10/16/90

DATE & TIME:	*PLACE:*
• November 29 (Thursday) 1:30 pm - 6:00 pm • November 30 (Friday) 9:00 am - 2:00 pm	• Los Angeles Airport Sheraton Plaza La Reina 6101 West Century Blvd. Los Angeles 90045 (213) 642-1111

NOTE: 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 LATE CHANGES.

REVISED TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Thursday, November 29, 1990

1. MINUTES OF SEPTEMBER 13-14, 1990, COMMISSION MEETING (sent 10/2/90)

2. COMMENTS ON PROBATE TENTATIVE RECOMMENDATIONS FOR 1991 LEGISLATURE

STUDY L-644 - RECOGNITION OF TRUSTEES' POWERS
Memorandum 90-138 (SU) (to be sent)

STUDY L-3046 - RECOGNITION OF AUTHORITY OF AGENT UNDER STATUTORY FORM POWER OF ATTORNEY
Memorandum 90-140 (SU) (to be sent)

STUDY L-3022 - ACCESS TO DECEDENT'S SAFE DEPOSIT BOX
Memorandum 90-142 (RJM) (to be sent)

STUDY L-3034 - GIFTS IN VIEW OF DEATH
Memorandum 90-139 (RJM) (to be sent)

STUDY L-3009 - NONPROBATE TRANSFERS
Memorandum 90-91 (RJM) Repeal of Civil Code § 704 (United States Savings Bonds) (to be sent)

STUDY L-3025 - TOD REGISTRATION FOR VEHICLES AND VESSELS
Memorandum 90-141 (RJM) (to be sent)

3. FINALIZATION OF PROBATE RECOMMENDATIONS FOR 1991 LEGISLATURE

STUDY L - GENERAL 1991 PROBATE BILL
Draft of Miscellaneous Provisions
Memorandum 90-133 (JHD) (to be sent)

STUDY L-1030 - DISPOSITION OF SMALL ESTATE WITHOUT PROBATE
Interrelation with Litigation Involving Decedent Recommendation
Memorandum 90-134 (SU) (to be sent)

4. OTHER PROBATE MATTERS

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY
Comments on Tentative Recommendation
Memorandum 90-135 (RJM) (sent 10/15/90)

STUDY L-619 - STATUTORY WILL
Draft Statute
Memorandum 90-123 (JHD) (sent 10/02/90)

STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE
Draft Statute
Memorandum 90-122 (SU) (to be sent)

Friday, November 30, 1990

5. ADMINISTRATIVE MATTERS

Annual Report For 1990
Memorandum 90-132 (JHD) (to be sent)

Communications from Interested Persons

6. STUDY H-112 - COMMERCIAL REAL PROPERTY LEASES: USE RESTRICTIONS

Revision of Comment
Memorandum 90-110 (NS) (to be sent)

7. ADMINISTRATIVE LAW

STUDY N-100 - ADMINISTRATIVE ADJUDICATION GENERALLY
Obtaining Additional Input at Commission Meetings
Memorandum 90-130 (NS) (to be sent)

STUDY N-105 - ADMINISTRATIVE ADJUDICATION: EFFECT OF ALJ DECISION
Memorandum 90-129 (NS) (sent 10/15/90)

STUDY N-106 - ADMINISTRATIVE ADJUDICATION: EX PARTE COMMUNICATIONS
Consultant's Background Study
Memorandum 90-136 (NS) (to be sent)

8. STUDY H-409 - APPLICATION OF MARKETABLE TITLE ACT TO EXECUTORY INTERESTS

Memorandum 90-131 (SU) (to be sent)

9. STUDY D-327 - BONDS AND UNDERTAKINGS

Limitations on Personal Sureties
Memorandum 90-86 (NS) (to be sent)

§§§

MEETING SCHEDULE

October 1990	Meeting Canceled	
November 1990		
Nov. 29 (Thurs.)	1:30 p.m. - 6:00 p.m.	Los Angeles
Nov. 30 (Fri.)	9:00 a.m. - 2:00 p.m.	
December 1990	No Meeting	
January 1991		
Jan. 10 (Thur.)	1:30 p.m. - 6:00 p.m.	San Jose
Jan. 11 (Fri.)	9:00 a.m. - 2:00 p.m.	
February 1991		
Feb. 21 (Thur.)	1:30 p.m. - 6:00 p.m.	Los Angeles
Feb. 22 (Fri.)	9:00 a.m. - 2:00 p.m.	
March 1991	No Meeting	
April 1991		
Apr. 11 (Thur.)	1:30 p.m. - 6:00 p.m.	Fresno
Apr. 12 (Fri.)	9:00 a.m. - 2:00 p.m.	
May 1991		
May 9 (Thur.)	1:30 p.m. - 6:00 p.m.	Los Angeles
May 10 (Fri.)	9:00 a.m. - 2:00 p.m.	
June 1991		
June 13 (Thur.)	1:30 p.m. - 6:00 p.m.	Sacramento
June 14 (Fri.)	9:00 a.m. - 2:00 p.m.	
July 1991		
July 18 (Thur.)	1:30 p.m. - 6:00 p.m.	San Diego
July 19 (Fri.)	9:00 a.m. - 2:00 p.m.	
August 1991	No Meeting	
September 1991		
Sep. 12 (Thur.)	1:30 p.m. - 6:00 p.m.	San Francisco
Sep. 13 (Fri.)	9:00 a.m. - 2:00 p.m.	
October 1991		
Oct. 10 (Thur.)	1:30 p.m. - 6:00 p.m.	Sacramento
Oct. 11 (Fri.)	9:00 a.m. - 2:00 p.m.	
November 1991		
Nov. 14 (Thur.)	1:30 p.m. - 6:00 p.m.	Los Angeles
Nov. 15 (Fri.)	9:00 a.m. - 2:00 p.m.	
December 1991	No Meeting	

ad54
09/22/90

1990 LEGISLATIVE PROGRAM
Measures Introduced at Request of Law Revision Commission

Enacted

1990 Stats. Ch. 79 - Assembly Bill 759 (Friedman) New Probate Code
As enacted, new probate code becomes operative only if AB 831 (probate attorney fees) is enacted. AB 831 is dead. Senate Bill 1775 has been amended to make the new code become operative on July 1, 1991, even though Assembly Bill 831 is dead, and to insert in the new code the substance of existing law relating to probate attorney fees. **CORRECTED CHAPTERED BILL PRINTED ON 4-12-90.**

1990 Stats. Ch. 140 - Senate Bill 1855 (Beverly) Creditors of Decedent
AMENDED ON APRIL 17, 1990.

1990 Stats. Ch. 324 - Senate Bill 1774 (Lockyer) Urgency Probate Bill
Effectuates the Commission's *Recommendation Relating to Disposition of Small Estate by Public Administrator* and makes a technical correction relating to the operative date of a 1989 enactment. **AMENDED ON MAY 29. OPERATIVE JULY 16, 1990.**

1990 Stats. Ch. 710 - Senate Bill 1775 (Lockyer) Comprehensive Probate Bill
This bill would effectuate seven Commission recommendations:
(1) *Survival Requirement for Beneficiary of Statutory Will.*
(2) *Execution or Modification of Lease Without Court Order.*
(3) *Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding.*
(4) *Court-Authorized Medical Treatment.*
(5) *Priority of Conservator or Guardian for Appointment as Administrator.*
(6) *Notice in Probate Where Address Unknown.*
(7) *Jurisdiction of Superior Court in Trust Matters.*

Bill has been amended to provide that the new Probate Code (AB 759) will become operative even though Assembly Bill 831 (compensation of estate attorney) is dead and to insert in the new Probate Code the substance of existing law relating to probate attorney fees. Recommended provision relating to access to decedent's safe deposit box was deleted from bill and is to be given further study by the Commission. Bill also would make a number of technical cleanup revisions in new Probate Code. **AMENDED AUGUST 13, 1990.**

1990 Stats. Ch. 986 - Senate Bill 1777 (Beverly) Uniform Statutory Powers of Attorney Bill

This bill effectuates two recommendations, one proposing the Uniform Statutory Powers of Attorney Act and the other relating to springing powers of attorney. Bill was amended to delete provision providing for attorney fees in action against person who unreasonably refuses to honor power of attorney. This amendment was necessary to eliminate opposition of California Bankers Association and California Land Title Association. **AMENDED May 29, 1990.**

1990 Stats. Res. Ch. 53 - SCR 76 (Lockyer) Resolution to Continue Authority to Study Previously Authorized Topics

Passed Both Houses and Sent to Governor for Approval

Senate Bill 2649 (Morgan) Uniform Management of Institutional Funds Act **AMENDED MAY 30, 1990.**

Dead

Assembly Bill 831 (Harris) Trustees Fees and Attorney Fees

This bill would have effectuated the Commission recommendations concerning trustee fees and attorney fees. Trustee fees provisions are included in new Probate Code and will become operative if new Probate Code becomes operative as provided in SB 1775. Existing law on attorney fees added to new Probate Code by SB 1775. **ASSEMBLY MEMBER HARRIS DROPPED AB 831 AT THE REQUEST OF SENATOR LOCKYER.**

Assembly Bill 2589 (Sher) In-law Inheritance

Amended on March 13 (technical amendment). Bill supported by California Association of Public Administrators, Public Guardians and Public Conservators. Bill opposed by various heir tracers (American Archives Association; Brandenberger & Davis; American Research Bureau; W.C. Cox & Company). State Bar has no position on the bill. **DEFEATED BY 5-4 VOTE IN SENATE JUDICIARY COMMITTEE ON JUNE 19.**

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 29-30, 1990

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on November 29-30, 1990.

Commission:

Present:	Roger Arnebergh Chairperson	Arthur K. Marshall
	Edwin K. Marzec Vice Chairperson	Forrest A. Plant (Nov. 29)
	Brad R. Hill	Ann E. Stodden
Absent:	Elihu M. Harris Assembly Member	Bion M. Gregory Legislative Counsel
	Bill Lockyer Senate Member	Sanford Skaggs

Staff:

Present:	John H. DeMoully	Stan Ulrich
	Nathaniel Sterling	Robert J. Murphy III

Consultants:

Michael Asimow, Administrative Law (Nov. 30)

Other Persons:

Joni S. Ackerman, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Legislative Committee, Encino (Nov. 29)
Joseph S. Avila, California Probate Referees Association, Los Angeles
Clark R. Byam, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Pasadena (Nov. 29)
Ken Cameron, Attorney, Santa Monica (Nov. 30)
Phyllis Cardoza, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Legislative Committee, Los Angeles (Nov. 29)
Steve Cohn, California Energy Commission, Sacramento (Nov. 30)
Ronald P. Denitz, Tishman West Companies, Los Angeles (Nov.30)
Karl Engeman, Director, Office of Administrative Hearings, Sacramento (Nov. 30)
Gary Gallery, Chief Administrative Law Judge, Public Employment Relations Board, Sacramento (Nov. 30)
Robert L. Harvey, California Unemployment Insurance Appeals Board, Sacramento (Nov. 30)

Deborah M. Hesse, Chairperson, Public Employment Relations Board, Sacramento (Nov. 30)
Gary Jugum, Assistant Chief Counsel, State Board of Equalization, Sacramento
Harry LeVine, Department of Insurance, San Francisco (Nov. 30)
Daniel Louis, State Department of Social Services, Legal Division, Sacramento (Nov. 30)
Tim McArdle, Chief Counsel, California Unemployment Insurance Appeals Board, Sacramento (Nov. 30)
Melanie McClure, State Teacher's Retirement System, Sacramento (Nov. 30)
Valerie J. Merritt, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Nov. 29)
Robert A. Miller, Department of Consumer Affairs, Sacramento (Nov. 30)
Prudence Poppink, Senior Counsel, Fair Employment and Housing Commission, San Francisco (Nov. 30)
Jack A. Rameson III, Los Angeles County Bar Association, Probate and Trust Law Section, Executive Committee, Los Angeles (Nov. 29)
Marilyn Schaff, Department of Motor Vehicles, Sacramento (Nov. 30)
Anita L. Scuri, Department of Consumer Affairs, Sacramento (Nov. 30)
Willard A. Shank, Member, Public Employment Relations Board, Sacramento (Nov. 30)
Neal J. Shulman, California Public Utilities Commission, San Francisco (Nov. 30)
John Sikora, Association of California State Attorneys and Administrative Law Judges, Sacramento (Nov. 30)
John W. Spittler, Chief Counsel, Public Employment Relations Board, Sacramento (Nov. 30)
Michael V. Vollmer, State Bar Estate Planning, Trust and Probate Law Section, Executive Committee, Irvine (Nov. 29)
David Wainstein, Department of Alcoholic and Beverage Control, Los Angeles (Nov. 30)
Stuart A. Wein, Occupational Safety and Health Appeals Board, Sacramento (Nov. 30)
Tom Wilcock, Chief Administrative Law Judge, Department of Social Services, Sacramento (Nov. 30)
Robin T. Wilson, Department of Real Estate, Sacramento (Nov. 30)
Paul Wyler, Administrative Law Judge, California Unemployment Insurance Appeals Board, Los Angeles (Nov. 30)
Richard W. Younkin, Secretary and Deputy Commissioner, Workers' Compensation Appeals Board, San Francisco (Nov. 30)

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF SEPTEMBER 13-14, 1990, MEETING

The Commission approved the Minutes of the September 13-14, 1990, Commission Meeting as submitted by the staff.

ANNUAL REPORT FOR 1990

The Commission considered Memorandum 90-132 and the First Supplement to Memorandum 90-132. The staff draft of the Annual Report (as revised in the First Supplement to Memorandum 90-132) was approved for printing after the following revisions were made:

(1) On page 2203, "Deposit of Estate Planning Documents With Attorney" and "California Statutory Will" were deleted; "Gifts in View of Impending Death" was substituted for "Gifts in View of Death"; and "TOD Registration of Vehicles and Certain Other State Registered Property" was substituted for "TOD Registration of Vehicles and Vessels."

(2) On page 2210, the same revisions were made as are described in item (1) above.

(3), On page 2213, line 7, "bring together" was substituted for "include" and the last two lines of the footnote 16 at the bottom of the page were deleted.

(4) The first three lines of the continuation of footnote 16 at the top of the footnotes on page 2214 were deleted.

(5) On page 2215, in the last line of the second paragraph on the page, the words "published by the Commission" were inserted following "recommendation."

(6) On page 2216, the word "legislative" was inserted before "committee" in the sixth and seventh lines on the page, and in line 9, "as to" was substituted for "in."

(7) On page 2219, the substance of the following was added at the end of the carryover paragraph at the top of the page:

> The bill that enacted new Probate Code (Assembly Bill 759) included a provision that the new code would not become operative unless Assembly Bill 831 was enacted. Assembly Bill 831 would have enacted the Commission recommended provisions relating to compensation of probate attorneys. When it became apparent that Assembly Bill 831 would not be enacted, Senate Bill 1775 was amended to add the following provisions to the new Probate Code:
>
> (1) A provision that the new Probate Code (enacted by Assembly Bill 759) becomes operative notwithstanding that Assembly Bill 831 was not enacted.
>
> (2) A new section (Section 10810) which continues the substance of the language of Section 910 of the repealed Probate Code (relating to compensation of the probate attorney).

RELATIONS WITH STATE BAR

The Commission considered Memorandum 90-145, reviewing the Commission's correspondence with the State Bar in the effort to obtain direct input from interested committees and sections in light of the Keller case. The Commission noted with approval the Bar's position that direct communication with the Commission should be allowed and encouraged. No further action on this matter was felt to be necessary at this time.

The Commission also requested the staff to correspond further with the State Bar Public Law Section to see whether we can obtain greater involvement from that section in the administrative law study. The staff noted that the section had been represented by Mr. Wyler, but he is no longer a member of the Executive Committee.

OBTAINING ADDITIONAL INPUT AT COMMISSION MEETINGS INVOLVING ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 90-130 relating to obtaining additional input at commission meetings involving administrative law, along with staff comments about additional consultant suggestions received. The Commission decided to engage as consultants Mark Levin, the law firm of Livingston & Mattesich for the services of Gene Livingston and James M. Mattesich, the law firm of Turner & Sullivan for the services of Richard K. Turner and Robert J. Sullivan, and Professor Preble Stolz. The consultants would, when requested by the Commission and when convenient for them to do so, attend meetings of the Law Revision Commission, meet with the Commission's staff, and attend legislative hearings on Law Revision Commission recommendations to provide expert advice concerning administrative law and procedure. The consultants would be reimbursed for travel, food, and lodging expenses necessary for attendance at the meetings and legislative hearings, on the same basis as reimbursement of travel expenses of state employees, plus $100 per diem to cover any uncovered expenses and for the inconvenience. The total amount payable for travel expenses for each consultant would not exceed $2,500. The contract would cover a three-year period.

The Commission is aware that there is at present a freeze on execution of new consultant contracts. The Commission intends to process the new contracts whenever it becomes possible to do so. Meanwhile, the consultants should be informed that they have been named as consultants, that they cannot be reimbursed for their expenses, but that the Commission welcomes their attendance at Commission meetings whenever possible and appreciates any written or oral comments on the meeting material they are able to provide.

The Commission also requested the staff to seek further input from the Los Angeles County Bar Association Public Law Section as well as from the State Bar Public Law Section.

STUDY H-409 -- APPLICATION OF MARKETABLE TITLE STATUTE TO EXECUTORY INTERESTS

The Commission considered Memorandum 90-131 and the attached staff draft *Tentative Recommendation Relating to Application of Marketable Title Statute to Executory Interests*. The Commission approved the tentative recommendation to be distributed for comment, with a view toward reviewing the comments in time to permit the proposed legislation, if approved, to be included in the Uniform Statutory Rule Against Perpetuities bill in the 1991 legislative session.

STUDY H-112 - COMMERCIAL LEASE LAW: USE RESTRICTIONS

The Commission considered Memorandum 90-110, relating to revision of the Comment to proposed Civil Code Section § 1997.040 (effect of use restriction on remedies for breach). The Commission approved revision of the Comment in the printed recommendation on use restrictions as suggested by the staff in the memorandum, except that the reference to an "exclusive" should make clear that it refers to a particular use to the exclusion of other parties.

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

The Commission considered Memorandum 90-135, the attached *Tentative Recommendation relating to Deposit of Estate Planning Documents With Attorney*, and a letter from Kathryn Ballsun to Valerie Merritt for Study Team 4, a copy of which is attached to these Minutes as Exhibit 1. The Commission did not go through the Tentative Recommendation section by section. The Commission thought the State Bar is the best agency to receive filing of notices of transfer of estate planning documents. The Commission decided to table this proposal until the State Bar Probate Section can reach agreement with the State Bar central staff on a satisfactory method for receiving and storing the notices.

STUDY L-644 - RECOGNITION OF TRUSTEES' POWERS

The Commission considered Memorandum 90-138 and the First Supplement thereto which reviewed comments received on the *Tentative Recommendation Relating to Recognition of Trustees' Powers* [September 1990]. The Commission approved the recommendation to be printed and introduced in the 1991 legislative session, subject to the following revisions:

Prob. Code § 18100.5. Reliance on trustee's affidavit

Subdivision (a) of this section should be revised as follows:

> (a) The trustee may execute an affidavit stating that the trustee is qualified and has power to act and is properly exercising the powers under the trust. The affidavit shall state the name or other designation of the trust sufficient to identify it and shall state that the trust is in effect. An affidavit under this subdivision may be executed by the trustee voluntarily or on the demand of a third person.

The Comment should also be revised to include the following: "The affidavit under this section may only be given by a trustee. Hence, a third person must be satisfied that the person presenting the affidavit is the trustee and may require sufficient proof of that fact."

STUDY L-1030 - DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

The Commission considered Memorandum 90-134 concerning the interrelation of the *Recommendation Relating to Litigation Involving Decedents* and the *Recommendation Relating to Disposition of Small Estate Without Probate* and approved the draft of Probate Code Section 13107.5 set out in the memorandum.

STUDY L-3009 - REPEAL OF CIVIL CODE § 704
(UNITED STATES SAVINGS BONDS)

The Commission considered Memorandum 90-91, the attached *Tentative Recommendation relating to Repeal of Civil Code § 704 (United States Savings Bonds)*, and the First Supplement. The Commission approved the *Tentative Recommendation* for printing as a Recommendation.

The Commission asked the staff to bring to the attention of law publishers the Commission's Comment to repealed Section 704, so that the Comment will be published in the annotated codes.

STUDY L-3013 -- APPLICATION OF MARKETABLE
TITLE STATUTE TO EXECUTORY INTERESTS

See Study H-409.

STUDY L-3022 - ACCESS TO DECEDENT'S SAFE DEPOSIT BOX

The Commission considered Memorandum 90-142, the attached *Tentative Recommendation relating to Access to Decedent's Safe Deposit Box*, and the First Supplement. The Commission revised proposed Probate Code Section 331 as follows:

Probate Code § 331 (added). Access to decedent's safe deposit box

331. (a) This section applies only to a safe deposit box in a financial institution held by the decedent in the decedent's sole name, or held by the decedent and others

where all are deceased. Nothing in this section affects the rights of a surviving co-holder.

(b) A person who has a key to the safe deposit box may, before letters have been issued, obtain access to the safe deposit box only for the purposes specified in this section by providing the financial institution with both of the following:

(1) Proof of the decedent's death. Proof shall be provided by a certified copy of the decedent's death certificate or by a written statement of death from the coroner, treating physician, or hospital or institution where decedent died.

(2) Reasonable proof of the identity of the person seeking access. Reasonable proof of identity is provided for the purpose of this paragraph if the requirements of Section 13104 are satisfied.

(c) The financial institution has no duty to inquire into the truth of any statement, declaration, certificate, affidavit, or document offered as proof of the decedent's death or proof of identity of the person seeking access.

(d) When the person seeking access has satisfied the requirements of subdivision (b), the financial institution shall do all of the following:

(1) Keep a record of the identity of the person.

(2) Permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution, and to make an inventory of its contents.

(3) Make a photocopy of all wills and trust instruments removed from the safe deposit box, and keep the photocopy on file for a period of five years. The financial institution may charge the person given access with a reasonable fee for photocopying.

(4) Permit the person given access to remove instructions for the disposition of the decedent's remains, and, after a photocopy is made, to remove the wills and trust instruments.

(e) The person given access shall deliver all wills found in the safe deposit box to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary as provided in Section 8200.

(f) Except as provided in subdivision (d), the person given access shall not remove any of the contents of the decedent's safe deposit box.

With the foregoing revisions, the Commission approved the Recommendation for printing.

The State Bar Estate Planning, Trust and Probate Law Section asked what happens when the safe deposit box contains documents relating to decedent's revocable living trust, such as deeds and assignments of property to the trustee, and bonds registered to the trust. If there is no probate proceeding, how does the trustee get these documents? Must the trustee initiate a probate proceeding? The report of State

Bar Study Team 1 is attached to these Minutes as Exhibit 2. The Commission asked the staff to address this matter later, and not to delay this recommendation.

STUDY L-3025 - TOD REGISTRATION FOR VEHICLES AND CERTAIN OTHER STATE-REGISTERED PROPERTY

The Commission considered Memorandum 90-141, the attached *Tentative Recommendation relating to Transfer-on-Death Designation for Vehicles and Certain Other State-Registered Property*, and the First Supplement. The Commission asked the staff to include a provision authorizing the Department of Motor Vehicles and the Department of Housing and Community Development to charge an appropriate fee for registering title in TOD form. The Commission revised the sections in the draft statute as follows:

Health & Safety Code § 18080.2 (added). Ownership of manufactured home, mobilehome, commercial coach, truck camper, or floating home in beneficiary form

18080.2. (a) Ownership registration and title to a manufactured home, mobilehome, commercial coach, truck camper, or floating home subject to registration may be held in beneficiary form that includes a direction to transfer ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home to ~~one or more~~ a designated ~~beneficiaries~~ beneficiary on death of the sole owner or last surviving coowner. ~~A certificate of~~ Ownership registration and title issued in beneficiary form shall include, after the name of the owner or names of the coowners, the words "transfer on death to" or the abbreviation "TOD" followed by the name of the beneficiary or beneficiaries.

(b) During the lifetime of a sole owner or of any coowner, the signature or consent of a beneficiary is not required for any transaction relating to the manufactured home, mobilehome, commercial coach, truck camper, or floating home for which ~~a certificate of~~ ownership registration and title in beneficiary form has been issued.

Health & Safety Code § 18102.2 (added). Transfer of manufactured home, mobilehome, commercial coach, truck camper, or floating home owned in beneficiary form

18102.2. (a) On death of a sole owner or the last surviving coowner of a manufactured home, mobilehome, commercial coach, truck camper, or floating home owned in beneficiary form, the manufactured home, mobilehome, commercial coach, truck camper, or floating home belongs to

the surviving beneficiary ~~or beneficiaries~~, if any. If there is no surviving beneficiary, the manufactured home, mobilehome, commercial coach, truck camper, or floating home belongs to the estate of the deceased owner or of the last coowner to die.

(b) A surviving beneficiary who becomes owner of a manufactured home, mobilehome, commercial coach, truck camper, or floating home under subdivision (a) is not liable for imputed negligence as owner until record ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home is transferred to the beneficiary.

~~(b) A certificate of title~~ (c) Ownership registration and title issued in beneficiary form may be revoked or the beneficiary changed at any time before the death of a sole owner or of the last surviving coowner by either of the following methods:

(1) By sale of the manufactured home, mobilehome, commercial coach, truck camper, or floating home, with proper assignment and delivery of the ~~certificate of~~ ownership registration and title to another person.

(2) By application for a new ~~certificate of~~ ownership registration and title without designation of a beneficiary or with the designation of a different beneficiary ~~or beneficiaries~~.

~~(c)~~ (d) Except as provided in subdivision ~~(b)~~ (c), designation of a beneficiary in ~~a certificate of~~ ownership registration and title issued in beneficiary form may not be changed or revoked by will, by any other instrument, by a change of circumstances, or otherwise.

~~(d)~~ (e) The beneficiary's interest in the manufactured home, mobilehome, commercial coach, truck camper, or floating home at death of the owner or last surviving coowner is subject to any contract of sale, assignment, or security interest to which the owner or coowners were subject during their lifetimes.

~~(e)~~ (f) The surviving beneficiary ~~or beneficiaries~~ may secure a transfer of ownership for the manufactured home, mobilehome, commercial coach, truck camper, or floating home upon presenting to the department all of the following:

(1) The appropriate certificate of title and registration card, if available.

(2) A certificate under penalty of perjury stating the date and place of the decedent's death and that the declarant is entitled to the manufactured home, mobilehome, commercial coach, truck camper, or floating home as the designated beneficiary.

(3) If required by the department, a certificate of the death of the decedent.

(g) After the death of the owner or last surviving coowner, the surviving beneficiary may transfer his or her interest in the manufactured home, mobilehome, commercial coach, truck camper, or floating home without securing transfer of ownership into his or her own name by appropriately signing the ownership registration and title

for the manufactured home, mobilehome, commercial coach, truck camper, or floating home, and forwarding these documents to the department with appropriate fees.

~~(f)~~ (h) A transfer at death pursuant to this section is effective by reason of this section, and shall not be deemed to be a testamentary disposition of property. The right of the designated beneficiary to the manufactured home, mobilehome, commercial coach, truck camper, or floating home shall not be denied, abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(i) A transfer at death pursuant to this section is subject to Section 9653 of the Probate Code.

~~(g)~~ (j) If there is no surviving beneficiary or coowner, the person or persons described in Section 18102 may secure transfer of the manufactured home, mobilehome, commercial coach, truck camper, or floating home as provided in that section.

~~(h)~~ (k) The department may prescribe forms for use pursuant to this section.

Health & Safety Code § 18102.3 (added). Transfer as discharge of department

18102.3. (a) If the department makes a transfer at death pursuant to Section 18102.2, the department is discharged from all liability, whether or not the transfer is consistent with the beneficial ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home transferred.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the department has been served with a court order restraining the transfer. No other notice or information shown to have been available to the department shall affect its right to the protection afforded by subdivision (a).

(c) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home and is in addition to, and not exclusive of, any other protection provided to the department by any other provision of law.

Vehicle Code § 4150.7 (added). Ownership of vehicle in beneficiary form

4150.7. (a) Ownership of title to a vehicle subject to registration may be held in beneficiary form that includes a direction to transfer ownership of the vehicle to ~~one or more~~ a designated ~~beneficiaries~~ beneficiary on death of the sole owner or last surviving coowner. A certificate of ownership issued in beneficiary form shall include, after the name of

the owner or names of the coowners, the words "transfer on death to" or the abbreviation "TOD" followed by the name of the beneficiary ~~or beneficiaries~~.

(b) During the lifetime of a sole owner or of any coowner, the signature or consent of a beneficiary is not required for any transaction relating to the vehicle for which a certificate of ownership in beneficiary form has been issued.

Vehicle Code § 5910.5 (added). Transfer of vehicle owned in beneficiary form

5910.5. (a) On death of a sole owner or the last surviving coowner of a vehicle owned in beneficiary form, the vehicle belongs to the surviving beneficiary ~~or beneficiaries~~, if any. If there is no surviving beneficiary, the vehicle belongs to the estate of the deceased owner or of the last coowner to die.

(b) A surviving beneficiary who becomes owner of a vehicle under subdivision (a) is not liable under Section 17150 until record ownership of the vehicle is transferred to the beneficiary.

(c) A certificate of ownership in beneficiary form may be revoked or the beneficiary changed at any time before the death of a sole owner or of the last surviving coowner by either of the following methods:

(1) By sale of the vehicle with proper assignment and delivery of the certificate of ownership to another person.

(2) By application for a new certificate of ownership without designation of a beneficiary or with the designation of a different beneficiary ~~or beneficiaries~~.

(d) Except as provided in subdivision (c), designation of a beneficiary in a certificate of ownership issued in beneficiary form may not be changed or revoked by will, by any other instrument, by a change of circumstances, or otherwise.

(e) The beneficiary's interest in the vehicle at death of the owner or last surviving coowner is subject to any contract of sale, assignment, or security interest to which the owner or coowners were subject during their lifetimes.

(f) The surviving beneficiary ~~or beneficiaries~~ may secure a transfer of ownership for the vehicle upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and registration card, if available.

(2) A certificate under penalty of perjury stating the date and place of the decedent's death and that the declarant is entitled to the vehicle as the designated beneficiary.

(3) If required by the department, a certificate of the death of the decedent.

(g) After the death of the owner or last surviving coowner, the surviving beneficiary may transfer his or her interest in the vehicle without securing transfer of ownership into his or her own name by appropriately signing

the ownership registration and title for the vehicle and forwarding these documents to the department with appropriate fees.

~~(g)~~ (h) A transfer at death pursuant to this section is effective by reason of this section, and shall not be deemed to be a testamentary disposition of property. The right of the designated beneficiary to the vehicle shall not be denied, abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(i) A transfer at death pursuant to this section is subject to Section 9653 of the Probate Code.

~~(h)~~ (j) If there is no surviving beneficiary or coowner, the person or persons described in Section 5910 may secure transfer of the vehicle as provided in that section.

~~(i)~~ (k) The department may prescribe forms for use pursuant to this section.

Vehicle Code § 5910.7 (added). Transfer as discharge of department

5910.7. (a) If the department makes a transfer at death pursuant to Section 5910.5, the department is discharged from all liability, whether or not the transfer is consistent with the beneficial ownership of the vehicle transferred.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the department has been served with a court order restraining the transfer. No other notice or information shown to have been available to the department shall affect its right to the protection afforded by subdivision (a).

(c) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of the vehicle and is in addition to, and not exclusive of, any other protection provided to the department by any other provision of law.

Vehicle Code § 9852.7 (added). Ownership of vessel in beneficiary form

9852.7. (a) Ownership of an undocumented vessel subject to registration may be held in beneficiary form that includes a direction to transfer ownership of the vessel to ~~one or more~~ a designated ~~beneficiaries~~ beneficiary on death of the sole owner or last surviving coowner. A certificate of ownership issued in beneficiary form shall include, after the name of the owner or names of the coowners, the words "transfer on death to" or the abbreviation "TOD" followed by the name of the beneficiary ~~or beneficiaries~~.

(b) During the lifetime of a sole owner or of any coowner, the signature or consent of a beneficiary is not required for any transaction relating to the vessel for which a certificate of ownership in beneficiary form has been issued.

Vehicle Code § 9916.5 (added). Transfer of vessel owned in beneficiary form

9916.5. (a) On death of a sole owner or the last surviving coowner of a vessel numbered under this division and owned in beneficiary form, the vessel belongs to the surviving beneficiary ~~or beneficiaries~~, if any. If there is no surviving beneficiary, the vessel belongs to the estate of the deceased owner or of the last coowner to die.

(b) A surviving beneficiary who becomes owner of a vessel under subdivision (a) is not liable under Section 661 of the Harbors and Navigation Code until record ownership of the vessel is transferred to the beneficiary.

~~(b)~~ (c) A certificate of ownership in beneficiary form may be revoked or the beneficiary changed at any time before the death of a sole owner or of the last surviving coowner by either of the following methods:

(1) By sale of the vessel with proper assignment and delivery of the certificate of ownership to another person.

(2) By application for a new certificate of ownership without designation of a beneficiary or with the designation of a different beneficiary ~~or beneficiaries~~.

~~(c)~~ (d) Except as provided in subdivision ~~(b)~~ (c), designation of a beneficiary in a certificate of ownership issued in beneficiary form may not be changed or revoked by will, by any other instrument, by a change of circumstances, or otherwise.

~~(d)~~ (e) The beneficiary's interest in the vessel at death of the owner or last surviving coowner is subject to any contract of sale, assignment, or security interest to which the owner or coowners were subject during their lifetimes.

~~(e)~~ (f) The surviving beneficiary ~~or beneficiaries~~ may secure a transfer of ownership for the vessel upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and certificate of number, if available.

(2) A certificate under penalty of perjury stating the date and place of the decedent's death and that the declarant is entitled to the vessel as the designated beneficiary.

(3) If required by the department, a certificate of the death of the decedent.

(g) After the death of the owner or last surviving coowner, the surviving beneficiary may transfer his or her interest in the vessel without securing transfer of ownership into his or her own name by appropriately signing the ownership registration and title for the vessel and forwarding these documents to the department with appropriate fees.

~~(f)~~ (h) A transfer at death pursuant to this section is effective by reason of this section, and shall not be deemed to be a testamentary disposition of property. The right of the designated beneficiary to the vessel shall not be denied, abridged, or affected on the grounds that the right has not

been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(i) A transfer at death pursuant to this section is subject to Section 9653 of the Probate Code.

~~(g)~~ (j) If there is no surviving beneficiary or coowner, the person or persons described in Section 9916 may secure transfer of the vessel as provided in that section.

~~(h)~~ (k) The department may prescribe forms for use pursuant to this section.

Vehicle Code § 9916.7 (added). Transfer as discharge of department

9916.7. (a) If the department makes a transfer at death pursuant to Section 9916.5, the department is discharged from all liability, whether or not the transfer is consistent with the beneficial ownership of the vessel transferred.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the department has been served with a court order restraining the transfer. No other notice or information shown to have been available to the department shall affect its right to the protection afforded by subdivision (a).

(c) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of the vessel and is in addition to, and not exclusive of, any other protection provided to the department by any other provision of law.

Probate Code § 9653 (amended). Duty to recover property transferred in fraud of creditors

9653. (a) On application of a creditor of the decedent or the estate, the personal representative shall commence and prosecute an action for the recovery of real or personal property of the decedent for the benefit of creditors if the personal representative has insufficient assets to pay creditors and the decedent during lifetime did ~~either~~ any of the following:

(1) Made a conveyance of the property, or any right or interest in the property, that is fraudulent as to creditors under the Uniform Fraudulent Transfer Act (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of the Civil Code).

(2) Made a gift of the property in view of impending death.

(3) Made a direction to transfer a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on the decedent's death pursuant to Section 18102.2 of the Health and Safety Code, or Section 5910.5 or 9916.5 of the Vehicle Code, and the property has been transferred as directed.

> (b) A creditor making application under this section shall pay such part of the costs and expenses of the suit and attorney's fees, or give an undertaking to the personal representative for that purpose, as the personal representative and the creditor agree, or, absent an agreement, as the court or judge orders.
>
> (c) The property recovered under this section shall be sold for the payment of debts in the same manner as if the decedent had died seised or possessed of the property. The proceeds of the sale shall be applied first to payment of the costs and expenses of suit, including attorney's fees, and then to payment of the debts of the decedent in the same manner as other property in possession of the personal representative. After all the debts of the decedent have been paid, the remainder of the proceeds shall be paid to the person from whom the property was recovered. The property may be sold in its entirety or in such portion as necessary to pay the debts.

The Commission approved the staff recommendation to include the following discussion in a footnote in the narrative portion of the Recommendation:

> Missouri has processed about 39,000 applications for TOD designations in motor vehicle registrations in the three years since Missouri enacted legislation to authorize it. Letter from James B. Callis, Administrator, Missouri Motor Vehicle Bureau, to California Law Revision Commission (Oct. 27, 1990) (on file in office of California Law Revision Commission). According to the U. S. Census Bureau, as of July 1, 1989, California had a population of 29,063,000, and Missouri had a population of 5,159,000, a ratio of 5.65 Californians for every Missourian. Based on this ratio, we may estimate that there will be about 220,000 TOD registrations in California in the first three years after enactment of authorizing legislation.

With the foregoing revisions, the Commission approved the Recommendation for printing. Commissioner Stodden was opposed. The Commission also asked the staff to prepare a Memorandum for a future meeting on the question of the procedure for creditors to reach nonprobate assets generally.

STUDY L-3034 - GIFTS IN VIEW OF IMPENDING DEATH

The Commission considered Memorandum 90-139, the attached *Tentative Recommendation relating to Gifts in View of Death*, and the First Supplement. The Commission decided to change the title of the

Recommendation to "Gifts in View of Impending Death." The Commission made the following revisions to the draft statute:

Probate Code §§ 5700-5705 (added). Gifts in view of impending death

PART 5. GIFTS IN VIEW OF IMPENDING DEATH

§ 5700. Gift defined

5700. As used in this part, "gift" means a transfer of personal property made voluntarily and without consideration.

§ 5701. Application of general law of gifts

5701. Except as provided in this part, a gift in view of impending death is subject to the general law relating to gifts of personal property.

§ 5702. Gift in view of impending death defined

5702. A gift in view of impending death is one which is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril.

§ 5703. Presumption of gift in view of impending death

5703. A gift made during the last illness of the giver, or under circumstances which would naturally impress the giver with an expectation of speedy death, is presumed to be a gift in view of impending death.

§ 5704. Revocation of gift in view of impending death

5704. (a) A gift in view of impending death is revoked by:

(1) The giver's recovery from the illness, or escape from the peril, under the presence of which it was made.

(2) The death of the donee before the death of the giver.

(b) A gift in view of impending death may be revoked by:

(1) The giver at any time.

(2) The giver's will if the will expresses an intention to revoke the gift.

(c) A gift in view of impending death is not affected by a previous will of the giver.

(d) Notwithstanding subdivisions (a) and (b), when the gift has been delivered to the donee, the rights of a bona fide purchaser from the donee before the revocation, or of a bona fide encumbrancer before the revocation, are not affected by the revocation.

§ 5705. Rights of creditors of the giver

5705. A gift in view of impending death is subject to Section 9653.

A conforming revision should be made to Probate Code Section 9653(a)(2) to refer to a gift "in view of impending death." The staff should also include a provision to the effect that any reference in the statutes of this state to a "gift in view of death" shall be construed to mean a gift in view of impending death.

The Commission approved the revision to the Comment to repealed Section 1149 of the Civil Code, changing the reference to Probate Code Section 5502 to "5702."

With the foregoing revisions, the Commission approved the Recommendation for printing.

STUDY L-3046 - RECOGNITION OF AGENT'S AUTHORITY UNDER STATUTORY FORM POWER OF ATTORNEY

The Commission considered Memorandum 90-140 and the First Supplement thereto which reviewed comments received on the *Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney* [September 1990]. The Commission approved the recommendation to be printed and introduced in the 1991 legislative session, subject to the following revisions:

Civil Code § 2412. Relief available

Section 2412 of the Civil Code should be amended to make clear that the general procedural rules applicable to powers of attorney apply to the new remedy:

> 2412. Except as provided in Section 2412.5, a petition may be filed under this article for any one or more of the following purposes:
>
> (a) Determining whether the power of attorney is in effect or has terminated.
>
> (b) Passing on the acts or proposed acts of the attorney in fact.
>
> (c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.

(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:

(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.

(e) Compelling a third person to honor the authority of an agent under a statutory form power of attorney pursuant to Section 2480.5.

Civil Code § 2480.5. Compelling third person to honor statutory form power of attorney

The language in proposed Section 2480.5 that would permit a third person to avoid dealing with agents by language in a contract with the principal should be deleted since it might permit routine, boilerplate avoidance. The focus of the proposed section is to enforce the policy that a third person must deal with the agent to the same extent that the third person could be compelled to deal with the principal.

STUDY L-3049 - STATUTORY WILL

The Commission considered Memorandum 90-123 (and the attached staff draft statute and staff draft form), the First and Second Supplements to Memorandum 90-123, and a staff-prepared document (attached to these Minutes as Exhibit 3) entitled "Notes Concerning Materials Relating to Statutory Wills" (with the attached letter from Michael V. Vollmer on behalf of the Statutory Will Revision Subcommittee of the Executive Committee of the Estate Planning, Trust and Probate Law Section).

The Commission discussed generally the various issues presented by the staff draft and the views of the State Bar Subcommittee. However, the Commission made only a few decisions which are reported below.

UNIFORM STATUTORY WILL ACT

The staff reported that the Uniform Statutory Will Act is designed primarily for use by lawyers. It has boiler-plate provisions a lawyer can use in preparing a will. The Act is not intended for use by

nonlawyers. The California Statutory Will, on the other hand, is designed for use by persons who do not have a lawyer. Accordingly, there is no reason to delay the revision of the California Statutory Will Act until the Uniform Statutory Will Act can be studied.

SINGLE FORM; ELIMINATION OF THE STATUTORY WILL WITH TRUST

The Commission approved the elimination of the California Statutory Will with Trust. Having two different will forms creates problems for users who may use the wrong form.

APPLICATION TO STATUTORY WILL OF GENERAL PROVISIONS RELATING TO WILLS

As a preliminary matter, the staff noted a section which continues the substance of existing law and makes clear that the general provisions of the Probate Code with respect to particular matters apply to a California Statutory Will. The Commission took no action with respect to this section.

The State Bar Subcommittee is concerned that there is nothing in the statutory will form that informs the consumer of the substance of the general provisions in the Probate Code. For example, the person using the statutory will form is not informed about the substance of the provisions relating to anti-lapse, whether encumbrances on specific devises must be paid by the estate, and whether or not estate taxes are to be prorated.

PLACEMENT OF BACKGROUND AND INFORMATIONAL MATERIALS

The "Notes" handed out by the staff at the meeting raised the issue of where the Questions and Answers material should be set out in the statutory will packet. Should this material be set out before the form itself as recommended by the State Bar Subcommittee or should it be set out after the form itself as recommended by the Commission's staff? The Commission took no action with respect to this issue. The Executive Secretary stated that the issue where the Questions and Answers material should be placed in the form is not a life or death issue.

IDENTIFICATION OF FAMILY MEMBERS

The Commission discussed but took no action with respect to the issue whether the statutory form should include a list of family members as recommended by the State Bar Subcommittee. The staff had recommended against including this new provision on the ground that it will cause confusion in the mind of the consumer.

PERMITTING SPECIFIC GIFTS OF REAL AND PERSONAL PROPERTY

The staff proposal to permit not more than five specific gifts of real or personal property was strongly opposed by Michael V. Vollmer, representative of the Statutory Will Revision Subcommittee of the Executive Committee of the Estate Planning, Trust and Probate Law Section. Mr. Vollmer takes the view that specific gifts present problems where there are encumbrances on the property, where shares of stock are sold or replaced by other stock, and the like. Although general provisions in the Probate Code cover these matters, Mr. Vollmer believes that the testator must be made aware of these general provisions so the testator can understand the effect of the general provisions on what he is doing. Because it would complicate the form to provide the testator with all of this information, the Subcommittee rejected the concept of allowing specific gifts of real or personal property.

Mr. Vollmer indicated that authority to give varying percentages of the estate would be better than giving the authority to make specific gifts of property (other than cash). The Subcommittee thought that giving the authority to make specific gifts would create problems, particularly with real estate, and particularly with death taxes.

Mr. Vollmer gave the following explanation at the Commission meeting of why the Subcommittee opposes giving authority to make specific gifts of personal property:

> If I put down specific items here [in the space for the listing of specific gifts] and I have a small estate, I might be doing this to give away my entire estate, and it might be my stock or bonds or something else. In doing it this way, what we were afraid of is they are going to let these wills go on, and these gifts that they think they have made (they are going to sell their stock or do something else and the stock or other asset is going to disappear--the gifts are going to lapse) and those assets won't be there.

> Or secondly, they will do a description of an asset--my wife might say, "I give my favorite ring to my daughter." Is that the 28 carat diamond, or is that the clay one that my son made when he was in kindergarten? I don't know how you can determine that.
>
> Our concern was how they are going to describe assets and, with that, our decision hinged on what the tax consequences were going to be. If you delete the death tax provision--because these could be major assets--you have taken away some of our arguments on that, because there could be death tax consequences of giving major assets and there might be nothing left in the residue.
>
> Flexibility, a wonderful idea. Room for mistake. I think it's rampant. And that is why we did what we did. We think that cash is cash and an amount that can be handled, that's fine, and leave them a number of choices. But if we spread it out too far, we were going to get into the issue of should they be doing something else and what about the tax consequences.

Mr. Vollmer gave the following explanation at the Commission meeting of why the Subcommittee opposes giving authority to make specific gifts of real property:

> On real estate, you have the situation--which I think is just multiplied--on values, encumbrances--what do the people understand is going to happen. Our law says, without them knowing it, that if I give you my house you take it subject to encumbrances unless I specify differently--you are taking it subject to the mortgage. You are looking at items that tend to have a much greater value, and then you hit into the area of who pays the estate tax. Are we going to apportion it or what?

Valerie J. Merritt commented:

> I have an additional problem with real property. I think there is a tendency for lay people to use a street address description, and I think you may find people saying "I give my home at 123 Adams Street, Los Angeles, to my son." The next thing that happens, of course, is that they decide to sell their home at 123 Adams Street.

The staff noted that the Probate Code contains rules that govern what happens when there is a specific devise of real property and the testator has disposed of the property or an interest therein before death. See Section 6172 which provides in part:

> A specific devisee has the right to the remaining specifically devised property and all of the following:
>
> (a) Any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at death.

(c) Any proceeds unpaid at death on fire or casualty insurance on the property.

The staff noted that this rule applies whether the will is a statutory will or a will drawn by an attorney (unless the will specifically otherwise provides).

The Commission discussed this issue in the context of the residence of the testator. The feeling was that if the testator changes his or her residence, the will should permit the testator to make a specific devise of the residence of the testator at the time of death.

The Commission deleted the staff recommended provision for making specific gifts of real and personal property and added the substance of the following to the statutory form:

X. **Personal Residence. (Optional. Use this paragraph only if you want to give your personal residence to a different person or persons than you give your other property.)** I give my personal residence at the time of my death as follows:

(a) **Choice One:** To the following person:

_____

(b) **Choice Two:** Equally among the following persons who survive me (any deceased person's share shall be added equally among the surviving person's shares) (INSERT EACH PERSON'S NAME)

_____

_____

_____

_____

The provision for five separate gifts, limited to cash gifts, was approved.

DISTRIBUTION OF PROPERTY TO BENEFICIARY UNDER AGE 25

The Commission examined the provision of the State Bar Subcommittee draft that dealt with designation of a custodian for a beneficiary between the ages of 18 and 25. The Commission was of the view that the State Bar draft was too complex and should be simplified.

It was suggested that the form might have a provision that a custodian could be designated to hold the property to an age selected by the testator between age 18 and age 25. The testator could fill in the age to which the property is to be held. The provision might be framed in terms that "outright distribution to a beneficiary under age of 25 should be delayed until age (fill in age between age 18 and 25)."

The staff should make an effort to revise and clarify the provisions relating to guardianship and conservatorships and the age at which the property is to be distributed outright to a beneficiary under age 25.

A member of the Commission expressed concern that the user of the form will not understand the meaning of "Name of First Executor to Serve" and comparable language in the form. The use of the word "consecutively" also creates confusion. The word "alternative" might be used instead of "consecutively" and the form should make clear that the first named will serve, and if unable to serve, the second named will serve, etc. It was suggested that "First Choice for Executor to Serve" might be a better phrasing.

SURVIVAL REQUIREMENT

The statute should contain language to alert the user of the form of the effect of the anti-lapse statute in cases where survival is not specifically required.

STUDY N-105 - ADMINISTRATIVE ADJUDICATION: EFFECT OF ALJ DECISION

The Commission considered Memorandum 90-129, containing a staff draft that would implement the Commission's consultant's (Professor Asimow) recommendations on the effect of the administrative law judge's decision. The Commission also considered the First Supplement to Memorandum 90-129, along with other letters addressed to the matter received at the meeting, copies of which are attached to these Minutes as Exhibit 4, and oral comments of persons present at the meeting interested in the matter.

The Commission's Assistant Executive Secretary reviewed the status of the administrative law study, noting that administrative adjudication is the first phase of the study which eventually will cover the entire field. The Assistant Executive Secretary explained the Commission's standard method of operation, starting with the consultant's background study, making initial policy decisions, developing a tentative recommendation, preparing a final recommendation, and obtaining the enactment of legislation. The present study is at the stage of making initial policy decisions, and meetings conducted by the Commission are more in the nature of working sessions than formal hearings. The Assistant Executive Secretary noted that there are many persons, organizations, and agencies interested in this study, and most will not begin to receive materials for comment until the tentative recommendation stage. However, anyone may request meeting agendas, and the Commission will circulate meeting materials to persons who plan to attend the meetings or who plan to comment on the materials in advance of the meetings.

The Commission requested that interested agencies try to identify one or two representatives who will consistently attend Commission meetings so there is continuity and a working relationship developed. The Commission will look into the possibility of shifting more of its meetings to Sacramento when administrative law matters are considered in order to facilitate agency participation.

The Commission made the following decisions with respect to the staff draft.

§ 610.250. Agency head

No change was made in this section.

§ 610.280. Agency member

No change was made in this section.

§ 610.400. Order

The "order" terminology should be changed to "decision" terminology, which is more descriptive and more commonly used by California agencies.

This section, and other sections using the term "person", should include in the Comment a reference to the other provisions of the Government Code defining person to include legal entities and government agencies.

§ 610.460. Party

The reference to any person "allowed to appear or participate" in the proceeding may be overly broad, since it could include witnesses. This should be limited, perhaps by reference to persons allowed to intervene in the proceeding. This limitation should be reviewed when the Commission reviews the intervention and appearance and participation procedures.

§ 610.700. Rule

This definition should be checked to make sure it is coordinated with the definition of rule found in the rulemaking provisions of the existing administrative procedure act.

613.010. Service

This section should not require certified mail. First class mail should be sufficient. The staff should look into whether the agency by rule should be able to require a different form of mail or delivery.

With respect to the last known address of a person, if the agency requires the person to maintain an address with the agency, notice at the address maintained with the agency should be sufficient.

Service on both a person and the person's attorney should not be required. Service should be on a person's attorney, rather on the person, if the person is represented by an attorney of record. The statute should make clear that this rule applies any time the statute requires service on a "party".

§ 640.010. When adjudicative proceeding required

No change was made in this section.

§ 640.210. Definitions

No change was made in this section.

§ 640.220. Office of Administrative Hearings

No change was made in this section.

§ 640.230. Administrative law judges

No change was made in this section.

§ 640.240. Hearing officers and other personnel

The reference to "shorthand" was deleted. The director should be authorized to appoint "reporters", without limitation.

§ 640.250. Assignment of administrative law judges and hearing officers

No change was made in this section. Conforming changes will be needed in other statutes that now require hearings under the Administrative Procedure Act: they will be revised to require hearings by Office of Administrative Hearings personnel. There does not appear to be a problem with an agency either selecting or rejecting any individual administrative law judge for any proceeding or otherwise influencing the assignment by the Office of Administrative Hearings.

§ 640.260. Voluntary temporary assignment of hearing personnel

This section should be redrafted to allow more flexibility for the Director of the Office of Administrative Hearings to appoint personnel from other agencies, and should make clear that it does not restrict the ability of the Director to appoint pro tempore administrative law judges. The two lines of authority might be reconciled, perhaps by the requirement of appointment from the voluntary assignment list before pro tempore assignment, and might be dealt with in one statute section rather than two.

§ 640.270. Cost of operation

No change was made in this section.

§ 640.280. Study of administrative law and procedure

No change was made in this section.

§ 642.010. Applicable hearing procedure

No change was made in this section. The applicable hearing procedure (formal, conference, summary, emergency, declaratory, etc.) would be selected by the agency by rule for the type of proceeding for which it is most appropriate. The Commission may investigate whether the agency rule should be subject to the standard OAL rulemaking process or should be subject to a more informal internal process.

§ 642.210. Designation of presiding officer by agency head

No change was made in this section. The rule of this section giving the agency head discretion in selection of the presiding officer is subject to statutory requirements, such as a requirement that the presiding officer be provided by the Office of Administrative Hearings or a requirement that the agency head preside. The Commission does not intend to revise any of these statutory requirements unless a specific problem in a particular agency is brought to its attention.

The statute does not specify any particular qualifications for the presiding officer selected by the agency head. That depends on the type of hearing and needs of the particular agency.

§ 642.220. OAH administrative law judge as presiding officer

This section is used by some agencies, and should be retained as drafted.

§ 642.710. Proposed and final orders

The 100 day limitation for an agency head/presiding officer to make a decision in the case may be too short for some agencies and too long for others. The 100 days should be a default rule applicable absent an agency rule changing the time.

The 30 day limitation for a non-agency head/presiding officer to make a decision in the case should also be subject to variation by the agencies, except where the presiding officer is from the Office of Administrative Hearings.

It was noted that there appears to be no sanction for failure to comply with the time requirements. Also, the times may need to be coordinated with suspension orders that expire unless a determination is made within a short time.

§ 642.720. Form and contents of order

This section should be revised to adopt a concept analogous to a statement of decision in a civil action, as provided in Code of Civil Procedure Section 632; it would be triggered by a request of the party at the hearing. In this connection, the reference to a determination of the issues presented might refer instead to conclusions of law.

The requirement that the findings include an identification of findings based substantially on credibility of evidence or demeanor of witnesses also should be refined.

The issue was raised whether the form of decision contemplated by this section is suitable for the perfunctory type of denial of a tax claim, for which the remedy is not administrative review but a civil trial.

The issue also was raised whether default proceedings should be governed by such elaborate provisions. The statement of decision may be self-limiting, by reference to controverted issues.

As a related matter the Commission might wish to investigate the concept of telephonic hearing procedures.

§ 642.750. Delivery of order to parties

Rather than require immediate delivery of a copy of the proposed decision to the parties, there might be a requirement of delivery if an agency alters a proposed decision. The cost of sending all proposed decisions out, even if non-adopted, was considered, along with the transactional cost that would be the result of, in effect, encouraging lobbying of the agency during the period when it is deciding whether to adopt the proposed decision. The Commission would like to see further documentation of the need for the change in law represented by this section.

The provision that a copy of the proposed decision should be filed as a public record should be coordinated with the public records act, and confidentiality should be protected. The Comment should note that service on a party is made on the party's legal representative, if any, citing the relevant statute.

§ 642.760. Correction of mistakes in order

The motion terminology in this section should be replaced with application terminology, and the reference to findings of fact and conclusions of law should be deleted, in order to help deformalize it. The presiding officer on its own application should be able to make corrections.

This section coordinates with the concept of parties having immediate access to a copy of the proposed decision. The correction procedure could affect the timing of when the proposed decision becomes final. How is the determination to be made whether the error is technical or substantive, and what sort of notice will there be if the procedure is informal? The procedure should not be ex parte.

§ 642.770. Adoption of proposed order

This section should be reviewed in light of the review of the concept of requiring immediate delivery of the proposed order to the parties. The time limits for the agency to act should be reviewed as well--does the agency have 30 days to act, or 100 days? Thirty days may be too short a time for some agencies. If an agency does adopt the order within 30 days, the relationship between that adoption and the provision for a party to seek administrative review of a proposed order should be reviewed.

§ 642.780. Time proposed order becomes final

An agency by rule should be able to extend the time a proposed order becomes final if 100 days is too short for that agency.

§ 642.810. Availability of review

The words "on its own motion" were deleted from this section.

§ 642.820. Limitation of review

Does it make sense to have both a procedure for agency adoption and a review procedure (where the agency has not exercised its adoption right)? Does allowing agencies by rule to vary the availability of the review procedure unduly promote diversity over uniformity? The review procedure may build delay into the administrative procedure system not

now present. The staff should present the Commission with additional perspective on this issue so the Commission can decide whether to recommend a departure from existing law on this matter.

Subdivision (c) was deleted as an unnecessary complication. If an agency wishes occasionally to review a case for policy reasons, it can adopt a rule allowing it to do that under other provisions of this section.

§ 642.830. Initiation of review

It may be necessary to tie the availability of review to the time before a proposed decision becomes final, rather than to a fixed 100-day period, for logistical reasons.

§§ 642.840-642.860. Administrative review of proposed order

The Commission did not consider these sections due to lack of time.

Code Civ. Proc. § 1094.5. Administrative mandamus

Professor Asimow noted that the tenor of many comments received on the proposal to give ALJ credibility-based determinations great weight is to the effect that this would remove the power of decision from the agency to the ALJ and prevent the agency from performing its constitutional or statutory function. He indicated there was no intent to do this, that all the proposal requires is that the agency have good reason for overturning credibility-based determinations, and that all federal administrative agencies and nearly all agencies of other states, as well as a number of major California agencies, operate under this rule without a problem.

A number of issues were raised in connection with this proposal, including:

(1) What is the magnitude of the problem of agencies substituting their credibility determinations for those of the finder of fact? The Commission, staff, and consultant indicated that statistics are not available, but it is a problem that has frequently been brought to the attention of the Commission, the Legislature, and the Governor, by private attorneys and others as well as by administrative law judges and hearing officers. The consultant found in his interviews with participants in the California administrative law system that this is

perceived as the single most objectionable feature of the system. Some agencies routinely adopt the hearing officer's findings, and others already follow the Universal Camera rule; but others ignore it, or even routinely overturn all hearing officer initial decisions as a matter of course.

(2) Shouldn't an agency be able to try the case itself, and be entitled to great weight for its own credibility-based determinations? Professor Asimow indicated that his recommendation is that the agency should be able to decide whether to hear the case itself or delegate it to a hearing officer. But once it has been delegated to a hearing officer, the agency should not be able to retry the case. This would enable the agency to avoid credibility-based determinations that it disagreed with. Also, it would subject the public to multiple administrative proceedings. One of our objects is to ensure due process and public satisfaction with administrative hearing procedures so that the court system is not burdened with judicial review. Problems raised with this approach included that there is no evidence the agencies would abuse the right to retry cases themselves, the prohibition on retrying the case goes far beyond credibility determinations and extends to all issues, and this may be just the beginning of a far more extensive erosion of agency power. If there is a problem of agency abuse, this won't cure it, because the agency can simply keep on remanding a decision it disagrees with until it gets the right answer. In any case, an agency should be able to hear newly-discovered evidence even if it can't rehear the case as a whole. Do federal agencies have the right to rehear cases, and have there been any problems with the federal system?

(3) Isn't the requirement that great weight be given credibility determinations overbroad? Credibility includes more than demeanor, including such matters as internal contradictions and inherent implausibility, which need not be based on observation of witnesses. The draft should be refined. If the trier of fact's observations are to be given great weight, there should be a greater burden on the finder of fact and stricter standards to specify the basis of the findings, setting forth such matters as impeaching evidence and exactly

why or why not certain testimony is credible (a "sweaty lip" standard). This would help avoid the problem of mischaracterization of the nature of a finding by the trier of fact.

(4) How does the whole scheme work where an agency member sits with a hearing officer? Who is making the findings in this situation? The statute needs to be clear on this matter since a number of agencies follow this procedure.

The Commission did not make any initial decisions on these issues. The Commission requested the staff to provide it with further research and policy discussion on the questions raised, along with a draft refined in light of the discussion, for further Commission consideration at a future meeting.

APPROVED AS SUBMITTED _____

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

_____
Date

_____
Chairperson

_____
Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

703\001\007.L7

November 28, 1990

BY FAX

Valerie Merritt, Esq.
Kindel & Anderson
555 S. Flower Street
29th Floor
Los Angeles, CA 90071

Re: Memorandum 90-135 - Deposit of Estate Planning Documents With Attorney

Dear Valerie:

On November 16, 1990 and November 20, 1990, Team 4 (i.e., Harley Spitler, Robert Temmerman, Don Green, Tom Stikker, Clark Byam, Jim Quillinan and I) discussed Memorandum 90-135, Deposit of Estate Planning Documents With Attorney ("Memorandum"). A summary of our discussion follows.

Team 4 spent a substantial amount of time discussing the general method and specific procedures for the deposit of estate planning documents as set forth in the Memorandum. During this discussion, several of the members of Team 4 questioned the validity of the entire proposal; however, the majority of Team 4 members believed that the project was important and should be continued.

During the course of the Team 4 discussions, another approach to the deposit of estate planning documents was proposed, discussed and approved by Team 4 ("alternate proposal"). Notwithstanding several anticipated difficulties with the alternate proposal, Team 4 requests that the Law Revision Commission give serious consideration to the alternate proposal, or some reasonable modification of it.

Team 4's alternate proposal is as follows. A retiring attorney, or the personal representative of an incompetent or deceased attorney ("responsible person") will be responsible for the deposit

of estate planning documents over which he/she has dominion and control. Unless a deposit agreement has been signed in advance by the depositor, the responsible person must give written notice to the depositor at the depositor's last known address. The notice will request that the depositor affirmatively respond to the proposed transfer of his/her estate planning documents to another attorney or firm, or that there has been prior written consent to such a transfer. If the affirmative response is received, or if prior written consent has been given, then the transfer to the successor attorney or firm can proceed. If the affirmative response is not received, and if no prior consent exists, then the estate planning documents are to be lodged with the Clerk of the Superior Court in the county where the depositor resided, or if that county is not known, in the county where the retired, incompetent or deceased attorney last resided. An appropriate initial lodging fee would be charged.

The State Bar will maintain as part of the database which it maintains for retired or deceased attorneys the information that certain documents have been forwarded to a particular attorney(s); individual depositors would not be entered onto the database. The Clerk of the Superior Court would not have to be listed because this alternative automatically would accompany the response to each inquiry. A reasonable fee to cover costs could be charged. Team 4 considers this central filing aspect of the alternate proposal to be critical. The cost of this database should be reasonable. Most importantly, it will provide a valuable public service. Discussions with the State Bar about the cost and feasibility of enlarging the database are continuing. The State Bar must maintain a record of a retired or deceased attorney.

Although Team 4 realizes that the Clerks of the Superior Court may have some concern with Team 4's alternate proposal, Team 4 is most willing to discuss and resolve with the Clerks the issues raised by them. Team 4 believes that the Clerks would be the best depositories because they have procedures already in place for retaining documents. On the other hand, Team 4 recognizes that costs and logistics must be considered, and therefore Team 4 is most willing to discuss such modifications as microfiche; sunset provisions; and modification of the requirement re: affirmative response (e.g., documents more than 50/75 years old could be forwarded to another attorney without affirmative response).

The remainder of this letter addresses several of the other issues raised by the Memorandum. In light of the fairly substantial change in approach suggested by Team 4, specific procedures that would have to be altered in response to the alternate proposal are not addressed.

1. Re: Section 701 Attorney.

Team 4 suggests that the original language of Section 701 be retained (except to delete "both of") and to add as subsection (c): "an individual licensed to practice law in this state." The language of the section should be sufficiently broad to cover the various forms in which law is practiced in California, e.g., sole proprietor; partnership, corporation.

2. Re: Section 710. Protecting Document Against Loss or Destruction.

2.1 Team 4 agrees with the staff's redraft of the section, but would reword the subsection (a) as follows, additions underlined:

(a) If a document is deposited with an attorney, the attorney shall place within a reasonable time after a document is deposited..... (The remainder of the sentence is the same.)

2.2 With respect to the discussions concerning the retention of superseded estate planning documents, Team 4 believes that it is the best practice to return all old documents to the client and discuss with the client his/her options with respect to the documents, including destruction of them. Team 4 strongly feels that an attorney has no duty to keep estate planning documents nor to advise clients about the retention of such documents. These points should be clarified in the Memorandum.

3. Re: Section 711. Attorney's Standard of Care.

3.1 With respect to the attorney's standard of care, as expressed in the discussion to Section 711, Team 4 was evenly divided. This issue will be discussed with the Executive Committee as a whole during its December 8, 1990 meeting.

3.2 Team 4 believes that Sections 710 and 711 should not be combined.

4. Re: Section 712. No Duty to Verify Contents of Documents.

Team 4 strongly urges the Commission to delete the newly proposed last sentence of proposed subsection (b) of Section 712. An attorney does not have a duty to inform clients (although this may be good practice) and the proposed language could be construed as creating such a duty.

5. Re: Section 723. Termination by Attorney Transferring Document to Another Attorney or Trust Company.

5.1 If Team 4's alternate proposal is accepted, in whole or in part, then much of Section 723 will have to be rewritten. For this reason, Team 4 refrains from commenting about the section at this time.

5.2 The same considerations as set forth in 5.1 apply to Section 726.

5.3 With respect to subsection (e) (page 14), Team 4 believes that a fundamental policy question has been raised with respect to the release of documents: all documents versus wills. Team 4 believes that this issue is important enough that it should be discussed by the entire Executive Committee at its December 8, 1990 meeting.

5.4 Team 4 agrees with the modifications suggested by Demetrios Dimitrious.

Hope all is well.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN

KAB\tc

cc: Team 4
Bruce Ross, Esq.

REPORT

TO: BRUCE S. ROSS, CHAIR
VALERIE J. MERRITT
STERLING L. ROSS, JR.
ROBERT E. TEMMERMAN, JR.
CLARK R. BYAM
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT (Captain)
STUDY TEAM NO. 1

DATE: November 26, 1990

RE: LRC Memorandum 90-142 and its First Supplement
Study L-3022 -- Access to Decedent's Safe Deposit Box
(Comments on Tentative Recommendation)

This Report is made by William V. Schmidt after talking to attorney, Kenneth M. Klug in Fresno, California. No conference call was held by the members of Study Team No. 1. Study Team No. 1 and the Executive Committee in General has already approved this tentative recommendation.

We are happy to see that all of the letters received by the staff approve of the recommendation, and that none oppose it.

In response to the letter from attorney, Alvin G. Buchignani, the staff proposes adding the following sentence to the end of subsection (a) of Section 331: "Nothing in this Section affects the rights of a surviving co-owner." Study Team No. 1 has no objection to the addition of this sentence.

In response to the letters from two commentators, the staff also proposes that the person given access to the box be permitted to remove trust instruments as well as wills and instructions for the disposition of the decedent's remains. The financial institution would first make a photostatic copy of all such trust instruments, wills and instructions. Kenneth M. Klug and I both feel that this is a worthwhile addition. We would like to see it adopted by the Commission.

Mr. Klug and I both agree that the tentative recommendation is excellent and should serve the community and the legal profession very well. We hope that the revisions would also be acceptable to the California Bankers Association. We would not want to see any additions to the proposed Section 331 which would cause opposition to come from the Bankers Association to this proposal.

On the other hand, having said that, I would like to pursue a line of thought which results from the addition of the words "trust instruments" to the proposed statute. Today, we are seeing more and more revocable living trusts as substitutes for wills. When these trusts are fully funded, the will is not needed and no probate proceedings are ever commenced. Also it is not uncommon in today's world for clients to keep assets belonging to revocable living trusts in their safe deposit box. They also keep in the same safe deposit box documents of title, such as deeds and assignments of property to the trustee of their revocable living trust. Since there is no provision in Section 331 for the removal of trust assets or of documents of title transferring property into a trust, such assets or title documents remain in the box under subsection (f). The question then arises, "How are they subsequently removed?"

If a will is admitted to probate and a personal representative appointed, it seems clear that the personal

representative can present a certified copy of his letters to the financial institution and subsequently obtain access to the contents of the box. What happens if no probate proceeding is ever commenced and no personal representative is ever appointed? How does the trustee obtain access to trust assets and title instruments in the box to which he is entitled? Must he open a probate proceeding and be appointed as personal representative for the sole purpose of gaining access to these contents?

If, for example, the box contained $10,000 of jewelry, which would be the only probate assets passing under a pourover will into the revocable trust, the trustee should be able to collect such jewelry by an affidavit under Probate Code Section 13101. Although we seldom see a Section 13101 affidavit used to collect assets which are in a safe deposit box, we do not see why this procedure should not be available.

A slightly different problem is raised when the box contains, for example, $100,000 of bonds registered in the name of the trustee of the revocable living trust. Can an affidavit under Section 13101 be used by the trustee to gain access to these bonds? Subsection (a) talks about furnishing the affidavit to the "holder of the decedent's property". Do these bonds, registered in the name of the trustee, constitute the "decedent's property" within the meaning of Section 13101 to permit use of an affidavit under the Section? Ideally, we would like to have an easy procedure for the trustee of a revocable living trust to be able to obtain access to the contents of the safe deposit box to which he is clearly entitled.

At this late stage, it may be that the questions posed above involve more than that with which the Commission currently wishes

to deal. We would certainly not recommend any additions to the proposed section which might cause controversy or opposition from the California Bankers Association. On the other hand, it might be helpful to the bankers in general and to the appropriate financial institution in particular to have an addition to the section (perhaps subsection (f)) or an addition to the comments of the section which deals with the subsequent removal of the contents of the decedent's safe deposit box after the initial items allowed by Section 331 have been allowed.

The removal of the contents by a duly appointed personal representative of the decedent should clearly be allowed. In the absence of the appointment of such a personal representative, perhaps it would be helpful for Section 331 to authorize removal of all or part of the contents of the box under either Section 13101 or a comparable procedure permitting a trustee to remove those assets and documents of title to which he is entitled.

We raise these questions for the consideration of the staff and the Commission with the hope that they would not unduly delay the adoption of this fine tentative recommendation, and with the suggestion that they be deferred if they would cause such a delay.

Respectfully submitted,

STUDY TEAM NO. 1

By: _____

William V. Schmidt,
Captain

NOTES CONCERNING MATERIALS RELATING TO STATUTORY WILLS

PRELIMINARY MATTERS

Objective

Our objective at this meeting is to consider and determine the various policy issues presented by a revision of the California Statutory Will form.

Determining these policy issues will permit the staff to prepare a Tentative Recommendation for the January meeting. The Tentative Recommendation can be reviewed and revised by the Commission at the January meeting and then approved for distribution to interested persons and organizations for review and comment. The Commission will review the comments we receive as a result of this distribution and approve a recommendation for submission to the Governor and Legislature.

We do not know whether this schedule will permit submission of a bill in 1991, but the staff believes that is important that the bill submitted be one that will not have defects that will require a revision of the will form at a later legislative session. We are dealing with a printed form, and we should avoid the need to have the form reprinted in order to make corrections the need for which could be avoided if the legislation is carefully drafted in the first place.

Uniform Statutory Will Act

Memo 90-123 at pages 3-4.

State Bar Project to Revise Statutory Will Form

Michael V.Vollmer is the Chair of a State Bar Committee that is working to prepare a redraft of the California Statutory Will statute. He provided the staff with a copy of the Committee's most recent redraft, and the staff has drawn heavily from the Committee redraft in preparing its recommended revision of the statutory will statute. We have just received a letter from Mr. Vollmer noting some concerns that the Committee has with the Staff Draft included in Memorandum 90-123. At the same time, we note that the Committee has not objected to some significant changes in existing law that would be made by the Staff Draft.

Single Form; Elimination of the Statutory Will With Trust

The Committee believes that the statutory will with trust should not be continued. This form "is too complex for consumers and has income tax and other problems associated with it." The staff agrees with the Committee.

Mr. Boucher (page 1-2 of Second Supplement).

SPECIFIC CHANGES SUGGESTED BY COMMITTEE IN STAFF RECOMMENDED FORM

Hand out Staff Recommended Form

APPLICATION TO STATUTORY WILL OF GENERAL PROVISIONS RELATING TO WILLS

The Committee suggests that provisions be included in the statutory will form or the statutory will statute to provide rules to deal with various matters. For example, the Committee suggests the following "Technical Provision":

> A new section . . . should be added to expressly provide whether property passes subject to encumbrances; whether lifetime gifts of specific assets are deemed to be advances of property provided for in the Will for distribution at death; and how death taxes are to be allocated.

The California Probate Code contains general provisions dealing with these and other matters. These general provisions apply to any will (statutory or otherwise) unless the will otherwise provides. The provisions were drafted by the Commission with the assistance of the State Bar Section and many other interested persons and organizations. The provisions are designed to provide default rules (absent a contrary provision in the Will) that are most likely to reflect the testator's intent had the testator considered the particular matter.

The staff sees no need to invent the wheel. Accordingly, the staff recommended that it be clear that these general provisions apply to a statutory will, and the Staff Draft of the new statutory will statute makes this clear in Section 6265:

> § 6265. Application of general law
>
> 6265. Except as specifically provided in this chapter, the general law of California relating to wills applies to a California Statutory Will.

Comment. Section 6265 is the same in substance as former Section 6248 (repealed California Statutory Will statute). The phrase "relating to wills" has been added to the language of former Section 6248. The section makes clear that, except as provided in this chapter, general California law relating to wills applies to a California Statutory Will. Thus, for example, Sections 6100 ("An individual 18 or more years of age who is of sound mind may make a will"), 6110 (manner of execution of will), 6120 (acts constituting revocation), 6122 (effect of dissolution or annulment of marriage on will), 6123 (second will revoking first will, or subsequent will which revokes a prior will or part expressly or by inconsistency), 6124 (presumption of revocation), 6147 (antilapse statute), 6148 (failed devises), 6152 (half-bloods, adoptees, persons born out of wedlock, stepchildren, foster children, and the issue of such persons, when included in class gift or relationship), 6165-6178 (exoneration and ademption), 20100-20225 (proration of estate taxes and taxes on generation-skipping transfers), and 21400-21406 (abatement) apply to a statutory will. This chapter may, however, provide a special rule that modifies a rule of the general law relating to wills. For example, Section 6270 permits the court to find valid a defectively executed will executed on a California Statutory Will form if the court is satisfied that the maker signed the will and knew and approved of the contents of the will and intended it to have testamentary effect. For another special rule applicable to a California Statutory Will, see Section 6258 (120-hour survival requirement)

In response to the suggestion of the Committee, we have added the additional underscored references to the examples given in the Comment to Section 6265.

PLACEMENT OF BACKGROUND AND INFORMATIONAL MATERIAL

Where should Questions and Answers material be set out in statutory will packet? The Committee draft includes informational material presented in the form of Questions and Answers. This material, which consists of three and one-half printed pages (see pages 10-13 of Exhibit 1 of handout), is designed to help the consumer understand about wills and to help the consumer decide if the California Statutory Will form will meet the consumer's needs.

The existing statute contains a brief statement at the beginning of the form that advises the consumer of some matters of great importance in connection with the form and its execution.

The staff believes that the Questions and Answers prepared by the Committee contain much useful background information and that the Questions and Answers should be included in the statutory will packet. But we believe that the substance of the brief statement now found at the beginning of the existing statutory will form should be retained with an added reference to the Questions and Answers which the staff could place at the end of the statutory will packet. We fear that if too much information is included in front of the statutory will itself, the testator will not read any of it or will not appreciate the importance of certain matters. We believe it is better to note the most important matters at the front of the statutory will form itself and to refer the testator to the Questions and Answers at the back of the form packet for more detail and additional information.

The Committee is of the view that the Questions and Answers material should be at the very beginning of the will form, not at the middle or end. The Committee believes that every one of the questions is important and should be considered by any user of the form. The Committee believes that the will is misleading if the Questions and Answers are placed at the end of the form.

The POLICY ISSUE is whether the NOTICE material on the first page of the Staff Recommended Form should be deleted and the Questions and Answers material (pages 10-13 of the Staff Recommended Form) be inserted before the text of the California Statutory Will. If this is done, the staff would retain the INSTRUCTIONS portion of the first page as a part of the California Statutory Will form. (The Questions and Answers material is not a part of the California Statutory Will.)

Mr. Vollmer has a number of suggestions for revision of the Notice (drawn from existing law) that appears on the first page of the Staff Recommended Form. If the Commission decides to retain the scheme of the Staff Recommended Form, we will take these suggestions into account in preparing the Tentative Recommendation.

Definition of "trust" in Questions and Answers. Several persons who have reviewed the Staff Draft have objected to the definition of a "trust" in the Questions and Answers. The definition entirely ignores the revocable living trust concept, and conveys the impression that a

trust is only used to deal with persons who are young, immature, elderly, or who have a problem of disability. The persons objecting to the definition of "trust" apparently believe that the Questions and Answers should define a trust in a manner that informs the consumer that a revocable living trust may be more appropriate for the particular consumer than a will. The staff believes that either the definition of a trust should be omitted entirely, or the definition should be revised to indicate that a revocable living trust is an alternative to a will, and not only avoids the need for probate but also avoids a court supervised conservatorship should the consumer become unable to manage his or her financial affairs in the future. The problem is that such a definition becomes somewhat long and complex. WHAT ACTION DOES THE COMMISSION WISH TO TAKE ON THIS POINT?

Non-citizen spouse. Mr. Vollmer also mentions in his letter that people who are married to a non-citizen spouse should not use the statutory will form, but we do not see this warning in the Questions and Answers. SHOULD A STATEMENT TO THIS EFFECT BE ADDED TO THE QUESTIONS AND ANSWERS?

Manner of changing will. Question 10 states that "You may change your will at any time, but only by an amendment (called a codicil)." The staff does not believe that a consumer can understand what this means or how an amendment can be made. We believe that it would be more useful to tell the consumer who wants to change his or her will to make and sign a new will. The Committee language may encourage a person to write a change on the text of the statutory will form. There is no warning that the "codicil" must be a separate document. The staff would delete the sentence: "You may change your will at any time, but only by an amendment (called a codicil)." Much more is needed if this question is to be answered in a manner that will really inform the consumer.

Conforming revisions. The Questions and Answers also may need to be revised to reflect the content of the statutory will form as approved by the Commission.

IDENTIFICATION OF FAMILY MEMBERS

The Committee draft adds a new provision to the statutory will form that requires the listing of the testator's spouse and "children now living." Vollmer states the reason this provision is included:

> However, the choices and many blanks in the form invite a person to disinherit a family member. To do so without reciting who those individuals are, welcomes a will contest (see Probate Code Sections 6560 through 6573).

Question 8 informs the consumer that the consumer should talk to a lawyer if "you want to disinherit your spouse or descendants."

The staff believes that the provision listing "living" children will cause more problems that it will cure. See page 26 of Memorandum 90-123. Professor Beyer is of the same view. See First Supplement to Memorandum 90-123. If it is desired to deal with the problem of disinheriting a family member, we suggest that a specific provision be added to the form which lists any family members who are to be disinherited. We do not recommend the addition of such a provision.

PARAGRAPH 2 OF STAFF RECOMMENDED FORM

Indication in statutory will that paragraph 2 is "optional." The Committee suggests that Paragraph 2 (Household and Personal Items) of the Staff Recommended Form should be labeled as "Optional." The staff believes this is a good suggestion and should be adopted by the Commission.

Addition of provision dealing with death taxes. The Committee suggests that the following sentence be added at the end of the introductory portion of paragraph 2: "No death tax shall be payable from these gifts." The staff would not add this provision and would instead leave the matter of payment of death taxes to the general provisions of the Probate Code that govern this matter. We doubt that the consumer will understand the purpose and effect of the added sentence.

Making percentage gifts. Professor Beyer has suggested that gifts be allowed by designating different percentages to different beneficiaries. See First Supplement to Memorandum 90-123 at pages 2-3. The Committee "believes that this greatly increases the change of errors and will be used so infrequently as to be useless. The staff

concluded that giving the testator this ability was unnecessary because the Staff Recommended Form permits the testator, for example, to give one child more than the others (by making specific gifts) if that is the testator's desire.

PARAGRAPHS 2 AND 3 STAFF RECOMMENDED FORM SHOULD BE INVERTED

The Committee suggests that if paragraph 3 (specific gifts of real and personal property) is approved, then paragraph 3 should precede paragraph 2. The staff has no problem with the adoption of this suggestion.

SPECIAL PROVISION FOR DISPOSITION OF FAMILY HOME

Professor Beyer suggests that a special provision be included for disposition of the family home. See First Supplement to Memorandum 90-123 at page 2. The Staff Recommended Form includes a provision (discussed below) permits gifts of specific real or personal property. This provision permits a disposition of the family home to a beneficiary designated by the testator. We see no need to complicate the form by adding a special provision relating to the family home.

SPECIFIC GIFTS OF REAL AND PERSONAL PROPERTY

The Committee draft permits specific gifts of cash only. The Committee draft does not, for example, permit the consumer to give a grandchild or friend a piece of jewelry or to give a child shares of stock or an automobile or to give a tract of real property to a particular child.

