

Revised July 12, 1968

<u>Time</u>	<u>Place</u>
July 18 - 10:00 a.m. - 4:30 p.m.	Bahia Motor Hotel
July 19 - 9:00 a.m. - 3:00 p.m.	998 Mission Bay Drive
July 20 - 9:00 a.m. - 3:00 p.m.	San Diego, Calif. 92109

REVISED
FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Diego

July 18-20, 1968

July 18

1. Approval of Minutes of June 28-29 Meeting (sent 7/8/68)
2. Administrative Matters

Future Meetings

August	No meeting
September 19-21 (3 full days)	San Francisco
October 18, 19	Los Angeles
November (date to be set)	Berkeley
December 20, 21	Los Angeles

Wolford

3. Study 55 - Additur and Remittitur

Memorandum 68-50 (sent 7/9/68)
Tentative Recommendation (attached to memorandum)

Ball

4. Study 63 - Evidence Code

Commercial Code Revisions

Memorandum 68-62 (sent 7/8/68)

Marital Privileges Revisions

Memorandum 68-63 (sent 7/8/68)

Psychotherapist-Patient Privilege Revisions

Memorandum 68-67 (sent 7/9/68)
Tentative Recommendation (attached to memorandum)

Wolford 5. Study 44 - Fictitious Business Name Statute
Memorandum 68-64 (sent 7/9/68)

Special Order of Business at 1:00 p.m. on July 18

July 19 and 20

Uhler 6. Study 52 - Sovereign Immunity
Statute of Limitations
Memorandum 68-68 (sent 7/8/68)
Tentative Recommendation (attached to memorandum)

7. Study 36 - Condemnation Law and Procedure

Yale The Right to Take
Memorandum 68-65 (sent 7/11/68)
Research Study (attached to memorandum)

Uhler 8. Study 52 - Sovereign Immunity
The Collateral Source Rule
Memorandum 68-66 (sent 7/8/68)
Prisoners and Mental Patients
Memorandum 68-51 (sent 5/7/68, additional copy sent 7/8/68)
Tentative Recommendation (attached to memorandum)

Stanton 9. Study 63 - Evidence Code
Evidence Code Section 1224
Memorandum 68-69 (sent 7/10/68)
Law Review Article (attached to memorandum)
Evidence Code Section 1235
Memorandum 68-70 (sent 7/11/68)
Evidence Code Section 1202
Memorandum 68-71 (sent 7/11/68)

Arnebergh 10. New Topic
Memorandum 68-72 (sent 7/11/68)

Arnebergh 11. Study 50 - Leases
Memorandum 68-73 (enclosed)
Tentative Recommendation (attached to memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JULY 18, 19, AND 20, 1968

San Diego

A meeting of the California Law Revision Commission was held at San Diego on July 18, 19, and 20, 1968.

Present: Sho Sato, Chairman
Thomas E. Stanton, Jr.
Lewis K. Uhler
Richard H. Wolford (July 18 and 19)
William A. Yale

Absent: Joseph A. Ball, Vice Chairman
Alfred H. Song, Member of the Senate
F. James Bear, Member of the Assembly
Roger Arnebergh
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Executive Secretary, Jack I. Horton, Junior Counsel, and John L. Cook, Student Legal Assistant, of the Commission's staff also were present.

Also present were the following observers:

Bert Berman, Office of County Clerk, Los Angeles	(July 18)
- Robert Carlson, State Dept. of Public Works	(July 19)
- Don Clark, Office of San Diego County Counsel	(July 19)
Ronald P. Denitz, Asst. General Counsel, Tishman Realty & Construction Co., Inc.	(July 20)
Eugene Golden, Attorney, Buckeye Realty Management Corp.	(July 20)
R. B. James, Office of County Clerk, San Diego	(July 18)
- Jim Merkle, State Dept. of Water Resources	(July 19)
Mr. O'Shinn, Office of County Clerk, Los Angeles	(July 18)
- Willard Shank, Office of Attorney General	(July 18 and 19)
William G. Sharp, Office of County Clerk, Los Angeles	(July 18)
- Jim Smith, Office of San Diego County Counsel	(July 19)
- Robert Smith, State Dept. of Public Works, San Diego	(July 19)
- Terry Smith, Office of Los Angeles County Counsel	(July 19)

ADMINISTRATIVE MATTERS

Minutes of June Meeting. The Minutes of the meeting held on June 28 and 29, 1968, were approved as presented.

Legislative Program (1968). The Executive Secretary reported that all measures recommended by the Commission (seven bills and two resolutions) were enacted or adopted. (The Commission withdrew its recommendation that one bill--Senate Bill No. 62--be enacted.)

Future Meetings. Future meetings are scheduled as follows:

August	-- No meeting
September 19 (evening), 20 and 21	-- San Francisco
October 18 and 19	-- Los Angeles
November 21 (evening), 22, and 23 (morning)	-- Berkeley (Big Game)
December 20 and 21	-- Los Angeles

Note: The Commission will meet on the evening of September 19 only if necessary.

Civil Service Examination Procedures for Staff Attorneys.

The Executive Secretary reported that it is essential that junior staff attorneys be promoted as soon as they have served the minimum amount of time necessary to qualify for promotion. The Commission authorized the Executive Secretary to work with the State Personnel Board to establish a procedure that would permit promotion as soon as junior staff members qualify for promotion to Assistant Counsel or Associate Counsel. If necessary to meet this problem, an agency examination system should be established. No change is contemplated in the examination procedures for Senior Attorney or higher level positions on the Commission staff.

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CONSIDERATION OF NEW TOPICS

The Commission considered Dillon v. Legg, 68 A.C. 766 (June 1968) and Memorandum 68-72. In the Dillon case, the California Supreme Court (Traynor, Burke, and McComb dissenting) held that recovery for personal injury resulting from emotional trauma on witnessing the tortious infliction of death or injury on a third party does not require the claimant to have been in the zone of danger.

The Commission concluded that it would not request authority to study the problem dealt with in the Dillon case.

STUDY 36 - CONDEMNATION LAW AND PROCEDURE

The Right to Take -- "Byroads"

The Commission considered Memorandum 68-65 and the attached research study relating to the right to take for "byroads," roads designed to serve primarily one or a few persons but open to the public generally.

The Commission made the following decisions:

1. The provision in subdivision (4) of Section 1238 of the Code of Civil Procedure relating to "byroads" and subdivision (6) of the same section should be eliminated. These provisions should be superseded by more explicit statutory provisions.

2. A statutory provision should be enacted to provide expressly that any public condemnor that acquires property for a public use may acquire by eminent domain such additional property as is necessary to provide access to property not taken which would otherwise be without access as a result of the taking.

3. The substance of former Streets and Highways Code Sections 1128-1133 should be reenacted. In other words, a statutory procedure should be provided whereby the county board of supervisors should be authorized to take property by eminent domain for a road, open to all who desire to use it, but to require that the cost of acquisition and establishment, and possibly cost of maintenance, be imposed on the person or persons primarily benefited. This procedure will place the county board of supervisors in the position of determining whether the access road should be established. If this type of procedure were adopted, the statute probably should permit cities and other public entities concerned with road work to utilize the procedure.

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To the extent possible, existing statutory procedures should be adapted for use to deal with this problem.

4. A private person should not have the right to condemn for a "byroad."

The Commission requested that representatives of San Diego County provide the Commission with a reference to the statutory authority under which the county is now acquiring property by eminent domain to provide access roads at the expense of the benefited person.

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STUDY 44 - FICTITIOUS BUSINESS NAME STATUTE

The Commission considered Memorandum 68-64, the staff background study relating to Fictitious Business Name legislation, supporting documentation, and the written and oral report of Mr. R.B. James, Chairman of the Legislative Committee of the California County Clerks Association.

The Commission rejected the suggestion contained in the background study that a dual filing system or central filing system be established. The Commission determined that no change should be made in the present filing system which requires a filing with the county clerk of the county in which the principal place of business is located. This decision was made after considerable discussion of the written and oral report made by Mr. James.

After a lengthy discussion, the Commission determined that the requirement that the certificate be published should be eliminated. The Commission was unable to determine any purpose that is served by publication. The likelihood that any person will check all newspapers in a county for such certificates was considered exceedingly remote. The Commission rejected the staff suggestion contained in Memorandum 68-64 that publication be retained but be limited to specified factual data and the suggestion contained in the background study that publication of specific factual data be made in one newspaper in each county selected by competitive bidding in the same manner as newspapers are selected for publication of city legal notices.

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The Commission discussed the persons and firms that should be required to file under the statute. The statute should cover individuals, partnerships, and unincorporated associations engaged in business for profit and both domestic and foreign corporations transacting business under a name other than its corporate name. Limited partnerships and medical partnerships should be excluded from the filing requirement if they have previously complied with statutory requirements affording similar public records.

The Commission directed the staff to prepare a memorandum on the ramifications of these decisions for consideration at the next meeting.

The Executive Secretary was directed to notify the representatives of the newspaper industry of the time and place when the Commission will next consider this matter and to advise these representatives that the Commission would be pleased if they were present at the discussion of this subject at the next meeting.

STUDY 50 - LEASES

The Commission considered Memorandum 68-73 and the attached tentative recommendation. The following actions were taken by the Commission.

Section 1951

A definition of "lease" should be added to this section, to read: "Lease" includes a sublease.

Section 1951.2

Paragraphs (1) and (2) of subdivision (a) were revised to read:

- (1) The unpaid rent which had been earned at the time of termination;
- (2) The worth at the time of judgment of the amount by which the unpaid rent for the balance of the term after termination exceeds the amount of rental loss that the lessee ~~proves~~ could have been or could be reasonably avoided; and

In paragraph (3) of subdivision (a), the word "amount" was substituted for "damages."

A number of revisions were made in the comment to Section 1951.2. The significant revisions are:

- (1) The last sentence of the third paragraph of the comment was revised to read: "To this must, of course, be added interest to the date of judgment in accord with the terms of the lease or as provided by law. See Civil Code Section 3287."

- (2) The last sentence of the paragraph that appears at the bottom of page 16 and at the top of page 17 was revised to read: "Where the due date of a rental payment has not occurred by the time of judgment, the amount by which the rental payment exceeds the amount of avoidable rental loss must be discounted to reflect the fact that it is being prepaid."

Section 1951.4

The phrase in the introductory portion of subdivision (a) reading "includes one or more of the following provisions" was deleted and the following substituted for that phrase and for paragraphs (1) and (2) of subdivision (a):

permits the lessee to do any of the following:

(1) Either to sublet the property or to assign his interest in the lease, or both.

(2) Either to sublet the property or to assign his interest in the lease, or both, to any person reasonably acceptable as a tenant to the lessor and the lease does not set any unreasonable standards for the determination of whether a person is reasonably acceptable as a tenant or for such subletting or assignment.

(3) Either to sublet the property or to assign his interest in the lease, or both, if the consent of the lessor is obtained and the lease provides that such consent shall not unreasonably be withheld.

In subdivision (b), the following sentence was inserted after "(b)":

Nothing in subdivision (a) affects any right the lessor may have to terminate the lessee's right to possession.

Subdivision (c) was revised to read:

(c) For the purposes of subdivision (b), the following do not constitute a termination of the lessee's right to possession:

(1) Acts of maintenance or preservation or efforts to relet the property by the lessor.

(2) The appointment of a receiver upon initiative of the lessor to protect the lessor's interest under the lease.

Section 1951.6

This section was approved as drafted.

Section 1951.8

Subdivision (b) of this section was revised to read:

(b) An advance payment shall be applied toward any amount recoverable by the lessor. The lessee is entitled to recover so much of an advance payment as he proves would result in a forfeiture if retained by the lessor.

The comment is to be revised to reflect this change.

Section 1952

This section was approved as drafted. References to Section 1951 should be deleted from the comment.

Section 1952.2

This section was approved after the dates were changed from January 1, 1971, to January 1, 1970.

Sections 1952.4 and 1952.6

These sections were approved as drafted.

Section 3308

This section is to be revised to conform to Section 1951.2 as revised.

Section 337.5

The words "more than four years" were inserted before "after the termination."

Section 339.5

The words "more than two years" were inserted before "after the termination."

The tentative recommendation was approved as revised for distribution for comment. The letter sending out the tentative recommendation should note that the statute contains no detail on how prepaid rent is to be discounted and request comments on whether a provision is needed to deal with this problem.

STUDY 52 - SOVEREIGN IMMUNITY (STATUTE OF LIMITATIONS)

The Commission considered Memorandum 68-68 and the attached Tentative Recommendation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees.

The Commission made the following determinations:

(1) Code of Civil Procedure Section 352 should be made not applicable to causes of action governed by the general claims statute.

(2) The public entity is to be required to act on each claim (by approving the claim in whole or in part or by rejecting the claim) within the time presently provided for action on the claim (45 days unless extended by agreement). The notice of the action on the claim shall include a notice of the applicable limitation period for bringing action on the claim. Conforming changes should be made in the provisions relating to actions against public employees. The statute should permit the plaintiff to bring his action if the claim is not acted upon within the time prescribed by the statute for action on the claim. If the public entity fails to act upon the claim within the prescribed time and to give notice thereof plus notice of the applicable limitation period, the time for bringing the action is six months from the time the notice is actually given or two years, whichever is the earlier time.

(3) A recommendation on this subject should be submitted to the 1969 Legislature. The staff is to prepare a revised tentative recommendation to effectuate the above decisions, distribute the revised tentative recommendation to the members of the Commission

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and allow them about 10 days within which to forward suggested revisions to the staff, revise the tentative recommendation in light of the suggested revisions by Commissioners, and distribute the revised, revised tentative recommendation to interested persons for comment.

STUDY 52 - SOVEREIGN IMMUNITY (PRISONERS AND MENTAL PATIENTS)

The Commission considered Memorandum 68-51 and the attached draft of a statute prepared by the staff.

The Executive Secretary suggested that, in view of the Commission's prior decision to restrictively redefine the word "prisoner" for purposes of sovereign immunity, it would be appropriate to deal with other related problems in the chapters dealing with prisoners and mental patients in one comprehensive recommendation dealing with all problems in these areas of the law.

The following actions were taken on the draft statute:

Section 844

The Commission considered the reasons for restricting the definition of prisoner. The consensus was that prisoner immunity was not supported by convincing policy justifications and ought to be limited to persons who have been convicted of criminal acts so that the immunity would not cover, for example, a sick person who is negligently thrown into the "drunk tank." The facilities for detention of persons being held for trial should be in reasonably safe condition because innocent persons may be held in such facilities.

In subdivision (b) "or a finding under Section 707 of the Welfare and Institutions Code that he is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law." was deleted. The Commission's concern that juveniles should not have lesser protection than adults prompted the deletion of the above language of subdivision (b).

As amended, Section 844 was approved.

Section 844.6

Subdivision (a) was approved as drafted.

In subdivision (d), "licensed, certificated or registered in one of the healing arts under Division 2 (commencing with Section 500) of the

Business and Professions Code or any law of this state, or against a public employee who, although not so licensed, certificated or registered, is . . . as a public employee" was deleted as superfluous.

Subdivision (d) was approved as redrafted.

The staff was directed to determine the appropriateness of the term "healing arts."

Section 845.4

Approved as drafted.

Section 845.6

Adopted as amended to conform with Commission action taken with respect to Section 844.6(d).

Section 846

The Commission generally approved the policy reflected in the changes to Section 846. The Commission expressed the view that subdivision (b) should more clearly refer to the civil arrest statutes mentioned in the Comment.

Section 854.2

The staff was directed to reconsider the necessity of this section and to redraft it accordingly.

Section 854.4

Staff recommendation to redraft this section was approved.

Section 854.6

The staff was directed to redraft this section to reflect any changes in Section 854.2.

Section 854.8

The Commission expressed general approval of the section as drafted.

Subdivision (d) should incorporate the changes made in Section 844.6(d).

Section 855.2

Generally approved as drafted.

Section 856

Generally approved as drafted with the admonishment to particularly consider the desirability of the limitation "in a medical facility operated or maintained by a public entity" in Sections 856, 856.2. Extension of immunity to temporary use of private facilities by the state should be considered.

Section 856.2

Generally approved as drafted.

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STUDY 52 - SOVEREIGN IMMUNITY (THE COLLATERAL SOURCE RULE)

The Commission considered Memorandum 68-66 relating to the collateral source rule.

The Commission noted that the collateral source rule does not apply to public entities--in other words, the amount received from collateral sources to cover the same injury is to be deducted from the amount the injured person would otherwise be entitled to recover from the public entity.

After considerable discussion, the Commission concluded that the advice of a consultant should be obtained as to whether the study of the collateral source rule should be restricted merely to its application to public entities or whether the study should consider the collateral source rule as applied to all defendants. It was also noted that a comprehensive study of the collateral source rule would perhaps involve a study of the whole question of the adequacy of compensation in tort cases.

The Chairman, after consulting with the Executive Secretary, is to invite a member of a law faculty from a California law school to a future meeting so that this problem may be discussed with the person who may serve as a research consultant in preparing a research study on the topic if the Commission decides to undertake a study of the problem.

STUDY 55 - ADDITUR AND REMITTITUR

The Commission considered Memorandum 68-50 and the attached Tentative Recommendation. The following actions were taken:

(1) The introductory clause "subject to any limitations established by law" in subdivision (a) was deleted and proposed subdivision (b) was deleted.

(2) The phrase "in its discretion" in subdivision (a) was deleted.

(3) The tentative recommendation is to be revised to reflect the above decisions and distributed for comment with a view to submitting a recommendation on this subject to the 1969 Legislature.

STUDY 63 - EVIDENCE CODE (PSYCHOTHERAPIST-PATIENT PRIVILEGE REVISIONS)

The Commission considered Memorandum 68-67 and the attached tentative recommendation. The following actions were taken with respect to the tentative recommendation:

(1) Section 1012 should be amended to conform to Section 992, the comparable section relating to the physician-patient privilege.

(2) The Comment to Section 1012 and the preliminary portion of the tentative recommendation should be revised to reflect the revision made in Section 1012.

(3) The tentative recommendation, as revised, is to be distributed to interested persons for comment with a view to submitting this recommendation to the 1969 Legislature. If it is to be submitted to the 1969 Legislature, it will be combined with the recommendation relating to the marital privilege revisions.

The Commission discussed whether the psychotherapist-patient privilege should be extended to cover school psychologists, social workers, and other persons performing the same function as a psychotherapist. It was suggested that the staff prepare a memorandum on this problem for consideration at a future meeting. The exemptions stated in the Government Code chapter licensing psychologists should be considered in connection with the problem. See Government Code Section 2900 et seq.

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STUDY 63 - EVIDENCE CODE (MARITAL PRIVILEGES REVISIONS)

The Commission considered Memorandum 68-33. After considering the comments on the tentative recommendation relating to the marital privileges revisions, the Commission approved the tentative recommendation for printing for submission to the 1969 Legislature. Editorial revisions were suggested by the staff (a revision of page 3 of the recommendation was handed out at the meeting) and these were approved. Revisions contained on drafts submitted by Commissioners Sato and Stanton are to be considered when the recommendation is prepared for the printer.

If the Commission determines to make a recommendation on the psychotherapist-patient privilege to the 1969 Legislature, that recommendation will be combined with the one on the marital privileges so that one recommendation dealing with privileges would be submitted, rather than two.

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STUDY 63 - EVIDENCE CODE (COMMERCIAL CODE REVISIONS)

The Commission considered Memorandum 68-62. After considering the comments on the tentative recommendation relating to the Commercial Code revisions, the Commission determined not to submit a recommendation on this subject to the 1969 Legislature. The subject will be considered after the other codes have been conformed to the Evidence Code.

The Executive Secretary was directed to send a letter to the National Conference of Commissioners on Uniform State Laws advising them that the Commission believes that the problem of burden of proof and presumptions under the Commercial Code needs study and that the Commission is not recommending further revision of the California Commercial Code at this time because the Commission does not want to create a lack of uniformity and has suspended further action on the recommendation in order that the National Conference of Commissioners on Uniform State Laws will have an opportunity to consider the problem.

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STUDY 63 - EVIDENCE CODE (EVIDENCE CODE SECTION 1202)

The Commission considered Memorandum 68-71 and the attached letter from Judge Martin E. Rothenberg questioning whether under some circumstances a prior inconsistent statement of a deponent should come in as substantive evidence rather than merely to impeach the witness. After discussion, the Commission determined that no change in the Evidence Code is needed.

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STUDY 63 - EVIDENCE CODE (EVIDENCE CODE SECTION 1224)

The Commission considered Memorandum 68-69 and the attached law review article--Markley v. Beagle: Rewriting the New Evidence Code, 4 Cal. Western L. Rev. 210 (1968). After discussing the law review article, the Commission concluded that no change is needed in the Evidence Code.

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STUDY 63 - EVIDENCE CODE (EVIDENCE CODE SECTION 1235)

The Commission considered Memorandum 68-70 and the case of People v. Johnson, 68 A.C. 674 (May 1968). The Commission approved the following for inclusion in the next annual report:

1

In People v. Johnson, the Supreme Court of California held Evidence Code Section 1235, which provides a hearsay exception for prior inconsistent statements of a witness, violates the Sixth Amendment's guarantee of the right of confrontation when the prior inconsistent statement is sought to be used as substantive evidence against the defendant in a criminal prosecution. Since Evidence Code Section 1204² specifically recognizes that the hearsay exceptions provided in the code are subject to any restrictions on the admission of evidence imposed by the state and federal constitutions, the Commission has concluded that no revision is needed in the Evidence Code to reflect the decision in the Johnson case.

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1. 68 A.C. 674 (1968).
 2. Section 1204 provides: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."