APPROVED MINUTES OF MEETING CALIFORNIA LAW REVISION COMMISSION

AUGUST 4, 2017

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on August 4, 2017.

Commission:

Present: Susan Duncan Lee, Chairperson

Thomas Hallinan, Vice Chairperson

Diane F. Boyer-Vine, Legislative Counsel

Damian Capozzola

Assembly Member Ed Chau

Taras Kihiczak Jane McAllister

Crystal Miller-O'Brien

Absent: Victor King

Senator Richard D. Roth

Staff: Brian Hebert, Executive Director

Barbara Gaal, Chief Deputy Counsel

Kristin Burford, Staff Counsel

Other Persons:

Nikki Moore, California News Publishers Association Mark S. Poochigian, Executive Committee, State Bar Trusts and Estates Section Gary Tokumori, Parker Milliken

CONTENTS
Approval of Actions Taken2
Minutes of June 8, 2017, Commission Meeting
Administrative Matters
Report of Executive Director
Commissioner Suggestions
Public Records Practices
2017 Legislative Program
Study G-400 — California Public Records Act Clean-Up
Study J-507 — Civil Discovery Improvements
Study L-3032.1 — Revocable Transfer on Death Deed: Follow-Up Study7
Study L-4100 – Nonprobate Transfers
Study R-100 — Fish and Game Law9
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 8, 2017, Commission Meeting
Memorandum 2017-32 presented a draft of the Minutes of the June 8, 2017,
meeting. The Commission approved the Minutes as submitted.
(Commissioners Kihiczak, McAllister, and Miller-O'Brien were not present when
·
this decision was made.)
ADMINISTRATIVE MATTERS
Report of Executive Director
Commission Membership
The Executive Director reported that the terms of Commissioners Capozzola,
Kihiczak, and Miller-O'Brien will expire on October 1. Commissioners Capozzola
and Kihiczak are not applying for reappointment. It is not yet known whether
Commissioner Miller-O'Brien will serve another term. Consequently, the
Commission will soon have two or three vacancies.
In light of these developments, it may make sense to change the location of

discussion in September.

the December meeting. The Executive Director plans to raise that point for

- He also plans to postpone consideration of the 2018 meeting schedule until December, so that new Commissioners will have an opportunity to participate in setting that schedule.
- 4 Commemoration of Professor Miguel Méndez

5

6 7

8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

The Executive Director reported the sad news that the Commission's former consultant on evidence law studies, Professor Miguel Méndez, recently passed away. Professor Méndez taught at Stanford Law School and later at UC Davis School of Law.

The Executive Director read the following statement written by the Chief Deputy Counsel, who was a student of Prof. Méndez and worked with him on several Commission studies:

Prof. Miguel Méndez prepared a 9-part background study for the Law Revision Commission comparing the California Evidence Code to the Federal Rules of Evidence, which was published as a series of law review articles. Over the years, he also provided valuable comments on several other Commission studies involving evidence issues. He was incredibly knowledgeable about such issues, analyzing them passionately and methodically, always looking for the approach that would best serve the public interest.

Prof. Méndez was also kind-hearted and generous with his time, great at explaining complicated legal principles and talking through challenging questions. He freely shared his expertise in evidence and criminal law and wide range of practical experience.

The citizens of California are fortunate to have had the benefit of his good counsel in shaping the laws of their state. He was a mentor and role model for many people. His lifetime of dedicated teaching and public service will have an enduring positive impact.

Commissioner Suggestions

Chairperson Lee suggested that the Commission examine the possibility of revising the format for its agendas. For consideration in this regard, she will provide the staff with an agenda template prepared by the Attorney General's office.

Vice Chairperson Hallinan plans to make a suggestion relating to a motion to quash an order for examination. He will put his suggestion in writing, for the Commission to consider in its annual review of new topics and priorities.

Public Records Practices

1

8 9

10

11

12

13

14

15

16

17

21

22

2324

25

26

28

- The Commission considered Memorandum 2017-21 and its First Supplement, relating to the California Supreme Court's decision in *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017).
- The Commission decided to adopt the following policies, which supplement the policies on staff communications described at pages 4-5 of Memorandum 2017-21:
 - Commissioners and staff should not use text messaging or social media to conduct substantive Commission business.
 - Commissioners should segregate any email messages they send or receive relating to Commission business (other than messages from the staff), by placing such messages into a separate folder.
 - Within a reasonable time after a Commissioner's term ends, the Commissioner shall forward that email folder to the staff for safekeeping.
 - The staff should continue to prepare an annual memorandum on open government laws, for training purposes.
- The staff will draft language to implement these decisions in the Commission's *Handbook of Practices and Procedures*, and present that language to the Commission for review and approval at a future meeting.
 - (Commissioner Chau was not present for these decisions.)

Election of Officers

- The Commission considered Memorandum 2017-33, relating to the election of Commission officers. The Commission elected Thomas Hallinan as Chairperson and Jane McAllister as Vice Chairperson, for terms commencing September 1, 2017, and ending August 31, 2018.
- 27 (Commissioner Chau was not present for these decisions.)

2017 LEGISLATIVE PROGRAM

The Commission considered Memorandum 2017-34, discussing the Commission's 2017 Legislative Program. No Commission action was required or taken.

STUDY G-400 — CALIFORNIA PUBLIC RECORDS ACT CLEAN-UP

The Commission considered Memorandum 2017-37, relating to stakeholder outreach. At the Chair's suggestion, the Commission directed the staff to contact the Peace Officers Research Association of California ("PORAC") about participating in this study.

The Commission also considered Memorandum 2017-24, which presents a draft of a tentative outline for reorganizing the California Public Records Act ("CPRA"). The Commission made a number of decisions regarding that outline, as described below.

(Commissioner Chau was not present for any of the decisions relating to this study.)

Location of the CPRA Within the Government Code

The Commission approved the concept of relocating the CPRA to a new division ("Division 10. Inspection of Records") of "Title 1. General" of the Government Code. The Commission decided against relocating the content of the nearby chapters relating to public records (Chapters 3, 3.01, 3.1, 3.2, and 3.3). Instead, the staff should:

- (1) Cross-refer to Chapters 3, 3.01, 3.1, 3.2, and 3.3 (or material in those chapters) where appropriate in the Commission's Comments to code sections in the recodified CPRA.
- (2) Include one or more "signpost provisions" within the recodified CPRA, which would direct readers to the other chapters relating to public records.

Constitutional Right of Access

On behalf of the California News Publishers Association, Nikki Moore pointed out that overlying the CPRA is the right of access established in Article I, Section 3(b) of the California Constitution. Ms. Moore asked whether the Commission's proposed legislation would refer to that constitutional provision.

The Commission decided to refer to Article I, Section 3(b) at appropriate places in its Comments to the proposed legislation, but not in the proposed legislation itself. That will help alert readers to the constitutional provision, while maintaining the nonsubstantive character of the Commission's proposal.

Retention of Records

Ms. Moore suggested that the recodified CPRA should refer to or incorporate the provisions governing retention of public records. To alert readers to those

- provisions, the Commission decided to refer to them at appropriate places in its
- 2 Comments to the proposed legislation.

Nonsubstantive Reform

3

15

24

25

2627

2829

30

As previously decided, the proposed CPRA recodification should include provisions modeled on Penal Code Sections 16005, 16020, and 16025 (shown at pp. 6-7 of Memorandum 2017-24). In addition, the recodification should include statutory language that specifically refers to Attorney General opinions interpreting the CPRA or determining its constitutionality. The staff should draft language to implement this decision and provide it to the Commissioners and interested persons to review.

11 **Definition of "Prompt"**

- 12 Ms. Moore suggested including a definition of "prompt" in "Chapter 2.
- Definitions" of the recodification outline. The Commission declined to do so,
- because the CPRA does not currently define "prompt."

Government Code Section 6253

- Ms. Moore pointed out that subdivisions (a) and (b) of Government Code
 Section 6253 are redundant to some extent, and there is also some overlap
 between subdivisions (b) and (c). She asked how the Commission planned to
- 19 handle that situation in its proposed recodification.
- The staff explained that the Legislature's resolution on this study (2016 Cal.
- Stat. res. ch. 150) instructs the Commission to eliminate duplicative provisions.
- 22 The staff will take Ms. Moore's comments into account in preparing a
- 23 recodification of Section 6253 for the Commission to consider.

Government Code Section 6254.16

The tentative outline would place the substance of Government Code Section 6254.16 in "Chapter 10. Personal Information." Ms. Moore pointed out that Section 6254.16 applies to both residential and commercial users, so it may not belong in a chapter on "personal information." The Commission directed the staff to look into this point and bring it back to the Commission for further consideration.

