

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

October 28, 1977

<u>Time</u>	<u>Place</u>
November 3 - 7:00 p.m. - 10:00 p.m.	Holiday Inn
November 4 - 9:00 a.m. - 5:00 p.m.	Civic Center
November 5 - 9:00 a.m. - 12:00 noon	50 Eighth Street San Francisco 94118 (415) 626-6103

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

November 3-5, 1977

1. Minutes of October 6-7, 1977, Meeting (sent 10/24/77)
2. Administrative Matters
Annual Report--New Topics Portion
Memorandum 77-71 (sent 10/25/77)
Draft of Portion of Annual Report (attached to Memorandum)
3. Approval of Recommendations for Printing
Study 79 - Parol Evidence Rule
Memorandum 77-72 (sent 10/25/77)
Draft of Recommendation (attached to Memorandum)
4. Study 39.160 - Attachment (Property Subject to Security Interest)
Memorandum 77-73 (sent 10/14/77)
5. Study 39.200 - Enforcement of Judgments
Redemption From Execution Sales
Memorandum 77-40 (sent 7/14/77, another copy sent 10/14/77)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 77-40 and Memorandum 77-55
(sent 8/31/77; another copy sent 10/14/77)

Exemptions
NOT considered Memorandum 77-55 (sent 8/2/77, another copy sent 10/14/77)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 77-40 and Memorandum 77-55
(sent 8/31/77; another copy sent 10/14/77)

Levy Procedure

Memorandum 77-56 (sent 8/8/77; another copy sent 10/14/77)
Draft Statute (attached to Memorandum)

Miscellaneous Policy Problems

Memorandum 77-57 (sent 8/24/77; another copy sent 10/14/77)

Third-Party Claims

Memorandum 77-74 (sent 10/26/77)
Draft Statute (attached to Memorandum)

6. Study 30.300 - Guardianship-Conservatorship Revisions

Power of Attorney Which Will Survive Principal's Incompetency

Memorandum 77-77 (sent 10/26/77)

Independent Exercise of Powers

Memorandum 77-76 (sent 10/21/77)

Not considered —

CALIFORNIA CIVILIANS' COMMISSION ON COURT REFORM

Extract from Report "Righting the Liability Balance" (September 1978). On page 162 of its report, the Commission recommends:

The Legislature should create a State Commission on Reform of the California Court System, pursuant to the suggestions of a high-level planning group assembled to prepare a plan for establishment of the Commission. However, in no event should judges and lawyers make up a majority of the Commission.

A portion of the text justifying this recommendation states:

If the past two decades are any indication of the probability of action in the next two, then it appears unlikely to us that the legal and judicial professions, and the legislative and executive branches, can be counted upon to supply real Court reform unless their degree of interest and their dedication to persistent implementation change in the near future. We believe, therefore, that a new driving force for Court reform needs to be found, preferably to supply leadership, but at the very least to supply expertise, long-range planning, and continued and intense pressure for actual improvement, rather than just further discussion.

We believe that these questions need further attention by a body specifically created for that purpose. The Constitution Revision Commission and the Law Revision Commission in California are good examples of bodies created for specific purposes where progress was slow, and where a great deal has since been accomplished.

SCHEDULE FOR FUTURE MEETINGS

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

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
NOVEMBER 3 AND 4, 1977
San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on November 3 and 4, 1977.

Present: Howard R. Williams, Vice Chairman, November 4
Beatrice P. Lawson
Jean C. Love, November 4
Thomas E. Stanton, Jr., November 3
Laurence N. Walker

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

Members of Staff Present:

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

Consultant Present:

Garrett H. Elmore, Guardianship-Conservatorship
November 4

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ADMINISTRATIVE MATTERS

Minutes of October Meeting Approved as Corrected

The Minutes of the meeting of October 6 and 7, 1977, were corrected as follows:

On page 10, the text of proposed Section 2625 (termination of proceeding upon exhaustion of estate) was deleted, and the following was inserted in its place:

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 order the proceeding terminated and the guardian or conservator forthwith ~~discharged~~ discharged unless the court determines that there is reason to continue the proceeding.

As thus corrected, the Minutes of the meeting of October 6 and 7, 1977, were approved.

Annual Report (New Topics Portion)

The Commission considered Memorandum 77-71, setting out a description of the new topics that the Commission has decided to request authority to study, to be included in the Annual Report. The Commission approved the description for printing.

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STUDY 30.300 - GUARDIANSHIP-CONSERVATORSHIP

The Commission considered Memorandum 77-77 and the State Bar's draft of a proposed section which would authorize a principal to execute a power of attorney which would remain effective notwithstanding the principal's later incompetency. The Commission was concerned that this device, which may be used as an alternative to conservatorship or guardianship of an adult, lacks the procedural safeguards of the Probate Code (court supervision, notice to interested persons, periodic accounting, etc.), and is not limited according to the size of the estate. The Commission was of the view that, although an agent is a fiduciary (1 B. Witkin, Summary of California Law Agency and Employment § 84, at 704 (8th ed. 1973)), there should be some requirement of disclosure by the attorney in fact of his or her actions and a provision giving interested persons standing to challenge the actions in a judicial proceeding.

There is also the important problem raised by the attorney in fact changing the testamentary disposition of the incompetent principal's estate by disposing of property specifically devised or bequeathed. In the context of guardianship, it has been held that sale of property by the guardian does not work an ademption of the specific gift. Estate of Mason, 62 Cal.2d 213, 42 Cal. Rptr. 13 (1965). The Commission was of the view that this problem should be dealt with in the proposed statute.

Third is the problem of determining when incompetency occurs in the absence of a court adjudication. Thus it will remain open to question whether the power of attorney was executed by the principal while competent, and whether a purported revocation occurred while the principal was competent. The Commission was of the view that the title companies might have some pertinent views on this question.

The Commission determined not to include a provision comparable to the State Bar's draft in the guardianship-conservatorship recommendation at this time. The Commission requested the Executive Secretary to communicate these concerns to the State Bar.

The Commission then considered Memorandum 77-76 concerning court supervision over the exercise of powers by a guardian or conservator of

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the estate. There was handed out at the meeting copies of a letter from Arne S. Lindgren in response to the Commission's letter request for the views of the members of the State Bar Subcommittee on Guardianship and Counservation. A copy of the letter is attached to these Minutes. The Commission also heard an oral background report from the consultant, Garrett Elmore. The Commission determined to take no further action pending receipt of responses from the other members of the State Bar Subcommittee on Guardianship and Conservatorship.

Study 30.300

EXHIBIT 1

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PAUL R. WATKINS (1958-1973)

DANA LATHAM (1958-1974)

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October 31, 1977

Mr. John Henry DeMouilly
Executive Secretary
California Law
Revision Commission
Stanford Law School
Stanford, Calif. 94305

Dear Mr. DeMouilly:

Thank you for your letter of October 21, 1977.
My responses to your questions are as follows:

1. I agree with the staff approach to have consolidated provisions relating to the powers and duties as to both guardians and conservators.

2. Although I would be in general agreement to allow a guardian or conservator to exercise certain powers without court approval, subject to a court limiting those powers, I have the following thoughts for your consideration:

If the court is given the authority to limit the rights I am fearful that the court will opt in every instance to limit those rights and to simply throw the procedure back to its current method whereby the conservator or guardian would have to apply for court authority in every instance prior to making a move. I think also the "prior notice" to specified persons may not be appropriate in the guardianship and conservatorship area since in the probate area the personal representative is aware of those persons who could be affected by the actions to be taken; in the conservatorship and guardianship areas, the representative does not really know who might be affected since the conservatee or ward may have a will which disposes of his property in a fashion unrelated to the family members who presumably would be the persons to receive the notice that you plan to adopt. I feel certain powers should automatically be granted without court limitation-such as the power to buy and sell securities.

Mr. John Henry DeMouilly
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I think the ability to lease property within certain limitations should be authorized without the necessity of prior court approval. Investments outside fairly conservative areas should be approached, in my judgment, very carefully, particularly where the conservator or guardian is not a financial institution.

3. I am not in agreement that there should be a distinction between a financial institution's acting as conservators or guardians as contrasted to individuals. Since I am not in favor of that approach I do not believe it can be expected that we can cut even a finger line to define who is a "skilled" representative. Also, I think you will find that even if a corporate representative is not required to obtain court approval that probably they will anyway as an "insurance policy" against subsequent attack. I think you may well find that even in the probate area where a corporate fiduciary is authorized to take certain action under the Independent Administration of Estates Act that, rather than giving the prior notice, they are still opting to get formal court orders.

4. I do believe there should be some authority in The Act to allow a conservator or guardian to be able to obtain after the fact approval of actions which were taken without prior court approval.

5. I believe the guardianship section should also have the insulation against claims based on any act authorized by the court except where obtained by fraud, conspiracy, or misrepresentation.

6. With respect to adopting the Independent Administration of Estates' approach to guardianships and conservatorships, my concern is that one does not know during the lifetime of the conservatee or ward who is going to be interested in the estate at death. Although now the conservatorship area looks to heirs within the second degree, the actual persons who may benefit upon the death of the conservatee may not be within the classification of those heirs. Consequently, it is my general feeling that the generalized approach of the Independent Administration of Estates Act in the conservatorship-guardianship area may not be workable.

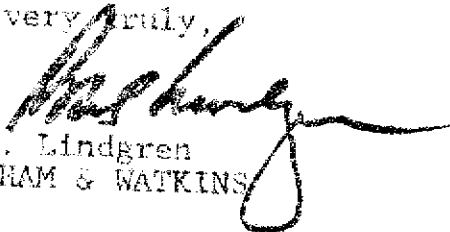
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7. I do believe it will be very useful to have separate treatment for small estates. In the probate area we have for years tried to enlarge the ability to collect assets upon death without court involvement based on affidavit. Although the affidavit approach will not work in the conservatorship-guardianship area, I believe that in smaller estates more flexibility might prove useful and avoid the necessity of court involvement at every turn of the wheel.

Yours very truly,


Arne S. Lindgren
of LATHAM & WATKINS

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STUDY 39.160 - ATTACHMENT (PROPERTY SUBJECT TO
SECURITY INTEREST)

The Commission considered Memorandum 77-73, pertaining to the Tentative Recommendation Relating to Attachment of Property Subject to a Security Interest, and a letter from Mr. Del Fuller which was distributed at the meeting and is attached hereto. The Commission decided to defer consideration of this subject until the State Bar Committee on the Uniform Commercial Code develops its proposals.

Study 39.160

EXHIBIT 1

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October 25, 1977

Mr. Stan Ulrick
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. Ulrick:

I am writing you further as a result in my status as a co-chairman of the State Bar Committee on the Uniform Commercial Code in connection with the proposed statutory amendments regarding Attachments of Property subject to Security Interests.

We understand that the Commission intends to defer action with respect to Section 8317 of the UCC, or any amendment of the California attachment statutes with respect to attachment of interest in securities, until the Commissioners on Uniform State Laws have completed their review of Division 8 of the Code. Our Committee as a whole may be not be adverse to providing for attachment of securities, but believes that any action should be deferred until the Commissioners complete their review of Division 8 of the Code.

Turning to the matter of attachment of property subject to security interests, our Committee has given further consideration to the Commission's proposal and wishes to call the Commission's attention to the following matters:

1. Professor Reisenfelt by letter of October 7 has indicated that the most important point, in his view, is that notice be given to the account debtor not to pay the debtor. Our Committee does not disagree with that statement but is very concerned that the attachment not be the occasion

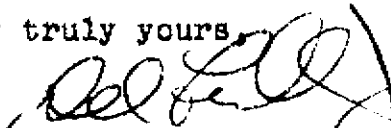
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for encouraging the account debtor to stop payments all together. Consequently, it regards the matter of defining what payments should be made in a clear and unambiguous fashion as critical. Our concern about the references to "perfection" was that debate on that subject could be the occasion for the account debtor halting all payment, and the Committee does not regard that possibility as inconsequential.

2. The Committee has discussed the general subject further and believes that it may be able to contribute additional thoughts as to how the matter of continued payment might be handled. A sub-committee has been appointed for the purpose for circulating into our Committee as a whole its thoughts on the matter. We anticipate that our Committee will forward additional thoughts to the Commission sometime during the month of November and, therefore, request that the Commission defer action until any Committee is able to respond further. Accordingly, we join with Professor Reisenfelt in expressing our hopes that the Commission does not take hasty action.

We very much appreciate your attention and cooperation in this matter.

Very truly yours,


Maurice D. L. Fuller, Jr.

cc: UCC Committee Members

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STUDY 39.200 - ENFORCEMENT OF JUDGMENTS (COMPREHENSIVE STATUTE--
REDEMPTION, LEVY PROCEDURES, MISCELLANEOUS PROBLEMS)

The Commission considered Memorandums 77-40 (redemption from execution and foreclosure sales), 77-56 (writ of execution; levy procedures), 77-57 (miscellaneous policy problems), and part of the First Supplement to Memorandum 77-40 (Professor Stefan A. Riesenfeld's comments on Memorandum 77-40). The Commission made the following decisions:

1. Redemption From Execution and Foreclosure Sales
of Real Property

The Commission decided that, when approved, the Tentative Recommendation Relating to Redemption From Execution and Foreclosure Sales of Real Property should be distributed for comment separately from the Enforcement of Judgments Law. The Commission requested the staff to prepare a background memorandum discussing the different interests and remedies of the parties under existing law and under the proposed law, particularly in a case where a lease is involved. The Commission requested more information on the availability and powers of a receiver in such situations. The staff should also research the extent to which redemption provisions under federal law are implemented by California law and prepare any necessary revisions. The draft recommendation should be revised as follows:

Preliminary Part

The second sentence of footnote 28, on page 8 of the preliminary part, should be revised to read:

Hence, under this proposal, the property could not be sold on execution sooner than 110 days after notice of levy of execution is given to, or an order of sale is served upon, the judgment debtor.

§ 703.515. Right of possession before sale; restraint of or damages for waste

Subdivision (a) of this section should refer to the successor in interest of the judgment debtor as well as the judgment debtor and the tenant of the judgment debtor. The staff should give further consideration to the rights of the judgment debtor during the time between levy and sale of the property.

§ 703.520. Notice of sale

A sentence should be added to the Comment to the effect that the judgment debtor may also advertise the sale. It should be made clear in the Comments to the relevant provisions that the 90-day delay of sale provision does not extend either the duration of a lien on the property or the enforceability of the judgment. The delay of sale provision should not apply to leasehold estates with unexpired terms of less than two years.

§ 703.660. Absolute sales

The Comment should cite Civil Code Section 2903 for the proposition that the property may be redeemed from the lien before sale (equity of redemption). The Comment should also make clear that both the judgment creditor and the judgment debtor may advertise the sale. The second paragraph of the Comment should be revised to provide more information concerning the equitable right to redeem from execution sales.

2. Writ of Execution; Levy Procedures

§ 703.120. Application for writ of execution

Subdivision (c) should be revised to make clear that a writ of execution may not be issued in a county until 90 days after the issuance of a prior writ, unless the prior writ has been returned before the expiration of 90 days.

§ 703.230. Levy on property in private place

A writ providing authority to levy upon property in a private place should be issuable only where the judgment creditor describes with particularity both the property to be levied upon and the place where it is to be found.

§ 703.240. Interest reached by garnishment; garnishee's return

This section was approved.

§ 703.250. Lien of execution

The Comment to this section should note that an execution lien on real property is useful only if the judgment creditor has not obtained a judgment lien.

§ 703.295. Return of writ of execution

The revised version of this section was approved.

§§ 703.310-703.470. Method of levy

Approval of these sections was postponed until the issues involved in the Tentative Recommendation Relating to the Attachment of Property Subject to a Security Interest are resolved.

3. Miscellaneous Policy Problems

Judgment Lien

The judgment lien provision should specifically provide that it is a judgment for the payment of money that provides the basis for the lien. The statute should not refer to orders and decrees since "decree" has no special legal significance and Code of Civil Procedure Section 1007 gives orders for the payment of money the same significance as judgments for purposes of enforcement. The Comment should note that a judgment for money on a claim against an executor or administrator does not provide the basis for a judgment lien, citing Probate Code Section 730 and Estate of Dow, 149 Cal. App.2d 47, 58, 308 P.2d 475 (1957). The reference to Welfare and Institutions Code Section 908(b) in existing Code of Civil Procedure Section 674 should be deleted as unnecessary.

The reference to judgments of small claims courts should be deleted unless the language "judgments of any court of this state" is for some reason inadequate to cover such judgments. The reference to judgments of courts of record of the United States should be restricted to judgments of such courts sitting in California or judgments registered in federal courts in California pursuant to 28 U.S.C. § 1963 (1970).

The duration of the judgment lien should be coextensive with the period of enforceability of the judgment--20 years exclusive of the time when enforcement of the judgment is stayed and when the judgment is stayed on appeal.

The judgment lien should be extended to reach leasehold estates with an unexpired term of not less than two years at the time the lien is created.

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The proceeds of real property subject to liens of equal rank should be prorated. This would change the rule in *Hertweck v. Fearon*, 180 Cal. 71, 179 P. 190 (1919).

The staff should determine whether there are installment judgments of uncertain amount (other than those referred to in Code of Civil Procedure Sections 674.5 and 674.7) and, if there are, a general provision should be drafted to provide for a judgment lien in such cases. This provision should be based on Sections 674.5 (child and spousal support) and 674.7 (certain judgments for personal injury). Where the total amount of an installment judgment is certain, it should be made clear that the judgment may be a lien for the full amount.

Time for Enforcement of Judgments

The Commission approved the staff recommendation that the principle of *Alonso Inv. Corp. v. Doff*, 17 Cal.3d 539, 551 P.2d 1243, 131 Cal. Rptr. 411 (1976), not be incorporated in the Enforcement of Judgments Law. Alonso held that a writ of execution which was issued within the 10-year period of enforceability provided by Code of Civil Procedure Section 681 could be enforced after the expiration of the 10-year period without the need to resort to the revival procedure of Code of Civil Procedure Section 685. Hence, under the Enforcement of Judgments Law, there will be an absolute 20-year period during which judgments may be enforced (excluding the time during which the judgment is stayed on appeal or enforcement is stayed). At the end of the 20-year period, the judgment will, in effect, be discharged.

Relation Back of Liens

The provisions for the creation of liens by levy or service under the various enforcement procedures and the relation back of such liens to the commencement of the first overlapping lien were approved.

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STUDY 70 - PAROL EVIDENCE RULE (APPROVAL OF
RECOMMENDATION FOR PRINTING)

The Commission considered Memorandum 77-72 and the attached draft of the Parol Evidence Rule. The Commission approved the draft for printing, subject to the following changes:

Preliminary portion. The first sentence of the preliminary portion of the recommendation was deleted, and footnote 1 should be moved to the next sentence and should refer only to "related provisions." The phrase "Use of the Uniform Commercial Code provision will also result in minimal disturbance of existing law since" was deleted from page 4 of the preliminary part.

Section 1856. The references to Commercial Code Sections 1205 and 2208 (defining course of dealing, usage of trade, and course of performance) were deleted from subdivision (c). The Comment should state: "It is expected that the courts will look to the definitions in Commercial Code Sections 1205 and 2208 for guidance in interpreting the meaning of the terms 'course of dealing,' 'usage of trade,' and 'course of performance.'"

Comment. The superfluous references to "finality" should be deleted from the discussion of subdivision (b). The reference to the "commercial" context should be deleted from the discussion of subdivision (c).

APPROVED AS SUBMITTED _____

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

Date

Chairman

Executive Secretary