
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 28-29, 1995
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on September 28-29, 1995.

Commission:

Present: Colin Wied, Chairperson
Allan L. Fink, Vice Chairperson (Sept. 28)
Christine W.S. Byrd (Sept. 28)
Bion M. Gregory, Legislative Counsel (Sept. 28)
Arthur K. Marshall
Sanford Skaggs

Absent: Robert E. Cooper
Quentin L. Kopp, Senate Member
Edwin K. Marzec

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

Consultants: Melvin A. Eisenberg, Business Judgment & Derivative
Actions (Sept. 28)
Robert C. Fellmeth, Unfair Competition Litigation (Sept. 28)

Other Persons:

Christopher Ames, Attorney General's Office, San Francisco (Sept. 28)
Kenneth W. Babcock, Public Counsel, Los Angeles (Sept. 28)
Herb Bolz, Office of Administrative Law, Sacramento (Sept. 29)
Clifford P. Dobrin, Deputy District Attorney, San Diego District Attorney's Office,
San Diego (Sept. 28)
Rick Dosa, California Land Title Association, San Francisco (Sept. 29)
Herschel T. Elkins, Senior Assistant Attorney General, Attorney General's Office, Los
Angeles (Sept. 28)
Jill C. Fannin, Chavez & Gertler, San Francisco (Sept. 28)
Gloriette Fong, Department of Motor Vehicles, Sacramento
James W. Han, State Bar, Business Law Section, Irvine (Sept. 28)

Gail Hillibrand, Consumers Union, San Francisco (Sept. 28)
 Alan M. Mansfield, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego (Sept. 28)
 Thomas A. Papageorge, Los Angeles District Attorney's Office, and California
 District Attorneys Association Consumer Protection Committee, Los Angeles
 (Sept. 28)
 Douglas M. Phillips, Office of Administrative Hearings, Sacramento (Sept. 29)
 James Quillinan, Mountain View (Sept. 29)
 Dick Ratliff, California Energy Commission, Sacramento (Sept. 29)
 Harry Snyder, Consumer Union, San Francisco (Sept. 28)
 Will Stern, Severson & Werson, San Francisco (Sept. 28)
 James C. Sturdevant, Consumer Attorneys of California, San Francisco (Sept. 28)
 Jim Towery, State Bar President-elect, San Francisco (Sept. 29)
 Jeff Wagner, State Bar, Real Property Section, San Francisco (Sept. 29)

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MINUTES OF AUGUST 18, 1995, MEETING

The Commission approved the Minutes of the August 18, 1995, meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

Approval of Recommendations for Submission to Legislature

The following final recommendations to the Legislature were approved by the Commission subject to ratification at the next Commission meeting by a minimum of four affirmative votes pursuant to Section 2.4.1 of the Commission's Handbook of Practices and Procedures:

- (1) Civil Code § 1464: Covenants that Run with the Land
- (2) Inheritance From or Through Child Born Out of Wedlock
- (3) Statute of Limitations in Trust Matters: Probate Code § 16460

Schedule of Future Meetings

The Commission considered Memorandum 95-49, relating to the schedule of future meetings. The Commission decided to make the meeting times, as a general rule, 9:00 am to 5:00 pm. Also, the Commission will try Thursday, rather than Friday, as the preferred day of the week for a one-day meeting, with the exception of December 1995, which was previously scheduled, and January 1996, which should be held in Los Angeles due to the tule fog peak in Sacramento. The October meeting should be held in conjunction with the State Bar Annual Meeting. The staff should propose a revised meeting schedule for 1996 at the January meeting, based on these principles.

The following meeting schedule through January 1996 was adopted:

November 1995	Sacramento
Nov. 2 (Thurs.)	9:00 am – 5:00 pm
December 1995	San Francisco
Dec. 8 (Fri.)	9:00 am – 5:00 pm
January 1996	Los Angeles
Jan. 19 (Fri.)	9:00 am – 5:00 pm

New Topics and Priorities

The Commission deferred consideration of Memorandum 95-50, relating to new topics and priorities, until the November 2, 1995, meeting.

Budget Issues

The Commission considered Memorandum 95-55, relating to budget issues. The Commission felt it would be useful to meet with Senator Kopp concerning the Commission's fiscal situation; Commissioners Wied and Skaggs offered to meet with Senator Kopp, along with the Executive Secretary. The Executive Secretary should check with Senator Kopp for an available meeting time, preferably Friday, November 3.

Remarks of State Bar President

Chairperson Colin Wied, a former President of the State Bar, introduced incoming State Bar President Jim Towery, in attendance at the meeting, and expressed appreciation for the cooperation and assistance of the State Bar and its various Sections and Committees in the work of the Law Revision Commission. Mr. Towery responded, expressing the Bar's appreciation and thanks for the work done by the Commission, noting that the Bar is able to contribute to the Commission's work in this way because of the existence of a strong unified bar organization.

1995 LEGISLATIVE PROGRAM

The Commission reviewed Memorandum 95-48, relating to the Commission's 1995 legislative program. The staff will report at a future meeting on whether the "unification by attrition" bill will require any additional statutory implementation.

STUDY B-601 — BUSINESS JUDGMENT RULE

The Commission considered Memorandum 95-33, relating to policy issues on codification of the business judgment rule. The Commission's consultant on this matter, Professor Mel Eisenberg, presented his background study.

The Commission decided to pursue the concept of codification of the business judgment rule. The staff should prepare a draft for consideration by the Commission at its December meeting, in conjunction with consideration of issues

involved in demand and excuse in shareholder derivative actions. The draft should address the following matters:

(1) The basic standard for codification should be that found in the ALI Restatement of Corporate Governance. The staff should consider the practical impact of having both objective and subjective criteria in the standard (“reasonably believes” and “rationally believes”), and propose any alternative formulations that appear appropriate. The staff should also consider whether it would make a difference to phrase the standard in terms of a standard of review (e.g., a director is not liable if the director satisfies the prescribed requirements) rather than as a definition of the standard of care (i.e., a director satisfies the duty of care if the director satisfies the prescribed requirements).

(2) The staff should investigate devices for limiting groundless lawsuits, such as the requirement of a prima facie showing before discovery will be allowed, preconditions such as those imposed in professional negligence or SLAPP suits, or deposit of costs such as provided in Corporations Code Section 800(b).

(3) The draft should cover officers as well as directors, provided the officer’s action is within the scope of authority. The staff should consider whether the same or a different standard should apply to officers as opposed to directors, and suggest any appropriate limitations to be imposed on directors.

(4) The term “interested” should be defined, but the definition should not necessarily be exclusive. The definition should make clear that an interest in a “party” to a transaction means a party other than the corporation. Other terms from the Restatement that are defined in the Restatement should be elaborated in the statute or Comment.

(5) The duty of care under consideration here is a duty to the corporation. In this connection the staff should review the impact of the statutory provision allowing the corporation to abrogate the duty of care.

(6) The current draft should be limited to corporations and not extended to other entities, whether for profit or nonprofit, at this time.

The staff should seek the involvement of interested organizations, including the plaintiffs’ bar, in the development of this draft.

STUDY B-700 — UNFAIR COMPETITION

The Commission considered Memorandum 95-43, and its First Supplement, presenting a staff draft of a tentative recommendation on *Unfair Competition*

Litigation. The Commission also considered the Second and Third Supplements to the memorandum, which forwarded comments on the draft tentative recommendation. The Commission made the following decisions:

Code Civ. Proc. § 385.10. Definitions

The definition of “public prosecutor” should be changed to “prosecutor” for the sake of simplicity. The definition should be clarified to include causes of action brought by public prosecutors, depending on the scope of the statute.

Code Civ. Proc. § 385.20. Prerequisites for pleading representative cause of action

This section should apply only to private plaintiffs. Accordingly, the word “private” should be inserted preceding “plaintiff” in subdivision (b).

Code Civ. Proc. § 385.22. Adequate legal representation

As a way of implementing the rule that the plaintiff’s counsel must be an adequate legal representative, the staff should draft a procedure requiring the plaintiff’s counsel to apply to the court to be appointed as the attorney for the general public as to the interests pled and perhaps stating the attorney’s qualifications. The staff should also investigate the standards applicable in class actions, as a possible model.

The standard should be revised to provide that the plaintiff may not have a conflict of interest that “reasonably could” compromise the good faith representation of the interests of the general public. The staff should redraft the section to make it more explicit, such as by providing that the existence of a conflict of interest should be based on the pleadings, or based on a determination that the plaintiff’s interest is antagonistic to the interests of the general public.

The statute should make clear that discovery is not available on the issues of adequacy and conflict of interest. However, the court should be able to inquire into the issues before making a determination.

The statute should also provide for the disposition of the case where the plaintiff fails to satisfy the adequacy and conflict of interest standards.

Code Civ. Proc. § 385.24. Notice to Attorney General’s register

Gov’t Code §§ 12660-12663. Attorney General’s register

The Commission decided not to propose establishment of a register of unfair competition actions under the Attorney General’s auspices. This section should

be revised to provide for notice to the Attorney General of the filing of an unfair competition action on behalf of the general public, along with a copy of the complaint in the action. The notice would be for information purposes only, and would not impose any duty on the Attorney General or any other prosecutor to intervene or take any other action as a result of the notice. It is anticipated that the notice would provide an opportunity for other prosecutors to learn of the action through the voluntary system currently in place.

Code Civ. Proc. § 385.26. Disclosure of similar cases against defendant

The defendant's duty to disclose similar cases should apply only as to representative actions and class actions based on substantially similar facts and theories of liability.

Code Civ. Proc. § 385.28. Notice of terms of judgment

Code Civ. Proc. § 385.30. Findings required for entry of judgment

The 45-day rule in draft Section 385.28 should be subject to an order shortening or extending time. A provision should be added for giving notice to a prosecutor who has filed a request for notice in the case.

Draft Sections 385.28 and 385.30 should not apply to prosecutors unless notice has been given to the Attorney General of a pending private representative action based on substantially similar facts and theories of liability. This is intended to avoid disrupting the existing practice whereby prosecutors may file an action and obtain entry of a stipulated judgment on the same day.

It was also suggested that the staff should consider preparing an alternate draft that would make the notice and hearing rules of draft Sections 385.28 and 385.30 optional, depending on whether the defendant wanted binding effect.

The staff should prepare a proposal for how to deal with dismissals of representative actions and amendments of complaints to strike a representative cause of action. It was suggested that the section might provide that the procedures apply to dismissals with prejudice but not to dismissals without prejudice. See draft Section 385.30(c) (action may not be dismissed without approval of court).

Remaining Issues

The remaining provisions in the draft (Code Civ. Proc. §§ 385.30-395.44) and several issues raised by commentators in the supplements will be carried forward and considered in the next memorandum on this subject.

STUDY H-407 — MARKETABLE TITLE: OBSOLETE RESTRICTIONS

The Commission considered Memorandum 95-46 and its First Supplement, concerning comments on the tentative recommendation relating to obsolete land use restrictions. The Commission also considered remarks of Jeffrey G. Wagner on behalf of the State Bar Real Property Section and Rick Dosa on behalf of the California Land Title Association, both of whom were present at the meeting.

The Commission directed the staff to prepare a revised tentative recommendation on the matter, to be considered at the next Commission meeting. Under the revised tentative recommendation, a land use restriction would expire 60 years after recordation, unless before that time a notice of intent to preserve the restriction for another 60 years was recorded. This rule would not apply to common interest development equitable servitudes. If a use restriction expired by its own terms before that time, the terms of the restriction would control, and if the restriction became otherwise unenforceable before that time under the common law applicable to restrictions (abandoned, obsolete, unlawful, etc.), the common law would control.

The revised tentative recommendation would also provide a 5-year statute of limitations for enforcement of a violation of a use restriction. The statute would apply only to action on a specific violation and not to enforcement of the restriction itself, which would continue in effect. This would overturn case law to the effect that failure to enforce a violation of a restriction is in effect a waiver of the restriction itself. The statute would apply to enforcement of a recorded notice of violation, which under the *Riviera* case is a recordable instrument. The statute should be located among the general statutes of limitation or in another appropriate place in the codes.

Other technical revisions should be made in the draft, including reference to “negative” easements in the section instead of Comment, and codification of the operative date provisions.

STUDY H-600 — CIVIL CODE § 1464: COVENANTS THAT RUN WITH THE LAND

The Commission considered Memorandum 95-46 and its First Supplement, concerning comments on the tentative recommendation to repeal the First Rule in Spencer’s Case. The Commission approved the proposal for printing and submission to the Legislature as a final recommendation.

STUDY J-110 — TOLLING STATUTES OF LIMITATION

The Commission considered Memorandum 95-44 concerning comments on the tentative recommendation on *Tolling Statutes of Limitation When Defendant Is Out of State*. The Commission directed the staff to revise the tentative recommendation to incorporate proposed Section 116.350, which is set forth on page 3 of Memorandum 95-44. In revising the tentative recommendation, the staff should make the following changes in proposed Section 116.350:

(1) The comment should explicitly state that the reason for the statute is the prohibition on out-of-state service in small claims cases.

(2) The draft should clarify that tolling pursuant to subdivision (a) continues to apply in any appeal from small claims court.

(3) The draft should state how the statute applies if the plaintiff increases the amount of a claim after it is transferred out of the small claims court.

The staff is to send the revised draft recommendation to the Judicial Council Civil and Small Claims Standing Advisory Committee, and report back to the Commission regarding any response.

STUDY K-501 — BEST EVIDENCE RULE

The Commission considered Memorandum 95-47 and its supplement. For the next meeting, the staff should revise the draft tentative recommendation to preserve existing law on the admissibility of oral testimony as to the contents of a writing.

STUDY K-510 — DISCOVERY OF ELECTRONIC EVIDENCE

The Commission considered Memorandum 95-53, which recommends awaiting the outcome of the debate on SB 1034 before taking further action regarding discovery of electronic evidence. The Commission adopted that recommendation.

STUDY L-659.02 — INHERITANCE FROM OR THROUGH
CHILD BORN OUT OF WEDLOCK

The Commission considered Memorandum 95-52, concerning comments on the tentative recommendation on *Inheritance From or Through a Child Born Out of Wedlock*. The Commission also considered the comments of the California Land Title Association, distributed at the meeting and attached as Exhibit pp. 1-2. The Commission approved the proposal for printing and submission to the Legislature as a final recommendation.

STUDY L-3057 — STATUTE OF LIMITATIONS IN TRUST
MATTERS: PROBATE CODE SECTION 16460

The Commission considered Memorandum 95-51, concerning comments on the tentative recommendation on the *Statute of Limitations in Trust Matters*. The Commission also considered the comments of the California Land Title Association, distributed at the meeting and attached as Exhibit pp. 1-2. The Commission approved the proposal for printing and submission to the Legislature as a final recommendation.

STUDY N-100 — ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

The Commission considered Memorandum 95-42, reporting on SB 523, the administrative adjudication bill. The Commission approved the draft of new and revised Comments attached to the memorandum, subject to any necessary corrections. The Comments should be published in the Commission's Annual Report or in a separate publication on administrative adjudication, and should be distributed to the law publishers for inclusion in their annotated codes.

STUDY N-110 — FOLLOWUP LEGISLATION ON ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 95-54, relating to followup legislation on the administrative adjudication bill. The Commission approved the amendments to Insurance Code Section 1861.08 (Proposition 103) and to Section 98 of SB 523 (operative date of transitional provisions) set out in the Memorandum for inclusion in followup legislation. The staff should also incorporate any changes necessary as a result of chaptering out.

The staff should also attempt to develop satisfactory language relating to imposition of the administrative adjudication provisions on hearings of quasi-public entities for inclusion in followup legislation. The draft set out in the memorandum, for example, might be revised to apply to constitutionally or statutorily required hearings of quasi-public entities. The Comment might give illustrative examples of the types of hearings to which the provision would apply. The staff should circulate the draft for comment to known persons and organizations that might be interested in this matter, and report back to the Commission at the next meeting.

☐ APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary