

Memorandum 74-43

Subject: Study 47 - Oral Modification of Written Contracts (Commercial Code Section 2209)

This memorandum discusses the comments received on the Tentative Recommendation Relating to Oral Modification of a Written Contract-- Commercial Code Section 2209. Attached to this memorandum are copies of the letters of comment and two copies of the tentative recommendation as distributed for comment. The lack of response to our request for comments indicates that the persons we sent the tentative recommendation to either believe that it is a desirable reform or do not have any strong feelings either for or against the tentative recommendation.

At the September meeting, we hope to be able to approve this recommendation for printing, subject to your editorial suggestions.

Favorable Reaction

The reaction to the tentative recommendation was generally favorable:

(1) Four out of nine letters support the tentative recommendation as is. (See Exhibits I - IV.)

(2) Exhibit V seems to support the principle of uniformity served by the tentative recommendation but criticizes the grammar of subdivision (2) of the UCC provision. The staff believes the grammar to be correct, although the subdivision could be better worded. The staff is mildly concerned that the writer of Exhibit V may not understand that a separate signing is required only as between a merchant and a nonmerchant where the merchant has supplied the form.

(3) Exhibit VI supports the liberalization of Section 2209 but suggests that a contract provision prohibiting oral modification should be

required to be initialed or perhaps printed in bold face type. The Commission has previously expressed its belief that requiring provisions to be initialed is generally a futile gesture; the separate signing provision was included in the tentative recommendation only in the interest of uniformity.

Unfavorable Reaction

Three of the nine letters are opposed to the tentative recommendation.

Although Exhibit VII states that the tentative recommendation is "a step in the right direction," the writer goes on to express his hope that the Commission will recommend that modification of all types of contracts (including construction contracts, in which the writer is particularly interested) be permitted only by writings executed by authorized personnel. Inasmuch as the Commission's tentative recommendation on Commercial Code Section 2209 would allow modification in more cases than does current law, and the Tentative Recommendation Relating to Civil Code Section 1698--Oral Modification of a Written Contract (see Memorandum 74-44) would not limit oral modification, the staff believes that the writer of Exhibit VII should be counted in opposition.

Exhibit VIII also suggests that only written modifications should be permitted.

Exhibit IX opposes the tentative recommendation without stating reasons.

Conclusion

The staff recommends no change in the tentative recommendation. We recommend that it be approved for printing and submission to the 1975 session.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

Memorandum 74-43

EXHIBIT I

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MILO E. SHADLE
ERNEST L. HUNT, JR.
GARY N. APPELT
JAMES L. HAGAR

April 5, 1974

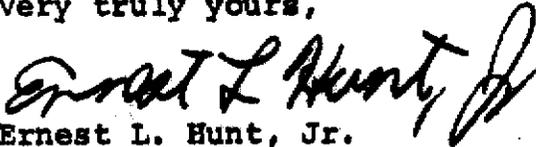
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation relating to
Oral Modification of a Written Contract

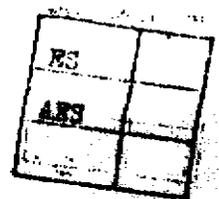
Dear Sirs:

I have reviewed the above tentative recommendation, and wish to comment that I am in favor of it. The present provisions of Section 2209(2) of the California Commercial Code have the potential of being a trap for the unwary, unsophisticated party to a contract, whereas the proposed amendment will operate to give better protection to such parties acting in good faith on the basis of a supposed oral modification of a written agreement.

Very truly yours,


Ernest L. Hunt, Jr.

ELH:gk



FITZGERALD, ABBOTT & BEARDSLEY

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JOHN L. McDONNELL, JR.
GERALD C. SMITH

LAWRENCE R. SHEPP
LLEWELLYN E. THOMPSON II
RICHARD T. WHITE

R. M. FITZGERALD 1898-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1862-1963

April 5, 1974

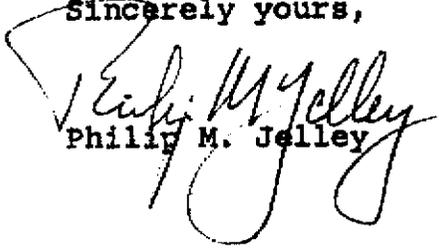
The California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation
re Oral Modification of
Written Contract

Gentlemen:

I have reviewed the Tentative Recommendation prepared by the California Law Revision Commission in connection with an oral modification of a written contract and proposed amendment to the Commercial Code. I concur with the Recommendation of the Commission that the California Code should be brought into conformance with the Uniform Commercial Code provisions relating to the subject.

Sincerely yours,


Philip M. Jelley

PMJ:ss

Memorandum 74-43

EXHIBIT III

SHEPPARD, MULLIN, RICHTER & HAMPTON

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 FINLEY L. TAYLOR
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 CHARLES H. MASHAM, JR.
 CARLTON A. VARNER
 RONALD M. BAYER
 TERRY S. TAYLOR
 ROY S. WUCHITECH
 THOMAS C. NELSON
 JOHN J. MOLLOY, III
 JOSEPH M. MALINOWSKI
 JAMES C. SHEPPARD
 (1899-1964)

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 GEORGE R. RICHTER, JR.
 GORDON F. HAMPTON
 MYRL R. SCOTT
 FRANK SIMPSON, III
 WILLIAM A. MASTERSON
 WESLEY L. NUTTEN, III
 DAVID A. MADDUK
 MERRILL R. FRANCIS
 STEPHEN C. TAYLOR
 JOHN D. MUSSEY
 THOMAS R. SHEPPARD
 JOHN A. STURGEON
 DON T. HIBNER, JR.
 PAUL H. REITLER
 PIERCE T. SELWOOD
 THOMAS C. WATERMAN
 RICHARD L. LOTT
 JOSEPH G. GORMAN, JR.
 WILLIAM M. BURKE
 PRENTICE L. O'LEARY

California Law
 Revision Commission
 School of Law
 Stanford, California 94305

Attention: John H. DeMouilly, Esquire
 Executive Secretary

Gentlemen:

I have read with interest your Tentative Recommendation Relating to Oral Modification of a Written Contract - Commercial Code Section 2-209. Although I am no longer Chairman of the California Commission on Uniform State Laws nor a member of that Commission, I would wholeheartedly endorse the tentative recommendation for the reasons as precisely stated in the paragraph on page 2 of the tentative recommendation.

Cordially yours,

George R. Richter, Jr.
 George R. Richter, Jr.

GRR:sv
 cc: Members of the
 California Commission

LAW OFFICES

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RICHARD S. CROWLEY
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OF COUNSEL
SHERWOOD C. CHILLINGWORTH
THOMAS W. NORTON

May 13, 1974

PLEASE REFER TO
OUR FILE NUMBER:

Robert H. Cornell, Esq.,
2160 Aetna Bldg.,
Crocker Plaza,
San Francisco, California, 94104.

Re: Uniform Commercial Code, Section 2-209

Dear Mr. Cornell:

I am in receipt of your letter of April 30,
1974.

I concur in the endorsement of the tentative
recommendation of the Revision Commission.

Very truly yours,


RICHARDS D. BARGER

RDB:J
CC to California Law Revision Commission ✓
School of Law
Stanford, California, 94305

Attn: John H. DeMouilly, Esq.
Executive Secretary

Memorandum 74-43

EXHIBIT V

BLUMBERG, SHERR, FLANAGAN, KERRORIAN & TAHAJIAN

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TELEPHONE 837-4783STEPHEN M. BLUMBERG
MORRIS H. SHERR
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GARY KERRORIAN
GERALD LEE TAHAJIAN

May 30, 1974

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Re: Oral Modification of Written Contract

Dear John:

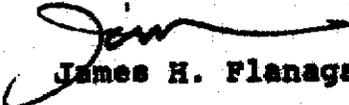
My comments on the tentative recommendations re Commercial Code 2209 and Civil Code §1698 are:

1. A uniform rule is desirable, so why not go all the way and eliminate all differences, not only between our and other commercial codes, but also, between that and the Civil Code.

2. Standard practice in written contracts is to put in a provision excluding modification or rescission except by a signed writing, so absence of such a provision infers intent to allow oral modification.

3. Grammatical inconsistency of UCC 2-209 (2): "as between merchants" versus "by the merchant".

Yours very truly,


James H. Flanagan, Jr.

JHF/cjm

P.S. Enclosed is a copy of an article by Reed Dickerson in the May, 1974, issue of ABA Journal - I remember that we used his book on Legislative Drafting in your seminar.

JHF

cc: B. I. Cornblum

Memorandum 74-43

EXHIBIT VI

LAW OFFICES

NOSSAMAN, WATERS, SCOTT, KRUEGER & RIORDAN

THIRTIETH FLOOR • UNION BANK SQUARE

445 SOUTH FIGUEROA STREET • LOS ANGELES, CALIFORNIA 90017

TELEPHONE (213) 628-5221

May 7, 1974

REFER TO FILE NUMBER

WALTER E. NOSSAMAN (1914-1964)	ARTHUR B. CITRIN
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WILLIAM L. SCOTT	JEFFREY L. DEBOCKER
ROBERT J. KRUEGER	HOWARD D. COLEMAN
RICHARD J. RIORDAN	RICHARD D. PERL
HAROLD MARSH, JR.	ROBERT D. MOHRER
THOMAS L. CAPS	FRANK W. FOLLO
PAUL THOMAS GUINN	WINIFRED D. WILSON
WILLIAM E. GUTNER, JR.	FREDERIC A. FUDACE
ALVIN S. KAUFER	RICHARD J. MORGAN
EACHLAN ROSTER	MICHAEL J. COWAN
ALAN F. BARTON	DAVID M. ARCHERLACHEN
RICHARD R. MAINLAND	RICHARD M. KASIMAN
BOYD A. LEMON	THOMAS K. BOURNE
WILLIAM D. MARRENSON	BRUCE C. MERRITT
CARL W. MCKENZIE	PAUL R. ALANIS
LINDELL L. MARSH	RONALD S. SENZAKI
FACILINE E. NEWMAN	MARTIN J. THOMPSON
PETER L. OSTROFF	BARBARA C. TAN
ROBERT M. TURNER	PHILIP J. GANT, JR.
JAMES A. HAMILTON	SANFORD I. HILSMERG

Mr. John H. DeMouilly
 Executive Secretary
 California Law Revision Commission
 School of Law
 Stanford, California 94305

Dear Mr. DeMouilly:

Thank you for your letter of April 29, 1974 regarding the proposed UCC code provision relating to oral modification of a written contract. I agree with the principle of liberalizing oral modification of contracts and particularly eliminating the provision that it must be "fully executed," but which is difficult to prove especially when the modification relates to the elimination of a duty.

There is a problem, however, in prohibiting oral modifications where a contract expressly requires a writing. The problem is that people will, in fact, make oral modifications and will intend at the time of the modification to be bound by the modification. At a later date during litigation, the contract provision will be asserted and the modification rendered void which will be contrary to the intent of the parties.

I respectfully submit that if a provision is adopted which prohibits oral modifications of contracts, the statute should require that the parties' attention is directed

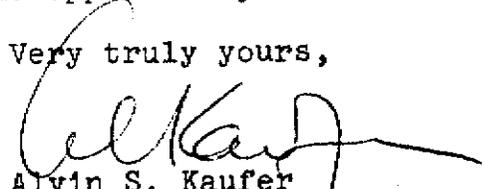
NOSSAMAN, WATERS, SCOTT, KRUEGER & RIORDAN

Mr. John H. DeMouilly
May 7, 1974
Page Two

to that provision such as by initialing the paragraph or by requiring special significance as is the case with subordination and warranty clauses.

Thank you for giving me the opportunity to comment.

Very truly yours,



Alvin S. Kaufer
of NOSSAMAN, WATERS,
SCOTT, KRUEGER & RIORDAN

ASK:bh

GRANT & POPOVICH

ATTORNEYS AT LAW

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April 15, 1974

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation Relating to
Oral Modification of a Written Contract

Gentlemen:

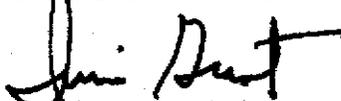
The proposed revision of Commercial Code §2209 is a step in the right direction in an important area of the law.

The practice of this office is limited primarily to matters involving the construction industry. We have found that carefully drawn written agreements are stripped of their effectiveness and meaning when, upon completion of a project, it is claimed that a foreman or superintendent on the project approved work which modified the written agreement. We have been repeatedly drawn into litigation involving substantial amounts of money where it is claimed that instructions were given by someone on the project site to do disputed work and had further promised to cause his employer to pay for such work. The normal problems of proof are compounded in construction contract matters because of the mobility of the contractor's work force; when the matter eventually comes to trial the person who allegedly approved the oral modification is usually not available to testify as a witness.

It is hoped that the Law Revision Commission will recommend legislation which will eliminate in all areas of contract law the rule permitting the oral modification of written agreements except by a writing executed by authorized personnel of the contracting parties.

Very truly yours,

GRANT & POPOVICH


Irvin Grant

GENDEL, RASKOFF, SHAPIRO & QUITTNER
ATTORNEYS AT LAW
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(213) OLIVE 3-3880

CABLE ADDRESS: GENRAS

IN REPLY REFER TO:

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H. NILES RASKOFF
BERNARD SHAPIRO
ARNOLD M. QUITTNER
EARL A. GLICK
LEONARD G. LEIBOW
FRANK C. CHRISTL
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RICHARD A. FOND
JOHN H. CRAIG

May 3, 1974

Maurice D. L. Fuller, Sr., Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

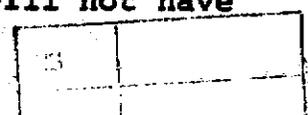
Re: STATE BAR UNIFORM COMMERCIAL CODE COMMITTEE

Dear Mr. Fuller:

Your April 29th letter highlights the fact that many of us have been marking time and not responding to the various suggestions being proposed. With reference to opposing A.B. 3294, I did write on March 21, 1974, and still feel that the National provision should be adopted and A.B. 3294 should be vigorously opposed.

With reference to A.B. 2510, my concern is that we will again end up with a variety of differences from the National format, although I have no real quarrel with the approach taken by George Richter and basically confirmed by your son and others who have commented in writing. Since George is one of the leading members of the National Commission, I am hopeful that this time the voice of California experience reflected by its lawyers will be heard in the Commission, so that the National format will not have to be changed by California.

The solution to the problems concerning banks and title companies involving personal property to be incorporated in or affixed to the structure might well be considered from the pragmatic approach as to which entity could best protect itself. Probably the seller of personal property, which he knows by its nature and the purpose for which it is intended will be incorporated in or affixed to a structure, should be able to protect itself from the very inception. It could either make appropriate arrangements with the subcontractor, the contractor or the owner to the end that the monies owing will be paid, or it must realize that as seller it will not have



GENDEL, RASKOFF, SHAPIRO & QUITTNER

Maurice D. L. Fuller, Sr., Esq.

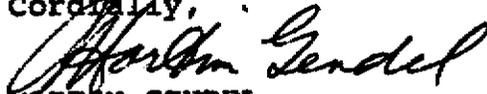
May 3, 1974

Page 2

a right to enforce a purchase money security interest that could be filed ten days after the delivery to the property and therefore leave the construction lender, the title company, the bank, etc., without a chance to protect themselves. I realize that this suggestion is not being articulated with specific recommended Code language, but knowing how resourceful Bob Fabian is, I am sure that he can devise appropriate language if he deems the suggestions acceptable. Again, if such an approach is adopted through persons like George Richter, we should attempt to have the approach incorporated in the National format.

As to the apparent willingness of the California Law Revision Commission to approve oral modification of a written contract, I find it very difficult to accept the approach that a contract involving dollars in excess of a certain amount must be in writing, but that under any conditions, either consented to by the parties, or otherwise, it can be modified orally. If the parties involved see fit to modify the contract and do not end up in litigation, nobody else will hear about it. But if, e.g., a trustee in bankruptcy or the rights of third parties become involved, then we have the anomaly of one or both parties claiming they changed the written contract by oral modifications. I think the requirement for a written contract in the first place eliminates a good part of the misunderstandings that arise from oral agreements, and I think this same philosophy should require written modifications. Being bothered by a long memory, I still feel that the Commission was wrong in permitting the newspaper lobbyists to continue the requirement that a dba must be published in a newspaper as well as filed. Except for enriching the coffers of the newspapers, there is no practical or legal reason whatsoever for such a publication requirement. Likewise, I wonder who is creating the apparent need for the revision of California C.C. Section 2-209(2).

Cordially,


MARTIN GENDEL

MG:mm

cc: Members of the Committee
Robert H. Fabian, Esq.
George R. Richter, Jr., Esq.
California Law Revision Commission ✓

Memorandum 74-43

EXHIBIT IX

KIPPERMAN, SHAWN & KEKER

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JOEL A. SHAWN
JOHN W. KEKER

TELEPHONE: (415) 788-2200

April 3, 1974

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION RELATING TO ORAL MODIFICATION
OF A WRITTEN CONTRACT

Dear Sirs:

My opinion of the above-mentioned proposal is that it should be rejected, and that the present California law should be preserved.

Very truly yours,



STEVEN M. KIPPERMAN

SMK/jm

RE	
ENC	
DATE	
BY	
FILE	

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION :

relating to

ORAL MODIFICATION OF A WRITTEN CONTRACT

Commercial Code Section 2209

May 1974.

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments should be sent to the Commission not later than August 1, 1974.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law to those who will have occasion to use it.

TENTATIVE RECOMMENDATION
relating to
ORAL MODIFICATION OF A WRITTEN CONTRACT
Commercial Code Section 2209

Subsection (2) of Section 2-209 of the Uniform Commercial Code permits the oral modification of a written contract for the sale of goods unless the contract expressly provides that it may not be rescinded or modified except by a signed writing.¹ This provision was changed when the Uniform Commercial Code was enacted in California. Subdivision (2) of Section 2209 of the California Commercial Code provides that "a written contract within

1. Section 2-209 of the Uniform Commercial Code provides as follows:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

this division may only be modified by a written agreement or by an oral agreement fully executed by both parties."²

The Commission recommends that California adopt the official text of Uniform Commercial Code Section 2-209.³ California is the only state that departs from the official text of this provision.⁴ The great volume of interstate business calls for a single national rule in the area of sales transactions, particularly concerning the manner of drafting forms. Other states have had no difficulty with the Uniform Commercial Code provision, and the case law that develops in other states will be of assistance to California lawyers in understanding and applying Section 2209 if our section is revised to conform to the official text.

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2. The California Commercial Code provision was influenced by, but differs significantly from, the rule provided by Civil Code Section 1698. Section 1698 provides: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." In D. L. Godbey & Sons Constr. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952), the California Supreme Court held that an oral agreement modifying a written contract is "executed" under Section 1698 if consideration was given for the oral agreement and it has been performed by the party relying on the modification. The language of California Commercial Code Section 2209(2) overrules the Godbey exception for purposes of Division 2 of the Commercial Code by requiring execution of the agreement by both parties.
 3. Whether the rule stated in Civil Code Section 1698 should be revised or retained for transactions not covered by the Commercial Code is the subject of a separate study by the Law Revision Commission.
 4. See Permanent Editorial Board for the Uniform Commercial Code, Report No. 2, at 34-35 (1964). See also 1 Uniform Laws Annotated--Uniform Commercial Code 128 (Master Ed. 1968). Although subdivision (3) of Uniform Commercial Code Section 2-209 was omitted from the code as originally enacted in California, subdivision (3) was added in 1967, thereby making the California provision the same as Section 2-209 of the Uniform Commercial Code with the exception of subdivision (2). Cal. Stats. 1967, Ch. 799, § 3.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 2209 of the Commercial Code, relating to modification of contracts.

The people of the State of California do enact as follows:

Commercial Code § 2209 (amended)

Section 1. Section 2209 of the Commercial Code is amended to read:

2209. (1) An agreement modifying a contract within this division needs no consideration to be binding.

~~(2) A written contract within this division may only be modified by a written agreement or by an oral agreement fully executed by both parties.~~

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this division (Section 2201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subdivision (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Comment. Subdivision (2) of Section 2209 is amended to conform to the language of the Uniform Commercial Code.