

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

November 24, 1976

<u>Time</u>	<u>Place</u>
December 2 - 7:00 p.m. - 10:00 p.m.	State Bar Building
December 3 - 9:00 a.m. - 5:00 p.m.	601 McAllister Street
December 4 - 9:00 a.m. - 12:00 noon	San Francisco 94102

FINAL AGENDA
for meeting of
CALIFORNIA LAW REVISION COMMISSION

San Francisco

December 2-4, 1976

December 2

1. Minutes of November 11-12, 1976, Meeting (sent 11/19/76)
2. Administrative Matters
3. Study 63.70 - Evidence (Evidence of Market Value of Property)
 Memorandum 76-87 (sent 11/17/76)
 Draft of Tentative Recommendation (attached to Memorandum)
4. Study 72 - Liquidated Damages
 Memorandum 76-109 (enclosed)
5. Conflict of Interest Statute
 Memorandum 76-108 (enclosed)
6. Study 63 - Evidence Code (Preliminary Fact Determinations)
 Memorandum 76-96 (sent 11/17/76)

The following items are for information only; will not be discussed at meeting unless a member of Commission wishes to bring them up for discussion

7. Study 86 - Marketable Title Act
 Memorandum 76-105 (sent 11/17/76)
8. Annual Report
 Memorandum 76-106 (sent 11/18/76)
 Annual Report (attached to Memorandum)
9. Study 39.32 - Wage Garnishment Procedure
 Memorandum 76-107 (sent 11/23/76)
 Recommendation (attached to Memorandum)

December 3 and 4

10. Study 77 - Nonprofit Corporations

Review of Redrafted Provisions

Memorandum 76-100 (sent 11/23/76)

First Supplement to Memorandum 76-100 (sent 11/19/76)

Additional Provisions (to be handed out at meeting)

Curative Provisions

Memorandum 76-101 (to be sent)

Review of New Comments

Memorandum 76-111 (sent 11/23/76)

Discussion of Letter of Transmittal and Acknowledgments

Draft to be supplied

Preliminary Portion of Recommendation

Summary of Report

Memorandum 76-103 (to be sent)

Professor Hone's Background Studies

Memorandum 76-102 (sent 11/17/76)

The following item is for information only; will not be discussed at meeting unless a member of Commission wishes to bring it up for discussion

Outline of Division 2

Memorandum 76-104 (sent 11/23/76)

11. Study 39 - Enforcement of Judgments

39.230 - Supplementary Procedures (Receivers, Liens on Judgments, Assignment Orders)

Memorandum 76-110 (enclosed)

39.240 - Third-Party Claims

Memorandum 76-72 (sent 8/24/76; another copy sent 11/17/76)

First Supplement to Memorandum 76-72 (to be sent)

39.260 - Enforcement of Nonmoney Judgments

Memorandum 75-71 (sent 8/17/76; another copy sent 11/17/76)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

DECEMBER 2 AND 3, 1976

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on December 2 and 3, 1976.

Present: Howard R. Williams, Vice Chairman
John D. Miller
Marc Sandstrom, December 3
Thomas E. Stanton, Jr.

Absent: John N. McLaurin, Chairman

Alister McAlister, Member of Assembly
John J. Balluff

Members of Staff Present:

John H. DeMouilly	Nathaniel Sterling
Stan G. Ulrich	Robert J. Murphy III

The following persons were present as observers on days indicated:

December 2

Ronald P. Denitz, Tishman Realty & Construction Co., Inc., Los Angeles
Norval Fairman, Department of Transportation, Legal Division, San Francisco
John M. Morrison, Office of Attorney General, Sacramento

December 3

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

Minutes
December 2 and 3, 1976

ADMINISTRATIVE MATTERS

Minutes of November 11 and 12, 1976, Meeting

The Minutes of the November 11 and 12, 1976, Meeting were approved as submitted by the staff.

Conflict of Interest Code

The Commission considered Memorandum 76-108 and the attached request for exemption from conflict of interest code filing requirements. The Commission made several editorial suggestions. After revision in accordance with these suggestions, the request for exemption should be sent to the Commission members for their comments before final submission to the Fair Political Practices Commission.

Annual Report

Several editorial changes were made in the Annual Report which was attached to Memorandum 76-106. The first paragraph of the summary on page 1 should be deleted. On page 11, the discussion of liquidated damages should be revised to state that the Commission's recommendation has been revised in light of the Governor's objections stated in his veto message. Similar changes should be made in the discussions of liquidated damages on pages 18 and 32.

12/768

Minutes
December 2 and 3, 1976

STUDY 39.33 - CREDITORS' REMEDIES (WAGE GARNISHMENT)

The Commission reviewed the previously approved Recommendation Relating to Wage Garnishment which was attached to Memorandum 76-107. The Commission decided not to revise the Comment to Section 723.120.

12/764

Minutes
December 2 and 3, 1976

STUDY 39.230 - ENFORCEMENT OF JUDGMENTS
(SUPPLEMENTARY PROCEDURES)

The Commission considered Memorandum 76-110 concerning receivers, liens on causes of action and judgments, and assignment orders. The Commission made the following decisions regarding the draft statute:

§ 705.310. Receiver to enforce judgment

In response to suggestions made in a memorandum prepared by Professor Stefan A. Riesenfeld, the Commission's consultant on creditors' remedies, this section should be revised as set forth on page 2 of Memorandum 76-110 to eliminate the provision requiring return of the writ unsatisfied and to provide the standard for appointing a receiver.

§ 705.610. Application for lien on cause of action and judgment

The Comment to this section should contain a cross-reference to the Comment to the repeal of Section 688.1 which, in turn, should explain that the prohibition against granting a lien on general damages in a personal injury action to an assignee by operation of law has not been continued because it was declared unconstitutional in In re Kanter, 505 F.2d 228 (9th Cir. 1974) as applied to a trustee in bankruptcy. The Comment to Section 705.610 should also note that, although the lien is created when the court makes its order, a creditor may have priority as of the date of application for the order. Del Conte Masonry Co. v. N. T. Lewis, 16 Cal. App.3d 678, 94 Cal. Rptr. 439 (1971).

The staff should research the manner in which a judgment creditor (with or without a lien on the judgment) can apply his judgment debtor's judgment to the satisfaction of the judgment against the judgment debtor.

§ 705.710. Order assigning rights to future payments

This section should be prefaced by the words "except as otherwise provided by law" because there are some rights to future payments, such as pension rights, which are protected from assignment by other laws.

12/763

Minutes
December 2 and 3, 1976

STUDY 39.240 - ENFORCEMENT OF JUDGMENTS
(THIRD PARTY CLAIMS)

The Commission considered Memorandum 76-72 concerning third party claims procedures. The Commission tentatively decided not to add provisions for notice or hearings designed to protect the interests of third persons. However, the staff should inform the Commission of any decisions that bear on the constitutionality of existing levy procedures. The Commission approved the general approach of the draft and made the following decisions:

§ 706.010. Definitions

The definition of "third person" should be omitted. The staff should consider whether the definition of "secured party" is needed.

§ 706.110. Manner of making third party claims

This section should be revised to permit only third persons claiming superior interests to make a claim.

§ 706.140. Payment to third person

The judgment creditor should be permitted to pay off the entire indebtedness secured by the property if the governing agreement does not preclude such payment and if applicable prepayment penalties are paid. The statute should not provide for discounting the indebtedness.

§ 706.220. Notice of hearing

The moving party, rather than the clerk, should give notice of the hearing on the third party claim.

Determination of Third Party Interests in Examination Proceedings

The Commission considered but did not adopt Professor Stefan A. Riesenfeld's suggestion that the third party claims procedure be made available where the third person claims superior rights at an examination proceeding.

12/762

Minutes
December 2 and 3, 1976

STUDY 39.260 - ENFORCEMENT OF JUDGMENTS
(NONMONEY JUDGMENTS)

The Commission considered Memorandum 75-71 concerning the enforcement of nonmoney judgments. The Commission approved the approach reflected in the draft.

12/767

Minutes
December 2 and 3, 1976

STUDY 63 - EVIDENCE CODE (PRELIMINARY FACT DETERMINATION)

The Commission considered Memorandum 76-96 and decided not to give further consideration to revising certain provisions of the Evidence Code that permit jury determination of foundational facts.

Minutes
December 2 and 3, 1976

STUDY 63.70 - EVIDENCE OF MARKET VALUE OF PROPERTY

The Commission considered Memorandum 76-87 and the attached staff draft of the Tentative Recommendation Relating to Evidence of Market Value of Property. The Commission approved the tentative recommendation for distribution for comment subject to editorial revision and the decisions noted below. Commissioner Sandstrom was opposed to the provisions liberalizing use of comparable sales and the capitalization approach.

Preliminary Part

The second paragraph of the discussion under the heading "Capitalization of Income" on page 7 should be revised to explain in more detail the process of applying the capitalization of income method to determine the market value of property where there is no relevant market data. Specifically, the discussion should state that the amount reasonably necessary to bring the property to its highest and best use must be taken into account.

The discussion under the heading "Admissibility of Unpaid Taxes" on pages 7 and 8 should contain a caveat that the Commission plans to devote further study to the simplification of the structure of Revenue and Taxation Code Section 4986.

Evidence Code § 811

The Comment to this section should state the substance of the rule in In re Marriage of Folb, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975), that is being changed by the statute.

Evidence Code § 819

Section 819 should be revised to state more clearly its purpose--to permit the capitalization of income based on the property as if it were improved for its highest and best use--whether or not it is presently so improved and regardless of existing improvements, and taking into account the expense of improving the property. The staff is to send this

section as redrafted to the Commission members for their approval before the tentative recommendation is distributed for comment. Although it was suggested that the use of this method of valuation might be limited by the draft to only special use property, the Commission intends that this method should be available where comparable sales would not provide a fair indication of the value of the property.

12/766

Minutes
December 2 and 3, 1976

STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 76-109 which presented several alternatives for revising the Recommendation Relating to Liquidated Damages in response to the Governor's veto message. The Commission decided that, in the case of a sale of residential real property, the court should be permitted to consider the price obtained by the seller at an actual sale within six months of the buyer's breach in determining the reasonableness of the amount specified as liquidated damages. The buyer should continue to have the burden of showing the invalidity of a clause that provides for liquidated damages not exceeding three percent of the purchase price. Where a larger amount is specified, the seller should have the burden of showing the validity of the entire amount, not just the amount over three percent as was provided by the second sentence of Section 1675(c) in the vetoed bill. When Section 1675 and its Comment are revised to reflect these changes, they should be sent to the Commissioners for their approval before the recommendation is printed.

The staff should also research the seller's remedy if the liquidated damages clause is shown to be invalid and report its finding to the Commission.

12/759

Minutes
December 2 and 3, 1976

STUDY 77 - NONPROFIT CORPORATIONS (ASSEMBLY SELECT COMMITTEE
ON REVISION OF THE NONPROFIT CORPORATIONS CODE)

The Commission considered Memorandum 76-102 and the attached background studies supplied by Professor Hone, draftsman for the Assembly Select Committee on Revision of the Nonprofit Corporations Code. After some discussion of the efforts of the Select Committee, the Commission requested that it be supplied with any further materials produced by them. Also, the staff should inform the Commission of differences developed in the approach of the Select Committee from that of the Commission.

12/761

Minutes
December 2 and 3, 1976

STUDY 77 - NONPROFIT CORPORATIONS (PRELIMINARY
PART OF RECOMMENDATION)

The Commission considered Memorandum 76-103 and the First Supplement thereto containing the Summary and Preliminary Part of the recommendation. The Commission made the following decisions with respect to the Summary and Preliminary Part.

In the Summary, the discussion under "Formation" was revised to read, "The incorporation process is greatly simplified, eliminating certain formalities surrounding incorporation of a nonprofit corporation that appear to serve little or no purpose." In "Multiple Boards of Directors," the word "Many" was changed to "Some." The "Duty of Care of Directors" should point out that the standard is a flexible one. The discussion of "Officers" should be deleted. The "Vote Required for Member Action" should note that the bylaws or articles may require a greater vote of the members. The last sentence in "Annual Report" should be prefaced by the phrase "Under specified circumstances."

In the preliminary part, the new business corporation law should be consistently referred to as "new 1975 General Corporation Law," the old general corporation law should be referred to as "old General Corporation Law," the law governing nonprofit corporations should be referred to as "existing law for nonprofit corporations," and nonprofit corporations may be referred to, in appropriate places, simply as "corporations." References to "uniformity" as a reason for making changes should be deleted. References to actions by a corporation should specify whether the actions may be accomplished by articles or bylaws. The discussion of the repeal of the old General Corporation Law should be phrased in terms of a body of law "which has been otherwise repealed," with a note concerning the preservation of the law for corporations other than business corporations. The discussion of enjoining ultra vires acts should be clarified. The discussion of the membership list should note the purpose of protecting the list "from possible improper use," and the notation of reasons should be merely illustrative.

The staff was directed to revise the Summary and Preliminary Part in accordance with these decisions, to incorporate editorial changes in copies submitted by the Commissioners, and to review the Summary and Preliminary Part for accuracy when revision of the statute is completed. As so revised, the Summary and Preliminary Part should be sent to the Commissioners for further review and submission of additional written comments, to be made within a short period of time, before being sent to the printer.

12/760

Minutes
December 2 and 3, 1976

STUDY 77 - NONPROFIT CORPORATIONS (CURATIVE PROVISION)

The Commission considered Memorandum 76-101 and directed the staff to revise subdivision (b) of proposed Section 5455 to give the court the authority to determine the number of members required to constitute a quorum, taking into account the number of known members and applying to the extent reasonably possible the provisions of the articles and bylaws relating to a quorum of members. The Commission also directed that, in the Comment to Section 5455, the word "but" be deleted from the first sentence, and the first sentence of the second paragraph be prefaced by the words "For example." As thus revised, proposed Section 5455 was approved.

STUDY 77.400 - NONPROFIT CORPORATIONS (REVIEW OF COMMENTS)

The Commission considered Memorandum 76-100 and the First Supplement thereto, containing redrafted provisions in accordance with Commission decisions made in response to comments received on the tentative recommendation relating to nonprofit corporations. The Commission also considered Memorandum 76-111, containing further comments on the tentative recommendation. The Commission took the following actions with respect to the comments and redrafted provisions:

Application of Statute to Religious Corporations

This provision was approved as drafted.

Nonprofit Cooperative Corporations

The staff was instructed to bring back the issue of the law governing nonprofit cooperative corporations formed under the old Civil Code provisions after the nonprofit corporation law has been enacted. The staff was also instructed to write to the person raising the issue, informing him of this action and noting that the Commission may request further information at that time.

Professional Corporations

The staff was instructed to bring back the issue of incorporating nonprofit corporations to engage in the practice of a profession after the nonprofit corporation law has been enacted. The staff was also instructed to write to the person raising the issue, informing him of this action and noting that the Commission may request further information at that time.

§ 5211. Incorporation of unincorporated associations

This provision was approved as drafted.

§ 5220. General Corporation Law not applicable unless expressly provided

The Comment to this section should note that references to the General Corporation Law include subsequent amendments. Similar comments should be added at the beginning of the statute and in the preliminary part.

§ 5221. Construction of words used in General Corporation Law

This section was approved without change.

§ 5222. Permissible corporate name: reservation of corporate name

The staff was directed to write to the State Bar Committee on Corporations with the suggestion that Section 201 be amended to add a provision comparable to Section 5222(b).

§ 5223. Members' derivative action

Subdivision (c) was deleted. The Comment should continue to refer to the case law precluding dismissal, discontinuance, compromise, or settlement without approval of the court.

§ 5224. Annual statement of officers, office, and agent for service

In subdivision (b)(2), the phrase "business and residence address" was revised to read "business or residence address." Subdivision (b)(5) was deleted. The Comment or the preliminary part should note that a listing of directors is not required because many nonprofit corporations have very large boards.

§ 5225. Service of process on domestic nonprofit corporation

This section was approved as drafted.

§ 5226. Foreign nonprofit corporations

This section was approved as drafted.

§ 5227. Crimes and penalties

This section was approved as drafted.

§ 5228. Other applicable General Corporation Law provisions

This section was approved as drafted.

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

The first sentence of the last paragraph of the Comment was revised to read, "The remedy provided in Section 5232, which permits injunction of ultra vires acts, should be distinguished from other remedies available to enforce charitable trusts. Nothing in Section 5232 limits the law of trusts as to standing to sue to enforce a trust or prevents pursuit of remedies other than ultra vires to prevent misuse or diversion of charitable assets."

§ 5250. Required contents of articles

Sections 5250 and 5250.5 were approved as drafted.

§ 5315. Multiple boards

This section was approved as drafted.

§ 5320. Nomination of directors

The last sentence of the Comment should refer to court imposition of "adequate and reasonable requirements."

§ 5410. Members

The definition of "member" was revised to read, in substance:

5155. "Member" means:

- (a) A person designated in the articles or bylaws as such.
- (b) If there is no person described in subdivision (a), a person given the right to vote for directors in the articles or bylaws.
- (c) If there is no person described in subdivision (a) or (b), a director as provided in Section 5412.

This definition is subject to further staff investigation to assure that it works properly in the nonprofit corporation law.

§ 5520. Subventions

A provision should be added to the subvention chapter that states:

A nonprofit corporation may not redeem a subvention certificate if the redemption would not satisfy the requirements of Section 5552.

Comment. This section incorporates the requirement of Section 5552 (purchase or redemption of memberships) that a nonprofit corporation may not make a payment that would cause it to be unable to meet its liabilities (except those whose payment is otherwise adequately provided for) as they mature. It makes the requirement applicable to all redemptions of subventions, held by both members and nonmembers.

The general restrictions on payments to members should, by their terms, not be applied to subvention certificates, which may be held by nonmembers.

§ 5525. Redemption of subvention certificates upon call of the holder

The standard of Section 5525 should be replaced with a reference to the general provisions of Section 5551 (there must be a fund balance of

revenues over expenditures, and assets must exceed liabilities by 1-1/4); the Comment should note the ability of the nonprofit corporation to place additional limitations on call of subvention certificates for its own protection.

§ 5550.5. Time of payment

Section 5550.5 was added as set out on page 3 of Memorandum 76-111. The Comment should note the law review article on which subdivision (b) is based.

§ 5560. Management of charitable property

The Comment to this section should be expanded, and, likewise, the discussion in the preliminary part, to provide an illustration of the reasons for exonerating directors from the duty of care where they are reasonably acting to carry out the trust purposes.

§ 5632. Number of consents required

This section was deleted. A provision should be added to the vote required for action by mail ballot to include written consents.

§ 5713. Vote required for member action

Subdivisions (a)(1) and (2) of Section 5713 were revised to read:

(1) If the approval is at a meeting of members duly held at which a quorum is present, be approved if the votes represented at the meeting and entitled to be cast on the action are cast in a greater number for approval than for disapproval of the action.

(2) If the approval is by mail or any reasonable means provided in the bylaws, be approved if the votes cast on the action are cast in a greater number for approval than for disapproval of the action, provided the number of votes cast (including abstentions) equals or exceeds the number required for a quorum of a meeting of members.

§ 5732. Form of proxy

Subdivision (b) was revised to read:

(b) In an election of directors, a proxy in which the nominees for election are set forth and which is marked "withhold," or otherwise marked in a manner indicating that the authority to vote for a nominee is withheld, shall not be voted either for or against the election of that nominee.

The description of this provision in the preliminary part should be reviewed for accuracy.

§ 6160. Action to test validity of, or enjoin or rescind, merger or consolidation

This section should limit the time within which an action to test the validity of a merger may be brought, to a period of 30 days after the notice of approval of agreement of merger has been given under Section 6124. The Comment to Section 6124 should note that a merger agreement can be made effective at any time after approval of the agreement but, if assurance is desired that the merger will not be challenged, a delayed effective date of at least 30 days is necessary.

§ 6410. Bankruptcy reorganizations and arrangements

Section 5528(1) was approved as drafted.

§ 6624. Judicial supervision

The words "or limiting the issues that may be considered at the meeting" were added to subdivision (b). The Comment should indicate that the section provides more flexibility for the court than the comparable provision of the business corporation law.

Transition Provisions

The words "unless and" were deleted from Section 6813.5.

12/765

Minutes
December 2 and 3, 1976

STUDY 86 - MARKETABLE TITLE ACT

The Commission considered Memorandum 76-105 which reported that the California Land Title Association has appointed a special committee to review the Uniform Simplification of Land Transfers Act. The Commission suggested that the staff inform the Commission from time to time concerning the special committee's progress in preparing a report on the uniform act.

APPROVED

Date

Chairman

Executive Secretary