The staff believes that the limitation of specific gifts to "cash gifts" only makes the statutory will so inflexible that it will not meets the needs of the ordinary consumer. The other states that have statutory will forms permit gifts of specific property. Maine and Wisconsin (any real or personal property), Michigan (personal and household items).

he Staff Recommended Form includes a provision (paragraph 3) which is the same in substance as the Wisconsin provision. Paragraph 3 permits the testator to make not more than five gifts of specific real or personal property. Absent this provision, the staff believes that

the statutory will form will preclude a testator from achieving his or her desires with respect to particular property. The staff considers this an essential provision of a revised statutory will from.

The Committee objects to expanding the provision permitting a cash gift to include specific personal property and specific real property. The Committee advises that it "considered the flexibility of allowing such gifts, but decided against allowing specific non-cash gifts because such gifts raise a number of questions which are not easily answered by a Will form." See discussion on pages 5-6 of Vollmer letter.

If two technical revision are made in the Staff Draft,, there will be no need to attempt to answer the questions presented by the Committee. This is because the California Probate Code provides answers to the questions if the will does not otherwise provide. The rules in the Probate Code were carefully drafted by the Commission with the assistance of the State Bar Section and many other persons and organizations.

To make clear how the general Probate Code rules would apply, the staff recommends that the following section be added to the statute (not a part of the statutory will form):

> § 6271. A gift of particular property, whether real or personal, in paragraph 3 of the California Statutory Will is a specific devise.

The staff further recommends that the introductory portion of clause 3 be revised to read:

> I make the following gifts of cash or of ~~the~~ my property described below, and I sign my name in the box after each gift. If I don't sign in the box, I do not make a gift. ~~No death tax shall be paid from these gifts.~~

With these changes, the general provisions of the Probate Code will determine the answers to the questions raised by the Committee:

(1) In the rare case where the estate is of a size that there is a federal estate tax (property worth more than $600,000 passing to a nonspouse), the proration of the tax would be governed by Division 10 (commencing with Section 20100).

(2) Abatement for the purposes of payment of debts, expenses, and charges (other than estate taxes) would be governed by Part 4 (commencing with Section 21400) of Division 11.

(3) Exoneration and ademption would be governed by Article 3 (commencing with Section 6165) of Chapter 5 of Division 6.

As previously indicates, the staff believes that these general provisions (which apply to all wills unless the will otherwise provides) are appropriate for application to the statutory will, and we would not eliminate the provision permitting specific gifts of real or personal property merely because issues might arise that will require reference to the Probate Code to determine the applicable rule. We see no need to provide the answers to the various questions raised by the Committee in the statutory will form itself. Should one of these questions arise in connection with a particular statutory will, the testator using the statutory will form will be in the same position as a testator using an attorney prepared will that does not include a special provision dealing with the particular question.

The staff strongly recommends that paragraph 3 of the staff draft be approved. We note that Professor Beyer comments: "I am very pleased to see the staff's form providing the testator with increased opportunities for individualization. This may be the most significant and most beneficial revision." Boucher comments: "Your draft of a proposed revision of the California Statutory Will is a marked improvement over both the present form and the Bar Committee's draft, and my opinion your reasons for departing from several provisions of the Bar's draft are sound and convincing."

RESIDUARY PERCENTAGE GIFTS

Professor Beyer has suggested that percentage gifts of the residue be permitted. See First Supplement to Memorandum 90-123 at pages 3-4. The Committee comments: "This would be flexible, but (i) increases the change [sic] for error, (ii) adds complexity, and (iii) makes it necessary to state what happens if one beneficiary does not survive the testator (does the gift lapse? does the gift pass to descendants?)

There is no need to state what happens if one beneficiary does not survive the testator. The same question can be presented where the

residuary devisees take equal shares. Subject to the anti-lapse statute (Probate Code Section 6147), the rule is stated in Probate Code Section 6148(b) applies (If the residue . . . is devised to two or more persons and the share of a devisee fails for any reason, the share passes to the other devisees in proportion to their other interest in the residue"). Section 6147 (the anti-lapse statute) provides that the issue of the deceased devisee take in his or her place if the devisee is kindred of the testator or kindred of a surviving deceased of former spouse of the testator. These provisions provide a carefully drafted solution to the concern expressed by the Committee.

So long as the statutory will form permits the gift of specific real or personal property to a particular devisee, the staff believes that the need for percentage gifts of the residue does not offset the complexity and chance for error that concerns the Committee and the staff.

SURVIVORSHIP CLAUSES

The Committee draft was intended (but sometimes failed) to include survivorship provisions in each paragraph (e.g. "equally among all of the following persons who survive me"). The Staff Draft does not include this survival requirement. The result will be that it will be clear that the general anti-lapse statute will determine whether the devise lapses if the devisee fails to survive the testator. Probate Code Section 6146 provides that a devisee who fails to survive the testator does not take under the will. The anti-lapse statute (Probate Code Section 6147) provides that if the devisee predeceases the testator, the issue of the deceased devisee take in his or her place if the devisee is "kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator" and the will does not express a contrary intent or make a substitute disposition. Accordingly, if the testator makes a devise to one of his or her children, and the child predeceased the testator, leaving issue, the issue take notwithstanding the death of the child of the testator. We doubt that the testator would want a contrary rule, a rule under which the children of a deceased child of the testator get nothing.

The staff believes that it is good policy to apply the general provisions of the Probate Code governing the effect of the failure of a devisee to survive the testator. These provisions were carefully drafted by the Commission and others when the new Probate Code was prepared. We think the addition of the Committee draft language specifically requiring survival is unnecessary, will be confusing to the consumer, and may create uncertainty whether the anti-lapse statute will apply.

THE 120-HOUR SURVIVAL PROVISION

The 1990 legislative session added a 120-hour survival requirement to California statutory will statute. The provision was added to the law upon recommendation of the Commission. The provision was actively opposed by the State Bar Executive Committee at the Senate hearing on the bill that proposed the provision. The provisions was the subject of discussion at the Assembly Committee hearing on the bill. In both cases, and after discussion and consideration of objections to the provision, the legislative committee approved the provision.

The staff believes that the Commission recommendation to the 1990 Legislature is sound. More important, we would be greatly concerned to see the Commission recommending a provision to one session which enacts the provision and then at the very next session recommending the repeal of that provision because it was bad public policy. The Commission will lose its credibility with the Legislature if this practice is followed. (It is another thing to recommend a revision in a Commission enacted statute to correct a defect brought to light by experience under the statute.)

For these reasons, the staff recommends that the revised draft continue the existing law as enacted by the 1990 Legislature.

DEFINITION OF "PROPERTY"

The Committee recommends that "property" be defined. The staff has no problem with this suggestion, and recommends that the following provision be included in the statute:

§ 6254.5. Property

6254.5. Property means anything that may be the subject of ownership and includes both real and personal property and any interest therein.

This definition is the same as Section 62 of the Probate Code, which defines "property" as used in the Probate Code. (We will renumber the definition provisions if this addition is approved by the Commission.)

CALIFORNIA UNIFORM TRANSFERS TO MINORS PROVISIONS

The Committee draft includes a complex provision designed to discern the intent of the testator concerning the distribution of property to a beneficiary under age 25. See pages 19-20 of Memorandum 90-123. The staff does not believe that a consumer can understand this provision and properly fill in the spaces provided in this portion of the form.

The staff has recommended that this provision be omitted, and that the problem of immature beneficiaries be dealt with in the statute itself, rather than in the form.

The staff agrees that outright distribution to a beneficiary under age 25 ordinarily is not desirable. The Staff Draft gives the executor the option of delaying outright distribution to a beneficiary under age 25. The Staff Draft would revise the existing language of the statutory will statute as follows:

> (b) POWERS OF EXECUTOR.
>
> (2) The executor may distribute estate assets otherwise distributable to a minor beneficiary to (A) the guardian of the minor's person or estate, (B) any adult person with whom the minor resides or who has the care, custody, or control of the minor, or (C) a custodian ~~serving on behalf of~~ for the minor under the ~~Uniform Gifts to Minors Act of any state or the Uniform Transfers to Minors Act of any state~~ California Uniform Transfers to Minors Act, Part 9 (commencing with section 3900), or any other state's Uniform Transfers to Minors Act or Uniform Gifts to Minors Act. The executor may distribute estate assets otherwise distributable to a beneficiary under age 25 to a custodian under the California Uniform Transfers to Minors Act, Part 9 (commencing with Section 3900), in which case the executor shall provide, in making the transfer pursuant to Section 3909, that the time for the transfer to the beneficiary of the custodial property so transferred is delayed until the beneficiary attains the age of 25 years, except that the executor in his or her discretion may provide, in making the transfer pursuant to Section 3909, that the time for transfer to the beneficiary of the custodial property so transferred is delayed only to an earlier time, not earlier than the time the beneficiary attains the age of 18 years. The executor is free of liability and is discharged from any further accountability

for distributing assets in compliance with the provisions of this paragraph.

This provision is discussed in some detail 19-22 of Memorandum 90-123.

An examination of the existing statute will disclose that one option the executor has under existing law is to transfer the property to a custodian under the California Uniform Transfers to Minors Act. Under the existing statute, the executor selects the custodian. Like existing law, the provision set out above gives the executor complete discretion as to how a distribution to a minor beneficiary will be made.

The Committee is concerned that the Staff Draft does not give the testator the option of naming the custodian who will manage the property if it is transferred to a custodian under the Uniform Transfers to Minors Act. The Committee has a good point where the beneficiary is the child of the testator. In this case, it seems reasonable to require that the transfer be made to the person nominated as guardian in the statutory will. For other beneficiaries, the staff is willing to leave to the executor (as does existing law) the decision who is to serve as custodian. It may be many years after the will is executed before the testator dies, and the staff does not believe that the testator is in a good position at the time the will is executed to make a choice of a custodian for grandchildren and other immature beneficiaries when distribution of estate assets are made after the testator's death. Accordingly, the staff recommends that the following provision be added to the provision set out above:

> If the maker in the will has nominated one or more persons to serve as guardian of the property and a transfer is made pursuant to this paragraph to a custodian under the California Uniform Transfers to Minors Act for a beneficiary under age 25 who is the child of the maker, the transfer to the custodian pursuant to this paragraph shall be made to the person who would serve as a guardian if a guardian were appointed if that person is able and willing to serve as custodian.

DESIGNATION OF GUARDIAN

The Committee has a problem with the introductory clause of paragraph 5 on page 4 of the Staff Draft, which reads: "If I have a child under age 18 and the child does not have a living parent at my death." The staff took this language from the draft provided us by the Committee. Nevertheless, the Committee points out that the quoted

language "permits the user to appoint a guardian for a child's estate only if the child 'does not have a living parent'. A divorced parent might want to provide that assets be set aside for a child, but under no circumstances want the surviving natural parent to deal with the money set aside for the child." This is a good point. The staff recommends that we replace the introductory clause with the clause found in the existing statute: "If a guardian is needed for any child of mine,"

The Committee notes: "Finally, the staff version deals only with guardians of the estate of children, and not other beneficiaries (such as nephews and nieces). The Section's [California Uniform Transfers to Minors Act] provision solved this problem in a direct manner [by permitting the testator to designate the custodian for any beneficiary under age 25]." As pointed out above, we do not believe that it would be good policy to provide for the designation of the custodian by the testator who would serve as custodian for all beneficiaries, including nephews and nieces. For beneficiaries other than the testator's children, we believe that the determination of who should be the custodian should be made by the executor at the time of distribution of the estate. The executor at that time can select different custodians for different beneficiaries if desirable and can consider the estate management ability at the time of distribution of the persons might serve as custodians. Considering the complexity the provision for designation if custodians adds to the will form, we strongly recommend against adding the provision relating to beneficiaries under age 25.

TECHNICAL REVISIONS

The Committee suggests that "property" be substituted for "estate" in Sections 6277 and 6278 of the Staff Draft and that other nonsubstantive minor revisions be made in those sections. We will make the suggested revisions when we prepare the Tentative Recommendation for consideration at the January meeting.

UNRESOLVED POLICY ISSUE

The Committee states:

> Because of our large Hispanic and Vietnamese populations in California, we thought it might be appropriate to have a

version of the will prepared in at least Spanish and perhaps Vietnamese. Practitioners' comments on the wisdom of such an approach were equally divided. Some individuals though it was extremely appropriate (at least insofar as the Hispanic population s concerned), and others thought that it was an outrageous suggestion, especially since the Wills probably wouldn't bed used by that segment of the population anyway. Our Committee therefore took no ultimate position on this issue, in part because it would require an extremely careful review by persons fluent in the foreign language involved and would have to be carefully reviewed to assure that no nuances contained in the English version were not also contained in the Spanish (or other) language version..

The staff does not recommend that the Commission undertake to prepare foreign language versions of the California Statutory Will form.

OTHER SIGNIFICANT CHANGES IN EXISTING LAW

The Staff Draft makes other significant revisions in existing law that were approved (or not objected to) by the Committee.

TECHNICAL ERRORS IN EXECUTION OF FORM

There is reason to believe that statutory will forms are often improperly completed or are not properly executed. For example, Alameda County Court Commissioner Barbara J. Miller has stated that most statutory will are not completed correctly. An article in the California Lawyer states that one half of the statutory wills offered for probate in Los Angeles County are rejected because they are improperly completed or not signed.

The staff suspects that the most common errors are the result of failure to follow the execution and witnessing requirements and the testator's making additions or deletions on the form that are not permitted by the statute. The Staff Draft includes provisions to deal with these situations.

Substantial compliance with execution requirements. The Committee recommended that a provision be included to permit the court to admit a statutory will to probate if there is "substantial" compliance with the execution requirements.

The Staff Draft includes a provision to deal with this matter:

§ 6270 Validity of will where lack of full compliance with execution requirements

6270. Notwithstanding Sections 6110, a document executed on a California Statutory Will form provided by Section 6275 is valid as a will if all of the following requirements are shown to be satisfied by clear and convincing evidence:

(a) The form is signed by the maker.

(b) The court is satisfied that the maker knew and approved of the contents of the will and intended it to have testamentary effect.

(c) The testamentary intent of the maker as reflected in the document is clear.

Comment. Section 6270 is a new provision. Since the great majority of statutory wills are executed by persons who do not have the advice of legal counsel, it is important that some provision be made to save statutory wills that otherwise would be invalid because of the failure to comply with the technical execution requirements. Under Section 6270, the court may find a California Statutory Will form to be a valid will even though the form was not executed with the formalities required by Section 6110. For example, the witnesses might not be "present at the same time" to witness the signing of the will, or one of the witnesses to the will may not be competent to be a witness (see Section 6112), or there may be only one or no witnesses to the will.

There were no objections to the concept of this provision. All persons who commented supported the concept. The underscored material is added in response to a suggestion of Professor Beyer that the degree of proof be specified. The Committee states: "'Clear and convincing evidence' seems a proper standard for the court to admit a 'technically' defective Statutory Will."

Effect of additions or deletions on statutory form. The staff recommends the following provision:

§ 6269. Additions or deletions made on face of will

6269. Where an addition to or deletion from the California Statutory Will is made on the face of the California Statutory Will form, other than in accordance with the instructions, the addition or deletion shall be given effect only where that would effectuate the clear intent of the maker. If the intent is unclear, the court either may determine that the addition or deletion is ineffective and shall be disregarded or may determine that all or a portion of the California Statutory Will is invalid, whichever is more likely to be consistent with the intent of the maker.

Comment. Section 6269 supersedes subdivision (b) of former Section 6225 (repealed California Statutory Will statute) which provided that an addition to or deletion from the California Statutory Will on the face of the California Statutory Will form, other than in accordance with the instructions, is ineffective and shall be disregarded. Section 6269 gives effect to the maker's testamentary intent where the intent is clear. Thus, the court will give effect to the will with the addition or deletion where that is consistent with the clear intent of the maker. Or the court may ignore the addition or deletion, or may find all or a portion of the will invalid, whichever is more likely to be consistent with the intent of the maker.

Beyer approved the staff suggested provision and there were no objections to it.

ATTESTATION CLAUSE

The Staff Draft includes the substance of an improved wording of the attestion clause prepared by the Committee. See page 5 of the Draft Form. There was approval and no objections to this revision.

Respectfully submitted,

John H. DeMoully
Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8289

November 26, 1990
BY: FEDERAL EXPRESS *REPLY TO:* Michael V. Vollmer

Law Revision Commission
Attn: John H. DeMoully
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: California Statutory Will Revisions
Memorandum 90-123 / Study L-3049

Dear Mr. DeMoully:

I am writing this letter as Chair of the Statutory Will Revision Subcommittee ("Subcommittee") of the Executive Committee of the Estate Planning, Trust and Probate Law Section ("Section") of the State Bar of California. On November 16, 1990, I received your latest draft of the proposed changes to the California Statutory Will. My first two paragraphs below will how the Section viewed the overall concept and how particular decisions were made. My third paragraph will focus on particular issues in your most recent draft and how we think they can be improved.

1. Four Drafting Principles. During our drafting and review process of approximately two years, we were guided by four principles:

(a) Keep it Simple. Our primary goal was to keep the form simple. We did not want to add things which would (i) make it confusing, or (ii) cause errors by users, or (iii) create tax problems.

(b) Give More Choices. We tried to incorporate as many matters as possible which our "smaller estate" clients want or about which they are concerned. We recognized that adding choices also adds complexity. We tried to weigh the advantage

of adding each choice against the loss of simplicity.

(c) Make it Understandable. We wanted to assure the user of the form would understand what was being signed. The form should say what it means and mean what it says. We did not follow the drafting concept of the proposed Uniform Statutory Will Act, because any user of that form would have to know our California statutes to understand how property would pass at death. It is also inflexible. We also felt that the Michigan and Wisconsin use of "Questions and Answers" at the beginning of the Will is helpful, especially if expanded to define terms (such as executor, guardian, community property, bond, etc.) used in the Will form, explain what assets may not be subject to the Will form, warn prospective users about the dangers of the Will form, and advise users that other Will formats may be more appropriate for them. We want prospective users to make a "knowledgeable choice", and we do not expect many of them to read the fine print at the end of the Will form itself. The questions and answers are critical if the user is to be informed. Matters which are omitted or not discussed may create as many problems as matters which are included but which are inflexible. One of the problems with the present "two form" statutory Will system is that a prospective user may see one form and not know that a second one exists. A second problem is that many single people criticize the forms because they feel they are appropriate only for married people or parents.

(d) Remember the Audience. A single Will form cannot be all things to all people. Therefore, we tried to constantly focus on who the likely users would be. The "audience" of prospective users probably would not (and should not) include people with large estates, or those with special problems (non-citizen spouse, complicated estates, disinheritance situations, children with "special needs", etc.). We anticipated that the largest groups of users would be (i) the elderly whose children are grown; (ii) newly married couples with small estates (who will be most acutely interested in who would serve as guardian to raise their children, who would serve as the trustee or manager of assets on behalf of their children, and when the children would receive outright distribution); (iii) members of the military stationed in California and going overseas; (iv) other individuals with small estates; and (v) people going through divorce proceedings (where they need an "emergency" Will).

2. The Review Process.

We spent many many months and countless hours preparing our first drafts. We circulated the drafts among all 4,000 or so members of the Section via our Newsletter and asked for comments. We published a short article in the State Bar Journal in an effort to reach other lawyers who were not necessarily members of our Section. I contacted the legal officer of the San Diego office of

the United States Navy, which is apparently a very large user of the forms. With the recent outbreak of difficulties in the Middle East, I am certain that many statutory Wills have been prepared as sailors and marines prepare to go overseas through San Diego and El Toro. I sent a copy of drafts to numerous California members of the American College of Trust and Estate Counsel (then known as the American College of Probate Counsel) in an effort to solicit their comments as well. Finally, I gave the forms to lawyers, paralegals and non-lawyers (including young adults and even some children 14 or 15 years old), and asked them to complete them and comment on them. This helped the Subcommittee to focus on where errors are made, to identify areas where misunderstandings may arise, and to gain insight on what things people wanted covered.

As with the original statutory Will concept, it is critical to have input from lawyers who deal in the estate planning area. These lawyers on a daily basis discuss with clients what the clients are concerned about, and have the best insight about what issues should be addressed in a statutory Will form. Most clients with smaller estates are concerned about their children (who will raise them; at what age they will get money; who will manage the money). They want to retain flexibility but within certain ranges. Most people want to retain control over their estate plans and to tailor their Will to the needs of their family. They want flexibility, but they want to retain control over the parameters of the flexibility. This is why the Section was extremely distressed to find that the most recent Staff version deletes the ability of a user to designate a custodian to control the assets set aside for a minor, and to determine at what age children or other beneficiaries (such as nieces or nephews) will receive outright distribution of assets.

3. Specific Changes. The Section respectfully recommends that the Staff draft be changed as follows:

a. Warnings/Explanations Should Be Highlighted and Should Precede the Dispositive Provisions: The warnings and explanations should be at the very beginning of the Will form, and not at the middle or end.

(i) Most users will not read "the small print" which follows their signature. To define terms, to explain choices, and to state when the Will form may be inappropriate, at the end of the Will form makes the entire Will misleading. People with large estate should not use the form! People who have generation skipping transfer tax problems should not use the form! People who have closely held business interest should not use the form! People who are married to a non-citizen spouse should not use the form! People who have not checked title to their assets should not use the form (because they may hold everything in joint tenancy, and yet somehow think that the Will form controls disposition of those assets).

(ii) Every one of the questions in our initial draft is important, and should be considered by any user of the form. For

example, the Staff version at paragraph 5 states simply that "this will is not designed to reduce taxes". The Section's paragraph 8 is more specific, so that a user has a better chance to understand what tax savings might be available, and when the form is inappropriate.

(iii) Mr. Boucher and Professor Beyer have criticized our paragraph 18 definition of a trust. We intended to simply let individuals know that such a thing as a trust exists, that the Will form does not contain a trust, and then give an example of when a trust might be appropriate. Paragraph 18 states that a trust may be established for someone "who may be young, or immature, or elderly, or who has a problem or disability". It does not state that a trust is only for such persons. Since the Will form does not contain a provision for a trust, it did not seem appropriate to provide a comprehensive legal definition (which a layman might not understand anyway). We look forward to seeing Mr. Boucher's definition.

(iv) The Staff's paragraph 2 (line 2) should read "your wishes", not "you wishes". The Staff's paragraph 4 states that the will has no effect on "jointly-held property, on retirement plan benefits, or on life insurance on your life". "Jointly-held" property might include community property, or tenancy in common property. We believe the Staff intended to refer to property held in "joint tenancy". Furthermore, the statement that the will "has" no effect is probably inaccurate, particularly as it relates to retirement plan benefits (see the August 1990 California Supreme Court case of Estate of Margery M. MacDonald, 51 Cal. 3d 262). That is why the Section's paragraph 5 states that life insurance and retirement plan benefits "may" pass directly to the named beneficiary.

(v) The Staff's paragraph 5 states that this Will is not designed to "reduce taxes". Although technically accurate, it does not tell the maker what kind of taxes might be avoided and whether these subjects should be discussed. The Section's paragraph 8 states that the Will is not designed to reduce "death or any other taxes", and gives some specific (although not exhaustive) examples of when planning might be important.

(vi) The Staff's paragraph 8 states that the Will may be changed by "making and signing a new Will". The Section's recommended paragraph 10 explains another way that the Will may be changed (by a codicil, or what a user is more likely to refer to as an "amendment").

b. Explanation of Family Status. We understand the Staff's concern that it is easier (and might even result in fewer errors) if there is no mention of family members (e.g., whether the user of the form is married or has children). However, the choices and many blanks in the form invite a person to disinherit a family member. To do so without reciting who those individuals are, welcomes a will contest (see Probate Code Sections 6560 through

6573).

c. Paragraph 2 Should Be Optional. Paragraph 2 (household and personal items) should be modified so that the term "optional" is at the end of the topic heading (as it appears at paragraph 3). Furthermore, if no death tax is intended to be paid from these gifts, then the end of the sentence should read "No death tax shall be payable from these gifts". Professor Beyer has suggested that gifts be allowed by designating different percentages to different beneficiaries. The Section believes that this greatly increases the chance of errors and will be used so infrequently as to be useless. For major "separate gifts of personalty", a non-form Will is more appropriate.

d. Paragraphs 2 and 3 should be Inverted. If the LRC approves of the Staff version of paragraph 3 (specific cash gifts or property gifts), then it seems more logical to have paragraph 3 precede paragraph 2 (since the user may give away a specific item of jewelry, and may then give away the balance of the user's personal effects).

e. Paragraph 3 Should Be Deleted. Staff paragraph 3 expanded the Section recommendation of specific cash gifts to include specific gifts of other personal property and even real property. The Section considered the flexibility of allowing such gifts, but decided against allowing specific non-cash gifts because such gifts raise a number of questions which are not easily answered by a Will form. For example:

(i) Imagine what kind of descriptions you are going to see! What if the user decides to make specific devises of all of his or her assets? Where are debts and taxes to be paid from (e.g., do we look at Probate Code Section 21400 et. seq for abatement rules)? Tax apportionment rules are probably appropriate when the bulk of the estate is disposed of by a residuary clause, but are probably not appropriate when specific gifts of major value are involved.

(ii) What if the user later sells the specific asset, but the Will form provides for a gift of 1,000 shares of AT&T stock to nephew John?

(iv) If the user makes a gift of real estate, will it pass subject to encumbrances, or must the mortgages be paid off? Does the user know what the rule will be in this case?

(v) If the user makes a very substantial gift (e.g., of his or her residence, as Professor Beyer suggests be done in a separate paragraph), does it pass free of (or subject to) encumbrances and death taxes? With encumbrances, it seems simple to make a decision (probably "subject to"). With smaller cash and other small gifts, it may seem appropriate for the gift to be free from any liability to pay death taxes, but should the same rule apply when larger gifts (such as residential property) might be

made? When gifts are made of more valuable assets, doesn't it become more important to alert the user to the consequences (and doesn't this make the form longer and more complicated)?

(vi) Survivorship provisions become much more important when larger gifts are permitted (see paragraph 3f below).

f. No Residuary Percentage Gifts. Professor Beyer has suggested that percentage gifts of the residue be permitted. This would be flexible, but (i) increases the change for error, (ii) adds complexity, and (iii) makes it necessary to state what happens if one beneficiary does not survive the testator (does the gift lapse? does the gift pass to descendants?)

g. Survivorship Clauses. The Section draft provided for survivorship provisions in each paragraph (e.g., "equally among the following persons who survive me"). The Staff draft has deleted all references to survivorship with the following three exceptions: (i) whenever property is given to a spouse, the provision states "if my spouse survives me"; (ii) whenever property is given to children, the provision states "my descendants (my children and the descendants of any deceased child)"; and (iii) in every other case, there is no provision whatsoever and the user has to read the "mandatory provisions" (and specifically Probate Code Section 6258, which provides a 120 hour survivorship clause) and also somehow learn our California anti-lapse statutes which are not reproduced in the Will format. The Staff provisions violate one of the Section's primary principles ("say what you mean, and mean what you say").

(i) There Should Be No 120 Hour Survival Provision. The Section understands that the 120 hour survival provision, which initially applied only to the intestacy situation, somehow became a part of the Statutory Will this year. The use of this presumption should be eliminated from the new Will for the following reasons:

(a) The user doesn't know that "if my spouse survives me" really means "if my spouse survives me by 120 hours", unless the user reads the Mandatory Provisions. This is misleading. If you want 120 hours to apply, why not just say so?

(b) In small estates, does the user want to require 120 hours of survival in order to avoid the requirement of a second probate at the spouse's death; or to assure that user's property passes to the user's children of a prior marriage and not the spouse's children (in this case only, wouldn't a federally approved six month survival provision be more appropriate?)

(c) If the user specifies that his residence is to pass to his brother, and the brother doesn't survive him by 120 hours, may we assume that the user wants the residence to pass to the brother's descendants (in accordance with the unreproduced anti-lapse statute)? Might not the user instead wish for the

residence to pass to the user's sister? The Staff relies on the Wisconsin Statutory Will provisions (especially in connection with gifts of real or personal property to persons or charities), but even the Wisconsin version provides "if the person mentioned does not survive me or if the charity does not accept the gift, then no gift is made".

(d) In a simple Will, gifts (particularly of personal effects, and especially of gifts to persons other than children) should be conditioned upon survivorship (if the user finds it objectionable, at least the user knows that the problem exists and can change it by codicil or another Will). The Staff prefers instead to rely a provision of California law (the "anti-lapse" statute set forth in Probate Code Section 6147) which is not reproduced in the Will form, and on the "120 hour" survivorship scheme contained in a statute which is reproduced only in the "mandatory provisions" at the end of the Will form. The user cannot read the main part of the Will form and know where property will pass if the named beneficiary does not survive the user, and that seems improper in a form designed for a consumer to use without the assistance of a lawyer.

h. Define "Property". The Staff form continually refers to "property". The Section believes that this term should be defined, so that users understand that it includes stocks, bonds, cash, real estate, deeds of trust, etc., and not just "real property".

i. Insert CUTMA Provisions. The Staff form deletes any provision for a user to mandate that property to be set aside for a minor (child or otherwise) beyond age 18. The Section recommended that the user be allowed to use the California Uniform Transfer to Minors Act (CUTMA), so the maker (and not the maker's Executor) could decide when the property should pass outright, either:

(i) at age 18 [thus requiring a guardian to serve and deal with the property until the beneficiary reaches age 18), or

(ii) to a custodian for the beneficiary until the beneficiary attains any age between 18 and 25.

The Section suggested this CUTMA option because of our experience in dealing with individuals who have minor children (or minor nephews or nieces) that they want to provide for. Many people believe that age 18 is simply too young for a person to receive property, particularly if it is of a significant value. CUTMA permits property to be held as late as age 25, and that is frequently what clients will request to be inserted.

The Staff attempts to solve this problem by placing authority in the Executor (isn't it more appropriate for the user of the Will form to make this decision directly?) to determine if CUTMA should be used. This Executor's authority is contained in the Mandatory Clauses (which the Staff acknowledges users probably will not read because they are at the end), and seems contrary to the express provisions of paragraph 5 of the Will form itself. Furthermore,

testators frequently want one person to deal with the administration of the entire probate estate (perhaps a resident), but someone else to deal with property set aside for a minor beneficiary. For example, I might designate my father as my Executor, but someone else might be more appropriate (because of age or other factors) to handle distributions until my 5 year old child reaches age 18 or 25.

Staff paragraph 5 permits a user to appoint a guardian for a child's estate only if the child "does not have a living parent". A divorced parent might want to provide that assets be set aside for a child, but under no circumstances want the surviving natural parent to deal with money set aside for the child. Allowing the user to select a CUTMA account (with a non-parent custodian) solves this problem.

Finally, the Staff version deals only with guardians of the estates of children, and not other beneficiaries (such as nephews and nieces). The Section's CUTMA provision solved this problem in a direct manner (instead of looking to the Mandatory Clauses - Section 6278(b)(2) at the end of the Will).

j. Technical Provisions.

(i) Definition of Property. A new section [6255.5(a)?] should be added to define "property".

(ii) Encumbrances/Taxes/Advancements. A new section [6276.5?] should be added to expressly provide whether property passes subject to encumbrances; whether lifetime gifts of specific assets are deemed to be advances of property provided for in the Will for distribution at death; and how death taxes are to be allocated.

(iii) Substitute "property" for "estate". Section 6277 should be modified to delete the term "estate" and to substitute the term "property". The definition might be simply what is already in Probate Code Section 62, which defines property as "anything that may be the subject of ownership and includes both real and personal property and any interest therein".

(iv) Section 6278. Section 6278(a) should be modified by deleting the term "estate" and by substituting in its place the term "property". The term "the executor" should be replaced with the term "my executor", and the term "the estate" should be replaced with the term "my estate" or "my property" throughout Section 6278.

k. Spanish/Vietnamese Version. Because of our large Hispanic and Vietnamese populations in California, we thought it might be appropriate to have a version of the will prepared in at least Spanish and perhaps Vietnamese. Practitioners' comments on the wisdom of such an approach were equally divided. Some

individuals thought it was extremely appropriate (at least insofar as the Hispanic population is concerned), and others thought that it was an outrageous suggestion, especially since the Wills probably wouldn't be used by that segment of the population anyway. Our Committee therefore took no ultimate position on this issue, in part because it would require an extremely careful review by persons fluent in the foreign language involved and would have to be very carefully reviewed to assure that no nuances contained in the English version were not also contained in the Spanish (or other) language version.

k. Court Authority to Admit Wills with Minor Technical Problems. "Clear and convincing evidence" seems a proper standard for the court to admit a "technically" defective Statutory Will.

I will be present at your Law Revision Commission meeting scheduled for Thursday afternoon, November 29, 1990. If you have any questions of me in advance of that meeting, please write or call me at the following address and telephone number:

Michael V. Vollmer, Esq.
18400 Von Karman Avenue, Suite 600
Irvine, CA 92715
(714) 852-0833

Very truly yours,

Michael V. Vollmer
MVV:ll
cc: Bruce S. Ross
Valerie Merritt
William V. Schmidt

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF Consumer Affairs

BOARD OF VOCATIONAL NURSE AND PSYCHIATRIC TECHNICIAN EXAMINERS
1414 K STREET
P.O. BOX 944206
SACRAMENTO, CA 94244-2060
TELEPHONE: (916) 445-0793

November 26, 1990

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D
Palo Alto, CA 94303

Dear Mr. Sterling:

The Board of Vocational Nurse and Psychiatric Technician Examiners understands that the Commission is considering a proposal to sponsor legislation that would grant to administrative law judges the power to make binding the determination of the credibility of witnesses. The Board is gravely concerned with any such measure which would dilute the authority of the Board with respect to disciplinary decisions regarding its licensees.

The Board opposes any such change and will work actively to defeat proposed legislation addressing this issue.

Sincerely,

for (Mrs.) Billie Haynes, M.Ed., R.N.
Executive Officer

AES:rm

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

November 26, 1990

Mr. John Demoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Demoully:

This is to reiterate opposition to the proposals set forth by Professor Asimow regarding the effect of decisions of administrative law judges in state service.

The Public Employment Relations Board and the Agricultural Labor Relations Board firmly believe that the proposal recommends changes which are unacceptable for our boards and for state government in general.

We believe that the proposal is poor policy and poor government because it paralyzes the ability of governmental executives to create and execute policy decisions and because it creates a layer of judiciary which is not accountable to the public.

If there are any questions, please feel free to contact either of us or PERB's General Counsel, John W. Spittler.

Sincerely,

Deborah M. Hesse

Deborah M. Hesse
Chairperson

State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
714 P Street, Room 1750
P. O. Box 944275
Sacramento 94244-2750

(916) 445-5678

November 27, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Memorandum 90-129 - Discussion Draft Statute

Gentlemen:

Thank you once again for the opportunity to comment on the Administrative Law Study project. Please find attached our comments on the draft statute.

As we have stated in the past, the Appeals Board supports the concept of modernizing and streamlining administrative law and procedure in California. We have, however, a number of concerns with the draft statute. Even though it is only a discussion draft, we think it is appropriate to bring these concerns to your attention now.

Some of our comments address rather fine points of nomenclature and procedure. Others address more fundamental points of differences between a typical APA agency (under current law) and purely adjudicatory agencies such as the CUIAB. We have attempted in this memo to address only those matters which could impact CUIAB and not issues which may concern other agencies.

The Board looks forward to continuing working with the Commission, its staff, and its consultant in achieving a product which will serve the needs of everyone involved in administrative adjudication.

Very truly yours,

TIM McARDLE, CHIEF COUNSEL

cc: Professor Michael Asimow
Robert L. Harvey
Michael A. DiSanto
Linda Clevenger

610.400. Order.

This Board uses the term "decision" for dispositions by which a legal interest is determined. "Order" is used in the case of actions of an interlocutory nature from which no appeal rights arise. If "order" is to become the favored term, there should be another term which describes these lesser actions. This would require an Unemployment Insurance Code amendment, perhaps a catchall addition to the prefatory general provisions.

In the note to this section, it is mentioned that the Commission intends to address issues involving adjudicative/rulemaking hybrids. Appeals Board Precedent Decisions (UIC 409) might fall into this category. The Board is most interested in retaining this category of decision in the adjudicative procedure.

613.010. Service.

This Board achieves service by first class mail. A requirement for the Board to serve its hearing notices and decisions by certified mail would be immensely burdensome and prohibitively expensive. In 1989, the Board issued approximately 13,500 decisions at the higher authority and nearly 140,000 decisions at the lower authority. Multiplying the latter figure by the number of hearing notices required, and the former by appeal acknowledgements, briefing notices, and other writings that might be deemed to require certified mailing, and the numbers approach the astronomical.

Service by first class mail has not been a significant problem for us. What few problems we do have are most commonly encountered in applications to reopen where a party alleges it did not receive the hearing notices. These allegations are usually taken as prima facie evidence of good cause for failure to attend the hearing, in which case reopening is granted.

640.230. Administrative Law Judges.

This section continues the requirement that OAH ALJs be admitted to practice in this state. When the time comes to draft qualifications for non-OAH ALJs, we want the Commission to be aware that the unemployment insurance program is a federal-state partnership. Thus, the Board has in the past and continues to recruit ALJs on a nationwide basis. We would not want our recruiting base to be limited to California attorneys.

640.260. Voluntary Temporary Assignment.

This provision partially embodies a suggestion we made in response to the central panel concept. The only suggestion we have here is to modify or delete the first clause to subdivision (a), thereby giving the director and non-OAH ALJs greater opportunity to participate in a voluntary temporary assignment.

Article 7. Orders.

There will have to be some differentiation made in this article between those agencies which issue proposed orders and those which do not. Appeals Board ALJs, for example, issue decisions which are, for most purposes, final and enforceable when issued, notwithstanding that they can be appealed to the Board. Similarly, Board decisions are final when issued, notwithstanding the right to seek mandamus.

642.710. Proposed and Final Orders.

Because the benefit entitlements adjudicated by the Board are designed to provide immediate, short-term relief, the federal Department of Labor has adopted "guidelines" (as opposed to statute or regulation) which require that the Board issue 60% of its decisions within 30 days of the appeal being filed at the lower authority and 60 days at the higher authority. (Section 303(a) of the Social Security Act mandates that U.I. benefits be paid promptly when due.)

UIC 1337 requires the higher authority to issue a decision within 60 days of submission. Except in periods of very high workload, the lower authority guidelines have proven realistic. We meet the statutory goal at the higher authority for all but special cases, such as those being considered for precedent. We have never come close to meeting the federal guideline at the higher authority.

The point here is that a universally applicable time limit will not work without some built-in flexibility. We suggest that a provision be made which would allow agencies to set shorter time limits as their situation dictates.

642.720, 642.770, Form, Contents, Adoption of Proposed Order.

These sections presume the fact of a proposed order. Again, there will have to be an accommodation made for adjudicatory agencies such as the Appeals Board which issue only final orders.

642.760. Correction of Mistakes in Order.

There appears to be an inconsistency between the draft statute and the note. Whereas in subdivision (c) the draft speaks of a motion being granted only upon findings of fact and conclusions of law, it is stated in the note that the presiding officer's ruling on the motion is not required to be written. Since the emphasis here is on expedient identification and correction of obvious errors, we strongly favor the less formal approach. In this regard, we believe that "motion" is too formal a term to describe what is only a simple request.

There should also be a provision for the agency to correct mistakes in the absence of a party's request. Nor should the power to correct mistakes be limited to the hearing officer but should include the senior or presiding at a particular location. Since this procedure would be limited to correction of mistakes, there should be no opportunity for mischief by the officer who makes the correction.

642.830. Initiation of Review.

Our comments on section 642.710 apply to subdivision (a) of this section. Agencies should be free to adopt shorter time limits as circumstances warrant.

Regarding subdivision (b), UIC 413 allows the Appeals Board to vacate an ALJ decision and remove the proceedings to itself for review. Although used only infrequently, this section has proved useful in rectifying obvious miscarriages of justice when there is no appeal by a party. We would like to see this provision included in the new statute.

642.840. Review Procedure.

Regarding subdivision (b), the Appeals Board's existing procedure, pursuant to precedent decision, is that the Board will not consider additional evidence which, in the exercise of diligence, could have been submitted before the ALJ. The Board does consider evidence which was not available at the time of the hearing, in which case the evidence is served on the other parties for review and comment. This rule is followed strictly. In the event that the ALJs fact finding is deficient, the case is remanded to an ALJ (not the ALJ) for a further hearing (availability of the original ALJ can be a problem).

The Board's practice regarding additional evidence mirrors almost exactly the procedure in CCP 1094.5(d). We see no reason why the Board should not be able to decide a case in consideration of additional evidence provided all due process safeguards are followed. If the procedure is permissible in court, it certainly should be permissible before an administrative agency.

Regarding subdivision (c), the Board grants written argument to any party upon request and furnishes the party a copy of the administrative record, including the transcript, without charge. Oral argument, however, is discretionary and is granted only about once every month. Given that most parties appearing before the Board are unrepresented, and given the Board's tremendous caseload, oral argument as a matter of right would be wholly impractical.

642.850. Final Order or Remand.

Our comments to this provision echo those to preceeding sections. The 100-day disposition period should be the maximum allowable period for issuance of an order after the case has been submitted. Agencies should be free to mandate upon themselves shorter limits as their circumstances dictate. Again, this section in its final form will have to allow for agencies whose orders are final when issued.

642.720. Form and Contents of Order (continued), and Administrative Mandamus, CCP 1094.5.

The Appeals Board agrees with the proposal to include in the new APA the provisions requiring that great weight is to be accorded to findings of the hearing officer which are based substantially on credibility of evidence or demeaner of witnesses.

The Board has long adhered to the principal that the administrative law judge as the trier of fact has the duty and responsibility of weighing and evaluating the testimony of witnesses and resolving conflicts in testimony. Unless the ALJ's findings are manifestly against the weight of the evidence, those findings will be accepted by the Board (Precedent Decisions P-B-10, P-T-13, and P-B-57). This principle is, of course, consistent with the rule of Universal Camera.

Under this procedure, it is the ALJ's responsibility to identify those findings that are based substantially on demeanor credibility. If the Board rejects those findings, it should articulate reasons for doing so, such as contradictory, manifestly self-serving, or inherently improbable testimony on the subject given by the witness upon whom the ALJ has chosen to rely.

We note that, after many years of experience as a respondent in administrative mandamus cases, the actual practice of judges reflects the proposed amendment to CCP 1094.5(c). That is, courts tend to discount Board decisions which reverse the ALJ to the extent that those Board decisions ignore ALJ demeanor credibility determinations.

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE: (415) 557-

Public Utilities Commission

STATE OF CALIFORNIA

COMMISSIONER

November 29, 1990

Edwin K. Marzec
Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study N-105 - Administrative Adjudication

Dear Chairman Marzec:

These comments respond to the recommendations of Professor Michael Asimow contained in his August 1990 study for the California Law Revision Commission and implemented in the draft statutory language to be considered by the Commission at its November 30, 1990 meeting.

The California Public Utilities Commission (CPUC) is not subject to the provisions of the Administrative Procedure Act. However, as we are aware of the Commission's intention to craft revisions to the Act which would facilitate its uniform application to all state administrative agencies, the CPUC feels compelled to respond to suggestions made to the Commission which could adversely affect the operation of our agency. We continue to believe that the specific procedural requirements of the CPUC's varied caseload warrants retention of the separate statutory scheme now in place, and the CPUC's continued exemption from APA requirements.

The CPUC is concerned that certain of the recommendations made to the Law Revision Commission are extremely ill-considered and would wrest decisionmaking authority from the Commissioners who are constitutionally responsible for the decisions of the CPUC. Given the nature of the proceedings before the CPUC, there is no justification whatever for transferring such authority to Administrative Law Judges nor for insulating the judges' decision from either agency or court review. We strongly urge the Commission to reject such proposals as inconsistent with the basic pattern of responsibility and accountability within the Executive Branch of state government and contrary to the public interest.

With regard to the specific recommendations of Professor Asimow in the area of administrative adjudication, the CPUC comments as follows:

Recommendation 1. The APA should make clear that the agency heads can hear cases themselves or delegate the initial hearing to hearing officers for preparation of an initial decision.

The CPUC has no objection to this proposal as it reflects current CPUC practice to delegate all cases to an ALJ for initial decision.

Recommendation 2. The APA should provide that agencies may delegate final decisionmaking authority to hearing officers, may make review of initial decisions discretionary, and may delegate review of initial decisions to subordinate appellate officers or panels of agency heads.

This recommendation conflicts with the existing statutory scheme for review of initial decisions of the CPUC in major cases, which provides an opportunity for parties to review and comment on an initial decision, and provides for review of an initial ALJ decision by the full Commission. (Public Utilities Code § 311 and CPUC Rule of Practice and Procedure 77.2 et seq.) The CPUC has no objection to granting agencies the authority to make such review discretionary, but it does not recommend any change in the existing system for reviewing CPUC decisions. The review and comment system instituted by § 311 has met with general approval from the parties appearing before the CPUC.

Recommendation 3. The existing provisions for petitions for reconsideration should be revised.

It appears that the consultant's proposals contemplated agency review of both proposed and final decisions. The draft legislation, at the request of the Law Revision Commission, largely omits any procedure for agency review of a final order. The CPUC strongly opposes any procedural scheme which does away with the existing review and rehearing procedures included in the Public Utilities Code.

The CPUC has a specific procedure in place whereby parties can review and comment on proposed decisions. (P. U. Code § 311 and Rule 77.2 et seq.). In addition, the Commission follows a statutorily prescribed procedure for rehearing of final orders as set forth by statute (P. U. Code §§ 1731-1736) which has operated very effectively for over 70 years. It has always been the experience of the CPUC that rehearings are an important vehicle for identifying and correcting legal error without the necessity for appellate litigation. The CPUC strongly disagrees that rehearing is a futile procedure. In actual practice, the CPUC frequently modifies final decisions to correct legal error and

less frequently grants full rehearing. The CPUC contends that agency review of final decisions is a crucial ingredient in procedural due process as well as a major factor in reducing unnecessary appellate litigation. See the specific comments to the draft legislation below.

Recommendation 4. Agency heads should be permitted to summarily approve a proposed decision. All parties should receive a copy of the initial decision and an opportunity to file briefs prior to summary approval.

This recommendation is consistent with existing CPUC practice under P. U. Code Section 311.

Recommendation 5. ALJ determinations as to credibility are to be given greater weight by the reviewing agency and a reviewing court.

While the recommendation speaks of "credibility", this is a far broader concept that demeanor evidence, as it can encompass the credentials of an expert witness or the persuasive power of an argument. Such evidence of credibility is apparent from the record of the case and is not solely the province of the ALJ. The CPUC strongly objects to any limitation on the ability of its Commissioners to render a decision on the full record in the case. Matters before the CPUC are most often decided on the basis of expert testimony from witnesses whose credentials and findings are extensively documented in the record in the form of written reports. All cross examination is transcribed as well. The Commission rejects the notion that demeanor evidence, the sound of the witness' voice or the expression on his face, is so essential to a determination of credibility in such cases that the Commission must accept the ALJ's determination and forgo any independent review of the credibility of expert witnesses. In our experience it will be the rare exception, rather than the rule, that percipient evidence--testimony as to facts and events actually seen by the witness--will be at issue in CPUC proceedings. In such cases, where the witnesses' actual demeanor is significant in determining the credibility of percipient witnesses, a much more narrowly drafted rule to lend greater weight to ALJ determinations may be acceptable. However, under no circumstances should the CPUC be required to labor under such a handicap in the vast majority of its cases.

The full CPUC has always taken upon itself the task of evaluating the expert testimony before it as part of the decisionmaking process. To remove the power to evaluate the evidence in this fashion fundamentally alters the relationship between the Commissioners as agency heads and the ALJ. The proposal would give final decisionmaking power to the ALJ who can virtually decide the outcome of a case by deciding which expert witnesses are credible. This decision is then to be given "great weight"

by the agency and the reviewing courts. The CPUC submits that such a result turns on its head the entire system of responsibility and accountability within executive branch agencies. The appointed Commissioners, who have the constitutional authority to render ratemaking decisions, will find most cases decided for them by a permanent civil service employee who is not accountable to either the Governor or the electorate. This is wholly improper and not in the public interest.

The CPUC recommends that this proposal be eliminated from further consideration by the Law Review Commission.

Comments on the Proposed Statutory Changes

Consistent with the foregoing general comments, the CPUC offers the following specific comments on the proposed draft legislative changes set forth in Memorandum 90-129:

§ 610.400 Order The CPUC believes that the provisions for administrative review of agency decisions should apply uniformly to all its orders, whether adjudicatory decisions or rulemakings. The CPUC is also concerned that the proposed legislation reflects a statutory scheme which would force the CPUC to use rulemaking procedures in adjudicatory cases involving more than one utility. It would be wholly inappropriate for the CPUC to be limited to rulemaking procedures in the many complex cases it handles each year which affect more than one utility or address a ratemaking issue of general application to all utilities. The CPUC's rules currently provide for Orders Instituting Investigation, which may investigate any aspect of a utility or a class of utilities. (Rule 14.) These OIIs are not conducted according to rulemaking procedures, but are conducted as adjudicatory proceedings with full hearing procedures. The CPUC has separate rules for the conduct of rulemakings. (Rule 14.1 et seq.)

§ 642.710 Proposed and Final Orders The CPUC cannot consent to subject either its ALJs or the agency itself to a 30 day limit for preparation of a proposed decision. The CPUC's caseload involves a large number of cases in which far more time than that is required to digest the record, let alone prepare a proposed decision. The CPUC should be exempted from any such absolute time limitations.

§ 642.750 Delivery of Order to Parties The CPUC notes that the proposed statute does not specifically dictate that the proposed order is to be issued prior to any internal agency review, but that is clearly the intent discussed in the subsequent note prepared by staff. The CPUC opposes such a procedure. Internal review of complex orders is not only appropriate but essential for maintaining a high quality of decisionmaking in utility regulation. The proposed legislation should not interfere with

such procedures. The Public Utilities Code specifically authorizes the Commissioners to assign an ALJ to "assist the Commissioner" in hearing the case. (P.U. Code { 311(b).) Under these circumstances, the ALJ and the Commissioner are fully entitled to jointly review the proposed decision before its release to the parties.

{ 642.760 Correction of Mistakes in Order The proposed amendments call for a motion to correct mistakes within 15 days of a proposed order, and a determination of the motion 15 days following its filing. Such procedures would be completely impossible for the CPUC to implement given the statutorily required 30 day comment period under P.U. Code { 311 and the existing rehearing procedures required by statute. Neither the parties nor the ALJ could successfully manage all these procedures at the same time. The CPUC submits that the {311 comment procedure, the rehearing procedure, and the petition for modification procedure (P.U. Code { 1708) present sufficient opportunities for parties to seek correction of errors in proposed and final decisions.

{ 642.770 Adoption of Proposed Order The CPUC practice is for the ALJ to review the comments on the proposed decision, and modify the proposed decision as required in consultation with the agency head. This draft legislation should not prohibit the CPUC's existing procedure by requiring the agency head to review the comments.

{ 642.780 Time Proposed Order Becomes Final The CPUC also opposes automatic acceptance of the proposed decision as the decision of the agency after 100 days. As comments on the proposed decision are permitted within the first 25 days, that leaves the agency 75 days to make any required changes in the decision. (Rule 77.2, 77.5.) While it is not often that the CPUC requires a longer period of time to issue a final decision, we strongly disfavor provisions to give automatic effect to decisions which are not the product of the full Commission.

There are, for instance, times during the last few months of the year when the CPUC's calendar is especially crowded due to the necessity of issuing rate orders in time for new rates to become effective on January 1st. During that time it is simply not possible to address all the pending orders. Less important orders are deferred to early in the following year. Under this proposed statute, such a deferral could transform a proposed decision into the CPUC's final decision without any participation by the Commissioners. Such a result is clearly not responsible. This is quite different from the case where the agency knowingly defers action so that a proposed order can become final by operation of law.

The arbitrary time limitation adopted in this proposed statute may be reasonable in the management of licensing adjudications or similar small scale administrative proceedings, but it is quite unreasonable in the context of CPUC cases. No appellate court would impose a rule to make the lower court decision final if not acted on within 100 days. The CPUC faces a caseload and a complexity of issues in each case fully equal to that of an appellate court. It should not be burdened with such artificial constraints on its decisionmaking process.

{ 642.820 Limitation of Review The CPUC does not view review of proposed decisions as discretionary under current law, as the opportunity for such review is an essential part of the statutory scheme enacted in P. U. Code { 311. [1] Thus the provisions of { 642.820 would not appear to apply to the Commission as there is an express statutory limitation on restricting the right of review. In addition, as to final decisions, the right to a rehearing is mandated by statute, P. U. Code {{ 1731-1736. As discussed above, the CPUC believes that such a right to rehearing ought to be preserved. The CPUC has no objections to granting other agencies the discretion to limit review of proposed.

{ 642.830 Initiation of Review The CPUC opposes the requirement that a notice of review of a proposed decision indicate the issues for review. The CPUC practice is to review the entire decision in light of the comments received. Such a notice would merely circumscribe the agency's scope of review and make it cumbersome to fix errors detected after the notice was issued.

{ 642.840 Review Procedure The CPUC objects to subsection (c) which grants parties the right to a brief and an oral argument in each review of a proposed order. The CPUC submits that the written comments permitted under CPUC rules are sufficient, and that providing parties the right to oral argument is completely impossible given the CPUC's caseload and the large number of parties in each case. Even fifty commissioners would be hard pressed to hear arguments in all such cases, let alone the five who are constitutionally authorized to make ratemaking decisions.

{ 642.850 Final order or Remand The CPUC objects to the time limitation for issuance of a final order. The existing statutory scheme set forth in P.U. Code { 311 takes into account the

---

1 Section 311 does not specifically mandate the filing of comments by parties, although it is indisputable that the right to comment was intended by the legislature, based upon a review of the legislative history of the statute. The CPUC has provided for a mandatory right to comment in cases covered by Section 311 in its Rules of Practice and Procedure. (Rule 77.2 et seq.)

extreme complexity of CPUC decisions by imposing a minimum period for receipt of comments on a proposed decision, but omitting any maximum time for preparation of a final decision. The CPUC's cases routinely involve dozens of well-financed litigants, complex economic issues, months of hearing time and decisions several hundred pages in length. The CPUC submits that any procedure requiring a decision by a fixed date, absent a special finding which may then be appealed, will simply involve the CPUC in routine disputes about the pace of its decisionmaking process. The net result of this will simply be more delay, precisely contrary to the intended result.

The CPUC also opposes the provision of this section to require identification of the differences between the proposed and final orders. In a lengthy CPUC decision with extensive modification from the proposed order, this would be a time consuming and wasteful task. The parties before the Commission are fully capable of comparing the proposed and final decisions for themselves.

Code of Civil Procedure (1094.5 The CPUC strongly opposes any change which would grant "great weight" to the hearing officer's credibility determinations. A witness' credibility, particularly if an expert, may rest on far more than his demeanor while testifying. As discussed above, CPUC cases primarily involve the testimony of expert witnesses whose credibility can easily and reliably be evaluated based upon the written record in a case. At this point it is helpful to consider the generally accepted distinction between legislative and adjudicative facts. See Davis, Administrative Law Treatise 2nd Ed., {{12.3-12.5, especially at 415-417.

Demeanor evidence is of far less probative value when witnesses are discussing matters of law and policy. This is particularly true in the regulatory sphere, where courts have easily made the distinction between adjudicative facts and legislative facts addressed in expert witness testimony. Davis cites a number of cases reviewing regulatory decisions which discuss, "...the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony.' 359 F.2d at 633." Davis, supra, {12:4 at 417. As Davis concludes, "the ALJ's findings are nevertheless to be taken into account by the reviewing court and given special weight **when they depend on the demeanor of witnesses.**" Davis, supra, at {17.16, p. 330, emphasis added. Demeanor will rarely add anything to the policy discussion of an expert witness, yet that witness' credibility remains an important issue. Therefore, it is neither logical nor in the public interest to deny the agency heads an opportunity to evaluate that evidence of credibility for themselves during the course of their review of the proposed decision. Likewise, no reviewing court should be so bound. The proposed addition to CCP (1094.5 should be deleted.

The CPUC also notes that by statute the CPUC is subject to a different standard of review than that stated in CCP (1094.5. The CPUC continues to oppose elimination of its specific statutory scheme for review of decisions.

The CPUC appreciates the opportunity to comment on the proposed legislation and the recommendations of Professor Asimow. The task the Law Revision Commission has undertaken is, indeed, a daunting one. As our comments demonstrate, it is extraordinarily difficult to craft uniform procedures which fit the needs and responsibilities of every state agency which conducts administrative hearings. More importantly, some of the changes suggested would have an extremely disruptive and unfair impact on the current procedures of the CPUC. As a result, the CPUC strongly urges the Commission to carefully review the proposed legislation and to pull back from counterproductive steps such as granting ALJs final determination on issues of expert witness credibility. We shall be pleased to send a representative to the Commission meeting to address these issues and to answer any questions you or the other Commissioners may have.

Cordially,

G. Mitchell Wilk
President

California
Fair Political
Practices Commission

November 27, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 95303-4739

Re: Proposed Revisions to Administrative Adjudication Procedures

Dear Mr. Marzec:

The Fair Political Practices Commission wishes to comment on the Law Revision Commission's Memorandum 90-129, concerning Administrative Adjudication: Effect of ALJ Decision. We join with the Public Employees Relations Board (PERB) in expressing concern about the proposed legislation, although our specific concerns differ somewhat from those identified by PERB. We are unable to send a representative to the meeting of the Law Revision Commission on November 29-30; however, we are submitting the following written comments for your consideration.

The Fair Political Practices Commission (FPPC) was created in 1974 by initiative statute (Proposition 9 of the June 1974 Primary Election). This statute, known as the Political Reform Act (the "PRA"),[1/] can be amended by another initiative, or directly by the Legislature if specific procedures are followed and the amendment furthers the purposes of the PRA. (Section 81012.) The FPPC has authority to enforce the PRA by administrative action, and is required to conduct its administrative enforcement proceedings in accordance with the Administrative Procedure Act. (Section 83116.) It is the FPPC's position that any amendment to the Administrative Procedure Act which substantially changes the power of the FPPC to exercise its administrative enforcement authority is an amendment to the PRA. Unless such an amendment meets the requirements of Section 81012, it would not apply to the FPPC. (See Franchise Tax Board v. Cory (1978) 80 Cal.App.3d 772.)

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

The PRA vests in the FPPC primary authority for its implementation and enforcement. (Section 83111.) We question whether the proposed amendments, which diminish the role of the FPPC in administrative actions, would further the purposes of the PRA. The draft legislative proposal currently before the Law Revision Commission would substantially change the authority of the FPPC to exercise its administrative enforcement authority by shifting the role of the FPPC from decisionmaker to decision reviewer. In addition, the power of the FPPC would be significantly diminished by the proposed amendments to California Code of Civil Procedure Section 1094.5, which would require the FPPC and any reviewing court to give deference to the credibility findings of the administrative law judge.

We recognize that some of our concerns are unique to the FPPC. However, we join with other state agencies in raising serious questions about the wisdom of shifting the primary administrative adjudicatory function away from the state boards and commissions, who have the benefit of staff with considerable expertise in the applicable subject area.

Finally, we note that the proposed amendments include provisions which allow the state agencies a certain amount of discretion to choose the hearing procedure most suitable to them. We encourage the Law Revision Commission to develop a proposal that contains maximum flexibility for state agencies, since one procedure will not fit all agencies nor all types of cases handled by any particular agency.

Thank you for your consideration of our comments. If you have any questions, please contact Acting General Counsel Scott Hallabrin at (916) 322-5901.

Sincerely,

Gregory W. Baugher
Executive Director

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-3956

WILLIAM M. BENNETT
First District, Kentfield

CONWAY H. COLLIS
Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
Third District, San Diego

PAUL CARPENTER
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

CINDY RAMBO
Executive Director

November 28, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

I have been furnished with a copy of your Memorandum 90-129 (NS) 10/10/90, drafted by your staff for the purpose of implementing certain of Professor Michael Asimow's recommendations to the Commission in regard to administrative adjudications. We understand that the memorandum was prepared in accordance with the instruction of the Commission to its staff adopted during the Commission meeting of September 13-14, 1990, concerning Study N-105 - Administrative Adjudication (Effect of ALJ Decision). This matter will be discussed in Los Angeles during the Commission meeting scheduled for November 30, 1990.

As Executive Director of the Board of Equalization, I would like to express strong concern regarding any change that would be made in the state's Administrative Procedure Act, which in any way removes the elected members of the Board of Equalization from the decision-making process or limits the opportunity of taxpayers to have a full evidentiary hearing in Superior Court.

The State Board of Equalization is a constitutional agency, all of whose members are elected by direct vote of the people. Four members are elected from separate equalization districts. The State Controller is a member of the Board by virtue of his office. All administrative matters heard by the Board--whether adversarial or nonadversarial in nature--are heard de novo by the elected members themselves. All suits for refund of state business taxes (as well as state income and franchise taxes) are de novo proceedings in the Superior Court.

It is our understanding from discussion with your staff that the Commission is considering extending the administrative adjudication provisions of the Administrative Procedure Act to

apply generally to all state agencies, and it appears from the material furnished to us that the Commission contemplates a standardization of procedures without regard to specific constitutional or statutory duties assigned to individual agencies.

At this juncture, we have difficulty understanding how the Commission's proposal would be interpreted and how the proposal would apply to the Board. It is our understanding that the Commission will propose that Government Code section 11501, which enumerates those agencies specifically subject to the adjudicatory provisions of the Administrative Procedure Act, be repealed and that new section 612.010 be added to the code. Yet, new section 612.010 was not distributed with Memorandum 90-129. We understand from your staff that all executive and administrative agencies would be covered by the proposed change in law.

It is not clear to us, from a review of the draft materials, whether it is the Commission's intent that any or all of our hearings be conducted by personnel of the Office of Administrative Hearings. It is not clear to us whether the procedures set at Chapter 2 of the draft are to apply to informal staff hearings or formal Board hearings, or both.

We think it inappropriate to adopt an homogenized set of procedural rules to be applicable to tax and nontax matters, to constitutional and nonconstitutional obligations and responsibilities, to proceedings conducted by both elected and appointed officials and to all matters without regard to the basis for judicial review of the agencies' action. We think it inappropriate to limit the prerogatives of elected constitutional officials to hear and decide. Further, it appears that your proposal could be interpreted to limit the jurisdiction of the Superior Court in general tax matters by requiring the court to give any specified "weight" to findings of any hearing officer, in derogation of the court's own conclusions as to the credibility or demeanor of witnesses appearing in open court.

Based on our analysis of the information available to us, we think that your proposal would unduly restrict and limit the role and responsibility of the members of the State Board of Equalization. The implication is that informal procedures will become formal. The hearing officer function could preempt the finality of decision and the authority of the Board.

Once the Commission has formalized its position, I will bring this matter to the Board's attention, so that the Board may take a formal position with respect to any proposal which may effect this agency.

Mr. Gary J. Jugum, Assistant Chief Counsel, will attend your meeting in Los Angeles on November 30, 1990, as our representative. He will be available to answer any questions which the Commission may have concerning this matter.

Sincerely,

Cindy Rambo
Executive Director

CR:sr

cc: Honorable Conway H. Collis
Honorable Ernest J. Dronenburg, Jr.
Honorable William M. Bennett
Member, Fourth District
Honorable Gray Davis

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Room 335
Sacramento, Ca 95814
(916) 322-4612

November 29, 1990

Roger Arnbergh, Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: **Study N-105 -- Professor Asimow's recommendations relating to "Appeals Within the Agency: the Relationship Between Agency Heads and ALJs" (Memorandum 90-112), and the statutory language proposed by the Commission's staff to implement those recommendations. (Memorandum 90-129).**

Dear Mr. Arnbergh:

Thank you for the opportunity to comment on Professor Asimow's study and the statutory language which the Commission's Staff has drafted to implement that study.

We heartily concur with the general comments made by Elaine Donaldson of the Occupational Safety and Health Appeals Board on page 2 of her letter to you of November 20, 1990. The Agricultural Labor Relations Act, like Cal OSHA, already embodies many of Professor Asimow's recommendations. We also share her concern that "being part of the APA would carry with it the danger of future change, based on perceived problems or needs of other, dissimilar agencies, without sufficient concern for how the change may impact our particular...proceedings."

Even more fundamentally, we believe that Professor Asimow's underlying aim of making administrative adjudication less confusing and more accessible to parties and practitioners would be frustrated by placing the ALRB under the APA.

The Agricultural Labor Relations Act came into being in 1975 and extended to agricultural employees the collective bargaining rights which industrial workers had enjoyed under the National Labor Relations Act since 1935. The Legislature believed that the best way to do that was to pattern the ALRA--both

substantively and procedurally--on the NLRA.[1] That was a wise and deliberate decision: The parties and participants who appear before us are labor organizations, employers, and attorneys whose background and experience is with labor law, not with general administrative law. As such, they are much more at home with a statutory structure based on the NLRA and with procedures drawn from the NLRB. Furthermore, that structure and those procedures are rooted in, and have evolved out of, the substantive law of collective bargaining. Not so with the APA. Its origin and focus, as Ms. Donaldson correctly points out, is with proceedings arising out of proposed license revocations and petitions for licenses.

Since our procedures are clear and accessible to our constituencies and since they bear a logical and organic relationship to the substantive provisions of our Act, nothing would be gained and much would be lost by demolishing them and substituting procedures designed for different constituencies with different problems.

Turning to the specific recommendations contained in Professor Asimow's Report of August 13, 1990, our comments are as follows:

Recommendation No. 1

> "The Administrative Procedure Act (APA) should make clear that agency heads can hear cases themselves, but that all agencies can delegate the initial hearing to hearing officers for preparation of an initial decision."

ALRB Position: This recommendation has already been incorporated into our Act. (Labor Code, section 1160.3)

Recommendation No. 2

> "The APA should provide that agencies have the power to delegate final (rather than merely initial) decision-making authority to hearing officers, either in classes of cases or on a case-by-case basis. It should also provide that agencies can make the review of initial decisions discretionary rather that available as a matter of right. Finally, it should permit the reviewing function to be delegated to subordinate appellate officers or to panels of agency heads."

---

[1]Not only did the Legislature adopt the statutory scheme found in the NLRA, but it included a provision requiring the ALRB to "follow applicable precedents of the National Labor Relations Act, as amended." (Labor Code, section 1148, emphasis supplied.)

ALRB Position: When it enacted the ALRA, the Legislature followed the lead of Congress in enacting the NLRA and determined that decisions affecting the relations of labor and management were of such importance as to require the Board itself to make the final determination of whether the law has been violated. (Labor Code, section 1160.3) For the same reason, any aggrieved party has the right to secure Board review of an adverse initial decision (Labor Code, section 1160.3.)[2] However, an initial decision will become a final decision unless review is sought within 20 days of its issuance. (Labor Code, section 1160.3) Furthermore, the five member Board can, and frequently does, delegate its decisional power to panels made up of three members. (Labor Code, section 1146.)

Recommendation No. 3

"The existing provision relating to petitions for reconsideration should be revised."

ALRB Position: Reconsideration is provided for in our statute (Labor Code, section 1160.3.), but since all final decisions are rendered by the Board itself, it is not a prerequisite to appellate review [unless the appellee desires to raise an issue which was not presented to the Board]. The one technical problem with reconsideration under our Act is explained and clarified in Nish Noroian Farms v. ALRB (1984) 35 Cal.2d 726, 742, fn. 7. We therefore see no need to change the present statutory scheme.

Recommendation No. 4

"The present APA permits agency heads to summarily approve a proposed decision. This provision should be retained and it should apply to all hearing officer decisions. However, the parties should be entitled to receive a copy of an initial decision and file briefs with the agency prior to summary approval."

ALRB Position: While the ALRB does not have a formal summary approval procedure, it does follow NLRB practice of "short forming" initial decisions; that is, if the Board--after considering the briefs and reviewing the transcript of the hearing--is in substantial agreement with the initial decision of its hearing officer, it will simply adopt that decision as its own. This procedure works well, and it is consistent with the right of an aggrieved party to secure Board review, as described above.

---

[2]And the same considerations lay behind the Legislature's determination that court review of ALRB decisions should be in the Court of Appeal and not in the Superior Court. (Labor Code, section 1160.8.)

Recommendation No. 5

"The present APA allows agencies to reject an administrative law judge's proposed decision and decide the case for themselves. In such situations, the administrative law judge's credibility determinations can be ignored. The provision should be changed so that administrative law judge credibility determinations are given greater weight. The study recommends that hearing officers be required to identify findings based substantially on credibility. It also would require reviewing courts to give great weight to hearing officer credibility determinations."

ALRB Position: Because the Universal Camera case directly involved the NLRB, it has always been part and parcel of our statutory scheme. (Labor Code, section 1148.) We therefore would have no problem with its general adoption. We are, however, very concerned over the failure to provide a clear definition of "credibility". Does the term cover every factor listed in Evidence Code, section 780, or is it confined to the two factors which relate to hearing room conduct: demeanor while testifying and attitude toward the action? We would hope that the commission means the latter.

Finally, there are a number of problems with the statutory language which the Commission's staff has drafted to implement Professor Asimow's recommendations. We share the OSHA Appeals Board's concerns about: (1) the narrow definition of "party" which could be interpreted to exclude unincorporated associations such as the labor organizations which appear frequently before us; (2) the expensive, and to our mind, unnecessary requirement that parties must be formally served even when they are represented by counsel; and (3) the confusing wording of sections 640.230 and 640.250 which appear to revive the central panel concept which the Commission has tentatively rejected.

Additionally, we are quite concerned with the recommendation that decisions be termed "orders". (See Note to Section 642.710.) In the course of a typical hearing, any number of orders may issue, some dealing with discovery, with prehearing conferences, with continuances or extensions of time, with subpoenas, anon. Surely, the Commission does not intend those orders to be reviewable in the manner of decisions; yet the use of the same term to describe both might well lead to such a result. Also, terming the relief granted by an agency a "penalty" (Section 642.720(a)(3)0, would create serious problems for us. The word "penalty" carries with it the connotation of "punishment", and there are a number of Court decisions holding that the ALRB may not grant relief which is "punitive" rather than simply "remedial".

While the staff proposals concerning the time in which decisions must issue are appropriate for run-of-the-mill ALRB

cases, they would not work at all for the 10% to 20% of our cases which involve long and complex hearings. These cases take anywhere from 20 to 40 hearing days and involve initial decisions of over 100 pages. In those cases it would be impossible for the initial decisions to issue within 30 days (Section 642.710(b)) or for adequate review to be accomplished within 130 days (Section 642.850(a)).

We find that oral argument is seldom necessary when an initial decision is before the Board on review; rather than making it a right of the parties (Section 642.840(c)) it should be a matter of discretion with the Board. Finally, we find confusing the staff proposal for transcripts. (Section 642.840(a).) Our Board pays for the transcripts it utilizes, but it could ill afford to pay the thousands of dollars it would cost to provide copies of our extended hearings to all parties; to the extent that the staff proposal would create such a requirement, we would oppose it.

Thank you for this opportunity to express our views on these matters. Unfortunately, we are unable to send a representative to the upcoming Los Angeles meeting of the Commission, but we would be pleased to answer any questions you or your staff may have concerning the ALRB.

Yours very truly,

Bruce Janigian
Chairman

cc: Elaine Donaldson
Deborah Hesse, PERB

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, Governor

FAIR EMPLOYMENT & HOUSING COMMISSION

Memorandum

To : Roger Arnbergh, Chairman
California Law Revision
Commission

Date : November 30, 1990

Subject: Memorandum 90-129;
ADMINISTRATIVE
ADJUDICATION: EFFECT
OF ALJ DECISION

From : Steven C. Owyang SCO
Executive and Legal Affairs Secretary

The Fair Employment and Housing Commission (FEHC) is that state agency which interprets and enforces California's civil rights laws. The FEHC is an agency currently governed by the Administrative Procedure Act (APA). Unlike many other APA agencies, however, the FEHC is statutorily empowered "to establish a system of published opinions which shall serve as precedent in interpreting and applying the provisions of [the Fair Employment and Housing Act]." (Gov. Code, §12935, subd. (h).)

Because of this mandate, the FEHC is vitally interested in Professor Michael Asimow's recommendations regarding the APA and the effect/weight to be given proposed decisions written by administrative law judges.

Last year, the FEHC had commented extensively on Professor Asimow's earlier report "Administrative Adjudication: Structural Issues." We had been led to understand that because we had submitted comments on that report, we would be kept informed by the Law Revision Commission of further developments on these issues. We heard nothing, however, about the current study and recommendations until we received a letter from the Public Employment Relations Board on November 13, 1990.

Because of this lack of notice, the FEHC has not had time to meet and develop a thoughtful response to the Asimow recommendations and the draft APA statute. The FEHC, however, would like to submit a response, both in writing and orally at a future Law Revision Commission meeting if possible. The FEHC plans to discuss this issue at its next scheduled meeting on December 4, 1990, and will submit formal written comments as soon thereafter as possible.

Preliminarily, however, the FEHC can say that it is concerned about Professor Asimow's fifth recommendation, which would require ALJ's to identify findings based substantially on credibility. It would also require reviewing courts to give

"great weight" to these credibility findings, even if they have been modified or reversed by the agency.

An initial concern is that the recommendation requires the ALJ to identify those findings which are based in credibility, but it does not require the ALJ to explain the reason for the designation. This will make it very difficult, if not impossible, for the agency or the courts to challenge those findings with such a "credibility" label. This recommendation, therefore, cedes great power to the ALJ and effectively deprives an agency of its ability to perform its statutory mandate to decide these cases.

Additionally, since the ALJ's labeling of a fact as "credibility based" will determine whether it is to be given "great weight" or not, there will be disputes over the correctness of this label in the first place. And, again, practically speaking, the agency is at a serious disadvantage in being able to challenge the ALJ's designation. Indeed, even the CLRC staff sees problems with this and states, in its comments on page 15 of the draft statute that

> Given this situation, the staff wonders whether this provision may do more harm than good, leading to battles over the weight to be given the [ALJ's] identification, in addition to the inevitable battles over the weight to be given the findings themselves.

A third and critical concern with this recommendation is that, in most instances, the ALJ is really in no better position to determine "credibility" than is the agency itself. The FEHC already defers to the fact that the ALJ sits at the hearing and observes the demeanor of the witnesses. But demeanor is only one of many factors determining the credibility of a witness and, as to the other factors, an agency is probably as competent as an administrative law judge to make such a determination. For instance, inconsistencies in testimony, prior inconsistent or consistent statements, and the existence of bias or motive are credibility factors which can be as easily ascertained by a review of the record as by the judge.

This are just a few preliminary thoughts on Professor Asimow's recommendations and the draft statute; we hope to flesh out these ideas in a later submission. The ramifications of the suggested proposals are many and significant and we strongly urge you to continue to take public testimony from as diverse a group as possible before deciding on a course of action.

Thank you for your attention to our views.

SCO/PKP/wp:awh

STATEMENT OF
WORKERS' COMPENSATION APPEALS BOARD
November 30, 1990

My name is Richard W. Younkin, Secretary and Deputy Commissioner of the Workers' Compensation Appeals Board.

For reasons stated in other testimony before this Commission, the Workers' Compensation Appeals Board is opposed to the recommendation that the Administrative Procedures Act apply to workers' compensation proceedings. For nearly 75 years, the Workers' Compensation Appeals Board and its predecessor commission have operated under their own Rules of Practice and Procedure and Labor Code §5307 specifically authorizes the Appeals Board to adopt reasonable and proper Rules of Practice and Procedure. Many of the procedures set forth in the discussion draft of study N-105 are contrary to the procedures set forth in the Labor Code and the Board's current Rules of Practice and Procedure. Any attempt to impose the Administrative Procedure Act procedures on the Workers' Compensation Appeals Board will create nothing but chaos unless careful study is given to the impact of those procedures on the ability of the Board to comply with existing statutes and case law and to meet its Constitutional mandate of substantial justice, inexpensively and without encumbrance. Arbitrary action will only lead to Constitutional challenges and extensive litigation. In addition, as previously noted in Chairperson Little's letter to the commissioners of July 25, 1990:

"Certain new procedures, functions, statutes, and rules have recently been adopted pursuant to the Margolin-Bill Greene Workers' Compensation Reform Act of 1989 (the Reform Act) for injuries occurring on and after January 1, 1990 and additional rules are currently being drafted pursuant to provisions, procedures, and rules, which apply to injuries occurring on or after previously enacted statutory provisions, procedures and rules which apply to injuries that occurred prior to January 1, 1990, thereby resulting in a complicated multiple track system for processing and adjudicating workers' compensation claims. Moreover, under the provisions of the Reform Act, in addition to WCJs and Appeals Board commissioners, there are now and/or will soon be referees and arbitrators to process workers' compensation cases, and investigators and auditors to monitor and enforce the provisions of the workers' compensation law...."

The WCAB is entrusted with the responsibility of enacting rules of practice and procedure to implement this legislation. Imposition of the APA procedures may have a deleterious effect on this effort.

The Board, however, appreciates being able to review the proposed procedures and has the following comments:

Section 613.010 provides that "service" requires that an order or writing be personally delivered to a person or sent by certified mail to the person at the person's last known address and if the person has an attorney of record in the proceeding, to the person's attorney. The Workers' Compensation Appeals Board and its workers' compensation judges issued thousands of orders and decisions as well as notices of hearing and other legal documents to the public. To require that these orders, decisions and notices be sent by certified mail would create an impossible administrative situation. Presently, notices of hearing are served by a central computer with a data mailer and other documents are served in accordance with the rules of the Workers' Compensation Appeals Board

which provides that proof of service may be made by endorsement on a document setting forth the facts of service on the persons listed on the Official Address Record on the date of service, with the endorsement stating whether the service was made personally or by mail, the date of service and the signature of the person making the service. Workers' compensation judges are trained to carefully monitor address records so that current service is made.

Rule 642.840 is inconsistent with present Board procedures. At the present time, when the Board grants reconsideration, it may develop the record without referring the matter back to a workers' compensation judge. Much of the evidence submitted in workers' compensation proceedings is written rather than oral. The Board frequently uses notices of intention to admit written documents, with the parties being given an opportunity to object or request further hearing. Further hearings are held by workers' compensation judges who hear the case at the direction of the Board and the record is referred back to the Board for decision. The provision that the reviewing authority allow each party an opportunity to present a brief and an oral argument does not work in a workers' compensation system where nearly 6,000 petitions for reconsideration are reviewed in some 4,000 cases. While only a small percentage of cases are granted further proceedings, allowing oral argument before the panels of commissioners would impose an enormous burden given the fact that each commissioner reviews 8 to 10 cases per day.

Currently, the Labor Code obliges the Board to review only the summary of evidence prepared by the workers' compensation judge unless the petition explicitly alleges inaccuracy or inadequacy of the summary and points out specific defects in the summary. *Allied Compensation Insurance Co. v. IAC (lintz)* (1961), 57 Cal2d 115, 26 Cal.Comp.Cases 241. To require the Board to order a transcript in each of 4,000 cases would create another impossible burden on the system both in the review process and the hearing level. A transcript could not be prepared in time for the Appeals Board to meet its statutory deadline.

The Workers' Compensation Appeals Board is bound to develop its record if it is not complete and may do this through the use of a number of alternatives. On occasion, the Board will grant, rescind and return the decision to the workers' compensation judge to take other evidence and to issue a new decision. On the other hand, in many cases it is more expeditious for the Board to develop the record at the Board's level and to consider the additional evidence itself. When the Board does take additional evidence, each party preserves its right to petition for reconsideration from any decision made by the Board where new evidence is received by the Board.

In the workers' compensation system, it is the Board which makes the decision. Board Rule 10348 provides that orders, findings, decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. The Board perceives the function of its workers' compensation judges not to be adversaries but to be participants in its adjudication system. Workers' compensation judges, once a petition for reconsideration is filed, prepare a report to be submitted with the case file to the Board. The workers' compensation judge may recommend that the reconsideration be granted if the workers' compensation judge feels that an error has been made. On the other hand, workers' compensation judges may recommend denial or dismissal. The Board relies heavily on the reports of the workers' compensation judges in making its decisions and, as noted by Dr. Asimow, is bound by *Garza v. WCAB* (1970), 3 Cal 3d 312, 35

Cal.Comp.Cases 500, to give great weight to credibility findings of workers' compensation judges.

Labor Code §5903 sets forth the statutory authority for the Workers' Compensation Appeals Board with reference to reconsideration. Any person aggrieved by any finding, order or decision of a workers' compensation judge may petition for reconsideration upon the following grounds:

(a) That by order, decision or award made and filed by the workers' compensation judge, the workers' compensation judge acted without or in excess of his or her powers.

(b) That the order, decision or award was procured by fraud.

(c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

(e) That the findings of fact do not support the order, decision or award.

The review of the Workers' Compensation Appeals Board is an independent review of both facts and law which is consistent with the statutory judicial authority given to the Appeals Board. The Appeals Board reviews petitions for reconsideration in panels of three commissioners assuming a thorough and independent review by each commissioner, the requirement that two out of three commissioners agree on a decision. Procedures suggested in 6.42.840 simply will not fit into the workers' compensation system.

Currently, Code of Civil Procedure §1094.5 has no applicability to decisions of the Workers' Compensation Appeals Board whose decisions are directly appealed to the District Court of Appeal by the filing of a petition for writ of review. Again, any change in the review procedures applicable to the Workers' Compensation Appeals Board would require serious study and analysis in light of its impact on the body of law on workers' compensation appeals and the serious implications of delay in workers' compensation proceedings.

The Board has no further comment but suggests that other divisions of the Department of Industrial Relations may wish to submit comment at future meetings.