STATE OF CALIFORNIA PETE WILSON, Governor

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

September 9, 1993

Date: September 23-24, 1993	*Place:* Sacramento
September 23 (Thursday) 10:00 am – 5:00 pm September 24 (Friday) 9:00 am – 4:00 pm	State Capitol Room 3191

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 any late changes.**

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 correct amount made out to the "California Law Revision Commission".

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

Thursday, September 23, 1993

1. MINUTES OF JULY 22-23, 1993, MEETING

   (sent 8/24/93) ($8.50)

2. ADMINISTRATIVE MATTERS

   Proposed 1994 Meeting Schedule
   (attached to agenda)

   New Topics and Priorities
   Memorandum 93-40 (NS) (sent 8/30/93) ($8.50)
   First Supplement to Memorandum 93-40 (NS) (to be sent)

   Communications from Interested Persons

3. LEGISLATIVE PROGRAM

   Memorandum 93-41 (NS) (to be sent) ($)

4. STUDY J/D-2.01 — CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

   Comments on Tentative Recommendation
   Memorandum 93-37 (RJM) (sent 7/28/93) ($18.00)

5. STUDY J-801 — ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

   Comments on Tentative Recommendation
   Memorandum 93-36 (RJM) (to be sent) ($)

6. STUDY F-1001 — FAMILY CODE CLEANUP

   Revised Comments
   Memorandum 93-46 (SU) (to be sent) ($)

7. STUDY F/L-521.1 — EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

   Revised Draft of Recommendation
   Memorandum 93-42 (NS) (sent 8/24/93) ($8.50)

8. STUDY L-3044 — COMPREHENSIVE POWERS OF ATTORNEY STATUTE

   Draft of Tentative Recommendation
   Memorandum 93-43 (SU) (to be sent) ($)
   First Supplement to Memorandum 93-43 (to be sent) ($)

9. STUDY L-3056 — MISCELLANEOUS PROBATE ISSUES

   Memorandum 93-44 (NS) (sent 8/30/93) ($18.00)

10. STUDY F/L-3050.1 — NONPROBATE TRANSFER LEGISLATION REVISITED

    Memorandum 93-24 (NS) (sent 8/31/93) ($8.50)

Friday, September 24, 1993

11. STUDY N-100 — ADMINISTRATIVE ADJUDICATION

    Comments on Tentative Recommendation
    Copy of Tentative Recommendation (sent 6/4/93) ($25.00)
    Memorandum 93-45 (NS) (enclosed) ($25.00)
    First Supplement to Memorandum 93-45 (to be sent) ($)

    Analysis of Comments on First Portion of Tentative Recommendation
    Memorandum 93-47 (NS) (to be sent) ($)

12. STUDY N-202 — JUDICIAL REVIEW OF AGENCY ACTION – SCOPE OF REVIEW

Draft of Initial Decisions

Memorandum 93-31 (NS) (sent 4/30/93) ($8.50)
First Supplement to Memorandum 93-31 (sent 5/11/93) ($5.50)
Second Supplement to Memorandum 93-31 (to be sent) ($)

Note. We will continue consideration of the draft statute with §652.560 on page 6.

7/27/93

CALIFORNIA LAW REVISION COMMISSION
MEETING SCHEDULE

1993 (Scheduled)

September 1993	**Sacramento**
Sep. 23 (Thur.)	10:00 am – 5:00 pm
Sep. 24 (Fri.)	9:00 am – 4:00 pm
November 1993	**Los Angeles**
Nov. 18 (Thur.)	10:00 am – 6:00 pm
Nov. 19 (Fri.)	9:00 am – 4:00 pm

1994 (Proposed)

January 1994	**San Francisco**
Jan. 27 (Thur.)	10:00 am – 6:00 pm
Jan. 28 (Fri.)	9:00 am – 4:00 pm
March 1994	**Sacramento**
March 24 (Thur.)	10:00 am – 5:00 pm
March 25 (Fri.)	9:00 am – 4:00 pm
May 1994	**Sacramento**
May 12 (Thur.)	10:00 am – 5:00 pm
May 13 (Fri.)	9:00 am – 4:00 pm
July 1994	**Los Angeles**
July 14 (Thur.)	10:00 am – 6:00 pm
July 15 (Fri.)	9:00 am – 4:00 pm
September 1994	**Sacramento**
Sep. 22 (Thur.)	10:00 am – 5:00 pm
Sep. 23 (Fri.)	9:00 am – 4:00 pm
November 1994	**Los Angeles**
Nov. 10 (Thur.)	10:00 am – 6:00 pm
Nov. 11 (Fri.)	9:00 am – 4:00 pm

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 23-24, 1993
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on September 23-24, 1993.

Commission:

Present: Sanford M. Skaggs, Chairperson
Daniel M. Kolkey, Vice Chairperson
Arthur K. Marshall
Edwin K. Marzec
Forrest A. Plant
Colin Wied

Absent: Christine W.S. Byrd
Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel
Bill Lockyer, Senate Member

Staff:

Present: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary (September 23)
Barbara Gaal, Staff Counsel (September 23)
Robert J. Murphy, Staff Counsel

Consultants:

Michael Asimow, Administrative Law (September 24)
Edward C. Halbach, Jr., Probate Law (September 23)
Jerry Kasner, Community Property (September 23)

Other Persons:

Catherine Arthur, Prisoners' Rights Union, Sacramento (September 24)
Gina S. Berry, Prisoners' Rights Union, Sacramento (September 24)
Steve Birdlebough, Judicial Council of California, Sacramento (September 24)
Herb Bolz, Office of Administrative Law, Sacramento (September 24)
James Browning, Parole Hearings, Department of Corrections, Sacramento (September 24)
William M. Chamberlain, California Energy Commission, Sacramento (September 24)
Ted Cobb, State Water Resources Control Board, Sacramento (September 24)
Alex Creel, California Association of Realtors, Sacramento (September 24)

