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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
SEPTEMBER 3, 2008  
BURBANK

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A meeting of the California Law Revision Commission was held in Burbank on September 3, 2008.

**Commission:**

*Present:* Pamela L. Hemminger, Chairperson  
Sidney Greathouse  
Frank Kaplan  
William E. Weinberger

*Absent:* Susan Duncan Lee, Vice-Chairperson  
Diane Boyer-Vine, Legislative Counsel  
Ellen Corbett, Senate Member  
Noreen Evans, Assembly Member  
Edmund L. Regalia

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

**Consultants:** None

**Other Persons:**

Jason Davis, Trutanich & Michel, LLP, Long Beach  
Carole Hochstatter, Bakersfield  
Neil I. Horton, State Bar Trusts and Estates Section  
Mary M. Howell, Epsten, Grinnell & Howell, APC, San Diego  
C.D. Michel, Trutanich & Michel, LLP, Long Beach  
Lindsay Nichols, Legal Community Against Violence  
Norma Walker, Bakersfield

CONTENTS

|  |   |
|--|---|
| Operation as Subcommittee .....  | 2 |
| Minutes of June 5, 2008, Commission Meeting.....                           | 2 |
| Administrative Matters.....  | 2 |
| Recognition of Service .....   | 2 |
| Meeting Schedule.....  | 2 |
| Report of Executive Secretary .....  | 3 |
| Legislative Program.....   | 3 |
| Study K-350 — Attorney-Client Privilege After Client’s Death.....          | 4 |
| Study L-622 – Donative Transfer Restrictions.....                          | 4 |
| Study M-300 – Nonsubstantive Reorganization of Deadly Weapon Statutes..... | 7 |

OPERATION AS SUBCOMMITTEE

1       The Commission did not have sufficient members present at the September 3,  
2 2008, meeting to establish a quorum. Instead, those members who were present  
3 operated as a subcommittee. **Consequently, the decisions described in these**  
4 **minutes are provisional only.** The Commission will need to decide, at a future  
5 meeting, whether to ratify those decisions.

MINUTES OF JUNE 5, 2008, COMMISSION MEETING

6       The Commission approved the Minutes of the June 5, 2008, Commission  
7 meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

8       **Recognition of Service**

9       The Commission recognized Commissioner Sidney Greathouse for his service  
10 as Chairperson in 2007-2008.

11       The Commission also recognized Chief Deputy Counsel Barbara Gaal for her  
12 15 years of service to the Commission.

13       **Meeting Schedule**

14       The Commission considered Memorandum 2008-32, relating to the  
15 Commission’s meeting schedule.

16       The Commission changed the date of the October 2008 meeting and  
17 shortened it to a single day. The meeting will be held on October 29, 2008, in  
18 Burbank.

1 The Commission approved the 2009 meeting schedule proposed in the  
2 memorandum.

### 3 **Report of Executive Secretary**

4 The Executive Secretary reported that the office space in Palo Alto is being  
5 reduced in size, as a cost-saving measure.

#### LEGISLATIVE PROGRAM

6 The Commission considered Memorandum 2008-33 and its First Supplement,  
7 reporting generally on the Commission's 2008 legislative program. As noted in  
8 those materials, two bills that would have assigned new studies to the  
9 Commission were not approved in that form. Consequently, the bills will not  
10 operate to assign the Commission new studies.

11 The Commission also considered Memorandum 2008-43 and its First, Second,  
12 Third, and Fourth Supplements, relating to Assembly Bill 1921 (Saldaña), which  
13 would have implemented the Commission's recommendation on *Statutory  
14 Clarification and Simplification of CID Law* (Dec. 2007). After considering those  
15 materials, the Commission made the following decisions:

- 16 • The recommendation was withdrawn for revision. It will be  
17 revised consistent with the amendments that were made to  
18 AB 1921 and any other changes that may be made in response to  
19 input from CID attorneys or any other interested person.
- 20 • The Commission expects to receive a comprehensive analysis of  
21 the proposed law from the ad hoc CID attorney group discussed in  
22 the memoranda, in time for consideration at the December 2008  
23 meeting.
- 24 • The Commission will decide at the December 2008 meeting  
25 whether the analysis from the CID attorney group raises enough  
26 significant issues to defer approval of a revised recommendation  
27 (which would preclude legislative introduction in 2009). If so, the  
28 Commission will proceed along the lines proposed in  
29 Memorandum 2008-43, at page 43. If not, the Commission will  
30 expedite approval of a revised recommendation for possible  
31 legislative introduction in 2009.
- 32 • Work on further substantive reform of CID law should not be  
33 delayed while work on the revised recommendation continues.  
34 The "New Topics and Priorities" memorandum, which will be  
35 considered at the October meeting, will include discussion of  
36 possible new CID study topics.

1           STUDY K-350 — ATTORNEY-CLIENT PRIVILEGE AFTER CLIENT’S DEATH

2           The Commission considered Memorandum 2008-34 and its First Supplement,  
3 and Memorandum 2008-35 and its First Supplement, relating to the study on  
4 whether the attorney-client privilege should survive the client’s death, and if so,  
5 under what circumstances. The Commission made the following decisions  
6 relating to the preparation of a draft tentative recommendation on the matter:

- 7           • As a general matter, the draft tentative recommendation will be  
8 consistent with the Commission’s original policy determination  
9 that the privilege should survive until the decedent’s estate is  
10 distributed.
- 11          • The privilege will end on final distribution of the estate (rather  
12 than on discharge of the personal representative).
- 13          • The exception provided in Evidence Code Section 957 will be  
14 expanded to include those who claim through a deceased client  
15 pursuant to a nonprobate transfer on death.

16          The Commission considered generalizing the existing rule on survival of the  
17 privilege after death, so that it would not just survive during probate  
18 administration, but would also survive with respect to assets transferred on  
19 death outside of probate. The Commission decided that such a proposal would  
20 be premature, as the Commission is intending to undertake a comprehensive  
21 study of creditor rights with respect to nonprobate assets. The Commission’s  
22 former Executive Secretary, Nathaniel Sterling, is preparing a background study  
23 on the matter. The staff will invite Mr. Sterling’s input on the posthumous  
24 application of the attorney-client privilege.

25          The Commission decided against addressing issues relating to the duty of  
26 confidentiality. At an appropriate time, the Commission will refer those matters  
27 to the State Bar for consideration.

28                           STUDY L-622 – DONATIVE TRANSFER RESTRICTIONS

29          The Commission considered Memorandum 2008-36, discussing public  
30 comment on the tentative recommendation on *Donative Transfer Restrictions* (June  
31 2008). The Commission directed the staff to prepare a draft recommendation  
32 based on the tentative recommendation, subject to the following decisions:

1 **Proposed Probate Code § 21362. “Care Custodian”**

2 The definition of “care custodian” in proposed Probate Code Section 21366  
3 will be revised as follows:

4 21362. (a) “Care custodian” means a person who provides  
5 health or social services to a dependent adult for remuneration, as a  
6 profession or occupation. The ~~compensation~~ remuneration need not  
7 be paid by the dependent adult.

8 (b) For the purposes of this section, “health and social services”  
9 include, but are not limited to, the administration of medicine,  
10 medical testing, wound care, assistance with hygiene,  
11 companionship, housekeeping, shopping, cooking, ~~transportation~~,  
12 and assistance with finances.

13 **Proposed Probate Code § 21366. “Dependent Adult”**

14 The definition of “dependent adult” in proposed Probate Code Section 21366  
15 should be replaced with a definition that is based on the definition of “dependent  
16 adult” in Welfare and Institutions Code Section 15610.23 (as is the case under  
17 existing Section 21350). However, the staff will explore making two changes to  
18 that definition:

- 19 (1) Replace the term “normal activities” with the term “major life  
20 activities,” paralleling the usage of that term in the Fair  
21 Employment and Housing Act.  
22 (2) Expand the definition of “dependent adult” to include an adult  
23 living in a “long-term care facility.”

24 **Proposed Probate Code § 21374. “Related by Blood or Affinity”**

25 The Comment to proposed Probate Code Section 21374 will be revised as  
26 follows:

27 **Comment.** Section 21374 restates the substance of former  
28 Section 21350(b) to make clear that a spouse and domestic partner  
29 are treated in the same way under this provision.

30 Subdivision (a)(3) applies to the spouse or domestic partner of a  
31 relative regardless of whether that relative is living or deceased.

32 See also Section 21368 (“domestic partner”).

33 **“Donative Instrument”**

34 The term “donative instrument” will be replaced throughout the proposed  
35 law with the term “instrument.” The Comments to sections using the term  
36 “instrument” will be revised to include a cross reference to Probate Code Section  
37 45 (“instrument” defined).

1 **Removal of Trustee**

2 The proposed amendment to Probate Code Section 15642 will be revised to  
3 remove references to “menace” and “duress,” as follows:

4 15642. ...

5 (b) The grounds for removal of a trustee by the court include the  
6 following:

7 ...

8 (6) Where the sole trustee is a person described in subdivision  
9 (a) of Section ~~21350~~ 21380, whether or not the person is the  
10 transferee of a donative transfer by the transferor, unless, based  
11 upon any evidence of the intent of the settlor and all other facts and  
12 circumstances, which shall be made known to the court, the court  
13 finds that it is consistent with the settlor’s intent that the trustee  
14 continue to serve and that this intent was not the product of fraud,  
15 ~~menace, duress,~~ or undue influence. Any waiver by the settlor of  
16 this provision is against public policy and shall be void. This  
17 paragraph shall not apply to instruments that became irrevocable  
18 on or before January 1, 1994. This paragraph shall not apply if any  
19 of the following conditions are met:

20 (A) The settlor is related by blood or marriage to, or is a  
21 cohabitant with, any one or more of the trustees, the person who  
22 drafted or transcribed the instrument, or the person who caused the  
23 instrument to be transcribed.

24 (B) The instrument is reviewed by an independent attorney who  
25 (1) counsels the settlor about the nature of his or her intended  
26 trustee designation and (2) signs and delivers to the settlor and the  
27 designated trustee a certificate in substantially the following form:

28 “CERTIFICATE OF INDEPENDENT REVIEW

29 I, (attorney’s name), have reviewed (name of instrument) and  
30 have counseled my client, (name of client), fully and privately on  
31 the nature and legal effect of the designation as trustee (name of  
32 trustee), ~~of~~ contained in that instrument. I am so disassociated from  
33 the interest of the person named as trustee as to be in a position to  
34 advise my client impartially and confidentially as to the  
35 consequences of the designation. On the basis of this counsel, I  
36 conclude that the designation of a person who would otherwise be  
37 subject to removal under paragraph (6) of subdivision (b) of Section  
38 15642 of the Probate Code is clearly the settlor’s intent and that  
39 intent is not the product of fraud, ~~menace, duress,~~ or undue  
40 influence.

41 “

42 \_\_\_\_\_  
(Name of Attorney) (Date)

43 This independent review and certification may occur either  
44 before or after the instrument has been executed, and if it occurs  
45 after the date of execution, the named trustee shall not be subject to  
46 removal under this paragraph. Any attorney whose written  
47 engagement signed by the client is expressly limited to the

1 preparation of a certificate under this subdivision, including the  
2 prior counseling, shall not be considered to otherwise represent the  
3 client.

4 (C) After full disclosure of the relationships of the persons  
5 involved, the instrument is approved pursuant to an order under  
6 Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of  
7 Division 4.

8 ...  
9 (c) If, pursuant to paragraph (6) of subdivision (b), the court  
10 finds that the designation of the trustee was not consistent with the  
11 intent of the settlor or was the product of fraud, ~~menace, duress,~~ or  
12 undue influence, the person being removed as trustee shall bear all  
13 costs of the proceeding, including reasonable attorney's fees.

14 ...  
15 **Comment.** Section 15642(b)(6) is amended to correct a reference  
16 to former Section 21350 and to delete a superfluous word.

17 Subdivisions (b)(6) and (c) are amended to remove references to  
18 menace and duress. The references relate to the presumption of  
19 menace, duress, fraud, or undue influence that could arise under  
20 former Section 21350. Much of the substance of that provision is  
21 continued in Section 21380, but Section 21380 does not provide for a  
22 presumption of menace or duress. That change in the law makes  
23 the references to menace and duress in this section unnecessary.

## 24 **Removal of Executor**

25 The Commission decided against including a provision for removal of an  
26 executor who is a "disqualified person" under the Donative Transfer Restriction  
27 Statute, as proposed by the Executive Committee of the State Bar Trusts and  
28 Estates Section. However, that matter will be included as a possible study topic  
29 in the "New Topics and Priorities" memorandum, which will be considered at  
30 the October meeting.

## 31 STUDY M-300 – NONSUBSTANTIVE REORGANIZATION OF 32 DEADLY WEAPON STATUTES

33 The Commission considered Memoranda 2008-38, 2008-39, 2008-41, and 2008-  
34 42, relating to nonsubstantive reorganization of the deadly weapon statutes. The  
35 drafts and staff recommendations are acceptable, subject to the following  
36 revisions:

### 37 **Proposed Penal Code § 16250. "BB device"**

38 Proposed Penal Code Section 16250 should read:

1           16250. As used in this part, “BB device” means any instrument  
2           that expels a projectile, such as a BB or a pellet, not exceeding 6mm  
3           caliber, through the force of air pressure, gas pressure, or spring  
4           action, or any spot marker gun.

5           There is no need to eliminate the word “such” from this provision, because the  
6           Office of Legislative Counsel does not object to using the phrase “such as” in  
7           statutory text.

8           **Proposed Penal Code § 16940. “Nunchaku”**

9           Proposed Penal Code Section 16940 should read:

10           16940. As used in this part, “nunchaku” means an instrument  
11           consisting of two or more sticks, clubs, bars or rods to be used as  
12           handles, connected by a rope, cord, wire, or chain, in the design of  
13           a weapon used in connection with the practice of a system of self-  
14           defense such as karate.

15           There is no need to eliminate the word “such” from this provision, because the  
16           Office of Legislative Counsel does not object to using the phrase “such as” in  
17           statutory text.

18           **Proposed Penal Code § 17705. Exemption for firearm or ammunition**  
19           **constituting curio or relic**

20           Proposed Penal Code Section 17705 should be revised as follows to more  
21           closely track the existing text of Penal Code Section 12020(b)(7):

22           17705. (a) The provisions listed in Section 16590 do not apply to  
23           any firearm or ammunition that is a curio or relic as defined in  
24           Section 478.11 of Title 27 of the Code of Federal Regulations and  
25           that is in the possession of a person permitted to possess the items  
26           under Chapter 44 (commencing with Section 921) of Title 18 of the  
27           United States Code and the regulations issued pursuant thereto.

28           (b) Any person prohibited by [Section 12021, 12021.1, or 12101  
29           of this code] or Section 8100 or 8103 of the Welfare and Institutions  
30           Code from possessing firearms or ammunition who obtains title to  
31           these items by bequest or intestate succession may retain title for  
32           not more than one year, but actual possession of these items at any  
33           time is punishable under [Section 12021, 12021.1, or 12101 of this  
34           code] or Section 8100 or 8103 of the Welfare and Institutions Code.  
35           Within the year, the person shall transfer title to the firearms or  
36           ammunition by sale, gift, or other disposition. ~~The exemption~~  
37           ~~provided by subdivision (a) does not apply to any person who~~  
38           ~~violates this subdivision.~~ Any person who violates this section is in  
39           violation of the applicable provision listed in Section 16590.

1 **Proposed Penal Code § 17710. Exemption for “any other weapon” in**  
2 **possession of person permitted to possess it under federal Gun Control**  
3 **Act of 1968**

4 Proposed Penal Code Section 17710 should be revised as follows to more  
5 closely track the existing text of Penal Code Section 12020(b)(8):

6 17710. (a) The provisions listed in Section 16590 do not apply to  
7 “any other weapon” as defined in subsection (e) of Section 5845 of  
8 Title 26 of the United States Code, which is in the possession of a  
9 person permitted to possess the weapons under the federal Gun  
10 Control Act of 1968 (Public Law 90-618), as amended, and the  
11 regulations issued pursuant thereto.

12 (b) Any person prohibited by [Section 12021, 12021.1, or 12101  
13 of this code] or Section 8100 or 8103 of the Welfare and Institutions  
14 Code from possessing these weapons who obtains title to these  
15 weapons by bequest or intestate succession may retain title for not  
16 more than one year, but actual possession of these weapons at any  
17 time is punishable under [Section 12021, 12021.1, or 12101 of this  
18 code] or Section 8100 or 8103 of the Welfare and Institutions Code.  
19 Within the year, the person shall transfer title to the weapons by  
20 sale, gift, or other disposition. ~~The exemption provided by~~  
21 ~~subdivision (a) does not apply to any person who violates this~~  
22 ~~subdivision~~ Any person who violates this section is in violation of  
23 the applicable provision listed in Section 16590.

24 (c) The exemption provided by this section does not apply to a  
25 pen gun.

26 **Proposed Penal Code § 18270. Return of stolen weapon**

27 Proposed Penal Code Section 18270 should be revised as follows to more  
28 closely track the existing text of Penal Code Section 12028.5(d):

29 18270. If a firearm or other deadly weapon has been stolen and  
30 has been ~~seized~~ taken into custody pursuant to this division, it shall  
31 be restored to the lawful owner upon satisfaction of all of the  
32 following conditions:

33 (a) Its use for evidence has been served.

34 (b) The owner identifies the firearm or other deadly weapon  
35 and provides proof of ownership.

36 (c) The law enforcement agency has complied with [Section  
37 12021.3].

38 **Proposed Penal Code § 18405. Notice of petition**

39 Proposed Penal Code Section 18405 should be revised as follows:

40 18405. (a) If a petition is filed under Section 18400, the law  
41 enforcement agency shall inform the owner or person who had  
42 lawful possession of the firearm or other deadly weapon, at that

1 person's last known address, by registered mail, return receipt  
2 requested, that the person has 30 days from the date of receipt of  
3 the notice to respond to the court clerk to confirm the person's  
4 desire for a hearing, and that the failure to respond shall result in a  
5 default order forfeiting the confiscated firearm or other deadly  
6 weapon.

7 (b) For purposes of this section, the person's last known address  
8 shall be presumed to be the address provided to the law  
9 enforcement officer by that person at the time of the family violence  
10 incident.

11 (c) In the event the person whose firearm or other deadly  
12 weapon was seized does not reside at the last address provided to  
13 the agency, the agency shall make a diligent, good faith effort to  
14 learn the whereabouts of the person and to comply with these  
15 notification requirements.

16 **Proposed Penal Code § 18730. Sale or transportation of destructive device other**  
17 **than fixed ammunition greater than .60 caliber**

18 The staff should check whether the reference to "former Section 12303.6" in  
19 the Comment is correct, and revise the Comment if necessary.

20 **Heading of Title 3 (commencing with Section 19910) of new Part 6 of the Penal**  
21 **Code**

22 The heading of Title 3 (commencing with Section 19910) of new Part 6 of the  
23 Penal Code should be revised as follows:

24 TITLE 3. WEAPONS AND DEVICES OTHER THAN FIREARMS

APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary