
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 5-6, 2000
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on October 5-6, 2000.

Commission:

Present: David Huebner, Chairperson
Joyce G. Cook, Vice Chairperson
Bill Morrow, Senate Member
Sanford M. Skaggs (Oct. 6)
Howard Wayne, Assembly Member (Oct. 5, teleconference)

Absent: Bion M. Gregory, Legislative Counsel

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel

Consultants: James E. Acret, Mechanic's Liens (Oct. 5)
Edward C. Halbach, Jr., Estate Planning and Probate Law
(Oct. 5)
Michael Hone, Unincorporated Nonprofit Association Law
(Oct. 6)
William M. McGovern, Probate Law (Oct. 5)
Frederick Tung, Bankruptcy Law (Oct. 6)

Other Persons:

Sam Abdulaziz, Abdulaziz & Grossbart, North Hollywood (Oct. 5)
Herb Bolz, Office of Administrative Law, Sacramento (Oct. 6)
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
(Oct. 5)
John Doherty, Aids Legal Services, San Jose (Oct. 5)
Theresa Drought, Kaiser Permanente, Oakland (Oct. 5)
Maxine Ferguson, Department of Transportation, Sacramento (Oct. 5)
Peter C. Freeman, Lumber Association of California & Nevada, Barr Lumber, San
Bernardino (Oct. 5)
Ellen Gallagher, Contractors State License Board, Sacramento (Oct. 5)
Janet Grove, Administrative Office of the Courts, San Francisco (Oct. 6)

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ADMINISTRATIVE MATTERS

Schedule of Future Meetings

The Commission considered Memorandum 2000-57, relating to the schedule of future Commission meetings.

The Commission tentatively rescheduled the November/December meeting for December 7-8 in Los Angeles. This decision is subject to confirmation with absent Commissioners that the rescheduled date will work for them. If not, the Executive Secretary should consult with the Chairperson in selecting an alternate date for that meeting.

The remainder of the proposed meeting schedule as set out in the memorandum was adopted as submitted.

New Topics and Priorities

The Commission considered Memorandum 2000-58, relating to new topics and priorities. The Commission adopted the staff recommendations summarized at pages 22-23 of the memorandum, subject to the following decisions.

(1) The Commission’s authority to study arbitration should be broadened to include other forms of alternative dispute resolution. In addition the Commission will seek to engage an expert consultant to prepare a general review of the existing arbitration statutes (both contractual and judicial), with the view to modernizing them and improving their operation; the study might include a review of developments in other jurisdictions. The staff should report back to the Commission with a proposal on this matter.

(2) As a follow-up to the administrative rulemaking project, the Commission will address immediately two issues that have been identified for possible cleanup legislation in 2000 — (a) the definition of “proposed action” and (b) the conflicting statutes on internet publication. Other cleanup issues that are identified should be held for later attention by the Commission, a year from now.

(3) With regard to the possible study of civil grand juries, the Commission was concerned that such a project could take the Commission into politicized issues it will be unable to deal with effectively. The Commission was also concerned that it currently is occupied with other major priority studies that will preclude it from devoting the careful attention to this matter that it deserves. If the Legislature decides to assign this project to the Commission, the Commission believes it would need an ample amount of time to complete it.

1 (4) The Commission has received a response from the Supervising Probate
2 Attorney of the Los Angeles Superior Court to its inquiry about problems in trust
3 administration. The Commission requested the Executive Secretary to express its
4 appreciation for the information and indicate that the Commission currently has
5 a full calendar but may be able to turn its attention to this matter in the future.

6 (5) In connection with its investigation of environmental restrictions that
7 neither run with the land nor are enforceable as equitable servitudes, the staff
8 should check to see whether corrective legislation was adopted in the 2000
9 legislative session.

10 **Report of Executive Secretary**

11 The Executive Secretary reported that there have been no new appointments
12 to the Commission by the Governor. Currently there are four vacancies to be
13 filled.

14 The staff attorney hired to begin work in September has decided that he will
15 not work for the Commission. We have begun the process of recruiting a new
16 attorney as a replacement.

17 The Commission's administrative assistant is leaving due to her family's
18 relocation. We have begun the process of recruiting a new administrative
19 assistant as a replacement.

20 **2000 LEGISLATIVE PROGRAM**

21 The Commission considered Memorandum 2000-59, relating to the
22 Commission's 2000 legislative program. The Executive Secretary updated the
23 memorandum with the information that the Governor had signed all bills
24 sponsored by the Commission that had passed the Legislature. The Governor
25 also signed SB 2140, which directs the Commission by January 1, 2002, to
26 recommend repeal of statutory provisions rendered obsolete by trial court
27 restructuring.