William B. Eley, Alcoholic Beverage Control Appeals Board, Sacramento (September 24)
Karl Engeman, Office of Administrative Hearings, Sacramento (September 24)
Margaret Farrow, Office of the Administrative Hearings, Sacramento (September 24)
Jeffrey Fine, Unemployment Insurance Appeals Board, Sacramento (September 24)
Virginia H. Gaburo, State Bar Committee on Administration of Justice, San Diego (September 23)
Ellen Gallagher, State Personnel Board, Sacramento (September 24)
Gary Gallery, Public Employment Relations Board, Sacramento (September 24)
Don E. Green, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (September 23)
Robert Hargrove, Legal Section, Department of Motor Vehicles, Sacramento (September 24)
Bill Heath, California School Employees' Association, San Jose (September 24)
Robert S. Hedrick, Kahn, Soares & Conway, Sacramento (September 24)
Ellen Johnck, Bay Planning Coalition, San Francisco (September 24)
Heather Mackay, Prison Law Office, San Quentin (September 24)
Melanie McClure, State Teachers' Retirement System, Sacramento (September 24)
Elizabeth McNeil, California Medical Association, Sacramento (September 24)
Laurel Nelson, Carlsbad (September 24)
Joel Perlstein, Legal Division, California Public Utilities Commission, San Francisco (September 24)
Dick Ratliff, California Energy Commission, Sacramento (September 24)
Dan Siegel, Office of the Attorney General, Sacramento (September 24)
James Simon, Department of Social Services, Sacramento (September 24)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (September 23)
Cheryl Taylor, Criminal Justice Consortium, Sacramento (September 24)
Stan Wieg, California Association of Realtors, Sacramento (September 24)

CONTENTS

MINUTES OF JULY 22-23, 1993, MEETING

The Commission approved the Minutes of the July 22-23, 1993, meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission adopted the following meeting schedule.

SCHEDULED

October 1993	**Sacramento**
Oct. 28 (Thur.)	10:00 am – 5:00 pm
Oct. 29 (Fri.)	9:00 am – 4:00 pm
November 1993	**Los Angeles**
Nov. 18 (Thur.)	10:00 am – 6:00 pm
Nov. 19 (Fri.)	9:00 am – 4:00 pm
December 1993	**Sacramento**
Dec. 9 (Thur.)	10:00 am – 5:00 pm
Dec. 10 (Fri.)	9:00 am – 4:00 pm
January 1994	**San Francisco**
Jan. 20 (Thur.)	10:00 am – 6:00 pm
Jan. 21 (Fri.)	9:00 am – 4:00 pm

TENTATIVE

March 1994	**Sacramento**
March 24 (Thur.)	10:00 am – 5:00 pm
March 25 (Fri.)	9:00 am – 4:00 pm
May 1994	**Sacramento**
May 12 (Thur.)	10:00 am – 5:00 pm
May 13 (Fri.)	9:00 am – 4:00 pm
July 1994	**Los Angeles**
July 14 (Thur.)	10:00 am – 6:00 pm
July 15 (Fri.)	9:00 am – 4:00 pm

September 1994	**Sacramento**
Sep. 22 (Thur.)	10:00 am – 5:00 pm
Sep. 23 (Fri.)	9:00 am – 4:00 pm
November 1994	**Los Angeles**
Nov. 10 (Thur.)	10:00 am – 6:00 pm
Nov. 11 (Fri.)	9:00 am – 4:00 pm

New Topics and Priorities

The Commission considered Memorandum 94-40 and its First Supplement, relating to new topics and priorities. The Executive Secretary reported that the Chairperson and Executive Secretary had met September 15 concerning the study of SCA 3 (trial court unification) with Greg Schmidt of Senator Lockyer's office, Steve Birdlebough of the Judicial Council, Judge Warren of the Sacramento County Superior Court and chair of the Judicial Council study committee on SCA 3, and Professor Kelso, consultant to the Judicial Council on this matter. Among the matters discussed were scheduling and budgetary concerns.

The Executive Secretary also reported that a press release was issued September 21 to try to build up a mailing list that includes persons in addition to judges. Depending on the response to the press release, the Commission may solicit input from specific interest groups. There will be a joint interim hearing of the Senate and Assembly Judiciary Committees on October 8 from 9:00 to 12:00 at the San Diego Convention Center concerning SCA 3. The Executive Secretary will attend, some Commissioners may attend, and there will be a transcript prepared.

Steve Birdlebough appeared before the Commission to discuss the Commission's study of SCA 3. Mr. Birdlebough indicated that the Judicial Council had adopted its report on SCA 3, which would be available to the Commission along with the resources of the Administrative Office of the Courts. He offered their assistance and indicated that representatives from their office would be attending Commission meetings on the topic.

The Commission concluded that the study of SCA 3 assigned by the Legislature must receive highest priority to the exclusion of other topics on the Commission's agenda. The Commission scheduled monthly meetings until submission of its report to the Legislature on the constitutional amendments. See schedule above. At that time the Commission will be in a better position to determine its scheduling for the statutory implementation of the constitutional

amendments during the following year. The Commission will solicit input from judges in the area where the meetings are held. The January meeting in San Francisco should be at the State Bar building if possible.

During the coming year, as long as trial court unification remains the highest priority, the Commission and staff will devote only the minimum time necessary to wrap up existing projects that are nearly complete and to address the statutorily mandated creditors' remedies projects that have specific date deadlines.

The Commission will recommend that a study of the tolling of the statute of limitations while the defendant is out of state be added to its agenda. The Commission agreed that the following topics should be deleted from its agenda:

Involuntary Dismissal for Lack of Prosecution
Statutes of Limitation for Felonies
Modification of Contracts
Governmental Liability
Liquidated Damages
Parol Evidence Rule
Pleadings in Civil Actions

LEGISLATIVE PROGRAM

The Commission considered Memorandum 93-41, relating to the Commission's 1993 legislative program. The staff reported that the Governor has not yet acted on any of the bills that are shown as pending on the chart attached to the memorandum. The Governor has until October 11 to act on these matters.

STUDY D-2.01 – CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

See Study J-2.01.

STUDY F-521.1 — EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

The Commission considered Memorandum 93-42 and its First Supplement, along with a Fax Memo from the LA County Bar Association Family Law Section distributed at the meeting (attached to these Minutes as Exhibit pp. 1-2), relating to the effect of joint tenancy title on marital property. The Commission directed the staff to redraft the recommendation with the following revisions.

§ 862. Transmutation of marital property to joint tenancy

This section should be revised to incorporate the substance of the language in the Comment that, "An express declaration transmuting marital property to joint interests in separate property should state that the property or tenure is converted to joint tenancy or joint interests in separate property, or words to that effect expressly stating that the characterization or ownership of the property is being changed." The section would thus state that the instrument must satisfy the transmutation statute and should include an express declaration. The Comment might note that this requirement is an effort to codify the effect of the *MacDonald* case on joint tenancy title.

§ 863. Statutory form

The first sentence of the form notice should be in all caps. The first and second sentences also should refer to "the property described below".

The description of the impact of joint tenancy on creditors and availability of credit was made into a separate paragraph and divided into two separate statements.

The reference to the tax consequences for property that has decreased in value should be stated as "would ... if" rather than "does not ... unless".

The last sentence of the notice was revised to state that if you do not want to give up separate property, you should not sign the declaration and should not take title as joint tenants.

The State Bar suggested editorial revisions also should be made, but the declaration should not be made under penalty of perjury.

The reference to "joint interests in separate property" should be revised to refer to "joint tenancy". The staff should review the other usages of this phrase in the recommendation with the thought perhaps of defining a married person's joint tenancy interest as separate property, and then referring simply to "joint tenancy" throughout.

Subdivision (b)—the exculpatory clause—should be revised to immunize a person from liability solely as a consequence of providing the form. The explanatory material in the Comment should be moved into the text of the statute.

The reference in the Comment to providing a married person a copy of the form was revised to refer to providing a married person "with" a copy of the form.

STUDY F-3050.1 — NONPROBATE TRANSFER LEGISLATION REVISITED

The Commission considered Memorandum 93-24 relating to problems that had been raised concerning the legislation on nonprobate transfers of community property. The Commission noted that no action was required on this matter at this time, and took none. The staff indicated that Professor Halbach feels that the Commission needs to revisit this matter, since there appear to be many concerns and problems in practice. The Commission will take this up in the future when time permits after the trial court unification study.

STUDY J-2.01 – CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The Commission considered Memorandum 93-37 and attached staff draft of *Conflicts of Jurisdiction and Enforcement of Foreign Judgments*. The Commission decided not to take further action on this subject.

STUDY J-801 – ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

The Commission considered Memorandum 93-36 and attached staff draft of a Recommendation on *Orders to Show Cause and Temporary Restraining Orders*. The Commission made the following decisions:

The Commission approved the staff recommendation to keep the existing 15-day period within which a hearing must be held on an order to show cause with a temporary restraining order, but to allow the court to extend this time to 22 days for good cause.

The Commission revised the minimum two-day period before the hearing for service to require that service be effected either within five days after issuance of the order or two days before the hearing, whichever is earlier.

The Commission thought perhaps the draft should make clear that where the term "injunction" is used in Section 527, it means preliminary injunction. The Commission thought perhaps the second sentence of Section 527 concerning service should be clarified and put in subdivision (f) in the staff draft.

The staff should consider whether the language in subdivision (e) of Section 527, permitting the court to hear the matter as though it were a notice of motion where a hearing is not held within the required time, might better be located in subdivision (j). The Commission asked the staff to clarify "the matter," perhaps to say "the application for a preliminary injunction." The Commission wanted to

know what, other than plaintiff's failure to serve, might cause a hearing not to be held within the required time.

The reference to "affidavits" in subdivision (f) of Section 527 should probably say "if any," since a verified complaint may serve the purpose of an affidavit.

Subdivision (i) of Section 527, permitting the court to reissue a temporary restraining order for lack of service, should probably be revised to say "or if for any other reason the hearing does not go forward," the court may reissue.

The authority of the court in subdivision (c) of Section 526.7 to extend the effect of a temporary restraining order should be tied to the court's authority in subdivision (d) to extend the time for hearing. The reference in subdivision (c) of Section 527.6 to reissuance of a temporary restraining order should probably be deleted, since a reissued TRO will be treated as a new order subject to new time limits.

The term "plaintiff" in subdivision (f) of Section 527.6 is inaccurate, because it may be the defendant who is seeking protection against harassment and needs a support person. The staff should restore the existing reference to a "party."

The Commission asked the staff to work with the State Bar Committee on Administration of Justice to arrive at satisfactory language, and to bring back a revised draft.

STUDY L-521.1 — EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

See Study F-521.1.

STUDY F-1001 – FAMILY CODE CLEANUP

The Commission considered Memorandum 93-46 and the draft comments attached to the memorandum. The Commission approved the draft comments for distribution to legal publishers, subject to technical revisions needed to correct errors and adjust the comments to conform with bills signed by the Governor.

STUDY L-3044 – POWER OF ATTORNEY STATUTE

The Commission considered Memorandum 93-43 concerning the comprehensive power of attorney statute, and the First and Second Supplements to the memorandum. The Commission approved the draft for distribution as a tentative recommendation, subject to revision to implement Commission

decisions. Before the tentative recommendation is distributed, however, the staff will send a copy of significantly redrafted sections to Commissioners; any Commissioner who has a concern with the drafting should notify the staff by the date set, and the matter will be scheduled for consideration at the next Commission meeting.

The Commission made the following decisions:

Prob. Code § 4101. Priority of provisions of power of attorney

For purposes of clarity and completeness, this section should be revised substantially as follows:

> 4101. (a) Except as ~~otherwise~~ provided in ~~this division~~ subdivision (b), the principal may limit the application of any provision of this division by an express statement in the power of attorney or by providing an inconsistent rule in the power of attorney.
>
> (b) ~~Subdivision (a) does not authorize a~~ A power of attorney ~~to~~ may not limit the application of ~~statutes~~ a statute specifically providing that it is not subject to limitation by a power of attorney or a statute concerning any of the following matters:
>
> (1) Requiring a specific ~~type of~~ warning or notice to be included in a power of attorney.
>
> (2) Providing operative dates of statutory enactments or amendments.
>
> (3) Providing execution requirements for powers of attorney.
>
> (4) Providing qualifications of witnesses.
>
> (5) Providing qualifications ~~for~~ of attorneys-in-fact.
>
> (6) Protecting third persons from liability.

Prob. Code § 4122. Requirements for witnesses

A cross-reference to the special witness requirements applicable under durable powers of attorney for health care should be added to this section:

> 4122. If the power of attorney is signed by witnesses, as provided in Section 4121, the following requirements shall be satisfied:
>
> (a) The witnesses shall be adults.
>
> (b) The attorney-in-fact may not act as a witness.
>
> (c) Each witness signing the power of attorney shall witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney.

(d) At least one of the witnesses shall be a person who is neither (1) a relative of the principal by blood, marriage, or adoption ~~or~~ nor (2) a person who would be entitled to any portion of the principal's estate at the principal's death under a will existing at the time of execution of the power of attorney or by operation of law then existing.

(e) At least one of the witnesses shall make the following declaration in substance: "I declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the principal's estate at the principal's death under a will now existing or by operation of law."

(f) In the case of a durable power of attorney for health care, the additional requirements of Section 4701.

Prob. Code § 4150. Modification of power of attorney

This section should be revised as follows:

4150. A principal may modify a power of attorney ~~may be modified~~ as follows:

(a) In accordance with the terms of the power of attorney.

(b) By an instrument executed in the same manner as a power of attorney may be executed.

~~(c) When the principal's legal representative, with approval of the court, informs the attorney-in-fact in writing that the power of attorney is modified or when and under what circumstances it is modified.~~

~~(d) When a written notice that the power of attorney is modified is filed by the principal or the principal's legal representative for record in the county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the attorney-in-fact's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.~~

The Comment to this section should note that subdivision (b) is subject to contrary provisions in the power of attorney. Subdivisions (c) and (d) are omitted because the power to modify a power of attorney should be limited to the principal.

Prob. Code § 4151. Manner of revocation of attorney-in-fact's authority

This section should be revised as follows:

4151. As between the principal and attorney-in-fact, the authority of an attorney-in-fact under a power of attorney may be revoked as follows:

(a) In accordance with the terms of the power of attorney.

(b) When the principal informs the attorney-in-fact orally or in writing that the attorney-in-fact's authority is revoked or when and under what circumstances it is revoked.

(c) When the principal's legal representative, with approval of the court, informs the attorney-in-fact in writing that the attorney-in-fact's authority is revoked or when and under what circumstances it is revoked.

~~(d) When a written notice that the attorney-in-fact's authority is revoked is filed by the principal or the principal's legal representative for record in the county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the attorney-in-fact's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.~~

A provision should be added to this section or elsewhere providing that the principal may revoke the power of attorney itself by a writing. The staff should consider redrafting this section, in conjunction with related sections, to separate the concepts of revocation of the power of attorney, revocation of the attorney-in-fact's authority, and the effect of notice given to the attorney-in-fact or a third person.

Prob. Code § 4152. Termination of authority of attorney-in-fact

This section should be revised as follows:

4152. (a) Subject to subdivision (b), an attorney-in-fact's authority under a power of attorney is terminated by any of the following events:

(1) ~~Expiration of the term~~ In accordance with the terms of the power of attorney.

(2) Extinction of the subject or fulfillment of the purpose of the power of attorney.

(3) Revocation of the attorney-in-fact's authority ~~under the power of attorney by the principal~~ , as provided in Section 4151.

(4) Death of the principal, except as to specific authority permitted by statute to be exercised after the principal's death.

(5) Removal of the attorney-in-fact.

(6) Resignation of the attorney-in-fact.

(7) Incapacity of the attorney-in-fact, except that a temporary incapacity suspends the authority of the attorney-in-fact only during the period of the incapacity.

(8) Dissolution or annulment of the marriage of~~, or legal separation of~~, the attorney-in-fact and principal, as provided in Section 4153.

(9) Death of the attorney-in-fact.

(b) An attorney-in-fact or third person who does not have notice of an event that terminates the power of attorney or the authority of an attorney-in-fact is protected from liability as provided in Chapter 4 (commencing with Section 4300).

This section should also be reviewed to make sure that it is consistent with other provisions concerning the attorney-in-fact's authority.

Prob. Code § 4155. Validity of instrument for other purposes

This section should be deleted.

Prob. Code § 4207. Resignation of attorney-in-fact

This section should be revised as follows:

4207. (a) An attorney-in-fact may resign by any of the following means:

(1) If the principal is competent, on giving notice to the principal.

(2) If a conservator has been appointed, on giving notice to the conservator.

(3) On written agreement of a successor who is designated in the power of attorney or pursuant to the terms of the power of attorney to serve as attorney-in-fact.

~~(3)~~

(4) Pursuant to a court order.

(b) This section is not subject to contrary provisions in the power of attorney.

The procedural provisions (e.g., Section 4941) should provide for a petition for resignation of the attorney-in-fact, perhaps with notice to the public guardian. The authority of the court should be circumscribed in a case where the attorney-in-fact has not expressly agreed in writing to act under Section 4230(c).

Prob. Code § 4262. Limited power of attorney

This section should be revised as follows:

> 4262. Subject to this article, if a power of attorney grants limited authority to an attorney-in-fact, the attorney-in-fact has the following authority:
>
> (a) The authority granted in the power of attorney, as limited with respect to permissible actions, subjects, or purposes.
>
> (b) ~~The authority granted by statute, except as limited in the power of attorney~~.
>
> ~~(c)~~ The authority incidental, necessary, or proper to carry out the granted authority.

Prob. Code § 4609. Health care

This section should be revised as follows:

> 4609. "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition and includes decisions affecting the principal after death~~, including the following~~:
>
> ~~(a) Making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code~~.
>
> ~~(b) Authorizing an autopsy under Section 7113 of the Health and Safety Code~~.
>
> ~~(c) Directing the disposition of remains under Section 7100 of the Health and Safety Code~~.

The effect of this revision is to preserve existing law. The authority to make anatomical gifts, authorize autopsies, and direct disposition of remains would remain in Section 4720. The statute should not limit the existing authority to make such decisions pursuant to other instruments.

Prob. Code § 4703. Requirements for printed form of durable power of attorney for health care

Subdivision (b) of this section should be revised as follows for conformity with the general substantive rules on execution:

> (b) The printed form described in subdivision (a) shall also include the following notice: "This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two qualified adult witnesses ~~who are personally known to you and~~ who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California."

Prob. Code § 4941. Petition as to powers of attorney other than durable powers of attorney for health care

See the discussion of Section 4207 *supra.*

Prob. Code § 4922. Jurisdiction over attorney-in-fact

This section should be revised as follows:

> 4922. Without limiting Section 4921, a person who acts as an attorney-in-fact under a power of attorney governed by this division is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the attorney-in-fact performed in this state~~, performed for a domiciliary of this state~~, or affecting property ~~or a principal~~ in this state.

Prob. Code § 4923. Venue

This section should be revised as follows to provide an order of priority in determining venue:

> 4923. The proper county for commencement of a proceeding under this part ~~is as follows~~ shall be determined in the following order of priority:
>
> (a) The county in which the principal resides ~~or is temporarily living~~.
>
> (b) The county in which the attorney-in-fact resides.
>
> (c) A county in which property subject to the power of attorney is located.
>
> (d) Any other county that is in the principal's best interest.

Prob. Code § 4940. Petitioners

This section should be revised as follows:

> 4940. A petition may be filed under this part by any of the following:
>
> (a) The attorney-in-fact.
>
> (b) The principal.
>
> (c) The spouse of the principal.
>
> (d) A relative of the principal.
>
> (e) The conservator of the person or estate of the principal.
>
> (f) The court investigator, referred to in Section 1454, of the county where the power of attorney was executed or where the principal resides.
>
> (g) The public guardian of the county where the power of attorney was executed or where the principal resides.

(h) A treating health care provider, with respect to a durable power of attorney for health care.

(i) A person who is requested in writing by an attorney-in-fact to take action.

(j) Any other interested person or friend of the principal.

STUDY L-3050.1 — NONPROBATE TRANSFER LEGISLATION REVISITED

See Study F-3050.1.

STUDY L-3056 — MISCELLANEOUS PROBATE ISSUES

The Commission considered Memorandum 93-44 presenting miscellaneous probate issues for resolution. The Commission noted that it would be unable to consider these matters in the immediate future in light of the demands of the trial court unification study. Representatives of the State Bar Probate Section present at the meeting inquired whether there would be any problem with them addressing some of these issues. The Commission indicated they should feel free to do so.

STUDY N-100—ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 93-45 and its First Supplement, relating to comments on the tentative recommendation on administrative adjudication. The Commission also considered Memorandum 93-47 analyzing comments received concerning the first portion of the tentative recommendation. The Commission received at the meeting letters from the Alcoholic Beverage Control Appeals Board, the Bay Planning Coalition, the California State Personnel Board, and the Public Employment Relations Board, copies of which are attached to these Minutes as Exhibit pp. 3-12.

The staff summarized the tenor of the letters that had been received. The Commission noted that due to the demands of the trial court unification study, it would not be submitting a final recommendation on administrative adjudication in the 1994 legislative session. Moreover, it is unlikely the Commission will be able to get back to the topic of administrative adjudication before February 1994 at the earliest. The Commission expressed appreciation to the private sector representatives present at the meeting, and urged their attendance more regularly when the Commission takes these matters up again so that the

Commission will have the benefit of a perspective in addition to that provided by the state agencies.

The Commission made decisions concerning the following issues on the tentative recommendation.

Preliminary Part

The inaccuracies in the preliminary part noted in Memorandum 93-47 should be corrected.

§ 610.010. Application of definitions

The concern of OAL about this provision was noted.

§ 610.190. Agency

The Comment should be expanded to clarify the rules on action by divisions within an agency.

§ 610.310. Decision

The Comment should be corrected as noted in the memorandum.

§ 610.350. Initial pleading

This section should be recast as a definition. An initial pleading is an action by an agency that commences a proceeding, and includes the matters listed in the section, as well as an application.

The section is potentially confusing in instances where an administrative hearing is triggered by a request by a private person. The staff should attempt to draw this provision in such a way that it is more workable for various agencies.

§ 610.940. Adoption of regulations

The Commission considered whether review by OAL should be eliminated for adoption of variant procedural regulations authorized under the Administrative Procedure Act. A number of persons representing private organizations indicated they felt OAL review was important to keep government regulations in check. OAL indicated it would be willing to consider simplifying procedures, but not eliminating review.

The Commission discussed the possibility of eliminating the necessity requirement for adopting regulations under the Administrative Procedure Act. This may be particularly useful where the agency is merely codifying existing practice or readopting existing regulations.

An alternative approach could be to rebuttably presume that the regulations satisfy all requirements unless objected to by a person.

The Commission requested its staff to confer with Herb Bolz of OAL and Dick Ratliff of the California Energy Commission, along with anyone else particularly interested in this problem, concerning appropriate means to expedite adoption of regulations under this act. The staff should report back with a proposed resolution.

The Commission also requested the staff to review the default rules that are subject to variance by regulation to see whether some of them might not be modified or even eliminated, so as to avoid the need for agencies to adopt variant regulations. This might be done in the context of reviewing the statute as a whole to see whether some agencies might not be exempted from it and the statute tightened up.

§ 641.110. When adjudicative proceeding required

Subdivision (a) was revised to eliminate application of the statute to an "other adjudicative proceeding" required by the Constitution or by statute. The statute should only apply to hearings, and those should be limited to "on the record" hearings. Professor Asimow will make an effort to draft language to clarify the meaning of "on the record hearing" so that the application of the statute can be readily determined.

Professor Asimow has provided language for the Comment that could be useful. In addition, the Commission will seek to the extent possible to specify in individual statutes providing hearings which ones are required to be conducted under the Administrative Procedure Act.

In this connection, the staff should consider whether *Skelly* hearings might not be added to the list of hearing types for which the informal hearing procedure may be used.

In connection with agency requests for exemption from the new statute, the Commission decided it will schedule a session to review exemption requests. Interested persons from the private sector should be informed when the exemption requests will be considered.

STUDY N-202 — JUDICIAL REVIEW OF AGENCY ACTION (SCOPE OF REVIEW)

The Commission considered Memorandum 93-31 and its First and Second Supplements, along with a letter from the California State Employees Association

(copy attached to these Minutes as Exhibit pp. 13-14), relating to the scope of judicial review of agency action. The Commission made the following decisions concerning issues raised in the materials.

§ 652.560. Review of agency fact finding

After discussing the various review standards set out in the memorandum, and after hearing concerns about applying substantial evidence review in local agency determinations where fundamental rights are involved and in legislative factfinding such as that made by the Public Utilities Commission, the Commission concluded that substantial evidence review should be the standard applicable to decisions made under the new Administrative Procedure Act unless the agency head changes a fact finding by the presiding officer, in which case independent judgment review would be applied. This rule would govern decisions where the APA is used voluntarily as well as where it is applied by statute. The existing standard of review for other administrative decisions would not be changed.

§ 652.570. Review of agency exercise of discretion

Subdivision (a)(1) was deleted. The reference to an action inconsistent with the an agency's regulation was deleted from subdivision (a)(2), and the remainder of the discussion in subdivision (a)(2) was removed from the section to the Comment. In subdivision (a)(3), the word "otherwise" was deleted.

In subdivision (b), the last clause was deleted.

The standard for review of rulemaking set out in Government Code Section 11342.2 should be looked at in connection with this provision.

Professor Asimow offered some suggested explanatory language for inclusion in the Comment. See Exhibit p. 15.

§ 652.580. Review of agency procedure

The reference to motivation by an improper purpose was deleted from subdivision (a)(2).

§ 652.580. Review of agency procedure

Subdivision (j) might be revised to refer to personal assistants "other than assistants described in Section 643.340".

Subdivision (k) might be revised to refer to a record "of" an ex parte application or some other more appropriate phrasing.

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

_____
Date

_____
Chairperson

_____
Executive Secretary

Fax No. 916-322076

FAX MEMO

FROM: L.A. COUNTY BAR ASSOCIATION FAMILY LAW SECTION

TO: NAT STERLING, EXECUTIVE SECRETARY, CALIFORNIA LAW REVISION COMMISSION STATE CAPITOL ROOM 3191

RE: PROPOSED JOINT TENANCY TRANSMUTATION LEGISLATION
ATTENTION HELEN, LEGISLATIVE COUNSEL SECRETARY

DATE: September 23, 1993

****

Dear Mr. Sterling:

Tuesday evening the Los Angeles County Bar Association Family Law Section Executive Committee came regularly for their monthly meeting and voted unanimously to authorize me to communicate to you our position concerning the most recent Tentative Draft Recommendation of the proposed Joint Tenancy Transmutation statutes.

We agree with the staff of the California Law Revision Commission that the current law is confusing and promotive of litigation and requires immediate attention. However, we believe that the most recent version of the proposed bill would add to the confusion of the present law and would possibly create even more litigation.

Therefore, we concur with the position of The Honorable Arnold Gold, Presiding Judge of the Probate Department of the Superior Court of Los Angeles County, the position of the Beverly Hills Bar Association Probate and Estate Planning Legislative Committee and the position of the Los Angeles County Bar Association Probate and Estate Planning Executive Committee that any new transmutation laws with notice provisions should provide that, unless otherwise set forth by an instrument in writing, property held by married persons in joint tenancy is presumed to be community property with a right of survivorship, rather than a transmutation from community property or separate property into joint tenancy form with joint separate interests.

We hope that the Commission will take into consideration all of the strong opposition which it has received concerning the Tentative Draft Recommendation and return the draft for immediate further study. We greatly appreciate all the time and effort the staff has taken to research and draft this very important new

legislation and appreciate the opportunity to be heard on the matter.

Very truly yours,

FRIEDA GORDON,
Chairperson, Legislation Sub-committee
Los Angeles County Bar Association
Family Law Section Executive Committee

cc: Arlene Colman Schwimmer, Esq.
Glenn Schwartz, Esq.
Martin Shucart, Esq.
Fern Salka, Esq.
Dominique Carpenter
Gerald Chernoff, Esq.
Miles Rubin, Esq.
Susan Millman, Esq.

STATE OF CALIFORNIA PETE WILSON, Governor

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

1001 Sixth Street, Suite 401
Sacramento, CA 95814

September 14, 1993

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

Subject: Additional Comments on the Tentative Recommendation dated May 1993, "Administrative Adjudication by State Agencies"

Dear Mr. Sterling:

This letter is in response to your Memorandum 93-45 dated September 9, 1993 in which you offered to supplement your memorandum with any comments received later. As you will recall, you recently telephonically informed us that the proposed APA would apply to the ABC Appeals Board ("ABCAB").

ABCAB is not covered by the existing APA. ABCAB is a constitutional agency (Article XX, §22, State Constitution) and is not mentioned in Government Code §11501. ABCAB is not to be confused with the Department of ABC ("DABC") which is listed in §11501. See California Administrative Hearing Practice (Cont. Ed. Bar 1984) page 291, Appendix.

It is submitted that ABCAB should not be covered by the proposed APA for the following reasons:

I.

ABCAB functions as a review tribunal, the sole function of which is to review decisions of DABC concerning which aggrieved litigants have filed appeals. ABCAB does not take testimony under oath or permit advocates at oral argument to cross-examine one another (or anyone else); in sum, it does not conduct trial-type adjudicatory hearings. ABCAB's scope of review is virtually identical to that of the Court of Appeal and the California Supreme Court. Compare Business and Professions Code §23084 with

§23090.2. ABCAB permits written briefs and oral argument (Business and Professions Code §23083; Title 4, California Code of Regulations §§193 and 197), just as appellate courts do. It is generally agreed that ABCAB's decisions (referred to in statutory language as "orders") are entitled to substantial respect because the agency is conducted like an appellate court, although its three members are not required to be attorneys.

II.

There is a strong theme of promptness expressed by the Legislature as a guide for ABCAB in the issuance of its orders. See Business and Professions Code §23086[1] and Stats. 1975, Ch. 782, eff. 1/1/76.[2]

The ideal of promptness is also reflected elsewhere as follows:

The superior court was eliminated from the chain of review in November 1967. See Business and Professions Code §23090 et seq. Jurisdiction of the Court of Appeal or Supreme Court is invoked by the filing of an application for a writ of review, which is discretionary. (Ibid.) See also Donia v. Alcoholic Bev. etc. Appeals Bd. (1985) 167 Cal.App.3d 588, 594, (disapproved on other grounds in Kowis v. Howard (1992) 3 Cal.4th 888, 896).

Business and Professions Code §23088 prohibits ABCAB from reconsidering or rehearing its own orders. There is no constitutional or statutory provision for ABCAB to issue proposed decisions.

Were ABCAB to be covered by the proposed APA, it is probable that proposed decisions, reconsiderations and rehearings would result in overjudicialization and would delay the issuance of ABCAB decisions beyond current time frames.

---

[1]The statement in §23086 that "the board shall enter its order within 60 days after the filing of an appeal" has been interpreted as directory rather than mandatory. Koehn v. State Bd. of Equalization (1959) 166 Cal.App.2d 109, 333 P.2d 125. Preparation of the reporter's transcript alone often takes more than 60 days.

[2]It has generally been recognized that expediting ABC Act proceedings was intended to allow an applicant for a department license to obtain a relatively prompt decision as to whether an applied-for license would be granted or denied.

CONCLUSION

For the above reasons, it is requested that the draft of the tentative recommendation exempt the Alcoholic Beverage Control Appeals Board from coverage by the proposed APA. It should be remembered that ABCAB is a separate constitutional agency from the Department of ABC.

Sincerely,

Edward M. Davis

EDWARD M. DAVIS
Chairman
(916) 445-4005

William B. Eley

WILLIAM B. ELEY
Chief Counsel & Executive Officer
(916) 445-4005

cc: Governor Pete Wilson
Member John B. Tsu
Member Ray T. Blair

BAY PLANNING COALITION
WORLD TRADE CENTER, SUITE 303 SAN FRANCISCO, CALIFORNIA 94111 (415) 397-2293 FAX (415) 986-0694

September 23, 1993

Mr. Arthur K, Marshall, Chairperson
Mr. Sanford Skaggs, Vice Chairperson
Commissioners Christine W. S. Byrd
Daniel M. Kokley
Edwin K. Marzec
Forrest A. Plant
Colin Weid
Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel
Bill Lockyer, Senate Member
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: Nathaniel Sterling, Executive Secretary

Subject: Proposal to modify the Administrative Procedures Act at the scheduled meeting of the California Law Revision Commission, September 24, 1993

Dear Mr. Sterling,

This letter is to call your attention to the importance of the OAL's oversight functions over the rulemaking process of all state government agencies. The OAL was created to implement the Administrative Procedures Act (APA) and ensure that regulations proposed by state agencies are properly drafted. The OAL's purpose is to reduce the number of unnecessary regulations and increase the quality of the regulations that are adopted.

Regarding the proposal on your September 24th agenda to modify the APA, we recommend against approving any exemptions from OAL review of interim or final regulations.

The value of OAL was confirmed recently by the state legislature

with the passage of AB 3359 in 1992. The State Water Resources Control Board (SWRCB) sought an exemption from OAL for Basin Plan amendments through this legislation. Yet the bill was amended to effectively deny the exemption and require the Board(s) to regularly submit all Basin policies and plan amendments to OAL from this time forward as of June 1, 1992.

Further, the value of OAL lies in its specific function sto: 1) coordinate and centralize all final regulations adopted by state agencies, which ensure that the regulated public can easily locate rules affecting its day to day operations; 2) review each proposed regulation according to a set of very important criteria: necessity, reference, authority, consistency, nonduplication, and clarity; and 3) provide notice of all rulemaking being undertaken by an agency or board which allows the public to better prepare for involvement in the process.

Through its review of "underground" regulations, the OAL provides for the necessary checks and balances against the abuses and discretion of State agencies when they adopt plans and policies which are, in effect, regulations.

Thus as a general matter we do not think that there is any substantive justification for exemptions. For those agencies who are granted exemptions, the public would only be able to identify rules that impact their activities by trial and error and be increasingly subjected to agencies' abuse and a haphazard and discretionary method of rulemaking.

Thank you for your serious consideration of our view. The Bay Planing Coalition, a non-profit, public interest corporation, represents many businesses, property onwers and individuals whose access to public participation and administrative rulemaking records will be seriously abridged by exemptions granted to agencies.

Sincerely yours,

Ellen Johnck

Ellen Johnck
Executive Director

STATE OF CALIFORNIA PETE WILSON, Governor

CALIFORNIA STATE PERSONNEL BOARD
801 CAPITOL MALL • P.O. Box 944201 • Sacramento 94244-2010

September 23, 1993

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

Re: August 31, 1993 State Personnel Board Comments
Errata Letter

To the Executive Secretary:

The August 31, 1993 memorandum from Chief Counsel Elise S. Rose setting forth the comments of the State Personnel Board (SPB) concerning the tentative recommentations on administrative adjudication by state agencies omits certain language at pages 2 and 3. The "General Comments on Introduction", p. 6 should state as follows:

"Statement that current system limits precedential decision to the issuing agency. This procedure is completely appropriate, especially since the burden of proof may differ with the adjudication (preponderance v. clear and convincing) and the agency standard of review (substantial evidence v. independent judgment). It is a continual challenge to keep current on one's own agency precedents and judicial decisions. It would be nearly impossible to keep informed of, much less be bound by, other agency precedents."

Thank you for the opportunity to submit comments.

Christine A. Bologna
Chief Administrative Law Judge
(916) 653-0544

cc: Chief Counsel Elise S. Rose
Board President Richard Carpenter
Executive Officer Gloria Harmon

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Board Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8012

September 23, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision
Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Dear Mr. Sterling:

The Public Employment Relations Board (PERB or Board) has reviewed the Law Revision Commission's draft model Administrative Procedures Act (APA) and strongly wishes to remain exempt from the APA. We recognize the value of uniform procedures for most administrative agencies whose dispute resolution responsibilities are only incidental to their major program activities. However, a different conclusion is warranted for labor relations agencies, such as PERB and the Agricultural Labor Relations Board (ALRB), whose very purpose is to resolve disputes as a quasi-judicial substitute for the court system. PERB's current regulatory system is much better suited than the proposed APA to adjudicate and promote voluntary settlement of labor law disputes.[1]

The Legislature recognized this difference when it exempted PERB from the current APA. In 1976, when the Educational Employment Relations Act became law, the Legislature was familiar with the Administrative Procedures Act. It chose to exempt the Education Employment Relations Board, as PERB was initially known, from the APA. Rather, it allowed the Board to adopt regulations similar to the procedures of the National Labor Relations Board (NLRB). This choice was based on 40 years of successful adjudication by the NLRB of labor disputes; disputes identical in nature to those to be resolved by the Board. The

[1] Under current PERB procedures the parties to an unfair practice proceeding receive the proposed decision directly from the administrative law judge. The decision becomes final, though nonprecedential, if neither party files an appeal with the Board within 20 days. The model APA provides for a more involved process with considerable delay (section 649.110(b)).

Legislature took the same position regarding APA coverage when it created the ALRB in 1975 and when it added two additional statutes (the Ralph C. Dills Act covering State of California employees in 1977 and the Higher Education Employer-Employee Relations Act covering University of California and California State University employees in 1978) to PERB's jurisdiction.[2]

PERB's ability to resolve disputes outside the framework of the APA has proven essential to successful labor management relations. The foundation of labor relations is the right of employees to choose whether to be represented and, if they select a representative, for that entity to engage in collective bargaining with the employer. As with the NLRB, PERB's representation hearings are not subject to the APA. Establishing bargaining units, conducting elections, resolving challenged ballots and other election-related disputes are a central part of PERB's activities. These activities require timely action to make the collective bargaining process meaningful to the parties. Accordingly, many decisions made during the election process (e.g. election timing and mechanics) are not immediately appealable to the Board. Rather, an aggrieved party may only appeal them as an objection to the election after the election has been conducted. Under the APA these decisions would be subject to appeal immediately, significantly lengthening the time required to complete the election process. In labor relations, delay may well mean the difference between success and failure in protecting the rights of the parties. Delay defeats the very purpose of the statute, denying the benefits of collective bargaining to employees, employee organizations and employers.

Another problem is that the model APA provides for liberal discovery in comparison to that presently permitted before PERB. Unlike witnesses in most administrative matters adjudicated under the APA, witnesses in unfair labor practices are often employees of a party to the hearing. As employees, they are subject to pressures, both overt and subtle, from their employers and/or exclusive representatives, whose conduct is often the subject of the hearing. To protect witnesses, labor relations agencies such as the PERB, the ALRB and the NLRB have purposefully limited discovery. Requiring PERB to comply with discovery under the APA would expose witnesses to harassment, delay the completion of

[2] In fact, the decisions of one of these quasi-judicial boards influences others as labor law precedents tend to remain consistently applied across both the public and private sector.

hearings and force PERB into the business of protecting witnesses prior to the hearing. These activities would detract from PERB's mission of providing timely and fair resolution of labor disputes.

The model APA also contemplates agencies providing advisory opinions. Again, similar to the NLRB and the ALRB, PERB only acts on unfair practice charges once a party files a charge alleging a violation of the statute. While advisory opinions may be appropriate for other administrative agencies, it runs contrary to the scheme of collective bargaining that PERB oversees. That system provides for private negotiations between the parties operating with a minimum of government involvement. PERB functions not as the direct supervisor of the parties, but rather as a quasi-judicial body which resolves the most persistent disputes where all efforts at settlement between the parties have failed. This system has worked well for almost 60 years for the NLRB at the national level and for almost 20 years in California. To force PERB to now give advisory opinions would destroy this system.

Imposition of the model APA on PERB and its clients is unnecessary. The vast majority of the advocates before PERB are well-versed in the practice of labor law. Processing of election matters and unfair practice hearings is conducted under well understood and accepted regulations. Imposition of new rules under the APA will disrupt a system which has functioned smoothly for all parties for almost 20 years in the California public sector. Such dramatic change will divert scarce PERB resources to drafting new procedures, seeking regulatory relief and responding to court challenges when budget reductions have already seriously strained the agency's ability to perform its mission. The impact on the parties will be equally disruptive, with new procedures to learn and costs to absorb. Thus, any potential value to the affected parties of the new system would be greatly diminished.

PERB believes the exemption is justified and warranted. We have avoided a section-by-section analysis in our response, but are prepared to develop and furnish the Law Revision Commission a detailed list of changes necessary to accommodate the inclusion of labor law adjudication under the auspices of the model APA. We believe that such a change would defeat the original intent to update and make the APA more workable for the agencies who are currently subject to the act.

Should you have any questions, please contact Del Pierce of our staff.

Sincerely,

Sue Blair

SUE BLAIR
Chair

CALIFORNIA STATE EMPLOYEES ASSOCIATION

1108 "O" STREET • SACRAMENTO, CA 95814
(916) 444-8134

September 20, 1993

Sanford Skaggs, Chairperson
California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: SCOPE OF JUDICIAL REVIEW

Dear Chairperson Skaggs and Members of the Commission:

It recently came to my attention that on September 24, 1993, the Commission will consider Prof. Michael Asimow's recommendation to dispense with the independent judgment test, and adopt the substantial evidence test, in all administrative mandamus proceedings.[1]

Prof. Asimow primarily relies on Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335. In that case, the court permitted decisions of the Agricultural Labor Relations Board to be reviewed under the substantial evidence test because, in part, the administrative proceedings included numerous procedural safeguards. (Tex-Cal Land Management, Inc., supra, at 345.)

Unfortunately, the proposed Administrative Procedure Act (APA) does not require all administrative agencies to adopt procedural safeguards similar to those found in Tex-Cal. If the Commission wishes to decrease the intensity of judicial review then it should simultaneously require all administrative agencies, including constitutional, non-constitutional, and local agencies to adopt the minimal procedural safeguards found in Tex-Cal. Unless such procedures are adopted, injustices, both real and perceived, will occur at the administrative level and thus, notwithstanding the substantial evidence test, individuals will be motivated to seek judicial review of administrative decisions. Accordingly, Prof. Asimow's stated goal of reducing the Superior Court's workload will not be fully realized simply by adopting the substantial evidence test; administrative procedures must also be strengthened to create the appearance, if not the reality, of fairness.

---

[1]Prof. Asimow repeatedly notes that the only group to oppose his recommendations is priv... ...torneys who represent professionals (see, e.g., the Scope of Judicial Review of Administrative Action, Michael Asimow, p. 26), suggesting, perhaps inadvertently, that only wealthy physicians and attorneys benefit from the independent judgment test. Rest assured that the more economically vulnerable, such as the part-time school bus driver who looses a DMV certificate, the laid-off State janitor fighting for unemployment benefits, and the single parent who has applied for Aid to Families With Dependent Children also benefit from the independent judgment test.

In closing, it should be noted that Prof. Asimow does an excellent job of advocating a particular point of view. The Commission, however, would do both itself and the public a valuable service if, before acting on Prof. Asimow's recommendation, it solicited a critical response from professors of equal stature.

Very truly yours,

HARRY J. GIBBONS
Attorney

HJG/jw/hggen/skaggs1.ltr

cc: Gary Reynolds
Sherri Golden
Mark DeBoer

DRAFT LANGUAGE FOR COMMENT TO §652.570

On p. 11, change the 3rd ¶ of the comment as follows:

Subdivisions (b) and (c) clarify the standards for court determination of abuse of discretion but do not significantly change existing law. See Code Civ. Proc. § 1094.5(c) (administrative mandamus); Gov't Code § 11350(b) (review of regulations). The standard for reviewing agency discretionary action is whether there is a rational basis for the action. This rational basis analysis consists of two elements.

First, to the extent that the discretionary action is based on factual determinations, there must be substantial evidence in the light of the whole record in support of those factual determinations. This is the same standard that a court uses to review agency findings of fact generally. However, it should be emphasized that discretionary action such as agency rulemaking is frequently based on findings of legislative rather than adjudicative facts. Legislative facts are general in nature and are necessary for making law or policy (as opposed to adjudicative facts which are specific to the conduct of particular parties). Legislative facts are often scientific, technical, or economic in nature. Often, the determination of such facts requires specialized expertise and the fact findings involve a good deal of guesswork or prophecy. A reviewing court must be appropriately deferential to agency findings of legislative fact and should not demand that such facts be proved with certainty. Nevertheless, a court can still legitimately review the rationality of legislative fact finding in light of the evidence in the whole record.

Second, discretionary action is based on a choice or judgment. A court reviews this choice by asking whether there is a rational basis for the agency action in light of the record and the reasons stated by the agency. See §652.520(d) (agency must supply reasons when necessary for proper judicial review). This standard is often encompassed by the terms "arbitrary," "capricious," or "abuse of discretion." The court must not substitute its judgment for that of the agency, but the agency action must be rational. [The rest is the same as the sentence starting "See discussion in Asimow..." to the end of the ¶] .

file: discretion.comment