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

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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