

CALIFORNIA LAW REVISION COMMISSION

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October 20, 1995

<i>Date:</i> November 2, 1995	<i>Place:</i> Sacramento
Nov. 2 (Thursday) 9:00 am – 5:00 pm	State Capitol, Room 127
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".</p>	
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FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Thursday, November 2**

1. MINUTES OF SEPTEMBER 28-29, 1995, MEETING (sent 10/12/95)
2. RATIFICATION OF ACTIONS TAKEN ON SEPTEMBER 29, 1995
3. 1995 LEGISLATIVE PROGRAM

Final Report

Memorandum 95-69 (NS) (enclosed)

4. UNFAIR COMPETITION (STUDY B-700)

Draft of Tentative Recommendation

Memorandum 95-57 (SU) (to be sent)

5. ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

Followup Legislation (Study N-110)

Memorandum 95-58 (NS) (enclosed)

6. PROBATE MISCELLANEOUS ISSUES

Collecting Estate of Small Value Without Probate (Study L-1030)
Memorandum 95-59 (RM) (enclosed)

Standing of Parents To Sue for Wrongful Death of Child (Study L-3016.01)
Memorandum 95-60 (RM) (to be sent)

Inheritance From or Through a Foster Parent or Stepparent (Study L-659)
Memorandum 95-61 (RM) (sent 10/12/95)

7. MARKETABLE TITLE: OBSOLETE RESTRICTIONS (STUDY H-407)

Draft of Revised Tentative Recommendation
Memorandum 95-63 (NS) (sent 10/3/95) (\$8.50)

8. HOMESTEAD EXEMPTION (STUDY D-352)

Comments on Tentative Recommendation
Memorandum 95-64 (SU) (to be sent)

9. TOLLING STATUTES OF LIMITATION (STUDY J-110)

Draft of Final Recommendation
Memorandum 95-68 (BG) (sent 10/18/95)
First Supplement to Memorandum 95-68 (to be sent)

10. BEST EVIDENCE RULE (STUDY K-501)

Draft of Tentative Recommendation
Memorandum 95-65 (BG) (to be sent)

11. ADMINISTRATIVE MATTERS

New Topics and Priorities
Memorandum 95-50 (NS) (sent 9/12/95)

Annual Report for 1995
Memorandum 95-56 (SU) (to be sent)

Report of Executive Secretary

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
NOVEMBER 2, 1995
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on November 2, 1995.

Commission:

Present: Colin Wied, Chairperson
Allan L. Fink, Vice Chairperson
Christine W.S. Byrd
Quentin L. Kopp, Senate Member
Sanford Skaggs

Absent: Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall
Edwin K. Marzec

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

Consultants: None

Other Persons:

Christopher Ames, Attorney General's Office, Consumer Law Section, San Francisco
Hannah Bentley, Environmental Law Foundation, Oakland
Herb Bolz, Office of Administrative Law, Sacramento
Terrence Brown, Sacramento District Attorney, Sacramento
Tom Dresslar, Daily Journal, Sacramento
Karl Engeman, Office of Administrative Hearings, Sacramento
Robert Hargrove, Department of Motor Vehicles, Sacramento
Kathleen Hrepich, California District Attorney Association, Sacramento
John S. Higgins, Jr., Tulare County District Attorney, California Family Support Council, Visalia
Earl Lui, Consumers Union, San Francisco
Alan M. Mansfield, Milberg, Weiss, Bershad, Hynes, & Lerach, San Diego
Thomas A. Papageorge, Los Angeles District Attorney's Office, and California District Attorneys Association Consumer Protection Committee, Los Angeles

Nancy Peverini, Consumer Attorneys of California, Sacramento
David Roe, Environmental Defense Fund, Oakland
Harry Snyder, Consumers Union, San Francisco
James C. Sturdevant, Consumer Attorneys of California, Sacramento
W.F. Walsh, State Office of Child Support, Sacramento

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MINUTES OF SEPTEMBER 28-29, 1995, MEETING

The Commission approved the Minutes of the September 28-29, 1995, meeting as submitted by the staff.

The Commission ratified the decisions made at the September meeting to submit the following final recommendations to the Legislature, which is required by Section 2.4.1 of the Commission’s Handbook of Practices and Procedures to be done by a minimum of four affirmative votes:

- (1) Civil Code § 1464: covenants that run with the land.
- (2) Inheritance from or through child born out of wedlock.
- (3) Statute of limitations in trust matters: Probate Code § 16460.

ADMINISTRATIVE MATTERS

New Topics and Priorities

The Commission considered Memorandum 95-50 and the First Supplement to Memorandum 95-50, relating to new topics and priorities.

With respect to proposed new topics, the Commission decided:

(a) To proceed with its request for authority to study the subject of the law of contracts, including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

(b) The issue of coordination of federal benefits with state guardianship and conservatorship law was deferred pending receipt of further information on this matter from the State Bar Estate Planning, Probate and Trust Law Section.

(c) The issue of coordination of guardianship orders among the various counties should be referred to the Department of Social Services and the Judicial Council.

(d) The staff will carefully review Professor Reppy's article on community property issues to determine if any of the issues are sufficiently compelling to warrant Commission attention.

(e) Commissioner Skaggs will suggest to the staff some needed reforms in eminent domain law.

(f) The other suggested new topics will not be studied by the Commission.

The Commission's priority for work during the remainder of 1995 will be to complete work on currently pending matters for introduction in the 1996 legislative session.

During 1996, the Commission intends to complete work on unfair competition litigation (if the study proceeds), judicial review of agency action, obsolete restrictive covenants, the best evidence rule, and corporate governance issues. The Commission also plans to initiate work on a health care decisions act, administrative rulemaking, the Uniform Unincorporated Nonprofit Association Act, and minor matters such as the mediation privilege.

Annual Report for 1995

The Commission considered Memorandum 95-56, relating to the Annual Report for 1995. The Commission approved the draft for printing, subject to editorial revisions and updating to reflect decisions made at the Commission meeting.

Report of Executive Secretary

The Executive Secretary reported on the following matters:

Membership of Commission. The terms of four Commissioners expired October 1 — those of Commissioners Cooper, Marshall, Marzec, and Wied. The Executive Secretary has spoken with the Governor's Legal Affairs Secretary

(former Commissioner Kolkey) about the possibility of expediting reappointments, so that the Commission will be able to assemble a quorum. The holdover periods of the expired terms ends December 1.

Budget for 1996-97. The Executive Secretary submitted a budget change proposal to Department of Finance to increase the Commission's budget allocation by eliminating salary savings (an increase of \$27,000). Preliminary staff reports from the Department of Finance on the proposal are favorable.

Office Space. McGeorge Law School in Sacramento is exploring with the Executive Secretary the possibility of making available office space for the Commission in the Law School's new Legislative Research Center. The Executive Secretary is entertaining discussions with a great degree of caution, since the Commission has decided that it would be undesirable to relocate the Commission's office if that would mean losing key experienced staff members.

Conflict of Interest Code. The Executive Secretary has notified the Fair Political Practices Commission of the Commission's intention to amend its Conflict of Interest Code to add several classes of financial interests adopted at the Commission's March 1995 meeting (e.g., entities that have been defendants in unfair competition litigation within the past two years). The staff is in the process of implementing the amendment, but Commissioners need not file a revised conflict of interest statement until the process is complete. With respect to the Commission's direction to the staff to seek an exemption from filing requirements for the Commission, the Commission reconfirmed its decision that this should only be pursued if it will require minimal staff involvement.

1995 LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-69, making a final report on the Commission's legislative program for 1995. All Commission recommendations were enacted. Changes to the recommendations made during the legislative process are reported in Appendices to the Annual Report for 1995.

STUDY B-700 – UNFAIR COMPETITION

The Commission continued its considered of Memorandum 95-57 and the staff draft statute concerning unfair competition litigation, along with the First and Second Supplements to the memorandum. The Commission heard the views of persons attending the meeting concerning the approach of the draft statute and the need for legislation in this area. The commentators at the meeting

generally expressed the viewpoint that legislation was not needed because the problems were minor or not amenable to statutory solution.

After a lengthy discussion, the Commission decided to solicit comment from interested persons concerning whether there are problems in the unfair competition litigation area that should be addressed, particularly relating to competing actions between public and private plaintiffs or between private plaintiffs, the routine use of unfair competition causes of action in essentially private actions to increase leverage, and the desirability of providing some form of binding effect on absent parties. Tentatively, the Commission decided not to proceed with the study in the absence of evidence that there are problems in the area that can be effectively dealt with by statute. Without further input, it is difficult to determine whether serious problems do not in fact exist or that the Commission is hearing predominately from the plaintiffs bar. The Commission will consider whether to proceed with the study at a later meeting when interested persons have had a chance to comment on these issues.

STUDY D-352 – HOMESTEAD EXEMPTION

The Commission considered Memorandum 95-64, and the First Supplement thereto, concerning comments on the tentative recommendation on the *Homestead Exemption*. The Commission approved the tentative recommendation for submission to the Legislature, subject to the following revisions and limitations:

Code Civ. Proc. § 704.720 (amended). Homestead exemption

The section governing the proceeds exemption should be amended to preserve the favored position of support creditors in enforcement against homesteads. Subdivision (d) is intended to provide equitable relief where the support obligor is also required to support persons other than the support creditor. This rule places the burden on the debtor to initiate proceedings to apply the exemption, rather than on the favored support creditor to invade the exemption generally applicable. This approach is intended to answer the concerns of the Family Support Counsel, as set forth in letters and expressed at the meeting.

As revised, this section would be amended as follows:

704.720. (a) A homestead is exempt from enforcement of a money judgment as provided in this article and is exempt from sale under this division to the extent provided in Section 704.800.

(b) The proceeds from a disposition of a homestead are exempt under the following conditions:

(1) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. The proceeds are exempt for a period of six months after the time date the proceeds are actually received by the judgment debtor, except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.

(2) If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of the sale.

(3) If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support, unless the judgment debtor obtains an order, on noticed motion, that the proceeds are exempt in all or part. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

Protective Rules on Proceeds Exemption

The Commission approved the recommendation subject to working out additional rules to restrict the freedom to dispose of exempt proceeds from sale of a homestead. The intention is to honor the purpose of the exemption by shielding proceeds for up to six months to enable the debtor to purchase another home. The staff should work with the title companies to develop an appropriate procedure. It was suggested that this approach should be implemented in a manner that does not place burdens on the title insurance industry.

STUDY H-407 – MARKETABLE TITLE: OBSOLETE RESTRICTIONS

The Commission considered Memorandum 95-63 and the attached revised draft tentative recommendation on obsolete restrictions, together with the First Supplement to Memorandum 95-63, containing comments of State Bar Real Property Section members on the revised draft.

The Commission approved the revised draft for circulation for comment after making the following changes:

(1) The Comment to Section 888.030 (expiration of restriction) should cross-refer to the statute setting out who may record a notice of intent to preserve an interest (Section 880.320).

(2) The term “restriction” should be defined generally in the Civil Code, and incorporated by reference in the marketable title and statute of limitations provisions. The Comment to the statute of limitations provision should note that the definition of “restriction” is broad and is not limited in the statute of limitations provision (in contrast with the marketable title provisions, which exclude common interest development equitable servitudes).

(3) The statute of limitations should run from the time when, through the exercise of reasonable diligence, a person entitled to enforce the restriction should have discovered the breach.

(4) Typographical errors should be corrected in the draft, including, “This will help clear land titles from the encumbrance of such notices that have been recorded but never acted upon.”

STUDY J-110 – TOLLING STATUTES OF LIMITATION

The Commission considered Memorandum 95-68 and the attached draft of a final recommendation. Although the Judicial Council did not submit any written comments on the draft, Cara Vonk informed the staff before the meeting that the version of Section 116.350 in Memorandum 95-44 was acceptable to the Judicial Council and its Civil and Small Claims Standing Advisory Committee. Ms. Vonk also reported that the revised version of Section 116.350 in Memorandum 95-68 had been circulated to the members of the Civil and Small Claims committee and had been favorably received. In light of that response, the Commission approved the proposal attached to Memorandum 95-68 for printing and submission to the Legislature as a final recommendation.

STUDY K-501– BEST EVIDENCE RULE

The Commission considered Memorandum 95-65 and the attached revised staff draft tentative recommendation. The Commission approved distribution of the tentative recommendation for comment, subject to the following revisions:

Evid. Code § 357 (added). No obligation to use evidence requested

This section should be deleted. The Comment on repeal of Section 1503 should clarify that the repeal has no effect on the existing practice that parties may refrain from introducing evidence they subpoena.

Evid. Code § 1521 (added). Oral testimony about content of writing

The staff should explore the degree of overlap between paragraph (c)(1) and paragraph (c)(2) in Section 1521 of the revised staff draft. In addition to that version of Section 1521, the tentative recommendation should include an alternative version substantially as follows:

§ 1521. Oral testimony about content of writing

1521. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the writing or a copy of the writing and any of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(3) The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

The staff should investigate the most effective means of bringing the tentative recommendation to the attention of appropriate sections of the State Bar.

**STUDY L-659 – INHERITANCE FROM OR THROUGH
A FOSTER PARENT OR STEPPARENT**

The Commission considered Memorandum 95-61, attached staff draft of a Tentative Recommendation on *Inheritance From or Through a Foster Parent or Stepparent*, and First Supplement that was handed out at the meeting. The Commission decided to defer this until the California Supreme Court decides *In re Estate of Smith* (petition for review granted Sept. 28, 1995).

STUDY L-1030 – DECEDENTS’ ESTATES: COLLECTING
SMALL ESTATE WITHOUT ADMINISTRATION

The Commission considered Memorandum 95-59 and attached staff draft of a Tentative Recommendation on *Collecting Small Estate Without Administration*. The Commission approved the Tentative Recommendation for distribution for comment.

STUDY L-3016.01 – STANDING OF PARENTS TO SUE
FOR WRONGFUL DEATH OF THEIR CHILD

The Commission considered Memorandum 95-60. The Commission directed the staff to communicate with the Senate Judiciary Committee to point out that the 1992 revision of the wrongful death statute was made without full consideration of policy issues affecting standing of parents to sue, and to suggest the following amendment to Section 377.60 of the Code of Civil Procedure to restore pre-1992 law:

377.60. A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent’s personal representative on their behalf:

(a) The decedent’s surviving spouse, children, and issue of deceased children, or, if ~~none~~ there is no surviving issue of the decedent, the persons who would be entitled to the property of the decedent by intestate succession.

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STUDY N-110 – FOLLOWUP LEGISLATION ON ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 95-58, together with the First and Second Supplements to Memorandum 95-58, relating to followup legislation for the administrative adjudication bill.

The Commission approved inclusion of the following provision in the followup legislation:

Gov’t Code § 11019.6 (technical amendment)

11019.6. (a) Notwithstanding any other provision of state law, and to the extent not in conflict with federal law, if a principal agency is not designated by statute, a principal state agency shall be designated by the Governor for the coordination of procedures, forms, and deadlines in every area of regulatory activity under the state’s jurisdiction, as determined by the Governor. All other state agencies shall defer to the principal agency in the performance of

their duties in a particular regulatory area, or upon a particular project, with respect to procedures, forms, and deadlines, but not with respect to any other areas of authority.

(b) This section shall not apply to the processing of any permit pursuant to Division 34 (commencing with Section 71000) of the Public Resources Code.

(c) No part of this section shall be construed to limit the authority of any agency to hold public hearings on any matter within the jurisdiction of that agency.

(d) No part of this section shall be construed to authorize any state agency to adopt or implement procedures, forms, or deadlines in conflict with those explicitly specified in statute or in conflict with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500).

(e) Nothing in this section shall be construed to confer upon any state agency decisionmaking authority over substantive matters within another agency's jurisdiction, including any informational and public hearing requirements needed to make regulatory and permitting decisions.

(f) As used in this section, "agency" and "principal agency" shall not mean a court or any office of the judicial branch of government.

Comment. Section 11019.6 is amended to add a reference to the general provisions on administrative adjudication in the Administrative Procedure Act.

The Commission made the following revisions in the previously-approved amendment of Insurance Code Section 1861.08, in response to suggestions from the Proposition 103 Enforcement Project:

Ins. Code § 1861.08 (amended)

1861.08. Hearings shall be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

(a) Hearings shall be conducted by administrative law judges for purposes of Sections 11512 and 11517, chosen under Section 11502 or appointed by the commissioner.

(b) Hearings are commenced by a filing of a Notice in lieu of Sections 11503 and 11504.

(c) The commissioner shall adopt, amend or reject a decision only under Section 11517 (e) (b), (c), and (e) and Section 11518.5.

(d) Notwithstanding Section 11501, Section 11430.30 and subdivision (b) of Section 11430.70 shall not apply in these hearings.

(e) Discovery shall be liberally construed.

Comment. Section 1861.08 is amended to reflect revision of the Administrative Procedure Act by 1995 Cal. Stat. ch 938.

The introductory portion of the section is amended to refer to the entire formal hearing chapter. That chapter is supplemented by Chapter 4.5 (commencing with Section 11400) of the same part, containing general provisions on administrative adjudication applicable to all state agency hearings. See Gov't Code § 11410.10 (application of chapter).

Subdivision (c) is amended to add a reference to Section 11517(b), which includes expanded procedures for agency adoption of a proposed administrative law judge decision.

The reference in subdivision (c) to the procedure for adoption, amendment, or rejection of a decision is supplemented by a reference to the new procedure for correction of mistakes and clerical errors in the decision. See Gov't Code § 11518.5. The reference to a decision "solely on the basis of the record" in subdivision (c) is deleted as surplus. All decisions under the Administrative Procedure Act must be based exclusively on the record. Gov't Code § 11425.50 (decision).

The reference in subdivision (d) to former Government Code Section 11513.5 is deleted as obsolete. It That section is superseded by Government Code Sections 11430.10-11430.80 (ex parte communications), which apply to all hearings under the Administrative Procedure Act. However, subdivision (d) makes clear that Government Code Sections 11430.30 (permissible ex parte communications from agency personnel) and 11430.70(b) (ex parte communications in individualized ratemaking proceeding) do not apply in hearings under this article; this preserves the effect of existing law under former Government Code Section 11513.5.

The reference in subdivision (d) (e) to determination of discovery disputes by the administrative law judge is deleted as surplus. All discovery disputes under the formal hearing procedure are now determined by the administrative law judge. Gov't Code § 11507.7.

The Commission decided to revise the provision on confidentiality of offers of settlement or compromise to add a provision parallel to the Evidence Code provision applicable in judicial proceedings, along the following lines:

Gov't Code § 11415.60 (amended)

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in

settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Comment. Section 11415.60 is amended to protect conduct and statements made in settlement negotiations from admissibility, parallel to the protection provided in Section 1152 of the Evidence Code. This provision supplements the existing protection from admissibility of evidence of an offer of compromise or settlement (as opposed to evidence of conduct or statements made in settlement negotiations).

The Commission decided not to include a provision in the followup legislation applying the Administrative Procedure Act to quasi-public entities. Instead, the Commission will prepare a separate tentative recommendation on this matter, to be circulated to interested persons, organizations, and agencies for comment. The organizations from which comment is solicited should include the State Compensation Insurance Fund and the California Insurance Guarantee Association. Commenters should be asked to indicated what specific problems would be caused by applying the provisions to hearings conducted by a quasi-public entity.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary