A meeting of the California Law Revision Commission was held in Los Angeles on July 22, 2016.

Commission:
Present: Taras Kihiczak, Chairperson
        Crystal Miller-O’Brien, Vice Chairperson
        Damian Capozzola
        Thomas Hallinan
        Victor King
        Jane McAllister

Absent: Assembly Member Ed Chau
        Senator Richard D. Roth
        Diane F. Boyer-Vine, Legislative Counsel
        Susan Duncan Lee

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

Other Persons:
Bob Andersen, Andersen Mediations
Lee Jay Berman, American Institute of Mediation
Lee Blackman, Blackman ADR Services
Suzanne V. Chamberlain
Mary B. Culbert, The Loyola Law School Center for Conflict Resolution
Robert Flack
Jacqueline Harake, The Loyola Law School Center for Conflict Resolution
Ron Kelly
Jeff Kichaven
Priscilla W. Lloyd
Phyllis G. Pollack, PGP Mediation
Lynette Berg Robe
Fern Topas Salka
Ana Sambold, San Diego County Bar Association
Floyd Siegal
Jill Switzer

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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.

MINUTES OF JUNE 1, 2016, COMMISSION MEETING

Memorandum 2016-31 and its First Supplement presented a draft of the Minutes of the June 1, 2016, Commission meeting. The Commission approved the Minutes, with the revision set out in the First Supplement.

ADMINISTRATIVE MATTERS

Report of Executive Director

The Executive Director reported that the State Budget for 2016-17 does not materially change the Commission’s funding or staffing level.

The Executive Director proposed that the Commission consider adopting a Tribal Consultation Policy, as a more formalized way to comply with Governor Brown’s Executive Order B-10-11. The Commission directed the staff to prepare a memorandum on that topic, for presentation at a future meeting.

Commissioner Suggestions

Commissioner Capozzola suggested that the Commission study the procedure for objecting to a deposition and recommend clarifying changes to the
law. Commissioner Capozzola will provide background information to the staff, which will address the matter in the Commission’s next New Topics and Priorities memorandum.

Chairperson Kihiczak encouraged Commissioners to submit other study proposals to the staff for consideration in the next New Topics and Priorities memorandum.

**Meeting Schedule**

The Commission considered Memorandum 2016-32, discussing the Commission’s 2017 meeting schedule. The Commission changed the date of its April 2017 meeting. The meeting will now be held on April 13, 2017.

**2016 Legislative Program**

The Commission considered Memorandum 2016-33, discussing the status of its 2016 Legislative Program. No Commission action was required or taken.

**Study K-402 — Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct**

The Commission’s discussion of this study was divided into three parts:

1. Preliminary in camera filtering.
2. Possible questions for the State Bar.
3. Public comment.

**Preliminary In Camera Filtering**

The Commission considered Memorandum 2016-38 (preliminary in camera filtering) and its First Supplement. The Commission also received documents from Prof. Mary Culbert (Loyola Law School Center for Conflict Resolution), as noted in the Third Supplement to Memorandum 2016-39.

The Commission made the following decisions:

- The staff should not further pursue the concept of conducting an Early Neutral Evaluation Conference (“ENEC”) or similar process in a legal malpractice case that alleges mediation misconduct. (Commissioner Capozzola was not present for this decision.)
The staff should not further pursue an approach modeled on Civil Code Section 1714.10 (alleged conspiracy between attorney and client).

(Commissioner Capozzola was not present for this decision.)

The staff should further investigate the possibility of creating a specialist certification requirement or a self-certification requirement for a legal malpractice case that alleges mediation misconduct.

(Commissioner Hallinan and Commissioner Miller-O’Brien voted against this decision.)

In addition, the Commission decided not to study the idea of fee-shifting in a legal malpractice case that alleges mediation misconduct. (Commissioner Capozzola and Commissioner King supported a motion to study this topic; Chairperson Kihiczak, Vice-Chairperson Miller-O’Brien, Commissioner Hallinan, and Commissioner McAllister voted against that motion.)

Possible Questions for the State Bar

The Commission considered Memorandum 2016-37 (possible questions for the State Bar). Chairperson Kihiczak and the staff encouraged stakeholders and other interested persons to submit further input on empirical data relevant to this study, particularly data that is not discussed in Memorandum 2015-5 (empirical data) or Memorandum 2015-6 (data from Early Mediation Pilot Programs).

The Commission asked the staff to further explore the ideas raised at page 6 of Memorandum 2016-37, relating to requiring the State Bar to collect certain data upon enactment of the mediation confidentiality exception under discussion in this study. (Commissioner Miller-O’Brien voted against this decision.)

Public Comment

The Commission considered Memorandum 2016-39 (public comment), its First Supplement, and its Second Supplement, which was distributed at the meeting. The Commission received a document from Fern Topas Salka, which is attached to the Third Supplement to Memorandum 2016-39. No Commission action was required or taken.
STUDY L-3032.1 — REVOCABLE TRANSFER ON DEATH DEED: FOLLOW-UP STUDY

The Commission considered Memorandum 2016-36, presenting the results of staff research into experience with revocable transfer on death deeds (“RTODD”) in other states.

The Commission directed the staff to conduct further analysis of all of the following issues, later in the study:

- Whether to revise Probate Code Section 5654(b) to provide clearer guidance on the extent to which property transferred by RTODD is subject to Medicaid estate recovery claims.
- The extent to which property transferred by RTODD is part of the bankruptcy estate of a beneficiary who commenced bankruptcy proceedings before the RTODD operated.
- Whether the law should be clarified regarding the effect of an RTODD on a mobilehome that is located on real property transferred by the RTODD.
- Whether the beneficiary of an RTODD has standing to contest an instrument that would revoke or otherwise defeat the effect of the RTODD.
- Whether the beneficiary of an RTODD is an “interested person” for the purposes of the Probate Code.

With regard to the last two issues, the staff will research whether the issue also applies to the beneficiaries of other types of nonprobate transfers. If so, the staff will present its findings as part of the Commission’s next New Topics and Priorities memorandum, for consideration of whether to address the issues as separate studies.

STUDY R-100 — FISH AND GAME LAW

The Commission considered Memorandum 2016-34 and its First Supplement, which discuss a number of issues relating to preparation of a draft tentative recommendation. The Commission made the following decisions relating to those materials:

- All of the staff recommendations in Memorandum 2016-34 were approved.
- The staff should specifically solicit comment from regulatory bodies and other stakeholders on existing provisions of the Fish and Game Code governing criminal forfeiture.
- At the September meeting, the staff will present its analysis of the use of prima facie evidence rules in the Fish and Game Code.
The Commission also considered Memorandum 2016-35, which presents public comment from the Yurok Tribe. No Commission action was required or taken in connection with that memorandum.