Min.

Date of Meeting: January 16-17, 1959

Date of Memo: January 8, 1959

Memorandum No. 5

Subject: Study #32 - Arbitration

Please bring with you to the meeting Mr. Kagel's Arbitration study and your copy of the proposed minutes for the November meeting which I prepared (the document which contains the proposed outline for a revision of Mr. Kagel's study).

I enclose copies of an exchange of correspondence between Mr. Stanton and me following the December meeting.

I recommend that we devote enough time to this matter at the January meeting to reach a firm decision as to how we will proceed. I suggest that our consideration of the matter take the form of a detailed analysis and discussion of the first several statutory provisions proposed by Mr. Kagel. Only when we have done this, it seems to me, will the Commission be in a sufficiently informed position, both as to the complexity of the policy and drafting problems presented and the adequacy of Mr. Kagel's study to provide the information which the Commission needs to solve those problems, to be able intelligently to plan our future course of action.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

December 22, 1958

John R. McDonough, Jr., Esq.
Executive Secretary
Law Revision Commission
School of Law
Stanford, California

Re: Arbitration Statute

Dear John:

This will answer your letter to me of December 18, 1958 on the above subject.

I must admit that my first reaction is one of dismay. In my opinion there are several very important points left unanswered by the Uniform Arbitration Act and not adequately covered by our present research study, among which are the following:

1. Should oral contracts for arbitration be enforceable and if so should any special procedure be established for such enforcement?

2. Should the Arbitration Act extend to appraisals or evaluations and if so are any special provisions required for such proceedings?

3. Should the Arbitration Act extend to proceedings for the enforcement of the arbitration of controversies relating to the amendment or modification of agreements as distinguished from controversies as to the interpretation, application or enforcement of already existing agreements, and if so what special provisions should be applicable to such controversies?

Since I have some familiarity with this field, I sense that these problems exist but I do not have the information, and do not have time to engage in the research, necessary to answer them intelligently. If California is to be a leader in this field, as distinguished from "run-of-the-mill," these matters should be thoroughly researched, with a complete study of the statutes of other states, the very considerable number of judicial decisions in the field and the many texts that have been written on the subject. The distinctions between commercial arbitration and labor arbitration should be defined and evaluated and a determination reached as to whether a single statute is adequate or whether two statutes are required.

Speaking from my personal standpoint, I could not reach

an informed judgment as to whether California should adopt the Uniform Arbitration Act until these very important questions are thoroughly explored. My own view is that once a subject matter has been referred to the Commission for study, it should make a complete and thorough report on that subject, unless specifically identified policy considerations lead it to the conclusion that some other existing agency is better equipped to do the job or that the matter is of such little consequence that the Commission should concentrate on more significant matters. I do not feel that either of these exceptions exists in the case of the Arbitration Statute.

Under no circumstances, in my opinion, should we accept half a loaf because of difficulties with our procedures. I think we should hammer again at the problem of obtaining the type of study we need to do our job, and that we should proceed without concern as to personal feelings or sensitivity in the matter. I reiterate my personal belief that we should lay the cards on the table with Sam Kagel and find out whether he is in a position to produce the very substantial research study I have outlined above.

I am quite ready to undertake such an assignment if it is given to me.

I agree that this matter should not be resolved without full discussion by the Commission and that we should not communicate further with Mr. Kagel until after such discussion. I assume, therefore, that the matter will be on the agenda for a full review at the January meeting. So that my views may be considered prior to the meeting I suggest that a copy of this letter be sent to each Commissioner.

Yours very truly,

S/ Tom

THOMAS E. STANTON, JR.

TES:hk

December 18, 1958

Mr. Thomas E. Stanton, Jr.
Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Tom:

After you left the meeting on Saturday, the members of the Commission present continued their discussion of the arbitration study. In the course of the discussion I suggested that a possible course of action would be for the Commission to limit its arbitration study to a study and report on the Uniform Arbitration Act. The principal reasons for this would be (1) that we are far from having a comprehensive research study on all of the questions which would be necessarily involved in an independent overhauling of the California Arbitration Statute, and in a considerable quandary as to how such a study can be obtained in light of the delicate problems arising out of our involvement with our present research consultant, and (2) it is not, so far as I can see, particularly likely that any end product we might come up with as a result of an independent study would differ materially from the Uniform Act on basic issues.

If the Commission were to set itself this more limited objective it could begin an intensive study of the Uniform Act drawing on the material which Sam Kagel has prepared. To assist the Commission, the staff could prepare a series of memorandum on the various sections of the Act drawing on the Kagel material and perhaps, to some extent, on other sources. At the end of such a study the Commission would probably have a number of suggestions to make for modification of the Uniform Act and, from our conversation with Martin Dinkelspiel, I am inclined to think that he would be inclined to accept many of them. Thus, we would have studied the subject and made a contribution and, at the same time, presumably have earned considerable good will on the part of the commissioners on Uniform State Laws.

This suggestion met with a favorable response on the part of those present. It was agreed that the Commission should give serious consideration to pursuing this course and that such consideration should take the form of making the Uniform Act a major item on the January agenda and going over at least several sections of it intensively to see whether the Commission's views on the subjects involved differ in substantial part or only in detail, from those of the draftsmen of the Act. It was further agreed that if this were to be done we should not communicate with Sam Kagel at this time but should defer any action along that line until after the January meeting.

I was instructed to communicate these thoughts to you. I think it is

fair to state that this proposed course of action was received with some enthusiasm because of the doubts of all then present that a really first-rate research study of the problems involved in a general overhauling of the California Arbitration Statute is likely to be obtained by the course or courses of action which we considered while you were present. It seems to me that the answer to this question is critical to a determination of how we should proceed.

Very truly yours,

John R. McDonough, Jr.
Executive Secretary

JRM:imh

JRM

October 3, 1958

KAGEL DRAFT WITH SUGGESTED REVISIONS

(All sections in Code of Civil Procedure)

1280(a) An agreement to settle by arbitration any existing controversy or any controversy thereafter arising between the parties ~~shall be~~ is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(b) "Agreement" as used in this title includes ~~an~~ oral and written agreements to arbitrate and includes ~~a~~ collective bargaining agreements.

(c) "Controversy" as used in this title means any claim by one of the parties to the agreement against the other or any question arising between the parties, whether such question is one of law or of fact.

(d) Unless otherwise therein provided, agreements providing for valuations, appraisals and other similar proceedings are subject to this title.

(e) Common law arbitration is abolished.

1282.(a) On ~~motion~~ petition of a party made pursuant to Section ~~11~~ 1290 hereof alleging the existence and breach of an agreement to arbitrate, the court shall order arbitration if it finds that such an agreement exists and has been breached, unless ~~the adverse party proves~~ it finds that the right to arbitrate has been waived by the

moving party.

(b) The only issues that may be raised on a ~~motion~~ petition to compel arbitration are whether there exists an enforceable agreement to arbitrate, whether the agreement has been breached and whether the ~~moving~~ petitioner ~~party~~ has waived arbitration.

(c) When a civil action involves an issue ~~in-an-agreement providing-for-arbitration~~ alleged to be referrable to arbitration, a party may, within the time provided to answer following the service on him of the ~~complaint~~ pleading in which the issue is raised, move that the court stay such action insofar as such issue is involved. The court shall grant a stay if an order compelling arbitration ~~or a-motion-therefor~~ has been made prior to the motion for a stay. If a petition for an order compelling arbitration is pending, the court shall not act upon the motion to stay until the petition has been acted upon.

1283(a) An arbitrator selected jointly by the parties, or by the court when the parties jointly are unable to do so, is a neutral-arbitrator. An arbitrator selected by a party, or the court, to represent a party on a board of arbitrators is a party-arbitrator. "Arbitrator," as used in this title, ~~shall-mean "arbitrators"-if-there-is-more-than-one-arbitrator-and-shall~~ refers both to neutral-arbitrators and party-arbitrators.

(b) If, in ~~the~~ an agreement to arbitrate, provision be made for a method of naming or appointing an arbitrator, such method shall be followed. If no method be provided therein, or if a method be provided and for any reason there is no arbitrator willing and able to ~~attend-or-fulfill-his-duties,-then~~ act, upon ~~motion~~ the petition filed pursuant to Section 1290 by either party to the ~~controversy~~ agreement, the court shall appoint an arbitrator who shall act under the ~~said~~ agreement with the same force and effect as if he had been specifically named therein. Unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator.

(c) When a court has been requested to appointing a neutral-arbitrator the court shall nominate 5 five or more persons from lists of qualified ~~arbitrators~~ persons supplied by any of the parties, ~~or~~ by recognized governmental agencies, or by private impartial associations concerned with arbitration. The parties shall within 5 five days of receipt of such list from the court jointly select a single person by agreememt or lot from such list, who shall ~~thus~~ be designated as the court-appointed arbitrator. If the parties ~~or-a-party~~ fails ~~to-act~~ to select an arbitrator within the second 5 five day period, the court shall appoint the arbitrator from ~~among-the-nominees~~ its list.

1284. ~~Unless-otherwise-provided-in-the-agreement,~~ When there is more than one arbitrator, the powers of the arbitrators may be

exercised by a majority of them, unless otherwise provided in the agreement, if reasonable notice of all proceedings ~~required-to-carry out-their-duties~~ has been given to all arbitrators.

1285.(a) Unless otherwise provided ~~by~~ in the agreement:

(1) The neutral-arbitrator shall appoint a time and place for the hearing and ~~unless-otherwise-mutually-agreed-by-the parties-he-shall~~ cause ~~notification-to-the-parties~~ notice thereof to be served on the parties personally or by registered mail not less than ~~ten~~ 10 days before the hearing. Appearance at the hearing waives such notice. The arbitrator may adjourn the hearing from time to time as necessary, and, on request of a party and for good cause shown or upon his own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award or, with the consent of the parties, to a later date.

(2) The parties are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Rules of evidence and rules of judicial procedure need not be observed so long as the hearing is fairly conducted.

(3) ~~The~~ A neutral-arbitrators ~~shall~~ may not obtain information, advice, or other data, from outside the presence of the parties without disclosing ~~such~~ his intention to do so to all parties to the arbitration and obtaining their consent thereto, except that an arbitrator may take judicial notice of ~~such-subjects-as-are-permitted-by law~~ matters of which a court may take such notice.

[Does this fit under "unless" clause]

(4) A party has the right to be represented by an attorney at any proceeding under this title, and a waiver thereof is ineffective.

(5) If an order directing arbitration has been made pursuant to Section 1282(a), the arbitrator may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

(6) Each party shall pay one-half of the arbitrator's total expenses and fees, together with other expenses deemed necessary by the neutral-arbitrator, not including counsel and witness fees, incurred in the conduct of the arbitration. Costs of ~~the-application~~ petition ~~and-the-proceedings-subsequent-thereto-taken~~ to confirm, vacate, modify or correct an award, and the proceedings pursuant thereto, shall be awarded by the court pursuant to Section 1032 of ~~the-Code-of-Civil-Procedure~~ this code.

(b)

(1) A neutral-arbitrator ~~shall-have-the-power-to~~ may administer oaths.

(2) The neutral-arbitrator shall issue subpoenas and subpoenas duces tecum at the request of any party, or upon his own ~~determination~~ motion, in accordance with the provisions of Section 1985 of ~~the-Code-of-Civil-Procedure~~ this code.

(3) All witnesses appearing pursuant to subpoena shall receive fees, mileage, and expenses in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a Superior Court. Fees, mileage and expenses shall be

paid by the party at whose request the witness is subpoenaed.

(4) On application of a party ~~and-for-use-as-evidence but-not-for-discovery,~~ a neutral-arbitrator may issue subpoenas for attendance at a deposition of a witness who cannot be subpoenaed to, or is unable to attend the hearing, for use as evidence but not for discovery. ~~to-be-taken~~ The deposition may be taken in the manner and upon the terms designated by the neutral-arbitrator.. ~~of-a-witness who-cannot-be-subpoenaed-to,-or-is-unable-to-attend-the-hearing.~~ The provisions of this Code relating to depositions are, insofar as consistent herewith, applicable to this subsection.

(5) [No change in this subsection]

1286. (a) The award shall be in writing and signed by the arbitrators concurring therein. It shall ~~include-a-determination-of-all the-issues-submitted-to-~~state what issues were decided by the arbitrator. The arbitrator shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) [No change here except to add "reasonable" after "such" in the first sentence]

(c) On application of a party made within ~~ten~~ 10 days after delivery of the award to the applicant, the arbitrator may modify or correct the award upon the grounds set forth in paragraphs (1) and (3) of subsection (a) of Section 1289. Written notice of the application shall be given to ~~the-opposing-party~~ all other parties, stating that ~~he~~ they must serve ~~his~~ their objections thereto, if any, within ~~ten~~ 10 days from the service of such notice. No such modification or correction may be made more than ~~twenty-five~~ 25 days after delivery of the award

to the applicant.

1287. At any time within three-menths 90 days after the award is made delivered to a party he any-party-to-the-arbitration may make-a-metion-te petition the court for an order confirming er vacating the award. The court shall grant such an erder-eenfirming er-vacating-the-award petition unless within-the-time-limites-herein-after-impesed,-greunds-are-urged-fer-medifying-er-eerreeting-the award a timely petition to vacate, modify or correct the award has been filed or is thereafter filed before the award is confirmed. In such-eases if such petition has been filed, the court shall proceed as provided in the next two sections.

1288. (a) In-either-ef-the-fellewing-eases-the-must-make-an-erder vacating-the-award,-upen-the-metien-ef-any-party-te-the-arbitratien. Upon petition of a party the court shall vaaate the award if it finds: Upon petition of a party the court shall vacate the award if it finds:

(1) Where That the award was procured by corruption, fraud or undue means;

(2) Where-there That the arbitrator was corruptien-in-the-arbitrater.

(3) Where That the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or in engaging in other similar misconduct contrary to the provisions of Section 1285, which would substantially prejudice the rights of a-

the petitioning parties;

(4) ~~Where~~ That the arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final and definite award, upon the subject matter submitted, was not made.

(b) A ~~motion~~ petition filed under this section must be filed within ninety days after the award is delivered to the petitioner, provided that if the petition alleges ~~predicated-upon~~ corruption, fraud, or undue means, ~~shall-be-made~~ it may be filed within ~~3-months~~ 90 days after such grounds are known or should have been known.

(c) Where an award is vacated:

(1) The court may, in its discretion, direct a rehearing before a new arbitrator. ~~if-the-vacation-was-on-grounds set-forth-in-paragraphs-(a),-(b)-or-(c),-or-in-the-discretion-of the-court-and~~

(2) With the consent of the parties the court may, in its discretion, direct a rehearing before the arbitrator who made the award in a case where

~~(d)~~

the ground set forth in paragraph (4) of subsection (a) of this Section was the ground for vacation. A new arbitrator shall be appointed as provided in Section 1283. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the motion to vacate the award is denied and no motion to modify or correct the award is pending, the court shall

confirm the award.

1289. (a) Upon ~~motion~~ petition of any party to the arbitration, made within 30 days after delivery of a copy of the award to the ~~moving-party~~ petitioner, the court shall modify or correct the award:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award;

(2) Where the arbitrator has awarded upon a matter not submitted to him, and the award may be corrected without affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the ~~motion~~ petition is granted, the court shall modify and correct the award, so as to effect its intent and shall confirm the award as so modified and corrected. ~~Otherwise~~ If the motion is denied, the court shall confirm the award as made.

1290. (a) "Court" as used in this title shall mean the following superior court: ~~in-the-county-(including-a-city-and county)-wherein-venue-lies-as-follows:~~

(1) ~~A-motion~~ petition for an order that the parties proceed to arbitration, ~~as-provided-in-~~ made pursuant to Section 1282 (a), or a ~~motion~~ petition for the appointment of an arbitrator, ~~as-provided-in~~ made pursuant to Section 1283, ~~shall-be-made-to-the-court~~ may be filed in the county ~~of-this-state~~ wherein ~~either~~ any party resides or has a place of business or where the agreement

is to be performed, or, if ~~neither~~ no party has a residence or place of business in this State and the place of performance is not specified in the agreement, ~~to-the-court-of~~ in any county in this State.

(2) A motion for a stay of an action, ~~as-provided in~~ made pursuant to Section 1282(c), shall be made to the court ~~of-the-county~~ wherein the action is pending;

(3) Any motion or petition made after the commencement of ~~the~~ arbitration proceedings shall be made ~~to-the-court-of~~ in the county wherein the arbitration is being, or has been, held.

(b) Written notice of the hearing of any motion or petition authorized by this title ~~to-the-court~~ sh ll be served upon the ~~adverse-party.~~ or other parties to the arbitration agreement ~~or-his~~ their attorneys ~~five~~ 10 days prior to the date set for the hearing.

(c) The party ~~moving~~ petitioning for an order confirming, vacating, modifying or correcting an award shall attach to such ~~motion~~ petition ~~copies~~ a copy of each of the following: the agreement to arbitrate, the name of the arbitrator, each v itten extension of the time, if any, within which to make the award, and the award.

(d) Any ~~motion-made-to-the-court~~ petition filed under the authority of this title shall be heard in a summary way in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Proposed Section of Minutes for November,
1958 Meeting of California Law Revision
Commission

Study No. 32 - Arbitration: The Commission discussed Mr. Kagel's study generally with a view to making suggestions to be communicated to him concerning ways in which the study might be improved. In the course of the discussion the following conclusions were reached:

1. Mr. Kagel's current study (with its Appendix consisting of his original comparative study of the California Arbitration Statute and the Uniform Arbitration Act) appears to raise the principal issues with which the Commission must be concerned in considering recommendations for changes in the present law. Moreover the issues appear, on the whole, to be helpfully analyzed from a substantive point of view.

2. The study is, however, somewhat deficient in terms of presentation and analysis of primary and secondary authority (cases, statutes, texts, law review articles, etc.) on the issues presented and discussed. The Commission believes that it would be better able to consider and decide many of the questions involved if it were better informed as to the law of other states and of the views of writers in the field.

3. The Commission believes that the current study would be improved if its format were considerably changed. The study takes the form of a series of legislative proposals, each followed by what amounts to a series of explanatory notes. The proposals themselves are somewhat difficult to read owing to the fact that they are in the form of proposed amendments to existing code sections. At the same time, when a proposal is under

discussion it is necessary to turn back from the text to the proposal in order to follow the discussion. Moreover, this format tends to limit the extent and quality of the substantive analysis which can be brought to bear, even on the more difficult policy considerations presented, because it is in the form, substantially, of draftsman's notes. The Commission believes that a more satisfactory study would be produced if it took the form of discussion of questions or problems under a series of major headings, the discussion of each subject following more or less this form: statement of question, analysis of existing law (California and other), statement of pros and cons on policy issues involved, statement of conclusion reached, and proposal of statutory language to implement conclusion.

4. Without wishing to impose any specific requirement in terms of format, the Commission suggests that consideration be given to reorganizing the study somewhat along the following line:

I. Introduction (To provide background and to set stage and context for study.).

   A. What arbitration is. What the policy of State toward arbitration should be (herein arguments for, arguments against, conclusion).

   B. What State should do if decides to encourage and support arbitration: make agreements valid; make specifically enforceable by expeditious procedure; give arbitrator adequate powers (subpoena, power enter default judgment etc.); provide for expeditious enforcement of award; provide for very narrow judicial review of proceeding and

award.

C. History of arbitration

Herein of principal differences between Common law and Statutory arbitration	In England and U.S. generally.	
	In California:	
	Pre-1927	
	1927 Act	(General statement of history
	1927 - date	(of decisions interpreting Act)

D. What is now needed - i.e., study of whether changes in present law are necessary or desirable, in light of 1927 Act and decisions thereunder, legislation and decisions of other states, promulgation of Uniform Act and proposal for its enactment in California.

II. What Agreements for Settlement of Dispute by Reference to Third Person Should Be Covered by California Legislation on Arbitration.

A. Overall conclusion: all such agreements should be valid and specifically enforceable.

B. Discussion of possibility of excluding:

1) Oral agreements

2) Agreements between employers and employees and their representatives

3) Valuations, appraisals and other similar proceedings

C. Should agreements not within statute be made invalid - neither agreement nor third person's decision enforceable?

III. By What Procedures and Devices Should Valid Agreements To Arbitrate Be Made Binding on Parties - i.e., Specifically Enforceable.

A. Summary procedure to compel arbitration (herein of whether petitioner has to show breach, of waiver, of what defenses court should be able to consider (including defense of no agreement to

arbitrate this question), of whether should have right to jury trial.

B. Stay of civil actions pending arbitration.

C. Procedure for naming arbitrator if parties fail to do so.

IV. Conduct of Arbitration Proceedings.

A. Rights of parties (herein of notice, right to be heard and cross-examine witnesses, etc.).

B. Powers of arbitrators (herein of distinction between "neutral" and "party" arbitrators, of whether less than all can act, of power to proceed in absence of party, of power to administer oaths and issue subpoenas [and enforcement of same], of power to obtain information except in hearing).

C. Payment of expenses of proceeding.

V. Making and Enforcement of Arbitration Award.

A. Making of award (herein of time limitation on arbitrator, form of award, delivery to parties)

B. Modification of award by arbitrator.

C. Procedure for enforcement of award (herein of grounds for modification or denial of enforcement).

D. Procedure for setting aside award (herein of limited extent to which court should be empowered to review award and of disposition of matter if award is set aside).

E. Modification of award by court.

VI. Miscellaneous

A. Jurisdiction and venue of proceedings authorized.

B. Procedure (notice, papers, etc.) in proceedings authorized.

C. Enforcement of judgment on award.

D. Appeals