

Revised December 18, 1968

<u>Time</u>	<u>Place</u>
January 9 - 7:00 p.m. - 10:00 p.m.	Room 1101
January 10 - 9:00 a.m. - 5:00 p.m.	State Office Building
January 11 - 9:00 a.m. - 4:00 p.m.	107 S. Broadway Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

January 9, 10, and 11, 1969

JANUARY 9

1. Approval of Minutes of November 21-22 Meeting (sent 12/3/68)

2. Administrative matters

Election of Vice Chairman

Memorandum 69-9 (sent 12/3/68)

Meeting Dates

Memorandum 69-20 (sent 12/6/68)

Research Consultant

Memorandum 69-16 (sent 12/3/68)

3. 1969 Legislative Program

Stanton

Study 45 - Mutuality of Remedies

Memorandum 69-1 (sent 12/3/68)
Recommendation (enclosed)

Wolford

Study 55 - Additur and Remittitur

Memorandum 69-2 (sent 12/3/68)
Recommendation (sent 12/12/68)

Yale

Study 50 - Leases

Memorandum 69-4 (to be sent)
Recommendation (to be sent)

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Yale

Study 69 - Powers of Appointment

Memorandum 69-5 (enclosed)
Recommendation (enclosed)

Arnebergh

Study 63 - Evidence (Revision of Privileges Article)

Memorandum 69-6 (sent 12/6/68)
Recommendation (to be sent)
First Supplement to Memorandum 69-6 (enclosed)

Note: See also Agenda item 9 which will be discussed
on January 11

JANUARY 10

Wolford
Special order
of business
at 9:00 a.m.

4. Study 44 - Fictitious Business Name Statute

Memorandum 68-110 (sent 12/3/68)
Tentative Recommendation (attached to Memorandum)

Yale

5. Study 60 - Representation as to Credit

Memorandum 69-13 (sent 12/12/68)
Tentative Recommendation (attached to Memorandum)
Research Study (attached to Memorandum)

Stanton

6. Study 66 - Quasi-Community Property

Memorandum 69-7 (sent 12/12/68)
Tentative Recommendation (attached to Memorandum)

Stanton

7. Study 53 - Personal Injury Damages

Memorandum 69-8 (sent 12/6/68)

Uhler

8. Study 63 - Evidence Code

Res Ipsa Loquitur

Memorandum 69-19 (sent 12/6/68)
Tentative Recommendation (attached to Memorandum)

JANUARY 11

9. Study 52 - Sovereign Immunity

Arnebergh

Statute of Limitations

Memorandum 69-3 (sent 12/6/68)
Recommendation (sent 12/12/68)
First Supplement to Memorandum 69-3 (enclosed)

*Psychotherapist - Patient Privilege
Memorandum 69-6
1st Supplement 69-6
2nd Supplement 69-6*

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Arnebergh
Special order
of business
at 10:30 a.m.

Prisoners and Mental Patients

Memorandum 69-11 (enclosed)
Draft Statute (attached to Memorandum)

10. Study ~~6~~ - Inverse Condemnation

Uhler

Land Stability

Memorandum 69-14 (sent 12/6/68)

Uhler

Water Rights

Memorandum 69-15 (sent 12/6/68)

Research Study on Inverse Condemnation (attached to
Memorandum 69-14)

*Collateral Source - Rule
69-16*

Wolford

11. Agenda Topics

Memorandum 69-17 (sent 12/12/68)
First Supplement to Memorandum 69-17 (enclosed)

Uhler

12. Name Plates

Memorandum 69-18 (sent 12/3/68)

*#69 Power of Appointment
69-5*

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 9, 10, AND 11, 1969

Los Angeles State Office Building

A meeting of the California Law Revision Commission was held at the Los Angeles State Office Building on January 9, 10, and 11, 1969.

Present: Sho Sato, Chairman
Alfred H. Song, Member of the Senate (January 10)
Roger Arnebergh
Thomas E. Stanton, Jr.
Lewis K. Uhler
Richard H. Wolford
William A. Yale

Absent: George H. Murphy, ex officio

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

The following observers also were present:

Study 63 - Psychotherapist-Patient Privilege

Hindy Nobler, Clinical Social Worker, Chairman, Private Practice Counsel, NASW
Lester Fuchs, Member, Professional Advisory Committee to the State Clinical Social Workers and Counseling Board
Morris Lefkowitz, Children's Home Society

Study 44 - Fictitious Business Name Statute

Telford Work, Secretary-Treasurer, Los Angeles Newspaper Service Bureau

Study 65 - Inverse Condemnation

Willard Shank, California Attorney General's Office
Terry C. Smith, Los Angeles County Counsel
Charles Spencer, California Department of Public Works

Study 52 - Sovereign Immunity (Prisoners and Mental Patients)

Don Gilmour, California Department of Mental Hygiene

ADMINISTRATIVE MATTERS

Minutes of November Meeting. The Minutes of the meeting held on November 21 and 22, 1968, were approved.

Election of Vice Chairman. ⁶⁹⁻⁹ Thomas E. Stanton, Jr., was unanimously elected Vice Chairman of the California Law Revision Commission.

Scheduling of Meetings. ⁶⁹⁻²⁰ Meetings generally should be scheduled for Friday and Saturday. The former practice of generally meeting on Thursday evening is to be discontinued. Subjects that are of interest to persons who attend meetings as observers should be scheduled for Friday rather than Saturday so that the meeting on Saturday can be cancelled if the agenda is completed on Friday. The staff is to schedule no more work for any particular meeting than can reasonably be considered at the meeting. Commissioners are to be presumed to have read all the material to be considered at the meeting and the staff is to make its presentations on this assumption.

Schedule for Meetings in 1969. The following schedule for meetings during 1969 was adopted:

February 7 and 8	Los Angeles (State Bar Building)
March 7 and 8	San Francisco
April 11 and 12	Los Angeles (State Bar Building)
May 9 and 10	San Francisco (State Bar Building)
June 6 and 7	Los Angeles (State Bar Building)
June 26 (evening), 27, and 28 (morning)	San Diego
September 4, 5, and 6 (three full days)	Los Angeles (State Bar Building)
October 3 and 4	San Francisco (State Bar Building)
November 7 and 8	Los Angeles
December 5 and 6	San Francisco

Agenda Topics

(1) The Commission considered Memorandum 69-17 and the First and Second Supplements thereto. The Commission noted various communications reporting the need for a comprehensive revision of condemnation law.

(2) Arbitration of Small Claims. The Commission determined that the topic did not merit study.

(3) Small Claims Court Law. The Executive Secretary advised the Commission that a memorandum relating to the use of counterclaims or cross-complaints in the small claims court would be prepared in the near future.

(4) Additional Topics. The Executive Secretary advised the Commission of the need for additional agenda topics. The Commission requested the Executive Secretary to inquire as to what was involved in the study being made by a Washington based organization for the Assembly Judiciary Committee concerning what problems would be suitable for study by that Committee. Several pleading and procedural problems were brought to the Commission's attention, namely, class actions, denials placed upon the basis of lack of information, and inconsistent defenses. The Commission requested the Executive Secretary to prepare a memorandum for consideration at a future meeting requesting authority to examine practice and procedural problems in judicial proceedings generally. The Commission suggested that the Executive Secretary solicit suggestions for law reform from California Appellate Court Judges, Bernard Witkin, and Felix Stumpf.

Nameplates

A motion that the Commission purchase nameplates failed to receive enough votes to be adopted. 69-19

STUDY 44 - FICTITIOUS BUSINESS NAMES

The Commission considered general problems relating to the Fictitious Business Name Statute. The Commission also considered the justifications, if any, for the publication requirement. Mr. Telford Work, representing the Newspaper Service Bureau, assisted the Commission in its inquiry. Mr. Work stated he thought the newspapers would oppose a recommendation reducing the number of publications and making the material published more succinct and useful. The Commission indicated a desire to avoid controversy concerning the publication requirement and the hope was expressed that it would be possible to prepare a statute in cooperation with the newspaper industry that would require fewer publications and only publication of meaningful material. 68-110

The Commission directed the staff to prepare a revision of the Fictitious Business Names Statute within the following policy guidelines:

- (1) The required number of publications should be reduced to two.
- (2) The matter required to be published should be made more succinct and useful.
- (3) The staff should examine the statute to ascertain whether there are any identifiable groups that should not be required to publish.

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STUDY 45 - MUTUALITY OF REMEDIES IN SUITS FOR
SPECIFIC PERFORMANCE

The Commission considered Memorandum 69-1 and the attached recommendation. The Commission adopted the substance of the second proposed revision of Section 3386 of the Civil Code as submitted by the Southern Section of the State Bar Committee on the Administration of Justice. Section 3386 of the Civil Code as amended in the Commission's printed recommendation was further amended to read:

Notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, specific
Specific performance may be compelled, whether or not the
agreed-counterperformance-is-or-would-have-been-specifically
enforceable, if:

(a) Specific performance would otherwise be an appropriate remedy; and

(b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

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STUDY 50 - LEASES

69-4

Mr. Eugene Golden, representing Buckeye Realty Management Corporation, brought to the Commission's attention a potential problem under Section 1952(c) of the Civil Code and Section 1174 of the Code of Civil Procedure. Mr. Golden posed the following problem: Where Section 1174 proceedings are brought and judgment obtained, and the judge stays the writ of execution because there was no forfeiture, is the lessor entitled to his remedies under Section 1951.4 where the tenant pays the rent and subsequently abandons the premises? Consideration of this problem was deferred and Mr. Golden was instructed to submit a letter to the Commission outlining the problem in greater detail.

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STUDY 52 - SOVEREIGN IMMUNITY (STATUTE OF LIMITATIONS)

The Commission reviewed Memorandum 69-3 and the First and Second Supplements thereto relating to the claims statute. The Commission considered the report of the State Bar Committee on the Administration of Justice. After reviewing various suggestions for revision, the Commission determined to make no change in its recommendation.

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STUDY 52 - SOVEREIGN IMMUNITY (PRISONERS AND MENTAL PATIENTS)

The Commission considered Memorandum 69-11 and the draft statute attached to the memorandum.

Section 854.2. Mr. Don Gilmour expressed concern that the definition may not include dangerous mental patients who are placed in correctional facilities. The staff was directed to examine this problem.

Section 854.4. The words "mental or emotional" were deleted.

Section 854.8. "In-patient" was substituted for "inmate" and the staff was directed to revise the Comment to clarify the meaning of "in-patient."

Concern was expressed about the immunity for all defective conditions of property, but no revision was made of the section to limit the immunity in this respect.

Section 856. The Commission suggested that the definition of "confined" be placed in a separate section. In subdivision (d) "or" was substituted for "and."

Section 856.2. The last sentence of the first paragraph of the Comment was deleted.

Section 844.6. Subdivision (d) was deleted.

Concern was expressed about the immunity for all defective conditions of property, but no revision was made of the section to limit the immunity in this respect.

In subdivision (e), to be renumbered as subdivision (d), commas were inserted before and after "based on such malpractice." Conforming changes may be necessary in other sections.

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STUDY 52 - SOVEREIGN IMMUNITY (THE COLLATERAL SOURCE RULE)

The Commission considered Memorandum 69-16 and determined that a research consultant should be retained to prepare a comprehensive research study on the collateral source rule as applied to actions against public entities and public employees.

The Commission determined that the consultant should be compensated \$2,000 for the study, plus \$250 for travel expenses in attending Commission meetings subject to the same regulations that govern travel expenses paid to members of the Commission.

The Commission directed the Executive Secretary to write to Professor John G. Fleming of Boalt Hall, University of California at Berkeley, to determine whether he would be willing to serve as the research consultant to prepare the needed background research study. If Professor Fleming is willing to prepare the research study, the Executive Secretary was directed to prepare a contract with him in accord with the terms specified by the Commission and in the same general form as other research contracts. The Executive Secretary was further directed to execute the contract on behalf of the Commission.

The Commission discussed the contents and form of the research study. The study should be written in a form suitable for publication in a law review. The study should be comprehensive. It should include a general discussion of the compensation system used in those jurisdictions where the collateral source rule does not apply. This is not because the Commission would necessarily recommend such a system, but because this background information will be helpful to the Commission and others in understanding the significance of the collateral source rule and in

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formulating legislation. The study should also consider what items received from collateral sources should be offset against damages recoverable from a public entity or public employee if no substantial change in the California law were to be made. In other words, the study should provide the Commission with background information and analysis that would permit the Commission to determine whether a particular type of item received from a collateral source should be offset against the plaintiff's losses if the Commission determined merely to recommend legislation to make the existing law certain. The study should also discuss whether the judge or jury should make the offset of receipts from collateral sources, problems arising out of contribution where a public entity and private person are defendants, and other related problems.

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STUDY 53 - PERSONAL INJURY DAMAGES

The Commission considered Memorandum 69-8 relating to the division of personal injury damages upon divorce or separation. The Executive Secretary advised the Commission of the legislative history of this topic. The Commission considered the merits of the law faculty revision particularly as they related to Section 169.3 of the Civil Code. The Commission determined to make no recommendation upon the subject.

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STUDY 55 - ADDITUR AND REMITTITUR

The Commission considered Memorandum 69-2 and the changes recommended by the State Bar Committee on the Administration of Justice. The Commission was advised that in judge-tried cases the trial judge has the power, upon appropriate motion, to modify the judgment as to the amount of damages. The Commission revised Section 662.5 of the Code of Civil Procedure as contained in the Commission's printed report to read:

In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion :

(a) ~~Grant-a-motion-for-a-new-trial-on-the-ground-of~~ If the ground for granting a new trial is inadequate damages , and make its order subject to the condition that the motion for a new trial is denied if the party against whom the verdict has been rendered consents to an addition of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable.

(b) ~~Grant-a-motion-for-a-new-trial-on-the-ground-of~~ If the ground for granting a new trial is excessive damages , and make its order subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable.

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STUDY 60 - REPRESENTATIONS AS TO CREDIT (CCP § 1974)

The Commission considered the research study on representations as to credit, Memorandum 69-13, and the attached tentative staff recommendation. The cases which were the basis for the placement of this topic on the Law Revision Commission agenda were reviewed. The elements of actions in deceit and misrepresentation were also discussed. The Commission expressed concern that repeal of this section might permit disreputable lenders to take advantage of persons who give gratuitous representations as to the credit of others. The Commission was also concerned that such lenders might bring nuisance suits. The Commission determined that Section 1974 should not be repealed but that the provision should be revised as follows: (1) The section should be recast to make clear that it is merely a provision of the Statute of Frauds and may be invoked or waived as any other provision of that statute; (2) the section should be revised to clearly limit it as a supplement to the suretyship provision of the Statute of Frauds and it should be conformed to that provision, i.e., be subject to the exceptions, including the main purpose rule, that apply to the suretyship provision.

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STUDY 63 - EVIDENCE CODE (PSYCHOTHERAPIST-PATIENT PRIVILEGE)

The Commission considered Memorandum 69-6 and the First and Second Supplements thereto. The Commission considered each suggestion made by the persons commenting on the tentative recommendation. The following actions were taken:

(1) The Commission considered the First Supplement to Memorandum 69-6 relating to the exception to the psychotherapist-patient privilege where the patient tenders the issue of his mental or emotional condition. Specifically, the problem raised was whether the psychotherapist can in his own right refuse to disclose confidential information. The Commission decided to take no action on this problem.

(2) The Commission took special note of the letter from Richard K. Turner, Deputy Attorney General, relating to the applicability of the psychotherapist-patient privilege to proceedings by a public entity to terminate employment. There was no disposition to permit introduction of confidential information in such proceedings.

(3) The Commission considered the impact of Sections 5328-5330 of the Welfare and Institutions Code upon the Commission's proposed revision of the privileges article. After considerable discussion, the Commission determined further study of this problem was not required. The Commission also determined to make no change in its recommendation to the 1969 Legislature relating to revision of the privileges article.

(4) Mr. Morris Lefkowitz, representing the Children's Home Society, spoke before the Commission. He suggested that the Commission consider

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extending the psychotherapist-patient privilege to family service agencies handling confidential records such as adoption agencies. The Commission declined to so extend the privilege.

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STUDY 63 - EVIDENCE CODE (RES IPSA LOQUITUR)

The Commission reviewed Memorandum 69-19 and the Tentative Recommendation relating to the classification of the res ipsa loquitur presumption. The Commission generally discussed the proper classification of the res ipsa loquitur presumption. The Commission directed that the recommendation on res ipsa loquitur be sent out for comment.

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STUDY 65 - INVERSE CONDEMNATION (WATER DAMAGES)

The Commission considered Memoranda 69-14, 69-15, and the research study on inverse condemnation. The Commission generally discussed the difficult problem of codifying inverse condemnation law.

Mr. Willard Shank pointed out that the area of water damages is one of the most important in inverse condemnation. Mr. Shank pointed out several current problems. One problem is determining the defenses available to the public entity. For example, can the public entity raise the defenses of contributory negligence, causation, or mitigation of damages? Is it a defense to show that people were warned of an impending flood and did nothing to remove tractors, animals, and the like? Is it a defense, for example, to show that the damages were no greater than they would have been had the improvement not been constructed or that the improvement caused only a small portion of the damages and, hence, the public entity is not liable for such damages or, if it is liable, it is liable only for that portion of the damages that can be attributable to the public improvement? Mr. Shank also pointed out the law does not classify particular issues as questions of law or questions of fact. If inverse condemnation is analogous to condemnation, then is valuation the only jury question? For example, is whether the improvement was the proximate cause of the damage a jury question? Another problem is whether one landowner can recover damages for more than one flood, or does the public acquire a prescriptive right to flood the land? Mr. Shank suggested that resumes of the water

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damage cases now being handled by the Attorney General's Office might be helpful to the Commission. Mr. Shank stated that he would like to see the rules under which the state's liability is determined clarified.

Mr. Charles Spencer advised the Commission that the Department of Public Works had no major problems with inverse condemnation law although some problems have arisen in the areas of flood waters and surface water. He suggested that possibly the upper landowner should be able to require the lower landowner to accept some responsibility for determining which type of drainage system would cause the least interference with present or future land use.

The Commission took the following actions:

(1) The Commission should make a concerted effort to codify inverse condemnation. The Commissioners agreed the best approach to this problem would be to study the various factual situations arising under inverse condemnation and determine what is and what ought to be the basis for liability.

(2) Mr. Shank and Mr. Spencer were requested to submit to the Commission a memorandum or letter outlining the particular problem areas and factual situations where legislation would be helpful.

(3) The Executive Secretary was directed to invite a representative from an insurance company to discuss with the Commission the possibility of obtaining insurance in the area of inverse condemnation.

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STUDY 66 - QUASI-COMMUNITY PROPERTY

The Commission considered Memorandum 69-7 and the attached Tentative Recommendation relating to whether the definition of quasi-community property should be expanded to embrace all property, real or personal, wherever situated. The following actions were taken:

(1) The Commission approved the extension of the definition of quasi-community property to include all property, real or personal, wherever situated.

(2) The Commission approved of the technical revision of the tracing principle set forth in Section 140.5(b) of the Civil Code.

(3) The Commission directed the Executive Secretary to solicit Professor Harold Marsh's comments on the proposed revision of Section 140.5.

(4) Section 140.5 of the Civil Code was redrafted to read as follows:

As used in Sections 140.7, 141, 142, 143, 146, 148, 149, and 176 ~~of this code~~, "quasi-community property" means all real or personal property, wherever situated, and all real property situated in this state heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse who acquired ~~acquiring~~ the property been domiciled in this state at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere~~ which would have been community property of the husband and wife had the spouse who acquired the property so exchanged been domiciled in this state at the time of its acquisition .

~~For the purposes of this section, personal property does not include and real property does not include leasehold interests in real property.~~

(5) Civil Code Section 1237.5(2) was revised as follows:

In exchange for real or personal property, wherever situated, which would have been community property of the husband and wife had the spouse who acquired the property so exchanged been domiciled in this state at the time of its acquisition ~~acquired-ether-than-by-gift,-devise, bequest-or-deseent-by-either-spouse-during-the-marriage-while domiciled-elsewhere .~~

(6) Probate Code Section 201.5(b) was revised as follows:

In exchange for real or personal property, wherever situated, which would have been community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time the property so exchanged was acquird ether--than-by-gift,-devise,-bequest-or-deseent ~~by-the--decedent-during-the-marriage-while-domiciled-elsewhere .~~

(7) The Commission was of the opinion that the wording of Section 201.5(b) may be technically incorrect. The Commission directed the Executive Secretary to confer with Professor Harold Marsh on the propriety of the wording of this subdivision.

(8) Section 15300(b) of the Revenue and Taxation Code was revised as follows:

(b) In exchange for real or personal property, wherever situated, which would have been community property of the husband and wife had the spouse who acquired the property so exchanged been domiciled in this state at the time of its acquisition ~~acquired ether-than-by-gift,-devise,-bequest-or-deseent-by-either-spouse during-the-marriage-while-domiciled-elsewhere .~~

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STUDY 69 - POWERS OF APPOINTMENT

The Commission considered Memorandum 69-5 relating to the revocability of an appointment where the creating instrument does not expressly provide that the donee is to retain discretion throughout his lifetime to amend or revoke any appointment made during his lifetime. The Commission made no change in the printed recommendation.