Memorandum 92-30

Subject: Study L-3044 - Comprehensive Powers of Attorney Statute (Policy Issues & Completion of Review of Draft Statute)

Background

At this meeting, the Commission needs to make final determinations of the policy issues raised by Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section and to complete its review of the draft statute.

The policy issues were presented in detail at the last meeting, but final decision had to be deferred on several major issues because of a shortage of Commission members.

After the major policy issues are determined, the Commission should consider any matters of interest in the draft statute attached to Memorandum 91-40 (copy attached). This review will start on page 27 of the draft statute, at Section 2415.080. This will complete the task that the Commission began in September 1991. The staff will then be in a position to prepare a new draft statute, depending, of course, on the resolution of the policy issues.

Attached to this memorandum are six exhibits which have been collected from Memorandum 91-21 considered at the April meeting, and its three supplements. We have collected the exhibits here for convenience.

Policy Issues

The following is a brief overview of the policy issues raised by Team 4 and others in the exhibits attached to this memorandum:

Scope of Study

Team 4 believes that the study should include the durable power of attorney for health care. (See Exhibit 1, p. 3.) Team members argue

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 believes 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.

Location of Power of Attorney Statute

The Commission tentatively agreed at the April meeting 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. (For background, see the discussion in Memorandum 91-40, at pp. 2-4; Questions 1 & 2 in Exhibit 1, pp. 3-5.)

It seems generally accepted that the statute will be in the Civil Code, but whether a comprehensive revised statute can fit into the existing location is difficult to tell. The staff believes the better location would be at the end of the Civil Code. This also has the benefit of using clearly distinct section numbers, whereas using the same numbers in the 2400-2514 range will cause confusion between old and new law.

Relation to General Agency Statute

We believe the issue of the relationship of the power of attorney statute and the general agency statute has been resolved by consensus. (See Question 1 in Exhibit 1, pp. 3-4.) The power of attorney statute will make clear that it prevails over conflicting general agency rules, and 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 to override a confusing or undesirable general rule.

Terminology

The Commission has 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." The staff will incorporate this usage into future drafts.

Personal Care Powers

A definition of "durable power of attorney for personal care" or a similar term will be included in the next draft. (For background on this issue, see the Staff Note following draft Section 2402.130, on page 5 of the draft; Question 7 in Exhibit 1, pp. 9-10.) This type of power would cover matters outside traditional property powers and 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.

Dating of Durable Power of Attorney

The question of whether powers of attorney should be required to be dated was discussed without final resolution at the April meeting. Team 4 would require dating (and acknowledgment, discussed below). (See Question 11 in Exhibit 1, p. 12.) As noted in Memorandum 91-40, the Beverly Hills Bar Association has also made this suggestion. It was noted at the April meeting that, if a power of attorney is acknowledged, the instrument would have some sort of date on it. The consensus was that a power of attorney should be dated, but that further consideration should be given to the consequences of not including a date and the possible remedies for saving an undated power.

A suggestion for dealing with this issue that has been before the Commission is drawn from the holographic wills rule under Probate Code Section 6111. Such a provision might read as follows:

> If a power of attorney [for property] does not contain a statement as to the date of its execution, the following rules apply:
>
> (a) If the omission results in doubt as to whether its provisions or the inconsistent provisions of another power of attorney are controlling, the undated power of attorney is invalid to the extent of the inconsistency unless the time of

its execution is established to be after the date of execution of the other power of attorney.

(b) If it is established that the principal lacked capacity at any time during which the power of attorney might have been executed, the power of attorney is invalid unless it is established that it was executed at a time when the principal had capacity.

Team 4 distinguishes the power of attorney situation from the holographic will situation, since a court looks at the will, and need do so only once, whereas a power of attorney is used on a day-to-day basis in private transactions. Still, if a power of attorney could be saved with this procedure, presumably it could be used, even if awkwardly, when accompanied by the validating court order. On the other hand, there may be a point at which conservatorship is the more appropriate course.

Acknowledgment of Durable Power of Attorney

The consensus at the April meeting was that a durable power of attorney for property should require either acknowledgment or two witnesses, consistent with the execution requirements for health care powers. (For background, see Question 12 in Exhibit 1, pp. 12-13.) It should be recognized that this policy will invalidate powers that have historically been valid. We will also need to consider whether the policy should apply to all powers of attorney for property, or only durable powers.

It should also be remembered that the statutory form provides in effect that a power that is dated and acknowledged is "legally sufficient." Civ. Code § 2476. The statute does not say that an undated or unacknowledged statutory form is invalid.

Duties of Attorney-in-Fact and the Duty to Act

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. We have received several recent letters concerning this issue. (See the letters from Harley Spitler, attached as Exhibits 3 and 4; the letters from William Schmidt on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law

Section attached as Exhibit 5; and the letter from Kathryn Ballsun, forwarding a letter from Team 4, attached as Exhibit 6.) For those of you desiring additional historical information on this issue, the staff draws your attention to the First Supplement to Memorandum 92-21 (considered at the April 1992 meeting).

It would be best to consider this issue when we reach draft Section 2418.010 (on page 32 of the draft statute attached to Memorandum 91-40).

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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

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

REPLY TO:

703\001\054.13

October 30, 1991

Stan Ulrich, Esq.
Staff Counsel
c/o CA Law Revision Commission
4000 Middlefield Road - D-2
Palo Alto, CA 94306

BY FEDERAL EXPRESS

Re: Memorandum 91-40 - Comprehensive Powers of Attorney Statute

Dear Stan:

Enclosed is a copy of "Team 4's Report - California Law Revision Commission Memorandum 91-40; Comprehensive Powers of Attorney Statute." On October 26, 1991, the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar ("Executive Committee") discussed the enclosed Team 4 Report, particularly Questions 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15 and 22. With respect to each individually noted question in the preceding sentence (except for question number 12 which is noted in the Report), the Executive Committee adopted Team 4's recommendations and positions.

We hope that these Team 4's comments will be of assistance to the Commission. If you have any questions, please do not hesitate to contact me.

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
STANTON AND BALLSUN
A Law Corporation

KAB/gts

cc: Team 4
Valerie Merritt, Esq.
Bruce S. Ross, Esq.
William V. Schmidt, Esq.
Sterling L. Ross, Jr.
Robert Temmerman, Esq.
Don Green, Esq.
T. Stikker, Esq.

TEAM 4 REPORT

CALIFORNIA LAW REVISION COMMISSION MEMORANDUM 91-40;

COMPREHENSIVE POWERS OF ATTORNEY STATUTE

On Saturday, October 12, 1991, the members of Team 4 (Sandy Rae, Bill Schmidt, Harley Spitler, Clark Byam, Don Green, Tom Stikker, Marc Hankin and Kathryn A. Ballsun) met to discuss the September 13, 1991 comments of the California Law Revision Commission ("Commission") to and about Memorandum 91-40, Comprehensive Powers of Attorney Statute ("Durable Powers of Attorney").

