

October 14, 1976

Time

Place

October 21 - 7:00 p.m. - 10:00 p.m.	Hyatt House Hotel, Rm. 1232
October 22 - 9:00 a.m. - 5:00 p.m.	International Airport
October 23 - 9:00 a.m. - 3:50 p.m.	6225 W. Century Blvd. Los Angeles 90045

FINAL AGENDA
for meeting of
CALIFORNIA LAW REVISION COMMISSION

Los Angeles

October 21-23, 1976

October 21

1. Minutes of September 9-10, 1976, Meeting (sent 10/4/76)
2. 1976 Legislative Program - Final Report
Memorandum 76-84 (sent 10/4/76)
3. Study 39.33 - Comprehensive Wage Garnishment Statute
Memorandum 76-85 (sent 10/5/76)
Draft of Revised Bill (attached to Memorandum)
Printed Recommendation (attached to Memorandum)
4. Administrative Matters
Contract With Mr. Elmore as Consultant
Memorandum 76-86 (sent 9/23/76)
Topics on Agenda
Memorandum 76-88 (sent 10/4/76)

October 22 and 23

5. Study 77 - Nonprofit Corporations
Schedule for Completion of Project
Memorandum 76-94 (sent 10/13/76)
General Reaction to Tentative Recommendation; Basic Approach of Tentative Recommendation
Memorandum 76-83 (sent 10/6/76)
Matters requiring action, see pages 13-15 (application of old General Corporation Law), 21 (additional provisions for Division 4)
First Supplement to Memorandum 76-83 (sent 10/12/76)

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Transitional Provisions

Memorandum 76-95 (sent 10/13/76)

Review of Comments on Division 2

Memorandum 76-90 (sent 10/12/76)

First Supplement to Memorandum 76-90 (sent 10/12/76)

Second Supplement to Memorandum 76-90 (enclosed)

Third Supplement to Memorandum 76-90 (to be sent)

Draft of Tentative Recommendation (Parts I and II) (attached to Memorandum 76-83)

Review of Comments on Division 4

Memorandum 76-91 (sent 10/12/76)

Review of Comments on Conforming Changes

Memorandum 76-92 (sent 10/13/76)

Cooperatives and Other Special Corporations

Memorandum 76-93 (sent 10/12/76)

NOTE: Changes may be made in this agenda. For meeting information, call (415)497-1731.

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 21, 22, AND 23, 1976
Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on October 21, 22, and 23, 1976.

Present: John N. McLaurin, Chairman, October 21 and 22
Howard R. Williams, Vice Chairman
John J. Balluff
John D. Miller
Thomas E. Stanton, Jr., October 22 and 23

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
Marc Sandstrom
George H. Murphy, ex officio

Members of Staff Present:

John H. DeMouilly Nathaniel Sterling
Robert J. Murphy, III Stan G. Ulrich, October 21 and 22

Consultants Present:

G. Gervaise Davis III, Nonprofit Corporations,
October 22 and 23
Peter Whitman, Nonprofit Corporations, October 22 and 23

The following persons were present as observers on days indicated:

October 21

E. E. Barlangl, California Ass'n of Collectors, Sacramento
Jos. R. W. Henry, Active Collection Agency, Los Angeles
Robert McMahon, State Bar, Los Angeles

October 22

Wells A. Hutchins, California State Automobile Ass'n, San Francisco
Robert H. Nida, Automobile Club of So. California, Los Angeles

October 23

Wells A. Hutchins, California State Automobile Ass'n, San Francisco
Robert H. Nida, Automobile Club of So. California, Los Angeles

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ADMINISTRATIVE MATTERS

Minutes of September 9 and 10, 1976, Meeting

The Minutes of the September 9 and 10, 1976, Meeting were approved after the following change was made: On page 11, in the fifth line from the bottom of the page, change "and" to "and."

Future Meetings

Future meetings are scheduled as follows:

November Meeting

November 11 - 7:00 p.m. - 10:00 p.m.	San Francisco
November 12 - 9:00 a.m. - 5:00 p.m.	
November 13 - 9:00 a.m. - 3:00 p.m.	

December Meeting

December 2 - 7:00 p.m. - 10:00 p.m.	Los Angeles
December 3 - 9:00 a.m. - 5:00 p.m.	
December 4 - 9:00 a.m. - 12:00 noon	

1976 Legislative Program

The Commission considered Memorandum 76-81 which had attached the report set out below concerning the 1976 legislative program. The Commission determined to review the liquidated damages recommendation at a future meeting with a view to submitting a recommendation to the 1977 legislative session.

1976 LEGISLATIVE PROGRAM
CALIFORNIA LAW REVISION COMMISSION

ENACTED

Statutes of 1976

- Chapter 22 - Operative Date of Eminent Domain Law (AB 2583)
- Chapter 73 - Partition of Real and Personal Property (AB 1671)
- Chapter 109 - Modification of Contracts (AB 2581)
- Chapter 143 - Relocation Assistance (AB 2761)
- Chapter 144 - Transfer of Out-of-State Trusts to California (AB 2855)
- Chapter 145 - Claim and Delivery Statute--Turnover Orders (AB 2895)
- Chapter 437 - Prejudgment Attachment (AB 2864)
- Chapter 888 - Service of Process on Unincorporated Associations (AB 3128)
- Chapter 994 - Byroads and Utility Easements (with byroads eliminated and resolution of local legislative body required)(AB 2582)
- Res. Ch. 30 - Continues Authority to Study Topics (ACR 130)

MEASURE OF INTEREST TO COMMISSION

- Res. Ch. 160 - Authorizes study by Law Revision Commission of various aspects of tort liability but does not provide any additional funds. This ACR has been amended to make the Joint Legislative Committee the vehicle to carry on this study; Law Revision Commission no longer involved unless the Joint Legislative Committee and the Law Revision Commission determine at some future time that the Commission could be of assistance with respect to some aspect of the topic. (ACR 170)

VETOED BY GOVERNOR

- AB 3169 - Liquidated Damages

FAILED TO PASS LEGISLATURE

- AB 2580 - Admissibility of Duplicates (died in Assembly Judiciary Committee)
- AB 2847 - Undertakings for Costs (died in Assembly Judiciary Committee)

Contract With Garrett H. Elmore

The Commission reviewed Memorandum 76-86 and directed the Executive Secretary to execute a contract with Garrett H. Elmore to serve as an expert consultant to the Commission on the project to eliminate the overlap between the guardianship and conservatorship statutes.

The services Mr. Elmore would perform would be to provide expert advice to the staff on the topic, to review and provide written and oral comments on all materials prepared by the staff, and to attend Commission meetings upon request to provide expert advice to the Commission at meetings when this project is being considered.

Compensation for providing expert advice to the staff and reviewing and submitting written and oral comments on material prepared by the staff would be \$1,800, payable as follows:

Dec. 15, 1976 - \$300
June 15, 1977 - 300
Dec. 15, 1977 - 300
June 15, 1978 - 300
Dec. 15, 1978 - 300
June 15, 1979 - 300

Compensation for attending Commission meetings, State Bar committee meetings, or legislative committee meetings would be \$20 for each day he attends such a meeting. The total amount payable for attending such meetings would be limited to \$200.

Travel expenses would be paid at the rate payable to state employees. Travel expenses would be reimbursed for travel performed at the request of the Commission through its Executive Secretary in conferring with Commission's staff and in attending Commission meetings and meetings of any State Bar Committee or legislative committee considering the Commission's recommendations on this subject. Total amount of travel expenses would be limited to \$500.

The contract would terminate on June 30, 1979.

The contract would be in the standard form of Law Revision Commission contract with research consultants.

Topics on Agenda

The Commission reviewed Memorandum 76-88 relating to the topics on the Commission's agenda. The Commission made the following decisions:

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- (1) Modification of Contracts should be retained on the agenda.
- (2) The other topics discussed in the memorandum should be retained on the agenda.
- (3) A statement should be inserted under the tort study to indicate that the Commission does not plan to study this topic because the study is being made by the Joint Legislative Committee. A letter should be obtained from the Chairman of the Joint Legislative Committee confirming this decision as in accord with the desires of the joint committee.
- (4) A statement should be inserted under the Arbitration study that this topic is under study by the Judicial Council and the State Bar. For this reason, the Commission is not actively studying this topic but stands ready to cooperate with the State Bar and the Judicial Council to the extent that either group desires the Commission's participation and assistance.
- (5) A notation should be placed under governmental liability, prejudgment interest, and offers of compromise that the Commission is not actively studying these topics because they are included within the broad scope of the tort study which is being conducted by the Joint Legislative Committee on Tort Liability.

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STUDY 39.33 - CREDITORS' REMEDIES (WAGE GARNISHMENT)

The Commission considered Memorandum 76-85 and the draft of the Recommendation Relating to Wage Garnishment. The Commission approved the proposed form of the recommendation and approved it for printing subject to review in response to the reaction of the State Bar Committee re Relations of Debtor and Creditor at its meeting on November 5. The Commission also made the following decisions:

§ 723.024. Employer's service charge for withholding

The statute and Comment should make clear that, regardless of the number of earnings withholding orders in effect against a debtor's earnings during a month, the maximum employer's service charge is five dollars.

§ 723.028. Withholding order for costs and interest

The last sentence of the section should be deleted and a statement added to the Comment to the effect that neither an earnings withholding order for costs nor an additional garnishment on the same indebtedness is grounds for discharge from employment under Labor Code Section 2929.

§ 723.079. Receipt required from state

This section should be deleted in view of its history (outlined in the memorandum) and because the employer is required by Labor Code Section 226 to give a receipt for amounts withheld.

Operative Date

The operative date should be delayed one year to January 1, 1979.

STUDY 77 - NONPROFIT CORPORATIONS (ADMINISTRATIVE MATTERS)

The Commission considered Memorandum 76-94 relating to the schedule for the completion of the nonprofit corporation law project and other administrative matters.

Letter to Professor Hone. The staff was directed to write a letter to Professor Hone requesting clarification of the conditions under which the Commission could consider the two portions of his background study which he provided Mr. Sterling on a confidential basis.

Letter to State Bar Committee on Corporations. The staff is to prepare a letter, after consulting with Commissioners Williams and Stanton, for the Chairman's signature, to the State Bar Committee on Corporations reporting the Commission's action with respect to Division 4 and the Commission's plans with respect to the nonprofit corporation study. This letter should be prepared and sent as soon as possible.

Printing of recommendation. The recommendation was approved for printing, as revised at the October and November meetings, subject to the following qualifications:

(1) Any specific sections or Comments the Commission decides it wishes to review before printing will be revised and brought back for review at the November or December meeting.

(2) The preliminary part of the recommendation will be revised to reflect the revisions made in the proposed legislation after those revisions have been made and to make significant additions and editorial revisions and will be presented for approval for printing at the December meeting.

(3) Any additional comments received before the November meeting will be reviewed at the November meeting and any needed revisions made before the recommendation is printed.

(4) Any comments received thereafter but before the December meeting will be reviewed at the December meeting. Comments received thereafter will be reviewed at the meeting following their receipt.

(5) Necessary editorial and technical changes will be made before sending the material to the printer.

The staff is to give a top priority to preparing the proposed legislation in bill form so that the bills can be sent to the Legislative Counsel to prepare for introduction. The bills will be introduced as soon as they have been prepared for introduction by the Legislative Counsel, and the printed bills will be used to print the text of the proposed legislation in the Commission's recommendation (only the remainder of the recommendation will need to be composed by the State Printing Office), thereby saving the Commission the substantial cost of composing the text of the bills.

Form of proposed legislation. The Commission plans to prepare two bills:

(1) A bill to enact a new Division 2 (new Nonprofit Corporation Law) and to repeal existing Division 2.

(2) A bill to make conforming amendments, additions, and repeals. The transitional provisions will be carefully reviewed and inserted in the appropriate bill or bills. All bills would become operative on the same date as the new nonprofit corporation law. All bills would be drafted so that all would have to become law if any are to become law.

Setting bills for hearing. Assemblyman McAlister will decide when the bills introduced in the Legislature should be set for hearing.

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STUDY 77.180 - NONPROFIT CORPORATIONS (TRANSITIONAL PROVISIONS)

The Commission considered Memorandum 76-95, relating to transitional provisions and the attached draft of the transitional provisions. The Commission determined to add a provision to enable a majority of the remaining directors of an existing nonprofit corporation to wind up and dissolve the nonprofit corporation notwithstanding that the number of directors would be inadequate under prior law. The Commission also made the following changes in the transitional provisions:

§ 6815. Application of provisions relating to capital improvement assessments

The Comment to this section should be revised to state that it is only the statutory withdrawal right that may not be exercised under the section.

§ 6818. Application of provisions relating to proxies

This section was revised to read, "Prior law applies to a proxy in an existing nonprofit corporation executed prior to the operative date." The Comment should be adjusted accordingly.

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STUDY 77.400 - NONPROFIT CORPORATIONS (GENERAL REACTION TO TENTATIVE
RECOMMENDATION: BASIC APPROACH OF TENTATIVE RECOMMENDATION)

General Reaction to Tentative Recommendation

The Commission considered Memorandum 76-83 and the First Supplement to Memorandum 76-83 and noted that the general reaction to the tentative recommendation was highly favorable.

Division 4

The Commission considered Memorandum 76-83 and the First Supplement to Memorandum 76-83. The Commission noted that the great majority of the commentators approved the basic approach of the tentative draft, which included a proposed Division 4 containing certain provisions of an external nature applicable to all corporations. At the same time, however, the Commission noted that the concept of Division 4 was opposed by the State Bar Committee on Corporations and by the office of the Secretary of State and a few other commentators.

The Commission was generally of the view that it was sound to have a separate Division 4. However, in view of the opposition of the State Bar Committee on Corporations and the office of the Secretary of State, the Commission decided to adopt the suggestion of the State Bar Committee on Corporations and incorporate the substance of Division 4 with appropriate modifications into the nonprofit corporation law itself and not to recommend any changes in the General Corporation Law.

The staff is to revise the amendment set out on pages 13-15 of Memorandum 76-83 to reflect the decision made with respect to Division 4.

The entire conversion chapter--Chapter 8--should be compiled in the nonprofit corporation law.

STUDY 77.400 - NONPROFIT CORPORATIONS (COMMENTS CONCERNING
DIVISION 2--NONPROFIT CORPORATION LAW)

The Commission considered Memorandum 76-90 and the First, Second, and Third Supplements thereto, reviewing comments received on Division 2 of the Commission's tentative recommendation. The Commission considered comments relating to the provisions through Section 5529, making the following changes in the tentative recommendation:

Preliminary Part of Tentative Recommendation

The preliminary part should be expanded to include the points suggested in the comments of Mr. Davis (Exhibit XXXXVI to Memorandum 76-83) and the points made on pages one and two of the Second Supplement to Memorandum 76-90, relating to the need to follow the General Corporation Law and the need to direct legislation only to the abuses discovered in existing law.

The preliminary part should also note the concern expressed by some persons of the need for some sort of disclosure statement of rights of members. The preliminary part should state that, to the extent there is a need for such a disclosure statement, this is a matter that should be handled within the context of the Corporate Securities Law, an area the Commission has not undertaken to study.

405/934

Organization of Statute

The staff was directed to reorganize the statute in a logical fashion, taking into account the suggestions of the Commissioners, Mr. Davis, and other persons who commented on the organization of the statute.

405/935

Scope of Statute

The staff was directed to forward to the Attorney General the comment received relating to the need for more control over some non-profit corporations, particularly schools and churches.

Charitable Corporations

The following provision should be added to the statute:

§ 5163. Nonprofit corporation organized for charitable purposes

5163. "Nonprofit corporation organized for charitable purposes" means a nonprofit corporation formed or operated primarily or exclusively for charitable purposes.

Comment. The phrase defined in Section 5163 is used in the following provisions:

Notice to Attorney General of formation	§ 5223
Special ultra vires provision	§ 5232
Contents of articles	§ 5250
Management of charitable property	§ 5560
Attorney General supervision	§ 5564
Property received on general charitable trust	§ 5565
Common trust funds	§ 5570
Notice to Attorney General of disposition of assets	§ 6012
Notice to Attorney General of merger or consolidation	§ 6142
Division limited	§ 6210
Notice to Attorney General of division	§ 6242
Reports to Attorney General not affected	§ 6527
Purchase of memberships to avoid dissolution prohibited	§ 6740
Disposition of assets on dissolution	§ 6773
Name containing the word "charitable"	§ 14512
Conversion prohibited	§ 14801

It should be noted that the phrase "charitable purposes," as used in this section, is used in its broadest sense, it being impossible to enumerate specifically all purposes that are charitable in nature. See, e.g., discussion in Lynch v. Spilman, 67 Cal.2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967).

30/681

Religious Corporations

A section should be added that recognizes the constitutional limitations on the application of regulatory provisions to religious organizations where ecclesiastical matters are concerned. The Commission was of the view that such a section might be modeled after the exculpatory language of Sections 930 and 940 of the Evidence Code.

405/976

§ 5121. Affidavit (new)

The following provision was added:

5121. An affidavit under this division may be made by declaration under penalty of perjury.

Comment. Section 5121 is new. It codifies the rule that affidavits under the Corporations Code may be made under penalty of perjury just as any other affidavit pursuant to Section 2015.5 of the Code of Civil Procedure. See 30 Ops. Cal. Atty. Gen. 294 (1957).

405/953

§ 5128. Board

The Comment to this section should note that the board of directors may be called board of trustees, or any other name, and should cross-refer to Section 5140 (director), which makes this clear.

405/965

§ 5130. Business corporation

Section 5130 was revised to read:

5130. "Business corporation" means a corporation organized under the laws of this state which is other than a nonprofit corporation.

405/966

§ 5132. Bylaws

The definition of bylaws to mean articles or bylaws was deleted; the statute should use the phrase "articles or bylaws" where necessary. A new definition of bylaws should be drafted to state that bylaws are rules adopted in the manner provided for adoption of bylaws and made available for inspection as bylaws. The Comment or statute may allude to the concept of de facto bylaws.

405/972

§ 5150. Financial statements and similar accounting items

This section was revised to delete the references to "generally accepted accounting principles then applicable" and to replace them with references to "fairly and adequately presenting the matters which they purport to present." The Comment should note the reasons that the new business corporation law has not been followed on this point.

§ 5165. Principal executive office (new)

The following provision was added:

5165. "Principal executive office" means the office of the nonprofit corporation designated in the statement filed pursuant to Section 14602.

Comment. Section 5165 makes clear that the "principal executive office" of a nonprofit corporation is simply the office selected for statutory purposes by the nonprofit corporation. It need not be the principal business office of the nonprofit corporation, but it is the place where the corporate records are kept. See, e.g., Sections 5267 (articles and bylaws kept at principal executive office), 6510 (record of members kept at principal executive office).

Defined Terms:

Filed, § 5148

Cross-References:

Statement required of nonprofit corporation, § 14602

405/979

§ 5168. Proxy

The Comment to this section should cross-refer to Section 5317, precluding proxy voting by directors.

405/978

§ 5211. Incorporation of unincorporated association

A new subdivision (e) should be added to this section to the effect that nothing in the section affects any property rights a dissenting member of the association may have with respect to the assets of the association. The Comment on this point should note that the rights of dissenting members are determined by the applicable law under the circumstances of the particular case.

A new provision should also be added to the effect that, unless the articles of incorporation provide otherwise, incorporation of an unincorporated association may be made by a majority of the directors of the association.

A Comment should be added that conversion of memberships in an unincorporated association into corporate memberships may be subject to qualification under the Corporate Securities Law absent an exemption.

The following changes were made in subdivisions (c) and (d):

(c) The articles shall be signed by the presiding officer or acting presiding officer and the secretary or clerk or similar officer of the association or by at least a majority of its governing board or body, and there shall be attached thereto the affidavit of the signing officers or governing board or body that the association has (1) duly authorized its incorporation, (2) given written notice to each member of the association of such authorization, and (3) has authorized the officers or governing board or body to execute the articles.

(d) The members of the association are members of the non-profit corporation so created unless they file their dissent in writing with the secretary thereof within fifteen (15) days of the giving of the notice of authorization to incorporate required to be given pursuant to subsection (c) of this section.

406/001

§ 5221. Execution of articles

The word "natural" was inserted in this section in order to make reference to "one or more natural persons."

406/119

§ 5224. Additional requirement for charitable corporations

A Comment should be added to this section to the effect that a charitable corporation need only send a copy of its articles to the Attorney General once; if a copy is sent pursuant to the Uniform Supervision Act, that satisfies the requirement of this section.

Also, the staff should forward to the Attorney General and the Franchise Tax Board the comment that a single form for annual reporting requirements be devised to service both agencies. The letter should note that the Commission thinks this would be desirable but that it is beyond the scope of the Commission's present study.

406/120

§ 5230. Powers of nonprofit corporation

Subdivision (b)(7) was revised to refer to contracts of "guaranty, suretyship, or indemnity." The Comment to Section 5230 should note that traditional profit-sharing plans may, in appropriate cases, be included

within the authorization of subdivision (b)(6) to establish pension, savings, thrift, and other retirement, incentive, and benefit plans, trusts, and provisions.

The provision of existing law relating to the authority of a non-profit corporation to pay a religious corporation for services rendered prior to 1975 should be continued as an uncodified section, with the addition of a provision that nothing in the section limits the powers of a nonprofit corporation under the nonprofit corporation law.

406/122

§ 5231. Defense of ultra vires

Language was added to this section that a limitation described in subdivision (a) "constitutes as between the nonprofit corporation and the members, officers, or directors, an authorization to the directors and a limitation upon the actual authority of the representatives of the nonprofit corporation." A new subdivision (c) was also added:

406/123

§ 5232. Enjoining ultra vires act of nonprofit corporation holding assets on charitable trust

Subdivision (a) was amended to read:

(a) Notwithstanding Section 5231, where a nonprofit corporation holds ~~its~~ assets on a charitable trust or is organized for charitable purposes, a limitation described in Section 5231 may be asserted in an action to enjoin the doing or continuation of unauthorized activities that affect the charitable trust or charitable purposes by the nonprofit corporation or its officers, or both, regardless of whether third parties have acquired rights thereby.

A new subdivision (c) was added:

(c) An action may be brought under this section by the Attorney General, a director, or a person having the right of visitation.

The Comment should explain what a right of visitation is and should note that the section does not limit any rights a person may have under any other statute.

406/124

§ 5235. Illegal distribution; derivative action against member

The words "with knowledge of facts indicating the impropriety thereof" was deleted from subdivision (a). The Comment should note the basic differences between business and nonprofit corporations with regard to distribution of assets that require this departure.

Subdivision (e) should incorporate a specific reference to the Uniform Fraudulent Conveyances Act, and the Comment should note that Section 5235 expands and does not limit the general rights of creditors.

406/126

§ 5242. Instrument signed by certain officers valid absent actual knowledge of lack of authority

This section was revised to read:

5242. An instrument in writing, including an assignment or endorsement thereof, executed or entered into between a nonprofit corporation and another person and signed by the officers as specified in Section 5174 is ~~not~~ :

(a) Presumed to be signed by the officers specified. This presumption is a presumption affecting the burden of producing evidence.

(b) Not invalidated by any lack of authority of the signing officers unless (subject to subdivision (b) of Section 5231) the other person has actual knowledge of the lack of authority.

The Comment should make reference to Section 14609, which makes clear that the statement of officers made under Section 14602 is not constructive notice for the purposes of Section 5242.

405/974

§ 5244. Execution of instruments by corporate officers (new)

The following section was added:

5244. Any instrument required by this division to be signed or executed by more than one officer may not be signed or executed by the same person acting in different official capacities unless the nonprofit corporation has only one officer.

Comment. Section 5244 is new. It is intended to preclude a single person from executing instruments for which the signature of several corporate officers is required. Compare Section 5362(b) (any number of offices may be held by same person).

406/127

§ 5250. Required contents of articles

Subdivision (b) was revised to read in substance:

(b) That the nonprofit corporation is organized pursuant to the Nonprofit Corporation Law for lawful purposes and that the nonprofit corporation shall not distribute gains, profits, or dividends to members except to the extent permitted in the Nonprofit Corporation Law. The articles may set forth any further or additional statement with respect to the purposes or powers of the nonprofit corporation and the further or additional statement shall not be construed as a limitation on the purposes or powers unless the articles expressly so provide.

A transitional provision should be added to provide that an existing nonprofit corporation need not comply with this section until it amends its articles after the operative date. The Comment should note that a charitable corporation may be subject to the Uniform Supervision Act. A cross-reference to Section 5311, relating to the number of directors, should be added.

043/178

§ 5260. Adoption of bylaws

Subdivision (b) was amended to read:

(b) Notwithstanding subdivision (a), the articles or bylaws may restrict or eliminate the power of the members or board to adopt, amend, or repeal any or all bylaws.

The following language was added to the Comment:

The power of the directors to adopt, amend, or repeal the bylaws may be limited by statute as well as by the articles or bylaws. See, e.g., Sections 5264(b) (bylaws adversely affecting voting rights of members may be adopted, amended, or repealed only by the members), 5311 (bylaws relating to the number of directors may be adopted, amended, or repealed only by the members).

404/165

§ 5267. Articles and bylaws made available to members

Subdivision (b) was replaced with the following provision:

(b) The nonprofit corporation shall, upon written request of a member, furnish the member with a copy of the articles and bylaws, and may make a reasonable charge therefor.

§ 5268. Provisions effective only in bylaws

The portion of the Comment relating to de facto bylaws should be sharpened. The Comment should note the application of this section to Section 5510 (imposition of dues, fees, and assessments), and this section should be referred to by Section 5510. Similar references should be made in other important sections relating to bylaws. The following language should also be added to the Comment:

Nothing in this section is intended to preclude the adoption by a nonprofit corporation of rules relating to membership activities, such as house rules, swimming pool rules, and other rules that are not bylaws. Such rules may be adopted by a nonprofit corporation in whatever manner it provides in its bylaws.

404/404

§ 5312. Term of directors

Subdivision (a)(2) was revised to read:

(2) Each director, including a director elected to fill a vacancy, holds office until the expiration of the term for which elected and until a successor is elected and takes or accepts office.

405/970

§ 5313. Initial directors

Section (b)(3) was revised to read:

(3) The term of office of initial directors is until successors are selected and take or accept office.

The last sentence of the Comment was deleted.

The following language was added to the Comment:

The number of initial directors named in the articles may be one or more, but need not be the same as the number of directors of the nonprofit corporation.

406/004

§ 5314. Personal liability of directors

The following sentence was added to the Comment:

Section 5314 does not in any way affect the equitable doctrine in which the corporate entity is "disregarded" in order to fasten responsibility upon those found to be the alter ego of the corporation.

968/636

§ 5315. Multiple boards

This section was revised to provide in substance:

5315. (a) A nonprofit corporation may have multiple boards of directors if all of the following conditions are satisfied:

(1) The articles or bylaws provide for multiple boards.

(2) The articles or bylaws specify the manner of selection and authority of each board.

(3) The articles or bylaws designate a managing board, however named, having all the authority of the board of directors provided in this division that is not specifically delegated to another board.

(b) Each board is responsible for matters delegated to it by the articles or bylaws.

(c) The managing board is responsible for matters not delegated to other specific boards.

This provision is subject to further refinement and should be returned to the Commission for further consideration. The Comment should note that the duties assigned to a particular board may vary or a board may have no duties at all; the duties delegated to an honorary or advisory board may be to offer advice when asked.

405/998

§ 5317. Vote required for board action

A subdivision should be added to this section precluding proxy voting by directors.

968/707

§ 5320. Nomination of directors

The order of Sections 5320 and 5321 (election of directors) was reversed, and Section 5320 was revised to provide in substance:

§ 5321. Nomination of and procedure for election of directors

5321. (a) The bylaws shall provide a reasonable means of nominating persons for election as directors.

(b) A nominee shall have a reasonable opportunity to communicate with voting members the qualifications of the nominee and the reasons for the nominee's candidacy.

(c) If proxy voting is permitted, all nominees shall have an equal opportunity to solicit proxies or votes.

The Comment should make clear that the section is not intended to preclude any reasonable manner of selection of directors of a nonprofit corporation (such as through a representative body). The following language should be added to the Comment:

Section 5320 codifies the principle that a nonprofit corporation may not unreasonably restrict the right of members to nominate and elect directors. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). Under Section 5320, a court may find the electoral procedures of a nonprofit corporation that fails to provide a reasonable means for nominating and electing directors unlawful and may impose such requirements as it considers reasonable. Ibid.

968/812

§ 5321. Election of directors

The order of Sections 5321 and 5320 (nomination of and procedures for election of directors) was reversed. The portion of the preliminary part of the recommendation that explains why cumulative voting is not allowed unless permitted by the nonprofit corporation might note that denial of cumulative voting is the general rule for nearly all nonprofit corporations and that cumulative voting has been denied for many years without problems having arisen in nonprofit corporations.

998/822

§ 5323. Declaration of vacancy by board

Subdivision (a) should be amended to refer to directors declared "incompetent or of unsound mind." A new subdivision (b) should be inserted to read, "A conservator or guardian of the person or estate of the director has been appointed." The Comment should note that the by-laws may make failure to perform, absenteeism, and neglect of duties grounds for removal from the board.

18/538

§ 5325. Removal of directors

Subdivision (b) was revised to read:

(b) The superior court of the proper county, in an action by 10 percent of the members, or where the director is elected by a class, by 10 percent of the members of the class, may remove a director from office for fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the nonprofit corporation.

The following language was added to the Comment:

Nothing in this section limits any authority the Attorney General may have to seek by court action the removal of a director of a nonprofit corporation organized for charitable purposes in appropriate cases.

The Comment should also note that, unlike the business corporation law, Section 5325 is not intended as the sole means by which directors may be removed, but the bylaws may provide other procedures.

18/539

§ 5331. Call of meetings

This section was revised to read:

5331. Meetings of the board may be called by the chairman of the board or the president or any vice president or the secretary or any two directors.

15/642

§ 5332. Notice of meeting

The staff should investigate the interrelation of this section with Section 5160 (notice), particularly with reference to communication by "electronic" or "wireless" means. The Comment should cross-refer to Section 5338 (validation of defectively noticed meeting). The Comment should note that the reference to "regular" meetings of the board includes the annual meeting, if any.

30/675

§ 5336. Quorum of directors

Subdivision (b) was deleted, and a sentence added to the Comment that, "It should be noted that Section 5336 is subject to Section 5330 (bylaws control)."

30/678

§ 5338. Validation of defectively noticed meeting

Subdivision (c) was revised to read, "All waivers, consents, and approvals are filed with or made a part of the minutes of the meeting." Provisions of other sections that relate to filing of materials with the corporate records or minutes should be reviewed for consistency.

30/679

§ 5340. Superior court may appoint provisional director

A note should be added to the Comment that the board of directors is the appropriate one of multiple boards, with a cross-reference to the definition in Section 5128 that makes this clear.

30/680

§ 5341. Deadlock among directors

This section should be revised to provide that an action may be brought by a person authorized by 50 members or 10 percent of the voting members (whichever is less) rather than by a large group of members. The authorization should be in writing and filed in the action. In addition, the section should provide that a provisional director may not be appointed if it is shown that a majority of the members oppose the appointment. The Comment should note that the board involved is the appropriate one of multiple boards, with a cross-reference to the definition in Section 5128 that makes this clear.

30/684

§ 5343. Rights and powers of provisional directors

The words "until the conditions of subdivision (a) of Section 5341 no longer exist or" were deleted from this section. The staff was requested to research the issue of the immunity from liability and possible indemnity for provisional directors.

30/685

§ 5353. Authority of committees

The phrase in subdivision (a) "to the extent provided in the resolution of the board" was revised to read "to the extent provided by resolution of the board."

30/686

§ 5354. Meetings of committees

The words "with necessary changes having been made in the language thereof" were substituted for the phrase "mutatis mutandis."

30/687

§ 5360. Corporate officers

The introductory portion of this section was revised to read, "A nonprofit corporation shall have all of the following offices, which shall be given such titles as the bylaws provide."

30/688

§ 5363. Resignation of officers

Subdivision (a) was divided into two provisions to make new subdivisions (a) and (b):

(a) An officer may resign at any time upon written notice to the nonprofit corporation.

(b) The resignation is effective upon giving the notice, or after such period not exceeding 30 days as is provided in the bylaws, unless the notice specifies a later time for the effectiveness of the resignation.

30/689

§ 5371. Transactions involving interested directors

A note should be added to the Comment that the directors of a charitable corporation are subject to the duty of care in the management of corporate assets prescribed in Section 5560.

30/690

§ 5373. Loans to directors and officers

A note should be added to the Comment that the section limits only loans by a nonprofit corporation and does not affect "participant loans" under any benefit plans.

30/691

§ 5374. Illegal distribution or loan; derivative action against directors

The Comment should make clear that this section supplements, and does not replace, any other available remedies, including remedies under the Uniform Fraudulent Conveyances Act.

30/392

§ 5380. Definitions

Subdivision (a)(2) was revised to refer to "A foreign nonprofit corporation or another domestic nonprofit corporation." Subdivision (b) was revised to read:

(b) "Expenses" includes ~~without limitation~~, but is not limited to, reasonable attorney's fees and ~~any~~ expenses of establishing a right to indemnification under Section 5383 or subdivision (c) of Section 5384.

30/694

§ 5381. Indemnification in proceedings other than derivative actions

The Comment to this section should make reference to Section 5382 (indemnification in derivative actions).

30/693

§ 5388. Insurance for corporate agents

This section should be revised to permit insurance for liability or loss, including judgments, fines, settlements, and expenses incurred in defense. The staff is to examine the governmental liability statute in drafting appropriate language.

30/695

§ 5390. Indemnification of estate of deceased agent

This section was revised to read:

5390. This article applies to the estate, executor, administrator, heirs, legatees, or devisees of an agent, and the term "person" where used in this article includes the estate, executor, administrator, heirs, legatees, or devisees of the agent.

30/696

§ 5410. Members

The staff was directed to prepare a definition of "member" drawing upon the following concepts: (1) a member is a person who has rights or interests in the nonprofit corporation; (2) the rights or interests of a member are those prescribed in the articles and bylaws; (3) a member may be described in the articles or bylaws by any other name.

30/697

§ 5414. Liability of members

This section was revised to make clear that the members of a non-profit corporation are not "by reason of membership alone" personally liable for the corporate obligations.

30/698

§ 5420 et seq. Issuance of memberships

The following Comment was added to the beginning of the article on issuance of memberships:

Comment. Article 2 (commencing with Section 5420), which relates to issuance of memberships, governs only the internal affairs of nonprofit corporations. It does not affect in any way the coverage of the Corporate Securities Law, Sections 25000-25804, which may in an appropriate case be applicable to the issuance of memberships in a nonprofit corporation. See Sections 25019, 25100(j). See also Silver Hills Country Club v. Sobieski, 55 Cal.2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961).

30/699

§ 5422. Redeemable memberships

Subdivision (a) was revised to read:

(a) Pursuant to its bylaws, a nonprofit corporation other than a nonprofit corporation organized for charitable purposes may issue memberships or classes that are redeemable, in whole or in part.

The Comment should note that a subvention can be redeemed, being more in the nature of a loan than a membership and, hence, distinguishable.

30/175

§ 5433. Liability of transferee with knowledge

This section was prefaced by the phrase, "Except as provided in Section 5432", and the parenthetical language was omitted from the section.

30/176

§ 5436. Creditors' remedy

The Comment should make clear that this section is not intended to preclude the availability of other remedies to the creditor, for example, under the Uniform Fraudulent Conveyances Act. The staff was directed to investigate the general rules on intervention, including under the Federal Rules of Civil Procedure, and, if it appears that intervention is generally subject to the discretion of the court, revise subdivision (b) to conform to this general rule.

30/177

§ 5441. Termination of membership

The phrase "except where the membership is terminated pursuant to Section 5511" should be moved from the end to the beginning of subdivision (b).

30/178

§ 5442. Effect of termination of membership

This section was revised to read, "Unless the bylaws provide otherwise, all rights of a member in a nonprofit corporation or its property cease on death or other termination of membership." The Comment should note that this continues existing law, but that there may be problems under existing law of forfeiture or of rights of owners of community or joint interests in property, and that some nonprofit corporations may find it appropriate to make provisions in the bylaws to preserve property rights on termination of membership by death or otherwise.

30/179

§ 5443. Withdrawal of members

Section 5443 was revised to read:

5443. (a) Unless the bylaws provide a procedure for ~~withdrawal of members~~ resignation of membership by members, a member may ~~surrender~~ resign membership ~~upon 30 days'~~ pursuant to written notice to the nonprofit corporation.

(b) Unless the bylaws provide otherwise, ~~surrender~~ resignation of membership terminates all future rights, powers, and obligations of membership, but does not terminate the members' liability for dues, assessments, fees, charges, or other obligations incurred prior to ~~surrender~~ resignation.

(c) Notwithstanding subdivision (a), resignation of membership does not extinguish binding contract obligations that run with the land at law.

The Comment should note that subdivision (c) will enable condominiums and homeowners' associations to limit the effect of resignation of membership in the nonprofit corporation without transfer of the property.

30/180

§ 5450. Record date

Subdivision (c), relating to an "allotment of rights" was deleted. A similar change should be made in Section 5454.

30/181

§ 5451. Authority of board to fix record date

Subdivision (a) was revised to state that the "bylaws may provide, or if the bylaws do not provide the board may fix, in advance, the record date." Subdivision (b) should likewise refer to the record date "provided by the bylaws or fixed by the board."

30/182

§ 5452. Record date where board does not fix date

The first portion of this section was revised to read:

5452. If no record date is provided by the bylaws or fixed by the board:

~~(1)~~ (a) The record date for determining members entitled to notice of or to vote at a meeting of members is the close of business on the tenth business day next preceding the day on which notice is given or, if no notice is waived required to be given, the close of business on the business day next preceding the day on which the meeting is held.

30/183

§ 5512. Levy of assessments for capital improvements

The staff was directed to revise the last sentence of subdivision (b) for clarity. A sentence should be added to subdivision (c) to the effect that resignation of membership does not extinguish binding contract obligations that run with the land at law.

30/184

§ 5520. Subventions authorized

The Commission determined to retain the subvention concept in the statute. The Comment should note that subventions may be subject to the Corporate Securities Law and reference made to Section 25100(j). A provision should be added to make clear that the subvention provisions apply only to instruments issued pursuant to the subvention article and designated as subvention certificates and do not limit or preclude the right of a nonprofit corporation to issue other types of debt instruments, including subordinated debts.

30/185

§ 5521. Consideration

The acceptable consideration for a subvention should be restricted to property and cash.

30/186

§ 5527. Transfer

This section should be revised to provide that a subvention certificate is not transferable inter vivos.

30/187

§ 5528. Contents of certificate

The subvention certificate should be required to contain a statement that it is subordinated and where the terms of subordination may be found, and a statement whether or not it is transferable.

§ 5529. Officers' certificate

This section was deleted.

§ 6112. Amendment of articles by agreement of merger

A provision should be added to the merger provisions to require that amendments to the articles effected by a merger be filed in the same manner as other amendments to the articles.

APPROVED

_____ Date

_____ Chairman

_____ Executive Secretary