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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MINUTES OF OCTOBER 26, 2007, COMMISSION MEETING

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

ADMINISTRATIVE MATTERS

Schedule of Future Meetings

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

New Topics and Priorities

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

Dr. Miller spoke about Physician Orders for Life-Sustaining Treatment ("POLST") and Thomas Heeter spoke about court reporting in a misdemeanor case.
The Commission decided to adhere to its traditional scheme of priorities in the coming year:

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

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

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

- Foreclosure.
- Duties where settlor of revocable trust is incompetent.
- Renewal of judgment.
- Litigation deadlines.
- Electronic transmission of instructions to sheriff or marshal.
- POLST.
- Use of TOD deed by owner of stock cooperative (if the Commission’s TOD recommendation is enacted).
- Scheduling of an administrative hearing.
- Court reporting in a misdemeanor case.

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

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

No changes to the Commission’s Calendar of Topics are necessary to reflect these decisions.
Report of Executive Secretary

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

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

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

LEGISLATIVE PROGRAM

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

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

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

STUDY H-821 — MECHANICS LIEN LAW

The Commission considered Memorandum 2007-57 and its First Supplement concerning the tentative recommendation on Mechanics Lien Law (June 2006), and Memorandum 2007-58, presenting a staff draft of proposed legislation. The
Commission adopted the staff recommendations made in those materials, subject to the following decisions:

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

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

**Content of Preliminary Notice**

The Commission revised proposed Civil Code Section 7204 as follows:

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

1. A general description of the work to be provided.
2. An estimate of the total price of the work provided and to be provided.
3. The preliminary notice shall include the following statement in boldface type: ….

**Appeal of Order Releasing Lien Claim**

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

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

**Content of Stop Payment Notice**

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

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

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

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

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

(b) The notice shall include a general description of work to be provided, and an estimate of the total amount in value of the work to be provided. The notice claimant’s demand for withholding may include only be given for the amount due the claimant for work provided through the date of the notice.

Effect of Contract Change on Payment Bond

The Commission revised proposed Civil Code Section 7602 as follows:

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

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

Notice Required Prior to Payment Bond Claim

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

Approval of Final Recommendation

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

The Commission invites public review of the proposed legislation, and will consider final revisions at the January 2008 meeting.
STUDY H-855 — STATUTORY CLARIFICATION AND SIMPLIFICATION OF CID LAW

The Commission considered Memorandum 2007-47 and its First, Second, Third, and Fourth Supplements, discussing the Commission’s tentative recommendation on Statutory Clarification and Simplification of CID Law (June 2007) and Memorandum 2007-55 and its First and Second Supplements, presenting a staff draft recommendation for Commission review. The Commission also considered material distributed at the meeting by Joanne Perkins, which is attached to the Third Supplement to Memorandum 2007-55.

The Commission approved the staff draft recommendation attached to Memorandum 2007-55 as its final recommendation, subject to the following decisions:

Limitation of Member Rights

Proposed Civil Code Section 4420 was revised as follows:

4420. Except as expressly provided by statute, the rights of members provided in this chapter may not be limited by contract or by the governing documents. Nothing in this section precludes a member from expressly waiving an individual right provided in this chapter.

Board Meeting Notice

Proposed Civil Code Section 4520(b) was revised as follows:

4520. …
   (b) Unless the governing documents provide for a longer period of notice, the association shall deliver notice of the time and place of a board meeting at least four days before the meeting.
   …

Meeting Location

Proposed Civil Code Sections 4530 and 4575(c) were revised as follows:

4530. A board meeting shall be held within the common interest development unless the board determines that a larger meeting room is required than is available within the common interest development. A board meeting held outside of the common interest development shall be held as close to the common interest development as the board, acting in good faith, determines to be practicable.
4575. …
(c) A member meeting shall be held within the common interest
development unless the board determines that a larger meeting
room is required than is available within the common interest
development. A member meeting held outside of the common
interest development shall be held as close to the common interest
development as the board, acting in good faith, determines to be
practicable.
…

Executive Session

Proposed Civil Code Section 4540 was revised as follows:

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

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

(1) An assessment dispute.
(2) A request for a payment plan.
(3) A decision to foreclose on a lien.
(4) A hearing pursuant to Section 5005.

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

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

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

The Commission considered Memorandum 2007-51, relating to discovery in
California for purposes of a proceeding pending in another jurisdiction. The
Commission approved the attached draft as its final recommendation, subject to the following revisions (and conforming revisions of the preliminary part):

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

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

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

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

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

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

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

1. It shall incorporate the terms used in the foreign subpoena.
2. It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
3. It shall bear the caption and case number of the out-of-state case to which it relates.
4. It shall state the name of the court that issues it.
5. It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

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

Subdivisions (a), (c), and (d)(1)-(2) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions (b) and (d)(3)-(5) address additional procedural details.
To obtain a subpoena under this section, a party must submit the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

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

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

**Issuance of a Subpoena by Local Counsel**

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

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

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

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

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
(3) It shall bear the caption and case number of the out-of-state case to which it relates.

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

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

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

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

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

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

**Judicial Council Forms**

Proposed Code of Civil Procedure Section 2029.390(a) would require the Judicial Council to prepare an application form. That form should make clear that any document from an out-of-state court requiring discovery is sufficient,
even if the document is not labeled as a subpoena. The preliminary part should be revised to mention this point.

**Discovery Dispute**

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

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

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

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

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

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

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

See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition), 2029.660 (notification of out-of-state court or California court adjudicating related case).
Notification of the Out-of-State Court or California Court Adjudicating Related Case

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

STUDY J-1403 — TRIAL COURT RESTRUCTURING: MISCELLANEOUS ISSUES

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

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

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

STUDY K-600 — MISCELLANEOUS HEARSAY EXCEPTIONS

Forfeiture by Wrongdoing

The Commission considered Memorandum 2007-54 and its First Supplement, relating to forfeiture by wrongdoing as an exception to the hearsay rule. Eve Sheedy of the Los Angeles City Attorney’s Office participated in the discussion. The discussion focused primarily on Option #1, which is to replace Evidence Code Section 1350 with a provision along the following lines:

1350. (a) Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:
   (1) The declarant is unavailable as a witness.
   (2) The evidence is offered against a party whose intentional criminal act caused the declarant to be unavailable to testify.
   (b) The requirements of subdivision (a) shall be proved to the court by a preponderance of the evidence.
   (c) The court may consider the evidence of the declarant’s statement in determining whether the party against whom it is offered engaged in an intentional criminal act that caused the
declarant to be unavailable as a witness. That evidence shall not be the sole basis for a finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. There shall also be some independent corroborating evidence.

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

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

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

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

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

**Present Sense Impressions**

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

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

- Proceed with the proposed reform.
- Revise the Comment to proposed Evidence Code Section 1240.5 to make clear that the two main reasons for admitting a present sense impression (no time for memory to fade; no time to concoct a lie) are sufficient to justify the exception. If another person is at the scene to check the accuracy of the present sense impression, that is an additional, but not necessary, assurance of reliability. See p. 5 of the memorandum.
• Make similar revisions in the preliminary part (narrative portion) of the proposal.

• Further revise the Comment to emphasize that the phrase “or immediately thereafter” is to be read narrowly. See pp. 9-10 of the memorandum.

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

STUDY L-637 — REVISION OF NO CONTEST CLAUSE STATUTE

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

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

Protected Instrument

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

21310. …
(e) “Protected instrument” means all of the following instruments:
(1) The instrument that contains the no contest clause.
(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified, either individually or as part of an identifiable class of instruments, in the no contest clause as being governed by the no contest clause.

Creditor Claims

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

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

Property Ownership Dispute

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

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

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

Retroactivity of Proposed Law

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

Revised Draft

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

See discussion under “Legislative Program,” supra.
The Commission considered CLRC Memorandum 2007-43 and its First and Second Supplements, presenting the staff draft recommendation on Technical and Minor Substantive Statutory Corrections: References to Recording Technology. The Commission approved the staff draft as its final recommendation, except that the proposed amendments to Penal Code Sections 1346, 1346.1, 1347, and 1347.5 were deleted.

☐ APPROVED AS SUBMITTED

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

_____________________________ Date

_____________________________ Chairperson

_____________________________ Executive Secretary