
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
MARCH 19-20, 1998
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on March 19-20, 1998.

Commission:

Present: Edwin K. Marzec, Chairperson
Bion M. Gregory, Legislative Counsel (Mar. 19)
Sanford Skaggs (Mar. 19)
Howard Wayne, Assembly Member (Mar. 19)
Colin Wied

Absent: Arthur K. Marshall, Vice Chairperson
Robert E. Cooper
Quentin L. Kopp, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel (Mar. 20)
Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law (Mar. 20)
David M. English, Health Care Decisions (Mar. 19)
J. Clark Kelso, Trial Court Unification (Mar. 20)

Other Persons:

Jim Bessolo, California Bankers Association, Los Angeles (Mar. 19)
Frank Coats, Department of Motor Vehicles, Sacramento (Mar. 20)
Jim Deering, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (Mar. 19)
Carol Gallegos, Department of Health Services, Sacramento (Mar. 19)
Marge Ginsburg, Sacramento Healthcare Decisions, Sacramento (Mar. 19)
Nancy Grisham, County Counsels' Association, Placer County Counsel, Auburn (Mar. 20)
Michael Gunther-Maher, M.D., Echo, Sacramento (Mar. 19)
Marlys Huez, Department of Health Services, Sacramento (Mar. 19)
David Lauer, California Bankers Association, San Francisco (Mar. 19)

Ed Lowry, California District Attorneys Association, Sacramento (Mar. 20)
Larry McDaniel, Office of Oil Spill Prevention and Response, Department of Fish
and Game, Sacramento (Mar. 20)
Julie Miller, Southern California Edison, Rosemead (Mar. 19)
Maurine Padden, California Bankers Association, Sacramento (Mar. 19)
Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles
(Mar. 19)
Robert A. Ryan, County Counsels' Association, Sacramento (Mar. 20)
Maureen Sullivan, California Healthcare Association, Sacramento (Mar. 19)
Shannon Sutherland, California Nurses Association, Sacramento (Mar. 20)
Scott Valor, Assembly Member Howard Wayne's Office, Sacramento (Mar. 20)

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MINUTES OF JANUARY 23, 1998, MEETING

The Minutes of the January 23, 1998, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission made the following changes in its meeting schedule:

April 1998

Apr. 27 (~~Mon.~~) 23 (Thu.)

Sacramento

9:00 am – 5:00 pm

June 1998

June 8 (~~Mon.~~) 4 (Thu.)

Sacramento

9:00 am – 5:00 pm

July 1998

July 13 (Mon.) 10 (Fri.)

Sacramento San Diego

9:00 am – 5:00 pm

After new gubernatorial appointments to the Commission are made, the staff will prepare a memorandum on the possibility of shifting from monthly one-day meetings to bimonthly two-day meetings.

Report of Executive Secretary

The Executive Secretary reported on the following matters.

Legislative Members. The Speaker of the Assembly has appointed Assemblyman Howard Wayne to replace Assemblyman Dick Ackerman as the Assembly member of the Commission.

Public Members. The two public member vacancies on the Commission have not yet been filled. Both the Commission Chairperson and the Executive Secretary have spoken with personnel in the Governor's Office about the need to fill the vacancies. The Governor's Office has assured us it is actively working on the matter.

Commission Offices. The Executive Secretary is continuing to explore the possibility of relocating the Commission's staff offices to Santa Clara University Law School. Issues include building standards for the proposed space (ADA compliance, asbestos abatement, seismic safety, etc.)

1998 LEGISLATIVE PROGRAM

The Commission considered Memorandum 98-8, relating to the Commission's 1998 legislative program. The staff augmented the memorandum with the following information.

AB 707 — Real Property Covenants

AB 707 (Ackerman) was approved by the Senate Judiciary Committee on March 17, on the consent calendar. The Commission Comments should be adjusted to reflect the bill in its current form, as set out in the Exhibit to the memorandum.

SB 2063 — Business Judgment Rule

SB 2063 (Johnson and Kopp) has been referred to Senate Judiciary Committee. It will probably be heard at the end of April or the beginning of May. The staff

reported on its efforts to alert potentially interested organizations to the bill. The Commission and its staff may not lobby the bill.

SB 2139 — Trial court unification

SB 2139 (Lockyer) is a spot bill on trial court unification. We expect the bill will be heard in the Senate Judiciary Committee in early April. The staff understands that fiscal pressures being brought to bear on the courts to make their operations more efficient are so strong that all courts are likely rapidly to unify if SCA 4 is approved by the voters.

SCR 65 — Annual Resolution of CLRC Authority

SCR 65 (Kopp) was approved by the Senate Judiciary Committee on March 17, on the consent calendar. An interest group has requested that the Commission study the law governing common interest developments; the staff will schedule this matter for Commission review in the fall when the Commission considers new topics and priorities.

STUDY E-100 – ENVIRONMENTAL LAW CONSOLIDATION

The Commission commenced consideration of proposed drafts of the Environment Code. After concluding its consideration of the drafts, but before adjournment, the Commission received a communication from a representative of the California District Attorneys Association expressing concern about the codification project and the opportunity for inadvertent change. See discussion of Division 2, below.

The Commission directed the staff to include in subsequent materials presenting portions of the proposed Environment Code a note clearly stating that the proposed legislation is intended to be entirely nonsubstantive.

Division 1 — Rules of Construction and Definitions

The Commission considered Memorandum 98-18 and its First Supplement, relating to Division 1 of the Environment Code (rules of construction and definitions). The Commission approved the draft attached to the memorandum for inclusion in the draft code when it is circulated for comment, with one change:

§ 4. Transitional provision for amendments, additions, and repeals. To allay concern that substantive changes may be intended in the codification of the Environment Code, Section 4(a)(1)(A) should be bracketed, and a note should be

added that the provision is being held in reserve for the eventuality that in the course of codification there may be unanimous agreement of all concerned that a particular statutory change should be made.

Division 2 — General Provisions

The Commission considered Memorandum 98-20, relating to Division 2 of the Environment Code (general provisions). The Commission approved the draft attached to the memorandum for inclusion in the draft code when it is circulated for comment. However, in response to comments from the California District Attorneys Association, the staff will investigate whether codification of the effect of the Governor's Reorganization Plan No. 1, of 1991, raises any policy issues.

Division 4 — Air Quality

The Commission considered Memorandum 98-2, relating to Parts 1 and 2 of Division 4 of the Environment Code (air quality). The Commission approved the draft attached to the memorandum for inclusion in the draft code when it is circulated for comment.

STUDY J-110 – TOLLING STATUTE OF LIMITATIONS WHEN DEFENDANT IS OUT OF STATE

The Commission considered Memorandum 98-15, concerning Code of Civil Procedure Section 351, which tolls the statute of limitations when the defendant is out of state. The Commission decided to not to do any further work on this study.

STUDY J-502 – RESPONSE TO DEMAND FOR PRODUCTION OF DOCUMENTS IN DISCOVERY

The Commission considered Memorandum 98-13 and attached staff draft of a *Recommendation on Response to Demand for Production of Documents in Discovery*. The Commission approved the Recommendation for printing and submission to the Legislature.

STUDY J-1300 – TRIAL COURT UNIFICATION

The Commission considered Memorandum 98-12 and its First Supplement, concerning trial court unification. The Commission made the following decisions:

Judicial Administration Issues

In a letter to the Executive Secretary, the State Bar Committee on Administration of Justice (“CAJ”) suggests that the procedures for good faith improvers (Code Civ. Proc. § 871.3) and stays pending arbitration (Code Civ. Proc. § 1281.5) deserve further study. (First Supplement to Memorandum 98-12, Exhibit pp. 1-2.) The Commission decided to add these issues to the portion of its report listing issues that may be appropriate for future study. The Commission deferred consideration of the remainder of CAJ’s letter until the next meeting.

The Commission also considered whether to recommend a mechanism for handling the issues identified for future study. The Commission concluded that it would be helpful to identify the Judicial Council and the Commission as bodies that may be suited for conducting the studies. The report should elaborate on relevant attributes of these organizations (e.g., the Judicial Council may need to establish new committees and procedures for such studies, while the Commission has a study process in place).

Judges’ Retirement

The Executive Secretary and the Commission’s consultant, Professor J. Clark Kelso, explained the urgency of the retirement issues described at pages 1-2 of Memorandum 98-12. The Commission directed the staff to alert the Judicial Council, the Public Employees Retirement System, and Senator Lockyer to the urgency of this matter. The Commission’s report should be revised accordingly.

Telephone Appearances at Trial Setting Conferences

An explanation along the following lines should be incorporated into the preliminary part of the Commission’s report:

Trial Setting Conferences

If the municipal and superior courts in a county unify, statutes providing for telephonic trial setting conferences in superior court will also apply to cases formerly within the jurisdiction of the municipal court. *Cf.* Code Civ. Proc. § 575.6; Gov’t Code § 68070.1. This result is appropriate; it will be neither practical nor desirable to distinguish among cases for this purpose in a unified court. The proposed legislation leaves existing statutes on this point intact.

Written Notice of Motions

Proposed Section 395.9 (misclassification as limited civil case or otherwise) should be revised as follows:

395.9. (a) In a county in which there is no municipal court, if the caption of the complaint, cross-complaint, petition, or other initial pleading erroneously states or fails to state, pursuant to Section 422.30, that the action or proceeding is a limited civil case, the action or proceeding shall not be dismissed, except as provided in Section 399.5 or subdivision (b)(1) of Section 581, but shall, on the duly noticed application of either party within 30 days after service of the initial pleading, or on the court's own motion at any time, be reclassified as a limited civil case or otherwise. The action or proceeding shall then be prosecuted as if it had been so commenced, all prior proceedings being saved. If summons is served before the court rules on reclassification of the action or proceeding, as to any defendant, so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead shall date from the denial or reclassification or, if reclassification is granted, from service upon that defendant of written notice that the clerk has refiled the case pursuant to Section 399.5.

(b) If an action or proceeding is commenced as a limited civil case or otherwise pursuant to Section 422.30, and it later appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, or of a cross-complaint, will necessarily involve the determination of questions inconsistent with that classification, the court shall, on the application of either party within 30 days after the party is or reasonably should be aware of the grounds for misclassification, or on the court's own motion at any time, reclassify the case.

(c) An application for reclassification pursuant to this section shall be supported by a declaration, affidavit, or other evidence if necessary to establish that the case is misclassified. A declaration, affidavit, or other evidence is not required if the grounds for misclassification appear on the face of the challenged pleading.

(d) An action or proceeding which is reclassified under the provisions of this section shall be deemed to have been commenced at the time the complaint or petition was initially filed, not at the time of reclassification.

(e) Nothing in this section shall be construed to preclude or affect the right to amend the pleadings as provided in this code.

(f) Nothing in this section shall be construed to require the superior court to reclassify any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered in a limited civil case.

(g) In any case where the erroneous classification is due solely to an excess in the amount of the demand, the excess may be remitted and the action may continue as a limited civil case.

(h) Upon the making of an order for reclassification, proceedings shall be had as provided in Section 399.5. Unless the

court ordering the reclassification otherwise directs, the costs and fees of those proceedings, and other costs and fees of reclassifying the case, including any additional amount due for filing the initial pleading, are to be paid by the party filing the pleading that erroneously classified the case.

Comment. Section 395.9 is added to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Section 85 (limited civil cases) & Comment.

For the briefing schedule on an application for reclassification, see Section 1005.

Appearance By Defendant

Code of Civil Procedure Section 1014 should be amended along the following lines:

1014. A defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, files an application for reclassification pursuant to Section 395.9, gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant is entitled to notice of all subsequent proceedings of which notice is required to be given. Where a defendant has not appeared, service of notice or papers need not be made upon him.

Comment. Section 1014 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). The amendment reflects the addition of Section 395.9 (misclassification as limited civil case or otherwise), which sets forth a procedure for challenging a caption stating, or failing to state, that an action or proceeding is a limited civil case. See also Sections 85 (limited civil cases) & Comment, 399.5 (reclassification pursuant to Section 395.9), 400 (petition for writ of mandate), 422.30 (caption).

Conforming Amendments

Because the draft legislation would renumber Code of Civil Procedure Section 85 as Section 582.5, conforming amendments of three Code of Civil Procedure provisions should be added to the draft:

697.310. (a) Except as otherwise provided by statute, a judgment lien on real property is created under this section by recording an abstract of a money judgment with the county recorder.

(b) Unless the money judgment is satisfied or the judgment lien is released, subject to Section 683.180 (renewal of judgment), a

judgment lien created under this section continues until 10 years from the date of entry of the judgment.

(c) The creation and duration of a judgment lien under a money judgment entered pursuant to Section ~~85~~ or 117 or 582.5 of this code or Section 16380 of the Vehicle Code or under a similar judgment is governed by this section, notwithstanding that the judgment may be payable in installments.

Comment. Section 697.310 is amended to reflect relocation of the substance of former Section 85 to Section 582.5.

697.350. (a) Except as otherwise provided by statute, a judgment lien on real property is a lien for the amount required to satisfy the money judgment.

(b) A judgment lien on real property created under a money judgment payable in installments pursuant to Section ~~85~~ or 117 or 582.5 of this code or Section 16380 of the Vehicle Code or under a similar judgment is in the full amount required to satisfy the judgment, but the judgment lien may not be enforced for the amount of unmatured installments unless the court so orders.

(c) A judgment lien created pursuant to Section 697.320 is a lien for the amount of the installments as they mature under the terms of the judgment, plus accrued interest and the costs as they are added to the judgment pursuant to Chapter 5 (commencing with Section 685.010) of Division 1, and less the amount of any partial satisfactions, but does not become a lien for any installment until it becomes due and payable under the terms of the judgment.

Comment. Section 697.350 is amended to reflect relocation of the substance of former Section 85 to Section 582.5.

697.540. (a) Except as otherwise provided by statute, a judgment lien on personal property is a lien for the amount required to satisfy the money judgment.

(b) A judgment lien on personal property created under a money judgment payable in installments pursuant to Section ~~85~~ or 117 or 582.5 of this code or pursuant to Section 16380 of the Vehicle Code is in the full amount required to satisfy the judgment, but the judgment lien may not be enforced for the amount of unmatured installments unless the court so orders.

Comment. Section 697.540 is amended to reflect relocation of the substance of former Section 85 to Section 582.5.

References to “Same Court”

To prevent ambiguity and confusion, Code of Civil Procedure Sections 1140, 1171, 1206, and 1287.4 should be revised along the following lines:

1140. The judgment may be enforced in the same manner as if it had been rendered in an action of the same classification (limited civil case or otherwise) in the same court, and is in the same manner subject to appeal.

Comment. Section 1140 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Sections 85 (limited civil cases), 86(a)(8) (enforcement of judgment in limited civil case), 904.1 (taking appeal), 904.2 (taking appeal in limited civil case). See also Section 85 Comment.

1171. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in an action of the same classification (limited civil case or otherwise) in the Court in which the action is pending.

Comment. Section 1171 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Section 85 (limited civil cases) & Comment.

1206. Upon the levy under a writ of attachment or execution not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer or other person who has performed work or rendered personal services for the defendant within 90 days prior to the levy may file a verified statement of the claim therefor with the officer executing the writ, file a copy thereof with the court which issued the writ, and give copies thereof, containing his or her address, to the plaintiff and the defendant, or any attorney, clerk or agent representing them, or mail copies to them by registered mail at their last known address, return of which by the post office undelivered shall be deemed a sufficient service if no better address is available, and such claim, not exceeding nine hundred dollars (\$900), unless disputed, must be paid by such officer, immediately upon the expiration of the time for dispute of the claim as prescribed in Section 1207, from the proceeds of such levy remaining in the officer's hands at the time of the filing of such statement or collectible by the officer on the basis of the writ.

The court issuing the writ must make a notation on its docket of every preferred labor claim of which it receives a copy and must endorse on any writ of execution or abstract of judgment issued subsequently in the case that it is issued subject to the rights of a preferred labor claimant or claimants thereunder and giving the names and amounts of all such preferred labor claims of which it has notice. In levying under any writ of execution the officer making the levy shall include in the amount due under the execution any and all preferred labor claims that have been filed in the action and of which the officer has notice, except any claims

which may have been finally disallowed by the court under the procedure provided for herein and of which disallowance the officer has actual notice. The amount due on preferred labor claims that have not been finally disallowed by the court shall be considered a part of the sum due under any writ of attachment or execution in augmentation of the amount thereof and it shall be the duty of any person, firm, association or corporation on whom a writ of attachment or execution is levied to immediately pay to the levying officer the amount of such preferred labor claims, out of any money belonging to the defendant in the action, before paying the principal sum called for in the writ.

If any claim is disputed within the time, and in the manner prescribed in Section 1207, and a copy of the dispute is mailed by registered mail to the claimant or the claimant's attorney at the address given in the statement of claim and the registry receipt is attached to the original of the dispute when it is filed with the levying officer, or is handed to the claimant or the claimant's attorney, the claimant, or the claimant's assignee, must within 10 days after such copy is deposited in the mail or is handed to the claimant or the claimant's attorney petition the court having jurisdiction of the action on which the writ is based, for a hearing before it to determine the claim for priority, or the claim to priority is barred. If more than one attachment or execution is involved, the petition shall be filed in the court having jurisdiction over the senior attachment or execution. The hearing shall be held within 20 days from the filing of the petition unless the court continues it for good cause. Ten days' notice of the hearing shall be given by the petitioner to the plaintiff and the defendant, and to all parties claiming an interest in the property, or their attorneys. The notice may be informal and need specify merely the name of the court, names of the principal parties to the senior attachment or execution and name of the wage claimant or claimants on whose behalf it is filed but shall specify that the hearing is for the purpose of determining the claim for priority. The plaintiff or the defendant, or any other party claiming an interest may contest the amount or validity of the claim in spite of any confession of judgment or failure to appear or to contest the claim on the part of any other person.

There shall be no cost for filing or hearing the petition and the hearing on the petition shall be informal but all parties testifying must be sworn. Any claimant may appear on the claimant's own behalf at the hearing and may call and examine witnesses to substantiate his or her claim. An appeal may be taken from a judgment in a proceeding under this section in the manner provided for appeals from judgments of the court where the

proceeding is had, in an action of the same classification (limited civil case or otherwise).

The officer shall retain in possession until the determination of the claim for priority so much of the proceeds of the writ as may be necessary to satisfy the claim, and if the claim for priority is allowed, the officer shall pay the amount due, including the claimant's cost of suit, from such proceeds, immediately after the order allowing the claim becomes final.

Comment. Section 1206 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Sections 85 (limited civil cases), 904.1 (taking appeal), 904.2 (taking appeal in limited civil case). See also Section 85 Comment.

1287.4. If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same classification (limited civil case or otherwise); and it may be enforced like any other judgment of the court in which it is entered, in an action of the same classification.

Comment. Section 1287.4 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Sections 85 (limited civil cases), 86(a)(8) (enforcement of judgment in limited civil case), 86(a)(10)(A) (arbitration-related limited civil cases). See also Section 85 Comment.

STUDY K-410 – PROTECTING SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 98-14 and its First Supplement, concerning the admissibility, discoverability, and confidentiality of settlement negotiations. Subject to the following revisions (and appropriate conforming changes), the Commission approved the draft attached to Memorandum 98-14 for circulation as a revised tentative recommendation:

Section 1131. Admissibility of Settlement Negotiations

Section 1131 should not restrict admissibility in a criminal action:

1131. Except as otherwise provided by statute:

(a) ~~Evidence,~~ evidence of settlement negotiations is not admissible in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

~~(b) Evidence of settlement negotiations is not admissible in a criminal action.~~

Section 1132. Confidentiality and Discoverability of Settlement Negotiations

Section 1132 should not apply in a criminal action:

1132. (a) Except as otherwise provided by statute, evidence of settlement negotiations is confidential and is not subject to discovery, ~~in a criminal action or in a civil case~~, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) This section applies only if the persons participating in a negotiation execute an agreement in writing, before the negotiation begins, which sets out the text of this section and states that the section applies to the negotiation.

(c) This section does not apply to evidence of a settlement agreement. Nothing in this section expands or limits existing law on discovery of a settlement agreement.

Section 1135. Misconduct or Irregularity

Section 1135 should be redrafted in more general terms. The list of types of misconduct should be deleted or moved to the Comment.

Section 1138. Sliding Scale Recovery Agreement

Section 1138 should be broadened along the following lines:

~~1138. Evidence of a sliding scale recovery agreement, as defined in Code of Civil Procedure Section 877.5, is not inadmissible under Section 1131 where a defendant party to the agreement testifies and the evidence is introduced to show bias of that defendant~~ Evidence of a settlement agreement is not inadmissible under Section 1131 where the evidence is introduced to show bias of a witness who is a party to the agreement.

Comment. Section 1138 provides an exception to Section 1131 (admissibility of settlement negotiations), in recognition that a settlement agreement may be compelling evidence of bias. The danger of bias is particularly strong where there is a sliding scale recovery agreement and a defendant party to the agreement testifies. See Code Civ. Proc. § 877.5(a)(2) (additional safeguards for use of a sliding scale recovery agreement).

See Section 1130 (application of chapter). See also Section 1141 (extent of evidence admitted or subject to disclosure).

Section 1139. Danger of Death or Substantial Bodily Harm

Section 1139 should be broadened along the following lines:

1139. Evidence of settlement negotiations is not inadmissible under Section 1131, or confidential and protected from disclosure under Section 1132, if a participant in the negotiations reasonably believes that disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm.

STUDY L-649 – UNIFORM PRINCIPAL AND INCOME ACT

The Commission considered Memorandum 98-19 and the First, Second, and Third Supplements, introducing consideration of the Uniform Principal and Income Act of 1997. The Commission heard the views of representatives of the California Uniform Law Commission, the State Bar Estate Planning, Trust and Probate Law Section Executive Committee, and the California Bankers Association. After a lengthy discussion focusing on the discretionary power to adjust between principal and income in Section 104 of the uniform act, the Commission decided to proceed with the study, starting with the technical revisions proposed in other parts of the uniform act. As progress is made on other issues in the act, the Commission will return to the policy issues presented by the discretionary power to adjust.

Chairman Marzec recused himself from participation in this matter on the grounds of a possible conflict of interest.

STUDY L-3023 – UNIFORM TOD SECURITY REGISTRATION ACT

The Commission considered Memorandum 98-17 and attached staff draft of a Tentative Recommendation on the *Uniform TOD Security Registration Act*. The Commission approved the Tentative Recommendation for distribution for comment.

STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandum 98-16 and its First, Second, and Third Supplements, including the staff draft of a tentative recommendation on *Health Care Decisions*. The Commission focused on areas of the draft statute discussed in the memorandum and issues raised at the meeting. (Issues raised in the memorandum and supplements that were not considered will be carried forward to the next version of the draft tentative recommendation.) The

Commission made the following decisions concerning provisions in the staff draft:

Prob. Code § 4605. “Advance health care directive”; “advance directive”

This definition should be revised as follows:

4605. “Advance health care directive” or “advance directive” means either an individual health care instruction or a power of attorney for health care.

§ 4652. Unauthorized acts

The Commission decided not to propose changes to the existing limitations on consent that may be given under a durable power of attorney for health care pursuant to Probate Code Section 4722.

§ 4661. Use of copies

The rule validating copies should be retained in the draft without any additional provision for certification by notaries or others.

§ 4662. Relation to agency law

The word “general” should be deleted because its scope is not clear:

4662. Where this division does not provide a rule, the general law of agency may be applied.

The Comment should explain that the law of agency includes both relevant statutory law, i.e., the rules in the Power of Attorney Law and the Civil Code, and relevant case law.

§ 4671. Authority to execute power of attorney for health care

This section should be revised so that it is clear that personal care powers must be specifically granted in a power of attorney for health care and are not automatic.

4671. (a) An adult having capacity may execute a power of attorney for health care, as provided in Article 2 (commencing with Section 4680). The power of attorney for health care may authorize the agent to make health care decisions and may also include individual health care instructions.

(b) The principal in a power of attorney for health care may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees,

providing transportation, handling mail, and arranging recreation and entertainment.

§ 4674. Validity of written advance directive executed in another jurisdiction

This section was approved as drafted. The statute need not attempt to cover the recognition of oral instructions that may have been made in another state.

§ 4680. Formalities for executing a power of attorney

A person who signs for the principal where the principal cannot sign the power of attorney should be an adult. A similar clarification will need to be made in the general Power of Attorney Law.

§ 4695. Revocation of advance directive

§ 4696. Revocation of designation of agent

These sections should be replaced with the rules in Section 3(a)-(b) of the Uniform Health-Care Decisions Act. “Personally informing” used in the uniform act rule would include both oral and written communication from the patient to the supervising health care provider. The statute should also be clear that only a patient having capacity may effectively revoke an advance directive.

§ 4697. Effect of dissolution or annulment

This section should be considered in comparison with the uniform act rule, both as to drafting and policy. The policy differences include whether a legal separation revokes a power of attorney and whether remarriage would revive the power of attorney. The rule should be consistent between health care powers and property powers of attorney, so if changes are made in this rule, the general rule in the Power of Attorney Law will need to be revised.

