

June 12, 1968

Time

June 28 - 10:00 a.m. - 5:00 p.m.
June 29 - 9:00 a.m. - 4:00 p.m.

Place

State Bar Building
1230 West Third Street
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

June 28 and 29, 1968

June 28

1. Approval of Minutes of May 17-18 Meeting (sent 6/10/68)

2. Administrative Matters

1968 Legislative Program

Oral Report at meeting

Budget for 1969-70 Fiscal Year

Memorandum 68-54 (enclosed)

Future Meetings

July 18, 19, 20 (three full days)	-- San Diego
August	-- No meeting
September 19, 20, 21 (three full days)	-- San Francisco
October 18 and 19	-- Los Angeles
November 14 (evening), 15, 16	-- San Francisco

3. Study 45 - Mutuality of Remedy

Memorandum 68-55 (enclosed)

Tentative Recommendation and Study (attached to Memorandum)

4. Study 50 - Abandonment or Termination of a Lease

Memorandum 68-56 (sent 6/11/68)

Draft Statute (attached to Memorandum)

} Special Order of
Business at 1:30 p.m.
June 28

June 12, 1968

5. Study 63 - Evidence

Evidence Code Section 1224

First Supplement to Memorandum 68-29 (sent 6/10/68)
Hastings Law Journal Article (attached to Supplement)
Memorandum 68-29 (sent 3/5/68)
Law Review Article and other background materials
(attached to Memorandum)

Psychotherapist-Patient Privilege

Memorandum 68-44 (sent 4/1/68)

Comment on Exercise of Privilege Against Self-Incrimination

Memorandum 68-39 (sent 4/1/68)

June 29

6. Study 52 - Sovereign Immunity

Statute of Limitations

Memorandum 68-60 (sent 6/10/68)
Tentative Recommendation (attached to
Memorandum)

} Special Order
} of Business
} 9:00 a.m.
} June 29

7. Study 65 - Inverse Condemnation

Unintended Physical Damage

Memorandum 68-57 (sent 6/5/68)
Research Study (attached to Memorandum)

Denial Destruction

Memorandum 68-58 (sent 6/10/68)
Tentative Recommendation (attached to
Memorandum)

8. Study 52 - Sovereign Immunity

Prisoners and Mental Patients

Memorandum 68-51 (sent 5/7/68)
Tentative Recommendation (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

June 28 and 29, 1968

Los Angeles

A meeting of the California Law Revision Commission was held at Los Angeles on June 28 and 29, 1968.

Present: Sho Sato, Chairman
Roger Arnebergh
Alfred H. Song, Member of the Senate (June 28)
F. James Bear, Member of the Assembly (June 29)
Lewis K. Uhler
Richard H. Wolford (June 28)
William A. Yale

Absent: Joseph A. Ball, Vice Chairman
Thomas E. Stanton, Jr.
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Executive Secretary, and Clarence B. Taylor, Assistant Executive Secretary, of the Commission's staff also were present.

Also present were the following observers:

Ronald P. Denitz, Assistant General Counsel, Tishman Realty & Construction Co., Inc.	(June 28)
Eugene Golden, Attorney, Buckeye Realty Management Corp.	(June 28)
Richard Light, Dept. of Water Resources	(June 29)
John M. Morrison, Attorney General's office	(June 29)
Edward B. Smith III, Attorney-at-Law	(June 28)
Charles Spencer, State Dept. of Public Works	(June 29)

Commissioner Wolford served as Chairman in the absence of the Chairman and Vice Chairman on the morning of June 28.

ADMINISTRATIVE MATTERS

Minutes of May Meeting. The Minutes of the meeting held on May 17 and 18, 1968, were approved as presented.

Legislative Program (1968). The Executive Secretary reported the status of the legislative program for 1968 and noted that all recommendations made to the 1968 session passed the Legislature with the exception of one proposal withdrawn by the Commission. Some measures have not yet been signed by the Governor.

Future Meetings. Future meetings are scheduled as follows:

July 18 - 10:00 a.m. to 4:00 p.m.	-	San Diego
19 - 9:00 a.m. to 3:00 p.m.		
20 - 9:00 a.m. to 3:00 p.m.		
August	-	No meeting
September 19, 20, 21 (3 full days)	-	San Francisco
October 18 and 19	-	Los Angeles
November 15 and 16	-	San Francisco

Note: The meetings scheduled above will be revised so that a meeting will be scheduled for the week-end of the Big Game (Stanford v. Cal.) at the place where the Big Game is held.

Commission Procedures. The Executive Secretary opened the discussion by stating that in his opinion the Commission can produce a satisfactory volume of high quality work only if the Commission meets a sufficient number of days to maintain a reasonable schedule, if Commissioners prepare to some extent before meetings and give thought to the matters that will be considered so that informed decisions can be made, and if matters are fully discussed at meetings and sound decisions made that are followed at subsequent meetings unless demonstrated to be wrong.

The Commission indicated that meetings should be scheduled for two days a month unless three-day meetings are absolutely necessary. It was recognized that members can find time to study material in evenings and week-ends at home but find it difficult to go to meetings more than two days a month.

The Commission suggested that only those items that actually will be considered at the meeting should be included on the agenda. In other words, only a volume of material that can reasonably be expected to be considered at the meeting should be included on the agenda for a particular meeting. If this is the standard practice, the Commissioners will know that all the material listed on the agenda will be considered at the meeting and can prepare accordingly. The Commission indicated that it would prefer to run out of material and adjourn the meeting early rather than to study material for a meeting that is not considered at the meeting and which will have to be again studied for a subsequent meeting.

It was suggested that each item of material come with a cover sheet indicating the action the staff suggests be taken with reference to the material prior to the meeting, i.e., the extent to which the material requires study prior to the meeting. Thus, it should be indicated whether the matter is for preliminary consideration or requires final action.

It was also suggested that consideration be given to the items that are included on the agenda so that Commission efforts will be devoted to topics that are worth the effort required. The Executive Secretary indicated that he planned to bring the topics on the agenda up for consideration at the September 1968 meeting, both with a view to dropping some topics and adding others.

The Commission suggested that with respect to each matter on the agenda one or more Commissioners should be designated as responsible for making a careful review of the matter prior to the meeting so that the Commission will be assured that at least one member of the Commission has made a careful study

of the matter prior to the meeting. The Commissioner who is responsible for making the careful review will be expected to contribute his thoughts at the meeting. The fact that a Commissioner is responsible for only a portion of the material to be considered at the meeting does not excuse him from reviewing the other materials that will be considered at the meeting. However, the Commissioner will know the particular topic on the agenda that he will give priority in preparing for the meeting. The Executive Secretary should indicate on the agenda and on the material when distributed which Commissioner or Commissioners have primary responsibility for particular matters. To the extent possible, the agenda for subsequent meetings should be determined in advance so that the assignments for the next meeting can be determined at the previous meeting so that individual Commissioners will be responsible for material that is of particular interest to them. If the Commissioner who is responsible for a particular topic wishes to have material distributed to the other Commissioners prior to the meeting, the material should be provided to the staff so it can be reproduced and distributed to members of the Commission. However, it was also noted that the members of the Commission have a substantial volume of material to consider prior to meetings and that additional material distributed by individual Commissioners might be unduly burdensome and possibly can be better brought to the attention of the Commission when the matter is discussed at the meeting.

Budget for 1969-70. The Commission considered Memorandum 68-54 and the First Supplement to Memorandum 68-54, relating to the regular budget and the program budget for 1969-70.

The Commission approved the regular budget as revised for 1968-69, the regular budget as proposed for 1969-70, and the program budget for 1969-70, as submitted by the staff. It was recognized that the budgets will have to be revised to reflect any across-the-board salary increases that may be granted by the 1968 Legislature.

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In the statement of the need for the program (in the program budget materials), it was suggested that the statement note that the Commission searches out and corrects "bugs" in existing law that no interest group would bring to legislative attention and which would be unlikely to be corrected. Also, it should be noted that the Commission also makes studies and determines that no legislation is needed, thus relieving the Legislature of the need to make such study.

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STUDY 45 - MUTUALITY OF REMEDY

The Commission considered Memorandum 68-55 and the attached Tentative Recommendation and Study relating to Mutuality of Remedies in Suit for Specific Performance.

On page 10 of the tentative recommendation, the new language added to Section 3386 was revised to read:

If specific performance would otherwise be an appropriate remedy, such performance may be compelled, whether or not the agreed counterperformance is or would have been specifically compelled, if the agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

The comment to amended Section 3386 should be revised to reflect this revision.

The tentative recommendation, as revised, was approved for distribution for comment.

STUDY 50 - LEASES

The Commission considered Memorandum 68-56 and the attached draft statute.

The Executive Secretary reported that the bill on attorney's fees in contract actions generally (attached as Exhibit I of the memorandum) was enacted as Cal. Stats. 1968, Ch. 266.

The following actions were taken on the draft statute (green pages) attached to the memorandum:

Section 1951

Approved as drafted.

Section 1951.2

In subdivision (a)(1), "present worth of the" was deleted. The Comment should indicate that the rent referred to in paragraph (1) would bear interest under the general rule that a liquidated debt bears interest.

In subdivision (a)(2), "worth at the time of judgment" was substituted for "present worth" and "portion of such" was deleted.

In subdivision (a)(3), "failure to perform his obligations under the lease" was substituted for "breach."

In subdivision (b), "reasonable" was deleted.

Subdivisions (c) and (d), to read substantially as follows, were substituted for subdivision (c) of the draft:

(c) Nothing in this section affects the right of the lessor under a lease of real property to indemnification for liability arising prior to the termination of the lease for personal injuries or property damage where the lease provides for such indemnification.

(d) Nothing in this section affects the right of the lessor under a lease of real property to equitable relief in any case where such relief is appropriate.

The Comment to Section 1951.2 is to indicate the extent to which interest is included in the amounts determined under subdivisions (1) and (2) of subdivision (a).

The Comment might also indicate that, where the lease imposes on the lessee the duty to provide insurance against earthquake, the expense of providing such insurance after termination and before reletting would be recoverable under subdivision (a)(3) if the lease terminates under Section 1951.2. Such an undertaking by the lessee would be considered within the amount determined as "rent." See Section 1951.

The Comment to new subdivision (d) should indicate that preference should be given to damages, and equitable relief should be granted only in rare cases. Negative enforcement to prevent violation of a contract not to compete might, however, be given in an appropriate case.

Section 1951.4

The phrase "terminated the lessee's right to possession" was substituted for "retaken possession of the premises" in the first two lines of the section.

In the introductory portion of the section, after "notwithstanding breach and abandonment by the lessee" the phrase "unless the lessor terminates the lessee's right to possession" was added.

Paragraphs (1) and (2) of subdivision (a) should be combined.

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Subdivision (c) was revised to read in substance:

(c) Nothing in this section affects the right of the lessor to recover damages under Section 1951.2 after the lessor has terminated the lessee's right to possession.

Section 1951.6

This section was revised to read substantially as follows:

1951.6. Section 1717 of the Civil Code, relating to attorney's fees, applies to leases of real property and the attorney's fees described in Section 1717 shall be recoverable in addition to any other relief or amount to which the lessor or lessee may be entitled.

Section 1951.8

This section was revised to read substantially as follows:

1951.8. (a) As used in this section, "advance payment or deposit" means moneys paid to the lessor of real property (1) as advance payment of rent, (2) as a bonus or consideration for the execution of the lease, (3) as a deposit to secure faithful performance of the terms of the lease, or (4) as the substantial equivalent of any of these.

(b) An advance payment or deposit shall be applied toward any amount recoverable by the lessor. If the lessee establishes that the advance payment or deposit exceeds the amount recoverable by the lessor, the lessee is entitled to recover the excess.

Section 1952

This section was deleted as unnecessary. One of the comments is to note that the new statute takes care of the problem to which Section 1952 was directed.

Section 1952.2

Subdivision (c) of this section was revised to read substantially as follows:

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(c) Whether or not the judgment referred to in Section 1174 of the Code of Civil Procedure declares the forfeiture of the lease, the lessor's right to damages after the lessor evicts the lessee is limited to the remedy that the lessor is provided under Section 1951.2.

Sections 1952.4, 1953, 1953.2

These sections were approved as drafted.

Section 3308

This section is to be conformed to Section 1952.2 as revised.

Sections 337.5 and 339.5

These sections were approved as drafted.

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STUDY 52 - SOVEREIGN IMMUNITY (STATUTE OF LIMITATIONS)

The Commission considered Memorandum 68-60 and the attached staff recommended draft statute relating to statute of limitations.

The Commission generally approved the draft of revised Sections 945.6, 950.4, and 950.6 of the Government Code. Approval was conditioned on and the staff was directed to draft (1) an amendment to § 910 to provide notice to the public entity when the claimant is a minor or incompetent, (2) additional sections requiring the public entity to give notice to a minor or incompetent claimant of the applicable limitation period and setting forth the form and method of service of this notice and the effect of failure to give such notice.

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STUDY 63 - EVIDENCE CODE

Privilege Against Self-Incrimination

The Commission considered Memorandum 68-39 and the attached letter from Robert E. Hinerfeld, a Los Angeles attorney, expressing the view that counsel ought to be able to comment on the defendant's claim of the privilege against compulsory self-incrimination in a civil case.

The Commission determined that no change should be made in the rule stated in Evidence Code Section 913(a).

STUDY 63 - EVIDENCE CODE

Psychotherapist-Patient Privilege

The Commission considered Memorandum 68-44 and the attached

letter from James E. Dixon, Ventura attorney, pointing out that the psychotherapist-patient privilege is not clearly made applicable to group therapy situations by Evidence Code Sections 912, 1010, and 1012.

The Commission determined that the benefits to society of encouraging free communication during group therapy outweigh the possible loss of evidence in judicial and other proceedings that would result if such communications were within the psychotherapist-patient privilege. The existing law under the Evidence Code is not clear.

The Commission determined that Evidence Code Section 1012 should be amended as follows:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or examination, or treatment or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation, or examination, or treatment, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

The Commission determined that Evidence Code Section 912, relating to waiver, should be amended to add a new subdivision (e), to read:

(e) The making of a communication in the course of group therapy conducted under the direction of a psychotherapist is not a waiver of the privilege provided by Section 1014 (psychotherapist-patient privilege) if the communication is otherwise protected by that privilege.

The Commission directed that a tentative recommendation be drafted reflecting the above decisions so that the tentative recommendation could be distributed for comment.

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The staff is to check the Evidence Code to determine whether the psychotherapist-patient privilege would protect a psychotherapist who prescribes LSD or narcotics or some other illegal form of treatment to a patient.

STUDY 63 - EVIDENCE CODE

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Evidence Code Section 1224

The Commission considered Memorandum 68-29, the first supplement thereto, and the exhibits attached to the memorandum and supplement. The Commission determined that there is no need for a change in the Evidence Code as a result of the decision of the California Supreme Court in Markley v. Beagle, 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967). The Commission recognized that a problem exists under the Markley decision as to the instructions to be given to the jury in a case where the employee is a party to the action against his employer but not a witness at the trial and a statement of the employee is admitted as an admission of a party. However, the Commission concluded that this problem as to proper instructions is one that is best left to the Supreme Court. See the discussion in the First Supplement to Memorandum 68-29.

STUDY 65 - INVERSE CONDEMNATION

Unintended Physical Damage

The Commission considered Memorandum 68-57 and Part IV of the research study on Inverse Condemnation. After a general discussion, the Commission concluded that the matters covered in this portion of the research study should be considered in detail at subsequent meetings. The matters covered in the study should be divided into small units.

The Commission determined that the first matter to be taken up in detail should be Interference with Land Stability (pages 39-41 of study) and that the second area should be Water Damages (pages 22-39 of study).

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STUDY 65 - INVERSE CONDEMNATION

Denial Destruction

The Commission considered Memorandum 68-58 and the attached tentative recommendation relating to denial destruction.

It was suggested that "disaster destruction" be substituted for "denial destruction." After "persons" in line 3, "deliberately committed" should be inserted. "Structure" should be substituted for "house."

The Commission discussed which public entity should bear the loss: The public entity for whom the employee acted may not be the public entity in which the benefited land is located. The public entity in which the benefited land is located may not have authorized or wished the disaster destruction to be committed. In some cases, lives may be saved in one area and land benefited in another. Moreover, what public entity bears the loss where the property is located in a city, various districts, etc.? It was suggested that the State might bear any losses under the proposed statute.

After considerable discussion, the Commission concluded that further work on this aspect of inverse condemnation should be suspended.