
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 13-14, 2007
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on December 13-14, 2007.

Commission:

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

Absent: Ellen Corbett, Senate Member
Noreen Evans, Assembly Member
Susan Duncan Lee

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

Consultants: None

Other Persons:

Karen D. Conlon, California Association of Community Managers
Patrick DeBlase, National Conference of Commissioners on Uniform State Laws
Thomas Heeter, Corning
Neil I. Horton, State Bar Trusts and Estates Section
Tony Klein, Process Server Institute
Ronald B. Miller, M.D., University of California Irvine and Southern California
Bioethics Committee Consortium
Dick Nash, Building Industry Credit Association
David Nelson, Loeb & Loeb
Joanne Perkins, Riverside
Charles Philipps, Association of California Surety Companies
Dick Preuss, Community Associations Institute, Greater Los Angeles Chapter
J. David Sackman, California State Council of Laborers

Eve Sheedy, Los Angeles City Attorney's Office
Bob Sheppard, Walnut House Cooperative

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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 2007-46, discussing the schedule
7 of future meetings. The Commission changed the time of the January 17, 2008,
8 meeting. The meeting will begin at 10:00 a.m. and end at 4:00 p.m.

9 **New Topics and Priorities**

10 The Commission considered Memorandum 2007-48 and its First Supplement,
11 relating to new topics and priorities. The Commission also considered material
12 distributed at the meeting by Dr. Ronald Miller (University of California, Irvine),
13 which is attached to the Second Supplement.

14 Dr. Miller spoke about Physician Orders for Life-Sustaining Treatment
15 (“POLST”) and Thomas Heeter spoke about court reporting in a misdemeanor
16 case.

1 The Commission decided to adhere to its traditional scheme of priorities in
2 the coming year:

- 3 (1) Matters for the next legislative session.
- 4 (2) Matters directed by the Legislature.
- 5 (3) Matters for which the Commission has an expert consultant.
- 6 (4) Other matters that have been previously activated but not
7 completed.

8 These matters are listed at pages 33-35 of Memorandum 2007-48.

9 The Commission decided not to undertake any new projects this year, except
10 for the two new projects assigned by the Legislature (the study of certain hearsay
11 exceptions and the study of the attorney-client privilege after the client's death),
12 and perhaps, if time permits, the narrow project on licensing a nonresident as a
13 life insurance analyst. Next fall, the Commission will reconsider the possibility of
14 studying the following topics:

- 15 • Foreclosure.
- 16 • Duties where settlor of revocable trust is incompetent.
- 17 • Renewal of judgment.
- 18 • Litigation deadlines.
- 19 • Electronic transmission of instructions to sheriff or marshal.
- 20 • POLST.
- 21 • Use of TOD deed by owner of stock cooperative (if the
22 Commission's TOD recommendation is enacted).
- 23 • Scheduling of an administrative hearing.
- 24 • Court reporting in a misdemeanor case.

25 The Commission discussed the possibility of having its former Executive
26 Secretary, Nathaniel Sterling, prepare a background study on creditors' rights
27 against nonprobate assets and application of family protection provisions to
28 nonprobate transfers. The staff informed the Commission that Mr. Sterling had
29 offered to prepare such a background study on a volunteer basis. The
30 Commission enthusiastically accepted that offer, noting that it was likely to
31 receive high quality work from Mr. Sterling.

32 The Commission also directed the staff to check the status of background
33 studies that have been commenced but not yet completed.

34 No changes to the Commission's Calendar of Topics are necessary to reflect
35 these decisions.

1 **Report of Executive Secretary**

2 The Executive Secretary reported that Commissioners Sidney Greathouse,
3 Pamela Hemminger, and Susan Duncan Lee were appointed by the Governor to
4 new terms.

5 The Executive Secretary also reported a proposal to create a private nonprofit
6 entity to provide support for the Commission's work. The Executive Secretary
7 will investigate whether there are any legal or administrative obstacles to such an
8 arrangement.

9 The Executive Secretary expressed his appreciation to the Commission and its
10 staff for the considerable amount of work involved in preparing and reviewing
11 the materials for the December 2008 meeting.

12 LEGISLATIVE PROGRAM

13 The Commission considered Memorandum 2007-60, discussing Assembly Bill
14 250 (DeVore), which would implement the Commission's recommendation on
15 *Revocable Transfer on Death (TOD) Deeds*, 36 Cal. L. Revision Comm'n 103 (2006).
16 The memorandum described a number of possible changes to the proposed law,
17 which might address legislative concerns about AB 250.

18 The Commission concluded that the changes described in the memorandum
19 would not be fundamentally incompatible with its recommendation. However,
20 the Commission indicated that it would disfavor limiting the scope of application
21 of the proposed law so as to make it a pilot project. The Commission also
22 objected to the "two-step transfer" terminology proposed to describe the creation
23 of a life estate. Standard legal terminology should be used to describe a life estate
24 and remainder interest, so as to avoid any question as to the legal effect of the
25 TOD deed.

26 Finally, the Commission suggested that the proposed law include a provision
27 requiring that the Judicial Council provide information about use of the TOD
28 deed on its self-help Internet website. The statutory form would direct readers to
29 the website.

30 STUDY H-821 — MECHANICS LIEN LAW

31 The Commission considered Memorandum 2007-57 and its First Supplement
32 concerning the tentative recommendation on *Mechanics Lien Law* (June 2006), and
33 Memorandum 2007-58, presenting a staff draft of proposed legislation. The

1 Commission adopted the staff recommendations made in those materials, subject
2 to the following decisions:

3 **Work Performed After “Completion” of a Work of Improvement**

4 The Commission decided not to extend the time to pursue a mechanics lien,
5 stop payment notice, or payment bond remedy for a claimant that provides work
6 after “completion” of a work of improvement.

7 **Content of Preliminary Notice**

8 The Commission revised proposed Civil Code Section 7204 as follows:

9 7204. (a) ~~In addition to~~ The preliminary notice shall comply
10 with the requirements of Section 7102, and shall also include:

11 (1) A general description of the work to be provided.

12 (2) An estimate of the total price of the work provided and to be
13 provided.

14 ~~(3) The preliminary notice shall include the following statement~~
15 ~~in boldface type:~~

16 **Appeal of Order Releasing Lien Claim**

17 The Commission added the following language to the Comment to proposed
18 Civil Code Section 7490:

19 Subdivision (c) is new. It is intended to allow a losing claimant
20 time to seek appellate review and a stay of the court order or
21 judgment. See California Rules of Court 8.112, 8.116 (request for
22 stay). This provision does not affect the time period for seeking
23 appellate review of the order or judgment.

24 **Content of Stop Payment Notice**

25 The Commission revised proposed Civil Code Section 7502 and proposed
26 Public Contract Code Section 44120 as follows:

27 7502. (a) A stop payment notice shall comply with the
28 requirements of Section 7102, and shall be signed and verified by
29 the claimant.

30 (b) The notice shall include a general description of work to be
31 provided, and an estimate of the total amount in value of the work
32 to be provided.

33 (c) ~~The notice~~ claimant’s demand for withholding may include
34 only be given for the amount due the claimant for work provided
35 through the date of the notice.

36

1 44120. (a) A stop payment notice shall comply with the
2 requirements of Section 42120, and shall be signed and verified by
3 the claimant.

4 (b) The notice shall include a general description of work to be
5 provided, and an estimate of the total amount in value of the work
6 to be provided.

7 The ~~notice~~ claimant's demand for withholding may include
8 only be given for the amount due the claimant for work provided
9 through the date of the notice.

10

11 **Effect of Contract Change on Payment Bond**

12 The Commission revised proposed Civil Code Section 7602 as follows:

13 7602. (a) This section applies if, before the commencement of
14 work, the owner in good faith files ~~the~~ a direct contract with the
15 county recorder, and records a payment bond of the direct
16 contractor in an amount not less than 50 percent of the ~~contract~~
17 price stated in the direct contract.

18 (b) If the conditions of subdivision (a) are satisfied, the court
19 shall, where equitable to do so, restrict lien enforcement under this
20 part to the aggregate amount due from the owner to the direct
21 contractor and shall enter judgment against the direct contractor
22 and surety on the bond for any deficiency that remains between the
23 amount due to the direct contractor and the whole amount due to
24 claimants.

25 **Notice Required Prior to Payment Bond Claim**

26 The Commission decided not to revise proposed Civil Code Sections 7206 or
27 7612, or proposed Public Contract Code Sections 43050 or 43060.

28 **Approval of Final Recommendation**

29 The Commission adopted the staff draft of the proposed legislation in CLRC
30 Memorandum 2007-58 (after incorporation of the decisions made at the
31 December 2007 meeting) as a final recommendation, subject to approval of any
32 revisions and the narrative portion of the recommendation to be presented at the
33 January 2008 meeting.

34 The Commission invites public review of the proposed legislation, and will
35 consider final revisions at the January 2008 meeting.

1 4575. ...

2 (c) A member meeting shall be held within the common interest
3 development unless the board determines that a larger meeting
4 room is required than is available within the common interest
5 development. A member meeting held outside of the common
6 interest development shall be held as close to the common interest
7 development as ~~the board, acting in good faith, determines to be~~ is
8 practicable.

9 ...

10 Executive Session

11 Proposed Civil Code Section 4540 was revised as follows:

12 4540. (a) The board may meet in executive session to consider
13 litigation, matters relating to the formation of contracts with third
14 parties, ~~an assessment dispute, or personnel matters, or to conduct~~
15 ~~a hearing pursuant to Section 5005.~~

16 (b) ~~The board shall meet in executive session to consider an~~
17 ~~assessment dispute or to conduct a hearing pursuant to Section~~
18 ~~5005, if requested to do so by the member who is the subject of the~~
19 ~~matter to be considered. Except as provided in subdivision (c), the~~
20 board may consider all of the following matters in executive
21 session:

22 (1) An assessment dispute.

23 (2) A request for a payment plan.

24 (3) A decision to foreclose on a lien.

25 (4) A hearing pursuant to Section 5005.

26 (c) ~~The board shall meet in executive session to consider a~~
27 ~~request for a payment plan made under Section 5620 or to make a~~
28 ~~decision on whether to foreclose on a lien under Section 5655. A~~
29 member who is the subject of a matter described in subdivision (b)
30 may submit a written request to the board (Section 4035) that the
31 matter be considered in an open meeting or in executive session.
32 The board shall comply with the member's request.

33 (d) Notwithstanding Section 4525, if the board meets in
34 executive session ~~to consider an assessment dispute, a request for a~~
35 ~~payment plan for overdue assessment debt, or to conduct a hearing~~
36 ~~pursuant to Section 5005, the~~ a member who is the subject of that
37 the matter under consideration may attend and speak during
38 consideration of the matter.

39 STUDY J-505 — CIVIL DISCOVERY: DEPOSITION IN 40 OUT-OF-STATE LITIGATION

41 The Commission considered Memorandum 2007-51, relating to discovery in
42 California for purposes of a proceeding pending in another jurisdiction. The

1 Commission approved the attached draft as its final recommendation, subject to
2 the following revisions (and conforming revisions of the preliminary part):

3 **Issuance of a Subpoena by the Clerk of Court**

4 Proposed Code of Civil Procedure Section 2029.300 should be revised to read:

5 2029.300. (a) To request issuance of a subpoena under this
6 section, a party shall submit the original or a true and correct copy
7 of a foreign subpoena to the clerk of the superior court in the
8 county in which discovery is sought to be conducted in this state. A
9 request for the issuance of a subpoena under this section does not
10 constitute making an appearance in the courts of this state.

11 (b) In addition to submitting a foreign subpoena under
12 subdivision (a), a party seeking discovery shall do both of the
13 following:

14 (1) Submit an application requesting that the superior court
15 issue a subpoena with the same terms as the foreign subpoena. The
16 application shall be on a form prescribed by the Judicial Council
17 pursuant to Section 2029.390. No civil case cover sheet is required.

18 (2) Pay the fee specified in Section 70626 of the Government
19 Code.

