
APPROVED MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JUNE 1, 2016
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on June 1, 2016.

Commission:

Present: Taras Kihiczak, Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Thomas Hallinan
Victor King
Susan Duncan Lee

Absent: Assembly Member Ed Chau
Senator Richard D. Roth
Damian Capozzola
Jane McAllister
Crystal Miller-O'Brien, Vice Chairperson

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

Other Persons:

Allison Andersen, Community Associations Institute, California Legislative Action Committee
Prof. William Dodge, U.C. Davis School of Law
Lawrence Doyle, Conference of California Bar Associations
Rachel Ehrlich, Ehrlich Mediation
Robert Flack
Ron Kelly
Jeff Kichaven
Phyllis G. Pollack, PGP Mediation
Harold Thomas, Butte County District Attorney's Office
John S. Warnlof, California Dispute Resolution Council
Michel Wigney
Dena Wilson, California Office of Emergency Services

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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 below.

(Commissioner Boyer-Vine was not present for the discussion of Studies G-301, H-859, K-402, or R-100.)

MINUTES OF APRIL 14, 2016, COMMISSION MEETING

Memorandum 2016-20 presented a draft of the Minutes of the April 14, 2016, Commission meeting. The Commission approved the Minutes as submitted.

ADMINISTRATIVE MATTERS

Report of Executive Director

The Executive Director introduced Michel Wigney, a third-year student at U.C. Davis School of Law, who is currently serving the Commission as a law student assistant.

Commissioner Suggestions

No Commissioner suggestions were made.

1 STUDY H-859 — COMMON INTEREST DEVELOPMENTS:
2 MECHANICS LIENS AND COMMON AREA

3 The Commission considered Memorandum 2016-24, presenting a staff draft
4 tentative recommendation relating to the application of mechanics lien law to
5 common interest developments.

6 The Commission approved the draft for circulation as a tentative
7 recommendation.

8 STUDY K-402 — RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND
9 ATTORNEY MALPRACTICE AND OTHER MISCONDUCT

10 The Commission considered Memorandum 2016-27 (preliminary *in camera*
11 filtering), Memorandum 2016-28 (existing *in camera* approaches), Memorandum
12 2016-29 (scope of public disclosure), and Memorandum 2016-30 (public
13 comment) and its First Supplement. The Commission also considered two letters
14 that arrived shortly before the meeting, which are attached to the Second
15 Supplement to Memorandum 2016-30.

16 The Commission’s decisions are reported below.

17 **Memorandum 2016-27: Preliminary *In Camera* Filtering**

18 The Commission directed the staff to further investigate and report back on
19 two concepts for preliminary *in camera* filtering of a legal malpractice case that
20 alleges mediation misconduct:

- 21 (1) A mandatory pre-filing Early Neutral Evaluation Conference
22 (“ENEC”) conducted by a private mediator (preferably with legal
23 malpractice expertise), not by a judicial officer. As conceived by
24 the Commission, this ENEC would be an opportunity for the
25 putative parties to try to resolve their differences in private and
26 thereby keep their mediation communications from becoming
27 public.
- 28 (2) An approach modeled on Civil Code Section 1714.10 (alleged
29 conspiracy between attorney and client), but conducted in a
30 manner that would protect mediation communications from
31 public disclosure.

32 These options would not necessarily have to focus solely on achieving
33 settlement; they could perhaps also address the proper use of mediation
34 communications if the legal malpractice case proceeds.

1 Among other things to consider, the staff should explore the possibility of
2 providing notice to all mediation participants whose communications might be
3 disclosed as the case progresses. The staff should prioritize its work on these
4 concepts, but may bring other possible approaches to the Commission's attention
5 as appears appropriate.

6 **Memorandum 2016-28: Existing *In Camera* Approaches**

7 No Commission action was required or taken in connection with
8 Memorandum 2016-28, which reiterates previously presented information on
9 existing *in camera* approaches to the intersection of mediation confidentiality and
10 mediation misconduct.

11 **Memorandum 2016-29: Scope of Public Disclosure**

12 Under the Commission's proposed new mediation confidentiality exception,
13 evidence of mediation communications would sometimes be disclosed and used
14 in a legal malpractice case that alleges mediation misconduct. The Commission
15 discussed whether its proposal should restrict public access to such evidence.

16 In particular, the Commission considered three main options:

- 17 (1) No special restrictions on public access.
- 18 (2) Only restrict public access with regard to a determination of
19 admissibility.
- 20 (3) Require or permit a court to more broadly restrict public access.

21 These options are described in greater detail at pages 3-4 of Memorandum 2016-
22 29.

23 Aside from possible preliminary *in camera* filtering (see above), the
24 Commission decided not to propose any special restrictions on public access. In
25 other words, it chose Option #1.

26 The Commission made clear that this would not preclude a court from using
27 existing procedural mechanisms to restrict public access. For example, a party
28 could seek a sealing order pursuant to the existing rules governing sealing of
29 court records (Cal. R. Ct. 8.45-8.47, 2.550-2.551).

30 **Memorandum 2016-30 and Its Supplements: Public Comment**

31 The Commission heard from members of the audience who wished to speak.
32 Among other things, questions surfaced regarding the availability of relevant
33 data from the State Bar.

1 The Commission discussed whether to request that a State Bar representative
2 attend and participate in its next meeting. The Commission decided not to make
3 such a request at this time. Instead, the staff should prepare a memorandum on
4 possible questions to ask a State Bar representative.

5 STUDY R-100 — FISH AND GAME LAW

6 The Commission considered Memorandum 2016-25 and its First, Second and
7 Third Supplements (presenting a draft of provisions governing specific types of
8 fish, invertebrates, amphibians, and reptiles), and Memorandum 2016-26
9 (discussing whether to prepare a tentative recommendation at this time).

10 The Commission made the following decisions:

- 11 • The provisional organization of the proposed law presented on
12 pages 3 and 4 of Memorandum 2016-25 was approved, but
13 without a separate division for insects. Provisions governing
14 specific types of insects will be included in the division of the
15 proposed law that governs invertebrates.
- 16 • The use of the three types of signposting provisions presented on
17 page 5 of Memorandum 2016-25 was approved.
- 18 • The Commission Comment to proposed Section 30600 was
19 expanded, as indicated on page 2 of the First Supplement to
20 Memorandum 2016-25.
- 21 • In general, proposed Divisions 6 through 11 will not include
22 provisions that are primarily aimed at protecting wildlife (rather
23 than regulating the take and use of wildlife). Such provisions will
24 be located elsewhere in the proposed code.
- 25 • The Staff Note shown on page 5 of the First Supplement to
26 Memorandum 2016-25 was added to the staff draft, following
27 proposed Section 27410.
- 28 • The staff should continue to research the constitutionality of
29 provisions that provide that certain facts are “prima facie
30 evidence” of an element of a crime, and will present the results of
31 that research to the Commission at a future meeting.
- 32 • All of the staff recommendations in the Second Supplement to
33 Memorandum 2016-25 were approved.
- 34 • The staff will prepare a draft tentative recommendation,
35 containing the content of the staff drafts that have been presented
36 to the Commission to date, including the staff draft presented by
37 Memorandum 2016-25. The draft tentative recommendation will
38 be presented for Commission review at a future meeting.