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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
MARCH 17-18, 2005  
SACRAMENTO

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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





1 from his law practice involving litigation over enforceability of arbitration  
2 agreements.

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

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

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

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

STUDY H-821 – MECHANICS LIEN LAW

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

24 **Contract Forms**

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

28 **Mailed Notice**

29 The draft should expand the methods of proof of service of notice beyond the  
30 return receipt or returned envelope, to include proof of mailing certified by the  
31 United States Postal Service. The draft should also expand the methods of service

1 to include delivery by a commercial delivery service, with an appropriate  
2 affidavit or other documentation of service. The draft should call attention to  
3 these changes and solicit comment on them.

4 **Notice of Nonresponsibility**

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

7 **Notice of Claim of Lien**

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

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

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

19 **Notice of Completion**

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

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

27 **Recommencement of Work after Notice of Completion**

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

1 **Waiver and Release**

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

6 **Design Professionals Lien**

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

9 STUDY H-850 – COMMON INTEREST DEVELOPMENT LAW

10 The Commission considered Memorandum 2005-3 discussing which subject  
11 area the Commission should address next in its study of common interest  
12 development law.

13 The Commission decided to work next on clarification and simplification of  
14 existing common interest development law. Minor substantive issues will be  
15 addressed as they arise in the course of the statutory revision.

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

17 The Commission considered Memorandum 2005-10 and its First and Second  
18 Supplements. The memorandum and its supplements discuss a staff draft  
19 recommendation on *State Assistance to Common Interest Developments* and describe  
20 an informational hearing on the topic that was held on March 9, 2005, by the  
21 Assembly Housing and Community Development Committee and the Assembly  
22 Business and Professions Committee.

23 The Commission approved a final recommendation based on the staff draft  
24 recommendation, subject to the following changes:

25 **Ombudsperson**

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

28 **Enforcement Powers**

29 Provisions relating to law enforcement and election supervision were deleted  
30 from the recommendation. Instead, the Ombudsperson would be required to  
31 make recommendations to the Legislature, within three years, on whether the

1 Ombudsperson’s powers should include law enforcement and supervision of  
2 elections.

3 **Fee Provisions**

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

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

9 The staff will inquire whether the per-unit fee charged to CIDs in Nevada is  
10 applied to undeveloped lots.

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

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

14 **Contracting**

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

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

19 The Commission considered the First Supplement to Memorandum 2005-9,  
20 discussing Senate Bill 853 (Kehoe). That bill would implement the Commission’s  
21 recommendation on *Preemption of CID Architectural Restrictions* (November 2004).

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

24 (b) Nothing in this section authorizes a physical change to the  
25 common area in a manner that is inconsistent with an association’s  
26 governing documents ~~or governing~~ unless the change is required  
27 by law.

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

28 The Commission considered Memorandum 2005-11 and material distributed  
29 at the meeting (attached to the First Supplement to Memorandum 2005-11),  
30 relating to equitable relief in a limited civil case. The Commission directed the

1 staff to convert the memorandum into a tentative recommendation and circulate  
2 it for comment.

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

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

13 **STUDY K-201 – HEARSAY ISSUES UNDER EVIDENCE CODE**

14 The Commission considered Memorandum 2004-45 and Memorandum 2005-  
15 6, concerning the hearsay rule and its exceptions. The Commission made the  
16 following decisions for purposes of a tentative recommendation:

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

18 *Definition of “Former Testimony”*

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

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

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

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

31 The hearsay rule exceptions for former testimony should be amended to  
32 require that when former testimony is offered against a person (or the successor



1 in interest of a person) who previously proffered the evidence, the former  
2 testimony is admissible only if the person had a similar interest and motive to  
3 examine the declarant on the former occasion as in the present case. The staff  
4 should explore how the Truth-in-Evidence provision (Cal. Const. art. I, § 28(d))  
5 would apply to this reform.

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

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

13 The hearsay rule exceptions for former testimony should also be amended to  
14 codify *People v. Coleman*, 13 Cal. 3d 867, 899, 533 P.2d 1024, 120 Cal. Rptr. 384  
15 (1975), which establishes that the testimony of a probationer at a probation  
16 revocation hearing is inadmissible if offered at a subsequent criminal trial against  
17 the probationer based on the same event and the probationer objects.

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

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

28 *Application to a Criminal Case*

29 The successor in interest clause of Section 1291(a)(1) should not be revised at  
30 this time to reflect the limitations of *Crawford v. Washington* \_\_ U.S. \_\_, 124 S.Ct.  
31 1354 (2004).

32 *Objections*

33 The guidance in Evidence Code Sections 1291(b)(1) and 1292(b) regarding  
34 objections based on competence or privilege should be retained.

1 The rule stated in Evidence Code Section 1291(b)(1) should be made  
2 inapplicable to a successor in interest.

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

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

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

12 Evidence Code Section 1294 should be left as is.

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

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

17  
18 1351. Evidence of a statement is not made inadmissible by the  
19 hearsay rule if both of the following conditions are satisfied:

20 (a) The declarant is unavailable as a witness.

21 (b) The statement is offered against a party in a civil action  
22 when that party has engaged or acquiesced in wrongdoing that was  
23 intended to, and did, procure the unavailability of the declarant as  
24 a witness.

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

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

33 It does not appear advisable to attempt to draft a provision similar to Section  
34 1350 that would apply to the prosecution in a criminal case.

1 **Statement By a Dead Declarant That is Relevant to a Gang-Related Prosecution**  
2 **(Evid. Code §§ 1231-1231.4)**

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

6 **Dying Declaration (Evid. Code § 1242)**

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

12 Section 1242 should be amended to make clear that it applies even if the  
13 declarant unexpectedly survives, so long as the declarant made the statement  
14 under a sense of immediately impending death. The provision should also be  
15 amended to require that the declarant be unavailable. In establishing  
16 unavailability, the proponent of the evidence should not have to show an attempt  
17 to depose the declarant. That federal requirement is not good policy. The staff  
18 should further explore how the Truth-in-Evidence provision (Cal. Const. art. I, §  
19 28(d)) would apply to these proposed revisions.

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

24 **Declaration Against Interest (Evid. Code § 1230)**

25 Unlike the corresponding federal rule, Evidence Code Section 1230 should  
26 continue to encompass a declaration against social interest. Likewise, Section  
27 1230 should continue to require a showing that the declarant has "sufficient  
28 knowledge of the subject."

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

32 It would also be inadvisable to incorporate the federal corroboration  
33 requirement for a declaration against penal interest offered to exculpate the  
34 accused. The current California approach, in which case law establishes that a

1 declaration against penal interest is admissible only if it is “clothed with indicia  
2 of reliability,” is preferable at the present time.

3 To clarify the treatment of a declaration against social interest and provide  
4 readily accessible guidance on a declaration that combines self-serving material  
5 with other material, the section should be amended along the following lines:  
6

7 1230. Evidence of a statement by a declarant having sufficient  
8 knowledge of the subject is not made inadmissible by the hearsay  
9 rule if the declarant is unavailable as a witness and the statement,  
10 when made, was so far contrary to the declarant’s pecuniary or  
11 proprietary interest, or so far subjected him to the risk of civil or  
12 criminal liability, or so far tended to render invalid a claim by him  
13 against another, or created such a risk of making him an object of  
14 hatred, ridicule, or social disgrace ~~in the community~~, that a  
15 reasonable man in his position would not have made the statement  
16 unless he believed it to be true.

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

24 For guidance on applying this section to a statement that  
25 combines self-serving or neutral material with material that  
26 disserves the declarant’s interest, see *People v. Leach*, 15 Cal. 3d 419,  
27 441, 541 P.2d 296, 124 Cal. Rptr. 752 (1975) (Section 1230 is  
28 “inapplicable to evidence of any statement or portion of a statement  
29 not itself specifically disserving to the interests of the declarant.”).  
30 See also *People v. Duarte*, 24 Cal. 4th 603, 612, 12 P.3d 1110, 101 Cal.  
31 Rptr. 2d 701 (2000) (same). For the leading federal decision on the  
32 same point, see *Williamson v. United States*, 512 U.S. 594, 600-01  
33 (1994) (“[T]he most faithful reading of Rule 804(b)(3) is that it does  
34 not allow admission of non-self-inculpatory statements, even if  
35 they are made within a broader narrative that is generally self-  
36 inculpatory.”).

37 The section should also be made gender neutral.

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

40 Evidence Code Section 1360 should be left as is. The staff should monitor case  
41 law construing *Crawford* and alert the Commission if it becomes appropriate to  
42 revisit this issue.

1 **Statement Describing Infliction or Threat of Physical Injury to Declarant**  
2 **(Evid. Code § 1370)**

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

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

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

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

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

APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

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