
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 26, 2007
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on October 26, 2007.

Commission:

Present: Pamela L. Hemminger, Vice Chairperson
Frank Kaplan
Susan Duncan Lee
Edmund L. Regalia
William E. Weinberger

Absent: Sidney Greathouse, Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Ellen Corbett, Senate Member
Noreen Evans, Assembly Member
David Huebner

Staff: Brian Hebert, Executive Secretary
Barbara S. Gaal, Chief Deputy Counsel
Catherine Bidart, Staff Counsel
Steve Cohen, Staff Counsel

Consultants: Prof. Miguel Méndez

Other Persons:

Charles Collier, Jr., Los Angeles
Frank Collard, Southern California Rock Products Association (CalcIMA)
Ken Grossbart, Abdulaziz, Grossbart & Rudman
Neil I. Horton, State Bar Trusts and Estates Section
Betty Melton, Roseville
David K. Milton, California Association of Realtors
David Nelson, Loeb & Loeb
Charles Philipps, Association of California Surety Companies
J. David Sackman, California State Council of Laborers
Bob Sheppard, Walnut House Cooperative, Berkeley
Maureen R. Siegel, Los Angeles City Attorney's Office
Norm Widman, Lumber Association of California and Nevada

CONTENTS

Minutes of October 26, 2007, Commission Meeting	2
Administrative Matters.....	2
Legislative Program.....	2
Study H-821 — Mechanics Lien Law	2
Study H-855 — Statutory Clarification and Simplification of CID Law	4
Study J-111 — Statute of Limitations for Legal Malpractice.....	4
Study K-600 — Miscellaneous Hearsay Exceptions	4
Study L-637 — Revision of No Contest Clause Statute	7

1 MINUTES OF OCTOBER 26, 2007, COMMISSION MEETING

2 The Commission approved the Minutes of the October 26, 2007, Commission
3 meeting as submitted by the staff.

4 ADMINISTRATIVE MATTERS

5 **Schedule of Future Meetings**

6 The Commission considered Memorandum 2007-36, discussing the schedule
7 of future meetings. The Commission changed the date of the August 21, 2008,
8 meeting to August 15, 2008.

9 **Annual Report**

10 The Commission considered Memorandum 2007-37, presenting a staff draft
11 of the 2007-2008 Annual Report. The Commission approved the draft, subject to
12 the correction of a typographical error on page 11.

13 LEGISLATIVE PROGRAM

14 The Commission considered Memorandum 2007-39, providing a final report
15 on the Commission’s 2007 legislative program. The Commission approved the
16 revision of two Comments, as recommended in the memorandum, to reflect
17 amendments to AB 310 (Silva).

18 STUDY H-821 — MECHANICS LIEN LAW

19 The Commission considered Memorandum 2007-45 and its First, Second,
20 Third, and Fourth Supplements, concerning the tentative recommendation on
21 *Mechanics Lien Law* (June 2006). The Commission adopted the staff
22 recommendations made in those materials, subject to the following decisions:

1 **Stop Payment Notice as Exclusive Remedy**

2 The Commission revised the Comment to Public Contract Code Section 44110
3 as follows:

4 **Comment.** Section 44110 restates former Civil Code Section
5 3264 to the extent it applied to a public works contract. See Section
6 42010 (application of part). For a comparable provision applicable
7 to a private work, see Civ. Code § 7500.

8 There may be specific statutory provisions that authorize
9 payment by a public entity from a fund designated for a public
10 work, notwithstanding the provisions of Section 44110. See, e.g.,
11 Code Civ. Proc. § 708.760 (satisfaction of judgment against direct
12 contractor on public work), Labor Code § 1727 (public entity to
13 withhold amounts needed to satisfy prevailing wage violations
14 from funds due direct contractor on public work). This section is
15 not intended to change existing law with respect to such
16 provisions.

17 See also Sections 41060 (“funds” defined), 41100 (“person”
18 defined), 41170 (“work” defined).

19 **Time for Giving of Stop Payment Notice**

20 The Commission revised Public Contract Code Section 44140 as follows:

21 44140. A stop payment notice is not effective unless given
22 ~~within 30 days after recordation of a notice of completion or, if a~~
23 ~~notice of completion is not recorded, within 90 days after~~
24 ~~completion before the earlier of the following times:~~

25 (a) Ninety days after cessation or completion.

26 (b) Thirty days after recordation of a notice of cessation or
27 completion.

28 **Withholding by Public Entity After Receiving Stop Payment Notice**

29 The Commission decided not to revise proposed Public Contract Code
30 Sections 44150 or 44160.

31 **Public Entity Duty to Notify Stop Payment Notice Claimant**

32 The Commission directed the staff to revise proposed Public Contract Code
33 Section 44170 along the following lines:

34 44170. (a) Not later than 10 days after ~~completion of a public~~
35 ~~works contract~~ each of the following events, the public entity shall
36 give notice to each claimant that has given a stop payment notice of
37 the time within which payment of the claim stated in a stop
38 payment notice must be enforced:

1 (1) Completion of a public works contract, whether by
2 acceptance or cessation.

3 (2) Recordation of a notice of cessation or completion.

4 (b)

5 **Stop Payment Notice Release Bond**

6 The Commission decided not to revise proposed Public Contract Code
7 Section 44180.

8 **Statute of Limitation on Payment Bond Claim**

9 The Commission decided not to revise the limitation period specified in
10 proposed Public Contract Code Section 45050.

11 STUDY H-855 — STATUTORY CLARIFICATION AND
12 SIMPLIFICATION OF CID LAW

13 The Commission considered Memorandum 2007-47 and pages 1 to 26 of its
14 First Supplement, discussing public comments on the tentative recommendation
15 on *Statutory Clarification and Simplification of CID Law* (June 2007).

16 The Commission approved the staff recommendations made in those
17 materials. The Commission also directed the staff to revise the Comment to
18 proposed Civil Code Section 4160 to provide an example of how a person other
19 than an owner of a separate interest could be a member of an association.

20 STUDY J-111 — STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

21 The Commission considered Memorandum 2007-38, noting an objection by
22 Rodney Pinks, that he had not made a comment attributed to him in a prior
23 memorandum. No action was required or taken.

24 STUDY K-600 — MISCELLANEOUS HEARSAY EXCEPTIONS

25 **Present Sense Impressions**

26 The Commission considered Memorandum 2007-40 and its First Supplement,
27 relating to present sense impressions. The Commission approved the draft
28 attached to the supplement as a tentative recommendation to be circulated for
29 comment.

1 **Forfeiture by Wrongdoing**

2 The Commission considered Memorandum 2007-41 and its First, Second, and
3 Third Supplements, relating to forfeiture by wrongdoing as an exception to the
4 hearsay rule.

5 The Commission discussed its role in conducting this study. The Commission
6 decided to follow its normal approach of studying the area of law in question
7 and developing proposed legislation to effectively address that area. The
8 Commission will not take a position on any pending legislation. That is the
9 Commission's longstanding practice; it is the role contemplated in and required
10 by the statute governing the Commission (Gov't Code §§ 8280-8298).

11 The Commission discussed the draft attached to the Second Supplement to
12 Memorandum 2007-41. Subject to the following revisions, the Commission
13 approved the draft as a tentative recommendation to be circulated for comment:

14 *Note on Forfeiture by Wrongdoing*

15 The Note on page 36, at lines 21-35, of the draft attached to the Second
16 Supplement to Memorandum 2007-41, should be revised along the following
17 lines:

18 **Note.** Possible approaches to forfeiture by wrongdoing
19 include:

20 **Option #1.** Repeal California's existing provision on forfeiture
21 by wrongdoing and replace it with a provision that tracks the
22 constitutional minimum. For example, see the draft provision in
23 footnote 144 *supra*, which would attempt to codify *People v. Giles*, 40
24 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *petition for*
25 *cert. filed*, U.S.L.W. (U.S. Aug. 20, 2007) (No. 07-6053).

26 **Option #2.** Replace the existing provision with one similar to
27 the federal rule.

28 **Option #3.** Broaden the existing provision to a limited extent,
29 with the possibility of further revisions later.

30 **Option #4.** Leave the law alone until there is further judicial
31 guidance.

32 The first approach is inadvisable because the United States
33 Supreme Court has not yet given guidance on key aspects of the
34 constitutional minimum. The Law Revision Commission has
35 tentatively concluded that the other options are reasonable
36 possibilities. It solicits comment on which of these approaches is
37 preferable.

38 Options #2 and #3 are shown below; no legislation on forfeiture
39 by wrongdoing would be necessary under Option #4. The
40 Commission solicits comment on each of these alternatives. The
41 Commission also welcomes any other suggestions or comments
42 relating to forfeiture by wrongdoing.

1 *Option #3. Broaden Evidence Code Section 1350 to a Limited Extent, with the*
2 *Possibility of Further Revisions Later*

3 In Option #3, the amendment of Evidence Code Section 1350 should be
4 revised as shown in boldface below:

5 1350. (a)

6 ~~(6) The statement~~ **(5) If the statement is offered against the**
7 **defendant in a criminal case, it is corroborated by other evidence**
8 **which that tends to connect the party against whom the statement**
9 **is offered with the commission of the serious felony offense with**
10 **which the party is charged. The**

11 **The** corroborator is not sufficient if it merely shows the
12 commission of the offense or the circumstances thereof.

13

14 *The Definition of Unavailability*

15 The amendment of Evidence Code Section 240 should be revised to read:

16 240. (a) Except as otherwise provided in subdivision (b),
17 “unavailable as a witness” means that the declarant is any of the
18 following:

19 (1) Exempted or precluded on the ground of privilege from
20 testifying concerning the matter to which his or her statement is
21 relevant.

22 (2) Disqualified from testifying to the matter.

23 (3) Dead or unable to attend or to testify at the hearing because
24 of then existing physical or mental illness or infirmity.

25 (4) Absent from the hearing and the court is unable to compel
26 his or her attendance by its process.

27 (5) Absent from the hearing and the proponent of his or her
28 statement has exercised reasonable diligence but has been unable to
29 procure his or her attendance by the court’s process.

30 (6) Present at the hearing but persists in refusing to testify
31 concerning the subject matter of the declarant’s statement despite
32 an order of the court to do so.

33 (7) Present at the hearing but lacks memory of the subject matter
34 of the declarant’s statement.

35 (b) A declarant is not unavailable as a witness if the ~~exemption,~~
36 ~~preclusion, disqualification, death, inability, or absence of the~~
37 ~~declarant~~ circumstance described in subdivision (a) was brought
38 about by the procurement or wrongdoing of the proponent of ~~his or~~
39 ~~her~~ the declarant’s statement for the purpose of preventing the
40 declarant from attending or testifying.

41 (c) Expert testimony which establishes that physical or mental
42 trauma resulting from an alleged crime has caused harm to a
43 witness of sufficient severity that the witness is physically unable to
44 testify or is unable to testify without suffering substantial trauma

1 may constitute a sufficient showing of unavailability pursuant to
2 ~~paragraph (3) of subdivision (a)~~. As used in this section, the term
3 "expert" means a physician and surgeon, including a psychiatrist,
4 or any person described by subdivision (b), (c), or (e) of Section
5 1010.

6 The introduction of evidence to establish the unavailability of a
7 witness under this subdivision shall not be deemed procurement of
8 unavailability, in absence of proof to the contrary.

9 STUDY L-637 — REVISION OF NO CONTEST CLAUSE STATUTE

10 The Commission considered Memorandum 2007-44 and its First, Second, and
11 Third Supplements, relating to revision of the no contest clause statute.

12 The Commission directed the staff to prepare a draft of a final
13 recommendation for review at a future meeting. The draft should (1) limit the
14 enforcement of a no contest clause to a direct contest, creditor claim, or property
15 ownership dispute, and (2) preserve the existing declaratory relief procedure, but
16 only for the purposes of determining whether a no contest clause would be
17 enforced against a creditor claim or property ownership dispute. The provisions
18 relating to a creditor claim or property ownership dispute would be drafted
19 using language from existing Probate Code Section 21305(a).

20 The Commission invited interested persons to suggest noncontroversial
21 improvements to the language drawn from existing Probate Code Section
22 21305(a).

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary