
APPROVED MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 1, 2016
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on December 1, 2016.

Commission:

Present: Susan Duncan Lee, Chairperson
Thomas Hallinan, Vice Chairperson
Damian Capozzola
Taras Kihiczak
Victor King
Jane McAllister
Crystal Miller-O'Brien

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

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

Other Persons:

Bart J. Carey
John P. Chamberlain, Chamberlain & Viau, a plc
Suzanne V. Chamberlain, Chamberlain & Viau, a plc
Jill Cohen
Mary B. Culbert, The Loyola Law School Center for Conflict Resolution
Robert Flack
Fred Glassman, LACFLA
Donn Hoffman, Los Angeles District Attorney Cyber Investigation Response Team
Suanne Honey
Janet Kaplan
Nora Kavner
Ron Kelly
Jeff Kichaven
David Kuroda
Kelly Cohen Leider
Hon. David W. Long (ret.), California Judges Association

Judith C. Nesburn
Phyllis Pollack, PGP Mediation
Ray Regalado, LA County Commission on Human Relations
Lynette Berg Robe, LA Family Law Mediators
Karen Rosin, Southern California Mediation Association
Fern Topas Salka
Ana Sambold, San Diego County Bar Association
Darlene Wanger
Alan Weinfeld, Parker Milliken

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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 SEPTEMBER 22, 2016, COMMISSION MEETING

Memorandum 2016-51 presented a draft of the Minutes of the September 22, 2016, Commission meeting. The Commission approved the Minutes as submitted.

(Commissioners Capozzola and Miller-O'Brien were not present when this decision was made. Commissioner King abstained.)

ADMINISTRATIVE MATTERS

Report of Executive Director

The Executive Director reported:

- 1 (1) He will be meeting with newly-elected legislators to provide them
2 with an overview of the Commission's work.
3 (2) He will be making a presentation on the Commission's work to a
4 visiting delegation of lawmakers from China.

5 **Commissioner Suggestions**

6 No new Commissioner suggestions were made.

7 **Annual Report**

8 The Commission considered Memorandum 2016-52, presenting a draft of the
9 2016-2017 Annual Report. The Commission approved the report, subject to
10 conforming revisions described in the memorandum, for publication and
11 distribution to the Legislature and the Governor.

12 *(Commissioners Capozzola and Miller-O'Brien were not present when this decision*
13 *was made.)*

14 **New Topics and Priorities**

15 The Commission considered Memorandum 2016-53, presenting the status of
16 the Commission's current program of work, the new topics suggestions received
17 in 2016, and discussing work priorities for 2017.

18 The Commission accepted the staff recommendations made in Memorandum
19 2016-53, including the following priorities for work in 2017:

- 20 • Manage the 2017 legislative program.
21 • Continue the study on fish and wildlife law.
22 • Continue the study on the relationship between mediation
23 confidentiality and attorney malpractice and other misconduct.
24 • Begin the study on the California Public Records Act and related
25 laws.
26 • Clarify the recordation requirement for transfer on death deeds.

27 As staff resources permit, the Commission will also begin studies of the
28 following topics, in descending order of priority:

- 29 • Creditor claims against nonprobate assets, focusing on the narrow
30 issue previously identified for initial study.
31 • The civil discovery issue raised by Commissioner Capozzola (see
32 pages 33-35 of Memorandum 2016-53) and perhaps other
33 previously suggested civil discovery topics. The staff should
34 prepare a list of the previous suggestions for the Commission to
35 examine.

1 *State Bar Disciplinary Proceeding*

2 Proposed Evidence Code Section 1120.5(a)(2)(A) in the Discussion Draft is
3 satisfactory. No revisions of it are needed.

4 *Legal Malpractice Claim*

5 Proposed Evidence Code Section 1120.5(a)(2)(B) in the Discussion Draft is
6 satisfactory. No revisions of it are needed.

7 The corresponding Comment should be revised to incorporate the language
8 that is quoted in the first bullet point on page 20 of Memorandum 2016-58. Put
9 differently, the Comment should state:

10 Section 1120.5 applies “when the merits of the claim will
11 necessarily depend on proof that an attorney violated a
12 professional obligation — that is, an obligation the attorney has by
13 virtue of being an attorney — in the course of providing
14 professional services.” *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d
15 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at
16 1239. “Misconduct does not ‘aris[e] in’ the performance of
17 professional services ... merely because it occurs during the period
18 of legal representation or because the representation brought the
19 parties together and thus provided the attorney the opportunity to
20 engage in the misconduct.” *Id.* at 1238.

21 *Attorney-Client Fee Disputes*

22 Proposed Evidence Code Section 1120.5(a)(2) in the Discussion Draft is
23 satisfactory. No revisions of it are needed to address attorney-client fee disputes.

24 (*Commissioner Kihiczak was not present for this decision or any other decision*
25 *regarding the types of disputes in which proposed Evidence Code Section 1120.5 would*
26 *apply.*)

27 **Possible Limitations on the Scope of the Exception**

28 The Commission discussed whether proposed Evidence Code Section 1120.5
29 should be made inapplicable to (1) community-based mediation programs
30 funded under the Dispute Resolution Programs Act and/or (2) family law
31 mediations (see pages 25-33 of Memorandum 2016-58). The Commission decided
32 not to make such changes to the Discussion Draft.

33 (*Commissioner Kihiczak was not present for this decision.*)

34 **Instructions to Litigants or Other Special Rules**

35 The Commission discussed whether to propose that the Judicial Council
36 and/or the State Bar study and develop means of preventing improper

1 disclosure of mediation evidence in adjudicating a cause of action for damages
2 against a lawyer based on mediation malpractice (see pages 33-36 of
3 Memorandum 2016-58). The Commission decided not to propose anything along
4 those lines.

5 The Commission also discussed whether to add a notice provision to
6 proposed Evidence Code Section 1120.5, along the lines shown on page 36 of
7 Memorandum 2016-58. The Commission decided to add such a provision, but it
8 asked the staff to revise the language to address the possibility that a disputant
9 might not know or be able to determine the identity of all of the mediation
10 participants.

11 *(Commissioner Kihiczak was not present for any of these decisions.)*

12 **Data Collection and Evaluation**

13 The Commission discussed the possibility of requiring the State Bar and/or
14 the court system to collect some data if the Commission's proposed new
15 mediation confidentiality exception is enacted (see pages 36-38 of Memorandum
16 2016-58). The Commission decided not to include any such requirement in its
17 tentative recommendation.

18 *(Commissioner Kihiczak was not present for this decision.)*

19 **STUDY R-100 — FISH AND GAME LAW**

20 The Commission considered Memorandum 2016-57, relating to the tentative
21 recommendation that is currently being prepared. The Commission decided
22 against proposing any reform of the existing procedure that governs the
23 forfeiture of property used to violate the Fish and Game Code.