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

**Administrative Matters**

**Schedule of Future Meetings**


**Annual Report**

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

**Legislative Program**

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

**Study H-821 — Mechanics Lien Law**

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

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

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

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

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

Time for Giving of Stop Payment Notice

The Commission revised Public Contract Code Section 44140 as follows:

44140. A stop payment notice is not effective unless given within 30 days after recordation of a notice of completion or, if a notice of completion is not recorded, within 90 days after completion of a public works contract. The public entity shall give notice to each claimant that has given a stop payment notice of the time within which payment of the claim stated in a stop payment notice must be enforced:

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

Withholding by Public Entity After Receiving Stop Payment Notice

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

Public Entity Duty to Notify Stop Payment Notice Claimant

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

44170. (a) Not later than 10 days after completion of a public works contract each of the following events, the public entity shall give notice to each claimant that has given a stop payment notice of the time within which payment of the claim stated in a stop payment notice must be enforced:
(1) Completion of a public works contract, whether by acceptance or cessation.
(2) Recordation of a notice of cessation or completion.

Stop Payment Notice Release Bond

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

Statute of Limitation on Payment Bond Claim

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

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

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

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

STUDY J-111 — STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

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

STUDY K-600 — MISCELLANEOUS HEARSAY EXCEPTIONS

Present Sense Impressions

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

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

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

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

Note on Forfeiture by Wrongdoing

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

☞ Note. Possible approaches to forfeiture by wrongdoing include:

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

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

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

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

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

Options #2 and #3 are shown below; no legislation on forfeiture by wrongdoing would be necessary under Option #4. The Commission solicits comment on each of these alternatives. The Commission also welcomes any other suggestions or comments relating to forfeiture by wrongdoing.
Option #3. Broaden Evidence Code Section 1350 to a Limited Extent, with the Possibility of Further Revisions Later

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

1350. (a) ....
(6) The statement (5) If the statement is offered against the defendant in a criminal case, it is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony offense with which the party is charged. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The Definition of Unavailability

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

240. (a) Except as otherwise provided in subdivision (b), “unavailable as a witness” means that the declarant is any of the following:
(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
(2) Disqualified from testifying to the matter.
(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.
(6) Present at the hearing but persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.
(7) Present at the hearing but lacks memory of the subject matter of the declarant’s statement.
(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant circumstance described in subdivision (a) was brought about by the procurement or wrongdoing of the proponent of his or her the declarant’s statement for the purpose of preventing the declarant from attending or testifying.
(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma
may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

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

STUDY L-637 — REVISION OF NO CONTEST CLAUSE STATUTE

The Commission considered Memorandum 2007-44 and its First, Second, and Third Supplements, relating to revision of the no contest clause statute. The Commission directed the staff to prepare a draft of a final recommendation for review at a future meeting. The draft should (1) limit the enforcement of a no contest clause to a direct contest, creditor claim, or property ownership dispute, and (2) preserve the existing declaratory relief procedure, but only for the purposes of determining whether a no contest clause would be enforced against a creditor claim or property ownership dispute. The provisions relating to a creditor claim or property ownership dispute would be drafted using language from existing Probate Code Section 21305(a).

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

☐ APPROVED AS SUBMITTED

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