Although Team 4 has responded to the policy issues and drafting concerns raised by the Commission, Team 4 feels that it is important to emphasize that California practitioners and the people of the State of California would be best served by the introduction and adoption of a comprehensive statute encompassing both durable powers of attorney for property and durable powers of attorney for health care. As Team 4 believes will become evident by a review of this report, the issues involving both types of durable powers of attorney are often complex, intertwining and interdependent; therefore, it is a critical purpose of the redrafting that the statute be as logical and straightforward as possible. Drafting a durable power of attorney statute in segments is almost certain to undermine this critical purpose of the redrafting. Team 4 is concerned that a statute which takes a fragmented approach by only addressing durable powers of attorney for property will result in a host of foreseeable problems which will only require additional redrafting. Thus, Team 4 continues to urge the Commission to consider and propose a truly comprehensive durable power of attorney statute, one addressing both durable powers of attorney for property and durable powers of attorney for health care.

In responding to the Commission, Team 4 used as a guide the September 22, 1991 memorandum prepared by Valerie J. Merritt and addressed to the members of Team 4 and the Executive Committee of the State Bar Estate Planning, Probate and Trust Law Section. A copy of that memorandum is attached to this report. Team 4's responses and the reasoning underlying those responses are as follows:

1. **Question:** Should the provisions dealing with durable powers of attorney for property and durable powers of attorney for health care remain in the Civil Code rather than being transferred to the Probate Code?

Team 4 Response:

Team 4's position is that the statutory provisions concerning durable powers of attorney for health care and durable powers of attorney for property should remain in the Civil Code. Any type of durable power arises as a result of a grant of power from one individual to another individual. This is the essence of an agency relationship, and a durable power of attorney for property or health care should be regarded as simply one type or sub-species of agency.

Durable powers are used extensively by general practitioners as well as by attorneys specializing in business law. It is improbable that a business attorney or a general practitioner would look in the Probate Code for the statutes governing durable powers of attorney. Since durable powers of attorney are, in fact, simply a type of agency, searching for durable powers in the Probate Code would not be logical in any event. The proposed transfer of durable powers of attorney to the Probate Code would create a "trap" for attorneys and non-attorneys as long as the main law of agency remains in the Civil Code.

If statutes governing durable powers of attorney were transferred to the Probate Code, then the transfer would result in a fragmentation of the statutes dealing with the same topic into different codes. The proposed revision would engender confusion instead of clarification - the professed goal of the current effort to restate the durable power of attorney statutes. Finally, Team 4's responses to item 2 (below) further support Team 4's unanimous conclusion that durable powers of attorney should remain in the Civil Code.

2. **Question:** Should the relationship between durable powers and the statutory agency provisions currently set forth in the Civil Code be severed?

Team 4 Response:

Team 4 unanimously feels that durable powers of attorney cannot, and should not, be separated from statutory agency provisions currently set forth in the Civil Code.

As stated previously, durable powers of attorney are simply one manifestation of an agency. Even if an attempt were made to redraft the entire durable powers of attorney law, as a practical matter, it would appear to be difficult, if not impractical, to re-legislate each and every aspect of agency law as currently set

forth in the Civil Code. Agency law would have to remain as the larger statutory framework supporting durable powers of attorney.

Even if the redrafted durable power of attorney statute did include a severance of agency law, as with any new law, certain issues still would not be addressed in the new statute. Both practitioners and the court would have to resort to some other body of law for reference and clarification. For durable powers of attorney, such unresolved issues logically should be resolved by reference to the law of agency. If the severance between durable powers and agency occurred, then the result either would be reference to the agency provisions notwithstanding the severance or total reliance upon the courts to fashion such interpretation as they deem proper.

Team 4 does not agree with Mr. Ulrich's conclusion that if durable powers of attorney were severed from the existing statutory agency provisions, that the courts would still be able to and would rely upon current case law. In fact, such a severing would appear to create tremendous interpretative difficulties for a court and would engender substantial confusion among practitioners as well as the public. Team 4 agrees that the law of agency should be redrafted to better reflect current trends and concerns. However, although agency law may be archaic, it does have a well documented interpretive history which should continue to be used by practitioners until replaced by a comprehensive statute. Team 4 does not believe that the task of redrafting the law of agency is within the scope of the present project.

Further, although some parts of agency law may conflict or overlap with certain provisions of durable powers of attorney for health care, such duplication does not mean that an entire body of law should be discarded. Instead, such conflicting or overlapping provisions require extraordinarily careful drafting and analysis in the redrafting of the existing durable powers of attorney statutes. If any provisions of the newly enacted law were to conflict with existing agency law statutes, then the new law should provide that it expressly supersedes any contrary provision in prior law.

Any durable power of attorney, whether durable or non-durable, creates an agency relationship. The creation of the agency relationship has nothing whatsoever to do with: 1) the probate of a decedent's estate; or 2) the devolution of property upon the death of the principal. Nothing in the Probate Code deals with the concepts of agency or agents. The law of agency is an integral part of durable powers of attorney and should remain so.

3. **Question:** Should California law (i.e., Civil Code § 2400.040) be rewritten to make it clear that if a power of

attorney is durable in another state that it will be treated as durable in California regardless of whether or not such durable power of attorney complies with the provisions of the Uniform Durable Powers of Attorney Act (as enacted in California)?

Team 4's Response:

Team 4 agrees that Civil Code § 2400.040 should be rewritten so that if a power of attorney is durable in another state, it will be treated as durable in California regardless of whether such a durable power complies with the provisions of the Uniform Durable Powers of Attorney Act as enacted in California. Team 4 favors the broadest possible interpretation of the durable powers of attorney statutes; such liberal interpretation should enable durable powers of attorney to become more portable. The concept of having portable durable powers of attorney is the basic concept underlying the Uniform Durable Powers of Attorney Act which California has adopted and which Team 4 believes important to retain (to the extent possible) as part of California law. Therefore, the revised durable powers of attorney statutes should be rewritten with an expansive perspective, which will encourage the use of and reliance upon durable powers of attorney. Such a perspective includes acknowledging as valid any non-California durable power of attorney which manifests an intent to function as or have the effect of a durable power of attorney.

4. **Question:** In rewriting the durable powers of attorney statute, should the word "attorney-in-fact" or the term "agent" be used to designate the individual (or institution) designated by the principal to fulfill the duties and responsibilities delegated under the durable power of attorney?

Team 4's Response:

Team 4 feels strongly that the term attorney-in-fact should be used as the statutory term to designate the individual appointed to act for the principal under a durable power of attorney. The term "agent" is a chameleon term. There are many types of agents. One of those types of agents is the attorney-in-fact under a durable power of attorney. For precise legal language, attorney-in-fact is preferable inasmuch as an attorney-in-fact cannot be confused with any other type of agent.

The purpose of redrafting the durable power of attorney statute is so that the statute will be uniformly interpreted by judges and lawyers who are familiar with the concepts of agency which underlie durable powers of attorney. For this reason, it is

strongly compelling that the terminology in the statutes be as precise as possible. On the other hand, if a practitioner feels that a member of the public would be confused by the term attorney-in-fact, then the word agent can be used in individually drafted documents. Team 4 believes that as the term "attorney-in-fact" continues to be used, that it will gain wide public acceptance in part because of the convenience in being able to distinguish attorneys-in-fact from all other agents.

5. **Question:** What capacity must the principal possess in order to execute a valid durable power of attorney? Team 4 has interpreted the question of capacity as relating to both a durable power of attorney for property and a durable power of attorney for health care.

Team 4's Response:

Team 4 believes that the standard of capacity which must exist for an individual to execute a durable power of attorney for property should be that the individual has the power to contract, that is the capacity to enter into a contract.

Team 4 is much less certain as to the proper standard of capacity which should exist before an individual can execute a durable power of attorney for health care. At the time of the execution of the durable power of attorney for health care, must an individual have the capacity to give informed medical consent? What does the ability to give informed medical consent mean? How are judges to interpret the standard? Is the ability to give informed medical consent a greater or lesser standard than the ability to enter into a contract? Are there any objective criteria for determining capacity which should be reflected in the durable power of attorney statutes?

The definition of "capacity" is critical to a meaningful redrafting of the durable powers of attorney statute. If the definitions are not clear, then the courts will be forced to spend considerable time and effort not only in determining whether in a particular instance, capacity existed but, as well, the very definition of capacity.

Medical and scientific procedures and techniques currently exist which assist in determining capacity and providing objective evidence of that capacity. Considering the emotion and conflicting interests that often are involved at the time of the execution of a durable power of attorney, objective criteria could remove a tremendous area for conflict. Team 4 is uncertain whether and to what extent scientific criteria should be incorporated into the

statute. However, Team 4 requests that the Commission carefully consider available medical and scientific tests for incapacity and whether such objective criteria should be adopted into the statute.

Team 4 is somewhat perplexed as to the reasons that durable powers of attorney for health care are being discussed so extensively in questions 5, 6, and 7 inasmuch as the Commission determined to defer action on the durable power of attorney for health care. As has been indicated several times, Team 4 feels that it would be most advantageous for both practitioners and the people of the State of California if one comprehensive durable power of attorney bill were introduced which reflected thorough analysis and integration of the durable power of attorney statutes. Specifically with respect to the durable powers of attorney for health care, Team 4 feels that the issue of capacity strongly illustrates the need to coordinate the capacity provisions between the durable powers of attorney for health care and the durable power of attorney for property.

Further, other issues with respect to the capacity issue require careful consideration. For example, does it make sense to have two different capacity standards, one for each type of durable power? Must the same capacity standard be met in order to terminate a durable power of attorney? To modify or restate a durable power of attorney?

Still another reason which reinforces the need to consider both durable powers of attorney at one time is the fact that many medical decisions may have a significant economic impact. For instance, if an individual stated that he/she wanted extensive medical intervention, and if the attorney-in-fact were to elect to pursue certain cancer treatments and maintain the individual at home, then the cost to the individual's estate could be overwhelming. Thus, an individual's directive to pursue certain medical remedies may have a major economic impact upon that person's estate. A host of issues emerge from this scenario and slight variations upon it. Which consideration, health care or property prevails? How should the conflict between the competing considerations be resolved? Team 4 believes that great care should be taken in redrafting the durable power attorney statutes so that the revisions will represent long-term and reasonable solutions.

6. **Question:** What is the effect of co-mingling provisions relating to durable powers of attorney for health care, durable powers of attorney for property and nominations of conservator in one and the same document? This issue becomes particularly acute in the event that different standards are required for the capacity to create one or the other of the durable powers of attorney.

Team 4's Response:

Team 4 believes that one document can combine a durable power of attorney for property and a durable power of attorney for health care. In many instances, such a combination would seem to represent a logical approach inasmuch as the health care decisions may have economic repercussions (see response to Question 5). Team 4 believes that the requirements and formalities required for each durable power of attorney (e.g. the requisite capacity that must exist in order to execute a durable power of attorney) must be met even though several durable powers of attorney appear in one document. For example, if a document combines both durable powers of health care and property, then an individual still must be able to contract in order for the durable power of attorney for property to be valid.

At this point, Team 4 again feels that it is important to emphasize that an integrated and thorough analysis of both types of durable powers is desirable and required. Team 4 believes that such questions as the effect of an integrated document cannot and should not be considered in a vacuum, and this is all the more reason that the durable powers of attorney for property and health care should be considered and dealt with at one time.

7. **Question:** The Commission was concerned with certain types of "powers" which cannot be categorized precisely into either a property or a health care category. Examples of these powers are the powers to determine the residence, to select a companion, to determine recreation and so forth.

Team 4's Response:

After extensive discussion of both types of durable powers of attorney, Team 4 felt that neither of the existing powers of attorney adequately addressed the types of powers listed in Question 7. On the other hand, Team 4 believes that an attorney-in-fact should have such powers (as listed below) if the attorney-in-fact is responsible for providing for all the possible needs of an individual. Furthermore, enabling a principal to grant these powers, and the manner of their granting should be addressed in the statute. An ellipsis in the statute will only mean that at some point, a court (with less time to consider and perhaps less background in the area) will have to resolve the issues involving these types of personal care considerations. Providing guidance in this area should be given the highest priority.

Therefore, Team 4 suggests that a new durable power, a durable power of attorney for personal care, be introduced as one of the

basic type of durable powers. The durable power of attorney for personal care would reflect the types of provisions mentioned above, e.g., selecting a companion, and other powers which cannot be easily encompassed within either the durable power of attorney for property or the durable power of attorney for health care. In attempting to delineate the range of powers which would be dealt with in the durable power of attorney for personal care, it is helpful to consider the various powers which currently are given to a conservator of a person. Team 4 feels that the law should recognize such personal care powers, but again emphasizes that it would be most helpful to the practitioners of the State of California if all of the durable powers were considered at one time.

Team 4 believes that it is important to recognize a durable power of attorney for personal care, but that the law should not prescribe where such powers should be set forth (e.g. requiring that a durable power of attorney for personal care could only be set forth in a separate and distinct document). In other words, such a durable power of attorney for personal care could be included in a durable power of attorney for property, a durable power of attorney for health care, or could be set forth in a separate document. All, except one of the members of Team 4, felt that the durable power of attorney for personal care should be totally a creation of statute. That is, the statute should expressly state how the durable power for personal care would be created and the capacity that an individual must possess in order to exercise such a power. Team 4 believes that in order to execute a durable power of attorney for personal care that an individual should have the same capacity as required for the execution of a valid durable power of attorney for property, that is the power to enter into a contract. In all fairness, it should be mentioned that one vocal member of Team 4 felt that the manner of creating a durable power of attorney for personal care should be omitted from the statute entirely.

8. **Question:** If conflicting provisions appear in different durable powers, then how should the conflicts be reconciled? The Commission also appeared to be particularly concerned as to how to reconcile various provisions relating to the disposition of remains and burial instructions.

Team 4 Response:

The issue of which provisions prevail in the event that various documents contain conflicting provisions is complex if only because of the number of permutations involved. Therefore, Team 4 felt that the issue warranted an extensive study which should

include a consideration of the interaction of all the various types of durable powers of attorney.

However, Team 4's preliminary response to the issues raised by the Commission are as follows: 1) with respect to the disposition of remains and burial instructions, a later executed document, including a will, should prevail over an earlier executed document; and 2) with respect to documents executed on the same date and all other documents which contain conflicting provisions, the intent of the person should control. Therefore, the issue would become one of a question of fact. In reality, later executed documents most often would control, and Team 4 believes this should be the general rule subject to the above considerations.

Team 4 also felt that it was critical to protect parties who had relied on earlier executed documents, and that this issue was particularly intertwined with the provisions set forth in the law of agency. In the law of agency, an agent is usually protected until that agent has been notified of a change of circumstances. Therefore, Team 4 felt that it would be important that in this case (as in many other instances) that the law of agency continue to apply to durable powers of attorney.

9. **Question:** Whether durable and non-durable powers of attorney should be addressed in one statute?

Team 4 Response:

Durable powers of attorney and non-durable powers of attorney are exactly the same except for the durable provisions. Therefore, the rewritten durable power of attorney statute should apply to both durable and non-durable powers except where expressly stated. Under the law of agency, there would be a separate section (title?) to deal with durable powers of attorney in order to preserve the Uniform Durable Power of Attorney Act (as enacted in California) intact.

If Team 4's above position is accepted, then it would mean that the word "durable" would have to be removed from many parts of the proposed statute and that each particular section in the proposed Memorandum would have to be re-examined in order to see whether or not such section should be reintegrated with the powers of attorney statute as a whole. In summary, durable and non-durable powers of attorney would be dealt with in one title (article?), except with respect to those particular provisions constituting a part of the Uniform Durable Power of Attorney Act which would be set forth in a separate division.

10. **Question:** Whether Civil Code § 2402.210 should include durable powers as well as non-durable powers?

Team 4's Response:

As stated in Question 9, Team 4 believes that the term "power of attorney" generally should apply to both durable and non-durable powers of attorney. The concerns of the Commission about the confusion in the types of agents (e.g., real estate brokers) who could be appointed under the durable power of attorney statutes is largely resolved if the words "attorney-in-fact" are used instead of the more generic (and confusing) term "agent". Team 4 suggests that the wording of § 2402.210 should be redrafted as follows:

> "(a) "Power of attorney" means a written instrument, however denominated, that is executed by a natural person who has the capacity to contract and who grants powers to an attorney-in-fact."

Team 4 further feels that a document does not have to be named a "power of attorney" in order for it to so function.

11. **Question:** Should durable powers of attorney be dated?

Team 4's Response:

Team 4 believes that it is important to require that durable powers of attorney be dated. Third parties often rely upon durable powers of attorney, and an undated document can create innumerable doubts and difficulties for such third parties. In addition, requiring a date is not unduly burdensome, but on the other hand does assist in determining the validity of the document. A durable power is different from an undated holographic will, inasmuch as an undated holographic will is submitted to a court for the court to determine the validity of the instrument. On Team 4, six members voted that documents should be dated while two members voted that dating should be voluntary.

12. **Question:** Does a durable power of attorney for property or health care have to be acknowledged in order for the document to be valid?

Team 4's Response:

On October 26, 1991, the entire Executive Committee discussed whether or not a durable power had to be acknowledged in order to be valid. The vote was 8 to 8, with the Chair then voting for acknowledgement.

13. **Question:** Should Civil Code § 2410.020 be rewritten as suggested by Team 4?

Team 4's Response:

Team 4 thanks the Commission for accepting Team 4's suggestion that § 2410.020 should be rewritten as follows:

> "In a power of attorney for property, a principal may grant to an attorney-in-fact powers to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes."

14. **Question:** Should the following language be deleted from Civil Code § 2410.040: "... notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive."

Team 4's Response:

Team 4 urges that the above quoted language be deleted from Civil Code § 2410.040 for the following reasons. Team 4 feels that the language if included would simply create a redundancy inasmuch as incapacity is already mentioned in a previous clause of the same statute. Furthermore, the reference to whether the principal is dead or alive is overly broad and general. There are other sections, i.e., § 2425.040, that specifically refer to and deal with the effect of the death or incapacity of the principal. The reference in this section to the principal being alive or dead merely creates confusion, and the cross-references are ineffective to remedy such confusion. Finally, this section is part of the Uniform Durable Powers of Attorney Act. Team 4 believes that in the interest of uniformity, that the language of the Uniform Act should be retained wherever possible.

15. **Question:** Whether or not the warning which should be included on the statutory durable power of attorney should be revised?

Team 4's Response:

Team 4 believes that the warning should be revised, and suggests that the following language be adopted by the Commission:

"WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. It creates a durable power of attorney. Before you sign this document, consider these important facts:

This document gives a person the power to act as your agent.

This document may give your agent broad powers to manage, dispose, sell or convey your real and personal property and to borrow money using your property as security for the loan.

Your agent has no duty to do any act under this power until your agent agrees to do so.

These powers may exist until you die unless you include a time limit in this document. These powers will continue to exist even if you can no longer make your own decisions.

Your agent is entitled to reasonable compensation for services rendered to you, unless your agent agrees otherwise. The agreement should be in writing.

You have the right to revoke or terminate this durable power of attorney at any time.

If there is anything about this form that you do not understand, ask a lawyer to explain it to you."

16. **Question:** Should Civil Code §2410.060 only apply to a durable power of attorney for property?

Team 4 Response:

Team 4 believes that the statute should not be rewritten. The provision regarding the nomination of a conservator of the person or estate or both should apply to both a durable power of attorney for property and a durable power of attorney for health care.

Since this provision is part of the Uniform Durable Power of Attorney Act, the provision should be kept intact unless there is a compelling reason for redrafting Section 2410.060. Team 4 believes that no such compelling reason exists.

17. **Question**: Should Civil Code § 2410.070 concerning springing powers of attorney be rewritten to apply only to durable powers of attorney for property?

Team 4 Response:

Team 4 believes that § 2410.070 concerning springing powers of attorney should be retained with the general provisions concerning durable powers of attorney and should not be rewritten. This is an example of a provision which pertains to both durable powers of attorney for property and durable powers of attorney for health care, and which should be integrated into one comprehensive statute. For the benefit of practitioners, provisions which concern both types of durable powers of attorney, such as springing powers should be located in one section dealing with provisions which are common to both types of durable powers.

18. **Question**: Civil Code § 2410.110 permits the principal and agent to enter into separate agreements which vary the provisions of the durable power of attorney between principal and agent. Should such side agreements be permitted?

Team 4 Response:

Team 4 believes that Civil Code § 2410.110 which permits side agreements should be deleted in its entirety. Team 4 believes that "side agreements" are dangerous and create substantial uncertainty inasmuch as they may lack the formalities which are required to create other durable powers of attorney and which protect the principal as well as the agent. In addition, third parties would find it difficult to rely upon a durable power of attorney if it were possible for the principal and agent to enter into a side agreement.

A third party always would be forced to pose questions about a possible side agreement. Such questions would include whether or not there was a side agreement. Did the side agreement vary or modify the durable power of attorney provisions under consideration? If so, to what extent? Third parties would require the production of any such side agreements. All in all such side

agreements would inhibit rather than facilitate the use of durable powers attorney, and all for no real purpose. Team 4 generally feels that the benefits of permitting such side agreements would be outweighed by the many negative aspects.

19. **Question**: Civil Code § 2410.120 concerns the manner of modifying a durable power of attorney by the principal. The issue raised by the Commission was whether or not oral modifications of a durable power of attorney should be permitted.

Team 4 Response:

Team 4 would rewrite Civil Code § 2410.120 so that the section dealt exclusively with modification of a durable power of attorney as opposed to both modification and termination. Team 4 felt that any modification should only be in writing. However, in view of Team 4's position with respect to side agreements, a conflict arises with respect to amendments as opposed to a total restatement. After balancing competing considerations, Team 4 felt that no amendments of durable powers should be permitted. In lieu of any amendment, an entirely new document would have to be executed. It should not be unduly burdensome to create such a new document, particularly because the certainty to be achieved would facilitate the use of the durable powers of attorney by both third parties and the attorney-in-fact.

Team 4 suggests that subparagraph (d) originally set forth in statute § 2410.120 which concerns recordation of a termination or modification be transferred to § 2410.130, with the reference to modification being deleted.

20. **Comment:** The Commission requested Mr. Ulrich to rewrite and update the language of Civil Code § 2410.130.

Team 4 Response.

Team 4 agrees that the language of § 2410.130 should be clarified and updated, and will review the revised statute upon receipt.

21. **Question**: Under Civil Code § 2410.140 does a temporary incapacity revoke a power of attorney under current law?

Team 4 Response:

It is Team 4's understanding that Stan Ulrich is to research this question; Team 4 then feels it inappropriate for it to comment until such research is completed.

22. **Question:** Should durable powers be certified as provided in proposed Civil Code § 2410.150?

Team 4 Response:

Team 4 believes that certification of durable powers is desirable in that such certification would make the administration of durable powers simpler and would facilitate the use of durable powers by third parties. However, Team 4 suggests that Civil Code § 2410.150 be broadened so that attorneys who practice law in the State of California and duly licensed notaries public also could certify durable powers of attorney.

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
405 HILGARD AVENUE
LOS ANGELES, CALIFORNIA 90024-1476

March 3, 1992

Mr. Stan Ulrich
California Law Revision Commission
4000 Middlefield Road -- D-2
Palo Alto, CA 94306

Dear Stan:

RE: Memorandum 92-21
Durable Power of Attorney

I like your durable power of attorney statute, but I think you should consider expanding the power in two ways.

First, an agent may be authorized (a) to create, modify, or revoke a trust, (b) to give the principal's property away, and (c) to change the death beneficiary on any payable-on-death account or contract. § 2421.060. In view of this (which I approve), why cannot an agent be granted the power to make or revoke the principal's will? This is forbidden by § 2421.070.

It is hard to see why an agent can make a will substitute but not a will. These are just alternative means of disposing of the principal's property at death. In order for the principal to authorize an agent to dispose of his non-P.O.D. property at death, the principal must create a trust during lifetime and transfer his property to it. An inter vivos trust may or may not have advantages to the principal, but it seems to me the principal ought to be able to choose between authorizing an agent to dispose of his property by way of an inter vivos trust or by will.

Of course, a principal could indirectly authorize an agent to dispose of his property at death by executing a will giving the agent a general or special power of appointment over the property. But this method does not offer the principal the same opportunities for tax savings as the power to make a will would.

I am not sure an agent can be given the power to sever any joint tenancy of the principal, but this would seem a desirable power. The agent could turn a joint tenancy with a spouse into community property with tax advantage, for example.

Second, why does the durable power expire at death of the principal? It seems to me that if the agent can act for the principal before death, it should be possible to authorize the agent to act for the principal within a nine-month period after death. This might be useful in curing defects in the estate plan, including tax problems and problems arising from disclaimers, that surface for the first time after death when all the relevant facts are known. The power should say that action under it during this nine-month period shall be treated for all purposes as though the action was taken just before the death of the principal.

Whether the IRS would accept this might be questionable, but if a principal can authorize an agent to create or revoke a trust of the principal's property before the principal's death, I see no private law objection to authorizing the agent to amend a trust within nine months after the principal's death and treating this as having been done by the principal himself.

I hope the Commission will consider broadening the durable power statute in these two ways.

Sincerely,

Jesse Dukeminier
Maxwell Professor of Law

JD:mrk

Cooley Godward Castro Huddleson & Tatum

Attorneys at Law

Northern California

One Maritime Plaza
20th Floor
San Francisco
CA 94111-3580
(415) 981-5252
Telex: 380815
COOLEY SFO
FAX: (415) 951-3699

Palo Alto CA
(415) 494-7622

Menlo Park CA
(415) 494-7622

Southern California

Newport Beach CA
(714) 476-5252

March 4, 1992

California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94306

Attention: Stan Ulrich,
Assistant Executive Secretary

Re: C.L.R.C. Memorandum 91-40 as Amended and Supplemented

Dear Stan:

Here with is my personal position on one major subject, and several related subjects, of C.L.R.C. Memorandum 91-40 as Amended and Supplemented.

The major subject deals with the duty of the Attorney-in-Fact ("Agent") to act. I believe that subject begins in new proposed Civil Code section 2418.010, on page 32, of the May 24, 1991 staff draft under study L-3044.

I. My Personal Interest

While I have been, for some years, and still am, a member of Team 4, and am presently a technical advisor of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar, in the general area of durable powers and health care this letter states my personal position.

Since the advent of durable powers of attorney in California, I have been very active before California legislative committees, and in published writings, in advocating durable powers of attorney in California. I have also been, and still am, a member of the Joint Editorial Board for the Uniform Probate Code which has the major responsibility, nationally, for promoting durable powers of attorney. More recently, I am an observer to the N.C.C.U.S.L. drafting committee which is in the process of drafting a uniform health-care decisions act. I mention the above solely to lay the ground work for my personal interest in durable powers of attorney.

II. The Agent's Duty To Act

My position is quite simple to state: The Agent always has a duty to act, as a fiduciary, in the best interest of the Principal. And that is true irrespective of whether the durable power instrument contains a grant of powers or a grant of duties or a mix of powers and duties.

In creating a duty to act, the legal status of the Agent is very important:

A. The Agent is a fiduciary. In that respect, the Agent is analogous to, but not the same as, the trustee under any trust agreement.

B. When the principal signs a durable power granting powers only, the principal's expectation is that, in the event of the principal's incapacity, the Agent has a duty to act in the best interest of the Principal. Most certainly, the Principal's expectation is not that the agent will do nothing.

III. Brief History Of Duty To Act In C.L.R.C. Study

A bit of history of the Duty To Act In C.L.R.C. Study.

This issue first arose, I believe, at a C.L.R.C. meeting held on November 30, 1989 at the Grosvenor Hotel, San Francisco Airport. My presentation was scheduled for 1:30 p.m. The agenda items were (i) Springing Powers of Attorney and (ii) the California Uniform Statutory Form Power of Attorney. My presentation was on behalf of the above Executive Committee. Among other points, I urged that all California forms of durable powers should always provide for the Agent's written acceptance. At that point Vaughn Walker, who was then a member of C.L.R.C., asked, in substance, "Are you saying that the Agent has no duty to do any act unless he accepts the appointment". My response was: "Yes, that is my understanding of the law". There was considerable discussion of that point. The discussion concluded with Vaughn Walker's direction to the staff to study the problem and determine whether or not there was any statutory method of always having the Agent under some duty to act.

I believe C.L.R.C. memo 91-40 is the staff response.

IV. The Attorney In Fact Always Has A Fiduciary Duty To Act In The Best Interests Of The Principal

My opinion is that the Attorney in Fact always has a fiduciary duty to act in the best interests of the principal.

That opinion is based upon the following:

A. The Attorney in Fact Is A Fiduciary. The relationship of principal and Attorney in Fact, legally, is a fiduciary relationship. That is well-accepted "boilerplate" law. The Attorney in Fact is not a trustee; however, like a trustee, the Attorney in Fact has a continuing fiduciary duty to act in the best interests of the principal.

B. The "Powers" Issue. It has been suggested, by some, that under a durable power that contains only a grant of powers (and does not contain a grant of duties) that the Attorney in Fact is not required to do anything at anytime irrespective of whether the Attorney in Fact does, or does not, accept the appointment in writing.

My opinion: That is totally wrong as a matter of law.

Take this example: The Attorney in Fact has power (not a duty) to sell securities, and has agreed in writing to accept the appointment. The principal is incapacitated. One security is 1,000 shares of Gold Mining Co. which had a market value of $1,000 per share when the durable power instrument was executed. The market value of Gold Mining Co. begins to drop and plummets to $75.00 per share. All investment advice is to "sell" because, for a number of reasons, the market value of Gold Mining Co. is going only in one direction -- down! The Attorney in Fact does nothing, saying to himself: "I hold only a power to sell and am not obligated to do anything!"

My opinion: The Attorney in Fact had a duty to sell Gold Mining Co., at some point in time, in view of the continuing down trend of the market. That duty derives from his continuing fiduciary duty to act, always, in the best interests of the incapacitated principal.

V. Possible Statutory Solution

One possible statutory solution would be along these lines:

> Civil Code Section ____. The attorney in fact is a fiduciary; and as a fiduciary always has a duty to act in the best interests of the principal.

Sincerely,

Harley Spitler

Harley Spitler

20435413

Cooley Godward Castro Huddleson & Tatum

Attorneys at Law

Northern California

One Maritime Plaza
20th Floor
San Francisco
CA 94111-3580
(415) 981-5252
Telex: 380815
COOLEY SFO
FAX: (415) 951-3699

Palo Alto CA
(415) 494-7622

Menlo Park CA
(415) 494-7622

Southern California

Newport Beach CA
(714) 476-5252

San Diego CA
(619) 453-1515

March 23, 1992

Stan Ulrich
Assistant Executive Secretary
C.L.R.C.
4000 Middlefield Road, D-2
Palo Alto, CA 94306

Re: CLRC Memorandum 91-40 as amended and supplemented

Dear Mr. Ulrich:

This is a supplement to my March 4, 1992 letter re CLRC Memorandum 91-40 as amended and supplemented.

There is strong support in:

1. The Restatement (Second) of Agency

2. California statutes

3. Court decisions

for the propositions that (i) the agent is a fiduciary and (ii) as a fiduciary always has a duty to act in the best interests of the principal.

I. Restatement (Second) of Agency

The Restatement (Second) of Agency, Sec. 13 states:

"An agent is a fiduciary with respect to matters within the scope of his agency"

The Restatement "Comment" states in part:

"The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is a person having a duty, created by his undertaking to act primarily for the benefit of another in matters connected with his undertaking"

Restatement (Second) of Agency, p. 58.

Restatement (Second) of Agency, Sec. 387 states:

"Sec. 387. General principle

Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."

II. California's Statutes

California Civil Code 2322(c) provides:

"An authority expressed in general terms, however broad, does not authorize an agent to do any of the following:

- - - - -

(c) Violate a duty to which a trustee is subject under Section 16002, 16004, 16005, or 16009 of the Probate Code"

Probate Code 16002(a) provides:

"(a) The trustee has a duty to administer the trust solely in the interest of the beneficiaries."

I believe all responsible commentators agree that when transposing the power of attorney section into the trust section, the language of Probate Code 16002(a) would be interpreted to read:

"(a) The attorney in fact has a duty to administer the power of attorney solely in the interest of the principal."

There are a number of specific duties of the attorney in fact set forth in Probate Code Sections 16004, 16005 and 16009.

III. CLRC Memos Re Duty Of Attorney In Fact To Act

I believe the first CLRC memo on the duty of the Attorney in Fact to act is memorandum 90-30 re Study L-3031 dated 1/19/90. Therein the staff recommendation was the addition of section 2515 to the Civil Code reading as follows:

"Staff Recommendation

We could add a provision to the Civil Code to read:

Civil Code § 2515. Acceptance of duties of attorney in fact

2515(a) A person named as attorney in fact in a power of attorney, whether or not a durable power of attorney, may accept the duties of attorney in fact by any of the following methods:

(1) Signing the power of attorney or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the power of attorney.

(b) If the person named as attorney in fact receives consideration for agreeing to serve and the agreement is not required by law to be in writing, the person may accept the duties of attorney in fact as provided in subdivision (a) or by orally agreeing or otherwise manifesting acceptance by words or conduct.

Comment. Section 2515 is new. Subdivision (a) makes two changes in what appears to have been prior law. First, a gratuitous attorney in fact is bound by written acceptance, whether or not actually entering upon performance. See 2B. Witkin, Summary of California Law *Agency and Employment* § 62, at 68 (9th ed. 1987). Second, a gratuitous attorney in fact is no longer bound by oral acceptance, nor is acceptance implied from circumstances and conduct. Id. § 36, at 49-50.

> Subdivision (b), concerning an attorney in fact who is compensated, is consistent with prior law. See id.; cf. Civ. Code § 2309 (when written authority required).
>
> Proposed Section 2515 would eliminate uncertainty about whether a gratuitous attorney in fact has any duty to perform before actually entering upon performance. This seems to be a desirable clarification, particularly for a durable power of attorney where the principal needs assurance that the named attorney in fact will perform if the principal becomes incompetent."

That new proposed C.C. Section 2515 would have solved the problem.

However at the April 1990 meeting, CLRC deferred action on C.C. 2515 and referred it back to the staff "in light of the decision to make a comprehensive review of the general power of attorney statutes." CLRC memo 90-85 dated 7/10/90, page 8.

Then, in memo 90-122 dated 10/31/90, the staff reversed the position taken by it in CLRC memo 90-30, set forth above. With due respect to the staff, the reasons given by it for that reversal of position are contradictory, confusing and wrong. There is no mention of CLRC memo 90-30.

Here are several examples of the contradiction and confusion in the "Duty to Act" section (pink section) and the "General Duties of Agents" section (pink section) of the staff draft of CLRC memo 90-122:

1. The cursory dismissal of C.C. 2322(c) and Probate Code 16002 in footnote 46 is simply both wrong and incomplete. The staff does not even quote Probate Code 16002(c), set forth above, which when transposed into power of attorney language places a duty upon the agent to administer the power of attorney solely in the interest of the principal.

2. The equally cursory dismissal of C.C. 2475:

> "By accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent"

is strange. Footnote 39 says: "The full implication of this statement is unknown." That could be said of every new statute. C.C. 2475 was enacted in 1990. I believe it was sponsored by CLRC. Most certainly, CLRC should have some view of the

meaning of the above sentence when it placed that sentence in C.C. 2475. If the sentence does not mean what it clearly says, CLRC should consider an amendment to delete the sentence!

3. The staff places heavy reliance upon statutes of other states, especially Illinois and Missouri. Several comments:

a. Staff says it is "the trend of modern statutes to relieve the agent under a power of attorney from a duty to exercise the authority granted." It cites only Illinois and Missouri.

b. What the staff fails to do is to examine the other related statutes in Illinois and Missouri to determine whether or not those states have statutes similar to California's C.C. 2322(c) and C.C. 2475 and Probate Code 16002(a).

c. The staff also fails to point out other states whose statutes define the attorney in fact as a fiduciary with a fiduciary duty to act in the best interests of the incapacitated principal.

For example, why doesn't the staff look at the statutes of a state such as South Carolina which specifically provide that the agent under a durable power of attorney is a fiduciary; and as a fiduciary, the agent is liable to the principal for the agent's failure to act prudently or the agent's failure or refusal to act. See South Carolina Durable Power of Attorney Statute S.C. Code Ann. 62-5-501 reading in relevant part:

> "The attorney in fact has a fiduciary relationship with the principal and in fact has a fiduciary relationship with the principal and is responsible as a fiduciary."

d. Finally, as to Illinois and Missouri, what concern has California with these states. We, CLRC and the legislature, want to do what is best for California residents.

4. <u>The Client's Expectation</u>. I would like to have the staff furnish me the name and phone number of <u>one</u> client, of any attorney, whose understanding after paying a $_____ fee for a set of durable powers was that if he/she, the client, became incapacitated, the agent never had to perform any act at any time! Utter nonsense! The client's rightful expectation is that in the unfortunate event of

incapacity, his/her agent has a continuing fiduciary duty to act in the best interests of that incapacitated principal.

IV. Court Decisions

As we are not concerned with court decisions in other states, this section deals only with California reported decisions. I believe, however, that there is no reported decision in any state holding that the attorney in fact under a power of attorney is not a fiduciary. The rule that the attorney in fact under a power of attorney is a fiduciary is "Boiler plate" law and a universal rule.

For California, see Kinert v. Wright (1947) 81 CA(2d) 919 at 925:

> "The relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character."

For a sound federal court of appeals decision, see Hill v. Bache Halsey Stuart Shields Inc. (1986, 10th Circuit) 790 F.(2d) 817 at 824:

> "Any state law fiduciary duty of Bache and Wright arose from their agency relationship with Hill. Wright, on behalf of Bache, was Hill's agent at least for the purpose of conducting trades Hill ordered. Wright therefore was a fiduciary, because all agents are fiduciaries "with respect to matters within the scope of [their] agency." *Restatement (Second) of Agency* § 13 (1958). But the district court instruction failed to address the key question, i.e., what was *the scope* of the agency? *See Sherman v. Sokoloff*, 570 F.Supp. 1266, 1269 n. 10 (S.D.N.Y.1983) (noting importance of scope question when stockbroker charged with willful or reckless breach of duty tantamount to fraud); *see also Restatement (Second) of Trusts* § 2, comment b (1959) ("A person in a fiduciary relation to another is under a duty to act for the benefit of the other *as to matters within the scope of the relation.*") (emphasis added). An agency relationship is consensual on both sides. *Restatement (Second) of Agency* § 1. A fiduciary duty thus cannot be defined by asking the jury to determine simply whether the principal reposed "trust and confidence" in the agent. The jury should have been instructed to decide first what Wright had agreed to do for Hill and then to determine whether Wright executed those tasks properly."

Please note, in particular, the quotation from Restatement (Second) of Trusts, section 2, page 6:

> "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation."

Sincerely,

Harley Spitler

20443107

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

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

April 19, 1992

REPLY TO:

William V. Schmidt
5030 Campus Drive
Newport Beach, CA 92660
Tel. (714) 955-2260
Fax (714) 833-1423

California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94306

Attn: Stan Ulrich,
Assistant Executive Secretary

Re: First Supplement to Memorandum 92-21

Dear Stan:

At the February 29, 1992 meeting of the Executive Committee in Los Angeles, the resolution set forth below was proposed by Don Green and adopted by a vote of 14 to 5.

"The law as to durable power - power of attorney should be that the holder of the power has no duty to act under that power, subject to two exceptions:

(1) Duty to follow through with an action to the extent that that action is undertaken.

(2) To the extent there is an express duty that has been expressly accepted by the agent."

I am aware of the March 4, 1992 letter to you from Harley Spitler which is attached to the First Supplement to Memorandum 92-21 as Exhibit 2. The purpose of this letter is (1) to inform you of the vote and position of the Executive Committee; and (2) to make you aware that some of the contents of Mr. Spitler's letter are inconsistent with the position of the majority of the Executive Committee.

It is always possible that this matter will again be placed on the agenda of the Executive Committee for further discussion and reconsideration. If this happens and the Executive Committee adopts a different position, we will most assuredly inform you of that position.

If you have any questions, please feel free to contact me.

Very truly yours,

Wm. V. Schmidt

WILLIAM V. SCHMIDT

WVS/dk
cc: Valerie Merritt
Michael Vollmer
Kathryn Ballsun
Harley Spitler
Matthew Rae
Thomas Stikker
Donald Green
Harriet Prensky

STANTON AND BALLSUN
A LAW CORPORATION
AVCO CENTER, SIXTH FLOOR
10850 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90024-4318
(213) 474-5257

TELEX/FAX (213) 474-1246

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Law Revision Commission
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BY FAX

File:
Key:

April 22, 1992

Stan Ulrich
Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94306

Re: Law Revision Commission, Memorandum 91-40;
Comprehensive Powers of Attorney Statute

Dear Stan:

Enclosed is a copy of Part Two of Team 4's report concerning the above-referenced Memorandum.

Part Two contains a discussion of several additional policy questions which Team 4 has discussed since Part One of its report was sent to you. We look forward to discussing the enclosed issues with you.

Thank you for your continuing cooperation.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
Stanton and Ballsun
A Law Corporation

cc: Team 4

Enclosure

TEAM 4 REPORT

PART II

CALIFORNIA LAW REVISION COMMISSION MEMORANDUM 91-40;

COMPREHENSIVE POWERS OF ATTORNEY STATUTE

(March 13, 1992)

In Part I of Team 4's Report to the Law Revision Commission ("Commission"), Team 4 discussed the September 13, 1991 comments of the Commission to and about Memorandum 91-40, Comprehensive Powers of Attorney Statute ("Durable Powers of Attorney").

Since the submission of its initial report, Team 4 has continued its review, discussion and study of the Durable Powers of Attorney. The purpose of this Part II is to present certain additional policy issues which have arisen as a result of Team 4's continued study of the Durable Powers of Attorney. The issues, Team 4's responses and the reasoning underlying those responses are as follows:

1. **Question 1:** Under current California law, if an attorney-in-fact does not accept his/her appointment, then that attorney-in-fact has no duty to act. Should the law continue to reflect this position, or should the law be changed so that an attorney-in-fact has an obligation to act, either at all times or under certain circumstances?

1.1 When does the attorney-in-fact's duty to act arise? (Under what circumstances does the attorney-in-fact's duty spring into power?)

1.2 Once an attorney-in-fact's duty to act arises, what is the extent of the duty?

1.3 Does acting in one transaction mean that the attorney-in-fact has undertaken to act in all transactions?

1.4 What type of an act can trigger the duty to act?

1.5 Can the acceptance of one power by the attorney-in-fact reasonably be construed to mean that the attorney-in-fact has accepted all powers under the Durable Power of Attorney?

1.6 Should there be a difference in the treatment of compensated and non-compensated attorneys-in-fact with respect to the assumptions of duty and the extent of the duties assumed?

By a vote of 14 to 5, the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar of California adopted the following resolution in response to the questions set forth above:

> "The holder of a durable power of attorney has no duty to act on or exercise that power, subject to the following two exceptions: (1) the power holder must follow through with an action which is undertaken; and (2) the power holder must comply with any express duty to act which is expressly accepted by the agent."

Although the vote of the Executive Committee was 14 to 5, each of the respective viewpoints was strongly asserted by its respective proponents. In fairness to those proponents, the arguments which were advanced in favor of and in opposition to the above resolution are set forth below. The arguments which were advanced in favor of the above resolution (as articulated by Executive Committee member Don Green) are as follows:

1. Powers of attorney are commonly used in a broad variety of situations by persons of widely varying technical expertise. Changing the law to impose broader duties will result in confusion and errors.

2. A legal document should do what it appears to do. Most powers of attorney, particularly those regarding property, grant only powers that have no express duties whatsoever.

3. To avoid the common frustration of third parties' reluctance to recognize the attorney-in-fact's authority, powers of attorney are commonly drafted very broadly. If implied duties to act are imposed on powers, agents will require that they be given the least power necessary. This will result in frustration of the purpose of the power when unexpected problems arise.

4. Prudent persons will refuse to accept powers of attorney in order to avoid liability for failure to act. If merely acting on a power of attorney becomes acceptance of a broad duty to affirmatively exercise all the powers as needed, the holders of powers are more likely to refuse to act at all.

5. Powers of attorney are importantly different than typical revocable trusts or conservatorships, because powers of attorney do not require acceptance of a primary obligation to handle all aspects of the assets of the principal. Imposing implied duties to act, or liability for failure to act, will vitiate this important distinction and substantially reduce the range of options available for incapacity planning.

6. Imposing additional duties to act will cause an explosion of litigation, defining and clarifying the scope and limits of a substantially new tort ("failure to act on implied duty to exercise power of attorney"). This litigation will involve not only the principal and the attorney-in-fact, but also third parties who will seek recovery against the attorney-in-fact for failure to act. (E.g., a person injured on a broken stair would also sue the attorney-in-fact if the attorney-in-fact should have seen the broken stair months earlier when collecting a rent check while the landlord/principal was temporarily away.) This new tort would also raise substantial and difficult issues regarding which insurance policies cover and are primarily liable for such claims.

The position which was expressed in opposition to the above position (as articulated by Executive Committee member Harley Spitler) can be summarized as follows:

"As a fiduciary, the attorney-in-fact always has a duty to act in the best interest of the principal. This duty exists irrespective of whether the durable power instrument contains a grant of powers or a grant of duties, or a mix of powers and duties.

"In creating a duty to act, the legal status of the attorney-in-fact is very important. First, the agent is a fiduciary. In that respect, the agent is analogous, but not the same as, the trustee under any trust agreement. Second, when the principal signs a durable power granting powers only, the primary expectation is that, in the event of the principal's incapacity, the attorney-in-fact has a duty to act and will act in the best interest of the principal."

2. **Question 2:** If an attorney-in-fact's authority is terminated as a result of the dissolution or annulment of the marriage of the attorney-in-fact and the principal, or the legal separation of the attorney-in-fact and the principal, should the attorney-in-fact's authority, terminated in the manner set forth above, be revived by the principal's remarriage to the attorney-in-fact?

The Executive Committee voted 17 to 4 that in the event of the remarriage of the principal and the attorney-in-fact after the dissolution of their marriage that neither the durable power of attorney for health care, nor the attorney-in-fact's authority, should be revived automatically as a result of the remarriage. The Executive Committee believes that such automatic revival would be contrary to the expectations of the parties. In addition, the implementation of a durable power should be given most serious consideration by the principal. In the event of a dissolution, and notwithstanding their subsequent remarriage, other circumstances or

considerations may have occurred which would negate the reasons for authorizing an automatic revival. Moreover, in the interim between the dissolution and the remarriage, the principal may have executed another durable power which, notwithstanding the remarriage, may more closely reflect the principal's current desires and intent. For all of these reasons, the durable power should not be revived in the event of the remarriage of the principal and the attorney-in-fact after the dissolution of their prior marriage.