
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 30, 2005
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on September 30, 2005.

Commission:

Present: Edmund L. Regalia, Chairperson
David Huebner, Vice Chairperson
Sidney Greathouse
Pamela L. Hemminger
Susan Duncan Lee
William E. Weinberger

Absent: Diane F. Boyer-Vine, Legislative Counsel
Frank Kaplan
Bill Morrow, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Brian P. Hebert, Assistant Executive Secretary
Steven E. Cohen, Staff Counsel
Barbara S. Gaal, Staff Counsel

Consultants: None

Other Persons:

Sam Abdulaziz, Construction Trade Groups, North Hollywood
Deonne Anderson, Los Angeles Superior Court
Ross Cirrincione, Cemex Construction Materials, Ontario
Frank Collard, Southern California Rock Products Association, South Pasadena
Theresa Jauregui, Los Angeles Superior Court
John Jones, Aliso Viejo
Tony Klein, Process Server Institute, San Francisco
John M. McCoy III, State Bar Committee on Administration of Justice, Los Angeles
Jim Morrow, Davis Wholesale Electric, North Hollywood
Dick Nash, Building Industry Credit Association, Los Angeles
Debi Pepaj
Daniel Pone, Judicial Council, Sacramento
Sam Shabot, Palos Verdes Peninsula
Mary Pat Toups, Laguna Woods
Diane Wasznicky, State Bar Family Law Section, Sacramento

Norm Widman, Lumber Association of California and Nevada, San Diego
Pat Zongker, Dixieline Lumber Company, San Diego

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MINUTES OF JULY 14, 2005, COMMISSION MEETING

1 The Commission approved the Minutes of the July 14, 2005, Commission
2 meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

3 **Appreciation of Service of William Weinberger as Chairperson**

4 On behalf of the Commission, the Chairperson presented a plaque to
5 Commissioner William Weinberger in appreciation for his service as Chairperson
6 of the Commission for the 2004-2005 term.

7 **Schedule of Future Meetings**

8 The Commission considered Memorandum 2005-28, relating to the
9 Commission’s schedule of future meetings. The Commission changed the
10 location of the November 2005 meeting from San Francisco to Oakland, and the
11 date of the proposed March 2006 meeting from the 9th to the 16th. As so revised,
12 the Commission adopted the following schedule of future meetings.

1	November 2005	Oakland
2	Nov. 18 (Fri.)	9:30 am – 5:00 pm
3	January 2006	Burbank
4	Jan. 20 (Fri.)	9:30 am – 5:00 pm
5	March 2006	Sacramento
6	Mar. 16 (Thur.)	9:00 am – 4:30 pm
7	April 2006	Sacramento
8	Apr. 27 (Thur.)	9:00 am – 4:30 pm
9	June 2006	Sacramento
10	June 8 (Thur.)	9:00 am – 4:30 pm
11	July 2006	Burbank
12	July 21 (Fri.)	9:30 am – 5:00 pm
13	September 2006	San Francisco
14	Sept. 8 (Fri.)	9:00 am – 5:00 pm
15	October 2006	Burbank
16	Oct. 20 (Fri.)	9:30 am – 5:00 pm
17	December 2006	Burbank
18	Dec. 8 (Fri.)	9:30 am – 5:00 pm

19 **New Topics and Priorities**

20 The Commission considered Memorandum 2005-29, its First Supplement, and
21 material distributed at the meeting (attached to the Second Supplement), relating
22 to new topics and priorities. The Commission also considered a suggestion raised
23 at the meeting by John Jones, relating to the process for renewing a judgment.
24 See Second Supplement to Memorandum 2005-37. Sam Shabot orally explained
25 his suggestion regarding forced heirship — the possibility of creating an
26 equitable statutory elective share for a disinherited child in a probate or trust
27 context.

28 The Commission decided to undertake the following new projects in late 2005
29 and 2006:

- 30 • The narrow procedural issue raised by eminent domain attorney
31 Michael Montgomery, which involves a provision drafted by the
32 Commission (Code Civ. Proc. § 1260.040). See Memorandum 2005-
33 29, pp. 24-25 & Exhibit pp. 65-66.

- 1 • As a low priority matter, the technical issues identified by the staff
2 that the Commission could investigate pursuant to its statutory
3 authority to correct technical and minor substantive defects (Gov't
4 Code § 8298). See Memorandum 2005-29, pp. 14-15.
- 5 • As a low priority matter, the narrow issue relating to interest on a
6 pecuniary gift in a trust, which involves a provision drafted by the
7 Commission (Prob. Code § 16340). See Memorandum 2005-29, p.
8 22 & Exhibit pp. 37-41.

9 Each of these new projects falls within existing statutory authorization or a
10 broader topic that is already on the Commission's Calendar of Topics and
11 incorporated into SCR 15 (Morrow).

12 Aside from these new projects, the Commission decided to follow its
13 traditional scheme of priorities: (1) matters for the next Legislative session, (2)
14 matters directed by the Legislature, (3) matters for which the Commission has
15 engaged an expert consultant, and (4) other matters that have been previously
16 activated but not completed. Projects falling within each of these categories are
17 identified at pages 32-35 of Memorandum 2005-29.

18 Next year at this time the Commission will consider whether to pursue any of
19 the other topics discussed in Memorandum 2005-29 that the staff identified as
20 potentially worthwhile. The Commission will also revisit Mr. Jones' suggestion
21 regarding the process for renewing a judgment.

22 **Report of Executive Secretary**

23 *Commission*

24 The Executive Secretary reported that the terms of three Commission
25 members — Kaplan, Regalia, and Weinberger — expire October 1, 2005. By
26 statute the Governor has 60 days in which to reappoint a Commission member
27 following expiration of the member's term.

28 There is still a vacancy in the office of Assembly member of the Commission.
29 The appointing authority is the Speaker of the Assembly.

30 *Personnel*

31 The Executive Secretary reported that the Commission has two new
32 employees. Steve Cohen, in attendance at the meeting, has been hired as a staff
33 counsel. Korrene Bradford has been hired as a staff services analyst, on a half
34 time basis.

1 *Other Matters*

2 The Executive Secretary reported that the Commission has been notified by
3 the Attorney General that it is named as a party in a pro per lawsuit. The
4 Commission has not received a copy of the complaint or been served with
5 process.

2005 LEGISLATIVE PROGRAM

6 The Commission considered Memorandum 2005-30, relating to the
7 Commission's 2005 legislative program.

8 The staff orally updated the chart attached to the memorandum with the
9 information that AB 333 (Harman) relating to civil discovery has been enacted as
10 Chapter 294 of the Statutes of 2005. The Commission ratified the technical
11 changes made to the bill before its enactment, as set out at pages 2-4 of the
12 memorandum.

13 The staff reported that two bills — AB 1162 (Mullin/Salinas) and SB 1062
14 (Kehoe) — have been amended to direct the Commission to study whether the
15 law governing the appraisal and valuation process in eminent domain
16 proceedings fairly compensates a condemnee for the taking of its property,
17 including the role and importance of legal counsel for the condemnee. The bills
18 are two-year bills.

19 STUDY F-1301 – ENFORCEMENT OF MONEY JUDGMENT UNDER FAMILY CODE

20 The Commission considered Memorandum 2005-37 and its First and Second
21 Supplements, concerning comments on the tentative recommendation on
22 *Enforcement of Judgments Under the Family Code* (May 2005). The Commission
23 directed the staff to prepare a draft recommendation based on the tentative
24 recommendation, subject to the staff suggestions made in the memoranda.

25 Before preparing the draft recommendation, the staff will (1) seek input from
26 the Trusts and Estates Section of the State Bar regarding the existing procedure
27 for enforcement of a support judgment after the death of the obligor, and (2)
28 conduct additional research on enforcement of judgment remedies that might
29 result in the enforcement of a Family Code judgment in a limited civil case.

30 John Jones submitted comments on the existing procedure for renewal of a
31 judgment. See the Second Supplement to Memorandum 2005-37. His comments

1 were considered in connection with the Commission's discussion of "New
2 Topics and Priorities" *supra*.

STUDY J-103 – ORAL ARGUMENT IN CIVIL PROCEDURE

3 The Commission considered Memorandum 2005-34, relating to comments on
4 the tentative recommendation on *Oral Argument in Civil Procedure* (June 2005).
5 The Commission decided to prepare a report indicating that after consideration
6 of input from both bench and bar, it appears there is not a sufficient problem
7 with denial of oral argument in the courts to warrant legislation on the matter or
8 the potential interpretive problems legislation is likely to cause.

9 The staff should present a draft of the report for consideration by the
10 Commission at a future meeting. The staff should indicate whether it would be
11 more appropriate to report on this matter to the Senate Judiciary Committee or to
12 the Legislature.

STUDY J-111 – STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

13 The Commission considered Memorandum 2005-36, relating to the statute of
14 limitations for legal malpractice. The Commission approved the attached draft as
15 a revised tentative recommendation to be circulated for comment, subject to the
16 following revisions.

17 **Mutuality**

18 The proposed law should permit either a malpractice plaintiff or a defendant
19 attorney to (1) move to stay a legal malpractice action or (2) move to lift a stay of
20 a legal malpractice action. The requirement that a court state its reasons for
21 denying a stay should apply regardless of whether the stay is sought by the
22 malpractice plaintiff or by the attorney defendant. Similarly, the requirement that
23 a court state its reasons for lifting a stay before final resolution of a related
24 proceeding should apply regardless of which party objects to that step.

25 **Factors to Consider**

26 The proposed Comment should state that a court is to consider the following
27 factors in deciding whether to grant a stay:

- 28 (1) The interest in litigating the malpractice action when evidence
29 is accessible, memories are fresh, and witnesses are available.

- 1 (2) The extent to which the malpractice plaintiff and attorney
2 defendant would be able to gather and effectively preserve
3 evidence relating to the malpractice action if that action were
4 stayed.
- 5 (3) The interest in providing certainty and stability by promptly
6 resolving the malpractice action.
- 7 (4) The extent to which the interest in providing certainty and
8 stability has been served by filing the malpractice action, thus
9 alerting the attorney defendant to the allegations and
10 permitting the attorney defendant to take the claim into
11 account in future planning.
- 12 (5) The financial burden, time demands, and emotional stress of
13 simultaneously litigating the malpractice action and a related
14 proceeding, and the ability of the malpractice plaintiff to cope
15 with those constraints.
- 16 (6) The danger of inconsistent judgments or problematic
17 application of collateral estoppel if the malpractice action is
18 litigated before the related proceeding is fully resolved.
- 19 (7) The likelihood that the malpractice plaintiff would be forced
20 to take inconsistent positions in the malpractice action and the
21 related proceeding if those matters were pursued
22 simultaneously, and the degree to which that would adversely
23 affect public respect for, and confidence in, the judicial system.
- 24 (8) The likelihood that resolution of the related proceeding would
25 make the malpractice action unnecessary.
- 26 (9) The likelihood that simultaneously litigating the malpractice
27 action and the related proceeding would force the malpractice
28 plaintiff to reveal privileged communications, other privileged
29 material, or other information that could be used against the
30 plaintiff in the related proceeding, and the extent to which
31 such harm could be prevented by a protective order.
- 32 (10) The likelihood that the outcome of the related proceeding
33 would have no effect, or only a minimal effect, on the
34 malpractice action.
- 35 (11) If a related proceeding is anticipated but has not yet
36 commenced, the likelihood that the anticipated proceeding
37 will actually commence and, if so, how soon that is likely to
38 occur.
- 39 (12) The likelihood that a malpractice plaintiff will be unable to
40 state a valid cause of action against an attorney defendant
41 because of an inability to plead damages, which may be
42 dependent upon the outcome of a related proceeding.
- 43 (13) Any other factor that is relevant to achieving justice in the
44 malpractice action or a related proceeding.

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STUDY J-505 – CIVIL DISCOVERY

The Commission considered Memorandum 2005-33 and its First Supplement, relating to civil discovery.

In the draft attached to the memorandum, proposed Code of Civil Procedure Section 2029.010(a) and the corresponding portion of the Comment should be revised as shown in boldface below:

2029.010. (a) Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a ~~natural~~ person in California, **or a deposition for the production of documents and things**, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony **or producing documents** in actions pending in California.

....

Comment. The first sentence of Section 2029.010 (new subdivision (a)) is amended to apply to an organization located in California, not just an individual found in the state. **The sentence is also amended to make clear that Section 2029.010 encompasses a deposition for the production of documents and things, regardless of whether the deponent is required to testify.**

As discussed in the First Supplement to Memorandum 2005-33, the draft should solicit input from attorneys and other interested persons on (1) their experiences in dealing with writ review of a pretrial ruling on an issue common to consolidated cases, (2) any problems they may have encountered in that context and suggestions for reform, and (3) any information they have on approaches used in other jurisdictions that might help to improve California law in this area.

Subject to these revisions, the Commission approved the draft attached to Memorandum 2005-33 as a tentative recommendation to be circulated for comment.

STUDY H-821 – MECHANICS LIEN LAW

The Commission considered Memorandum 2005-31, relating to an invalid lien under the mechanics lien law, and Memorandum 2005-38, relating to a

1 notice to withhold funds under the mechanics lien law, together with material
2 distributed at the meeting (attached to the First Supplement to Memoranda 2005-
3 31 and 2005-38). The Commission made the following decisions.

4 **Invalid Lien**

5 *Notice of Claim of Lien*

6 The provisions relating to notice of a claim of lien should be revised to correct
7 the technical issues raised by Dick Nash in the First Supplement to
8 Memorandum 2005-38. The staff should review the general provisions on proof
9 of service and proof of mailing to ensure they are consistent with current
10 practice.

11 *Expungement of Unenforceable or Invalid Claim of Lien*

12 The grounds for expungement should be expanded to include that the lien
13 claimant was unlicensed for all or part of the time of performance of the work for
14 which the lien is claimed. The statute should make clear that the expungement
15 procedure is not permitted if “the owner” has not agreed to an extension of
16 credit within the lien enforcement period. In this connection, the staff should
17 review the interaction between the statutes defining owner and co-owner, the
18 concept of the reputed owner, owners of lesser interests, and the notices to and
19 authority of each. The expungement procedure should be conditioned on failure
20 of the lien claimant to release the lien on demand of the owner.

21 *Common Law Remedies*

22 As a condition of exercise of remedies, the owner should be required to show
23 that the lienholder has failed to give a release, rather than an “unconditional
24 waiver and release” (which is a term of art). The owner should be required to
25 demand a release from the lienholder and allow ten days for a response before
26 commencing an action. This should be coordinated with the expungement
27 procedure.

28 **Notice to Withhold Funds**

29 *Terminology*

30 The stop notice should be redesignated as a “stop payment notice” rather
31 than as a notice to withhold funds.

1 *Contents of Stop Payment Notice*

2 The notice should state the claimant's demand after deducting all just credits
3 and offsets, rather than the "amount in value, as near as may be" of the work
4 performed. The notice should include contract changes. It may also include
5 damages for breach.

6 *Time to Give Stop Payment Notice*

7 The Commission declined to adopt any changes in the time when a stop
8 payment notice may be given.

9 *Demand for Stop Payment Notice*

10 The right of an owner to make a demand for a stop payment notice should be
11 revised to make clear that only an unbonded stop payment notice may be
12 required.

13 *Release Bond for Funds Withheld Pursuant to Notice*

14 Both the release bond for a stop payment notice and for a mechanics lien
15 should be 1-1/4 times the amount of the claim.

16 *Release of Notice or Reduction of Amount of Claim*

17 The staff should circulate the proposed redraft of the newly enacted
18 legislation concerning releases under the stop payment notice statute to
19 interested persons for review and comment. The proposed redraft should make
20 clear that the new provisions apply to a private work as well as a public work.

21 *Duty to Withhold Funds*

22 The draft should require funds to be withheld only to cover the amount
23 claimed in the stop payment notice and not "in any claim of lien that is
24 recorded." The recommendation should highlight this change, and note that the
25 existing language is problematic since any amount withheld pursuant to a stop
26 notice reduces the claim of lien.

27 *Enforcement of Stop Payment Notice*

28 The tentative recommendation should solicit comment on whether the 5-day
29 notice requirement after commencement of a stop payment notice enforcement
30 proceeding should be made mandatory, rather than directory as it is under
31 existing law.

1 STUDY H-855 – STATUTORY CLARIFICATION AND SIMPLIFICATION OF CID LAW

2 The Commission considered Memorandum 2005-32 discussing a staff draft on
3 the clarification and simplification of CID law.

4 The Commission approved the staff draft, subject to the following decisions.

5 **Time Periods**

6 In preparing the staff draft, time periods that are measured from the date of
7 the receipt of a document will be recast to measure from the date of delivery. As
8 this will shorten the period for action, proposed Sections 4035-4045 will be
9 revised to provide that delivery of a document by mail is deemed to be complete
10 a fixed number of days after posting. Code of Civil Procedure Section 1013 will
11 be examined as a model for that revision.

12 **Generally Accepted Accounting Procedures**

13 A provision requiring that generally accepted accounting procedures be used
14 in preparing certain financial statements will be revisited when the statutes
15 governing common interest development financial practices are examined.

16 **Civ. Code § 1360. Modification of separate interest**

17 Civil Code Section 1360 will be revisited when the statutes governing
18 architectural review in a common interest development are examined. In
19 particular, the staff will consider whether there is a substantive difference
20 between a requirement that a modification be consistent with the governing
21 documents and a requirement that a modification be consistent with the “intent”
22 of the governing documents.

23 **Proposed Civ. Code § 4305. Noncommercial display**

24 Civil Code Section 4305 was revised to provide that the flag of the United
25 States is not subject to the general flag size limitation.

26 A note will be added inviting comment on (1) whether the flag of the United
27 States should be subject to the general flag size limitation, and (2) whether the
28 existing attorney fee provision should be generalized to apply to any action to
29 enforce the section.

30 **Proposed Civ. Code § 4310. Pets**

31 The staff will research whether there is a standard statutory definition of
32 “pet” that can be incorporated into proposed Section 4310.

1 **Proposed Civ. Code § 4500. Scope of inspection right**

2 Proposed Section 4500 was revised to make clear that the financial records
3 that are subject to member inspection include all such documents, regardless of
4 whether they are interim, final, audited, unaudited, regularly scheduled, or
5 prepared on an as needed basis.

6 **Proposed Civ. Code § 4555. Inspection by director**

7 Proposed Section 4555 will be relocated to proposed Chapter 3, Community
8 Association. A note will be added asking for input on whether the director's
9 right of inspection should be qualified to protect member privacy, and if so, how.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary