
***APPROVED* MINUTES OF MEETING**
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 8, 2015
DAVIS

A meeting of the California Law Revision Commission was held in Davis on October 8, 2015.

Commission:

Present: Taras Kihiczak, Chairperson
Crystal Miller-O'Brien, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Damian Capozzola
Victor King
Susan Duncan Lee

Absent: Assembly Member Ed Chau
Senator Richard D. Roth

Staff: Brian Hebert, Executive Director
Barbara Gaal, Chief Deputy Counsel
Kristin Burford, Staff Counsel
Steve Cohen, Staff Counsel

Consultants: None

Other Persons:

Heather Anderson, Judicial Council
Andrea Bari, CLRC law student extern
J. Felix De La Torre, Public Employment Relations Board
Paul Dubow
Rachel Ehrlich, Ehrlich Mediation
Jim Ewert, California Newspaper Publishers Association
Brian Flemmer, Office of Senator Roth
Heather Falkenthal, Office of Senator Wieckowski
Daniel Felizzatto, Los Angeles County District Attorney's Office
Robert Flack, California Dispute Resolution Council
Ron Kelly
Erin King, California Self Storage Association
Janet Martinez, Stanford Law School
Nicole Moore, California Newspaper Publishers Association
Nancy Peverini

Patricia Prince, Prince Law & Mediation
Barbara Proctor, California Dispute Resolution Council
Kimberly Siclari, California Self Storage Association
Harold M. Thomas, Butte County District Attorney’s Office
Loretta van der Pol, Public Employment Relations Board
John S. Warnlof, California Dispute Resolution Council

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APPROVAL OF ACTIONS TAKEN

Unless otherwise indicated, the Commission decisions noted in these Minutes were approved by all members present at the meeting. If a member who was present at the meeting voted against a particular decision, abstained from voting, or was not present when the decision was made, that fact will be noted in connection with the affected decision.

MINUTES OF AUGUST 7, 2015, COMMISSION MEETING

Memorandum 2015-29 presented a draft of the Minutes of the August 7, 2015, Commission meeting. The Commission approved the Minutes, without change.

ADMINISTRATIVE MATTERS

Report of Executive Director

The Executive Director reported that proposed Memorandum 2015-39 had been removed from the agenda. The matters addressed in that memorandum will be considered at a future meeting.

The Executive Director introduced Andrea Bari, a second-year law student at King Hall School of Law, currently serving the Commission as an extern.

1 The Commission decided to move the location of its December 2015 meeting
2 to Los Angeles. (*Commissioner Miller-O'Brien voted against this decision.*)

3 **Election of Officers**

4 The Commission considered Memorandum 2015-26, relating to the election of
5 Commission officers. The Commission elected Taras Kihiczak as Chairperson
6 and Crystal Miller-O'Brien as Vice Chairperson, for terms commencing
7 immediately and ending August 31, 2016. The Commission waived the fourth
8 paragraph of Rule 1.1 of the *Handbook of Commission Practices and Procedures*
9 (relating to consecutive terms).

10 2015 LEGISLATIVE PROGRAM

11 The Commission considered Memorandum 2015-42, reporting on the
12 Commission's 2015 legislative program. No Commission action was required or
13 taken.

14 STUDY D-1200 — RECOGNITION OF TRIBAL AND FOREIGN COURT MONEY JUDGMENTS

15 The Commission considered Memorandum 2015-38, discussing the degree of
16 judicial discretion afforded to courts when deciding whether to recognize a
17 foreign judgment under the Uniform Foreign-Country Money
18 Judgments Recognition Act.

19 With respect to the issues discussed in the memorandum, the Commission
20 decided not to make any changes to the related California statutes.

21 The staff will contact the Uniform Law Commission to discuss the different
22 considerations that may bear on how a court decides to exercise its discretion.
23 When the staff prepares a draft tentative recommendation for this study, the staff
24 will include Comment language that discusses the exercise of judicial discretion.

25 STUDY J-1314 — TRIAL COURT UNIFICATION: PUBLICATION OF LEGAL NOTICE

26 The Commission considered Memorandum 2015-44, presenting a staff draft
27 recommendation on *Trial Court Unification: Publication of Legal Notice*.

28 The Commission decided to replace the district descriptions for San
29 Bernardino and San Diego counties with the district descriptions set out on pages
30 10-12 of Memorandum 2015-44.

1 With those changes and any necessary conforming revisions, the Commission
2 approved the draft as a final recommendation.

3 STUDY K-402 — RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND
4 ATTORNEY MALPRACTICE AND OTHER MISCONDUCT

5 The Commission considered Memorandum 2015-45 and its First Supplement
6 (drafting issues) and Memorandum 2015-46 and its First and Second
7 Supplements (public comment). The Commission also considered the three
8 communications attached to the Third Supplement to Memorandum 2015-46,
9 which the staff distributed at the meeting along with the Second Supplement to
10 Memorandum 2015-46.

11 The staff mentioned the recent publicity relating to this study and apparent
12 confusion regarding the status of the study. The Commission considered but did
13 not pursue the possibility of submitting a short written statement to media
14 sources to clarify the status of the study. (*Chairperson Kihiczak, Vice Chairperson*
15 *Miller-O'Brien, and Commissioner Capozzola voted to take that step; Commissioners*
16 *Boyer-Vine, King, and Lee voted against it.*)

17 For purposes of preparing a draft of a tentative recommendation, the
18 Commission made the following decisions:

19 **General Concept**

20 Commissioner King moved for reconsideration of the Commission's August 7
21 decision "to begin the process of preparing a draft of a tentative recommendation
22 that would propose an exception to the mediation confidentiality statutes (Evid.
23 Code §§ 1115-1128) to address 'attorney malpractice and other misconduct.'" See
24 Minutes (Aug. 7, 2015), p. 5. His motion failed because it was not seconded.

25 **Types of Misconduct to Cover**

26 The Commission reconsidered its August 7 decision that the proposed new
27 exception "should apply to alleged misconduct of an attorney or an attorney-
28 mediator." See Minutes (Aug. 7, 2015), p. 5. The Commission decided that the
29 exception should only apply to alleged misconduct of an attorney acting as an
30 advocate, not to alleged misconduct of an attorney-mediator. (*Vice Chairperson*
31 *Miller-O'Brien voted against this decision.*)

1 **Mediator Immunity**

2 The Commission decided that the proposed statutory text in the tentative
3 recommendation should include a statement along the following lines:

4 Nothing in this section is intended to affect the extent to which a
5 mediator is, or is not, immune from liability under existing law.

6 **Timing of the Alleged Misconduct**

7 The Commission reconsidered its August 7 decision that the proposed new
8 exception “should apply regardless of whether the alleged misconduct occurred
9 during a mediation.” See Minutes (Aug. 7, 2015), p. 5. The Commission decided
10 that the exception should only apply to evidence of misconduct that allegedly
11 occurred in the context of a mediation. This would include misconduct that
12 allegedly occurred at *any* stage of the mediation process (encompassing the full
13 span of mediation activities, such as a mediation consultation, a face-to-face
14 mediation session, a mediation brief, a mediation-related phone call, or other
15 mediation-related activity). The key consideration is whether the misconduct
16 allegedly occurred in a mediation context, not the time and date of the alleged
17 misconduct.

18 **Types of Proceedings in Which the Exception Would Apply**

19 Commissioner King moved for reconsideration of the Commission’s August 7
20 decision that the proposed new exception should apply in a State Bar
21 disciplinary proceeding and a legal malpractice case. See Minutes (Aug. 7, 2015),
22 p. 5. More precisely, he moved that the exception should only apply in a State
23 Bar disciplinary proceeding. His motion failed because it was not seconded.

24 The Commission also specifically considered whether the proposed new
25 exception should apply in a proceeding relating to enforcement of a mediated
26 settlement agreement (e.g., a proceeding to rescind a mediated settlement
27 agreement or a proceeding to enforce such an agreement). The Commission
28 decided that the exception should not apply in that type of proceeding.
29 (*Commissioner Boyer-Vine abstained from this decision.*)

30 The Commission deferred decision on how to handle disputes relating to
31 attorney-client fee agreements (see Memorandum 2015-45, pp. 23-25; First
32 Supplement to Memorandum 2015-45, p. 3 & Exhibit pp. 3, 4, 6). The
33 Commission asked the staff to provide further analysis of that matter for another
34 meeting.

1 **Purpose for Invoking the Exception**

2 The Commission considered whether the proposed new exception should
3 refer to “reporting” of professional malfeasance, not just proving or disproving
4 such malfeasance (see Memorandum 2015-45, pp. 26, 27). The Commission
5 decided that a reference to “reporting” is not necessary.

6 **Limitation on Extent of Disclosure of Mediation Communications**

7 The Commission decided that the proposed new exception should include a
8 provision similar to Uniform Mediation Act Section 6(d), which provides:

9 (d) If a mediation communication is not privileged under
10 subsection (a) or (b), only the portion of the communication
11 necessary for the application of the exception from nondisclosure
12 may be admitted. Admission of evidence under subsection (a) or
13 (b) does not render the evidence, or any other mediation
14 communication, discoverable or admissible for any other purpose.

15 **Particular Types of Mediation Communications**

16 The Commission considered whether to restrict the proposed new exception
17 to a particular type of mediation communication, such as a private attorney-
18 client discussion (see Memorandum 2015-45, pp. 31-33). The Commission
19 decided not to impose such a restriction; the exception should apply to all types
20 of mediation evidence.

21 **In Camera Screening Process**

22 The Commission did not discuss the details of the in camera screening
23 process for the proposed new exception (see Memorandum 2015-45, pp. 27-30,
24 33-41). The Commission asked the staff to provide further analysis of that matter
25 for another meeting.

26 **Mediator Testimony**

27 The Commission considered whether to propose any revision of Evidence
28 Code Section 703.5, relating to mediator testimony (see Memorandum 2015-45,
29 pp. 41-43). The Commission decided to leave Section 703.5 as is. (*Commissioner*
30 *Capozzola voted against this decision.*)

31 **Consequences of Invoking the New Exception and Losing**

32 The Commission considered the possibility of specifying a sanction for a
33 court to impose on a party who:

- 1 • seeks admission or disclosure of mediation evidence pursuant to
2 the proposed new exception,
3 • causes others to incur expenses or expend effort in response, and
4 • ultimately fails to prevail (either because the court concludes the
5 evidence is not admissible or subject to disclosure, or because the
6 evidence is admitted or disclosed but the party's claim turns out to
7 be meritless).

8 See Memorandum 2015-45, pp. 43-44.

9 The Commission decided not to specify a particular sanction to impose in
10 those circumstances. (*Commissioner Boyer-Vine was not present for this decision.*)

11 **Retroactivity**

12 The Commission decided that the proposed new exception should only apply
13 to evidence from a mediation that commences after the exception becomes
14 operative. (*Commissioner Boyer-Vine was not present for this decision.*)

15 STUDY M-301 — DEADLY WEAPONS: MINOR CLEAN-UP ISSUES

16 The Commission considered Memorandum 2015-43 presenting a draft
17 tentative recommendation proposing minor clean-up of various Penal Code
18 provisions relating to deadly weapons.

19 The Commission approved the draft tentative recommendation, with one
20 revision. On page 4, line 17, "subdivision" was replaced with "subdivisions."

21 STUDY R-100 — FISH AND GAME LAW

22 The Commission considered Memorandum 2015-40, presenting a staff draft
23 recommendation on *Fish and Game Law: Technical Revisions and Minor Substantive*
24 *Improvements (Part 2)*. The Commission approved the staff draft as a final
25 recommendation.

26 The Commission also considered Memorandum 2015-41 and its First
27 Supplement, presenting a draft of commercial fishing provisions. The
28 Commission made the following decisions:

- 29 • The staff should further research whether the definition of "far
30 offshore fishery" in Fish and Game Section 8111 should be revised
31 to eliminate possible ambiguity regarding use of the word
32 "fishery." The staff should also solicit public comment on the issue
33 in a Staff Note and report on whatever is learned.

- 1 • The staff should present further discussion of Fish and Wildlife
2 Code Section 10905, on the issue raised in the Staff Note following
3 that section, after allowing time for public comment.
- 4 Finally, the Commission decided to conduct a separate study to identify and
5 correct cross-reference errors in Health and Safety Code Section 131052.