A meeting of the California Law Revision Commission was held in Sacramento on June 8, 2017.

Commission:

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

Absent:  
Assembly Member Ed Chau  
Senator Richard D. Roth  
Damian Capozzola  
Crystal Miller-O'Brien

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

Consultant:  
Nathaniel Sterling

Other Persons:

Lawrence Doyle, Conference of California Bar Associations  
Ron Kelly  
David G. Knitter, Executive Committee, Trusts and Estates Section of the State Bar  
Hon. David W. Long (ret.), California Judges Association  
Nikki Moore, California Newspaper Publishers Association  
Ana Sambold, National Conflict Resolution Center  
Hon. Brian R. Van Camp (ret.), California Judges Association  
John S. Warnlof, California Dispute Resolution Council
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 APRIL 13, 2017, COMMISSION MEETING

Memorandum 2017-18 presented a draft of the Minutes of the April 13, 2017, meeting. The Commission approved the Minutes as submitted.

(Commissioner Hallinan was not present when this decision was made.).

ADMINISTRATIVE MATTERS

Report of Executive Director

The Executive Director noted that there was no change to the Commission’s budget in the Governor’s May Revision.

The Executive Director asked for Commission guidance on whether to change any of the staff’s existing practices regarding the scheduling of the start and stop times and lunch breaks for Commission meetings. Under those practices, the staff endeavors to:

• Avoid very early flights to the meeting.
• Provide a meaningful lunch break, with occasional longer lunches on special occasions.
• Provide enough meeting time to get through the material scheduled for consideration.
• To the extent compatible with the prior goals, avoid unduly late return flights.

The Commission directed the staff to continue those practices without change.

(Commissioner Hallinan was not present when this decision was made. Commissioner King abstained.)

Commissioner Suggestions

No new Commissioner suggestions were made.

Public Records Practices

The Commission considered Memorandum 2017-21, discussing whether to adjust the Commission’s practices to accommodate the holding in City of San Jose v. Superior Court, 2 Cal. 5th 608 (2017). The Commission decided to postpone making any final decision on that topic until its August 2017 meeting. Memorandum 2017-21 will be placed on the agenda for that meeting, along with a supplemental memorandum discussing records held by former commissioners.

(Commissioner Hallinan was not present when this decision was made. Commissioner King abstained.)

2017 LEGISLATIVE PROGRAM

The Commission considered Memorandum 2017-22, discussing the Commission’s 2017 Legislative Program. The Commission made the following decisions:

• The Commission accepted the amendment to AB 1034 (Chau) that was set out in the memorandum. The Commission will revise its recommendation to use the amended language. (Commissioner Hallinan was not present when this decision was made.)

• The Commission approved the Comment revisions proposed by staff to reflect the March 13, 2017, amendment of AB 905 (Maienschein). (Commissioner Hallinan was not present when this decision was made. Commissioner Boyer-Vine abstained.)
STUDY D-1300 — HOMESTEAD EXEMPTION: DWELLING

The Commission considered Memorandum 2017-25, presenting a draft tentative recommendation relating to the procedure used to approve the sale of a dwelling to satisfy a judgment creditor. The Commission approved the draft for circulation as a tentative recommendation.

(Commissioner Hallinan was not present when this decision was made.)

STUDY EM-560 — EMINENT DOMAIN: PRE-CONDEMNATION ACTIVITIES

The Commission considered Memorandum 2017-27, relating to the statutory procedure for compensation of a property owner in connection with pre-condemnation activity. The Commission approved the draft for circulation as a tentative recommendation.

(Commissioner Hallinan was not present when this decision was made.)

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

The Commission considered Memorandum 2017-30 (draft tentative recommendation) and its First and Second Supplements. The Commission also considered Memorandum 2017-31 (public comment).

The Commission made the following decisions:

Implementation of April Decisions on Mediator Testimony and Other Requests for Evidence From a Mediator

The Commission approved the staff’s implementation of the decisions that the Commission made in April relating to mediator testimony and other requests for evidence from a mediator (see First Supplement to Memorandum 2017-30, pp. 1-3).

Access to Mediator Communications

Proposed Evidence Code Section 1120.5 should be revised as shown in strikeout and underscore below:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both all of the following requirements are satisfied:
(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) ….

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

....

(Commissioner King voted against this decision.)

The tentative recommendation should include a Note that specifically solicits comment on the content and wording of proposed Section 1120.5(a)(3).

In addition, the Comment to proposed Section 1120.5 should be revised as shown in underscore below:

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For restrictions on obtaining a mediator’s electronic records from the mediator’s service provider, see 18 U.S.C. § 2702(a); O’Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

Subdivision (f) ....

The staff should make conforming revisions throughout the proposal as necessary to reflect these decisions.

Other Issues

The drafting issues described at pages 12-14 of the First Supplement to Memorandum 2017-30 should be handled as shown on those pages.

Approval of a Tentative Recommendation

Subject to the revisions described above, the Commission approved the draft attached to Memorandum 2017-30 as a tentative recommendation, to be posted to the Commission’s website and broadly circulated for comment.

(Commissioner King voted against this decision. Commissioner Boyer-Vine abstained.)
STUDY L-4100 — NONPROBATE TRANSFERS:
CREDITOR CLAIMS AND FAMILY PROTECTIONS

The Commission considered Memorandum 2017-23 and its First Supplement, discussing the Commission’s study of the liability of nonprobate transfers for creditor claims and family protections.

The Commission made the following decisions:

• The Commission will consider whether to recommend the enactment of Section 102 of the Uniform Nonprobate Transfers on Death Act (regarding the liability of nonprobate transfers for creditor claims and family protections). (Commissioner Hallinan was not present when this decision was made. Commissioner King abstained.)

• The Commission will consider whether to recommend any statutory reforms to address Kircher v. Kircher, 189 Cal. App. 4th 1105 (2010). (Commissioner Hallinan was not present when this decision was made. Commissioner King abstained.)

• Any liability rule for nonprobate transfers should expressly exclude matters preempted by federal law and Medi-Cal Estate Recovery. (Commissioners Boyer-Vine and Hallinan were not present when this decision was made. Commissioner King abstained.)

STUDY R-100 — FISH AND GAME LAW

The Commission considered Memoranda 2017-28 and 2017-29, relating to the Commission’s proposed recodification of the Fish and Game Code. The Commission made the following decisions:

• The Commission approved the draft attached to Memorandum 2017-28 for circulation as a tentative recommendation. (Commissioner Hallinan was not present when this decision was made; Commissioner Boyer-Vine abstained.)

• The Commission approved the preliminary staff draft attached to Memorandum 2017-29, for inclusion in a future tentative recommendation.

• The Commission directed the staff to include the remainder of the Fish and Game Code in a draft of a “Part 3” tentative recommendation, rather than presenting that material first as a preliminary staff draft.