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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
SEPTEMBER 11, 1997  
SAN DIEGO

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A meeting of the California Law Revision Commission was held in San Diego on September 11, 1997.

**Commission:**

*Present:* Christine W.S. Byrd, Chairperson  
Robert E. Cooper  
Allan L. Fink  
Arthur K. Marshall  
Sanford Skaggs  
Colin Wied

*Absent:* Dick Ackerman, Assembly Member  
Bion M. Gregory, Legislative Counsel  
Quentin L. Kopp, Senate Member  
Edwin K. Marzec, Vice Chairperson

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

**Consultants:** David M. English, Health Care Decisions  
J. Clark Kelso, Trial Court Unification

**Other Persons:**

Sherry Braheny, M.D., California Medical Association Bioethics Committee  
(Neurology), San Diego  
Susan Channick, California Western School of Law, San Diego  
Linda Daniels, University of San Diego, University Hospital, San Diego Medical  
Society Bioethics Committee, San Diego  
Don J. De Benedictis, Los Angeles Daily Journal, Los Angeles  
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento  
Glen Grossman, Association of California State Attorneys, Sacramento  
Gideon Kanner, Santa Monica

Alice Mead, California Medical Association, San Francisco  
Robert Orr, California Medical Association Council on Ethical Affairs, Loma Linda  
Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles  
Jerome Sapiro, Jr., State Bar Litigation Section and Committee on Administration of  
Justice, San Francisco  
Thomas Stolpman, Outgoing State Bar President, Long Beach  
Cara Vonk, Administrative Office of the Courts, San Francisco  
Michael Zischke, San Francisco

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## MINUTES OF JULY 21, 1997, MEETING

The Minutes of the July 21, 1997, Commission meeting were approved with the following correction:

On page 5, line 30, the references to “Chapter 5.1 civil matter” and “general civil matter” should be qualified by the phrase “or comparable terminology”.

## ADMINISTRATIVE MATTERS

### **Recognition of Service of Allan L. Fink as Chairperson**

Chairperson Christine W. S. Byrd, on behalf of the Commission and staff, thanked Commissioner Allan L. Fink for his service as chairperson during the past year and presented him a plaque in appreciation.

### **Schedule of Future Meetings**

In connection with its discussion of the 1997 Legislative Program (see below in these Minutes), the Commission changed the November meeting as follows:

**☛ (Tent. ) Two-Day Meeting**

**November 1997**

**Los Angeles**

Nov. 13 (Thu.)

10:00 am – 5:00 pm

Nov. 14 (Fri.)

9:00 am – 4:00 pm

The Commission also considered Memorandum 97-53, relating to the proposed schedule of Commission meetings for 1998. The Commission adopted the following schedule, as proposed in the Memorandum:

**January 1998**

**Los Angeles**

Jan. 23 (Fri.)

9:00 am – 5:00 pm

**February 1998**

**San Francisco**

Feb. 20 (Fri.)

9:00 am – 5:00 pm

**March 1998**

**Sacramento**

Mar. 19 (Thu.)

9:00 am – 5:00 pm

**April 1998**

**Sacramento**

Apr. 27 (Mon.)

9:00 am – 5:00 pm

**May 1998**

**No Meeting**

**June 1998**

**Sacramento**

June 8 (Mon.)

9:00 am – 5:00 pm

**July 1998**

**Sacramento**

July 13 (Mon.)

9:00 am – 5:00 pm

**August 1998**

**No Meeting**

**September 1998**

**Sacramento**

Sept. 10 (Thu.)

9:00 am – 5:00 pm

**October 1998**

**Sacramento**

Oct. 8 (Thu.)

9:00 am – 5:00 pm

**November 1998**

**Sacramento**

Nov. 9 (Mon.)

9:00 am – 5:00 pm

**December 1998**

**Los Angeles**

Dec. 7 (Mon.)

9:00 am – 5:00 pm

### **New Topics and Priorities**

The Commission considered Memorandum 97-54, relating to new topics and priorities. The Commission also heard a presentation by Professor Gideon Kanner on issues that should be addressed in the eminent domain and inverse condemnation areas.

Professor Kanner, Commission members, and staff noted the following issues that might be addressed in the eminent domain and inverse condemnation areas:

(1) Conform California's date of valuation statutes to constitutional standards announced by the United States Supreme Court that require the date of valuation to approximate the value of the property at the time of taking.

(2) Adjust California's prejudgment deposit statutes to conform with date of valuation requirements.

(3) Review the statutes governing general and special benefits and severance damages in light of recent California Supreme Court decisions.

(4) Review the statutes governing offer and demand and the award of litigation expenses.

(5) Review the procedural prerequisites for an inverse condemnation action, particularly exhaustion of administrative remedies and ripeness requirements, and relevant limitations periods.

(6) Codify the law governing compensation for loss of goodwill.

(7) Generally review the eminent domain law for procedural defects and improvements.

(8) Consider reported public utilities condemnation abuses arising from utility industry restructuring.

The Commission decided to study these matters but not to prioritize them. During 1998 background materials should be prepared, by means of a consultant study or collection of relevant materials or other appropriate techniques, so that the Commission will be in a position to take up selected issues after its other priorities for 1998 are addressed.

With respect to the suggested study of allocation of debts between the estate and surviving spouse, the Commission decided to refer this matter to the State Bar Probate Section.

With respect to the suggested study of child custody law, the Commission decided to refer this matter to an appropriate place determined by the staff, for example the Department of Social Services.

The Commission approved the proposed plan of work and priorities for the remainder of 1997, during 1998, and for future years, as set out in the Memorandum.

#### 1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-55 relating to the status of bills in the Commission's 1997 legislative program. The Executive Secretary updated the memorandum with the following information:

**AB 939 (Ortiz, Ackerman) — mediation confidentiality.** The bill was approved by the Senate and returned to the Assembly for concurrence.

**SB 209, SB 261 (Kopp) — judicial review of agency action.** The Senate Judiciary Committee is looking at November 13 in Los Angeles as a possible interim hearing date, although there are problems with that date. The Commission decided to accommodate this possibility by changing the November Commission meeting to November 13 in Los Angeles, with the tentative addition of November 14 if the hearing should be held on the 13th.

**SB 653 (Calderon), SB 453 (Solis) — ALJ code of ethics.** The Code of Ethics material was amended out of SB 653 and into SB 453. SB 453 was approved by the Assembly in a highly contested debate; Assembly Member Ackerman helped move the bill along. When the bill was returned to the Senate for concurrence it was moved to the inactive file by the author at the request of its original sponsor — ACSA — due to dissension among workers compensation referees.

#### STUDY E-100 – ENVIRONMENTAL LAW CONSOLIDATION

The Commission considered Memorandum 97-61 and the attached consultants' report on environmental law consolidation. The Commission approved circulating the suggested outline for input from the environmental community, with appropriate revision of the accompanying text. The preliminary part should point out that a consolidation of statutes would result in most existing section numbers being changed.

The first paragraph of the mission statement for this project should be revised to read:

The Legislature has directed the California Law Revision Commission to propose a reorganization of California's environmental quality and natural resources statutes. See 1996 Cal. Stat. res. ch. 38. This project is not a policy revision. Its purpose is to

simplify and consolidate existing statutes by bringing them together in an organized way that will make them more usable and accessible than existing law. The Commission also may propose to eliminate obsolete and duplicative statutes, and may suggest ways to resolve inconsistencies between statutes.

#### STUDY J-1300 – TRIAL COURT UNIFICATION

##### **Penal Code Draft**

The Commission considered Memorandum 97-57, relating to revisions of the Penal Code required by trial court unification. The Commission approved the draft revisions to circulate for comment as a tentative recommendation, with the following revisions.

**“Judicial District” defined.** A provision should be added at another appropriate place in the codes for application to the Penal Code and throughout the codes, to the following effect:

Unless the provision or context otherwise requires, a reference in a statute to a judicial district means:

- (a) As it relates to a court of appeal, the court of appeal district.
- (b) As it relates to a superior court, the county.
- (c) As it relates to a municipal court, the municipal court district.

**Comment.** This section is intended for drafting convenience. Court of appeal districts and municipal court districts are constitutionally mandated. See Cal. Const. art. VI, §§ 3, 5. Superior court districts do not exist except in Los Angeles County. See Gov’t Code §§ 69640-69650.

The Comment to this section should be amplified to point out that in a unified court, the term “judicial district” refers to the county, since the unified court is a superior court.

**Change of venue.** A provision should be added that authorizes the Judicial Council to adopt court rules relating to changes in place of trial in misdemeanor and infraction cases in a unified court. The staff should investigate whether the term “change of venue” may appropriately be used with reference to transfer to another trial location within the same court, as opposed to transfer to another court.

Whether the Los Angeles County Superior Court districts should be used for misdemeanor change of venue and other judicial district purposes should likewise be left to court rule.

A provision should also be added to the Penal Code along the following lines:

**Pen. Code § 1039 (added). Change of venue in county with no municipal court**

1039. A change of venue in a misdemeanor or infraction case shall be to a municipal court in the county to which the case is transferred or to the superior court if there is no municipal court in that county.

**Comment.** Section 1039 recognizes that transfer of a misdemeanor or infraction case may occur between a superior and municipal court if the courts in one but not both counties have unified. Cf. Section 1462 (misdemeanor jurisdiction in municipal court or superior court in county in which there is no municipal court).

**Penal Code § 1429.5 (procedure in case of plea of not guilty by reason of insanity).** The tentative recommendation should highlight the fact that on unification, misdemeanor cases in the unified court will not automatically receive a new jury for the sanity phase, as they would in a nonunified court.

**Penal Code § 1538.5 (procedure in case of plea of not guilty by reason of insanity).** The staff should review this section to ensure that any rehearing of a motion under this section should be by a judge other than the judge who originally heard the motion.

In this connection, the staff should investigate the writ review procedures for preliminary hearings in a unified court.

**Government Code Draft**

The Commission considered Memorandum 97-58 and its First Supplement, relating to changes in the Government Code required by unification. The Commission approved the staff draft for circulation for comment as a tentative recommendation, with addition of an appropriate preliminary part, with the following revisions.

**Personnel plan for unified courts.** The material in the draft relating to a proposed Task Force on Trial Court Employees, drawn from proposed trial court funding and improvement legislation pending in the 1997 Legislature, was deleted from the draft. Instead, the general transitional provision providing for a written personnel plan for the unified court (proposed Government Code Section 70210(d)) should be preserved. This approach should be highlighted in the draft.

**Terminology.** The statutory material in this and other codes relating to civil cases should be phrased, to the extent practical, in a way that avoids the need to label the case (e.g., as a “general case”). To the extent a label is needed to describe cases currently within the jurisdiction of the municipal courts, the staff should use a phrase such as “limited” case.

**Gov’t Code §§ 69744.5, 69746.5 (superior court sessions).** These sections should be listed for possible future study by way of judicial administration reform.

**Gov’t Code § 70200 (unification voting procedure).** The reference to changes during the voting period in subdivision (c) should be deleted.

**Gov’t Code § 70202 (certification of results).** Subdivision (c) was revised to read, “On certification, a vote in favor of unification of the municipal and superior courts in a county is final and may not be rescinded or revoked by a subsequent vote.” The Comment should note that “In the case of a vote against unification of the municipal and superior courts in a county, this section does not preclude a later vote in favor of unification, subject to Judicial Council rules governing the frequency of vote calls.”

**Gov’t Code § 71042.5 (preservation of judicial districts for purpose of publication).** The staff should double-check the individual publication statutes to make sure they will work in a unified county.

### **Other Codes Draft**

The Commission considered Memorandum 97-59, relating to changes in miscellaneous codes required by unification. The Commission approved the staff draft for circulation for comment as a tentative recommendation, with addition of an appropriate preliminary part, with the following revisions.

**Food & Agric. Code §§ 7581, 12647, 27601, 52514, 53564 (court jurisdiction).** These sections and comparable provisions that include a jurisdictional amount under \$25,000 for municipal court cases should be raised to \$25,000, consistent with modern statutes on superior and municipal court jurisdiction. The change should be highlighted in the materials.

**Food & Agric. Code §§ 25564, 29733, 43039, 59289 (abatement of nuisance).** These sections and comparable provisions that appear to create concurrent jurisdiction in municipal and superior court should be left unamended. These provisions might be referenced, however, in Section 85, as limited cases in the discretion of the officer filing the petition.



**Welf & Inst. Code § 245 (jurisdiction).** This section was revised to refer to “appealable” orders and judgments of the juvenile court, and a reference added in the Comment to Welfare and Institutions Code Sections 395 and 800, defining appealable orders.

#### STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandums 97-60 and 97-63 concerning health care decisionmaking.

#### **Statutory Surrogacy**

Memorandum 97-63 presented alternative approaches to statutory designation of surrogate health care decisionmakers. The Commission heard from several health care professionals and representatives of the medical community in attendance at the meeting. Their general consensus was that major legislative change is not needed, but if there is to be legislation, it should not impose a rigid priority scheme governing surrogate decisionmakers that would disrupt existing practice. Commissioners expressed a number of concerns, including whether legislation was needed at all on this subject, the extent to which courts should be involved, whether different standards should be applied depending on whether a decision related to providing care versus withholding or withdrawing care, what additional procedural protections might be provided in the hospital setting (as opposed to the legal system), and whether the process in hospitals that fall below the expected standards could be remedied by statute without negatively affecting the majority who are presumably performing admirably. The Commission considered three general statutory surrogacy approaches: (1) the priority scheme, as provided in the Uniform Health-Care Decisions Act, (2) a default priority scheme subject to physician discretion as in West Virginia, and (3) a group consensus or “horizontal” scheme like the Colorado statute.

The Commission directed the staff to prepare a draft for future consideration based on the West Virginia approach. This would provide a default priority for the general guidance of the persons concerned, but would permit variance from the priorities set out in the statute where medical judgment so determines, according to specified procedures and standards. Issues left open for further consideration include (1) the appropriate standard applicable to the determination, i.e., good faith, reasonable inquiry, or something else, (2) the

procedure for making a determination, i.e., notice to family, second physician's opinion, ethics committee or consultant, etc., and (3) the order of presumptive surrogates. There should be some attempt to encourage or codify the use of ethics committees in major decisions.

The staff should also draft for further consideration approaches to decisionmaking for the "friendless" patient. This may include clarification of the existing procedure relating court authorized medical treatment (Prob. Code § 3200 *et seq.*) and adapting the Epple bill approach (Health & Safety Code § 1418.8) to health care decisionmaking in nursing homes to cover acute care facilities.

### **Structural Issues**

Memorandum 97-60 presented a "second staff draft" integrating the Uniform Health-Care Decisions Act into California law, with suggested revisions needed for consistency with the Power of Attorney Law. The staff summarized the approach of the second draft, i.e., that it is more efficient and "user friendly" to treat health care decisionmaking in a separate division of the Probate Code. This approach has the added benefit of enabling the elimination of confusing exceptions and exclusions that cause confusion in the existing Power of Attorney Law. Favorable reviews of the suggested approach were given by Prof. David English, the Commission's consultant, and James Deeringer of the Estate Planning, Trust and Probate Law Section Executive Committee. (It was noted, however, that the Executive Committee had not yet considered this issue in full.)

The Commission approved the general approach of the second staff draft. The staff will continue the development of the project from this perspective and will integrate the surrogacy draft proposals into this structure for consideration at a future meeting.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

☐ APPROVED AS CORRECTED

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Chairperson

(for corrections, see Minutes of next meeting)

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Executive Secretary