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
OPERATION AS SUBCOMMITTEE

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

MINUTES OF JUNE 5, 2008, COMMISSION MEETING

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

ADMINISTRATIVE MATTERS

**Recognition of Service**

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

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

**Meeting Schedule**

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

The Commission changed the date of the October 2008 meeting and shortened it to a single day. The meeting will be held on October 29, 2008, in Burbank.
The Commission approved the 2009 meeting schedule proposed in the memorandum.

**Report of Executive Secretary**

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

**Legislative Program**

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

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

- The recommendation was withdrawn for revision. It will be revised consistent with the amendments that were made to AB 1921 and any other changes that may be made in response to input from CID attorneys or any other interested person.
- The Commission expects to receive a comprehensive analysis of the proposed law from the ad hoc CID attorney group discussed in the memoranda, in time for consideration at the December 2008 meeting.
- The Commission will decide at the December 2008 meeting whether the analysis from the CID attorney group raises enough significant issues to defer approval of a revised recommendation (which would preclude legislative introduction in 2009). If so, the Commission will proceed along the lines proposed in Memorandum 2008-43, at page 43. If not, the Commission will expedite approval of a revised recommendation for possible legislative introduction in 2009.
- Work on further substantive reform of CID law should not be delayed while work on the revised recommendation continues. The “New Topics and Priorities” memorandum, which will be considered at the October meeting, will include discussion of possible new CID study topics.
STUDY K-350 — ATTORNEY-CLIENT PRIVILEGE AFTER CLIENT’S DEATH

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

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

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

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

STUDY L-622 – DONATIVE TRANSFER RESTRICTIONS

The Commission considered Memorandum 2008-36, discussing public comment on the tentative recommendation on Donative Transfer Restrictions (June 2008). The Commission directed the staff to prepare a draft recommendation based on the tentative recommendation, subject to the following decisions:
Proposed Probate Code § 21362. “Care Custodian”

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

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

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

Proposed Probate Code § 21366. “Dependent Adult”

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

(1) Replace the term “normal activities” with the term “major life activities,” paralleling the usage of that term in the Fair Employment and Housing Act.

(2) Expand the definition of “dependent adult” to include an adult living in a “long-term care facility.”

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

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

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

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

See also Section 21368 (“domestic partner”).

“Donative Instrument”

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

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

15642. …

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

…

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

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

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

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

(Name of Attorney) (Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the
preparation of a certificate under this subdivision, including the
prior counseling, shall not be considered to otherwise represent the
client.

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

…

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

…

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

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

Removal of Executor

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

STUDY M-300 – NONSUBSTANTIVE REORGANIZATION OF
DEADLY WEAPON STATUTES

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

Proposed Penal Code § 16250. “BB device”

Proposed Penal Code Section 16250 should read:
As used in this part, “BB device” means any instrument that expels a projectile, such as a BB or a pellet, not exceeding 6mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.

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

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

Proposed Penal Code Section 16940 should read:

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

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

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

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

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

(b) Any person prohibited by [Section 12021, 12021.1, or 12101 of this code] or Section 8100 or 8103 of the Welfare and Institutions Code from possessing firearms or ammunition who obtains title to these items by bequest or intestate succession may retain title for not more than one year, but actual possession of these items at any time is punishable under [Section 12021, 12021.1, or 12101 of this code] or Section 8100 or 8103 of the Welfare and Institutions Code. Within the year, the person shall transfer title to the firearms or ammunition by sale, gift, or other disposition. The exemption provided by subdivision (a) does not apply to any person who violates this subdivision. Any person who violates this section is in violation of the applicable provision listed in Section 16590.
Proposed Penal Code § 17710. Exemption for “any other weapon” in possession of person permitted to possess it under federal Gun Control Act of 1968

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

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

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

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

Proposed Penal Code § 18270. Return of stolen weapon

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

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

(a) Its use for evidence has been served.

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

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

Proposed Penal Code § 18405. Notice of petition

Proposed Penal Code Section 18405 should be revised as follows:

18405. (a) If a petition is filed under Section 18400, the law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that
person’s last known address, by registered mail, return receipt requested, that the person has 30 days from the date of receipt of the notice to respond to the court clerk to confirm the person’s desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon.

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

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

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

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

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

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

TITLE 3. WEAPONS AND DEVICES OTHER THAN FIREARMS

☐ APPROVED AS SUBMITTED

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

________________________________________  ____________________________
Date                                        Chairperson

________________________________________  ____________________________
                                         Executive Secretary