

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335



04/10/92

DATE: • April 23 & 24	PLACE: • Sacramento
• April 23 (Thursday) 10:00 am - 5:00 pm — State Capitol, Room 113	
• April 24 (Friday) 9:00 am - 3:00 pm — State Capitol, Room 3191	
<p>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.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the proper amount made out to the "California Law Revision Commission".</p>	

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION**Thursday, April 23, 1992**

1. MINUTES OF MARCH 12-13, 1992, COMMISSION MEETING (sent 4/3/92)
2. STUDY N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION

Staff Draft of Previously Decided Policy Issues
Memorandum 92-23 (NS) (sent 4/9/92) (\$18.00)

Policy Issues

Memorandum 92-4 (NS) (sent 1/13/92) (\$8.50)
First Supplement to Memorandum 92-4 (sent 1/17/92) (\$5.50)
Second Supplement to Memorandum 92-4 (sent 2/26/92) (\$5.50)
Background Study (sent 10/4/91) (\$25.00)

NOTE. We will continue consideration of this matter commencing at page 8 of the memorandum and page 76 of the background study, relating to "Official Notice".

Sanctions in Proceedings

Memorandum 92-22 (RJM) (sent 2/26/92) (\$5.50)

First Supplement to Memorandum 92-22 (sent 4/9/92) (\$5.50)

3. 1992 LEGISLATIVE PROGRAM

Memorandum 92-24 (NS) (enclosed) (\$5.50)

NOTE. Agenda item 3 will be considered on Friday, April 24, if time does not permit on Thursday, April 23.

4. ADMINISTRATIVE MATTERS

Priorities and New Topic Suggestions

Memorandum 92-14 (NS) (sent 2/28/92) (\$8.50)

Communications from Interested Persons

NOTE. Agenda item 4 will be considered on Friday, April 24, if time does not permit on Thursday, April 23.

Friday, April 24, 1992

5. STUDY L-3016.01 - STANDING TO SUE FOR WRONGFUL DEATH

Draft of Tentative Recommendation

Memorandum 92-27 (RJM) (sent 4/7/92) (\$5.50)

6. STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Policy Issues

Memorandum 92-21 (SU) (sent 2/25/92) (\$25.00)

First Supplement to Memorandum 92-21 (sent 3/12/92; another copy sent 3/17/92) (\$5.50)

\$\$\$

MEETING SCHEDULE

April 1992

April 23 (Thur.) 10:00 a.m. - 5:00 p.m.
April 24 (Fri.) 9:00 a.m. - 3:00 p.m.

Sacramento

May 1992

May 21 (Thur.) 10:00 a.m. - 12:00 noon
1:00 p.m. - 5:00 p.m.
May 22 (Fri.) 9:00 a.m. - 3:00 p.m.

Sacramento

June 1992

No Meeting

July 1992

July 9 (Thur.) 10:00 a.m. - 6:00 p.m.
July 10 (Fri.) 9:00 a.m. - 4:00 p.m.

San Diego

August 1992

No Meeting

September 1992

Sep. 10 (Thur.) 10:00 a.m. - 6:00 p.m.
Sep. 11 (Fri.) 9:00 a.m. - 4:00 p.m.

San Francisco

October 1992

No Meeting

November 1992

Nov. 12 (Thur.) 10:00 a.m. - 6:00 p.m.
Nov. 13 (Fri.) 9:00 a.m. - 4:00 p.m.

Los Angeles

December 1992

No Meeting

ad08

NOTE. These Minutes were compiled from staff notes of Commission actions without the normal check against meeting tapes due to a tape recorder malfunction.

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
APRIL 23-24, 1992
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 23 and 24, 1992.

Commission:

Present:	Edwin K. Marzec Chairperson (Apr. 23) Daniel M. Kolkey	Forrest A. Plant Sanford Skaggs (Apr. 23) Colin Wied
Absent:	Bill Lockyer Senate Member Terry B. Friedman Assembly Member	Bion M. Gregory Legislative Counsel Arthur K. Marshall Vice Chairperson Christine Byrd

Staff:

Present:	Nathaniel Sterling Stan Ulrich	Pamela K. Mishey Robert J. Murphy III
----------	-----------------------------------	--

Consultant:

Michael Asimow, Administrative Law (Apr. 23)

Other Persons:

Larry Alamao, Department of Real Estate, Sacramento (Apr. 23)
Kathryn A. Ballsun, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Apr. 24)
Susan Buzynski, Public Employees' Retirement System, Sacramento (Apr. 23)
Monica Dell'Osso, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Oakland (Apr. 24)
Karl Engeman, Office of Administrative Hearings, Sacramento (Apr. 23)
Don E. Green, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (Apr. 24)
Robert Hargrove, Department of Motor Vehicles, Sacramento (Apr. 23)
Bill Heath, California School Employees Association, San Jose (Apr. 23)
Steve Kahn, Attorney General, Department of Justice, Sacramento (Apr. 23)
Derry Knight, Department of Consumer Affairs, Sacramento (Apr. 23)
Daniel M. Lindsay, California Correctional Peace Officers Association, Sacramento (Apr. 23)

Tim McArdle, California Unemployment Insurance Appeals Board,
Sacramento (Apr. 23)
Melanie McClure, State Teachers' Retirement System, Sacramento
(Apr. 23)
Joel T. Perlstein, Public Utilities Commission, San Francisco
(Apr. 23)
Joel S. Primes, Attorney General's Office, Sacramento (Apr. 23)
Anita Scuri, Department of Consumer Affairs, Sacramento (Apr. 23)
Willard Shank, Public Employment Relations Board, Sacramento
(Apr. 23)
James D. Simon, State Department of Social Services, Sacramento
(Apr. 23)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning,
Trust and Probate Law Section, San Francisco (Apr. 24)
Olive Magee Warner, Executive Committee, Probate and Trust Law
Section, Los Angeles County Bar Association, Los Angeles (Apr. 24)

MINUTES OF MARCH 12-13, 1992, COMMISSION MEETING

The Minutes of the March 12-13, 1992, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

MEETING SCHEDULE

The September 10-11 meeting scheduled for San Francisco was relocated to Oakland.

BUDGET MATTERS

The Executive Secretary reported on three matters affecting the Commission's budget.

(1) The Commission's budget for next fiscal year (1992-93) is in the legislative process. The budget as proposed by the Governor is the same as the current fiscal year's reduced budget. The Assembly has adopted the Commission's budget as proposed by the Governor. The Senate has adopted it as proposed, less \$7,000 (reflecting a Senate policy to reduce all agency budgets by an amount equivalent to 50% of travel allotment). The difference between the two houses will be resolved in the budget conference committee.

(2) The Department of Finance has advised all agencies of possible further across-the-board budget cuts of 5%, 10%, or 15% for 1992-93, depending on the state's actual revenues. A 5% cut would cause loss of the Commission's temporary help funds (for cite checking, getting out large mailings, etc.), with a slight loss in productivity. A 10% cut would cause an additional loss of half the Administrative Assistant position and a 15% cut would cause an additional loss of the whole position, resulting in a layoff in either case. This would result in a more substantial loss in productivity, as legal staff would devote more time to administrative tasks.

(3) The Department of Finance, pursuant to legislative directive, is conducting a review of all agencies including the Commission for possible consolidation or elimination. The Commission will have an opportunity to tell its story to the decision-makers, but this will not occur for some months since the task of reviewing all agencies is enormous and the department is swamped. It was suggested that input to the Department of Finance from legislators about the value of the Commission's work would be helpful at the appropriate time.

VOLUNTEER HELP

The Executive Secretary reported that the Commission has received an offer of volunteer assistance from a retired attorney who lives nearby the Commission's office. The Commission felt that use of volunteer help would be appropriate, provided the staff is able to maintain quality control.

1992 LEGISLATIVE PROGRAM

The Commission considered Memorandum 92-24 and the First Supplement to Memorandum 92-24, relating to the Commission's 1992 legislative program, supplemented by the following observations of the Executive Secretary concerning the bills:

SB 1372 (Deddeh) - Wage Garnishment and Other Matters

Passed Senate and awaiting hearing in Assembly. This is an urgency bill and a consent item.

SB 1455 (Mello) - Guardianship/Conservatorship Compensation and Other Matters

Awaiting hearing in Senate. Senator Mello has added other material to this omnibus guardianship and conservatorship bill. At the meeting, the Commission approved technical amendments to the bill as proposed by the staff and set out in the First Supplement to Memorandum 92-24.

SB 1496 (Senate Judiciary Committee) - Omnibus Probate Bill

On Senate floor. The California Bankers Association dislikes the provisions in the bill relating to recognition of an agent's authority and recognition of a trustee's authority. However, they did not oppose the bill in Senate Judiciary Committee, but may seek to work with the Commission on compromise language as the bill moves along.

The provisions of the bill relating to standing to sue for wrongful death are discussed below in these Minutes under the heading of Study L-3016.01.

AB 1719 (Horcher) - Nonprobate Transfers of Community Property

On Senate floor. The staff has worked out compromise language with PERS and STRS to provide that a written claim will not stop periodic payments from a pension plan; a restraining order is necessary for this purpose. This provision would apply to all pension plans, private as well as public. The bill has been so amended and is on the consent calendar, after procedural shenanigans.

AB 1722 (Horcher) - Powers of Appointment

Enacted.

AB 2641 & 2650 (Speier) - Family Code and Conforming Revisions

On the Assembly floor for approval. The staff will present for adoption by the Commission at the next Commission meeting amendments to be made in the Senate.

AB 3328 (Horcher) - Special Needs Trusts

On the consent calendar in the Assembly.

SCR 66 (Senate Judiciary Committee) - Continuing Authority to Study Topics

The Commission's resolution will go out of Assembly Ways and Means without a hearing.

STUDY L-3016.01 - STANDING TO SUE FOR WRONGFUL DEATH

The Commission considered Memorandum 92-27 and attached staff draft of a Tentative Recommendation relating to *Standing to Sue for Wrongful Death*. The substance of the Tentative Recommendation was approved by the Commission at the March meeting and amended into the Commission's omnibus probate bill, SB 1496. The Tentative Recommendation was based on an assumption that Senator Lockyer wanted to remove these provisions from the bill so they could be reviewed by interested groups. The staff reported that apparently Senator Lockyer had changed his mind and decided not to remove these amendments from SB 1496.

The Commission thought the substance of proposed new Probate Code Section 258, concerning the effect of homicide on the right to sue for wrongful death, should more appropriately be located in the Civil Code with the provisions on wrongful death. The Commission decided that SB 1496 should not be amended for the sole purpose of making this change. If there are other amendments to the bill, the staff should include this change with them. Otherwise, this change should be accomplished in other legislation at a later time.

The State Bar agreed to send written amplification of its argument for changing the rule that a disclaimer does not affect the right to sue for wrongful death.

The Commission directed the staff to hold the Tentative Recommendation for the time being. If the substance of the Tentative Recommendation remains in the bill, the Tentative Recommendation should be included in the Commission's printed reports for legislative background. If the substance of the Tentative Recommendation is removed from the bill, the staff should prepare a revised tentative recommendation that includes relocation of the statutes and that addresses the disclaimer issue.

STUDY L-3044 - COMPREHENSIVE POWER OF ATTORNEY STATUTE

The Commission considered Memorandum 92-21 concerning policy issues regarding the comprehensive power of attorney statute, and the First, Second, and Third Supplements. The Commission deferred detailed consideration of the draft statute attached to Memorandum 91-40.

The Commission made the following decisions:

Scope of Study

The Commission heard the views of Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section that the study should include the durable power of attorney for health care. Team members stated that it would be beneficial to draft comprehensive provisions concerning execution formalities, capacity, revocation and termination, judicial review standards and procedures, third-party reliance, priorities between fiduciaries, the effect of remarriage, delegation to subagents, etc. The staff suggested that the extent to which the two types of powers can be combined is unclear and that, while it is a beneficial goal, it is likely to extend the project for at least one and probably two years. The Commission deferred a decision on the scope until the next meeting so that more Commissioners can decide the matter.

Location of Power of Attorney Statute

The Commission tentatively agreed to keep the power of attorney statute in the Civil Code, but deferred final decision in the hope that the views of the Legislative Counsel could be heard. The decision on location of the statute is related to the question of the scope of the study.

Relation to General Agency Statute

The power of attorney statute should make clear that it prevails over conflicting general agency rules. The staff will examine the general agency statutes to make sure that a specific overriding rule is included in the power of attorney statute where necessary.

Terminology

The Commission agreed to use "attorney-in-fact" rather than "agent" in the power of attorney statute. However, "attorney-in-fact" would not be substituted for "agent" in statutory forms. The hyphenated term is considered to be more recognizable and is preferred over "attorney in fact."

Capacity to Execute Durable Power of Attorney

The Commission discussed the question of the standards governing the capacity required to execute different types of powers of attorney. The staff will do further research on this issue, in consultation with the Team. The Commission did not approve the suggestion of attempting to codify objective, scientific standards on capacity.

Personal Care Powers

A definition of "durable power of attorney for personal care" or a similar term should be drafted for Commission consideration. This type of power would cover matters that are neither traditional property powers nor powers reserved exclusively to the durable power of attorney for health care, e.g., deciding where the principal will live, providing meals, hiring household employees, providing transportation,

picking up mail, and arranging recreation and entertainment. Defining these powers will enable the statute to make clear which rules apply to them.

Treatment of Uniform Durable Power of Attorney Act

The question of whether and to what extent the Uniform Durable Power of Attorney Act should be reorganized in the comprehensive power of attorney statute was discussed. The staff will consult further with the Team to see if the State Bar's concerns can be alleviated.

Dating of Durable Power of Attorney

The Commission discussed the question of whether powers of attorney should be required to be dated. It was suggested that if a power of attorney is acknowledged, the instrument would have a date on it. The consensus was that a power of attorney should be dated, but further consideration should be given as to the consequences of not including a date and possible remedies for saving an undated power.

Acknowledgment of Durable Power of Attorney

The Staff should draft a provision for Commission consideration that would require either acknowledgment or two witnesses to a durable power of attorney. This would make the execution requirement for property powers consistent with the health care power.

Duties of Agent

The Commission deferred a decision on the issues raised concerning when and to what extent an agent has a duty to act under a power of attorney.

STUDY N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION

Policy Issues

The Commission considered Memorandum 92-4, the First, Second, and Third Supplements to Memorandum 92-4 (the Third Supplement was distributed at the meeting), and the consultant's background study, concerning policy issues in the administrative adjudication process. The Commission completed consideration of the material commencing at page 8 of the memorandum and page 76 of the background study, relating to "Official Notice". The Commission made the following decisions with respect to the issues reviewed.

Official Notice

The Commission rejected the consultant's suggestion that the 1981 Model State APA provisions on official notice be substituted for the existing provisions of the California administrative procedure act.

Representation

The Commission rejected the consultant's suggestion that lay representation be authorized by the administrative procedure act. However, agencies outside the existing administrative procedure act that rely on lay representation should be allowed to continue to do so, with limitations appropriate to their circumstances.

Conference Hearings

The statute should authorize an informal administrative adjudication in conference style. The Commission discussed whether the statute should narrowly list the types of proceedings in which the conference hearing could be used, or whether it should allow conference hearings in whatever cases the agency determines are appropriate. The staff draft should present statutory language showing both alternatives.

Emergency Procedure

The statute should authorize an emergency adjudicative procedure with quick judicial review, as in an interim licensing suspension. The staff should review existing emergency procedures available to various agencies to determine whether the statutes provide useful authority that should be retained or whether they may be superseded by the general procedure without loss.

Oath

The law should make clear that the presiding officer has power to administer oaths and shall take testimony only under oath or affirmation unless agency regulations provide the contrary.

Transcripts

The statute should permit an agency to provide for tape recording, rather than stenographic recording, of hearings. The presiding officer would have authority to require stenographic recording, and a party could require stenographic recording, at the party's own expense.

Telephone Hearings

The statute should permit a hearing to be conducted by conference telephone call or other appropriate telecommunications technology, provided that all participants are audible to each other. A party may object to a telephone hearing on a showing that a credibility determination is important to the case and that the telephone hearing will impair a proper determination of credibility.

Interpreters

The existing provisions governing interpreters should be expanded to include witnesses and extended to cover hearing impaired parties and witnesses.

Open Hearings

The statute should make clear that hearings are open to the public unless both parties agree that they should be closed or unless another statute mandates a closed hearing.

Findings and Reasons

The decision in the proceeding should contain separately stated findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the decision, including the remedy prescribed.

Precedent Decisions

The Commission directed the staff to prepare for further Commission review a draft that would implement Professor Asimow's suggestion that agencies be required to designate significant adjudicatory decisions as precedential, without subjecting them to the rulemaking process. The draft is solely for the purpose of focusing future Commission consideration of this matter; the Commission has made no policy decision for or against precedential decisions.

Draft of Previously Decided Policy Issues

The Commission considered Memorandum 92-23 and the attached draft of previously decided policy issues. The Commission completed review of the draft through Section 648.210 (settlement) on page 35 of the draft. The Commission made the following decisions with respect to the provisions reviewed.

§ 610.350. Initial pleading

The staff indicated that its intent is to eliminate various forms of initial pleading in other statutes, in reliance on the single administrative procedure statute. If this is done, the references in this section to an accusation, statement of issues, and order instituting investigation will be deleted from the section and referred to in the Comment.

§ 610.672. Responsive pleading

The staff indicated that its intent is to eliminate various forms of responsive pleading in other statutes, in reliance on the single administrative procedure statute. If this is done, the reference in

this section to a notice of defense will be deleted from the section and referred to in the Comment.

§ 641.130. Modification of statute by regulation

Subdivision (a) of this section states that if a provision of the statute authorizes an agency to modify the statute by regulation, this includes authority to make the statute inapplicable to that extent. Concern was expressed that this concept could be lost in the various places where an agency is authorized to modify the statute. The staff should consider revising the various statutes to provide directly that the agency may "modify or eliminate", rather than relying on the general provision in subdivision (a).

§ 641.320. Declaratory decisions permissive

It was noted that the declaratory decision process is activated by a "petition" rather than an "initial pleading". The staff will recast the provisions so they conform better with the basic scheme of the administrative procedure act. Thus the petition would become an application for a declaratory decision which, if the agency decides to act upon it, would trigger an initial pleading by the agency. The agency could elect to let the application stand as an initial pleading.

§ 641.330. Notice of petition

The 15 day period for an agency response to a petition for a declaratory decision was changed to 30 days.

§ 641.350. Action of agency

The 30 day period for agency action in a declaratory decision proceeding was changed to 60 days.

Subdivision (c) was clarified to read, "If an agency has not taken action under subdivision (a) within 60 days after receipt of a petition for a declaratory decision, ~~the petition is deemed to have been denied~~ the agency is deemed to have declined to issue a declaratory decision on the matter."

§ 643.230. Service of initial pleading and other information

The form of statement to the respondent set out in this section should be revised to conform to the Commission's policy decisions on representation by counsel or other representative at the hearing.

§ 643.320. Postponement of time of hearing

The reference to 10 business days was revised to 15 calendar days.

§ 643.340. Notice of hearing

The form of notice of hearing set out in this section should be revised to conform to the Commission's policy decisions on representation by counsel or other representative at the hearing and on conference hearings.

§ 645.010. Intervention permissive

The word "permissive" was deleted from the lead line of this section, and the section should provide that the presiding officer "shall", rather than "may", grant the petition if the conditions in the section are satisfied.

§ 646.110. Application of discovery chapter

This section should be revised to make clear that the discovery chapter provides the exclusive means of discovery subject to the ability of the agency to modify or supplement discovery rules. The Comment should note that the civil discovery provisions of the Code of Civil Procedure are inapplicable.

§ 646.130. Depositions

The provision authorizing depositions on petition of a party should be revised to provide notice of the petition to the other parties before a deposition is ordered. The presiding officer or agency may not act ex parte.

The reference in subdivision (c) to Government Code Section 11189 should be clarified.

§ 646.140. Subpoenas

The provision authorizing subpoenas at the request of a party should be revised to provide notice of the request to the other parties in the case of a subpoena duces tecum.

The per diem compensation of three dollars for a witness appearing pursuant to a subpoena should be conformed to the general Government Code witness per diem provisions.

§ 646.310. Petition to compel discovery

The staff should draft provisions for administrative review of discovery disputes before the matter is referred to superior court for enforcement.

§ 646.320. Time for petition

Although not necessarily in connection with this section, the law should be clear that there is a continuing obligation to inform the other parties of changes in previously disclosed writings and witness lists after the initial compliance, by means of supplemental disclosures.

§ 647.020. Conduct of prehearing conference

The reference in subdivision (c) to the ability of the participants to see the proceeding was deleted. Similarly, the discussion in the Comment about seeing witnesses should be deleted.

§ 647.030. Subject of prehearing conference

The prehearing conference should be supplemented with a separate provision for a settlement conference. The settlement conference should be held if the presiding officer orders it; it should be a separate proceeding and participation of the parties should be mandatory. The agency might provide settlement personnel different from hearing personnel; this would be required in proceedings before the Office of Administrative Hearings.

In subdivision (j), the reference to "petitions" for intervention should be changed to "applications".

§ 648.120. Consolidation and severance

The Commission discussed whether severance of issues for separate hearing should be within the control of the presiding officer as well as the agency. No action was taken on this issue.

§ 648.130. Default

The reference in subdivision (a) to failure to appear at an "other stage" of the proceeding should be revised to refer to failure to appear at the settlement conference. If there are other instances where failure to appear triggers a default, they should be listed expressly.

Subdivision (b), allowing a hearing after default in the discretion of the agency or presiding officer, should be limited to instances where an initial decision has not been issued.

§ 648.210. Settlement

This section might be made part of the settlement conference provisions. The reference to "administrative adjudication" in this and succeeding sections should be revised to referred to "adjudicative proceeding". A settlement should be permitted only after issuance of the initial pleading, in order that the matter be a public record.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary