

**CALIFORNIA LAW REVISION COMMISSION**

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



September 8, 1994

<i>Date:</i> <b>September 22-23, 1994</b>	<i>Place:</i> <b>Sacramento</b>
<b>Sept. 22 (Thursday)     10:00 am – 5:00 pm</b> <b>Sept. 23 (Friday)       9:00 am – 4:00 pm</b>	<b>State Capitol</b> <b>Room 2040</b>
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. <b>If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</b></p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".</p>	

**FINAL AGENDA**

*for meeting of the*

**CALIFORNIA LAW REVISION COMMISSION**

**[PLEASE NOTE ROOM CHANGE]**

**Thursday, September 22, 1994**

---

1. MINUTES OF JULY 14-15, 1994, MEETING  
    (sent 7/20/94)
2. EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY (STUDY F/L-521.1)

**Proposed Legislation for 1995**

Memorandum 94-40 (NS) (sent 8/11/94) (\$18.00)

First Supplement to Memorandum 94-40 (to be sent)

3. UNIFORM PRUDENT INVESTOR ACT (STUDY L-648)

**Draft of Tentative Recommendation**

Memorandum 94-47 (SU) (to be sent)

4. DEBTOR-CREDITOR RELATIONS

**Exemptions from Enforcement of Money Judgments: Decennial Review (Study D-351)**

Memorandum 94-31 (SU) (sent 7/6/94) (\$5.50)

First Supplement to Memorandum 94-31 (to be sent)

**Miscellaneous Debtor-Creditor Issues (Study D-1002)**

Memorandum 94-32 (SU) (sent 7/6/94) (\$8.50)

**Attachment Where Claim Is Partially Secured (Study D-331)**

Memorandum 94-41 (SU) (to be sent)

5. 1994 LEGISLATIVE PROGRAM

**Status of Bills**

Memorandum 94-42 (NS) (enclosed)

6. ADMINISTRATIVE MATTERS

**Meeting Schedule**

Memorandum 94-43 (NS) (sent 8/2/94)

**New Topics and Priorities**

Memorandum 94-44 (NS) (sent 9/2/94)

**Report of Executive Secretary**

**Communications from Interested Persons**

**Friday, September 23, 1994**

---

7. ADMINISTRATIVE ADJUDICATION (Study N-100)

**Comments on Revised Tentative Recommendation**

Memorandum 94-45 (NS) (to be sent)

Revised Tentative Recommendation (sent 8/2/94)

**Conforming Revisions**

Memorandum 94-46 (RJM) (to be sent)

---

MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
SEPTEMBER 22-23, 1994  
SACRAMENTO

---

A meeting of the California Law Revision Commission was held in Sacramento on September 22-23, 1994.

**Commission:**

*Present:* Daniel M. Kolkey, Chairperson  
Colin Wied, Vice Chairperson  
Christine W.S. Byrd  
Allan L. Fink  
Arthur K. Marshall  
Edwin K. Marzec  
Sanford Skaggs (Sept. 22)

*Absent:* Tom Campbell, Senate Member  
Terry B. Friedman, Assembly Member  
Bion M. Gregory, Legislative Counsel

**Staff:**

Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary (Sept. 22)  
Barbara S. Gaal, Staff Counsel  
Robert J. Murphy, Staff Counsel

**Consultant:**

Michael Asimow, Administrative Law (Sept. 23)

**Other Persons:**

Larry Alamao, California Department of Real Estate, Sacramento (Sept. 23)  
Mary Ann Bailey, Union of American Physicians and Dentists, Sacramento (Sept. 23)  
Ron Blubaugh, Public Employment Relations Board, Sacramento (Sept. 23)  
Herb Bolz, Office of Administrative Law, Sacramento (Sept. 23)  
Mark A. Carroll, California Correctional Peace Officers' Association, Sacramento (Sept. 23)  
Margaret A. Farrow, Office of Administrative Hearings, Sacramento (Sept. 23)  
Ellen Gallagher, State Personnel Board, Sacramento (Sept. 23)  
Jon Glidden, Office of Senator Tom Campbell, Sacramento (Sept. 22)  
Bill Heath, California School Employees' Association, San Jose (Sept. 23)  
Charlene Mathias, Office of Administrative Law, Sacramento (Sept. 23)  
Brian Putler, Franchise Tax Board, Sacramento (Sept. 23)  
Dick Ratliff, California Energy Commission, Sacramento (Sept. 23)  
Madeline Rule, Department of Motor Vehicles, Sacramento (Sept. 23)

Tim Shannon, California Medical Association, Sacramento (Sept. 23)  
Daniel Siegel, Office of the Attorney General, Sacramento (Sept. 23)  
Jeffrey A. Dennis-Strathmeyer, CEB Reporter Department, Berkeley (Sept. 22)  
Bob Temmerman, State Bar Estate Planning, Trust and Probate Law Section, San Jose  
(Sept. 22)

CONTENTS	
Minutes of July 14-15, 1994, Commission Meeting . . . . .	2
Administrative Matters . . . . .	3
Meeting Schedule . . . . .	3
New Topics and Priorities . . . . .	4
Report of Executive Secretary . . . . .	5
1994 Legislative program . . . . .	5
Study D-331 – Attachment Where Claim Is Partially Secured . . . . .	5
Study D-351 – Exemptions from Enforcement of Money Judgments . . . . .	6
Preliminary Part of Tentative Recommendation . . . . .	6
Code Civ. Proc. § 704.220. Wildcard exemption . . . . .	6
Other Issues . . . . .	6
Study D-1002 – Miscellaneous Debtor-Creditor Issues . . . . .	6
Enforcement of Family Code Judgments . . . . .	6
Homestead Issues . . . . .	7
Retirement Plan Exemptions . . . . .	7
Study F/L-521.1 — Effect of Joint Tenancy Title on Marital Property . . . . .	7
Study L-648 – Uniform Prudent Investor Act . . . . .	7
Prob. Code § 16008. Duty to dispose of improper investments . . . . .	8
Prob. Code § 16040. Trustee’s standard of care in administering trust . . . . .	8
Prob. Code § 16052. Delegation of investment and management functions . . . . .	9
Prob. Code § 16401. Trustee’s liability to beneficiary for acts of agent . . . . .	9
Study N-100 — Administrative Adjudication . . . . .	9
Overall Approach . . . . .	10
Specifics of Revised Tentative Recommendation . . . . .	10

MINUTES OF JULY 14-15, 1994, COMMISSION MEETING

The Minutes of the July 14-15, 1994, Commission meeting were approved as submitted by staff, subject to the following revision:

On page 4, under “Administrative Adjudication,” the first sentence of the third paragraph was revised to read:

“The preliminary part should point out that ~~the existing provisions on judicial review are merely continued from existing law have been left unchanged~~, without Commission review as to substance.”

It was also noted that, on pages 5 and 6, the draft of subdivision (a) of proposed Section 642.425 would be improved if it were revised to read:

642.425. (a) If an application for a continuance by a party is denied by an administrative law judge employed by the Office of Administrative Hearings, ~~within 10 calendar days after the denial~~ that party shall, within 10 calendar days after the denial, apply to the superior court for appropriate judicial relief or be barred from judicial relief from the denial as a matter of jurisdiction.

#### ADMINISTRATIVE MATTERS

##### Meeting Schedule

The Commission considered Memorandum 94-43. The Commission canceled the December 1994 meeting, and adopted the following meeting schedule for 1995. The meeting places are tentative, and may be altered depending on circumstances such as availability of commissioners for the location, the main topics to be considered at the meeting, and other relevant factors.

<b>January 1995</b>	<b>San Diego</b>
Jan. 26 (Thur.)	10:00 am – 6:00 pm
Jan. 27 (Fri.)	9:00 am – 4:00 pm
<b>March 1995</b>	<b>Sacramento</b>
March 9 (Thur.)	10:00 am – 5:00 pm
March 10 (Fri.)	9:00 am – 4:00 pm
<b>April 1995</b>	<b>Los Angeles</b>
April 27 (Thur.)	10:00 am – 6:00 pm
April 28 (Fri.)	9:00 am – 4:00 pm
<b>June 1995</b>	<b>Los Angeles</b>
June 1 (Thur.)	10:00 am – 6:00 pm
June 2 (Fri.)	9:00 am – 4:00 pm
<b>July 1995</b>	<b>Los Angeles</b>
July 20 (Thur.)	10:00 am – 6:00 pm
July 21 (Fri.)	9:00 am – 4:00 pm
<b>September 1995</b>	<b>San Francisco</b>
Sept. 28 (Thur.)	10:00 am – 6:00 pm
Sept. 29 (Fri.)	9:00 am – 4:00 pm
<b>November 1995</b>	<b>Los Angeles</b>
Nov. 16 (Thur.)	10:00 am – 6:00 pm
Nov. 17 (Fri.)	9:00 am – 4:00 pm

### **New Topics and Priorities**

The Commission considered Memorandum 94-44. The Commission approved the staff recommendation to give first priority to completing projects currently underway, with a view to having legislation ready for the 1995 session. These are: (1) administrative adjudication, (2) statutorily required reports on exemptions and attachment, (3) miscellaneous creditors remedies matters, and (4) the Uniform Prudent Investor Act.

For 1995, the Commission approved the staff recommendation to give next priority to judicial review of agency action, the Uniform Unincorporated Nonprofit Association Act, unfair competition litigation, and business judgment rule and derivative actions. Smaller matters such as revision of the statute governing covenants that run with the land, tolling the statute of limitations while the defendant is out of state, clarification of the rules of evidence concerning electronically recorded original documents and signatures, and the homestead exemption and the exemption for retirement accounts could be worked into the agenda as time permits. The Commission asked the staff to schedule consideration of unfair competition litigation at the January meeting in San Diego, if possible. The Commission decided to defer consideration of nonprobate transfers of community property.

The Commission decided not to request authority to try to harmonize California civil procedure with federal civil procedure. The Commission decided not to update its study on revising the California Evidence Code in light of the Federal Rules of Evidence. The Commission thought the question of admissibility of electronically recorded original documents and signatures could be considered as time and resources permit. The Commission decided to refer to the Judicial Council the suggestion to clarify the Small Claims Act on whether an appeal by one defendant requires a trial de novo as to all defendants. The Commission decided not to study the question of long-arm jurisdiction to determine support obligations owed by a resident to a nonresident.

The Commission deferred the question of codifying the privilege protecting income tax returns from disclosure because it is being considered by the State Bar Conference of Delegates. See Exhibit p 1. The staff should bring this back if no action is taken by the State Bar.

The Commission deferred study of the durable power of attorney for health care and the Uniform Health-Care Consent Act.

### **Report of Executive Secretary**

The Executive Secretary reported that he had addressed the Administrative Law Section of the Sacramento County Bar Association concerning the administrative adjudication project, and had encouraged attendance of section members at the Commission meeting. The Executive Secretary also wrote to the chairs of the Probate and Family Law sections of the Sacramento County Bar Association inviting their attendance. The Executive Secretary indicated he would continue this practice for the time being, but if the invitations are not acted upon, he will cease to send them.

The Executive Secretary reported that the Commission's tentative recommendation on administrative adjudication will be the subject of a forum at the State Bar Annual Meeting in Anaheim on September 24. The Executive Secretary plans to attend, and encourages Commissioners who are able to do so. The Executive Secretary will report to the Commission on the forum.

In connection with the State Bar Annual Meeting, the Executive Secretary plans to meet with the executive committees of the State Bar Appellate Courts Section, the State Bar Litigation Section, and the State Bar Committee on Administration of Justice, and to attend a social event with the executive committee of the State Bar Probate Section. The purpose of the meetings is to establish better communications and working relationships between the Commission and the State Bar sections.

### **1994 LEGISLATIVE PROGRAM**

The Commission considered Memorandum 94-42 and the attached chart showing the status of measures in the Commission's 1994 legislative program. The Executive Secretary noted that AB 3600 had been enacted as Chapter 587, and that AB 2208 had been passed by the Legislature and sent to the Governor. No action was taken on this report.

### **STUDY D-331 – ATTACHMENT WHERE CLAIM IS PARTIALLY SECURED**

The Commission considered Memorandum 94-41 and the draft report and tentative recommendation on *Attachment Where Claim Is Partially Secured*. The Commission approved the draft as submitted. The staff will add a reference to the letter from the Commercial Law League, which was distributed at the meeting (see Exhibit pp. 2-3), in the text of the tentative recommendation.

## STUDY D-351 – EXEMPTIONS FROM ENFORCEMENT OF MONEY JUDGMENTS

The Commission considered Memorandum 94-31 and the draft tentative recommendation on *Exemptions from Enforcement of Money Judgments: Decennial Review*. The Commission approved the tentative recommendation to be circulated for comment, subject to the following revisions:

### **Preliminary Part of Tentative Recommendation**

In addition to stating the justification for the \$5000 wildcard exemption based on inflation, the tentative recommendation should also note that the wildcard exemption has the benefit of providing flexibility, permitting the debtor to apply it where it is most likely to facilitate a fresh start.

### **Code Civ. Proc. § 704.220. Wildcard exemption**

The exemption provision should be redrafted to read as follows:

704.220. In addition to or in combination with any other property exempt under this article, the aggregate equity in real or personal property is exempt in the amount of five thousand dollars (\$5,000).

### **Other Issues**

The Commission reaffirmed its decision not to propose the increase of the alternative bankruptcy exemptions in Section 703.140.

## STUDY D-1002 – MISCELLANEOUS DEBTOR-CREDITOR ISSUES

The Commission considered Memorandum 94-32 concerning miscellaneous debtor-creditor issues. The Commission approved the staff proposal to include the following matters in the tentative recommendation on debtor-creditor matters to be circulated in October:

### **Enforcement of Family Code Judgments**

Code of Civil Procedure Section 683.310 should be amended to delete the obsolete reference to Family Code Section 4502. Family Code Section 5102 should be repealed as obsolete since the 10-year enforceability period no longer applies to judgments for spousal or child support. The 10-year renewal procedure of the Enforcement of Judgments Law should be explicitly applied to judgments for possession or sale of property under the Family Code.



### **Homestead Issues**

Code of Civil Procedure Section 704.810 should be amended to make clear that the court is not required to order a sale if the proceeds are not likely to be sufficient to satisfy any part of the creditor's judgment.

The Commission also decided that it would be appropriate, as time permits, to consider fundamental issues concerning the declared homestead exemption. This would not be a part of the current tentative recommendation.

### **Retirement Plan Exemptions**

The Commission directed the staff to give further consideration to the issues raised concerning the retirement plan exemption. This would be appropriate for Commission review as time permits, but would not be part of the current tentative recommendation.

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

The Commission considered Memorandum 94-40 and its First Supplement, together with a letter from members of the State Bar Estate Planning, Probate and Trust Law Section, relating to the effect of joint tenancy title on marital property (attached to these Minutes as Exhibit pp. 4-5).

After considering a number of alternative approaches to this matter, including the advantages and disadvantages of each, the Commission determined it could not find an acceptable consensus position among the interested parties. The Commission concluded that it could not improve on its printed recommendation on this matter submitted to the Legislature and Governor and introduced by Senator Campbell as SB 1868. The Executive Secretary should so inform Senator Campbell.

#### STUDY L-648 – UNIFORM PRUDENT INVESTOR ACT

The Commission considered Memorandum 94-47 and the staff draft of a tentative recommendation proposing enactment of the Uniform Prudent Investor Act. The Commission approved the draft to be distributed for comment, subject to the following revisions:

**Prob. Code § 16008. Duty to dispose of improper investments**

Subdivision (b) of Section 16008 should be revised for consistency with Section 3 of UPIA (Section 16048 of the draft) as follows:

(b) Unless the trust instrument expressly provides otherwise, the trustee may, without liability, continue to hold property included in the trust at its creation or later acquired by or added to the trust ~~or acquired pursuant to proper authority~~, if the purposes of the trust are better served by retention ~~is in the best interests of the trust or in furtherance of the purposes of the trust~~ of the property.

This revision is intended to reconcile the existing rule on retaining property in the trust with the new rule on diversification under UPIA.

The Comment to Section 16008 should note that the determination of what would be “a proper investment for the trustee to make” under subdivision (a) depends on the terms of the trust instrument and the application of the prudent investor rule.

**Prob. Code § 16040. Trustee’s standard of care in administering trust**

The general fiduciary standard of care in Section 16040 should be revised for closer consistency with draft Section 16046 governing trust investments and management:

(a) The Subject to the Uniform Prudent Investor Act (Article 2.5 commencing with Section 16045), the trustee shall administer the trust with the care, skill, and prudence, ~~and diligence~~ under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

There should be only one basic standard in Section 16040 and draft Section 16046. Before removing “diligence” from Section 16040, the staff should research its meaning in this provision and predecessor sections to determine whether any California cases have emphasized “diligence” as distinguished from “reasonable care, skill, and caution.” If so, the Commission will reconsider how best to achieve the goal of stating one rule, such as by adding the phrase “including diligence” to the UPIA standard.

The standard of liability in Section 16040(c) should be revised to adopt the reasonableness standard of UPIA: “A trustee is not liable to a beneficiary for the

trustee's ~~good faith~~ reasonable reliance on ... express provisions" in the trust instrument.

**Prob. Code § 16052. Delegation of investment and management functions**

The provision on delegation from UPIA should be supplemented with the California rules in existing Section 16401(a)(5)-(6):

(c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated, except where the trustee conceals the act of the agent or neglects to take reasonable steps to compel the agent to redress the wrong in a case where the trustee knows of the agent's acts or omissions.

**Prob. Code § 16401. Trustee's liability to beneficiary for acts of agent**

Existing Section 16401(b)(1) should be revised for consistency with the Restatement and UPIA as follows:

16401. (a) Except as provided in subdivision (b), the trustee is not liable to the beneficiary for the acts or omissions of an agent.

(b) The trustee is liable to the beneficiary for an act or omission of an agent employed by the trustee in the administration of the trust that would be a breach of the trust if committed by the trustee under any of the following circumstances:

(1) Where the trustee ~~has the power to direct~~ directs or permits the act of the agent.

....

The "power to direct" rule appears overbroad and could be read to impose liability on the trustee for acts of agents in every case, which is not the intent of the section.

STUDY N-100 — ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 94-45 and its first supplement, together with a letter from Fredric D. Woocher of Santa Monica (attached as Exhibit pp. 6-7), relating to the revised tentative recommendation on administrative adjudication. The Commission first discussed the overall approach of the revised tentative recommendation, and the pros and cons of alternatives to that approach. Later, the Commission considered comments relating to specific aspects of the revised tentative recommendation.

## **Overall Approach**

The Commission considered whether to recommend to the Governor and Legislature the comprehensive revision of state administrative adjudication procedure set out in the revised tentative recommendation or a more limited revision. The alternate approach would be a more narrowly focused version of the comprehensive statute. It would (i) modernize the existing Administrative Procedure Act without extending it beyond its present scope, (ii) impose a set of fundamental due process and public policy limitations on state agency hearing procedures, and (iii) add options to allow greater flexibility in state agency hearing procedures.

The staff should prepare a draft of the alternate approach for the Commission's review at the next meeting. The Commission will then have before it both the comprehensive approach of the revised tentative recommendation and the more narrowly-focused approach of the alternate draft. In order to generate commentary on this matter, particularly from the private sector, the staff should have a preprint bill of the comprehensive revision introduced and disseminated. This will also provide a vehicle for an interim or informational hearing, if it can be scheduled. The preprint bill should include a preamble declaring legislative policy that it does not necessarily represent the Commission's final recommendation, and that its purpose is to encourage comment.

## **Specifics of Revised Tentative Recommendation**

The Commission instructed the staff to make the following revisions in the revised tentative recommendation prior to having it introduced as a preprint bill:

### **§ 612.140. Contrary express statute controls**

The Commission approved the staff recommendation to revise Section 612.140 to read:

612.140. Notwithstanding any other provision of this division, a state statute or a federal statute or regulation applicable to a particular agency or decision prevails over a contrary provision of this division.

### **§ 613.110. Voting by agency member**

Because no deliberation requirement seems to exist, the Commission approved the staff recommendation to leave Section 613.110 unchanged.

**§ 631.010. Application to constitutionally and statutorily required hearings**

The Commission approved the staff recommendation to revise Section 631.010 to read:

631.010. This division governs a decision by an agency if, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

**§ 631.040. When adjudicative proceeding required to be conducted by administrative law judge employed by OAH**

The Commission rejected the proposal to allow agency personnel to conduct informal hearings. The staff is to leave Section 631.040 as is.

**§ 632.010. Purpose of informal hearing procedure**

Because of the practical importance of the informal hearing procedure, the Commission rejected the proposal to delete that procedure. The staff is to leave Section 632.010 as is.

**§ 632.020. When informal hearing may be used**

The Commission considered whether to delete paragraph (b)(4) of Section 632.020, which, with certain restrictions, allows use of an informal hearing procedure in matters involving a “disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.” The Commission decided that Section 632.020 should remain as is.

**§ 633.010. Special hearing procedure authorized**

The Commission approved the staff’s recommendation to augment the preliminary part of the recommendation with examples demonstrating the need for the special hearing procedure option.

The Commission also considered but rejected the staff’s suggestion that a sentence should be added at the end of Section 633.010 stating: “Nothing in this section precludes a court from drawing upon a principle or procedure in Part 4 to resolve an issue in a proceeding governed by a special hearing procedure, to the extent the principle or procedure is consistent with the purposes of the special hearing procedure.” The Commission decided against putting that sentence in the statute. Rather, the sentence should be in the Comment, with the following change: “Nothing in this section precludes a court from drawing upon a

principle or procedure in Part 4 to resolve an issue in a proceeding governed by a special hearing procedure, to the extent the special hearing procedure is silent on the issue and the principle or procedure is consistent with the purposes of the special hearing procedure.”

**§ 633.040. Regulations governing special hearing procedure**

The Commission approved the staff recommendation to revise Section 633.040 to read:

633.040. (a) An agency shall provide a special hearing procedure by regulation. The regulation is subject to any other statute that governs the adjudicative proceeding.

(b) A regulation that provides a special hearing procedure may do any of the following:

(1) State the special hearing procedure in a complete and self-sufficient body.

(2) State some provisions of the special hearing procedure explicitly and state other provisions of the special hearing procedure by incorporating by reference provisions of Part 4 (commencing with Section 641.110) (formal hearing) or any other statute that governs the adjudicative proceeding.

(3) Adopt Part 4 (commencing with Section 641.110) (formal hearing) as the special hearing procedure, subject to appropriate exceptions.

(c) The agency shall ~~provide~~ make available a copy of the special hearing procedure, together with a copy of or reference to any other statute that governs the adjudicative proceeding, to the person to which the agency action is directed.

(d) Notwithstanding Section 11350, a regulation that provides a special hearing procedure is not subject to judicial review on the basis of inconsistency with statute except in an adjudicative proceeding on a showing of prejudice to a party caused by the inconsistency.

**§ 634.010. Emergency decision**

The Commission approved the staff’s recommendation to augment the preliminary part of the recommendation with Professor Asimow’s discussion of the need to permit an emergency decision procedure.

**§ 642.260. Amended and supplemental pleadings**

The existing APA, specifically Section 11516 of the Government Code, includes guidelines for amending pleadings following submission of a case for

decision. The Commission instructed the staff to revise Section 642.260 to incorporate those rules.

The Commission also considered the staff's suggested revision of the Comment to Section 642.260, concerning the relation back doctrine. Rather than attempting to restate the doctrine in the Comment, the Commission instructed the staff simply to note that Section 642.260 is not intended to change existing law regarding the relation back doctrine.

**§ 643.110. OAH administrative law judge as presiding officer**

The Commission agreed with the staff recommendation to leave Section 643.110 as is, rather than revising it to require that all hearings be conducted by an administrative law judge.

**§ 643.210. Grounds for disqualification of presiding officer**

The Commission rejected the proposal to incorporate the standards of Section 170.6 of the Code of Civil Procedure. The staff is to leave Section 643.210 unchanged.

**§ 643.310. Limitation on service as presiding officer**

The Commission considered the California Trucking Association's suggestions to strengthen Section 643.310. The Commission decided that those issues were covered at previous Commission meetings and CTA's suggestions are not politically and practically feasible.

**§ 643.410. Ex parte communications prohibited**

The Commission considered the comments of the Unemployment Insurance Appeals Board about EDD's occasional practice of providing supplemental information to the hearing officer. The Commission observed that whether that practice constitutes a prohibited ex parte communication depends on how the hearing officer handles the information. The Comment to Section 643.410 should not categorically bless EDD's practice of providing supplemental information, but should explain that providing such information is not a prohibited ex parte communication if the hearing officer circulates the information to all parties and affords them an opportunity to comment on it.

**§ 643.430. Permissible ex parte communications from agency personnel**

The Commission considered whether, as the Department of Conservation contends, the Commission's proposed rules regarding ex parte communications would be unworkable as applied to small agencies. The Commission specifically considered potential complications relating to the first clause of the second sentence of subdivision (a) of Section 643.430, which commands: "An assistant or advisor shall not receive ex parte communications of a type the presiding officer would be prohibited from receiving." Due to possible difficulties in implementing that provision, the Commission reluctantly decided to delete it from the preprint of its tentative recommendation. Although the preprint bill will not include the deleted clause, the Commission resolved to reconsider the matter prior to finalizing its work on administrative adjudication.

The Commission also considered the interplay of subdivision (c) of Section 643.430 and subdivision (c) of Section 643.420, both of which concern nonprosecutorial proceedings. Because the Public Utilities Commission is to be exempt from the new APA, the Commission directed the staff to delete the former provision, which was originally included for the PUC's benefit.

Thus, Section 643.430 should read as follows:

643.430. A communication otherwise prohibited by Section 643.410 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning the following matters in an adjudicative proceeding that is nonprosecutorial in character, provided the content of the advice is disclosed on the record and all parties are given an opportunity to comment on it in the manner provided in Section 643.450 (disclosure of ex parte communication):

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer.



(2) The advice involves an issue in a proceeding of the California Coastal Commission, San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality board.

**§ 645.210. Time and manner of discovery**

At the request of the Department of Conservation, the Commission decided to increase the response time from 20 days to 30 days:

645.210. (a) After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after service on the party of the notice of commencement of proceeding or within 15 days after service on the party of an additional or supplemental pleading, is entitled to discovery to the extent provided in this article.

(b) A party shall respond to a request for discovery within ~~20~~ 30 days after service of the request, or within another time provided by stipulation.

**§ 645.420. Issuance of subpoena**

The Commission agreed that there should be a means for a *pro per* party to obtain a subpoena. The Commission approved the staff's recommended revision on this point:

645.420. (a) Subpoenas and subpoenas duces tecum ~~may~~ shall be issued by the agency, ~~or presiding officer at the request of a party,~~ or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure.

(c) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

**§ 647.010. Alternative dispute resolution**

The Commission considered but rejected ACSA's proposal to delete the alternative dispute resolution provisions in their entirety.

**§ 648.140. Open hearings**

The Commission approved the staff's recommendation to add a provision to Section 648.140 stating that the open hearing requirement "does not apply to a

prehearing conference or settlement conference, or proceedings for alternative dispute resolution.”

**§ 648.230. Language assistance**

The Commission considered but rejected ACSA’s proposal to apply the language assistance requirement to all state agencies.

**§ 648.310. Burden of proof**

The Commission considered the objections of CTA and ACSA regarding the burden of proof in professional licensing cases. Although the draft of Section 648.310 in the revised tentative recommendation appears to correctly reflect existing California law, the Commission decided to delete the sentences specifying whether the burden of proof is “preponderance of the evidence” or “clear and convincing evidence.” Those provisions, which border on being substantive rather than procedural, are not essential to the new APA. Additionally, it will be easier to prepare conforming revisions if they are omitted. As revised, Section 648.310 should read:

648.310. The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter.

**§ 648.420. Discretion of presiding officer to exclude evidence**

To avoid proliferation of appealable issues, the Commission decided against imposing a burden on the presiding officer to inform parties of their right to make an offer of proof. The Commission also decided to revise Section 648.420 as follows:

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time ~~or create substantial danger of confusing the issues.~~

**§ 648.460. Admissibility of scientific evidence**

Only two members of the Commission were present for the discussion of Section 648.460. Rather than override the Commission’s previous decision regarding that provision, they directed the staff to leave it unchanged.

**§ 649.210. Availability and scope of review**

The Commission considered but rejected CTA's proposal to require agency heads to act on every case. Section 649.210 should remain unchanged.

**§ 649.260. Communications between presiding officer and reviewing authority**

The revised tentative recommendation solicited comment on two alternative versions of this statute:

ALTERNATIVE (A).

649.260. (a) Notwithstanding any other provision of this part, there shall be no communication, direct or indirect, regarding any issue in the proceeding, between the presiding officer and reviewing authority.

(b) This provision does not apply where the agency head serves as both presiding officer and reviewing authority.

ALTERNATIVE (B).

649.260. (a) The provisions of this part restricting ex parte communications between the presiding officer and an employee or representative of an agency that is a party govern communications between the reviewing authority and the presiding officer.

(b) This provision does not apply where the agency head serves as both presiding officer and reviewing authority.

The Commission discussed those alternatives and the discrepancy between them and the Comment to Section 643.410, which states in part:

This section does not preclude ex parte communications between the agency head making a decision and any person who presided at a previous stage of the proceeding. This reverses a provision of former Section 11513.5(a).

The Commission decided that the rules for communications between the presiding officer and reviewing authority need further study, as do the rules for ex parte communications to the agency head generally. In the preprint bill, the staff is to solicit comment on both Alternative (A) and Alternative (B).

**Code Civ. Proc. § 1094.5. Administrative mandamus**

The State Teachers' Retirement System is opposed the requirement that credibility determinations of the presiding officer be given great weight on judicial review. Having previously discussed that requirement at length, the

Commission decided to leave Section 1094.5 as in the revised tentative recommendation.

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

---

Date

---

Chairperson

---

Executive Secretary

564 Mission Street #609  
San Francisco, CA 94105-2918  
September 8, 1994

Law Revision Commission  
RECEIVED

SEP 9 8 1994

File: \_\_\_\_\_

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

Dear Mr. Sterling:

Re: Codification of Privilege for Income Tax Returns

This letter replies to your letter dated April 11, 1994, which replied to my letter of April 8, 1994 (copies of both letters attached).

I have just learned that the Contra Costa Bar Association (CCBA) is sponsoring a resolution at the upcoming State Bar meeting in Anaheim to codify the taxpayer privilege and to add an additional protection to the taxpayer, creating a presumption that giving the tax return to a creditor when applying for credit is not a waiver of the privilege.

Inasmuch as the subject matter will be before the Conference of Delegates anyway, I again urge the Commission to act upon my recommendation and push for a modification of the proposal of the CCBA to accomplish the appropriate balancing of the right of taxpayer privacy against the need for disclosure.

Very truly yours,

*Gerald H. Genard*

Gerald H. Genard

GHG:tln  
Attachments

Thomas Zide  
Leo G. O'Biecunas, Jr.  
Creighton A. Stephens

**ZIDE & O'BIECUNAS**

Attorneys at Law

Post Office Box 15363, Del Valle Station  
1300 West Olympic Boulevard, Suite 403  
Los Angeles, California 90015-0363  
Telephone: (213) 487-7550  
Facsimile: (213) 382-6095

(of Counsel)  
Nathan Swedlow  
Douglas M. Kaye

September 22, 1994

Law Revision Commission  
RECEIVED

SEP 22 1994

File: \_\_\_\_\_

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

**RE: 1990 Attachment Amendments**

Dear Mr. Ulrich:

On behalf of the Creditor Rights Section of the Commercial Law League of America, I have been asked to respond to your letter of June 16. The Commercial Law League, founded in 1895, is North America's oldest creditors' rights organization. Member include 5000 attorneys, and other experts in the fields of Commercial law, Bankruptcy and Reorganization. I feel that my office is representative of the other California members of the League and I believe that my office's experiences and opinions are representative.

My own office is primarily engaged in enforcement of creditor rights and as part of our practice we have had experience with the attachment provisions of the California Code of Civil Procedure. While our practice generally only deals with general unsecured creditors, we have found the attachment provisions to be an effective tool to expedite the collection of monies owing. Whether a creditors claim is unsecured or under secured, the ability to attach assets early in the proceeding may mean the difference between recovery of the monies owing or an uncollectible judgment. The ability to attach, prior to judgment, protects the creditor from the assets of the debtor being dissipated or secreted so that normal judgment enforcement proceedings are ineffective.

Additionally, we have found that service of the attachment papers prompts early settlement negotiations and prevents actions from being bogged-down by dilatory litigation techniques. Again, this expedites the collection procedure and in the best of circumstances, removes the matter from an already overburdened court system.

I have spoken with several practitioners whose area of practice is similar to ours, and they generally agree with the opinions I have expressed. It is our belief that the attachment provisions of the Code of Civil Procedure should be allowed to remain in effect.

September 22, 1994  
Page 2

**RE: 1990 Attachment Amendments**

Should you have any questions, please feel free to contact me by telephone.

Very truly yours,

**ZIDE & O'BIECUNAS**



Leo G. O'Biecunas, Jr.  
LGO/va

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

*Chair*  
MICHAEL V. VOLLMER, Newport Beach

*Vice-Chair*  
ROBERT L. SULLIVAN, JR., Fresno

*Executive Committee*  
JAMES B. BIRNBERG, Los Angeles  
EDWARD V. BRENNAN, La Jolla  
FRAYDA L. BRUTON, Sacramento  
JAMES B. CODY, Burlingame  
JAMES B. ELLIS, Walnut Creek  
J. ROBERT POSTER, Morgan Hill  
MARY F. GILLICK, San Diego  
ANTONIA GRAPHOS, Palm Springs  
MARC B. HANKIN, Los Angeles  
DIANA HASTINGS TEMPLE, San Francisco  
SUSAN T. HOUSE, Pasadena  
JONNIE H. JOHNSON-PARKER, Inglewood  
NANCY L. POWERS, San Francisco  
JULIE ROBINSON, Orange  
WARREN A. SONSHEIMER, III, San Luis Obispo  
ROBERT L. SULLIVAN, JR., Fresno  
MICHAEL V. VOLLMER, Newport Beach



655 FRANKLIN STREET  
SAN FRANCISCO, CA 94102  
(415) 581-8206

Law Revision Commission  
**RECEIVED**

SEP 22 1994

File: \_\_\_\_\_

*Advisers*  
ARTHUR H. BREEDENBECK, Burlingame  
CLARK E. BYAM, Pasadena  
SANDRA J. CHAN, Los Angeles  
MONICA DELL'OSBO, Oakland  
MICHAEL G. DESMARAIS, Palo Alto  
ROBERT J. DURHAM, JR., La Jolla  
MELITTA FLECK, La Jolla  
ANDREW S. GARR, Los Angeles  
DON E. GREEN, Sacramento  
JOHN T. HARRIS, Oriskany  
VALERIE J. MERRITT, Glendale  
BRUCE S. ROSS, Beverly Hills  
WILLIAM V. SCHMIDT, Newport Beach  
THOMAS J. STICKER, San Francisco  
ROBERT E. TEMMERMAN, JR., Campbell

*Reporter*  
LEONARD W. POLLARD II, San Diego  
*Section Administrator*  
SUSAN M. ORLOFF, San Francisco

*REPLY TO:*

Robert E. Temmerman, Jr.  
Attorney at Law  
1550 S. Bascom Avenue, Ste. 240  
Campbell, CA 95008  
Tel (408) 377-1788

September 21, 1994

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

Re: Memorandum 94-40  
Effect of Joint Tenancy Title on Marital Property: Proposed Legislation for 1985

Dear Mr. Sterling:

On September 13, 1994, I conducted a telephone conference call with five members of the State Bar of California's Section on Estate Planning, Trust and Probate Law to discuss the above referenced Memorandum. As you know, the official position of the Section is to abolish joint tenancy between spouses. However, we realize such position is not politically feasible in California.

On Sunday, September 25, 1994, the Section's Executive Committee will meet in Anaheim, California. On the agenda for that meeting is the above-referenced topic.

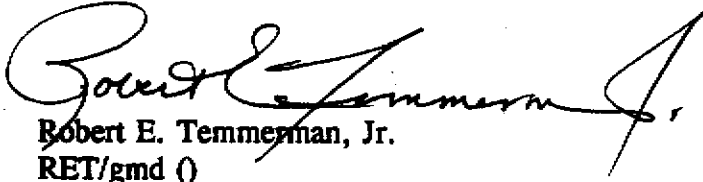


As a result of the conference call, the participants decided that we would present to the Section's Executive Committee two alternative proposals. The first proposal is to take the legislation that was set forth in SB 1868 and introduce the Bill in the 1985 Legislative session. If the Executive Committee chooses not to pursue that course of action then the participants will suggest that the Committee explore the possibility of proposing a new form of title entitled community property with right of survivorship.

We believe that the proposals set forth in Memorandum 94-40 are not workable. The proposals compromise what we believe to be the intentions of married couples in California to such an extent that we can no longer support the staff's proposals.

Please be advised that the opinion set forth in this correspondence are only those of myself and the four members that participated in the conference call. They are not the opinion of the Executive Committee or the State Bar of California.

Sincerely,



Robert E. Temmerman, Jr.  
RET/gmd ()

**CONFIRMATION COPY**

**STRUMWASSER & WOOCHEER**

ATTORNEYS AT LAW

100 WILSHIRE BOULEVARD, SUITE 1900  
SANTA MONICA, CALIFORNIA 90401

TELEPHONE: (310) 576-1233  
FACSIMILE: (310) 319-0156

FREDRIC D. WOOCHEER  
MICHAEL J. STRUMWASSER  
SUSAN L. DURBIN

RALEIGH H. LEVINE  
PUBLIC INTEREST FELLOW

Law Revision Commission  
**RECEIVED**

SEP 23 1994

September 21, 1994

File: \_\_\_\_\_

*Via Facsimile*  
415/494-1827

Mr. Nat Sterling  
California Law Revision Commission  
4000 Middlefield Rd., Ste. D-2  
Palo Alto, CA 94303

Dear Mr. Sterling:

We are writing to express our support for the tentative recommendation for Administrative Procedure Reform currently circulated by the Law Revision Commission. Our law firm practices extensively in the area of administrative law. Although we have represented both state administrative agencies themselves and clients appearing before various agencies, we write to you today purely on our own behalf and as private attorneys knowledgeable in this field of the law.

We firmly believe that the statute presently proposed would constitute a real advance in administrative justice. We are aware that the Attorney General and many agencies have expressed opposition to the recommendation, but we believe that the private Bar also should be heard from. We believe this proposal provides a historic opportunity to modernize California's administrative law.

To our knowledge, all other states and the federal government have an APA that applies to all agency adjudication. California's APA is antiquated and applies only to a small percentage of agency adjudications.

The Commission's tentative recommendation would impose minimal due process standards, such as separation of functions and a prohibition against ex parte contacts. It would make alternate dispute resolution available at every agency. It would permit informal procedures instead of unnecessary formal procedures in every case. It would provide for many economies in adjudication, such as improved use of electronic communication, and greater delegation to ALJs, and resolution of discovery disputes at the agency level instead of in court. It would make precedential decisions publicly available. And it would ensure that the procedures of every agency would be set forth in

Mr. Nat Sterling  
September 21, 1994  
Page 2

generally accessible regulations instead of the present situation in which the procedures are often known only to that agency's staff and to a handful of specialists.

The only serious objections that have been raised to the new law are that it would require agencies to go through a rulemaking proceeding in order to adopt special hearing procedures that depart from the default provisions in the Act. This would concededly impose a one-time cost on many agencies experiencing budget problems. But the tentative draft takes numerous steps to simplify this rulemaking process and gives agencies a long period of time in which to adopt regulations. We believe that this modest, one-time-only investment in rulemaking would be well worth the cost. All transitions have costs; if we thought only of the costs of change, we would never make any advances.

I hope the Commission will consider our views seriously. The tentative recommendations are too valuable in the long run to be jettisoned now. Thank you very much for the opportunity to submit our comments.

Sincerely,



Fredric Woocher