Government Code Section 6255

2 The tentative outline would place the entire substance of Government Code Section 6255 in proposed "Part 3. Inspection Procedures." Ms. Moore suggested placing Section 6255's catchall exemption elsewhere. The Commission directed the staff to look into this point and bring it back to the Commission for further consideration.

Enforcement

1

3

4 5

6

7

8

9

10 11

12

13

14

15

16

17

18

19

20

21

22 23

24

25

26

27

28

29

30

31

32

The tentative outline includes "Part 4. Enforcement of the Right to Inspect or Receive a Public Record." Ms. Moore explained that the right to "inspect or receive" a public record is not the only aspect of the CPRA that people may seek to enforce. She pointed out that Government Code Sections 6258 and 6259 could be more clear about that point.

In light of her comments, the Commission decided that "Part 4. Enforcement" would be a better name to use. Due to the nonsubstantive nature of this study, however, the Commission will not attempt to clarify the language used in Sections 6258 and 6259.

Article 2 of the CPRA

The Commission deferred decision on the best means of handling the material that is now in Article 2 of the CPRA (Gov't Code §§ 6275-6276.48).

STUDY J-507 — CIVIL DISCOVERY IMPROVEMENTS

The Commission considered Memorandum 2017-26, relating to disputes over whether a party deponent will attend and testify pursuant to a notice of deposition. The Commission discussed various possible approaches but opted to defer decision-making and further consideration of civil discovery until its December meeting, when the fate of AB 383 (Chau) will be more clear.

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

The Commission considered Memorandum 2017-35, which discusses a letter from the Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM") that raises some concerns relating to use of a revocable transfer on death deed ("RTODD"). The Commission will consider most of those concerns later in this study, after there has been more practical experience under the RTODD statute.

However, a number of TEXCOM's concerns relate to RTODD provisions that were modeled on existing provisions governing disposition of property without administration (Prob. Code §§ 13109-13111, 13204-13206, 13561-13562). Those concerns would seem to apply not only to the RTODD provisions, but also to the provisions governing disposition of property without administration.

The latter provisions were enacted on Commission recommendation, so it would be appropriate for the Commission to address any imperfections in them. The Commission authorized the staff to undertake such work right away, without waiting until the Commission commences its main review of the efficacy of the RTODD statute.

STUDY L-4100 – NONPROBATE TRANSFERS

The Commission considered Memorandum 2017-36, discussing the Commission's study of the liability of nonprobate transfers for creditor claims and family protections.

The Commission made decisions regarding the scope of the nonprobate transfer liability rule in Section 102 of the Uniform Nonprobate Transfers on Death Act (1989). The Commission decided that the following should be treated as nonprobate transfers for the purposes of the liability rule:

- Personal property joint tenancies. (Commissioners Hallinan and Kihiczak abstained from this decision)
- Multiple party accounts. (Commissioner Hallinan abstained from this decision)
- Transfer-on-death security registrations. (Commissioner Hallinan abstained from this decision)
- Property over which the decedent holds an exercisable general power of appointment, which was created by a person other than the decedent. (Commissioner Chau was not present for this decision)
- Life insurance and death benefits to the extent that the decedent could have obtained the funds immediately prior to death.

The Commission also decided that, for purposes of the liability rule, the following should not be treated as nonprobate transfers:

- Retirement accounts subject to a beneficiary designation.
- Real property joint tenancies.

STUDY R-100 — FISH AND GAME LAW

- The Commission considered Memorandum 2017-38, presenting a draft of a third tentative recommendation ("Part 3") on recodification of the Fish and Game Code. The Commission also considered the First Supplement to Memorandum 2017-38, which presents a letter from John Laird (Secretary for Natural Resources) requesting that the Commission readjust the sequence of its work on this study.
 - The Commission decided to take the following steps:

1

8

9

10

11

12

13

14

15

16

17

18

19

20

23

recommendation.

- Temporarily suspend further work on Parts 2 and 3 of the tentative recommendation.
- Complete an informational report on the funding specified in the Fish and Game Code (including the identification of mandates for which there is no dedicated funding source).
- Review public comments on Part 1 of the tentative recommendation.
- After the end of the 2017-2018 fiscal year, prepare a new tentative recommendation that includes the entirety of the proposed Fish and Wildlife Code. This tentative recommendation should incorporate any changes made pursuant to public comment on Part 1 and any statutory changes made in the budget process.
- The Commission also approved the draft attached to Memorandum 2017-38 as a preliminary draft for eventual incorporation into the new tentative
- 24 (Commissioner Chau was not present for any of the decisions relating to this study.)