20 (c) When a party submits a foreign subpoena to the clerk of the
21 superior court in accordance with subdivision (a), and satisfies the
22 requirements of subdivision (b), the clerk shall promptly issue a
23 subpoena for service upon the person to which the foreign
24 subpoena is directed.

25 (d) A subpoena issued under this section shall satisfy all of the
26 following conditions:

27 (1) It shall incorporate the terms used in the foreign subpoena.

28 (2) It shall contain or be accompanied by the names, addresses,
29 and telephone numbers of all counsel of record in the proceeding to
30 which the subpoena relates and of any party not represented by
31 counsel.

32 (3) It shall bear the caption and case number of the out-of-state
33 case to which it relates.

34 (4) It shall state the name of the court that issues it.

35 (5) It shall be on a form prescribed by the Judicial Council
36 pursuant to Section 2029.390.

37 **Comment.** Section 2029.300 is added to clarify the procedure for
38 obtaining a California subpoena to obtain discovery from a witness
39 in this state for use in a proceeding pending in another United
40 States jurisdiction. For the benefit of the party seeking the subpoena
41 and the court issuing it, the procedure is designed to be simple and
42 expeditious.

43 Subdivisions (a), (c), and (d)(1)-(2) are similar to Section 3 of the
44 Uniform Interstate Depositions and Discovery Act (2007).
45 Subdivisions (b) and (d)(3)-(5) address additional procedural
46 details.

1 To obtain a subpoena under this section, a party must submit
2 the original or a true and correct copy of a “foreign subpoena.” For
3 definitions of “foreign subpoena” and “subpoena,” see Section
4 2029.200 (definitions). The definition of “subpoena” is broad,
5 encompassing not only a document denominated a “subpoena,”
6 but also a mandate, writ, letters rogatory, letter of request,
7 commission, or other court document that requires a person to
8 testify at a deposition, produce documents or other items, or permit
9 inspection of property.

10 Subdivision (a) makes clear that requesting and obtaining a
11 subpoena under this section does not constitute making an
12 appearance in the California courts. For further guidance on
13 avoiding unauthorized practice of law, see Bus. & Prof. Code
14 § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court
15 Multijurisdictional Practice Implementation Committee: Final
16 Report and Proposed Rules (March 10, 2004); California Supreme
17 Court Advisory Task Force on Multijurisdictional Practice, Final
18 Report and Recommendations (Jan. 7, 2002). In general, a party to
19 out-of-state litigation may take a deposition in California without
20 retaining local counsel if the party is self-represented or
21 represented by an attorney duly admitted to practice in another
22 jurisdiction of the United States. *Birbrower v. Superior Court*, 17
23 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons
24 may represent themselves and their own interests regardless of
25 State Bar membership....”); Cal. R. Ct. 9.47; Final Report and
26 Recommendations, *supra*, at 24. Different considerations may
27 apply, however, if a discovery dispute arises in connection with
28 such a deposition and a party to out-of-state litigation wants to
29 appear in a California court with respect to the dispute.

30 See also Sections 2029.350 (issuance of subpoena by local
31 counsel), 2029.640 (discovery on notice or agreement).

32 **Issuance of a Subpoena by Local Counsel**

33 Proposed Code of Civil Procedure Section 2029.350 should be revised to read:

34 2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a
35 party to a proceeding pending in a foreign jurisdiction retains an
36 attorney licensed to practice in this state, who is an active member
37 of the State Bar, and that attorney receives the original or a true and
38 correct copy of a foreign subpoena, the attorney may issue a
39 subpoena under this article.

40 (b) A subpoena issued under this section shall satisfy all of the
41 following conditions:

42 (1) It shall incorporate the terms used in the foreign subpoena.

43 (2) It shall contain or be accompanied by the names, addresses,
44 and telephone numbers of all counsel of record in the proceeding to
45 which the subpoena relates and of any party not represented by
46 counsel.

1 (3) It shall bear the caption and case number of the out-of-state
2 case to which it relates.

3 (4) It shall state the name of the superior court of the county in
4 which the discovery is to be conducted.

5 (5) It shall be on a form prescribed by the Judicial Council
6 pursuant to Section 2029.390.

7 **Comment.** Section 2029.350 is added to make clear that if certain
8 conditions are satisfied, local counsel may issue process compelling
9 a California witness to appear at a deposition for an action pending
10 in another jurisdiction.

11 To issue a subpoena under this section, a California attorney
12 acting as local counsel must receive the original or a true and
13 correct copy of a "foreign subpoena." For definitions of "foreign
14 subpoena" and "subpoena," see Section 2029.200 (definitions). The
15 definition of "subpoena" is broad, encompassing not only a
16 document denominated a "subpoena," but also a mandate, writ,
17 letters rogatory, letter of request, commission, or other court
18 document that requires a person to testify at a deposition, produce
19 documents or other items, or permit inspection of property.

20 This section does not make retention of local counsel
21 mandatory. For guidance on that point, see Section 2029.300(a);
22 Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the
23 California Supreme Court Multijurisdictional Practice
24 Implementation Committee: Final Report and Proposed Rules
25 (March 10, 2004); California Supreme Court Advisory Task Force
26 on Multijurisdictional Practice, Final Report and Recommendations
27 (Jan. 7, 2002). In general, a party to out-of-state litigation may take a
28 deposition in California without retaining local counsel if the party
29 is self-represented or represented by an attorney duly admitted to
30 practice in another jurisdiction of the United States. *Birbrower v.*
31 *Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1
32 (1998) ("[P]ersons may represent themselves and their own
33 interests regardless of State Bar membership...."); Cal. R. Ct. 9.47;
34 Final Report and Recommendations, *supra*, at 24. Different
35 considerations may apply, however, if a discovery dispute arises in
36 connection with such a deposition and a party to out-of-state
37 litigation wants to appear in a California court with respect to the
38 dispute.

39 See also Sections 2029.300 (issuance of subpoena by clerk of
40 court), 2029.640 (discovery on notice or agreement).

41 **Judicial Council Forms**

42 Proposed Code of Civil Procedure Section 2029.390(a) would require the
43 Judicial Council to prepare an application form. That form should make clear
44 that any document from an out-of-state court requiring discovery is sufficient,

1 even if the document is not labeled as a subpoena. The preliminary part should
2 be revised to mention this point.

3 **Discovery Dispute**

4 Proposed Code of Civil Procedure Section 2029.600 should be revised to read:

5 2029.600. (a) If a dispute arises relating to discovery under this
6 article, any request for a protective order or to enforce, quash, or
7 modify a subpoena, or for other relief may be filed in the superior
8 court in the county in which discovery is to be conducted and, if so
9 filed, shall comply with the applicable rules or statutes of this state.

10 (b) A request for relief pursuant to this section shall be referred
11 to as a petition notwithstanding any statute under which a request
12 for the same relief would be referred to as a motion or by another
13 term if it was brought in a proceeding pending in this state.

14 (c) A petition for relief pursuant to this section shall be
15 accompanied by a civil case cover sheet.

16 **Comment.** Section 2029.600 is similar to Section 6 of the
17 Uniform Interstate Depositions and Discovery Act (2007). It serves
18 to clarify the procedure for using a California court to resolve a
19 dispute relating to discovery conducted in this state for purposes of
20 a proceeding pending in another jurisdiction.

21 The objective of subdivision (a) is to ensure that if a dispute
22 arises relating to discovery under this article, California is able to
23 protect its policy interests and the interests of persons located in the
24 state. In particular, the state must be able to protect its residents
25 from unreasonable or unduly burdensome discovery requests. A
26 court should interpret the provision with this objective in mind.

27 Subdivision (b) makes clear that a request for relief pursuant to
28 this section is properly denominated a “petition,” not a “motion.”
29 For example, suppose a party to an out-of-state proceeding
30 subpoenas personal records of a nonparty consumer under Section
31 1985.3 and the nonparty consumer serves a written objection to
32 production as authorized by the statute. To obtain production, the
33 subpoenaing party would have to file a “petition” to enforce the
34 subpoena, not a “motion” as Section 1985.3(g) prescribes for a case
35 pending in California.

36 See also Sections 2029.610 (fees and format of papers relating to
37 discovery dispute), 2029.620 (subsequent discovery dispute in same
38 case and county), 2029.630 (hearing date and briefing schedule),
39 2029.640 (discovery on notice or agreement), 2029.650 (writ
40 petition), 2029.660 (notification of out-of-state court or California
41 court adjudicating related case).

1 **Notification of the Out-of-State Court or California Court Adjudicating**
2 **Related Case**

3 Proposed Code of Civil Procedure Section 2029.660 should be deleted. The
4 provision is not necessary because the parties are likely to alert the out-of-state
5 court or other court if a problem arises.

6 STUDY J-1403 — TRIAL COURT RESTRUCTURING: MISCELLANEOUS ISSUES

7 The Commission considered Memorandum 2007-50, discussing comments on
8 the tentative recommendation on *Statutes Made Obsolete By Trial Court*
9 *Restructuring: Part 4* (August 2007) and presenting a staff draft recommendation.
10 The Commission approved the draft as its final recommendation.

11 STUDY J-1450 — TRIAL COURT RESTRUCTURING:
12 APPELLATE JURISDICTION OF BAIL FORFEITURE

13 The Commission considered Memorandum 2007-49, discussing comments on
14 the tentative recommendation on *Trial Court Restructuring: Appellate Jurisdiction of*
15 *Bail Forfeiture* (June 2007) and presenting a staff draft recommendation. The
16 Commission approved the draft as its final recommendation.

17 STUDY K-600 — MISCELLANEOUS HEARSAY EXCEPTIONS

18 **Forfeiture by Wrongdoing**

19 The Commission considered Memorandum 2007-54 and its First Supplement,
20 relating to forfeiture by wrongdoing as an exception to the hearsay rule. Eve
21 Sheedy of the Los Angeles City Attorney's Office participated in the discussion.

22 The discussion focused primarily on Option #1, which is to replace Evidence
23 Code Section 1350 with a provision along the following lines:

24 1350. (a) Evidence of a statement made by a declarant is not
25 made inadmissible by the hearsay rule if both of the following are
26 true:

27 (1) The declarant is unavailable as a witness.

28 (2) The evidence is offered against a party whose intentional
29 criminal act caused the declarant to be unavailable to testify.

30 (b) The requirements of subdivision (a) shall be proved to the
31 court by a preponderance of the evidence.

32 (c) The court may consider the evidence of the declarant's
33 statement in determining whether the party against whom it is
34 offered engaged in an intentional criminal act that caused the

1 declarant to be unavailable as a witness. That evidence shall not be
2 the sole basis for a finding that the party against whom it is offered
3 engaged in an intentional criminal act that caused the declarant to
4 be unavailable as a witness. There shall also be some independent
5 corroborating evidence.

6 (d) The intentional criminal act that caused the declarant's
7 unavailability may be the same as an act charged against the
8 opponent of the evidence, or it may be a different act.

9 (e) If evidence is offered under this section in a jury trial, the
10 court shall determine the admissibility of the evidence outside the
11 presence of the jury. The jury shall not be informed of the court's
12 finding.

13 The Commission asked many questions about how a provision like this would
14 apply in a murder case or an abuse case, or in a case involving an alleged gang
15 member. The Commission was particularly interested in what type of
16 corroboration would be required under various circumstances. The Commission
17 was also particularly interested in whether the exception would apply in
18 virtually all murder cases and abuse cases, and if not, why not.

19 The Commission requested that the Los Angeles City Attorney's Office and
20 the California District Attorneys Association provide further information on
21 these points in writing, preferably before the Commission meets on January 17,
22 2008. Ms. Sheedy agreed to convey that request to those organizations.

23 The Commission also continues to welcome and encourage input from other
24 knowledgeable sources.

25 **Present Sense Impressions**

26 The Commission considered Memorandum 2007-53, discussing comments on
27 the tentative recommendation on present sense impressions. The staff noted that
28 Catherine Bidart helped to prepare the memorandum and her name should have
29 been included on it.

30 Based on the limited input received thus far, the Commission is inclined to:

- 31 • Proceed with the proposed reform.
- 32 • Revise the Comment to proposed Evidence Code Section 1240.5 to
33 make clear that the two main reasons for admitting a present sense
34 impression (no time for memory to fade; no time to concoct a lie)
35 are sufficient to justify the exception. If another person is at the
36 scene to check the accuracy of the present sense impression, that is
37 an additional, but not necessary, assurance of reliability. See p. 5 of
38 the memorandum.

- 1 • Make similar revisions in the preliminary part (narrative portion)
2 of the proposal.
3 • Further revise the Comment to emphasize that the phrase “or
4 immediately thereafter” is to be read narrowly. See pp. 9-10 of the
5 memorandum.

6 The staff is to make additional efforts to obtain input on the tentative
7 recommendation.

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

9 The Commission considered Memorandum 2007-52 and its First Supplement,
10 discussing a staff draft of a final recommendation on revision of the no contest
11 clause statute.

12 The Commission approved the substance of the staff draft, subject to the
13 following decisions:

14 **Protected Instrument**

15 The Commission revised proposed Probate Code Section 21310(e) as follows:

16 21310. ...

17 (e) “Protected instrument” means all of the following
18 instruments:

19 (1) The instrument that contains the no contest clause.

20 (2) An instrument that is in existence on the date that the
21 instrument containing the no contest clause is executed and is
22 expressly identified, either individually or as part of an identifiable
23 class of instruments, in the no contest clause as being governed by
24 the no contest clause.

25 **Creditor Claims**

26 The Commission directed the staff to prepare a revised draft of proposed
27 Probate Code Section 21311(c), which would provide for the enforcement of a no
28 contest clause in response to “[the] filing of a creditor’s claim or prosecution of
29 an action based on it, if the no contest clause expressly provides for that
30 application.”

31 The revised provision would differentiate between creditor claims for two
32 types of debts: (1) a debt that arises before execution of a no contest clause and is
33 specifically identified in the no contest clause as being governed by the no
34 contest clause, and (2) any other debt. There would be no restriction on the
35 enforcement of a no contest clause against a creditor claim for the first type of

1 debt. Enforcement of a no contest clause against a creditor claim for the second
2 type of debt would be subject to a probable cause exception.

3 **Property Ownership Dispute**

4 The Commission directed the staff to prepare a revised draft of proposed
5 Probate Code Section 21311(b), which would provide for the enforcement of a no
6 contest clause in response to “[a] pleading to determine whether an asset is part
7 of the transferor’s estate, if the no contest clause expressly provides for that
8 application.”

9 The revised provision would avoid use of the potentially ambiguous term
10 “estate,” instead using language along the following lines: “A pleading to
11 challenge a transfer of property on the grounds that it was not the transferor’s
12 property at the time of the transfer, if the no contest clause expressly provides for
13 that application.”

14 In addition, the Commission directed the staff to consider whether the
15 provision could be revised further, to differentiate between property ownership
16 contests that are likely to have been contemplated by the transferor in executing
17 the no contest clause and those that are not likely to have been contemplated.
18 The proposed law could perhaps provide a probable cause exception for the
19 latter.

20 **Retroactivity of Proposed Law**

21 The Commission deleted proposed Probate Code Section 21315. The staff will
22 research the scope of any constitutional limitations on the application of the
23 proposed law to instruments that are executed or become irrevocable before the
24 operative date of the proposed law.

25 **Revised Draft**

26 The staff will prepare a revised staff draft recommendation that incorporates
27 the decisions described above. The revised draft will be presented for
28 Commission review at the January 2008 meeting.

29 STUDY L-3032 — BENEFICIARY DEEDS

30 See discussion under “Legislative Program,” *supra*.

1 STUDY T-101 — TECHNICAL AND MINOR SUBSTANTIVE STATUTORY CORRECTIONS

2 The Commission considered CLRC Memorandum 2007-43 and its First and
3 Second Supplements, presenting the staff draft recommendation on *Technical and*
4 *Minor Substantive Statutory Corrections: References to Recording Technology*. The
5 Commission approved the staff draft as its final recommendation, except that the
6 proposed amendments to Penal Code Sections 1346, 1346.1, 1347, and 1347.5
7 were deleted.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary