

CALIFORNIA LAW REVISION COMMISSION

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January 10, 1997

<i>Date:</i> January 24, 1997	<i>Place:</i> Los Angeles
Jan. 24 (Friday) 9:00 am – 5:00 pm	Crowne Plaza LAX 5985 West Century Boulevard (310) 642-7500
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.	
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov	

PLEASE NOTE LOS ANGELES LOCATION

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. **MINUTES OF DECEMBER 12, 1996, MEETING (sent 12/20/96)**
2. **ADMINISTRATIVE MATTERS**
 Report of Executive Secretary
3. **1997 LEGISLATIVE PROGRAM**
 Status of Bills
 Memorandum 97-1 (NS) (to be sent)
4. **JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)**
 Local Agency Issues
 Memorandum 97-2 (RM) (sent 1/7/97)
 First Supplement to Memorandum 97-2 (to be sent)
5. **MEDIATION COMMUNICATIONS (STUDY K-401)**
 Draft of Final Recommendation
 Memorandum 97-3 (BG) (to be sent)

6. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)
 - Memorandum 96-59 (BG) (sent 10/28/96)
 - First Supplement to Memorandum 96-59 (sent 12/10/96)
 - Second Supplement to Memorandum 96-59 (to be sent)

7. SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE (STUDY H-603)
 - Memorandum 96-87 (BH) (sent 12/4/96)
 - First Supplement to Memorandum 96-87 (sent 1/9/97)

8. HEALTH CARE DECISIONS (STUDY L-4000)
 - Natural Death Act**
 - Memorandum 96-66 (SU) (sent 10/4/96)

 - Other Issues**
 - Memorandum 97-4 (SU) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JANUARY 24, 1997
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on January 24, 1997.

Commission:

Present: Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Quentin L. Kopp, Senate Member
Arthur K. Marshall
Edwin K. Marzec
Colin Wied

Absent: Dick Ackerman, Assembly Member
Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Sanford Skaggs

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

Other Persons:

Maxine Baker-Jackson, Juvenile Dependency Court Mediation Association, Monterey
Stephen Beck, Association of California State Attorneys and Administrative Law
Judges, Glendale
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
John A. Gromala, Eureka
Ron Kelly, Berkeley
Melvin H. Kirschner, MD, LACMA-LACBA Joint Committee on Biomedical Ethics,
Los Angeles
Julie Miller, Southern California Edison, Rosemead
Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles

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MINUTES OF JANUARY 24, 1996, COMMISSION MEETING

MINUTES OF DECEMBER 12, 1996, MEETING

The corrected Minutes of the December 12, 1996, Commission meeting were approved as submitted by the staff, with the following change:

On page 7, the draft of Section 1127 was revised to read:

Notwithstanding Section 1122, a communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the court course of, or pursuant to, a mediation, may be admitted or disclosed if any of the following conditions exist:

ADMINISTRATIVE MATTERS

Report of Executive Secretary

The Executive Secretary reported on the following matters.

Trial court unification. The Commission continues to defer work on this matter at the request of Senator Lockyer’s office, looking to the possibility of shared responsibility or a joint working relationship between the Commission and Judicial Council. So far we have not been able to come to an agreement for an appropriate manner of proceeding. The Executive Secretary has suggested to Senator Lockyer’s office that a spot bill on trial court unification would be useful in the event a statewide general election is called before the one next scheduled for June 1998.

Public Utilities Code revision. The Executive Secretary continues to monitor Public Utilities Commission progress on its report to the Legislature on code changes required by utilities deregulation. PUC has received some input from affected parties, primarily in the telecommunications field. The Senate

Committee on Energy, Utilities & Communications and the Assembly Committee on Utilities and Commerce have scheduled a joint hearing for a status report on implementation.

Proposition 209. The Commission has received notification that it is a member of the defendant class in the Proposition 209 enforcement civil action, and is preliminarily enjoined from enforcing or implementing Proposition 209.

1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-1, relating to the Commission's 1997 legislative program. No Commission action was required or taken on this matter. The Executive Secretary supplemented the memorandum with the information that Senator Kopp has introduced the Best Evidence Rule recommendation as SB 177.

STUDY H-603 – SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

The Commission considered Memorandum 96-87 and its First Supplement concerning the effect of dissolution of marriage on a marital joint tenancy. The Commission decided against expanding the study to consider the effect of dissolution of marriage on other revocable spousal dispositions.

The Commission approved the preparation and distribution by staff of a Tentative Recommendation incorporating the proposed language contained in Memorandum 96-87 and its First Supplement, and embodying the following policy decisions.

Effect of dissolution or annulment of marriage

A judgment of dissolution or annulment of marriage will sever a marital joint tenancy as between the spouses whose marriage has been dissolved or annulled.

Survivorship in Multiple Party Accounts not affected

Dissolution or annulment of marriage will not affect survivorship in a Multiple Party Account.

Petition for and judgment of dissolution or annulment of marriage to carry warning

Family Code Section 2024 currently provides for a warning of the effect of dissolution or annulment of marriage upon a spousal disposition in a will. This

warning is provided on a petition for or judgment of dissolution or annulment of marriage. This warning should be expanded to also warn of the effect of dissolution or annulment upon a marital joint tenancy, and any other spousal dispositions revoked by dissolution or annulment of marriage.

Agreement of parties controls

Dissolution or annulment of marriage will not sever a joint tenancy where contrary to a written agreement of the spouses whose marriage has been dissolved or annulled.

Revival of a joint tenancy severed by dissolution or annulment of marriage upon remarriage of the former spouses

Remarriage of former spouses will restore a joint tenancy severed by dissolution or annulment of their former marriage, with two exceptions. A joint tenancy will not be revived on remarriage where a third party has acquired an interest in the property in the time between divorce and remarriage. A joint tenancy will not be revived on remarriage where any event sufficient to sever the joint tenancy, had the joint tenancy not already been severed by dissolution or annulment of marriage, occurs in the time between divorce and remarriage.

Innocent third parties protected

The rights of a third party purchaser or encumbrancer with no knowledge of a severance by dissolution or annulment of marriage are not affected by such a severance.

Reform prospective

The reform will have prospective effect only.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-3, the First and Second Supplements to Memorandum 97-3, the revised staff draft recommendation attached to Memorandum 97-3, written suggestions from Ron Kelly (Exhibit p. 1), a letter from Maxine Baker-Jackson, representative for the Juvenile Dependency Court Mediation Association (Exhibit pp. 2-3), a letter from Fred Butler, president of the Northern California Mediation Association (Exhibit pp. 4-5), and an electronic mail message from Barbara Giuffre (Exhibit p. 6). The

Commission approved the revised staff draft recommendation for printing and submission to the Legislature, subject to the following revisions:

Definitions (§ 1120 of revised staff draft recommendation)

Section 1120 should be revised as follows:

1120. For purposes of this chapter:

(a) “Mediation” means a process in which a mediator neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

(b) “Mediator” means a neutral person who conducts a mediation ~~and who has no authority to compel a result or render a decision on any issue in the dispute.~~ “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation.

(c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.

The concept that a mediator should have no authority to compel a result or render a decision on any issue in the dispute should be included in a Comment, at an appropriate place in the chapter on mediation.

Scope of chapter (§ 1120.1 of revised staff draft recommendation)

Subdivision (c) of Section 1120.1 should be deleted.

Court-ordered and court-supervised proceedings (§ 1120.2 of revised staff draft recommendation)

Section 1120.2 should be revised along the following lines:

1120.2. (a) This chapter does not apply to a settlement conference, ~~or other proceeding to resolve a dispute, that is conducted by a judge or other representative of the tribunal in which the dispute is pending pursuant to Rule 222 of the California Rules of Court.~~

(b) ~~Where a court or other adjudicative body orders persons to participate in a proceeding to resolve a dispute, this chapter applies to the proceeding if all of the following conditions are satisfied:~~

~~(1) The proceeding is a mediation as defined in Section 1120.~~

~~(2) The person conducting the proceeding is a mediator as defined in Section 1120.~~

~~(3) The proceeding is not excluded from this chapter by paragraph (a) or by Section 1120.1.~~

~~(4) The court or other adjudicative body refers to the proceeding as a “mediation.” This chapter applies to a mediation that is ordered by a court or other adjudicative body, unless the proceeding is excepted by subdivision (a) of Section 1120.1.~~

~~(c) Notwithstanding subdivision (b), this chapter does not apply to a proceeding ordered by a court or other adjudicative body if the court or other adjudicative body expressly informs the disputants before the proceeding, in writing or on the record, that the chapter does not apply.~~

~~(d) Nothing in this section authorizes a court or other adjudicative body to order disputants to participate in any proceeding.~~

The Comment to Section 1120.2 should continue to state that Section 1120.2 “does not expand a court’s authority to order participation in a dispute resolution proceeding.” Language similar to the last paragraph of Maxine Baker-Jackson’s letter (Exhibit p. 3) should be included in a Comment at an appropriate place in the chapter on mediation.

Mediation-arbitration (§ 1121 of revised staff draft recommendation)

Section 1121 should be revised along the following lines:

1121. (a) Section 1121 does not prohibit either of the following:

(1) A pre-mediation agreement that, if mediation does not fully resolve the dispute, the mediator will then act as arbitrator or otherwise render a decision in the dispute.

(2) A post-mediation agreement that the mediator will arbitrate or otherwise decide issues not resolved in the mediation.

~~(b) Notwithstanding Section 1120, if a dispute is subject to an agreement described in subdivision (a), the neutral person who facilitates communication between disputants to assist them in reaching a mutually acceptable agreement is a mediator for purposes of this chapter. In~~ If a dispute is governed by an agreement described in subdivision (a), in arbitrating or otherwise deciding all or part of the dispute, that person the person who served as mediator may not consider any information from the mediation that is subject to the protection of this chapter, unless all of the mediation parties expressly agree in writing, or orally in accordance with Section 1121.1, before or after the mediation that the person may use specific information from the mediation.

Recorded oral agreement (§ 1121.1 of revised staff draft recommendation)

Section 1121.1(b) should be revised to read: “The mediator ~~recites the terms of~~ the oral agreement are recited on the record.”

Disclosure by agreement (§ 1127 of revised staff draft recommendation)

The recommendation should incorporate Section 1127 (Option B), with revisions along the following lines:

1127. (a) Notwithstanding any other provision of this chapter, a communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, may be admitted in evidence or disclosed if any of the following conditions are satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1121.1, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1121.1, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of paragraph (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement binds any person designated by the mediator either to assist in the mediation or to communicate with the parties in preparation for the mediation included in the definition of “mediator” in Section 1120.

~~(c) If a person refuses to agree to disclosure pursuant to this section, any reference to that refusal during any subsequent trial is an irregularity in the proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure.~~

In place of subdivision (c), the recommendation should include a statute similar to Code of Civil Procedure Section 1775.12.

Written settlements and oral agreements reached through mediation (§§ 1128 and 1129 of revised staff draft recommendation)

Sections 1128 and 1129 should be reorganized into (1) a statute on written settlements and oral agreements reached through mediation, and (2) a statute on when mediation ends for purposes of the chapter on mediation. The latter statute should provide that mediation ends when:

- A written settlement fully resolving a dispute is fully executed.
- The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1121.1.

- The mediator or a disputant submits a declaration stating that the mediation is over.

The statute should also provide that if mediation partially resolves a dispute, mediation as to the issues resolved ends when:

- A written settlement partially resolving a dispute is fully executed.
- Mediation participants partially resolve a dispute by an oral agreement in accordance with Section 1121.1.

STUDY K-410 – CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 96-59, the First and Second Supplements to Memorandum 96-59, and the staff draft tentative recommendation attached to Memorandum 96-59. The Commission made the following decisions:

- The approach of making compromise evidence generally inadmissible, with specified exceptions, should be retained in the next draft.
- The staff should explore the idea, suggested by Professor Leonard, that humanitarian conduct be handled separately from compromise evidence.
- Section 1132(a) should be broadened to make compromise evidence inadmissible in any civil action, not just in “a civil action for the loss, damage, or claim that is the subject of the act of compromise.” The statute should be narrowed, however, such that an offer of compromise is inadmissible only if it is proffered against the person who made the offer.
- The staff should explore the idea of making compromise evidence inadmissible in a criminal action in some circumstances.
- The standard in Section 1132(b) for discovery of compromise evidence should be retained in the next draft.
- Section 1138(b)(1) should be deleted.

STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandum 96-66 concerning health care decisions under the Natural Death Act. The Commission engaged in a general discussion of the issues raised by the memorandum and heard the comments of Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles, Melvin H. Kirschner, MD, LACMA-LACBA Joint Committee on Biomedical

Ethics, Los Angeles, and Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento.

The Commission decided as a general approach to consider reform from the perspective of the Uniform Health-Care Decisions Act. The staff will prepare a detailed analysis of the UHCDA, comparing its provisions to California law and making recommendations as to the best approach when there is a conflict or where the uniform act provides a new rule. It is anticipated that the Natural Death Act will be completely superseded by the UHCDA. The possibility of eliminating the two-witness requirement applicable to existing health care decisionmaking instruments should be pursued, although the requirement of approval by a patient advocate or ombudsman for instruments signed by patients in skilled nursing facilities and long-term health care facilities should probably be retained.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary