

First Supplement to Memorandum 2018-14

2018 Legislative Program (Status Report)

The attached table summarizes the current status of the Commission's¹ 2018 legislative program. The staff will update this information orally at the April meeting.

A few noteworthy points are discussed below.

AB 1739 (CHAU) — REVOCABLE TRANSFER ON DEATH DEED

Assembly Bill 1739 (Chau) would implement the Commission's recommendation on *Revocable Transfer on Death Deed: Recordation* (April 2017), as an urgency measure. As discussed in the First Supplement to Memorandum 2018-4, the California Land Title Association had formally opposed AB 1739, based in part on concerns about its retroactive application.

The bill was amended on March 8, 2018, to address the retroactivity concern. The Commission's recommended language was revised to read:

(d) (1) Subdivision (a) does not require the recordation of the "Common Questions" language that is specified in subdivision (b) of Section 5642. The failure to record that part of the statutory form has no effect on the effectiveness of a revocable transfer on death deed. ~~This subdivision applies to all revocable transfer on death deeds executed pursuant to this part, regardless of whether the revocable transfer on death deed was executed before, on, or after the effective date of the act that added this subdivision.~~

(2) (A) This subdivision applies to a revocable transfer on death deed executed on or after the effective date of the act that added this subdivision.

(B) This subdivision applies to a revocable transfer on death deed executed before the effective date of the act that added this

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

subdivision only if the transferor was alive on the effective date of the act that added this subdivision.

That amendment avoids any unconstitutional impairment of a vested property right, by limiting the statute's retroactivity to cases where the revocable transfer on death deed has not yet operated (because the transferor has not yet died). With the amendment, CLTA removed its opposition to the bill.

At its February meeting, the Commission made the following decision regarding such an amendment:

The Commission decided that amendments to narrow or eliminate the retroactive effect of the proposed law would be inconsistent with the full purpose of the Commission's recommendation, but that such amendments could be accepted if the Legislature were to decide to make them. A narrowing amendment, which would limit the retroactive effect of the law to deeds executed by transferors who had not yet died, would be preferable to an amendment that would entirely eliminate the retroactive effect of the proposed law.²

The Commission now needs to decide whether to revise its recommendation to make it consistent with the current text of AB 1739 (which has not yet been published, and so can still be revised). If so, there are three changes that would need to be made.

First, the proposed legislation would need to be revised to correspond to the amended bill language set out above.

Second, the Comment to Probate Code Section 5626 would need to be revised along the following lines:

Comment. Section 5626 is amended to expressly provide that recordation of the "Common Questions" portion of the statutory revocable transfer on death deed form is not required. This rule applies retroactively, to revocable transfer on death deeds that were recorded before the effective date of the new law, if the transferor is still alive when the new law takes effect.

Finally, the narrative preliminary part of the recommendation would need to be revised along similar lines. Thus, in the summary page:

The Commission recommends that the law be revised to make clear that recordation of the FAQ is not required and that failure to record the FAQ has no effect on the validity of an RTODD. This

2. Minutes (Feb. 2018), p. 3.

rule would apply retroactively, if the transferor is still alive when the new law takes effect.

And in the conclusion:

For that reason, the Commission recommends that the law be revised to make clear that recordation of the FAQ is not required. That rule should be made retroactive, to deeds that have not yet operated when the new law takes effect, to remove any doubt about the validity of an RTODD that was recorded, without the FAQ, before the new law goes into effect.

Should changes along those lines be made?

The Commission should also be aware of Assembly Bill 3004 (Kiley), which addresses revocable transfer on death deeds. That bill would make the same change that the Commission recommended (making clear that FAQ recordation is not required), using language different from the Commission's to do so. The bill would also make changes that the Commission has not recommended. It would remove the sunset date on the RTODD statute and expressly provide that a charitable nonprofit corporation may be named in an RTODD as beneficiary.

SENATE CONCURRENT RESOLUTION 91 (ROTH AND CHAU)

Senate Concurrent Resolution 91 (Roth and Chau) is a routine part of the Commission's governance structure. At least once per session, the Legislature considers a concurrent resolution to authorize the Commission to study a specific list of topics.³ Sometimes obsolete matters are removed from the list. Sometimes new topics are added.

That is how the Commission was authorized to study "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct,"⁴ a study that the Commission completed last December.

Memorandum 2018-14 includes a letter from mediator Ron Kelly to the Chair of the Senate Committee on Judiciary. It is attached as an Exhibit. In his letter, Mr. Kelly formally opposes SCR 91, unless it is amended to, among other things, expressly bar the Commission from doing any further work on its completed study of the relationship between mediation confidentiality and attorney malpractice and other misconduct (i.e., the matters the Commission considered in Study K-402).

3. See Gov't Code § 8293.

4. See 2012 Cal. Stat. res. ch. 108.

In describing Mr. Kelly's opposition to SCR 91, the staff used the shorthand term "mediation confidentiality" to refer to the study of the relationship between mediation confidentiality and attorney malpractice and other misconduct.

Mr. Kelly has now written to make clear that he is not seeking a bar on the Commission studying *all* mediation-related topics, just the topic authorized in item 23 in SCR 91 (i.e., "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct"). Apparently, he construed the staff's shorthand use of "mediation confidentiality" more broadly than the staff had intended. The staff regrets any confusion on that point.

Respectfully submitted,

Brian Hebert
Executive Director

Status of 2017 Commission Legislative Program

As of March 28, 2018

		AB 1739	AB 2176	SCR 91							
Introduced Last Amended		1/3/18	2/12/18	1/23/18							
		—		—							
First House	Policy Committee	3/20/18	3/20/18	<i>4/24/18</i>							
	Second Committee Passed House	—									
Second House	Policy Committee										
	Second Committee										
	Passed House										
Concurrence											
Governor	Received										
	Approved										
Secretary of State	Date										
	Chapter #										

Bill List: AB 1739 (Chau). Revocable Transfer on Death Deed
 AB 2176 (Jones-Sawyer) Deadly Weapons: Minor Clean-Up Issues
 SCR 91 (Roth & Chau). Resolution of Authority

Also of Interest:

AB 3004 (Kiley). Revocable Transfer on Death Deed
 SB 954 (Wieckowski). Mediation confidentiality

KEY _____

Italics: Future or speculative

“—”: Not applicable

Re: Study K-402 - Request for Amendment of SCR-91 (Roth)

Dear Chairperson Hallinan, Commissioners, and Staff,

The Executive Director's Memorandum 2018-14 describes my letter to the Senate Judiciary Committee dated February 26, 2018 and its requested amendment of SCR-91. The discussion below respectfully takes a different view than this Memorandum provides. The Memorandum describes the requested amendments as follows:

Mr. Kelly requests two alternative amendments. Both of the alternatives would include the following three elements:

- (1) The Commission's authority to study mediation confidentiality would be deleted.
- (2) The Commission would be barred from spending further resources on the topic.
- (3) The Legislature would declare its rejection of the Commission's recommendation.

Regarding elements (1) and (2), I would **not** support amendments to the Commission's authorizing resolution which did either of these.

It was on the Commission's recommendation that the Legislature originally enacted our entire Evidence Code in 1965. This code's sections 1152 and 1154 provided important protections for candor in most voluntary settlements. Following the Commission's later specific study of mediation confidentiality, and on the Commission's recommendation, in 1985 the Legislature enacted section 1152.5. This created comprehensive confidentiality protections specifically for mediations. Following the Commission's further specific study of mediation confidentiality, and on the Commission's recommendation, in 1997 the Legislature enacted our current expanded statutory protections. These were Evidence Code sections 1115 through 1128. The protections for candor these provided have enabled millions of Californians to resolve their disputes voluntarily. The Commission's central role in creating them has served the fundamental democratic principle of self-determination.

If either of the requested amendments is adopted, SCR-91 **will still continue the authority in sections (7) and (8)**. These provided fully adequate authority for the Commission to craft all the above-referenced recommendations. These two sections of SCR-91 state:

...the Legislature **approves for continued study** by the California Law Revision Commission the topics listed below...

- (7) Whether the **Evidence Code** should be revised.
- (8) Whether the **law relating to** arbitration, **mediation**, and other alternative dispute resolution techniques should be revised. [emphasis added]

The requested amendments **do not** ask that these two sections to be deleted or restricted. The requested amendments **do not** ask the Legislature to delete the Commission's "authority to study mediation confidentiality."

The requested amendments ask the Legislature to direct the Commission "to expend no further resources on this **study**". But they **do not** ask the Legislature to bar the Commission from "spending further resources on the **topic**" of mediation confidentiality (emphasis added).

The Commission's study K-402 was initiated by the specifically-framed language now contained in SCR-91's section 23. The author carrying the 2012 resolution first inserted this language into the Commission resolution that year, ACR-98, when his bill to weaken mediation confidentiality protections, AB 2025, engendered substantial opposition. The Commission opted to recommend legislation taking an approach similar to AB 2025. Not surprisingly, the widespread opposition to the Commission's proposal - from organizations representing mediation users, the courts, the plaintiffs' and defense bars, public agencies, lawyers, judges, and mediators - is grounded in many of the same reasons as the opposition to AB 2025.

The Commission has undertaken and completed Study K-402, as directed by the specific language currently in section 23. The requested amendments do ask the Legislature to now delete this specific direction. Regarding the Memorandum's point (3), the requested amendments do ask the Legislature to expressly reject the Commission's recommendation in Study K-402, for the reasons stated in the February 26 letter to the Judiciary Committee.

cc Senator Richard Roth, author, SCR-91
Senator Hannah Beth Jackson, Chair
Senate Judiciary Committee

Respectfully submitted,
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