§ 4698. Effect of later advance directive on earlier advance directive

The rule in Section 3(e) of the Uniform Health-Care Decisions Act should be substituted for this section. Thus, an earlier advance directive would be revoked only to the extent it conflicts with a later advance directive, unlike the rule applicable under existing Section 4727(d) where a later power of attorney completely revokes an earlier power, unless the instrument provides otherwise.

§§ 4720-4725. Health care decisions for patients without surrogates

The issue of the scope of this procedure and the procedural details were discussed at some length. Concerns were expressed by representatives of the

medical community that the procedure as set out in the draft could become too cumbersome if required in a broad range of medical interventions. At the same time, the limitations of the Epple bill (Health & Safety Code § 1418.8) were recognized. The Commission affirmed its intent not to impose unnecessary requirements on medical decisionmaking and noted that the proposed procedure is provided as an option to whatever other means may exist for obtaining consent for incapacitated adults. The Commission also reaffirmed its earlier decision that there should be one procedure of this type, and that the procedure in the Health Care Decisions Law should supersede the Epple bill procedure.

The optional nature of the surrogate committee procedure should be made clear in the Comment to Section 4721.

The staff should give further consideration to the meaning of the term “major health care decisions” as used in Section 4722 governing the composition of the surrogate committee. The Commission considered the suggestion that the surrogate committee procedure be made mandatory for some types of decisions, such as those involving withholding or withdrawal of life sustaining treatment, but decided that the current draft should move forward without any mandatory feature.

STUDY N-301 – ADVISORY INTERPRETATIONS

The Commission considered Memorandum 98-10 and its First Supplement, presenting and discussing a draft tentative recommendation relating to advisory interpretations. Under the proposed law, a streamlined procedure could be used by an agency to issue generally applicable, nonbinding advice regarding its interpretation of a law that it enforces or administers, or that governs its procedures. The Commission approved distribution of a tentative recommendation, subject to the following decisions:

Definition of “Regulation”

Remove the proposed amendment to the definition of “regulation” in Government Code Section 11342(g). Instead, add language to proposed Section 11360.010 providing that a properly adopted advisory interpretation is not subject to other rulemaking provisions of the APA.

Gov't Code § 11360.010. Purpose and application

Relation to other procedural requirements. Change subdivision (b) and its Comment to provide that an agency statement that is required to be adopted pursuant to APA rulemaking procedures, or other specified procedures, may not be adopted as an advisory interpretation.

Optional nature of procedure. Change the Comment to subdivision (c) as follows:

Subdivision (e) (d) makes clear that adoption of an advisory interpretation is optional. An agency may choose to adopt an advisory interpretation or may express its interpretation in some other authorized form. For example, where otherwise authorized, an agency may express its interpretation of law in a duly-adopted regulation, an individual advice letter, or in case-specific adjudication. Note that an agency's interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it has been designated a precedent decision by the agency. See Section 11425.60. Nothing in subdivision (c) affects the proscription against the issuance or use of regulations that have not been properly adopted. See Section 11340.5.

§ 11360.050. Adoption, amendment, or repeal of advisory interpretation

Change the period for public comment from 30 to 45 days.

§ 11360.090. Review by Office of Administrative Law

Proposed Section 11360.090(e) should be changed as follows:

(e) For the purposes of this section, an advisory interpretation is consistent with the provision of law it interprets if it states—a rational interpretation is any one of several reasonable interpretations of that provision of law.

§ 11360.100. Review by Governor's office

Remove proposed Section 11360.100 (providing for review by the Governor's Office of a decision by OAL to disapprove an advisory interpretation), and all references to that section.

STUDY N-302 – CONSENT REGULATIONS

The Commission considered Memorandum 98-11, discussing possible streamlined procedures for the adoption, amendment, or repeal of a regulation, where the proposed action is unopposed. The Commission instructed the staff to

develop both of the approaches discussed in the memorandum. The Commission also decided that use of the consent regulation procedure should not be contingent on a finding that the proposed consent regulation has no economic impact. Instead, a simplified analysis of economic impacts should be prepared and included in the notice of the proposed regulatory action.

☐ APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary