

CALIFORNIA LAW REVISION COMMISSION

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March 31, 2000

<i>Date:</i> Thursday, April 13, 2000 9:00 am – 5:00 pm	<i>Place:</i> Sacramento State Capitol, Room 115
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FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Thursday, April 13****1. MINUTES OF FEBRUARY 10-11, 2000, MEETING (3/16/00)****2. ADMINISTRATIVE MATTERS****Meeting Schedule**

Memorandum 2000-33 (NS) (3/31/00)

Conflict of Interest Disclosure

Memorandum 2000-20 (BH) (3/7/00)

Report of Executive Secretary**3. 2000 LEGISLATIVE PROGRAM****Status of Bills**

Memorandum 2000-21 (NS) (3/31/00)

SB 1370 – Confidentiality of Settlement Negotiations [Study K-410]

Memorandum 2000-22 (BG) (to be sent)

AB 1822 – Administrative Rulemaking [Study N-300]

Memorandum 2000-34 (BH) (to be sent)

4. AFFIDAVIT UNDER FISH AND GAME CODE SECTION 2357 [STUDY J-1308]

Comments on Tentative Recommendation

Memorandum 2000-31 (BG) (to be sent)

5. RIGHTS AND DUTIES UNDER REVOCABLE TRUST [STUDY L-3060]

Memorandum 2000-23 (SU) (to be sent)

6. EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN [STUDY EM-458]

Memorandum 2000-24 (NS) (3/13/00)

First Supplement to Memorandum 2000-24 (to be sent)

7. RECLASSIFICATION OF CIVIL CASES [STUDY J-1312]

Memorandum 2000-25 (BG) (sent 3/31/00)

Special
Order of
Business
1:00 PM

8. MECHANIC'S LIENS [STUDY H-820]

Memorandum 2000-26 (SU) (to be sent)

9. STAY OF MECHANIC'S LIEN ENFORCEMENT PENDING ARBITRATION [STUDY J-1304]

Comments on Tentative Recommendation

Memorandum 2000-27 (BG) (3/31/00)

10. RULEMAKING UNDER PENAL CODE SECTION 5058 [STUDY N-304]

Comments on Request for Public Comment

Memorandum 2000-28 (BH) (3/30/00)

11. LAW LIBRARY BOARD OF TRUSTEES [STUDY J-1307]

Comments on Tentative Recommendation

Memorandum 2000-30 (BG) (to be sent)

12. AWARD OF COSTS AND CONTRACTUAL ATTORNEY'S FEES TO PREVAILING PARTY [STUDY J-901]

Memorandum 2000-29 (BG) (to be sent)

13. EXPIRED PILOT PROJECTS [STUDY J-1309]

Memorandum 2000-32 (BH) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
APRIL 13, 2000
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 13, 2000.

Commission:

Present: Howard Wayne, Assembly Member, Chairperson
Sanford M. Skaggs, Vice Chairperson
Joyce G. Cook
David Huebner

Absent: Bion M. Gregory, Legislative Counsel

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel

Consultants: James Acret, Mechanic's Lien Law
Gordon Hunt, Mechanic's Lien Law
J. Clark Kelso, Trial Court Unification, Administrative Rulemaking

Other Persons:

Sam Abdulaziz, North Hollywood
Yolanda Benson, Mattos & Associates, Sacramento
Herb Bolz, Office of Administrative Law, Sacramento
Donald C. Burns, Spa and Pool Industry Education Council, Sacramento
Gwynnae Byrd, Joint Committee on Prison Construction and Operations, Sacramento
Mohammed Cato, Assemblyman Honda's Office, Sacramento
Ellen Gallagher, Contractors License Board, Sacramento
Jan Hansen, Lumber Association of California & Nevada, Sacramento
Loretta Hollis, Department of Corrections, Sacramento
Keith Honda, Assemblyman Honda's Office, San Jose
Karen M. Lutke, San Mateo County Law Library, Redwood City
Deborah Mattos, Mattos & Associates, Sacramento
Lee Morhar, Judicial Council of California, Sacramento
Michael R. Nave, Meyers, Nave, Riback, Silver & Wilson, San Leandro
Tony Nevarez, Office of Tony Nevarez, Sacramento

1 disclosed. This will replace the current system, which limits disclosure of some
2 types of economic interests to those persons and entities listed in the Code as
3 likely to be materially affected by a Commission decision. The amendment shall
4 be timed so as to avoid the need to file new statements of economic interest
5 before the next annual statement is due.

6 **Report of Executive Secretary**

7 **Appointments.** The Executive Secretary reported that there have been no new
8 gubernatorial or legislative appointments to the Commission.

9 **Consultant contracts.** The Executive Secretary reported that the Commission
10 has received background studies prepared by Professors Tung (Municipal
11 Bankruptcy Issues) and McGovern (Probate Rules of Construction). These studies
12 will be scheduled for initial Commission consideration at upcoming meetings.
13 The Commission also anticipates receipt of other consultant background studies
14 during the next few months.

15 In connection with the study of mechanic's lien law (see entry in these
16 Minutes under Study H-820), the Executive Secretary reported that Professor
17 Sweet is in Jerusalem for the year and not readily accessible by email. The staff
18 has a lead on an alternate academic consultant who may be more readily
19 available. The Commission concluded that, for now, it has sufficient consultant
20 advice on this project, and directed the staff not to pursue the matter further.

21 **Topics and priorities.** The Executive Secretary reported that the Commission
22 has been approached informally about the possibility of a cleanup project on the
23 statutes governing trial court personnel.

24 **2000 LEGISLATIVE PROGRAM**

25 The Commission considered Memorandum 2000-21, concerning the status of
26 the Commission's 2000 legislative program. The Executive Secretary updated the
27 material in the memorandum with the information that:

28 (1) AB 1358 was amended April 3 to incorporate the Commission's
29 recommendation on Family Code enforcement.

30 (2) AB 1822, which would implement the Commission's recommendation on
31 administrative rulemaking, was approved by the policy committee in the
32 Assembly on April 11.

33 (3) SB 1487, which incorporates the Commission's tentative recommendation
34 on the trout affidavit, was approved by the Senate on April 3.

1 (4) The Commission's budget had a prehearing with the staff of the Assembly
2 Budget Subcommittee on April 11. It is anticipated the matter will be on the
3 Subcommittee's consent calendar.

4 For Commission action on issues relating to the 2000 legislative program, see
5 the entries in these Minutes under Studies J-1308 (trout affidavit), K-410
6 (confidentiality of settlement negotiations), and N-300 (administrative
7 rulemaking).

8 STUDY EM-458 – EARLY DISCLOSURE OF VALUATION DATA AND
9 RESOLUTION OF ISSUES IN EMINENT DOMAIN

10 The Commission considered Memorandum 2000-24, and its First and Second
11 Supplements, relating to early disclosure of valuation data and resolution of
12 issues in eminent domain. The Commission directed the staff to prepare a draft
13 of a tentative recommendation that would incorporate the following features:

14 **More Detailed Summary of Prelitigation Appraisal**

15 The draft should include revisions of Government Code Section 7267.2
16 (relocation assistance act) and Code of Civil Procedure Section 1255.010
17 (prejudgment deposit), to include more detail in the summary of the appraisal.
18 The revisions should be along the lines set out in the memorandum, with the
19 additional requirement that the summary should state the highest and best use
20 on which the appraisal is based, as well as calculations and an explanation
21 supporting any compensation for injury to the remainder and offsetting benefits.
22 The Comment should note that this would also cover a situation where the
23 compensation for injury to the remainder is zero, due to a total offset of benefits.

24 The draft should not include the amendment to Code of Civil Procedure
25 Section 1255.030, proposed in the memorandum. The issue addressed by that
26 proposal rarely arises. In addition, the proposal would tend to generate litigation,
27 and is extraneous to the purpose of the present recommendation.

28 The draft should not attempt to deal with the issue of admissibility of the
29 appraisal or summary against the condemnor in the eminent domain proceeding.

30 **Early Exchange of Valuation Data**

31 The proposal for an exchange of valuation data 90 days before trial should be
32 revised so that in no event could the exchange occur earlier than nine months
33 after the commencement of the proceeding. This should be combined with a

1 provision that would allow the court to extend time on motion and a showing of
2 good cause.

3 **Valuation Data Exchanged**

4 The proposal to elaborate the required exchange of data involving claimed
5 loss of business goodwill should be included in the draft if it is not dealt with in
6 other legislation this session.

7 The reference in the proposed revision of Code of Civil Procedure Section
8 1250.410 to “all statutorily and constitutionally required compensation” may be
9 unduly broad, since it could be construed to apply to relocation assistance. The
10 proposal should be clarified by revising the provision to apply to “all
11 compensation required pursuant to this title.” That clarification should be
12 included in the revised draft, or in other implementing legislation this session.

13 **Early Resolution of Legal Issues**

14 The proposal on early resolution of legal issues should be revised to provide
15 for a motion within 30 days after the exchange of valuation data. The motion
16 should be determined by the judge assigned for trial of the case. The statute
17 should authorize the judge to extend the time for final offers and demands, and
18 the time for commencement of trial, if necessary to allow a sufficient opportunity
19 for the parties to prepare in light of the resolution of the legal issues.

20 **Encourage Alternative Dispute Resolution**

21 The materials should emphasize the voluntary nature of ADR under the draft
22 provisions. ADR would be used in eminent domain only on mutual agreement of
23 the parties.

24 In the draft statute, if the parties elect binding arbitration, the arbitration
25 itself, not limited to judicial review rights, should be subject to the arbitration law
26 in the Code of Civil Procedure (Section 1280 *et seq.*).

27 The staff should also check the arbitration statute in the existing Eminent
28 Domain Law for possible overlap with this provision.

29 **STUDY H-820 – MECHANIC’S LIEN LAW**

30 The Commission considered Memorandum 2000-26, and its First Supplement,
31 concerning the study of mechanic’s lien law, and the materials distributed on
32 behalf of Keith Honda, Assemblyman Mike Honda’s chief of staff, and Ellen

1 Gallagher, on behalf of the Contractors State License Board, which are attached
2 to the Second Supplement to Memorandum 2000-26.

3 The Commission discussed the major alternative proposals for mechanic's
4 lien law reform with respect to home improvement contracts — mainly, recovery
5 funds, additional bonding (such as the homeowner's minibond), joint control
6 funds, defense of full payment, and direct payment as an alternative to lien
7 notice. The Commission heard the views of interested persons attending the
8 meeting and the opinions of its consultants, James Acret and Gordon Hunt. The
9 Commission directed the staff to analyze the constitutional limits on statutory
10 revisions of mechanic's liens, particularly in the context of the James Acret's full
11 payment proposal, and to work on a draft of Ellen Gallagher's home
12 improvement contract direct payment proposal for further consideration. The
13 Commission declined to change the name of the mechanic's lien, since the
14 terminology seems to be ingrained, even if old-fashioned.

15 STUDY J-1304 – STAY OF MECHANIC'S LIEN ENFORCEMENT
16 PENDING ARBITRATION

17 The Commission considered Memorandum 2000-27, concerning the tentative
18 recommendation on *Stay of Mechanic's Lien Enforcement Pending Arbitration*. The
19 Commission approved the proposal as a final recommendation, for printing and
20 submission to the Legislature.

21 STUDY J-1307 – LAW LIBRARY BOARD OF TRUSTEES

22 The Commission considered Memorandum 2000-30 and its First and Second
23 Supplements, concerning comments on the tentative recommendation on *Law*
24 *Library Board of Trustees*. The Commission directed the staff to prepare a revised
25 tentative recommendation, which would:

- 26 (1) Permit a judge to select a member of the public to serve on the law
27 library board in the judge's place, not just a member of the bar of
28 the county.
- 29 (2) Permit the board of supervisors to select a member of the public to
30 serve on the law library board in place of the chair of the board of
31 supervisors, not just another supervisor or a member of the bar of
32 the county.
- 33 (3) Incorporate the revisions proposed in the previous tentative
34 recommendation.

1 The revised tentative recommendation should be circulated to law library
2 boards, trial courts, boards of supervisors, and bar associations.

3 STUDY J-1308 – TROUT AFFIDAVIT

4 The Commission considered Memorandum 2000-31 and its First Supplement,
5 concerning comments on the tentative recommendation on *Affidavit Under Fish*
6 *and Game Code Section 2357*. The Commission approved the draft attached to
7 Memorandum 2000-31 as a final recommendation.

8 STUDY K-410 – CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

9 The Commission considered the First Supplement to Memorandum 2000-22,
10 concerning SB 1370 (Ortiz), which would implement the Commission's
11 recommendation on *Admissibility, Discoverability, and Confidentiality of Settlement*
12 *Negotiations*. The Commission directed the staff to continue to discuss the bill
13 with the interested parties and try to resolve their concerns, communicating with
14 the chair of the Commission as necessary. The Commission considered the
15 possibilities of adding a catchall exception (First Supp. to Memorandum 2000-22,
16 pp. 2-3) and narrowing the coverage of unfiled claims (*id.* at 6-8), but did not
17 make such revisions, because there was no indication that either step would
18 reduce opposition to the bill.

19 The Commission approved the following technical revisions:

20 **Proposed Evidence Code Section 1132. Effect of Chapter**

21 The Comment to proposed Evidence Code Section 1132 should be revised as
22 follows:

23 **Comment.** Section 1132 clarifies the interrelationship between
24 this chapter and provisions on mediation confidentiality (Sections
25 1115-1128). This chapter does not in any way limit the evidentiary
26 protection for evidence of a mediation. Evidence that is subject to
27 an exception in Article 3 of this chapter may still be inadmissible
28 under the mediation confidentiality provisions, particularly Section
29 1119 (admissibility, discoverability, and confidentiality).

30 Section 1132 also clarifies the interrelationship between this
31 chapter and Sections 1152 and 1154. Unlike this chapter, those
32 provisions apply to

1 **Proposed Evidence Code Section 1139. Obtaining benefits of settlement**

2 The leadline and the Comment to proposed Evidence Code Section 1139
3 should be revised as follows:

4 **§ 1139. Obtaining Offset and obtaining benefits of settlement**

5 1139. Article 2 (commencing with Section 1133) does not apply
6 where either of the following conditions is satisfied:

7 (a) A settlement agreement or other evidence of negotiations to
8 settle a pending civil action or administrative adjudication is
9 introduced or is relevant to enforce, or to rebut an attempt to
10 enforce, a settlement of the loss, damage, or claim that is the subject
11 of the negotiations.

12 (b) A settlement agreement or other evidence of negotiations to
13 settle a pending civil action or administrative adjudication is
14 introduced or is relevant to show, or to rebut an attempt to show,
15 the existence of, or performance pursuant to, a settlement barring
16 the claim that is the subject of the negotiations.

17 **Comment.** Section 1139 seeks to ensure that parties enjoy the
18 benefits of settling a dispute. For background, see generally D.
19 Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules*
20 *of Limited Admissibility* § 3.8.1, at 3:125 (1999) (“[T]he law would
21 hardly encourage compromise by adopting an evidentiary rule
22 essentially making proof of the compromise agreement
23 impossible.”). The provision would apply, for example, where
24 parties settle a case pursuant to Code of Civil Procedure Section
25 664.6 or 664.7 and the court exercises its jurisdiction to enforce the
26 settlement.

27 Under subdivision (b), a party to a settlement may introduce
28 evidence of the settlement to show that a claim is barred or
29 performance has or has not been rendered. The provision also
30 permits a non-settling defendant to show that the plaintiff has fully
31 or partially recovered from other parties and cannot proceed
32 against the non-settling defendant. In both situations, evidence of
33 negotiations to settle a pending civil action or administrative
34 adjudication may be used in rebuttal.

35 Evidence admitted pursuant to Section 1139 may only be used
36 for the purposes specified in the provision. A limiting instruction
37 may be appropriate. See Section 355.

38 See Section 1130 (negotiations to settle pending civil action or
39 administrative adjudication). See also Section 1131 (application of
40 chapter).

- 1 (5) It should be clarified that the special emergency rulemaking
2 procedures, provided in subdivision (e)(3), apply to the repeal or
3 amendment of a regulation, as well as the adoption of a regulation.
- 4 (6) Certification that the operational needs of the Department of
5 Corrections require adoption of a regulation under the emergency
6 rulemaking procedure, prepared pursuant to subdivision (e)(2),
7 should include an explanation of why it is necessary to use the
8 emergency rulemaking procedure.
- 9 (7) It should be clearly stated that the Department of Corrections may,
10 in appropriate circumstances, use the emergency rulemaking
11 procedure on the basis of operational necessity, as provided in
12 subdivision (e)(2), or may proceed under the regular emergency
13 rulemaking procedure provided in Government Code Section
14 11346.1.
- 15 (8) The period for review of a proposed emergency regulation by the
16 Office of Administrative Law should be extended where the use of
17 the emergency rulemaking procedure is based on operational
18 necessity rather than emergency. In such a case, OAL should be
19 required to read and consider public comments on the proposed
20 emergency regulation received during the first part of the review
21 period. For example, the review period might be extended from 10
22 to 20 days, with the current five-day public comment period
23 extended to 15 days.
- 24 (9) The tentative recommendation should explain that the changes to
25 the emergency rulemaking procedure were proposed in response
26 to assertions of overuse of the procedure, but that the Commission
27 did not itself conclusively find that the procedure has been
28 overused.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary