APPROVED MINUTES OF MEETING CALIFORNIA LAW REVISION COMMISSION APRIL 13, 2017

OAKLAND

A meeting of the California Law Revision Commission was held in Oakland on April 13, 2017.

Commission:

| Present: | Susan Duncan Lee, Chairperson Thomas Hallinan, Vice Chairperson Diane F. Boyer-Vine, Legislative Counsel Damian Capozzola Victor King Jane McAllister Crystal Miller-O'Brien | | |
|----------|--|--|--|
| Absent: | Assembly Member Ed Chau Senator Richard D. Roth Taras Kihiczak | | |
| Staff: | Brian Hebert, Executive Director Barbara Gaal, Chief Deputy Counsel Kristin Burford, Staff Counsel Steve Cohen, Staff Counsel Victoria Matias, Secretary Greg Gonzalez, Law Student Extern Elisa Shieh, Law Student Extern | | |
| | | | |

Other Persons:

Heather Anderson, Judicial Council of California Robert Flack Ron Kelly Hon. David W. Long (ret.), California Judges Association Phyllis G. Pollack, PGP Mediation Lorraine Walsh, State Bar Mandatory Fee Arbitration Committee John S. Warnlof, California Dispute Resolution Council

CONTENTS

| Approval of Actions Taken | |
|---|--|
| Minutes of February 2, 2017, Commission Meeting | |
| Administrative Matters | |
| Report of Executive Director2 | |
| Commissioner Suggestions2 | |
| 2017 Legislative Program | |
| Study D-1300 — Homestead Exemption: Dwelling | |
| Study Em-560 — Eminent Domain: Pre-Condemnation Activities | |
| Study K-402 — Relationship Between Mediation Confidentiality and Attorney Malpractice and | |
| Other Misconduct | |
| Study L-3032.1 — Revocable Transfer on Death Deed: Follow-Up Study5 | |
| Study R-100 — Fish and Game Law | |
| - | |

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.

- 6 MINUTES OF FEBRUARY 2, 2017, COMMISSION MEETING
- 7 Memorandum 2017-10 presented a draft of the Minutes of the February 2,
- 8 2017, meeting. The Commission approved the Minutes as submitted.
- 9 (Commissioner Hallinan was not present when this decision was made.).
- 10

1

ADMINISTRATIVE MATTERS

11 Report of Executive Director

The Executive Director introduced the Commission's secretary, Victoria Matias. The Commission honored and thanked Ms. Matias for over 35 years of excellent and dedicated service to the People of California.

The Executive Director also noted that the California Supreme Court recently decided an important case relating to the scope of the California Public Records Act (*City of San Jose v. Superior Court,* 2 Cal. 5th 608 (2017)). The staff will prepare a memorandum discussing whether the Commission should make any change to its practices to reflect the holding in that case.

- 20 **Commissioner Suggestions**
- 21 No new Commissioner suggestions were made.

1

2017 LEGISLATIVE PROGRAM

2 The Commission considered Memorandum 2017-11, discussing the 3 Commission's 2017 Legislative Program. The Commission made the following 4 decisions:

The Commission accepted the amendments to AB 534 (Gallagher)
 that were set out in the memorandum and will revise its
 recommendation to use the amended language.

The Commission accepted the amendment to AB 905 (Maienschein) that was set out in the memorandum, but will not revise its recommendation to use the amended language. The staff will prepare a draft of revised Comments, for Commission approval at a future meeting. (*Commissioner Boyer-Vine abstained.* Commissioner Miller-O'Brien voted against the decision.)

14

Study D-1300 — Homestead Exemption: Dwelling

The Commission considered memorandum 2017-13, relating to the procedure used to approve the sale of a dwelling to satisfy a judgment creditor. The Commission decided to work further on a reform of the type described in the memorandum.

19 Study EM-560 — Eminent Domain: Pre-Condemnation Activities

The Commission considered memorandum 2017-14, relating to the statutory procedure for compensation of a property owner in connection with precondemnation activity. The Commission decided to work further on a reform of the type described in the memorandum. In preparing proposed legislation, the staff will also draft revisions to eliminate the use of gendered language.

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

The Commission considered Memorandum 2017-19, which presents a partial draft of a tentative recommendation. The Commission also considered Memorandum 2017-20 and its First Supplement, which present new comments relating to this study.

31 The Commission made the following decisions:

1 Format of Tentative Recommendation

2 The three-part format used in the draft attached to Memorandum 2017-19 is 3 acceptable.

4 Placement of *Lee v. Hanley* Quotations in Proposed Comment

The revisions of the Comment to proposed Evidence Code Section 1120.5 that are shown at the top of page 3 of Memorandum 2017-20 (inserting quotations from *Lee v. Hanley*, 61 Cal. 4th 1225, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015)) are acceptable.

- 9 Types of Disputes in Which the New Exception Would Apply
- 10 Proposed Evidence Code Section 1120.5 should be revised as follows:
- Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when 11 representing client in mediation context 12 SEC. . Section 1120.5 is added to the Evidence Code, to read: 13 1120.5. (a) A communication or a writing that is made or 14 prepared for the purpose of, or in the course of, or pursuant to, a 15 mediation or a mediation consultation, is not made inadmissible, or 16 17 protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied: 18 19 (1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when 20 21 representing a client in the context of a mediation or a mediation consultation. 22 23 (2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following: 24 (A) A complaint against the lawyer under the State Bar Act, 25 Chapter 4 (commencing with Section 6000) of the Business and 26 Professions Code, or a rule or regulation promulgated pursuant to 27
 - the State Bar Act. (B) A cause of action for damages against the lawyer based upon alleged malpractice.
- 31 (C) A dispute between a lawyer and client concerning fees,
 32 costs, or both including a proceeding under the State Bar Act,
 33 Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business &
 34 Professions Code Sections 6200-6206.
 35 (b)
- ³⁶ The staff should make conforming revisions in the corresponding Comment and
- 37 the preliminary part.

28

29

30

38 (Commissioners King, McAllister, and Miller-O'Brien voted against this decision.)

1 Notice Provision

The notice provision in proposed Evidence Code Section 1120.5 (new subdivision (d)) and the corresponding portion of the Comment (shown on page 8 of Memorandum 2017-19) are acceptable.

5 I

Mediator Testimony and Other Requests for Evidence From a Mediator

Proposed Evidence Code Section 1120.5 should be revised to expressly statehow it applies to a request for evidence from a mediator.

8 Under that section, a request for written evidence from a mediator should be 9 treated the same way as a request for oral testimony from a mediator. Both types 10 of requests should be subject to the same general rule and exceptions as in 11 Evidence Code Section 703.5.

Proposed Section 1120.5 should expressly state that it does not alter or affectSection 703.5.

14 The staff should draft language to implement this approach and present it for 15 the Commission's approval at the June meeting.

In a cover memorandum, the staff should discuss how to handle an attempt to obtain evidence of a mediator's communications from a source other than the mediator, such as another mediation participant or an Internet service provider.

19 Ron Kelly's Proposed Warning

The draft tentative recommendation should not include a warning requirement like the one proposed by Ron Kelly (shown on page 11 of Memorandum 2017-19).

The staff should revise the preliminary part and Comment to proposed Evidence Code Section 1120.5 to emphasize that the discovery standard under that provision is stricter than the usual standard for obtaining discovery.

26 STUDY L-3032.1 — REVOCABLE TRANSFER ON DEATH DEED: FOLLOW-UP STUDY

The Commission considered Memorandum 2017-12 and its First and Second Supplements, presenting a draft tentative recommendation addressing the statutory requirement that a revocable transfer on death deed be recorded, in order to be valid. The Commission approved the draft as its final recommendation, in order to facilitate the possible introduction of implementing legislation this year. The staff will exercise discretion to make minor technical 1 revisions to the narrative part of the recommendation, to reflect its character as a

2 final recommendation.

| 3 | STUDY R-100 — FISH AND GAME LAW |
|----------|---|
| 4 | The Commission considered Memoranda 2017-15, 2017-16 and its First |
| 5 | Supplement, and 2017-17, relating to the Commission's proposed recodification |
| 6 | of the Fish and Game Code. The Commission made the following decisions: |
| 7 8 | • The Commission approved the draft attached to Memorandum 2017-15 for circulation as a tentative recommendation. |
| 9 | • The Commission approved the draft attached to Memorandum |
| 10 11 | 2017-16, with the addition proposed in the First Supplement to that memorandum, for inclusion in a future tentative |
| 12 | recommendation. |
| 13 14 | • The Commission approved the draft attached to Memorandum 2017-17, for inclusion in a future tentative recommendation. |