

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

September 30, 1977

Time

October 6 - 7:00 p.m. - 10:00 p.m.
October 7 - 9:00 a.m. - 5:00 p.m.

Place

State Bar Building
601 McAllister Street
San Francisco, CA 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

October 6-7, 1977

1. Minutes of September 8-10, 1977, Meeting (enclosed)
2. Administrative Matters
 - Report on 1977 Legislative Program
 - Oral Report at Meeting
 - Research Contract
 - Memorandum 77-70 (enclosed)
 - Annual Report
 - Memorandum 77-62 (sent 9/27/77)
 - Draft of Annual Report (attached to Memorandum)
 - Schedule for Work--Priorities for Topics
 - Memorandum 77-63 (sent 9/28/77)
 - New Topics
 - Memorandum 77-64 (sent 9/27/77)
 - Unconstitutional Statutes
 - Memorandum 77-69 (enclosed)
 - Draft of portion of Annual Report (attached to Memorandum)
 3. Study 39.160 - Attachment (Use of Court Commissioners)
 - Memorandum 77-65 (sent 9/28/77)
 - Revised Recommendation (attached to Memorandum)
 4. Study 79 - Parol Evidence Rule
 - Memorandum 77-60 (sent 9/20/77)
 - Tentative Recommendation (attached to Memorandum)
 5. Study 63.70 - Evidence (Market Value of Property)
 - Memorandum 77-66 (sent 9/23/77)
 - Revised Recommendation (attached to Memorandum)

6. Study 63.70 - Evidence (Sales to Condemnor)
Memorandum 77-58 (sent 9/20/77)
7. Study 63.80 - Evidence (Psychotherapist-Patient Privilege)
Memorandum 77-59 (sent 9/28/77)
Tentative Recommendation (attached to Memorandum)
8. Study 39.160 - Attachment (Property Subject to Security Interest)
Memorandum 77-53 (sent for last meeting; another copy sent 9/20/77)
Tentative Recommendation (attached to Memorandum)
Memorandum 77-67 (to be sent)
9. Study 39.160 - Attachment (Section 481.050)
Memorandum 77-48 (sent for last meeting; another copy sent 9/20/77)
10. Administrative Matters
Election of Officers] special order of business at
] 9:00 a.m. on October 7.
Memorandum 77-61 (sent 9/20/77)
11. Study 30.300 - Guardianship-Conservatorship Revisions
Memorandum 77-68 (enclosed)
Draft Statute (in binder) (sent for last meeting)
Note. We will first consider Memorandum 77-68 and then start with Section 2600 of the draft statute.

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 6 AND 7, 1977
San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on October 6 and 7, 1977.

Present: Howard R. Williams, Vice Chairman
Beatrice P. Lawson, October 6
Jean C. Love
John D. Miller
Thomas E. Stanton, Jr.
Laurence N. Walker

Absent: John N. McLaurin, Chairman
George Deukmejian, Member of Senate
Alister McAlister, Member of Assembly
Bion M. Gregory, Ex Officio

Members of Staff Present:

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

Consultants Present:

Garrett H. Elmore, Child Custody, October 7

Present as observer on October 6:

Norval Fairman, CALTRANS, Legal Division, San Francisco

ADMINISTRATIVE MATTERS

Minutes of September Meeting Approved as Corrected

The Minutes of the meeting of September 8, 9, and 10, 1977, were corrected as follows:

On page 3, the paragraph under the heading "Compensation for Commissioners" was deleted, and the following inserted in its place:

The Commission requested that the Executive Secretary seek to have the Commission's enabling statute amended to do both of the following: (1) Increase the per diem compensation of members of the Commission appointed by the Governor from \$20 per day to \$50 per day (for each day of attending meetings of the Commission); (2) Provide that members appointed by the Governor shall receive in addition \$12.50 for each hour actually spent in preparation for a Commission meeting; provided, however, that for each meeting no more than eight hours of preparation time shall be so compensated. The amendment sought by the Commission is based on the compensation provided by Section 30314 of the Public Resources Code (California Coastal Commission; regional coastal commissions).

On page 9, the text of proposed Section 1501 as revised was deleted and the following inserted in its place:

1501. (a) A parent may by will or by a signed writing appoint a guardian ~~by will or by deed~~ for the property of any minor child, living or likely to be born, which the child may take from the parent by the will or by succession.

(b) Any person may by will appoint a guardian ~~by will~~ for any property of a minor, living or likely to be born, which the minor may take from such person by the will.

On page 13 in the tenth line of the discussion under Section 1602, the citation "see proposed Section 1641" was changed to "see proposed Section 2641."

On page 14 in the discussion under Section 1810, the last portion of the first sentence which reads "which does not require the formalities of a witnessed will" was deleted and the following substituted in its place: "which requires the formalities of a witnessed will."

On page 18, the text of the second sentence of subdivision (a) of proposed Section 1851 as revised was deleted and the following inserted in its place:

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1851. (a) . . . The court investigator shall personally inform the conservatee personally that ~~he or she~~ the conservatee is under a conservatorship and shall give the name of the conservator to the conservatee. . . .

On page 21, subdivision (f) of proposed Section 2212 was deleted and the following inserted in its place:

(f) The name and ~~residence addresses~~ address of the guardian or conservator if the ~~guardian or conservator is not~~ other than the petitioner.

As thus corrected, the Minutes of the meeting of September 8, 9, and 10, 1977, were approved.

Schedule for Future Meetings

The following schedule for future meetings was adopted:

November

November 3 - 7:00 p.m. - 10:00 p.m.	San Francisco
November 4 - 9:00 a.m. - 5:00 p.m.	
November 5 - 9:00 a.m. - 12:00 noon	

December

December 1 - 7:00 p.m. - 10:00 p.m.	Los Angeles
December 2 - 9:00 a.m. - 4:00 p.m.	

January

January 5 - 7:00 p.m. - 10:00 p.m.	Los Angeles
January 6 - 9:00 a.m. - 5:00 p.m.	

February

February 2 - 7:00 p.m. - 10:00 p.m.	San Francisco
February 3 - 9:00 a.m. - 5:00 p.m.	
February 4 - 9:00 a.m. - 12:00 noon	

March

March 2 - 7:00 p.m. - 10:00 p.m.	San Francisco
March 3 - 9:00 a.m. - 5:00 p.m.	
March 4 - 9:00 a.m. - 12:00 noon	

Election of Officers

Howard R. Williams was elected as Chairman. Beatrice P. Lawson was elected as Vice Chairman. Their terms commence on December 31, 1977.

1977 Legislative Program

The Executive Secretary reported that the legislative measures introduced to effectuate the Commission's recommendations to the 1977 Legislature were enacted with the exception of (1) Assembly Bill 393 (wage garnishment) which was pending in a joint conference committee when the Legislature recessed in September 1977 and will be given further consideration during the second year of the 1977-78 session and (2) Senate Bills 623 and 624 (nonprofit corporations) which the Commission decided not to set for hearing in 1977 or 1978.

1977 Annual Report

The Commission considered Memorandum 77-62 and the attached draft of the Annual Report for 1977.

The last portion of the discussion under the heading Nonprofit Corporation Law on page 1611 was revised to read:

The Assembly Select Committee is preparing legislation for introduction in 1978. The Commission is advised that the Select Committee plans to adopt the Commission's basic recommendation that a new nonprofit corporation law be enacted that is independent and is substantially complete in itself and that the Select Committee has drawn from other aspects of the Commission's 1976 recommendation in preparing its proposals. The Commission is concerned that the presentation of different bills recommended by the Commission and the Select Committee might require legislative committees to devote so much time to hearing the bills that the Legislature would be unable to pass any legislation at all in 1978 on this subject.

On page 1612, the introductory portion of the last paragraph was revised to read:

The following amendments were made to this bill at the suggestion of the Assembly Judiciary Committee:

The topic "eminent domain" on page 1625 should be moved to the active studies since a recommendation relating to this topic will be submitted to the 1978 session.

Concern was expressed that the Annual Report contains unnecessary material; it was suggested that the listing of past recommendations and the listing of publications in the Annual Report might be eliminated or be published in abbreviated form. The suggestion was not adopted, but

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the staff plans to review the material included in the Annual Report and to submit suggestions for possible elimination of portions of the Annual Report when the Annual Report for 1978 is presented for approval for printing in October 1978. The staff suggestions will take into consideration the legislative action on the Commission's proposal (to be submitted to the 1978 Legislature) that the statute governing the Commission be amended to avoid the need to continue on the agenda of topics those topics on which legislation recommended by the Commission has been enacted.

The Commission considered Memorandum 77-69 and approved the attached Report on Statutes Repealed by Implication or Held Unconstitutional for inclusion in the Annual Report.

Members of the Commission submitted copies of the draft of the Annual Report on which suggested editorial changes were marked. These suggested changes should be considered by the staff when the Annual Report is revised prior to sending it to the printer.

New Topics

The Commission considered Memorandum 77-64 relating to suggested topics for Commission study. The Commission decided to request authority to study the following topics:

(1) Whether the law relating to community and separate property should be revised, particularly with relation to the problems of the community or separate nature of money loaned and installment purchases, the equal management and control of community property, and the use of separate property to satisfy community obligations.

(2) Whether the law relating to dismissal of actions for lack of prosecution should be revised.

(3) Whether the quiet title statutes should be revised.

The Commission directed the staff to bring back the suggested topic of statutory construction at a time when the statutes have been computerized and the topic is more nearly ripe for study. The Commission also directed the staff to forward to the Uniform Law Commission the suggestion for a reciprocal enforcement of visitation rights statute.

Among the topics already within current Commission authority, the Commission decided to review the following:

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(1) Anti-deficiency statutes should be reviewed after work on the enforcement of judgments statute is completed.

(2) The new bankruptcy act, when enacted, should be reviewed as part of the enforcement of judgments study.

(3) The decedent's hearsay exception should be reviewed at the time of the Commission's overall review of experience under the Evidence Code.

Schedule for Work on Topics

The following schedule for work on topics was approved with the understanding that it may require revision if new topics are authorized for study or if legislative committees indicate a desire that different priorities be established by the Commission.

POSSIBLE RECOMMENDATIONS FOR 1979 LEGISLATIVE SESSION

- (1) Guardianship-conservatorship revision
- (2) Comprehensive statute on enforcement of judgments
- (3) Retroactivity of exemptions from execution
- (4) Homestead exemption
- (5) General assignments for benefit of creditors
- (6) Selected aspects of eminent domain law

POSSIBLE RECOMMENDATIONS FOR 1980 LEGISLATIVE SESSION

- (1) Comprehensive statute on enforcement of judgments if not completed for 1979
- (2) Revisions of Evidence Code
- (3) Adoption and child custody
- (4) Selected aspects of inverse condemnation law

POSSIBLE RECOMMENDATIONS FOR 1981 LEGISLATIVE SESSION

- (1) Class actions
- (2) Marketable Title Act and related matters
- (3) Discovery in civil cases

The Commission also discussed the priorities for the meetings to be held from November 1977 to March 1978. It was agreed that the guardianship-conservatorship revision should be given a priority with a view to approving at the February 1978 meeting a tentative recommendation for distribution for comment. The enforcement of judgments study should be given a priority with a view to approving at the March 1978 meeting a tentative recommendation for distribution for comment. A top priority

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at the November 1977 meeting should be given to the recommendations to the 1978 Legislature. Other topics should be worked into the schedule if staff resources and meeting time permit.

Research Contract With Garrett Elmore

The Commission considered Memorandum 77-70. The Commission approved a contract with Garrett Elmore as an expert consultant to prepare a background study on the needed revisions of Chapter 2a (commencing with Section 1435.1) of Division 4 of the Probate Code, relating to homestead property and community property. The consultant's compensation for the background study to be prepared pursuant to this contract is to be \$1,500, to be paid when the study is delivered to the Commission's Executive Secretary. The Executive Secretary was directed to execute the contract on behalf of the Commission.

The consultant is to review the various proposals relating to Chapter 2a that the State Bar Committee on Guardianships and Conservatorships has had under consideration during the last few years. These proposals were designed to specify how the equal management of community property rule is to be applied when one or both of the spouses is incompetent and how the requirement of joinder in conveyances can be satisfied when one or both of the spouses is incompetent. In addition, the consultant is to review the existing procedure under Chapter 2a, which is thought by some to be too complex. The research study is to be presented in a report that consists of a draft statute with explanatory comments, together with such additional explanatory material as the consultant believes will be helpful to the Commission.

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STUDY 30.300 - GUARDIANSHIP-CONSERVATORSHIP

The Commission considered Memorandum 77-68 relating to court supervision of actions taken by a guardian or conservator of the estate. The Commission was of the view that the supervision required should be the same in guardianship and conservatorship proceedings, and that therefore one set of provisions applicable both to guardianship and conservatorship should be adopted. The Commission discussed the merits of existing guardianship law (Prob. Code §§ 1500-1561) which requires specific court approval of most actions, and of a plan analogous to the Independent Administration of Estates Act (Prob. Code §§ 591-591.7) which divides powers into three categories: (1) those requiring specific court approval, (2) those exercisable without court approval, and (3) those which require notice of the proposed action with an opportunity for interested persons to object. No support was voiced for the Uniform Probate Code scheme (Sections 5-424 and 5-425) which gives a conservator broad powers exercisable without notice and without court authorization or confirmation.

The Commission decided to seek policy guidance from the State Bar Subcommittee on Guardianship and Conservatorship before determining which course to follow. The Commission directed the Executive Secretary to correspond directly to the individual members of the subcommittee to obtain the most expeditious responses. Their views should be requested on the following questions:

1. What degree of court supervision should be required, given the range of choice between existing guardianship law (maximum supervision) and the Uniform Probate Code (minimum supervision)?
2. Is there merit in developing for guardianship-conservatorship law a scheme analogous to the Independent Administration of Estates Act, with powers divided into the three categories listed above?
3. Is there any basis for requiring either greater or lesser court supervision in guardianship proceedings than in conservatorship proceedings?
4. Would a scheme be sound which gives an institutional guardian or conservator greater latitude to act without court approval than a presumably less experienced individual guardian or conservator?

5. Should there be explicit authority for the court to confirm past acts of a guardian or conservator who has acted without obtaining advance court approval where advance approval is required by statute? See generally *Place v. Trent*, 27 Cal. App.3d 526, 530, 103 Cal. Rptr. 841, 843 (1972).

6. Should the conservatorship provision which insulates a conservator against claims based on any act authorized by the court unless the authorization was obtained by fraud, conspiracy, or misrepresentation (Prob. Code § 2103; *Conservatorship of Harvey*, 3 Cal.3d 646, 651-52, 477 P.2d 742, 744-45, 91 Cal. Rptr. 510, 512-13 (1970)), be broadened to apply also to guardianships? See also Prob. Code §§ 1539, 1557.2, 1593, 1602, 1631.

The Commission then resumed consideration of the staff draft of proposed new Division 4 of the Probate Code (attached to the First Supplement to Memorandum 77-54) at proposed Section 2600, having considered the earlier sections at the September meeting. The Commission made the following decisions:

§ 2614. Objections to appraisals

The reference in subdivision (b) of proposed Section 2614 to "Section 1200" should be changed to "Chapter 3 (commencing with Section 1460) of Part 1."

§§ 2620-2625. (accounts)

The Commission approved the staff recommendation to add to Article 3 (commencing with Section 2620) of Chapter 7 of Part 4 a section reading substantially as follows:

2621.5. The ward or conservatee, any relative or friend of the ward or conservatee, or any creditor or other person interested in the estate may file written objections under oath to the account of the guardian or conservator, stating the items of the account to which objection is made and the basis for the objection.

Comment. Section 2621.5 is new. No comparable provision was contained in the former guardianship or conservatorship statute, but Section 2621.5 appears to codify the former practice. See W. Johnstone & G. Zillgitt, *California Conservatorships* § 6.42, at 253 (Cal. Cont. Ed. Bar 1968).

The staff was directed to consider whether a similar provision for making objections should be applied to other types of hearings in guardianship and conservatorship proceedings.

Proposed Section 2625 (termination of proceeding upon exhaustion of estate) should be revised substantially as follows:

2625. If it appears upon settlement of any account that the estate has been entirely exhausted through expenditures or disbursements which are approved by the court, the court, upon settlement of the account, ~~shall~~ shall, unless good cause appears to the contrary, order the proceeding terminated and the guardian or conservator forthwith discharged.

§ 2643. Account of dead or incompetent guardian or conservator

Some concern was voiced for the situation where the guardian or conservator dies, the account is presented by the executor or administrator of the deceased guardian or conservator, and it appears that the deceased guardian or conservator should be surcharged. There may be a problem in presenting the claim for payment from the estate because of the short time period for presenting such claims. See Prob. Code §§ 700, 707; DeMeo, Creditors' Claims, in 1 California Decedent Estate Administration §§ 13.6, 13.11-13.12, at 465, 468-69 (Cal. Cont. Ed. Bar 1971). The staff was requested to give further consideration to this.

§ 2650. Causes for removal

The reference in subdivision (1) of proposed Section 2650 to appointment of a guardian "by will or by deed" should be revised to refer to appointment "by will or by signed writing" to correspond to the changes that have been made to proposed Sections 1500 and 1501.

§ 2700. Request for special notice

A new paragraph (2) should be added to subdivision (a) of proposed Section 2700, which lists the matters of which special notice may be requested, as follows:

(2) Petitions for transfer of the proceeding to another county.

The remaining paragraphs of subdivision (a) should be renumbered accordingly.

§ 2701. Modification or withdrawal of request; new request

Subdivision (a) of proposed Section 2701 should be revised as follows:

2701. (a) A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request and is deemed to be withdrawn at a date three years from the date it was ~~erved~~ filed.

(b)

§ 2703. Proof of service

The Commission had some concern about the meaning and effect of the last sentence of subdivision (b) of proposed Section 2703 ("[w]hen the order becomes final, it is conclusive upon all persons"). Does the sentence mean that, when the court's finding that notice has been regularly given becomes final, such finding is conclusive on all persons? If so, the sentence should be redrawn to make that clear. The staff was requested to determine whether the sentence has been construed and to report back to the Commission.

§ 2750. Appealable orders

The Commission was concerned that failure to appeal from an appealable order might give the order greater conclusive effect than it would have had if not appealable. For example, would failure to appeal from an order settling an intermediate account preclude later inquiry into the correctness of the account? See generally W. Johnstone & G. Zillgitt, California Conservatorships § 2.19, at 39 (Cal. Cont. Ed. Bar 1968). The staff was requested to do further research into this question and to report back to the Commission.

The Commission expressed some concern about the effect of subdivision (f) of proposed Section 2750, which makes appealable an order refusing to direct or allow payment of an attorney's fee. However, the Commission noted that such an order is appealable in the administration of decedent's estates (Prob. Code § 1240), and the Commission determined not to revise the staff draft of subdivision (f) for the time being.

§ 2751. Stay

The general rule of proposed Section 2751 (appeal stays operation and effect of judgment, order, or decree) appears to conflict with Section 917.7 of the Code of Civil Procedure in child custody matters

(appeal does not stay judgment or order which awards, changes, or affects child custody). The staff was requested to give further consideration to this and to resolve the conflict, if any.

The last sentence of subdivision (b) of proposed Section 2751 was revised as follows:

(b) . . . All acts of the guardian or conservator, or temporary guardian or temporary conservator, pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal.

§§ 2800-2806. (transfer of proceedings out of state)

The Commission had reservations about the procedure established under proposed Sections 2800-2806 (Sections 1603 and 2051-2055 of existing law) for transfer of a California guardianship or conservatorship proceeding to another state. Since there must already be a proceeding pending in the foreign state (see proposed Section 2802(f) and existing Section 2052(6)), it appears that this is really a transfer of assets and not a transfer of the proceeding. See W. Johnstone & G. Zillgitt, California Conservatorships § 2.34, at 49 (Cal. Cont. Ed. Bar 1968). Moreover, there is a question whether venue may properly be changed to a court having a different jurisdiction from the transferring court. See 77 Am. Jur.2d Venue § 49 (1975). The staff was requested to give these provisions further consideration.

PART 5. UNIFORM VETERANS' GUARDIANSHIP ACT

§ 2903. Petition; filing; contents

Since existing Probate Code Sections 1663 and 1664 (involuntary commitment to Veterans' Administration hospital) have not been continued in the staff draft in view of the application of the Lanterman-Petris-Short Act to involuntary commitments, the provisions of the staff draft of the Uniform Veterans' Guardianship Act deal with the management of property solely. Subdivision (e) of proposed Section 2903 is therefore superfluous, and should be deleted:

~~(e) In appointing a guardian of the person of a minor (other than a minor who is or has been married) under this section, the court is governed by Section 4600 of the Civil Code.~~

§ 2917. Inconsistent laws; application of laws relating to guardians and wards or conservators and conservatees

Subdivision (b) of proposed Section 2917 should be revised as follows:

(b) In the case of a minor who is ~~or~~ has been married or whose marriage has been dissolved, or an adult, a conservator instead of a guardian shall be appointed under this part and references in this part to the guardian refer to such conservator and references to the ward refer to the conservatee.

This change is to conform to the revisions made to proposed Sections 1516 (guardianship) and 1800 (conservatorship).

PART 6. TRANSACTIONS NOT REQUIRING GUARDIANSHIP OR CONSERVATORSHIP

§§ 3100-3113. (small estates of minors)

The Commission determined to increase the upper limit for the application of proposed Sections 3100 to 3102 from \$2,000 (value of money to be paid and value of guardianship estate) and \$2,500 (value of minor's total estate), respectively, to \$5,000, and to increase the lower limit for the application of proposed Sections 3110 to 3113 from \$2,000 to \$5,000. The staff should review these sections to determine whether the drafting may be simplified in view of these changes.

The Commission also considered the possibility of increasing the \$20,000 upper limit for the application of proposed Sections 3110 to 3113 but requested the staff to furnish some history concerning the adoption of that figure by the Legislature before making a decision.

The Commission also requested the staff to give consideration to adding a provision to proposed Section 3111 to exclude from the computation of the \$20,000 upper limit any property which has been left to the minor subject to a testamentary guardianship.

§ 3210. Persons having right to compromise claim of minor

The Commission requested the staff to investigate whether a covenant not to enforce judgment should be added to those things which a parent or guardian may execute on behalf of a minor under proposed Sections 3210 and 3212 (compromise or covenant not to sue). See generally

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Code Civ. Proc. § 877; 4 B. Witkin, Summary of California Law, Torts
§ 39, at 2338 (8th ed. 1974).

The Commission also requested the staff to consider whether, in the situation where the minor's parents are living separate and apart, the custodial parent should be required to give notice to the noncustodial parent before court approval of a minor's compromise is obtained.

§§ 3300-3314. (payment or delivery of property pursuant to compromise or judgment for minor or incompetent)

The Commission requested the staff to consider whether the cutoff figures of \$2,000 and \$10,000 for the application of the various provisions in proposed Sections 3300 to 3314 should be increased to \$5,000 and \$20,000, respectively, as in proposed Sections 3100 to 3113.

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STUDY 39.160 - ATTACHMENT (SECTION 481.050--CHOSE IN ACTION)

The Commission considered Memorandum 77-48 and approved the proposal to amend Section 481.050, which defines "chose in action" for purposes of the Attachment Law, by deleting the reference to "an interest in or a claim under an insurance policy." This amendment should be combined with the Recommendation Relating to the Attachment of Property Subject to Security Interest. A reference to Shaffer v. Heitner, 97 S.Ct. 2569 (1977), the recent opinion pertaining to quasi in rem jurisdiction, should be added to the Comment to Section 481.050.

STUDY 39.160 - ATTACHMENT (PROPERTY SUBJECT TO SECURITY INTEREST)

The Commission considered Memorandums 77-53 and 77-67 which discussed comments received on the Tentative Recommendation Relating to Attachment of Property Subject to Security Interest. The recommendation should be revised for consideration at the November meeting in accordance with the following decisions:

The provisions to be added to Section 488.440 pertaining to notice of levy to the account debtor in certain circumstances and release by the secured party of uncollected payments and the delivery of negotiable instruments and chattel paper to the levying officer were approved as set forth on page 2 of Memorandum 77-53. These provisions may be subject to further revision in light of the decision to adopt the principle suggested in the letter from Mr. Del Fuller (attached to Memorandum 77-67 as Exhibit 2) that, if the account debtor or obligor is making payments to the secured party, he should continue to make such payments regardless of whether the security interest is technically perfected, and that, if payments are being made to the defendant, payments should be made to the levying officer after the levy. A procedure will have to be devised to permit the attaching plaintiff to obtain a determination that the security interest was not perfected at the time the levy took place under the writ of attachment.

The Commission decided to defer consideration of levy upon pledged securities until the UCC Section of the State Bar Business Law Committee has considered the problem.

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STUDY 39.160 - ATTACHMENT (USE OF COURT COMMISSIONERS)

The Commission considered Memorandum 77-65 and the attached staff draft of the recommendation relating to use of court commissioners under the attachment law. The Commission approved the draft to print, subject to editorial changes submitted by the Commissioners to the staff.

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STUDY 63.70 - EVIDENCE (MARKET VALUE OF PROPERTY)

The Commission considered Memorandum 77-66 and the attached staff draft of the recommendation relating to evidence of market value of property. The Commission deleted the portions of the recommendation that would have made admissible evidence of offers to purchase the subject property. The Commission also, by a 4-2 vote, added to the Comment to Section 822(d) the language set out on page 4 of the memorandum relating to adjustments made in sales of comparable property used as a basis for an opinion. The reference to inequity was deleted from page 3 of the preliminary part, and the Comment to Section 812 was expanded by a cross-reference to the statutory listing in the Comment to Section 811. As so revised, and subject to the editorial comments of the Commissioners submitted to the staff, the recommendation was approved to print.

STUDY 63.70 - EVIDENCE OF MARKET VALUE (RESULTS OF
QUESTIONNAIRE CONCERNING ADMISSIBILITY OF SALES
TO PUBLIC AGENCIES)

The Commission considered Memorandum 77-58 and the attached questionnaire responses relating to admissibility of sales to public agencies along with an additional questionnaire response distributed at the meeting and attached as an exhibit hereto. The Commission determined to recommend no change in the law on this matter. The staff should inform Assemblyman Calvo of this decision.

STUDY 63.70

EXHIBIT

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QUESTIONNAIRE

PLEASE RETURN COMPLETED QUESTIONNAIRE TO: California Law Revision Commission, Stanford Law School, Stanford, CA 94305.

Your name RALPH H. PRINCE, City Attorney
Address City Hall, Room 668
300 North "D" Street
San Bernardino, CA 92418

1. I generally represent (check the one that best describes your practice)

Condemning agencies
Private property owners _____
Both condemning agencies and private property owners _____
Other (describe briefly) _____

2. Do you believe that any change should be made in subdivision (a) of Section 822 of the Evidence Code? (Answer "Yes" or "No") No
3. Please elaborate on your answer to question 2.

If you answered question 2 "No," please state your reasons for your answer below. Also, assuming that sales to condemnors are to be made admissible, state any limitations to such admissibility you recommend and the supporting reasons for your recommendations in that regard.

If you answered question 2 "Yes," please state below the specific change you recommend and the reasons you recommend such change. If your recommended change includes limitations on the admissibility of sales to condemnors, state the supporting reasons for your recommendations in that regard.

You may use the back of this sheet and additional sheets for your answer if necessary.

A public agency should only have to pay the fair market value of property as determined by a fair reference to private sector sales. Consideration of "comparable sales" of public sector acquisitions could result in some price distortions since the purchase price will, in part, be determined with reference to the time and cost of a court action if a settlement is not obtained.

If sales to condemnors are to be admitted into evidence, such sales should be limited to acquisitions made without the filing of an eminent domain action. Such a limitation would prohibit comparison of sales which are in effect a settlement of a lawsuit.

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STUDY 63.80 - EVIDENCE (PSYCHOTHERAPIST-PATIENT PRIVILEGE)

Decisions With Respect to Tentative Recommendation

The Commission considered Memorandum 77-59 and the attached tentative recommendation. The following decisions were made with respect to the tentative recommendation.

The suggested staff revisions listed as items (1) and (2) at the bottom of page 2 and the top of page 3 of the memorandum were not approved. Instead, the Commission determined that the provisions proposed to be revised by the staff should be deleted from the recommendation and be replaced by a statement in substance that the expansion of the scope of the privilege will promote the patient's freedom of choice among the different types of psychotherapists who provide psychotherapy. Under existing law, equality of treatment of patients is precluded by the limitations on the types of psychotherapists included within the scope of the privilege.

The last sentence of footnote 6 was revised to read:

The Commission has consulted the proposed rules and notes in preparing this recommendation.

The proposal to extend the privilege to patients of psychologists employed by nonprofit community agencies (as set out in Exhibit 11 attached to the memorandum) was approved.

The staff proposal to define psychiatric social workers as set out at the bottom of page 5 and the top of page 6 of the memorandum and to revise the Comment as set out on page 6 of the memorandum was approved.

The phrase "group and family therapy" is to be used uniformly in the text of the preliminary portion of the recommendation and in the Comments.

The following sentence is to be added to the Comment to Section 1012:

The waiver of the privilege by one of the patients does not affect the right of any other patient in group or family therapy to claim the privilege with respect to that patient's confidential communications. See Evid. Code § 912(b).

Approval to Print and Submission to 1978 Legislature

The tentative recommendation, after it has been revised to incorporate the decisions noted above and to take into consideration suggested editorial revisions noted on copies turned in by Commissioners, is approved for printing and for submission to the 1978 Legislature.

Decisions With Respect to Related Matters

Tarasoff rule. The staff should forward the letters or extracts thereof relating to this rule to Assemblyman Knox for his consideration in connection with the tort liability study.

Other matters. Various other matters are to be considered in connection with the general study of the Evidence Code. These matters include:

(1) Whether a "trainee" is the presence of a third person other than one permitted under Section 1012. See pages 4 and 5 of memorandum.

(2) Right of lawyer, doctor, or psychotherapist to claim the privilege when one of several joint clients or patients instructs him to disclose the privileged communication. See memorandum at pages 7 and 8.

(3) The patient-litigant exception. See memorandum at pages 9-10.

(4) Waiver of the privilege by submission of insurance claim.

See memorandum at page 10.

Minutes

October 6 and 7, 1977

STUDY 79 - PAROL EVIDENCE RULE

The Commission considered Memorandum 77-60, analyzing the comments on the Commission's tentative recommendation relating to the parol evidence rule, along with a letter from Judge Zack distributed at the meeting and attached as an exhibit hereto. The Commission made the following decisions with respect to the tentative recommendation:

Preliminary part. The preliminary part of the recommendation should be revised as set out on page 2 of the memorandum to make clear that the UCC formulation of the parol evidence rule serves as a basis for the Commission's recommendation because it is close to existing law.

Civil Code Sections 1625 and 1639. These sections should not be amended. The Comment to Code of Civil Procedure Section 1856 should note that these sections are modified by Section 1856.

Court and jury roles. The provisions of Code of Civil Procedure Section 1856 relating to the role of the court should be segregated from the substance of the section in a separate subdivision and discussed in the Comment. The staff was directed to prepare a memorandum concerning the types of decisions to be made in a contract interpretation case, and the allocation of the decisions between judge and jury.

Evidence of consistent additional terms. For clarity, subdivision (b)(3) of Section 1856 should be made a separate subdivision. The portion of subdivision (b)(3) relating to terms that would "certainly" have been included in the writing should be deleted from the subdivision; the Comment should note that one way to show the completeness and exclusivity of the agreement is by showing that the offered term would certainly have been included if agreed upon.

Comment. The Comment to Section 1856 should be revised to more thoroughly explain the operation of the parol evidence rule. Examples should be used, if possible drawn from actual cases. The Comment should also indicate the interrelation of the parol evidence rule and the rule of interpretation that the words of an agreement may not be construed to give them a meaning of which they are not reasonably susceptible. The Comment should also include the explanatory matter indicated in the memorandum on pages 4, 5, and 8.

Minutes
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The Commission also requested the staff to prepare a memorandum analyzing the effect of course of performance on the interpretation of contracts under general California law.

APPROVED

Date

Chairman

Executive Secretary



EXHIBIT 1

CHAMBERS OF

The Superior Court

LOS ANGELES, CALIFORNIA 90012

ERNEST J. ZACK, JUDGE

TELEPHONE
(213) 628-3414

September 27, 1977

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Attention: Mr. John H. DeMouilly
Executive Secretary

Gentlemen:

May I thank you for your invitation to attend the Commission's meeting on October 6th or 7th. Unfortunately, my own commitments will not permit me to do so. However, unsatisfactory as a writing may be as a substitute for oral personal give and take, perhaps this letter will serve as a substitute to convey some of the things I might have said had I been able to attend.

I have reviewed my letter of August 23rd and the material you forwarded to me. Some of the changes in the proposed draft which I suggested in my letter might be considered technical in nature. It is therefore understandable that they might not have persuaded any changes in the Proposed Draft. However, there is one area in which I believe I am misunderstood. This area is substantive and central to the matter of having a Parol Evidence Rule in any sense of the term, and to the purposes of attempting to codify such a rule. It, accordingly, deserves the following elaboration:

1. The purpose of the submitted draft, as indicated by the Commission's published material on the subject, is substantially to bring the statutes on the Parol Evidence Rule in line with the present case law.

2. A Parol Evidence Rule is one which, if parties reach a certain type of written agreement (herein referred to as "integrated"), they may not (under some circumstances, at least) later use evidence to vary or contradict the terms of that agreement. The number and vigor of the dissents on this subject in recent Supreme Court decisions have cast doubt on the extent to which this may be done under the present Parol Evidence Rule in California.

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3. In order to clarify the law the Commission proposes to strike the following language from the existing section 1856 of the Code of Civil Procedure (and to recommend the enactment of certain other language for this section):

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:"

As is evident, the quoted language is not directly concerned with the effect of the proffered evidence on the agreement. Once an integrated agreement is reached, no evidence outside the terms thereof can be used (there were exceptions, of course, in the case of mistake, imperfection, invalidity, ambiguity, illegality or fraud) whatever its effect.

4. Masterson v. Sine, 68 C.2d 222, permitted the use of evidence not falling within the quoted portion of the existing section 1856. The evidence was held usable from two separate standpoints: (1) It was ruled usable directly to contradict a presumption of law which attended a contractual document; (2) it was permitted as evidence of a collateral agreement not at variance with the language expressly used in the instrument. Accordingly, the test of use of parol evidence (aside from the other exceptions under the old rule) under Masterson became, not whether an integrated agreement (judged by its four corners) existed, but whether the parol evidence directly tended to vary or contradict the words used. Viewed by the Supreme Court as a collateral agreement, the evidence in that case did not contradict the actual words used. The test of usability was not precisely formulated from standpoint (2) since apparently the majority felt that under the "natural" test of the Restatement of Contracts 2d, or the "certain" test of the Uniform Commercial Code Commissioner's notes, the evidence was admissible.

5. The rationale of Masterson, throughout the opinion, was that from either standpoint the parol evidence (if it met other evidentiary tests not relevant here) could be admitted if it did not contradict the words in the instrument. (68 C.2d 222, 227.)

6. The Commission's proposed draft of section 1856 has attempted to codify this rationale, but it obviously has not done so. It forbids contradiction of the instrument with just three types of evidence: (a) Evidence of "negotiations or stipulations