First Supplement to Memorandum 94-23

Comprehensive Power of Attorney Law:
SB 1907 (Opposition and Concerns)

The hearing on Senate Bill 1907, the Commission's Comprehensive Power of Attorney Law, has been rescheduled for May 17 in the Senate Judiciary Committee. When Memorandum 94-23 was written, the bill faced no opposition but that is no longer true.

Harley Spitler's Letter

Harley J. Spitler sent a lengthy letter in opposition to SB 1907 to Senator Roberti, Chair of the Senate Judiciary Committee. A copy is attached. (See Exhibits pp. 1-13.) Mr. Spitler has been a member of Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, which has worked with the Commission in preparation of the recommendation. The State Bar Section supports SB 1907, as indicated in Memorandum 94-23.

Mr. Spitler raises a number of serious questions primarily relating to the health care power. The Commission's recommendation has focused on aspects of power of attorney law *other than* the durable power of attorney for health care and the statutory forms. This policy dates from the early stages of the project. The major gap in power of attorney law was in the general rules concerning powers of attorney concerning property matters. The health care powers had received comprehensive recent attention by the Commission in the early 1980's. In addition, we concluded that it would be difficult to do a comprehensive substantive review of the health care power in the same step. It was also determined that it was premature to attempt a detailed study of the health care powers before the Uniform Health-Care Decisions Act was finally approved, which has occurred only recently.

This is not to say that it is inappropriate to consider substantive revision of the health care power along with the Uniform Health-Care Decisions Act. But in light of the full calendar of the Commission, it does not appear that the Commission will be able to take up this subject in the near future. Accordingly, it is impossible for the Commission to respond favorably to Mr. Spitler's request that SB 1907 be delayed. The bill cannot be made a two-year bill because this is

the second year of the session. In any event, delaying the bill until next year would not achieve the goals urged by Mr. Spitler, because the Commission is not likely to have time to consider the health care issues. Accordingly, we hope that Mr. Spitler will reconsider his opposition to the bill. We will preserve his commentary in our files for consideration if and when the Commission is able to consider the subject again.

CLTA Suggestions

Craig Page, on behalf of members of the California Land Title Association, has forwarded several suggested revisions to the amendments that have been accepted to deal with the concerns of the California Bankers Association. (See Exhibit pp. 15-16.) The suggestions relate to the new versions of Sections 4305 and 4306 that are set out on pages 2 and 3 of Memorandum 94-23, and you should refer to the memorandum in connection with the following discussion:

(1) Section 4305(e): CLTA suggests amending the subdivision by adding "… *which the third party relying on the power of attorney determines to be* unrelated to the pending transaction." The staff has difficulty understanding how this would work. How would the third person be in a position to determine what matters in the instrument could permissibly be omitted from the certificate? If the third person has the instrument, the certificate is unnecessary. If the third person does not have the power, then how would it be able to determine that something in the power is necessary or not? The best thing is to leave the section alone.

The language in subdivision (e) was patterned after the rule in Section 18100.5(d) (trust certification) to the effect that the certificate may not contain dispositive provisions. Powers of attorney do not contain dispositive provisions, so subdivision (e) was reworded to achieve the analogous policy goal. The staff does not consider subdivision (e) to be crucial to the section — it is there for consistency with Section 18100.5. It could be omitted, leaving the contents of the certificate up to the parties in the particular situation without statutory guidance.

(2) Section 4306(b): CLTA suggests adding "of any person" following "without inquiry" in the first sentence of subdivision (b). The staff believes this would be a mistake. "Assume without inquiry" is a standard phrase — it is in Section 18100.5 — and to change it in this statute raises questions about what it means here and everywhere else. The "person who does not have actual knowledge" is the subject of the "assume with inquiry" clause; adding "of any person" is confusing.

The staff has no problem with adding the truthfulness concept in the first sentence, as suggested by CLTA, but would use "truth" in place of "truthfulness." It is redundant, but if it gives comfort without damaging the section, the language can be accepted.

CLTA's suggested revision of the second sentence of Section 4306(b) is confusing. The existing language is the same as that in Section 18100.5. The staff is reluctant to tinker with the substantive rules that have been accepted in the interest of consistency. The alternative is to revert to the bill as introduced and work with that language.

The proposed revision in the third sentence of Section 4306(b) would change the force of the section. Again, this is inconsistent with Section 18100.5. The issue here is effect of actual knowledge. The staff does not believe it is acceptable to try to limit that effect by what is stated in the certificate. See Section 18100.5(f). This would be contrary to the policy of existing law.

(3) Section 4306(d): CLTA proposes changes that are inconsistent with Section 18100.5 and are unacceptable for that reason if not for others. The bad faith standard provides a sufficient shield for third persons. Adding an additional cushion to the effect that the third person "may be" liable in such circumstances goes too far. If there is a problem with practice under Section 18100.5, then that is an issue that can be addressed by the Legislature when the appropriate time arrives. At this point, it is not appropriate to change the rule only in Section 4306. To do so would violate the major argument for accepting the revised versions of Section 4305 and 4306 — that it is consistent with what the Legislature adopted just last year in Section 18100.5. If the two rules are going to be different, the best alternative is to dump the amendments and fix the affidavit procedure in the Commission's original recommendation.

Contra Costa County Suggestion

James L. Sepulveda, Deputy District Attorney in Contra Costa County, has written the Commission suggesting an amendment to Section 4264(c). (See letter in Exhibit p. 17.) Mr. Sepulveda urges addition of a rule preventing the attorney-in-fact from making loans unless the power of attorney specifically authorizes this authority. This would put loans on the same basis as the making of gifts.

Section 4264 collects a set of estate planning powers that are not included in a grant of general authority, but must be specifically authorized. (It should be noted that SB 1907 does not create the problem that concerns Mr. Sepulveda — in

fact, by delineating the duties of an attorney-in-fact, the bill will be a help in policing unscrupulous attorneys-in-fact.) If the Commission decides to address this concern, the staff suggests consideration of a more limited rule, restricting the authority to make loans to or for the benefit of the attorney-in-fact. We understand that the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section may have some objections to this proposal.

The staff will report any further developments regarding SB 1907 at the meeting on Friday. We should then have copies of the reprinted bill.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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May 5, 1994

Senator David Roberti
Chair, Senate Judiciary Committee
State Capitol, Room 2032
Sacramento, California 95814

Re: S.B. 1907

Dear Senator Roberti:

I am an attorney at law and write in opposition to S.B. 1907 as introduced on February 25, 1994; and strongly suggest that it be made a two-year bill. The reasons for making S.B. 1907 a two-year bill are these:

1. S.B. 1907 fails to take into account, or even consider, the recently approved Uniform Health-Care Decisions Act ("UHCDA") which will most likely be introduced in the 1995 legislature.

2. S.B. 1907 fails to take into account, or even consider, *Cruzan v. Missouri* (1990) 497 U.S. 261 which held that the right to make health care decisions is a part of a person's "liberty interest" guaranteed by the 14th Amendment to the U.S. Constitution.

3. S.B. 1907 places, or purports to place, unconstitutional limitations on a person's constitutional right to make his/her own health care decisions.

I. S.B. 1907 Deals With Both Durable Powers Of Attorney For property And Durable Powers Of Attorney For Health Care.

Legislative counsel's digest states in part:

> "Existing provisions of the Civil Code set forth provisions governing the law of agency and powers of attorney, including provisions regarding durable powers of attorney, and durable powers of attorney for health care.
>
> This bill would revise and recast these provisions and would transfer these provisions to the Probate Code."

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In S.B. 1907, the main provisions relating to durable powers of attorney for health care are located in Part 4, being sections 4600-4779. However, many other provisions of the bill affect durable powers of attorney for health care.

S.B. 1907 is the work product of the California Law Revision Commission ("CLRC"). In CLRC's February 10, 1994 letter to Governor Pete Wilson, transmitting its proposed new Power of Attorney law, it stated in part:

> "This recommendation proposes a new comprehensive Power of Attorney Law in the Probate Code. The new law would replace the incomplete and disorganized collection of power of attorney statutes currently located with the other agency rules in the Civil Code. *The new law would apply to all durable powers of attorney, including durable powers of attorney for health care, and statutory form durable powers of attorney for health care, and uniform statutory form powers of attorney, and to any other power of attorney that incorporates its provisions.*" (Emphasis added.)

II. S.B. 1907 DOES NOT CONSIDER THE RECENTLY APPROVED UNIFORM HEALTH-CARE DECISIONS ACT.

The Uniform Health-Care Decisions Act ("UHCDA") is the work product of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). A drafting committee appointed by NCCUSL worked on the drafting for two years. In the drafting process, the following were involved:

Drafting Committee: 9 members, chaired by Michael Franck, Lansing, Michigan. One Californian, W. Jackson Willoughby, was on that committee.

Review Committee: 3 members. One Californian, Matthew S. (Sandy), Rae, Jr., was on that committee.

Consultants/Observers: 19 persons. Two Californians, Francis J. Collin, Jr. of Napa and the undesigned were in that group.

The following disciplines and organizations were represented in the entirety of the drafting process: Professors of law; practicing attorneys; American Bar Association; First Church of Christ Scientist; Choice in Dying; American Association of Retired Persons; American Hospital Association; Americans United For Life; American Association of

Neurological Surgeons; Catholic Health Association of the United States; United States Catholic Conference; American Nurses Association; and American Medical Association.

Thus, the final UHCDA is an amalgam of the views of all of the above disciplines and organizations which have a vested interest in health-care decision making.

On November 1, 1993, the final UHCDA with official comments was approved by NCCUSL. A copy of the final Act is enclosed.

III. THE UNIFORM HEALTH-CARE DECISIONS ACT SHOULD BE CAREFULLY STUDIED BEFORE ENACTING S.B. 1907.

The UHCDA is a prototype for *all* health care decision making statutes. Its provisions must be studied very carefully before enacting any of the durable powers of attorney for health care provisions of S.B. 1907.

A. To Ignore The UHCDA Is A Waste Of This Committee's Time.

Two reasons:

1. The UHCDA will most likely be introduced in bill form, in the California Legislature, in 1995. I say "most likely" because the California "Commission on Uniform State Laws" has the following statutory duty:

> "The Commission shall bring about, as far as practicable, the passage of the various uniform acts recommended by the national conference . . ." Govt. Code Sec. 8271.

The UHCDA is of course one of those "uniform acts."

2. Since *Cruzan v. Missouri* (1990) 497 U.S. 261, the legal subject of paramount interest to millions of Americans is: how, by what legal mechanism, can they control their right to die?

3. As this Committee endeavors to answer that question, it must consider the latest well drafted proposed statute -- namely the Uniform Health-Care Decisions Act.

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IV. SOME OF THE PROVISIONS OF S.B. 1907 APPEAR TO BE UNCONSTITUTIONAL UNDER BOTH THE FEDERAL AND CALIFORNIA CONSTITUTIONS.

A. U.S. Constitution: 14th Amendment: Liberty Interest

Cruzan v. Missouri (1990) 497 U.S. 261 held that the right to make health care decisions is a part of a person's "liberty interest" guarantied by the 14th Amendment to the U.S. Constitution.

The Court makes it very clear that the right to refuse medical treatment is grounded in the 14th Amendment to the U.S. Constitution as a "liberty interest."

> "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional *right of privacy*, we have never so held. We believe this issue is more properly analyzed in terms of a *Fourteenth Amendment liberty interest*." (Emphasis added.)

Or again:

> "The principle that a competent person has a *constitutionally protected liberty interest* in refusing unwanted medical treatment may be inferred from our prior decisions." (Emphasis added.)

Or, again after discussing other U.S. Supreme Court decisions:

> "Still other cases support the recognition of a *general liberty interest* in refusing medical treatment." (Emphasis added.)

Additionally,

> ". . . for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right (as a liberty interest) to refuse lifesaving hydration and nutrition."

This should put to rest the uncertainty as to whether the withholding/withdrawal of life support, nutrition and hydration are:

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a. A part of a person's "privacy" as suggested in some state decisions; and as implied (but not held) in a couple of U.S. Supreme Court decisions

or

b. A part of a person's "liberty" guarantied by the 14th Amendment.

Cruzan says they are part of "*liberty*."

B. The California Constitution: Article 1, Section 1.

"All people —- have inalienable rights. Among those are -- pursuing and obtaining -- privacy"

In addition to having the federal constitutional equivalent of the due process clause in Article 1, Section 7, California's constitution guaranties the "inalienable right of privacy." So, in California there are three constitutional guaranties of a person's right to make health are decisions:

1. **U.S. Constitution:** 14th Amendment "liberty interest."

2. **California Constitution:** Article 1, Section 7. "Liberty interest."

3. **California Constitution:** Article 1, Section 1. Right of Privacy.

V. A FEW SPECIFIC SUGGESTIONS.

It is not the purpose of this letter to draft specific proposed amendments to S.B. 1907. That would be a long, time consuming job, involving both major policy decisions and specific textual drafting. It could best be done by a small committee which would integrate California's present statutory health care decision making system with both S.B. 1907 and the UHCDA.

However, there are some specific areas which the Judiciary Committee should consider if it opts to report S.B. 1907 out this term:

1. "Capacity."

The heart of every health care decision making statute is the principal's "capacity"! His "capacity" to execute a DPAHC. His "capacity" when a health care decision is required.

California's very complex present system does not define "capacity."

S.B. 1907 does not define "capacity."

CLRC's 210 page February 10, 1994 recommendation to Governor Pete Wilson does not define "capacity."

The UHCDA has a very simple, clear definition:

"Capacity" means an individual's ability to understand the significant benefits, risks and alternatives to proposed health-care, and to make and communicate a health-care decision. UHCDA Sec. 1(3)

S.B. 1907 has no definition; but provides in section 4022:

"4022. "Power of attorney" means a written instrument, however denominated, that is executed by a natural person having the capacity to contract and that grants authority to an attorney-in-fact."

"Capacity" and "incapacity" are pervasive concepts in jurisprudence:

The "capacity" to make a will.

The "capacity" to enter into a contract.

The "capacity" to enter into a valid marriage. Prob. C 1901

The "capacity" of a conservatee. Prob. C 1801(a) & (b).

The durable power deserves a simple, understandable definition of "capacity."

2. **Execution and Witnessing Requirements Are Too Onerous and Complex.**

The UHCDA does not require any witnesses. The UHCDA does not require acknowledgment before a notary public.

Compare that simplicity with the California system which is carried forward into S.B. 1907:

a. **Two witnesses:** S.B. 1907, Secs. 4121(c)(2) and 4701

b. **Qualifications of witnesses:** Very long and hard to understand in a durable power of attorney for health care. S.B. 1907, Sec. 4701. Those witnessing qualifications take up *41 lines* on pages 50-51 of S.B. 1907!

c. **The Acknowledgment Alternative:** The above witnessing requirements can be avoided By having the DPAHC acknowledged before a notary public. S.B. 1907, Sec. 4121(c)(1). That is O.K. if, at the time, a notary public is readily available. Many DPAHC are signed, in a hospital or home crisis situation when a notary public is not readily available.

The Judiciary Committee should consider deleting all witnesses and all acknowledgment.

3. **The Uniform Statutory Form Power Of Attorney Should Not Be A Mandated Form.**

The Uniform Statutory Form Power of Attorney should *not* be a mandated form. Section 4401 of S.B. 1907 provides:

> "**4401.** The following statutory form power of attorney is legally sufficient --"

The language is mandated.

All modern durable power statutes containing a statutory form say, in substance, "-- a form substantially as follows."

The UHCDA makes very clear that its statutory forms are optional and that the form's language is not mandatory:

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"SECTION 4. OPTIONAL FORM. The following form may, but need not, be used to create an advance health-care directive. An individual may complete or modify all or any part of the following form:

ADVANCE HEALTH-CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care. If you use this form, you may complete or modify all or any part of it. You are free to use a different form."

The Judiciary Committee should consider amending Section 4401 of S.B. 1907 to read:

"**4401.** Any durable power of attorney form substantially the same as the following Statutory Form Power of Attorney is legally sufficient. . . ."

4. The Statutory Form Durable Power Of Attorney For Health Care.

Same comments as made in "3" above.

The Judiciary Committee should consider amending Section 4771 of S.B. 1907 to read:

"**4771.** The use of substantially the following form in the creation of a durable power of attorney for health care under Chapter 1 (commencing with Section 4600) is lawful —"

5. The Termination Provisions Of S.B. 1907 Is Completely Wrong.

Section 2 of S.B. 1907 reads in part

"SEC. 2. Section 2356 of the Civil Code is amended to read:

2356. (a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:

. . .

(3) The incapacity of the principal to contract."

Subdivision "(3)" should be deleted. The very reason any person ever executes a durable power of attorney is to empower an attorney in fact to act on behalf of the principal during "the incapacity of the principal to contract"!

EX: P, while mentally competent, executes a *durable* power naming A as his attorney in fact. Later, P suffers a stroke and is in an irreversible coma at a hospital. P is incapacitated to contract or to do anything except lie on his hospital bed.

2326(a)(3) says that P's incapacity has terminated the power of the agent! The very reason P created a durable power was to give A the power to act on P's behalf in the medical conditions that P now suffers.

Compare Section 4125 of S.B. 1907 which states the correct rule:

"**4125.** All acts done by an attorney in fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and *bind the principal and the principal's successors in interest as if the principal had capacity*."

The Judiciary Committee should consider deleting subsection "(3)" in its entirety; or changing subsection "(3)" to read:

"(3) The incapacity of the principal to contract unless the agent is acting under a durable power of attorney.

6. The Modification And Revocation Provisions Are Very Unclear.

The amendment and revocation provisions of the UHCDA are very simple.

"***Section 3. Revocation Of Advance Health-Care Directive.***

(a) An individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider.

(b) An individual may revoke all or part of an advance health-care directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

. . .

(e) An advance health-care directive that conflicts with an earlier advance health-care directive revokes the earlier directive to the extent of the conflict.

Comment

Subsection (b) provides that an individual revoke any portion of an advance health-care directive at any time and in any manner that communicates an intent to revoke. However, a more restrictive standard applies to the revocation of the portion of a power of attorney for health care relating to the designation of an agent. Subsection (a) provides that an individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider. This higher standard is justified by the risk of a false revocation of an agent's designation or of a misinterpretation or miscommunication of a principal's statement communicated through a third party. For example, without this higher standard, an individual motivated by a desire to gain control over a patient might be able to assume authority to act as agent by falsely informing a health-care provider that the principal no longer wishes the previously designated agent to act but instead wishes to appoint the individual.

. . .

Subsection (e) establishes a rule of construction permitting multiple advance health-care directives to be construed together in order to determine the individual's intent, with the later advance health-care directive superseding the former to the extent of any inconsistency."

Compare this simplicity with the very complex and unclear provisions of sections 4150, 4151, 4152 and 4153 of S.B. 1907.

Let's take an example and try to figure out how these sections would work in a typical case:

EX: P, while competent, executes a DPAHC naming A as his attorney in fact. Later P suffers a stroke and is taken to Hospital X. The stroke has rendered P speechless though he is otherwise alert and is mentally competent. P's physician recommends an operation on the left hemisphere of P's brain, to reduce the effect of the stroke; and explains, in detail, both the pros and cons of the surgery -- telling P he may live for 5-10 years if the surgery is successful, but may die in 2-3 weeks if the surgery is not successful. P is uncertain. P's DPAHC says P does not want any life support equipment if he is ever in a coma for 30 days; and under those circumstances, A is to let P die!

Situation 1: P wants to amend his DPAHC to provide, in substance, that if he is ever in a coma he is to be placed on life support equipment at once and that life support equipment is not to be withdrawn irrespective of the cost, or of his deteriorating medical prognosis.

Situation 2: A visits P in Hospital X. P does not like A's attitude toward P and toward dying. P wants to revoke the *authority* of A under P's DPAHC, and appoint C as his attorney in fact, but otherwise, for the present, make no other changes in his DPAHC.

How does P proceed under S.B. 1907?

As to Situation 1: P must proceed under 4150 a)(2):

> "(2) By an instrument executed in the same manner as a power of attorney may be executed."

The same complex execution and witnessing and/or acknowledgement requirements discussed above! Not very easy for speechless P to accomplish from his hospital bed!

As to Situation 2: P has two choices:

1. He can modify the DPAHC under 4150(a)(2) discussed above.

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2. He can terminate the "authority of an attorney in fact" under 4152 and 4153 by revoking A's authority under 4153(a)(3):

> "(2) *Where 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.* This paragraph is not subject to limitation in the power of attorney."

That revocation of the *agent's authority* can be done orally; then P has to use 4150(a)(2) to create a new agent to replace A!

The Judicial Committee should consider rewriting Section 4150, 4151, 4152 and 4153 into a simpler, clearer, system for revocation/amendment of a DPAHC.

7. Unconstitutional Restrictions In S.B. 1907.

The statutory restrictions on the principal's right to authorize his attorney in fact to consent to the five medical procedures, contained in Section 4722 of S.B. 1907 are violations of the principal's "liberty interest" under *Cruzan v. Missouri* (1990) 497 U.S. 261. See discussion under Section IV above.

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8. There Should Be A "Statutory Surrogacy" Provision.

There most egregious omission in S.B. 1907 is the failure to provide for a "statutory surrogate." See sections 1(17) and 5 of attached UHCDA for a clear explanation of the concept.

Sincerely,

Harley J. Spitler

HJS:wp

Enclosure

cc: Senator Tom Campbell

20732759

CALIFORNIA LAND TITLE ASSOCIATION
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May 7, 1994

TO: Stan Ulrich, CLRC
FR: Craig C. Page, Vice President and Legislative Counsel
RE: SB 1907 (Campbell) Amendments

Attached are a few amendments our members have requested based on the April 29, 1994 version you sent me.

CP/dc

AMENDMENTS TO SB 1907 (CAMPBELL)
(as introduced)

NOTE: These amendments amend the CLRC amendments of April 29, 1994. Page references are to the CLRC page numbers, NOT the page numbers of the bill.

Amendment 4

4305(e) on page 2 should read:

(e) The certificate may not be required to contain other provisions of the power of attorney which the third party relying on the power of attorney determines to be unrelated to the pending transaction.

4306(b) on pages 2-3 should read:

(b) A person who does not have actual knowledge that the statements in the certificate are incorrect may assume without inquiry of any person the truthfulness and the existence of the facts stated in the certificate. Actual knowledge may not be inferred solely from the fact that a copy of all or part of the power of attorney is held by the person relying on the certificate. Any transaction, ~~and any lien created thereby, entered into by the attorney-in-fact and a person acting in reliance on the certificate is enforceable~~ presented by the attorney-in-fact, including but not limited to, a lien on the property involved in the transaction, is binding against the principal's property involved in the transaction. However, if the person has actual knowledge that the attorney-in-fact is acting outside the scope of the authority represented as granted in the certificate, the transaction is not enforceable against the principal's property.

4306(d) on page 3 should read:

(d) Except in the context of litigation and subject to subdivision (f) of Section 4305, a person making a demand for the power of attorney in addition to a an acceptable certificate, as set forth in 4305(e), to prove facts set forth in the certificate acceptable to the third party ~~is~~ may be liable for damages, including attorney's fees, incurred as a result of ~~the~~ an unreasonable refusal to accept the certificate in place of the requested documents, if the court determines that the person acted in bad faith in requesting the documents.

GARY T. YANCEY
District Attorney

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF CONTRA COSTA

TO: Stan Ulrich
Law Revision Commission

FROM: James L. Sepulveda
Deputy District Attorney

DATE: May 9, 1994

SUBJECT: SB 1907

Having reviewed Senate Bill 1907, the February 25, 1994 version, I would like to make a suggestion. In my over ten years as chief of the Contra Costa County District Attorney consumer and criminal fraud unit, I have had numerous occasions to see attorneys-in-fact rip-off and otherwise plunder the assets of the principal. The two most common methodologies that attorneys-in-fact use to accomplish their nefarious goals are "gifts" to themselves or an entity under their control or "loans" to themselves or an entity under their control. In that the attorney-in-fact is acting under the legal authorization of a power of attorney, prosecution for theft is virtually impossible. Therefore, because California has no generic "fraud" statute, the principal's only recourse is to pursue a civil action for breach of fiduciary duty. However, because the principal may no longer have any assets thanks to the attorney-in-fact, the civil remedy is usually illusory as there are no assets to hire or retain counsel.

SB 1907 seems to address the "gift" aspect of my concern expressed above in section 4264(c). What I would propose is that after the word gift in subsection (c), the words "or loan" be inserted. The result of such an amendment will prohibit the attorney-in-fact from lending to himself or others the property of the principal unless expressly authorized in the power of attorney. There is obviously still room for unscrupulous persons to take advantage of the unwary but this law would be a vast improvement over what we have now.

Thank you for your consideration.