudsperson was expressly authorized to contract with private parties to provide mediation services.

**STUDY H-854 – COMMON INTEREST DEVELOPMENT CC&RS AND LOCAL REGULATION**


The Commission revised its recommendation to include a proposal that Civil Code Section 1378(b) be amended as follows:

- (b) 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 unless the change is required by law.

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

The Commission considered Memorandum 2005-11 and material distributed at the meeting (attached to the First Supplement to Memorandum 2005-11), relating to equitable relief in a limited civil case. The Commission directed the
staff to convert the memorandum into a tentative recommendation and circulate it for comment.

The tentative recommendation should note that if the issue in a particular case is complex and requires additional discovery, there is a mechanism available for that purpose under economic litigation procedures. And if the property interests involved could be more substantial than limited civil case jurisdiction, reclassification as an unlimited civil case is an option.

The tentative recommendation should omit the proposal to permit enforcement of an order under the Family Code in a limited civil case. That proposal should be combined with the tentative recommendation on enforcement of a money judgment under the Family Code. See the entry in these Minutes under Study F-1301.

STUDY K-201 – HEARSAY ISSUES UNDER EVIDENCE CODE

The Commission considered Memorandum 2004-45 and Memorandum 2005-6, concerning the hearsay rule and its exceptions. The Commission made the following decisions for purposes of a tentative recommendation:

**Former Testimony (Evid. Code §§ 1290-1292)**

**Definition of “Former Testimony”**

The definition of “former testimony” in Evidence Code Section 1290 should be left as is. The definition should continue to expressly include testimony given in an administrative adjudication or arbitration proceeding; it should not include deposition testimony given in the same action in which the testimony is offered. The California approach on these points is preferable to the federal approach.

**Organization and Drafting of Evidence Code Sections 1291 and 1292**

The staff should consider the best means of organizing and drafting the hearsay rule exceptions for former testimony (Evid. Code §§ 1291, 1292) to implement the Commission’s policy decisions. At a future meeting, the staff should present a draft for the Commission’s review.

**Former Testimony Offered Against a Party or the Successor in Interest of a Party Who Previously Proffered the Evidence**

The hearsay rule exceptions for former testimony should be amended to require that when former testimony is offered against a person (or the successor
in interest of a person) who previously proffered the evidence, the former testimony is admissible only if the person had a similar interest and motive to examine the declarant on the former occasion as in the present case. The staff should explore how the Truth-in-Evidence provision (Cal. Const. art. I, § 28(d)) would apply to this reform.

Testimony of a Defendant In Support of a Suppression Motion or at a Probation Revocation Hearing

The hearsay rule exceptions for former testimony should be amended to codify *Simmons v. United States*, 390 U.S. 377, 394 (1968), which establishes that the testimony of a criminal defendant in support of a motion to suppress evidence is inadmissible if offered against the same defendant at trial and the defendant objects.

The hearsay rule exceptions for former testimony should also be amended to codify *People v. Coleman*, 13 Cal. 3d 867, 899, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975), which establishes that the testimony of a probationer at a probation revocation hearing is inadmissible if offered at a subsequent criminal trial against the probationer based on the same event and the probationer objects.

Former Testimony Offered Against a Party Who Was Not a Party to the Prior Case But Whose Interests Were Protected Through Another Party’s Opportunity for Cross-Examination in the Prior Case

Under Federal Rule of Evidence 804(b)(1), if former testimony is offered as substantive evidence against a party who did not participate in the prior case, the testimony is admissible only if (1) certain requirements also adopted in California are met, and (2) a predecessor in interest of that party participated in the prior case. California’s hearsay rule exceptions for former testimony should not be amended to incorporate the predecessor in interest requirement of the federal rule.

Application to a Criminal Case

The successor in interest clause of Section 1291(a)(1) should not be revised at this time to reflect the limitations of *Crawford v. Washington* __ U.S. __, 124 S.Ct. 1354 (2004).

Objections

The guidance in Evidence Code Sections 1291(b)(1) and 1292(b) regarding objections based on competence or privilege should be retained.
The rule stated in Evidence Code Section 1291(b)(1) should be made inapplicable to a successor in interest.

Use in a Dependency Proceeding of Testimony Given at a Preliminary Examination By a Minor Child Who Was the Alleged Victim (Evid. Code § 1293)

Evidence Code Section 1293 should be left as is. The staff should monitor case law construing Crawford and alert the Commission if it becomes appropriate to revisit this issue.

Use in a Criminal Case of a Statement that was Admitted as a Prior Inconsistent Statement at the Preliminary Hearing or at a Previous Trial in the Same Case (Evid. Code § 1294)

Evidence Code Section 1294 should be left as is.

Statement By an Unavailable Declarant Whose Unavailability was Caused by a Party Opposing Admission of the Statement (Evid. Code § 1350)

Evidence Code Section 1350 should be left as is. A similar provision that would apply to a party in a civil case should be added, along the following lines:

1351. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:
   (a) The declarant is unavailable as a witness.
   (b) The statement is offered against a party in a civil action when that party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment. Section 1351 is added to the Evidence Code to help ensure that a party does not benefit from wrongfully causing the unavailability of an adverse witness. It is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5). For a provision governing unavailability of a declarant due to wrongdoing by the defendant in a criminal proceeding charging a serious felony, see Section 1350.

See also Section 120 (“civil action” defined).

It does not appear advisable to attempt to draft a provision similar to Section 1350 that would apply to the prosecution in a criminal case.
Statement By a Dead Declarant That is Relevant to a Gang-Related Prosecution
(Evid. Code §§ 1231-1231.4)

Evidence Code Sections 1231-1231.4 should be left as is. The staff should monitor case law construing Crawford and alert the Commission if it becomes appropriate to revisit this issue.

Dying Declaration (Evid. Code § 1242)

Evidence Code Section 1242 should be left as is with regard to the types of cases to which it applies. The California approach on this matter is preferable to the federal approach. The staff should monitor case law construing Crawford and alert the Commission if it becomes appropriate to reexamine how Section 1242 applies to a criminal defendant.

Section 1242 should be amended to make clear that it applies even if the declarant unexpectedly survives, so long as the declarant made the statement under a sense of immediately impending death. The provision should also be amended to require that the declarant be unavailable. In establishing unavailability, the proponent of the evidence should not have to show an attempt to depose the declarant. That federal requirement is not good policy. The staff should further explore how the Truth-in-Evidence provision (Cal. Const. art. I, § 28(d)) would apply to these proposed revisions.

In drafting an amendment of Section 1242 to implement the Commission’s decisions, the staff should track the language of the corresponding federal provision as closely as possible while properly reflecting what the Commission decided.

Declaration Against Interest (Evid. Code § 1230)

Unlike the corresponding federal rule, Evidence Code Section 1230 should continue to encompass a declaration against social interest. Likewise, Section 1230 should continue to require a showing that the declarant has “sufficient knowledge of the subject.”

In establishing unavailability for purposes of this provision, the proponent of the evidence should not have to show an attempt to depose the declarant. It would be unwise to adopt that federal requirement.

It would also be inadvisable to incorporate the federal corroboration requirement for a declaration against penal interest offered to exculpate the accused. The current California approach, in which case law establishes that a
declaration against penal interest is admissible only if it is “clothed with indicia
of reliability,” is preferable at the present time.

To clarify the treatment of a declaration against social interest and provide
readily accessible guidance on a declaration that combines self-serving material
with other material, the section should be amended along the following lines:

1230. Evidence of a statement by a declarant having sufficient
knowledge of the subject is not made inadmissible by the hearsay
rule if the declarant is unavailable as a witness and the statement,
when made, was so far contrary to the declarant’s pecuniary or
proprietary interest, or so far subjected him to the risk of civil or
criminal liability, or so far tended to render invalid a claim by him
against another, or created such a risk of making him an object of
hatred, ridicule, or social disgrace in the community, that a
reasonable man in his position would not have made the statement
unless he believed it to be true.

Comment. Section 1230 is amended to make clear that it
encompasses a declaration against social interest regardless of
whether a reasonable person in the declarant’s position would fear
subsequent public repetition of the revelation, or simply an
unwelcome reaction from the person to whom the statement is
addressed. For a provision that treats this point similarly, see Unif.
R. Evid. 804(3).

For guidance on applying this section to a statement that
combines self-serving or neutral material with material that
disserves the declarant’s interest, see People v. Leach, 15 Cal. 3d 419,
441, 541 P.2d 296, 124 Cal. Rptr. 752 (1975) (Section 1230 is
“inapplicable to evidence of any statement or portion of a statement
not itself specifically disserving to the interests of the declarant.”).
See also People v. Duarte, 24 Cal. 4th 603, 612, 12 P.3d 1110, 101 Cal.
Rptr. 2d 701 (2000) (same). For the leading federal decision on the
same point, see Williamson v. United States, 512 U.S. 594, 600-01
(1994) (“[T]he most faithful reading of Rule 804(b)(3) is that it does
not allow admission of non-self-inculpatory statements, even if
they are made within a broader narrative that is generally self-
inculpatory.”).

The section should also be made gender neutral.

Statement By a Minor Victim Under Age 12 Describing Child Abuse or
Neglect, Offered in a Criminal Case (Evid. Code § 1360)

Evidence Code Section 1360 should be left as is. The staff should monitor case
law construing Crawford and alert the Commission if it becomes appropriate to
revisit this issue.
Statement Describing Infliction or Threat of Physical Injury to Declarant
(Evid. Code § 1370)

Evidence Code Section 1370 should be left as is. The staff should monitor case law construing Crawford and alert the Commission if it becomes appropriate to revisit this issue.

Statement By an Elder or Dependent Adult, Offered in a Criminal Prosecution for Abuse (Evid. Code § 1380)

Evidence Code Section 1380 should be left as is. The staff should monitor case law construing Crawford and alert the Commission if it becomes appropriate to revisit this issue.

STUDY K-202 – ROLE OF JUDGE AND JURY UNDER EVIDENCE CODE

The Commission considered Memorandum 2004-55 discussing the role of the judge and jury in deciding preliminary questions on the admissibility of evidence. The Commission approved the proposed change to Evidence Code Section 1521 in concept, but instructed the staff to revise the language to conform more closely to statutory drafting standards. The staff will prepare a draft tentative recommendation reflecting that decision and prior decisions made in connection with this study.

☐ APPROVED AS SUBMITTED

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

Date

Chairperson

Executive Secretary