28 **STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT**

29 The Commission considered Memorandum 2000-69 and its First Supplement,
30 relating to unincorporated associations. The Commission directed the staff to do
31 the following:

- 1 (1) Consolidate existing statutory law into a comprehensive
2 Unincorporated Associations Act, reserving space for provisions
3 that might be added later.
- 4 (2) Discuss possible rules for contract and tort liability of members
5 and officers of an unincorporated association.
- 6 (3) Discuss possible improvements to the rules governing property
7 ownership and management by an unincorporated association.
- 8 (4) Identify the types of governance provisions that could be applied
9 to unincorporated associations and provide a general analysis of
10 the issues raised by each type.

11 STUDY D-1100 – MUNICIPAL BANKRUPTCY

12 The Commission considered Memorandum 2000-66 concerning issues in
13 municipal bankruptcy raised in Prof. Frederick Tung's background study.
14 Chairperson Huebner reported that his discussions with the Governor's office
15 indicated they did not think it was appropriate for the Governor to have the
16 gatekeeper role in determining whether a municipality could file for bankruptcy
17 protection. The Commission discussed the issues generally, but deferred making
18 policy decisions until the views of representatives of municipalities can be
19 obtained. The staff will attempt to get commentary from appropriate
20 organizations and their attendance at a future meeting. Senator Morrow offered
21 the assistance of his office in piquing the interest of local entities.

22 STUDY EM-456 – WITHDRAWAL OF PREJUDGMENT DEPOSIT IN EMINENT DOMAIN

23 The Commission considered Memorandum 2000-64 and its First Supplement,
24 relating to comments on the tentative recommendation on withdrawal of the
25 prejudgment deposit in eminent domain. After discussion of the matter, the
26 Commission requested that it be rescheduled for further consideration at the next
27 meeting.

28 STUDY EM-458 – EARLY DISCLOSURE OF VALUATION DATA AND
29 RESOLUTION OF ISSUES IN EMINENT DOMAIN

30 The Commission considered Memorandum 2000-65 and its First Supplement,
31 relating to comments on the tentative recommendation on early disclosure of
32 valuation data and resolution of issues in eminent domain. The Commission

1 approved the tentative recommendation as a final recommendation with the
2 changes identified in the memorandum, except as follows.

3 **Use of Precondemnation Offer as Admission**

4 The proposed amendment of Government Code Section 7267.1 to protect
5 from admissibility both the condemnor's appraisal and the property owner's
6 valuation opinion, should be limited to matters "prepared for the purpose of
7 negotiation" pursuant to the Relocation Assistance Act.

8 **Impeachment of Prejudgment Deposit Witness**

9 The Commission requested the staff to prepare for its consideration at a
10 subsequent meeting an analysis of issues concerning the prejudgment deposit
11 and its admissibility at trial.

12 **STUDY F-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE**

13 See entry in these Minutes under Study L-911.

14 **STUDY H-820 – MECHANIC'S LIENS**

15 The Commission considered Memorandum 2000-63, and its First and Second
16 Supplements, concerning draft proposals for a mandatory home improvement
17 payment bond and other alternatives set out in the supplements. The
18 Commission directed the staff to prepare an analysis of the option of using joint
19 control agencies; this is the one frequently mentioned approach that has not yet
20 been presented. The Commission would also like the staff to see if
21 representatives of general contractors and homeowners groups would be willing
22 to attend the meeting to give their perspective on the issues under consideration.

23 **STUDY H-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE**

24 See entry in these Minutes under Study L-911.

25 **STUDY J-1307 - LAW LIBRARY BOARD OF TRUSTEES**

26 The Commission considered Memorandum 2000-70 and its First Supplement,
27 concerning comments on the revised tentative recommendation on *Law Library*
28 *Board of Trustees*. The Commission directed the staff to prepare a draft
29 recommendation incorporating the following revisions:

1 **Number of Lay Trustees**

2 As recommended by the Council of California County Law Libraries
3 (“CCCLL”), the number of lay trustees serving on a law library board at the same
4 time should be limited to two. CCCLL’s proposed language should be revised
5 along the following lines:

6 (e) ~~Notwithstanding the above, no~~ No more than two (2)
7 trustees shall be residents of the county who are not judges or
8 members of the ~~bench or~~ bar of the county.

9 The first clause (“Notwithstanding the above ...”) is unnecessary because the
10 proposed amendment of Business and Professions Code Section 6301 starts with
11 “Except as otherwise provided by statute”

12 **Members of the Bar of the County**

13 Business and Professions Code Section 6301 refers to “members of the bar of
14 the county” but does not define this term. The provision should be revised to
15 eliminate this ambiguity. The Commission tentatively determined that “a
16 member of the bar of the county” should include any member of the State Bar
17 who resides in or practices law in the county. The Commission directed the staff
18 to research how the term is used elsewhere in the codes and propose appropriate
19 language on this point.

20 **Trial Court Unification**

21 Business and Professions Code Section 6301 should be reorganized to reflect
22 trial court unification. First, the provision should state how a law library board is
23 to be selected in a county with a unified superior court. Then a separate
24 paragraph should explain how a law library board is to be selected in a county in
25 which the courts have not unified. If the courts in all counties unify, it will then
26 be easy to delete this paragraph and limit the provision to unified superior
27 courts.

28 **STUDY J-1309 – EXPIRED PILOT PROJECTS**

29 The Commission considered Memorandum 2000-73, relating to expired pilot
30 projects. It approved the staff draft recommendation as its final recommendation.

1 STUDY J-1320 – CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION

2 The Commission considered Memorandum 2000-72, concerning issues
3 relating to Code of Civil Procedure Section 396a (statement of jurisdictional facts)
4 and technical corrections suggested by Mark Lomax. The Commission
5 determined that the issues relating to Section 396a require further study and
6 should not be addressed in the test proposal for the Commission’s joint study
7 with the Judicial Council, which is targeted for introduction in the Legislature in
8 early 2001. The staff should work with staff from the Administrative Office of the
9 Courts (“AOC”) to develop a plan for addressing these issues. The Commission
10 suggested that AOC staff take the lead role in this project. With regard to the
11 technical issues raised by Mr. Lomax, the Commission approved the draft
12 attached to Memorandum 2000-72 as a tentative recommendation to be circulated
13 for comment. In addition, the Commission directed the staff to research
14 provisions on filing and entry of judgment, to identify ambiguities,
15 anachronisms, and other clean-up possibilities.

16 The Commission also considered Memorandum 2000-71, concerning
17 comments on the tentative recommendation on *Elimination of Unnecessary*
18 *Procedural Differences Between Limited and Unlimited Civil Cases*. The Commission
19 made the following decisions:

20 **Code Civ. Proc. § 89. Implied court authority in limited and unlimited civil**
21 **cases**

22 Proposed Code of Civil Procedure Section 89 should be revised as follows:

23 **Code Civ. Proc. § 89 (added). Implied court authority in limited**
24 **and unlimited civil cases**

25 SEC. _____. Section 89 is added to the Code of Civil Procedure, to
26 read:

27 89. (a) The existence of a statute relating to the authority of the
28 court in a limited civil case does not, by itself, imply that the same
29 court authority does or does not exist in an unlimited civil case.

30 (b) The existence of a statute relating to the authority of the
31 court in an unlimited civil case does not, by itself, imply that the
32 same court authority does or does not exist in a limited civil case.

33 **Comment.** Section 89 is added to provide guidance in
34 interpreting statutory provisions that expressly authorize particular
35 conduct in a limited civil case but are silent as to an unlimited civil
36 case, or vice versa. See, e.g., Section 402.5 (transfer of limited civil
37 case).

1 **§§ 425.10, 425.11. Pleading personal injury and wrongful death damages**

2 The Commission directed the staff to present further analysis on the best
3 means of conforming Government Code Section 72055 with the proposed
4 amendments of Code of Civil Procedure Sections 425.10 and 425.11. This should
5 include research on why Government Code Section 72055 requires a fee of \$90
6 where the amount demanded exceeds \$10,000, and a fee of \$83 where the amount
7 demanded is \$10,000 or less. The staff should also explore the extent to which
8 guidance as to stating the demand could be provided by a rule of court, rather
9 than in Government Code Section 72055 and Code of Civil Procedure Section
10 425.10.

11 **§ 489.220. Undertaking for writ of attachment or protective order**

12 The proposed amendment of Code of Civil Procedure Section 489.220 should
13 remain as in the tentative recommendation. The court should not be given
14 discretion to reduce the initial undertaking below \$10,000. The preliminary part
15 of the tentative recommendation (narrative discussion) should be revised to more
16 fully explain the reasons for requiring a \$10,000 minimum undertaking.

17 **§ 631. Waiver of jury**

18 Code of Civil Procedure Section 631 should be amended along the lines
19 recommended in Memorandum 2000-71:

20 **Code Civ. Proc. § 631 (amended). Waiver of trial by jury**

21 SEC. _____. Section 631 of the Code of Civil Procedure is
22 amended to read:

23 631. (a) Trial by jury may be waived by the several parties to an
24 issue of fact in any of the following ways:

25 (1) By failing to appear at the trial.

26 (2) By written consent filed with the clerk or judge.

27 (3) By oral consent, in open court, entered in the minutes or
28 docket.

29 (4) By failing to announce that a jury is required, at the time the
30 cause is first set for trial, if it is set upon notice or stipulation, or
31 within five days after notice of setting if it is set without notice or
32 stipulation.

33 (5) By failing to deposit with the clerk, or judge, advance jury
34 fees 25 days prior to the date set for trial, except in unlawful
35 detainer actions where the fees shall be deposited at least five days
36 prior to the date set for trial, or as provided by subdivision (b). An
37 advance jury fee deposited pursuant to this paragraph may not
38 exceed a total of one hundred fifty dollars (\$150).

1 (6) By failing to deposit with the clerk or judge, promptly after
2 the impanelment of the jury, a sum equal to the mileage or
3 transportation (if allowed by law) of the jury accrued up to that
4 time.

5 (7) By failing to deposit with the clerk or judge, at the beginning
6 of the second and each succeeding day's session a sum equal to one
7 day's fees of the jury, and the mileage or transportation, if any.

8 (b) ~~In a superior court action, other than a limited civil case, if~~
9 ~~a jury is demanded by either party in the memorandum to set the~~
10 ~~cause for trial a party and the party, prior to trial, by announcement~~
11 ~~or by operation of law, waives a trial by jury, then all adverse~~
12 ~~parties shall have five days following receipt of the notice of the~~
13 ~~waiver that party shall promptly notify all other parties of the~~
14 ~~waiver, in writing or in open court. Each party adverse to the party~~
15 ~~who waived the trial by jury has five days after notice of the waiver~~
16 ~~is given to file and serve a demand for a trial by jury and to deposit~~
17 ~~any advance jury fees that are then due. If the party who waived a~~
18 ~~trial by jury does not promptly notify all other parties of the~~
19 ~~waiver, any other party, or the clerk or judge, may provide notice of~~
20 ~~the waiver, but is not required to do so. Where more than one~~
21 ~~notice of the waiver is given to a party, the five-day period to file~~
22 ~~and serve a demand for a trial by jury and to deposit advance jury~~
23 ~~fees commences on giving of the first notice.~~

24 (c) When the party who has demanded trial by jury either (1)
25 waives the trial upon or after the assignment for trial to a specific
26 department of the court, or upon or after the commencement of the
27 trial, or (2) fails to deposit the fees as provided in paragraph (6) of
28 subdivision (a), trial by jury shall be waived by the other party by
29 either failing promptly to demand trial by jury before the judge in
30 whose department the waiver, other than for the failure to deposit
31 the fees, was made, or by failing promptly to deposit the fees
32 described in paragraph (6) of subdivision (a).

33 (d) The court may, in its discretion upon just terms, allow a trial
34 by jury although there may have been a waiver of a trial by jury.

35 **Comment.** Subdivision (b) of Section 631 is amended to apply to
36 both limited and unlimited civil cases. This codifies existing law.
37 See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 &
38 Comment. For unlimited civil cases, see Section 88. For waiver of a
39 jury in a criminal case, see Cal. Const. art. I, § 16.

40 Subdivision (b) is also amended to delete the reference to the
41 memorandum to set the cause for trial. The reference is
42 unnecessary and may also be obsolete because in many cases an at-
43 issue memorandum is no longer required. See R. Weil & I. Brown,
44 Jr., *California Practice Guide: Civil Procedure Before Trial, Case*
45 *Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

1 As amended, subdivision (b) also clarifies that the party who
2 waives a jury after demanding one is responsible for providing
3 notice of the waiver. If that party fails to provide notice of the
4 waiver as required, another party (or the clerk or judge) is
5 permitted but not required to provide the notice instead. Failure to
6 provide timely notice may be grounds for a continuance or other
7 remedial action. See *Leslie v. Roe*, 52 Cal. App. 3d 686, 688, 125 Cal.
8 Rptr. 157 (1975).

9 Finally, the amendment provides that the time period for
10 demanding a jury trial and depositing jury fees runs from the date
11 of giving notice rather than from the date of receiving notice. This is
12 intended to facilitate proof of whether a jury demand is timely. For
13 extension of the five-day period where notice is given by mail or
14 Express Mail, see Section 1013.

15 **§ 685.030. Satisfaction of judgment**

16 The proposed amendment of Code of Civil Procedure Section 685.030 should
17 remain as in the tentative recommendation.

18 **§§ 720.160, 720.260. Undertaking of creditor in case of third party claim**

19 The proposed amendments of Code of Civil Procedure Sections 720.160 and
20 720.260 should remain as in the tentative recommendation. The court should not
21 be given discretion to reduce the initial undertaking below the lesser of \$10,000
22 or “twice the amount of the execution lien as of the date of levy or other
23 enforcement lien as of the date it was created.” The preliminary part should be
24 revised to more fully explain the reasons for this approach.

25 **§ 1134. Confession of judgment**

26 The proposed amendment of Code of Civil Procedure Section 1134 should
27 remain as in the tentative recommendation. This reform should be included in
28 the test proposal for the Commission’s joint study with the Judicial Council, not
29 delayed until it can be incorporated into a comprehensive proposal on filing fees.

30 **STUDY L-605 – RULES OF CONSTRUCTION FOR TRUSTS**

31 The Commission considered Memorandum 2000-75, reviewing the
32 Commission consultant’s background study on the rules of construction for
33 trusts. The Commission directed the staff to start preparing material for
34 development of a tentative recommendation consistent with the staff
35 recommendations in the memorandum, subject to the following decisions.

1 **Prob. Code § 21102. Intention of transferor; rules of construction apply unless**
2 **instrument indicates contrary intention**

3 The Comment to subdivision (a) of this section should include discussion of
4 the possibility of reformation for mistake, with reference to appropriate
5 provisions of the Evidence Code and the Parol Evidence Rule. A note should also
6 be added when the proposal is circulated for comment, specifically requesting
7 input as to whether the subdivision requires amendment.

8 **§ 21104. “Testamentary gift” defined**

9 “Testamentary gift” terminology should be left as is for the time being.
10 During the course of this project we will see whether other terminology, such as
11 “at death transfer” or another phrase yet to be suggested, appears to be
12 preferable.

13 **§ 21105. Will passes all property including after-acquired property**

14 This section, which by its terms applies to wills, should not be broadened to
15 apply to other instruments.

16 **§ 21110. Anti-lapse**

17 With respect to the issue whether “mere words of survival” in an instrument
18 should override the anti-lapse statute, the Commission requested the staff to
19 provide it with a more detailed analysis of approaches used in other
20 jurisdictions, and factors that might be taken into consideration in crafting an
21 appropriate anti-lapse statute, including whether a lawyer-drafted instrument or
22 institutional form is involved, whether disinheritance of an entire line would
23 result, whether persons not in being at the time the instrument was drafted
24 would be affected, and whether a specific gift or a residuary gift is involved.

25 With respect to application of the anti-lapse statute to future interests, the
26 Commission requested the same sort of treatment as with words of survival. The
27 staff should provide additional information about various considerations that
28 might be involved in crafting a finely-tuned anti-lapse statute that takes into
29 account considerations such as anti-lapse effect, limitation to kindred, and the
30 like.

1 **§ 21133. Unpaid proceeds of sale, condemnation, or insurance, property**
2 **obtained as a result of foreclosure**

3 The Commission felt this section should be preserved but modernized. The
4 staff should look at revised Uniform Probate Code language.

5 **§ 21134. Sale by conservator; payment of proceeds of specifically devised**
6 **property to conservator**

7 The Commission felt this section should be preserved but modernized. The
8 staff should look at revised Uniform Probate Code language.

9 **§ 21135. Ademption by satisfaction**

10 The Commission felt this section should be preserved but modernized. The
11 staff should look at revised Uniform Probate Code language.

12 **STUDY L-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE**

13 The Commission considered Memorandum 2000-60 and its First, Second, and
14 Third Supplements, relating to estate planning during dissolution of marriage. It
15 approved the staff draft recommendation as its final recommendation, with the
16 following changes:

17 **Fam. Code § 2040. Automatic temporary restraining order**

18 Proposed subdivision (b) will be revised as follows:

19 (b) Nothing in this section restrains any of the following:

20 (1) Creation, modification, or revocation of a will.

21 (2) Revocation of a nonprobate transfer.

