

#47

8/15/74

Memorandum 74-44

Subject: Study 47 - Oral Modification of Written Contract (Civil Code § 1698)

This memorandum discusses the letters received concerning the Tentative Recommendation Relating to Civil Code Section 1698--Oral Modification of a Written Contract. Attached to this memorandum are copies of the letters of comment and two copies of the tentative recommendation as distributed. As with the tentative recommendation relating to Commercial Code Section 2209, the lack of response indicates either approval or apathy.

We hope that this recommendation can be approved for printing, subject to editorial revisions, at the September meeting.

Favorable Comment

The writer of Exhibit I thinks the recommendation "conforms to the reality of the business world."

The writer of Exhibit II believes the recommendation is a "good idea" but suggests that subdivision (c) of the proposed Section 1698 read as follows:

(c) A contract in writing may be modified by an oral agreement supported by new consideration to the extent that the oral agreement is executed by the party seeking enforcement of the modification.

The staff thinks this is a sensible change.

The Franchise Tax Board has no opinion on the tentative recommendation.  
(See Exhibit III.)

Judge Kingsley (Exhibit V) favors the recommendation but wants to do a more complete revision. (See discussion below.)

Uniformity

The writer of Exhibit IV asks why the Commission does not eliminate the difference between the Civil Code and the Commercial Code provisions

by adopting the rules stated in the Commission's tentative recommendation concerning Commercial Code Section 2209. The Commission rejected this approach at the March meeting because of dissatisfaction with the Uniform Commercial Code language which is recommended for the Commercial Code only in interest of conformity with the provisions of the other states which have adopted the Uniform Commercial Code.

#### Codification of Other Mitigating Doctrines

Both Exhibits V and VI suggest that the statute should codify the doctrines of novation, rescission, waiver of condition, and oral independent collateral contracts cited in the Comment to proposed Section 1698. The staff believes the Commission has previously discussed this alternative and decided against it. The staff believes it would be a considerable--if not impossible--task to attempt to codify the other doctrines in a substantively adequate manner. It would be possible to list the doctrines by name in the statute, much as they are listed in the Comment, to serve notice on the reader that common law doctrines may be applicable. This might answer Judge Kingsley's point that lack of awareness of the Comment might lead to litigation on the contention that the new Section 1698 was intended to abolish the other doctrines.

Mr. Fernandez (Exhibit VI) basically does not feel that the proposed statute will achieve the purpose of offering more adequate guidance to contracting parties since (1) few people look at statutes before orally modifying, (2) attorneys should know the case and statutory law now, (3) the courts will probably ignore the "less explicit language" of the proposed section, and (4) the four mitigating doctrines are mentioned in the Comment instead of the statute. While Mr. Fernandez clearly does not favor the

present proposal, he does think that, if it is to be adopted, it would be better to provide for the other mitigating doctrines in the statute.

Should the proposed Section 1698 provide for oral novation, rescission, waiver of condition, and independent collateral contracts?

#### Opposed to Change

Exhibits VII and VIII both oppose any attempt to change the present statutory law. Apparently they believe that the proposed Section 1698 would favor oral modification more than existing law. However, as the Comment clearly states, Section 1698 merely restates existing statutory law with the addition of the Godbey rule and estoppel. These writers also seem to believe that a new statute will encourage more litigation and perhaps more court-created exceptions.

#### Applicability to Public Works Contracts

Mr. Jack Carlow, Deputy City Attorney in Los Angeles, has asked us whether the proposed statute would be applicable to public works contracts, particularly those involving chartered cities. The easy answer is that the proposed statute is intended to apply to such contracts to the same extent as does existing law. Unfortunately, it is not easy to determine to what extent Section 1698 affects modifications of city contracts.

One treatise, citing Doland v. Clark, 143 Cal. 176, 76 P. 958 (1904), sets forth the following general proposition:

A city or other municipal corporation having the power to make a contract can deal with the contract in the same manner as if it were a natural person, and may, in the absence of a statutory limitation upon its powers, or conformably with such limitation, change, modify or cancel it in the same manner as it might originally contract. [2 Dillon, Municipal Corporations § 820 (5th ed. 1911).]

This implies that oral modification is improper or, at least, disfavored. However, another treatise, citing cases from other states, contains the following:

Unless it is otherwise provided by statute, a written municipal contract may be modified by parol. The modification need not be express, but may be implied, and the consent of the corporation to modify a contract may be inferred or implied from acts on its part relating to the performance of a contract after it formed the conclusion. It has been held, however, that written contracts between a city and a construction contractor could not be modified by oral agreement between the mayor and the contractor's superintendent. [10 McQuillan, Municipal Corporations § 29.121 at 583-584 (3d ed. rev. 1966).]

In most cases, however, even if the contract could be orally modified, there is no authority on the part of city functionaries to do so. This is the case because the general manner of making government contracts is closely regulated by statute. Hence, the court in A. Teichert & Son, Inc. v. State, 238 Cal. App.2d 736, 48 Cal. Rptr. 225 (1965)(action for compensation for performed extra work) remarked:

The "executed oral modification" theory is drawn from Civil Code Section 1698 . . . . Permissibility of an oral modification of a public works contract let on competitive bidding is at least open to serious question. The complaint does not allege that any of the "oral modification" was approved by the state highway engineer. Subordinate field personnel could not waive the mandatory contract requirement that ordered changes be approved by the state highway engineer.

Certain types of modifications of government contracts are specifically regulated by statute. Government Code Section 14377, for example, provides that contracts under the State Contract Act (Section 14250 et seq.) "shall provide that the department may make changes in the plans and specifications." Section 14391 of the same act provides that "the department may increase or decrease quantities of work to be done under a unit basis contract during the progress of the work." Government Code Section 4107 allows the public entity to consent to the substitution of subcontractors under certain

conditions. City contracts, like state contracts, frequently have changes clauses which attempt to provide for minor modifications in the progress of a project.

Tentatively, we may conclude that, in theory, the general rules governing oral modification apply to contracts of public entities but, that, in almost every situation, the statutory provisions concerning the manner of making and altering contracts act as exceptions to the general rule. The problems are of such a special nature that perhaps it is best to avoid the conflicts and confusion by providing in the recommendation that Section 1698 does not apply to contracts involving a public entity. Even then, the doctrine of estoppel would in an egregious situation protect a party relying on an oral modification to his detriment. See Sawyer v. City of San Diego, 138 Cal. App. 652, 292 P.2d 233 (1956)(estoppel applied to city where required by justice).

If the Commission feels that public entity contracts should not be exempted from the coverage of Section 1698, the question remains whether the section would apply to home rule cities which may "make and enforce all ordinances and regulations in respect to municipal affairs" free of state control. See Cal. Const., Art. XI, § 5(a). The crux of the question is then whether the rules concerning oral modification are a matter of state concern or municipal affairs. There is no statutory or constitutional guidance on this question; it is left to court decision on a case-by-case basis. The court in In re Hubbard, 62 Cal.2d 119, 128, 41 Cal. Rptr. 393, 398 (1964), set down the following general criteria for determining whether a chartered city may legislate in a particular area:

Analysis of the many prior decisions on this subject indicates that although the language differs from case to case, the rationale of all have one thing in common, that is, that chartered counties and

cities have full power to legislate in regard to municipal affairs unless: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

The staff has found no case which has decided whether modification is a state or a municipal affair. However, by analogy to Frick v. City of Los Angeles, 115 Cal. 512, 47 P. 250 (1896)(charter provision requiring city contracts to be in writing and signed by the mayor is valid), and Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 159 P. 600 (1916)(San Francisco had power to provide complete scheme in charter for letting contracts), it may be argued that the manner of modifying contracts is a municipal affair.

The staff cannot give an authoritative answer on the question of whether the existing or proposed Section 1698 would be found by the courts to prevail over inconsistent city ordinances. Absent a legislative finding that the subject of the modification of contracts of public entities is a matter of grave state concern, the staff is doubtful that a court would strike down an inconsistent ordinance or charter provision on the grounds of a conflict with Section 1698. The staff thinks it would not be advisable to attempt in the Comment to Section 1698 to deal with the problem of whether the provision is intended to apply to charter cities. We feel that the soundest alternatives are to say nothing or to specifically exclude contracts with public entities from the coverage of Section 1698.

Respectfully submitted,

Stan G. Ulrich  
Legal Counsel

DESMOND, MILLER & DESMOND

ATTORNEYS AT LAW  
1008 FOURTH STREET, SUITE 900  
SACRAMENTO, CALIFORNIA 95814  
TELEPHONE: (916) 443-2081

EARL D. DESMOND  
(1905-1988)  
E. WAYNE MILLER  
(1904-1988)

RICHARD F. DESMOND  
LOUIS N. DESMOND  
CAROL MILLER  
HAL O. BARTHOLOMEW  
JOHN MULLEN  
WILLIAM S. DUCE  
STEVEN E. HARROLD

July 23, 1974

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

Gentlemen:

We have read and reviewed your tentative recommendation relating to Civil Code Section 1698, Oral Modification of a Written Contract.

Your tentative recommendation conforms to the reality of the business world. I believe it is a much more accurate expression of the ordinary persons understanding of the way business affairs should be conducted than the current Civil Code Section 1698.

Very truly yours,

DESMOND, MILLER & DESMOND

  
Louis N. Desmond

LND/llr

ES	

ALBERT J. FORN, INC.  
A Professional Law Corporation  
ALBERT J. FORN  
ATTORNEY AT LAW  
SUITE 415 WILSHIRE-NORTON BUILDING  
4055 WILSHIRE BOULEVARD  
LOS ANGELES, CALIFORNIA 90010  
TELEPHONE (415) 397-5439

July 12, 1974

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

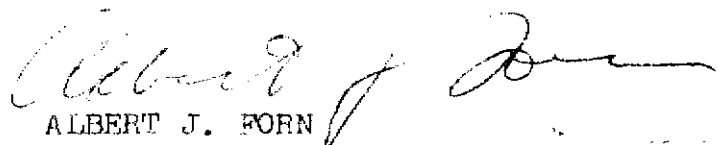
Dear Mr. DeMouilly:

Thank you for sending me the tentative recommendation re C.C. section 1698. I think it is a good idea.

In my view the language of proposed subsection (c) "an oral agreement supported by consideration" is entirely clear. Nevertheless I have a jaundiced view of our overrated judiciary; and I would wager that if a lawyer argued that no "new" consideration was required by the statute, that inasmuch as the original "contract" was supported by consideration so was the "agreement" supported by the same consideration, and that if the legislature meant "new" consideration it would have used that word, more than one judge would agree with him and rule that the omission of "new" was an intentional abrogation of existing law.

Accordingly, I would suggest that the proposed revision should be made redundant but certain by stating "an oral agreement supported by new consideration."

Very truly yours,

  
ALBERT J. FORN

AJF/ja





STATE OF CALIFORNIA

**FRANCHISE TAX BOARD**

SACRAMENTO, CALIFORNIA 95867

June 27, 1974


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

Attention: John H. DeMouilly  
Executive Secretary

The tentative recommendation relating to Civil Code Section 1698, Oral Modification of a Written Contract, has been reviewed.

The changes, as proposed, do not affect the administration of the tax laws to any appreciable degree.

For that reason we have no relevant comments to offer at the present time.

  
Martin Huff  
Executive Officer

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Memorandum 74-44

EXHIBIT IV

BLUMBERG, SHERR, FLANAGAN, KERKORIAN & TAHAJIAN  
ATTORNEYS AT LAW

STEPHEN M. BLUMBERG  
MORRIS M. SHERR  
JAMES H. FLANAGAN, JR.  
GARY KERKORIAN  
GERALD LEE TAHAJIAN

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FRESNO, CALIFORNIA 93776

AREA CODE 209  
TELEPHONE 237-4783

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:

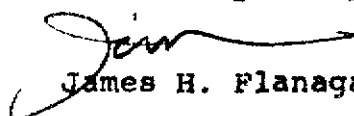
My comments on the tentative recommendations re  
Commercial Code 2209 and Civil Code §1698 are:

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

Enclosure

Memorandum 74-44

EXHIBIT V

STATE OF CALIFORNIA  
COURT OF APPEAL  
SECOND DISTRICT—DIVISION FOUR  
906 STATE BUILDING  
217 WEST FIRST STREET  
LOS ANGELES 90012

ROBERT KINGSLEY  
ASSOCIATE JUSTICE

June 6, 1974

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

Re: Civil Code, Section 1698

Dear Sir:

I have read the Commission's Tentative Recommendation concerning the above section. I agree with the proposed new section as far as it goes. However, if we are to re-write section 1698, I think we should do a complete job and, by appropriate language, include the doctrines of Pearsal v. Henry, Treadwell v. Nickel, Bardeen v. Commander Oil Co., and Lacy Mfg. Co. v. Gold Crown Mining Co.

Even though your comment finds its way into a footnote in some edition of the codes, there would always be a contention, subject to litigation, that the new statute was intended to be exclusive and to abolish those rules. Why leave it to doubt?

RK:ra

Sincerely,

  
Robert Kingsley

ALLARD, SHELTON & O'CONNOR

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TERRENCE J. BRUTOCAO

JOSEPH A. ALLARD  
(1887-1968)

ROLAND J. BROWNSBERGER  
OF COUNSEL

June 11, 1974

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

Re: Tentative Recommendation Relating to Civil Code §1698

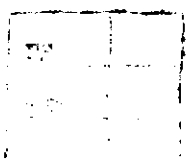
Dear Mr. DeMouilly:

I am writing to comment upon the Law Revision Commission's tentative recommendation regarding Civil Code §1698. As I understand the recommendation, the proposed amendments are being suggested because "California statutes offer inadequate guidance," in the area of oral contracts.

Although I understand the need for adequate guidance to the parties, I have some questions about the proposal:

(1) In the first place, I doubt that very many people, other than lawyers, actually read the California statutes before making an oral modification of a contract. If they do, they will find a declaration that contracts may only be altered by a writing or by an executed oral agreement, and that should induce them to put their modification in writing. If the parties go to an attorney, on the other hand, he should know the law and should be able to advise them properly. Indeed, one would expect that he would suggest a written modification rather than an oral modification in all events.

(2) Secondly, since §1698 is just about as explicit as the legislature could be, I wonder why the Law Revision Commission feels that changing that section to incorporate exceptions that the courts have devised up to now is going to keep the courts from coming up with new exceptions in the future, if they feel that "just results in particular cases," demand that. This is not to say that I believe courts ought to ignore statutes for the sake of what they consider just results. This is only to suggest that if the courts were willing to ignore the explicit language of §1698, I don't see why they would not ignore the less explicit language of newly proposed §1698. If they do, the law will be even more misleading than it is now, since the proposed statute seems to attempt to cover the bases.



Mr. John H. DeMouilly  
Page Two  
June 11, 1974

In short, I am not at all sure that the proposed law is necessary, nor am I sure that it is desirable.

Moreover, if the legislature does decide to adopt this revision, it seems to me that a section covering the other items mentioned in the text of your proposal [paragraphs 2, 3, 4, and 6] ought to be made a part of the legislation. I do not see how the Code is "clarified" by a comment, as opposed to adoption of a statute. If that were all that is needed, all one should have to do is add a comment to existing §1698.

Thank you for your consideration of this letter.

Yours truly,



Ferdinand F. Fernandez

FFF:kig

Memorandum 74-44

EXHIBIT VII

J. H. PETRY

ATTORNEY AT LAW

374 COURT STREET

SAN BERNARDINO CALIFORNIA 92401

AREA CODE 714

TURNER 9-9345

June 12, 1974

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

Re: CIVIL CODE SECTION 1698 - ORAL MODIFICATION  
OF A WRITTEN CONTRACT

Gentlemen:

I oppose a code provision which would authorize Oral  
Modification of a Written Contract.

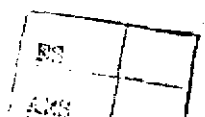
The present Civil Code Section 1698 was adopted to  
limit oral modification of written agreements. You  
know what the courts have done to this. If the law  
is amended to provide specific situations which would  
permit oral modification the court will have a field  
day interpreting those provisions and make exceptions  
to and extend the provisions thereof.

I urge that there be no change in the statutory law  
as it now exists.

Very truly yours,

  
J. H. Petry

JHP/hm



Memorandum 74-44

**CITY OF HAWTHORNE**

**KENNETH L. NELSON**  
CITY ATTORNEY



**EXHIBIT VIII**

4480 W. 126th ST., HAWTHORNE, CALIF. 90250 • PHONE: 678-1181

June 10, 1974

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

Dear Mr. DeMouilly:

We have received the proposed amendment to Section 1698  
of the Civil Code.

May we respectfully urge that this section be allowed to  
stand as now written. Any attempt to broaden the oral  
modification of a written contract appears to us to enlarge  
the prospects of litigation, rather than achieve what is an  
attempt, apparently, to reduce litigation in this particular  
field.

Respectfully yours,

**JAMES M. HALL**  
Assistant City Attorney

JMH:ld

ES	
AS	

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

*relating to*

CIVIL CODE SECTION 1698

ORAL MODIFICATION OF A WRITTEN CONTRACT

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 as it would exist (if enacted) to those who will have occasion to use it after it is in effect.



## TENTATIVE RECOMMENDATION

relating to

## CIVIL CODE SECTION 1698

## Oral Modification of a Written Contract

The parties to a written contract frequently find it convenient or necessary to modify the contract by oral agreement to meet unforeseen conditions, to remedy defects, or to resolve ambiguities in the contract as written, or for some other reason. In the majority of situations, both parties perform in accordance with the written contract as modified. In some situations, however, a dispute arises concerning the terms of the oral modification, the nature of the performance, or whether there was a modification at all.

California statutes offer inadequate guidance to the parties who attempt to orally modify a written contract. Since 1874, the rule provided in Civil Code Section 1698 has been that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."<sup>1</sup> As a result of a great amount of litigation, the courts have established exceptions to the application of the rule against oral modification in order to achieve just results in particular cases.<sup>2</sup> These exceptions include the following:

1. An oral agreement which has been executed by only one of the parties may be held to satisfy the rule.<sup>3</sup>

1. It has been suggested that this provision results from an inadequate attempt to state the common law rule that contracts required to be in writing can be modified only by a writing. See 2 Corbin, Contracts § 301 (1950); 15 Williston, Contracts § 1828 (3d ed. 1972).

2. See cases cited in Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549 (1972), and 1 B. Witkin, Summary of California Law Contracts §§ 715-719 at 600-604 (8th ed. 1973).

3. See D.L. Godbey & Sons Construction Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952). See also Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549, 1560-1561 (1972).

2. The parties may extinguish the written contract by an oral novation<sup>4</sup> and substitute a new oral agreement.

3. The parties may rescind the written contract by an oral agreement,<sup>5</sup> thereby satisfying the terms of Section 1698.

4. An oral modification may be upheld as a waiver of a condition of the<sup>6</sup> written contract.

5. A party who has changed his position in reliance on the oral agree-<sup>7</sup>ment may be protected by the doctrine of equitable estoppel.

6. An oral agreement may be held to be an independent collateral con-<sup>8</sup>tract, making Section 1698 inapplicable.

The effect of these exceptions has been largely to emasculate the rule against oral modification and make the statutory language deceptive at best. The vagueness and complexity of the rule and its exceptions have invited litigation.

The Law Revision Commission accordingly recommends that Section 1698 be replaced by a new section that clearly states the rules governing modifi-<sup>9</sup>cation of written contracts. Specifically, the new section should provide:

(1) The parties may modify a written contract by a written contract, by an oral agreement executed by both parties, or by an oral agreement supported

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4. See Pearsall v. Henry, 153 Cal. 314, 95 P. 154 (1908).

5. See Treadwell v. Nickel, 194 Cal. 243, 258-261, 228 P. 25, 32-33 (1924).

6. See Bardeen v. Commander Oil Co., 40 Cal. App.2d 341, 104 P.2d 875 (1940).

7. See Wade v. Markwell & Co., 118 Cal. App.2d 410, 258 P.2d 497 (1953).

8. See Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942).

9. The recommended section would not affect Civil Code Section 1697 (modification of oral contracts) and Commercial Code Section 2209 (modification of contracts for the sale of goods). In March 1974, the Commission distributed a Tentative Recommendation relating to Oral Modification of a Written Contract--Commercial Code Section 2209.

by consideration and executed by the party seeking enforcement. This would continue the substance of existing Section 1698 as interpreted by D.L. Godbey<sup>10</sup> & Sons Construction Co. v. Deane.

(2) An oral modification of a written contract is enforceable where a party has relied on the modification to his detriment. This would codify the rule in Wade v. Markwell & Co.<sup>11</sup>

These rules would merely describe cases where proof of an oral modification is permitted; the rules would not, however, affect in any way the burden of the party claiming that there was an oral modification to produce evidence sufficient to persuade the trier of fact that the parties actually did make an oral modification of the contract.

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10. 39 Cal.2d 429, 246 P.2d 946 (1957). See also Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974).

11. 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953).

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

An act to amend Section 1697 of, to amend the heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of, to add Section 1698 to, and to repeal Section 1698 of, the Civil Code, relating to modification of contracts.

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

Technical amendment (heading for Chapter 3)

Section 1. The heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of the Civil Code is amended to read:

CHAPTER 3.

ALTERATION MODIFICATION AND CANCELLATION

Civil Code § 1697 (technical amendment)

Sec. 2. Section 1697 of the Civil Code is amended to read:

1697. A contract not in writing may be ~~altered~~ modified in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new ~~alteration~~ modification .

Comment. The word "alteration" in Section 1697 is amended to read "modification" to conform with Section 1698. See Recommendation Relating to Civil Code Section 1698--Oral Modification of a Written Contract, 12 Cal. L. Revision Comm'n Reports \_\_\_\_ (1974).

Civil Code § 1698 (repealed)

Sec. 3. Section 1698 of the Civil Code is repealed.

~~1698.---A contract in writing may be altered by a contract in writing,  
or by an executed oral agreement, and not otherwise.~~

Comment. Former Section 1698 is superseded by new Section 1698.

Civil Code § 1698 (added)

Sec. 4. Section 1698 is added to the Civil Code, to read:

1698. (a) A contract in writing may be modified by a contract in writing.

(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by both parties.

(c) A contract in writing may be modified by an oral agreement supported by consideration to the extent that the oral agreement is executed by the party seeking enforcement of the modification.

(d) Although an attempt to modify a contract in writing does not satisfy the requirements of subdivision (a), (b), or (c), the agreement modifying the contract in writing may be enforced to the extent that failure to enforce the agreement would be unjust in view of a material change in position in reliance on the agreement by the party seeking enforcement of the modification.

Comment. Section 1698 provides for the manner of modifying written contracts. See Recommendation Relating to Civil Code Section 1698--Oral Modification of a Written Contract, 12 Cal. L. Revision Comm'n Reports \_\_\_\_\_ (1974). Subdivisions (a) and (b) continue the substance of former Section 1698. Subdivision (c) codifies the rule in D.L. Godbey & Sons Construction Co. v. Deane,

§ 1698

39 Cal.2d 429, 246 P.2d 946 (1952). See also Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal.3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974). Subdivision (d) protects the party who has materially changed his position in reliance on the agreement and is based on the rule in Wade v. Markwell & Co., 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953).

The rules provided by Section 1698 merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract.

Section 1698 does not affect related principles of law. E.g., Pearsall v. Henry, 153 Cal. 314, 95 P. 154 (1908)(oral novation and substitution of a new agreement); Treadwell v. Nickel, 194 Cal. 243, 258-261, 228 P. 25, 32-33 (1924)(rescission of a written contract by an oral agreement); Bardeen v. Commander Oil Co., 40 Cal. App.2d 341, 104 P.2d 875 (1940)(waiver of a condition of a written contract); and Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942)(oral independent collateral contract).