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

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 A written communication to the Commission that is relevant to
2 matters currently under consideration may be attached as an
3 exhibit to a staff memorandum. A communication that is off-topic,
4 defamatory, obscene, invasive of personal privacy or
5 confidentiality, or that is otherwise inappropriate for republication
6 will not be reproduced as an exhibit unless it is redacted to
7 eliminate the inappropriate material. Any redaction shall be clearly
8 indicated. A communication that is not reproduced as an exhibit
9 may be summarized in a staff memorandum.

10 **Report of Executive Secretary**

11 *Commission Membership*

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

14 *New Topics*

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

LEGISLATIVE PROGRAM

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

23 STUDY A-100 – CONTRACTUAL ARBITRATION IMPROVEMENTS

24 FROM OTHER JURISDICTIONS

25 The Commission considered Memorandum 2005-13, concerning Prof.
26 Alford's background study on contractual arbitration and the comments on that
27 background study. Prof. Alford presented his background study to the
28 Commission. David DeRubertis of the California Employment Lawyers
29 Association, Donne Brownsey of the California Dispute Resolution Council, and
30 Steve Ingram of the Consumer Attorneys of California participated in the
31 discussion. Commissioner Kaplan recused himself from participating in the
32 discussion and voting on this matter due to a potential conflict of interest arising

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