22 (3) Elimination of a right of survivorship ~~that is owned jointly~~
23 ~~by the parties.~~

24 (4) Creation of an unfunded living trust.

25 (5) Execution and filing of a disclaimer pursuant to Part 8
26 (commencing with Section 260) of Division 2 of the Probate Code.

27 The Comment to Section 2040 will be revised as follows:

28 **Comment.** Section 2040 is amended to clarify the scope of the
29 automatic temporary restraining order with respect to estate
30 planning changes.

31 Subdivision (a)(4) restrains modification of a nonprobate
32 transfer “in a manner that affects the disposition of property subject
33 to the transfer.” Modifications that are restrained as affecting the
34 disposition of property include a change of beneficiary or a donor’s
35 modification of the terms of a power of appointment (this would

1 not include exercise of a power of appointment by a donee).
2 Modifications that are not restrained include naming a new trustee
3 or successor trustee (so long as the change does not affect the
4 trustee's powers or duties with respect to disposition of trust
5 property).

6 Subdivision (b) provides that the restraining order does not
7 restrain elimination of a right of survivorship ~~between owners of~~
8 ~~jointly owned property.~~ This codifies *Estate of Mitchell*, 76 Cal. App.
9 4th 1378, 91 Cal. Rptr. 2d 192 (1999) (restraining order does not
10 restrain severance of joint tenancy). The fact that the restraining
11 order does not restrain revocation of a nonprobate transfer does not
12 mean that such a transfer is necessarily subject to revocation by one
13 party without the consent of the other party. The question of
14 whether a nonprobate transfer is subject to unilateral revocation is
15 governed by the terms of the nonprobate transfer and applicable
16 substantive law. See, e.g., Prob. Code § 5506 (action by all surviving
17 joint owners required to cancel beneficiary registration of jointly-
18 owned security); 31 C.F.R. § 353.51 (restricting changes in
19 ownership of jointly-owned Series EE savings bond).

20 Subdivision (b)(4) provides that the restraining order does not
21 restrain creation of one or more revocable or irrevocable unfunded
22 living trusts. However, the transfer of property to fund a living
23 trust would be restrained under subdivision (a)(2). An unfunded
24 living trust created during a dissolution proceeding could serve as
25 a receptacle for property subject to a pour-over provision in a will.
26 Such a trust could also be funded by property that has been
27 released from restraint by the restraining order.

28 Subdivision (d) defines "nonprobate transfer" for the purposes
29 of this section. The definition expressly incorporates instruments
30 described in Probate Code Section 5000, including a "marital
31 property agreement." Thus, an agreement between spouses as to
32 how to divide community property between them on either of their
33 deaths is a nonprobate transfer for the purposes of this section. See
34 Prob. Code § 100(b) (agreement as to division of community
35 property on death of spouse).

36 STUDY L-4003 – FAMILY CONSENT IN HEALTH CARE
37 DECISIONMAKING FOR ADULTS

38 The Commission considered Memorandum 2000-62, its First and Second
39 Supplements, and materials distributed at the meeting (see Third Supplement),
40 relating to family consent to health care for incapacitated adults. The
41 Commission discussed the latest draft and its alternatives, and heard the views of
42 interested persons.

1 Because it has become apparent, after months of considering a variety of
2 drafts, that it is impossible to arrive at a consensus of the interested persons, the
3 Commission decided to abandon efforts to recommend legislation setting
4 standards for family consent or statutory default surrogates. However, there are
5 a number of minor substantive and technical issues that could be addressed in
6 follow-up legislation. Accordingly, the Commission directed the staff to prepare
7 a draft tentative recommendation covering the matters discussed below for
8 consideration at the next meeting:

9 **Prob. Code § 4609. “Capacity”**

10 The proposal to provide a separate capacity standard for execution of an
11 advance directive or selecting or disqualifying a surrogate was approved. The
12 Commission rejected the suggestion that the “sound mind” standard be changed
13 in the witness statement.

14 **§ 4659. Supervising health care provider as agent**

15 The tentative recommendation should include language to make clear that a
16 supervising health care provider cannot be an agent.

17 **§ 4711. Patient’s designation of surrogate**

18 The Commission approved the proposal to amend Section 4711 to make clear
19 that designation of a surrogate replaces an agent named in a power of attorney
20 for health care only temporarily, unless the patient also expresses the intent to
21 revoke the agent’s authority under Section 4695(a).

22 However, further consideration should be given to the rule governing the
23 duration of the surrogate’s authority, which is limited to the period of treatment
24 or illness or the stay in the health care institution. In the nursing home setting,
25 this rule does not provide any effective limitation on the duration of the
26 surrogate’s authority. After a discussion with interested persons, it appeared that
27 the most fruitful approach would be to replace the named agent with the
28 surrogate only while the agent is not available, unless the patient expresses the
29 intent to revoke the agent’s authority under Section 4695(a). Where there is not
30 an agent, it may be advisable to restrict the surrogate’s authority to a specific
31 time period, such as 30 days. Where there is no agent named in a power of
32 attorney for health care, the existing limitation on oral surrogate designations is
33 acceptable, whether in acute care or long-term care settings, because the orally-

1 designated surrogate is not replacing an agent named in a formal document that
2 presumptively was carefully prepared.

3 **§§ 4712-4713.5. Family consent**

4 Consideration of the latest draft approach to establishing statutory family
5 consent guidelines and the comments of interested persons at the meeting made
6 clear that forming a consensus in this area is probably impossible. The
7 Commission decided that, lacking a general consensus, it was not fruitful to
8 continue working on this aspect of the Health Care Decisions Law. Attempts to
9 answer the concerns of nursing home reform activists since April 1999 have
10 resulted in draft proposals that are unacceptable to health care professionals. The
11 Commission also decided not to attempt a more modest approach, such as listing
12 potential surrogate decisionmakers without specifying the manner of
13 determining who should have priority.

14 **§ 4769. Notice of hearing to compel compliance**

15 For the purpose of getting comments from interested persons, the tentative
16 recommendation should include a proposal permitting a petition requiring
17 health care providers to honor the agent's health care decisions.

18 **STUDY N-304 – ADMINISTRATIVE RULEMAKING: EXEMPTIONS FROM APA**

19 The Commission considered Memorandum 2000-67, relating to rulemaking
20 under Penal Code Section 5058. The Commission approved the tentative
21 recommendation as its final recommendation, subject to the following changes
22 and limitations:

23 **Penal Code § 5058.1. Pilot program regulations**

24 Proposed Penal Code Section 5058.1 and its Comment will be revised as
25 follows:

26 5058.1. (a) For the purposes of this section, "pilot program"
27 means a program implemented on a temporary and limited basis in
28 order to test and evaluate the effectiveness of the program, develop
29 new techniques, or gather information.

30 (b) The adoption, amendment, or repeal of a regulation by the
31 director or the director's designee, to implement a legislatively
32 mandated or authorized pilot program or a departmentally
33 authorized pilot program, is exempt from Chapter 3.5 (commencing

1 with Section 11340) of Part 1 of Division 3 of Title 2 of the
2 Government Code, if the following conditions are met:

3 (1) A pilot program affecting male inmates affects no more than
4 10 percent of the total state male inmate population; a pilot
5 program affecting female inmates affects no more than 10 percent
6 of the total state female inmate population; and a pilot program
7 affecting male and female inmates affects no more than 10 percent
8 of the total state inmate population.

9 (2) The director certifies in writing that the regulations apply to
10 a pilot program that qualifies for exemption under this section. The
11 certification shall include a description of the pilot program and of
12 the methods the department will use to evaluate the results of the
13 pilot program.

14 (3) The certification and regulations are filed with the Office of
15 Administrative Law and the regulations are made available to the
16 public by publication pursuant to subparagraph (F) of paragraph
17 (3) of subdivision (b) of Section 6 of Title 1 of the California Code of
18 Regulations.

19 (4) ~~The pilot program would not have substantially the same~~
20 ~~effect as another pilot program implemented under this section.~~

21 (5) An estimate of fiscal impact is completed pursuant to
22 Sections 6650 to 6670, inclusive, of the State Administrative Manual.

23 (c) The adoption, amendment, or repeal of a regulation pursuant
24 to this section becomes effective immediately upon filing with the
25 Secretary of State.

26 (d) ~~The adoption, amendment, or repeal of a regulation~~
27 ~~pursuant to this section lapses by operation of law~~ A regulation
28 adopted pursuant to this section is repealed by operation of law,
29 and the amendment or repeal of a regulation pursuant to this
30 section is reversed by operation of law, two years after the
31 commencement of the pilot program being implemented, unless the
32 adoption, amendment, or repeal of the regulation is promulgated
33 by the director pursuant to Chapter 3.5 (commencing with Section
34 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For
35 the purpose of this subdivision, a pilot program commences on the
36 date the first regulatory change implementing the program is filed
37 with the Secretary of State.

38 **Comment.** Section 5058.1 continues former Section 5058(d)(1),
39 without substantive change, except as described below:

40 Subdivision (a) defines “pilot program” for the purposes of this
41 section. While there is no general statutory definition of “pilot
42 program,” a survey of statutes establishing pilot programs reveals
43 certain common characteristics: experimental purpose and limited
44 duration and scope. See, e.g., Bus. & Prof. Code § 3537.15 (limited
45 implementation “to test validity and effectiveness” of program

1 before full implementation); Fam. Code § 3032 (evaluation of
2 program to be reported to Legislature). See also Third New
3 International Dictionary 1716 (P. Gove ed., 1971) (“pilot” means
4 “serving on a small scale ... in checking technique or cost
5 preparatory to full scale activity”). Subdivision (a) is consistent
6 with this common usage. Pilot programs may include programs
7 initiated by the department of Corrections in response to a court
8 order or negotiated settlement directing the Department to
9 establish the program.

10 Subdivisions (b)-(d) provide that the exemption for regulations
11 implementing a pilot program applies to amendment and repeal of
12 a regulation, and not just adoption.

13 Subdivision (b)(1) requires that the certification that a regulation
14 relates to a pilot program include a description of the pilot program
15 and of the method by which the results of the pilot program will be
16 evaluated.

17 Subdivision (b)(3) corrects an erroneous reference to Section
18 6(b)(3)(F) of Title 1 of the California Code of Regulations.

19 ~~Subdivision (b)(4) prohibits adoption of a pilot program that
20 would have the same effect as another pilot program implemented
21 under this section. This ensures that the two-year time limit on the
22 effectiveness of regulations implementing a pilot program under
23 this subdivision cannot be circumvented by readopting a pilot
24 program, or by adopting a “new” pilot program that has the same
25 effect as another pilot program adopted under this section.~~

26 ~~Subdivision (b)(5) corrects an obsolete reference to the State
27 Administrative Manual.~~

28 Subdivision (d) makes clear that the duration of a rulemaking
29 action implementing a pilot program is two years from the date
30 that the pilot program commenced, regardless of when the
31 rulemaking action is taken. Thus, a change to the regulations
32 implementing a pilot program does not extend the two-year
33 maximum duration of the program.

34 **§ 5058.3. Emergency rulemaking**

35 Proposed Penal Code Section 5058.3(a)(1) will be revised as follows:

36 5058.3. (a) Emergency adoption, amendment, or repeal of a
37 regulation by the director or the director’s designee shall be
38 conducted pursuant to Chapter 3.5 (commencing with Section
39 11340) of Part 1 of Division 3 of Title 2 of the Government Code,
40 except that:

41 (1) Notwithstanding subdivision (e) of Section 11346.1 of the
42 Government Code, the initial effective period for an emergency
43 adoption, amendment, or repeal of a regulation shall be 160 days.

1 This effective period ~~can~~ may only be extended once, by an
2 additional 160 days.

3 **Clarification of Existing Law**

4 The staff will draft minor clarifications of existing law for inclusion in the
5 recommendation. These clarifications will be submitted to the Commission's
6 chair, the Department of Corrections, Senator Polanco, and the Prison Law Office
7 for review. If it is determined that the proposed clarifications would make
8 substantive changes to existing law, or would prove controversial, the chair may
9 direct the staff to remove the problematic clarification, or may direct the staff to
10 prepare a memorandum discussing the proposed clarification for the
11 Commission's consideration. In the latter case, approval of the final
12 recommendation is suspended pending consideration of the memorandum. The
13 proposed clarifications are as follows:

- 14 (1) Clarify that the special procedure for emergency rulemaking on
15 the basis of operational necessity provides an alternative to the
16 regular emergency rulemaking procedure and does not preclude
17 use of the regular procedure.
- 18 (2) Clarify that the 160-day effective period applies to any rulemaking
19 by the Department of Corrections, regardless of whether the
20 department has proceeded on the basis of operational necessity or
21 under the regular emergency rulemaking procedure.
- 22 (3) Clarify that the rule limiting the Department of Corrections to a
23 single readoption of an emergency regulation only applies to
24 regulations adopted on the basis of operational necessity. An
25 emergency regulation adopted under the regular emergency
26 rulemaking procedure may be readopted pursuant to Government
27 Code Section 11346.1(h).
- 28 (4) Clarify that a reference to the director includes a reference to the
29 director's designee, and delete all statutory references to the
30 director's designee.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary