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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**SEPTEMBER 24-25, 1998**  
**SACRAMENTO**

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A meeting of the California Law Revision Commission was held in Sacramento on September 24-25, 1998.

**Commission:**

*Present:* Arthur K. Marshall, Chairperson  
Pamela L. Hemminger  
Edwin K. Marzec (Sept. 24)  
Ronald S. Orr  
Sanford M. Skaggs

*Absent:* Howard Wayne, Assembly Member, Vice Chairperson  
Robert E. Cooper  
Bion M. Gregory, Legislative Counsel  
Quentin L. Kopp, Senate Member  
Colin Wied

**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:** Michael Asimow, Administrative Law (Sept. 24)  
David M. English, Health Care Decisions (Sept. 25)  
Gideon Kanner, Eminent Domain Law & Inverse  
Condemnation (Sept. 24)

**Other Persons:**

Jim Bessolo, California Bankers Association, Los Angeles (Sept. 25)  
Herb Bolz, Office of Administrative Law, Sacramento (Sept. 24)  
Frank Coats, Department of Motor Vehicles, Sacramento (Sept. 24)  
Lori Costa, California Association of Health Facilities, Sacramento (Sept. 25)  
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento  
(Sept. 25)  
Ed Heidig, Office of Administrative Law, Sacramento (Sept. 24)

Charlene Mathias, Office of Administrative Law, Sacramento (Sept. 24)  
Alice Mead, California Medical Association, San Francisco (Sept. 25)  
Julie Miller, Southern California Edison, Rosemead (Sept. 24)  
Lori Ortenstone, Pacific Telesis, San Diego (Sept. 24)  
Lisa Pau, Public Law Research Institute, Hastings College of the Law, San Francisco (Sept. 25)  
Nancy Peverini, Consumer Attorneys of California, Sacramento (Sept. 24)  
Frederick L. Pilot, Common Interest Consumer Project, Sacramento (Sept. 24)  
Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles (Sept. 25)  
Dick Ratliff, California Energy Commission, Sacramento (Sept. 24)  
William A. Reich, Division of Labor Standards Enforcement, Ventura (Sept. 24)  
Stephanie Shaw, Public Law Research Institute, Hastings College of the Law, San Francisco (Sept. 25)  
Maureen Sullivan, California Healthcare Association, Sacramento (Sept. 25)  
Robert L. Sullivan, Jr., Fresno (Sept. 24)  
Shannon Sutherland, California Nurses Association, Sacramento (Sept. 24)

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## MINUTES OF JULY 17, 1998, MEETING

The Minutes of the July 17, 1998, Commission meeting were approved as submitted by the staff.

**ADMINISTRATIVE MATTERS**

**Recognition of Service of Former Chairperson Marzec**

Chairperson Arthur K. Marshall presented, on behalf of the Commission, a plaque to Commissioner Edwin K. Marzec in appreciation for Commissioner Marzec's service as Chairperson of the Commission during the preceding year.

**Meeting Schedule for 1999**

The Commission considered Memorandum 98-55, relating to the Commission's meeting schedule for 1999. The Commission adopted the schedule proposed in the memorandum:

<b>January 1999</b>	<b>No Meeting</b>
<b>February 1999</b>	<b>Los Angeles</b>
Feb. 18 (Thur.)	10:00 am – 5:00 pm
Feb. 19 (Fri.)	9:00 am – 4:00 pm
<b>March 1999</b>	<b>No Meeting</b>
<b>April 1999</b>	<b>Sacramento</b>
Apr. 15 (Thur.)	10:00 am – 5:00 pm
Apr. 16 (Fri.)	9:00 am – 4:00 pm
<b>May 1999</b>	<b>No Meeting</b>
<b>June 1999</b>	<b>Sacramento</b>
June 10 (Thur.)	10:00 am – 5:00 pm
June 11 (Fri.)	9:00 am – 4:00 pm
<b>July 1999</b>	<b>No Meeting</b>
<b>August 1999</b>	<b>San Diego</b>
Aug. 26 (Thur.)	10:00 am – 5:00 pm
Aug. 27 (Fri.)	9:00 am – 4:00 pm
<b>September 1999</b>	<b>No Meeting</b>
<b>October 1999</b>	<b>Los Angeles</b>
Oct. 21 (Thur.)	10:00 am – 5:00 pm
Oct. 22 (Fri.)	9:00 am – 4:00 pm
<b>November 1999</b>	<b>No Meeting</b>

**December 1999**

Dec. 9 (Thur.)

Dec. 10 (Fri.)

**San Francisco**

10:00 am – 5:00 pm

9:00 am – 4:00 pm

**New Topics and Priorities**

The Commission commenced, but did not complete, consideration of Memorandum 98-56, relating to new topics and priorities. The Commission took the following action on the two matters considered at the meeting:

**Informal probate administration.** The Commission heard a presentation from Bob Sullivan, former Chair of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, concerning the need for informal probate administration in California. The Commission deferred action on this matter, until the Commission can hear from advocates of the other side of the issue. The Commission requested the staff to put together such a presentation for the Commission's December meeting.

**Common interest developments.** The Common Interest Consumer Project, represented by Fred Pilot, appeared to urge a comprehensive revision of the statutes governing common interest development housing. The Commission decided to request express legislative sanction for a study of this matter. However, the Commission's request should identify specific issues to be included in the study, and in fact the Commission may focus on specific issues rather than on a comprehensive statute covering the area.

**1998 LEGISLATIVE PROGRAM**

The Commission considered Memorandum 98-57 relating to the Commission's 1998 legislative program. The Commission approved the revised Comments to AB 1683 (Kuykendall) — Uniform TOD Security Registration Act — as set out at Exhibit pages 2-3, to reflect amendments made during the legislative process.

In connection with SB 2063 (Kopp) — business judgment rule — the Commission approved transmitting a copy of its recommendation on the business judgment rule to the California Supreme Court for consideration in #98-91 *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (S070296).

#### STUDY EM-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

The Commission considered Memorandum 98-68 and the attached recommendation to make clear the authority of the Public Utilities Commission to control exercise of condemnation power by privately owned public utilities. Commissioners Hemminger, Marzec, and Skaggs did not participate in this matter.

The Commission revised the Comment to proposed Public Utilities Code Section 610(b) to delete Example (3) (provision for a property owner to appeal a proposed taking to the Public Utilities Commission). As so revised, the tentative recommendation should be circulated for comment. The Commission expressed a particular interest in hearing further comment from the Public Utilities Commission on this matter.

#### STUDY EM-452 – DATE OF VALUATION

The Commission considered Memorandum 98-69 relating to date of valuation issues in eminent domain.

The Commission directed the staff to explore the following approaches to dealing with the *Kirby* problem (increase in value of the property between the date of valuation and the date of payment of the award):

(1) Make the date of valuation the date of trial, rather than the date of commencement of the proceeding.

(2) Investigate additional possible sources for real estate market value multipliers, including the Urban Land Institute, the Lincoln Institute of Land Policy, the MIT land development program, and the real estate investment community.

(3) Develop an alternative scheme for determining the increase in value since the date of valuation, such as an offer-and-demand type scheme that would impose litigation costs on a party behaving unreasonably.

#### STUDY EM-453 – VALUATION EVIDENCE

The Commission considered Memorandum 98-70, relating to clarification of Evidence Code Section 822(a)(1), concerning admissibility of a sale of property appropriated to public use as evidence of value.

The Commission approved the staff draft as set out in the memorandum for circulation as a tentative recommendation. The Comment should note that the

proposed amendment would correct the interpretation of the provision given in *City and County of San Francisco v. Golden Gate Heights Investments*.

**STUDY F-910 – EFFECT OF DISSOLUTION OF MARRIAGE  
ON NONPROBATE TRANSFERS**

See entry in these Minutes under Study L-910.

**STUDY H-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY**

See entry in these Minutes under Study Em-451.

**STUDY H-452 – DATE OF VALUATION**

See entry in these Minutes under Study Em-452.

**STUDY H-453 – VALUATION EVIDENCE**

See entry in these Minutes under Study Em-453.

**STUDY H-910 – EFFECT OF DISSOLUTION OF MARRIAGE  
ON NONPROBATE TRANSFERS**

See entry in these Minutes under Study L-910.

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

The Commission considered Exhibit pages 4-9 of Memorandum 98-61, containing revised Comments on SB 2139 (Lockyer) — trial court unification — correcting typographical errors. The Commission approved the revised Comments as set out in the memorandum. Consideration of the remainder of the memorandum was deferred until the next Commission meeting.

**STUDY K-410 – SETTLEMENT NEGOTIATIONS**

The Commission considered Memorandum 98-62 concerning comments on the revised tentative recommendation on the *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*. The Commission made the following decisions:

**Evid. Code § 1130. “Settlement negotiations” defined**

Section 1130 should make clear that the definition of “settlement negotiations” is limited to compromise-related conduct and statements (i.e., efforts to resolve a dispute). The staff should examine judicial and other definitions of settlement negotiations and analyze the alternatives in the context of this proposal.

The Comment to Section 1130 should explain that “settlement negotiations” does not include mere notification of the existence or nature of a problem. The Commission reserved decision on the other issues raised by Epstein & Grinnell, pending further input.

**§ 1131. Scope of chapter**

Section 1131 should state that the chapter on settlement negotiations does not apply to plea bargaining and does not restrict admissibility or discoverability of evidence in a criminal case. The provision should not attempt to summarize what the chapter addresses.

**§ 1132. Admissibility of settlement negotiations**

The Commission decided to continue with its general approach to admissibility of evidence of settlement negotiations.

**§ 1133. Confidentiality and discoverability of settlement negotiations**

A written agreement should be necessary to make settlement negotiations confidential, but should not be a prerequisite to protect evidence of such negotiations from discovery.

**Other Issues**

The Commission did not resolve the other issues discussed in Memorandum 98-62. For the next meeting, the staff should prepare a new memorandum and an analysis of the issues relating to confidential settlements (as proposed in Memorandum 98-62).

**STUDY L-649 – UNIFORM PRINCIPAL AND INCOME ACT**

The Commission considered Memorandum 98-64 and the staff draft tentative recommendation on the *Uniform Principal and Income Act*. The Commission also considered the First Supplement to the memorandum, which was distributed at the meeting.

The Commission approved the approach of preparing and distributing a staff discussion draft to elicit comments from interested persons in a timely fashion before the December meeting, at which it is anticipated that a final recommendation to the Legislature can be approved. The discussion draft will be substantially the same as the draft discussed at the meeting, as revised to implement Commission decisions, and will also include additional revisions agreed upon by the working group and implemented by the staff.

The Commission made the following decisions:

**Prob. Code § 16336. Trustee's power to adjust**

The trustee's power to adjust in the limited circumstances described in this section was approved, although the Commission is concerned about the clarity of the drafting. Where it can be achieved, the section should be drafted to provide more concrete standards and avoid restating broader fiduciary principles stated in other law. Thus, subdivision (a)(3) could be revised substantially as follows: "The trustee determines that application of the rules in subdivision (a) of Section 16335 would not permit the trustee to satisfy the standard provided in subdivision (b) of Section 16335 result in a fair and reasonable allocation of return to all beneficiaries."

The Commission requested further drafting proposals from the working group to improve this section. Subdivision (b)(1) should be revised so that it is clear that the final clause stating the qualifying condition ("if the trustee did not have the power to make the adjustment") applies only to the immediately preceding clause, and not the entire paragraph.

In subdivision (b), paragraph (8) precluding use of the power to adjust if the adjustment would benefit the trustee "directly or indirectly" should be deleted. General fiduciary principles should take care of problems that would arise if adjustments are made to benefit the trustee. The rule in paragraph (8), literally interpreted, could preclude almost any adjustment where the trustee's compensation is based on a percentage of principal held in trust.

Subdivision (c), permitting cotrustees who are not precluded by subdivision (b) to make an adjustment, should be revised to make clear that it is an exception to the statutory rule in Section 15629 requiring unanimous action by cotrustees unless the trust instrument provides a different rule.



**§ 16337. Safe harbor for adjustments to unitrust standard**

This section providing a safe harbor for adjustments from principal to income up to a 4% unitrust amount was not approved. The primary objections were that the 4% figure might not be an appropriate standard in different economic conditions, even with the proposed three-year window, and that the safe harbor could become the rule and act as a limitation on larger adjustments, where they would be appropriate, and perhaps encourage 4% adjustments where they would be inappropriate. Generally, it was felt that the notice of proposed action procedure in the next section would be a preferable and sufficient alternative to the safe harbor approach.

**§ 16338. Notice of proposed action**

The notice of proposed action procedure was approved in concept and should be sufficient to address the perceived uncertainties in exercise of the power to adjust. The good faith standard in subdivision (a) should be deleted. The staff should give further consideration to clarifying the class of beneficiaries entitled to notice of the proposed action.

**STUDY L-910 – EFFECT OF DISSOLUTION OF MARRIAGE  
ON NONPROBATE TRANSFERS**

The Commission considered Memorandum 98-65, its First Supplement, and the staff draft recommendation on *Effect of Dissolution of Marriage on Nonprobate Transfers*. The Commission approved the draft recommendation, subject to one change — proposed Probate Code Section 5603 should be revised to improve its clarity:

5603. (a) ~~This part applies to all instruments making a nonprobate transfer or creating a joint tenancy, whenever executed is operative on January 1, 2000.~~

(b) ~~Sections 5600 and 5601 do not apply where the event terminating a person's status as a surviving spouse occurs before the operative date of this part. Except as provided in subdivision (c), this part applies to an instrument making a nonprobate transfer or creating a joint tenancy, whether executed before, on, or after the operative date of this part.~~

(c) Sections 5600 and 5601 do not apply, and the applicable law in effect before the operative date of this part applies, to an instrument making a nonprobate transfer or creating a joint tenancy in either of the following circumstances:

(1) The person making the nonprobate transfer or creating the joint tenancy dies before the operative date of this part.

(2) The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before the operative date of this part.

**Comment.** Section 5603 governs the application of this part. Under subdivision (b), ~~Sections 5600 and 5601 do not apply where a divorce or other event terminating a person's status as surviving spouse under Probate Code Section 78 occurs before the operative date of the part.~~ (c), where a dissolution of marriage, or other event terminating a person's status as a decedent's surviving spouse occurs before January 1, 2000, that person's rights as a nonprobate transfer beneficiary or joint tenant of the decedent are not affected by Section 5600 or 5601. See Section 78 ("surviving spouse" defined).

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

The Commission considered Memorandum 98-63 concerning comments on the tentative recommendation on *Health Care Decisions for Adults Without Decisionmaking Capacity*. The Commission considered the major policy issues discussed in the memorandum and related issues raised in staff notes following sections in the draft recommendation attached to the memorandum. Issues that were not considered at the September meeting will be presented at the December meeting along with a revised staff draft recommendation implementing the Commission's decisions on the major issues.

The Commission made the following decisions:

##### **Prob. Code § 4631. "Primary physician"**

The Comment to this section should note that the "primary physician" is not necessarily a person's primary care physician or a hospitalist.

##### **§ 4701. Advance directive form (agent's authority and anatomical gifts)**

The statutory advance directive form in Section 4701 should be revised to provide notice in Part 1 that an agent will have the power to make anatomical gifts, authorize an autopsy, and direct disposition of remains unless the advance directive limits or qualifies that authority. This will make the form consistent with the substantive rule in Section 4683(b). The anatomical gift portion of the form (Part 3) should be consistent so that special instructions given in the form will control the agent's exercise of authority. The Commission decided not to

provide further implementation of autopsy or disposition authority so as not to complicate the advance directive form.

**§ 4712. Selection of statutory surrogate**

The presumptive order of surrogates in subdivision (a) should be revised to place domestic partners following the spouse and ahead of children. The description of this category of relationship should include the requirement that the patient and the partner reside together.

In subdivision (b), the standard for selection of the surrogate should be based on good faith, eliminating the “reasonably” appears standard.

Subdivision (d) should be revised to provide that the person selected as surrogate has a duty to communicate the selection to other persons who are potential statutory surrogates under subdivision (a) if they can be readily contacted. This is similar to the rule in Section 5(d) of the Uniform Health Care Decisions Act. Persons in the class of grandchildren or close friends would not be entitled to notice, but would be subject to the duty to communicate with potential surrogates in the first five classes (spouse, domestic partner, children, parents, siblings). The primary physician should have a duty to inform the surrogate of this notification requirement.

**§ 4722. Composition of surrogate committee**

The surrogate committee should be structured so that there are at least three persons on the committee in all cases, and four in cases involving “critical” health care decisions. The patient’s primary physician, a professional nurse with responsibility for the patient and knowledge of the patient’s condition, and a patient representative or community member would be required on all surrogate committees. A member of the health care institution’s ethics committee or an outside ethics consultant would be required in critical situations. Other health care institution staff and other patient representatives or community members could be added to the surrogate committee, but the minimum qualifications would always have to be met. The category of nurse in subdivision (b)(2) was broadened by eliminating “registered,” but the nurse should still be required to be a professional nurse. If participation of a nurse’s aid would be beneficial, the aid could be included as an optional, additional member of the surrogate committee. Subdivision (c) should be redrafted to make clear that it permits

adding persons to the surrogate committee, but not omitting any required members.

The Commission considered the suggestion to structure different types of surrogate committees depending on whether the patient was in an acute care or long-term care facility. The Commission concluded that the proposal, as revised, provides basic, essential protections as well as flexibility appropriate for different types of health care institutions.

**§ 4723. Review by surrogate committee**

This section should provide for recording of the committee membership in a particular case and require the surrogate committee to make a record of its deliberations and conclusions.

The law should be clear that a decision made through this process would include a course of treatment or set of treatments. It is not intended that the surrogate committee should be convened to make every detailed decision in the course of treating a patient who has no other decisionmaker.

**§ 4724. Decisionmaking by surrogate committee**

The voting of the surrogate committee should be recorded. The Comment should note that an abstention is not the same as opposition.

**§ 4736. Duty of declining health care provider or institution**

Subdivision (b) should be revised to require a health care provider or institution that declines to comply with a health care decision to “provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. In all cases, appropriate palliative care shall be continued.” The order of subdivision (b) (continuing care) and subdivision (c) (assistance in making transfer) should be reversed.

**Prob. Code § 2355 (amended). Health care where conservatee lacks capacity**

The Comment should make clear that the exercise of authority to make health care decisions by a conservator under this section does not require a determination of the conservatee’s wishes or best interest by clear and convincing evidence. There is no higher evidentiary standard under this statute and none should be inferred.

**Prob. Code § 3200 et seq. Court-authorized medical treatment**

This procedure should be retained in the current location where practitioners are familiar with it. The staff should evaluate whether there are any potential conflicts or inconsistencies between the procedure of Section 3200 *et seq.* and the judicial proceedings provisions (Section 4750 *et seq.*) of the Health Care Decisions Law.

**STUDY N-301 – ADMINISTRATIVE RULEMAKING: ADVISORY INTERPRETATIONS**

The Commission considered Memorandum 98-58 and its First Supplement concerning comments received on the tentative recommendation on *Advisory Interpretations*. The Commission instructed the staff to prepare a final recommendation incorporating the following changes from the tentative recommendation:

(1) Revise proposed Government Code Section 11360.030 to provide that an advisory interpretation is binding on the adopting agency in any adjudication and not just in an enforcement action initiated by the agency. However, an advisory interpretation that has been judicially disapproved would not be binding on the adopting agency in an enforcement action or other adjudication.

(2) Revise the advisory interpretation labeling requirement in proposed Government Code Section 11360.050 to reflect the change described in item (1) above.

(3) Replace proposed Government Code Section 11360.010(d) with a narrow provision providing that a California Environmental Quality Act guideline cannot be adopted under the advisory interpretation procedure.

(4) Revise proposed Government Code Section 11360.080(b)(3) to make clear that the full text of an advisory interpretation must be published in the California Code of Regulations.

(5) Revise the Comment to proposed Government Code Section 11360.010 to delete the specific references to other means by which an agency may lawfully express an interpretive opinion, and add a general statement that the advisory interpretation procedure is not intended to preclude other lawful means of communicating such opinions.

The staff will consult with Commissioner Hemminger to confirm that the final recommendation correctly incorporates these decisions.

STUDY N-302 – ADMINISTRATIVE RULEMAKING: CONSENT REGULATIONS  
AND OTHER NONCONTROVERSIAL REGULATIONS

The Commission considered Memorandum 98-59 concerning comments received on the tentative recommendation on *Consent Regulations and Other Noncontroversial Regulations*. The Commission instructed the staff to prepare a final recommendation incorporating the following changes from the tentative recommendation:

(1) Revise proposed Government Code Sections 11347 and 11365.030 to provide that a comment is not an “adverse comment” unless it objects to the substance of a proposed consent regulation or identifies a defect in the procedures used in proposing the consent regulation.

(2) Revise the Comment to proposed Government Code Section 11365.020 to eliminate any implication that the impact analysis requirements of the consent regulation procedure are governed by the existing impact analysis provisions of the APA:

~~The requirements of subdivision (b) are comparable to the requirements of Section 11346.5(a)(5) (determination of local agency mandate, (a)(6) (estimate of cost or savings to state agency), (a)(9) (statement of potential cost to private person or business, (a)(10) (assessment of adverse economic impact), (a)(11) (statement of effect on housing costs). Subdivision (b) requires an agency to determine the potential effects of a proposed regulatory action. A public comment asserting that the agency’s determination is incorrect or that the basis for the determination is flawed is an adverse comment as defined in Section 11365.030(b)(1)(B).~~

(3) Revise proposed Government Code Section 11365.070 to eliminate any implication that the consent regulation procedure requires the preparation of an initial statement of reasons, final statement of reasons, or updated informative digest:

11365.070. (a) Except as provided in subdivision (b), an agency taking a regulatory action under this article is subject to Section 11347.3.

(b) The requirements of paragraphs (2), (3), (4), (5), and (8) of subdivision (b) of Section 11347.3 do not apply to a rulemaking file prepared pursuant to this section.

(c) The rulemaking file prepared pursuant to this Section shall include the published notice of the proposed regulatory action.

(4) Delete the proposed revision of Government Code Section 11346.5(a)(5). This revision would have required that the informative digest include a statement explaining why a local agency mandate that would be imposed by a proposed regulatory action would not be reimbursable.

(5) Revise proposed Government Code Section 11365.060 to permit OAL to reject a defective notice of a proposed consent regulation:

11365.060. (a) ~~On~~ Except as provided in subdivision (b), on receiving notice of a proposed regulatory action proposed under this article, the office shall publish the contents of the notice in the California Regulatory Notice Register.

(b) The office may refuse to publish a notice of a proposed regulatory action submitted to it pursuant to this article if the agency that submitted the notice has not satisfied the requirements of this article.

(c) On receiving the final text of a regulatory action proposed under this article and certification that all timely public comment was read and considered and that no adverse comment was received, the office shall file the final text of the proposed regulatory action with the Secretary of State.

(6) Delete proposed Government Code Section 11365.080 (elective review by Office of Administrative Law (OAL)). Consent regulations should be subject to automatic OAL review under Government Code Section 11349 *et seq.*

(7) Revise proposed Government Code Section 11365.040 to require that the notice of a proposed consent regulation include an explanation of the necessity of the proposed consent regulation.

(8) Revise proposed Government Code Sections 11347 and 11365.050 to provide that the streamlined procedures are not available where the final text of a proposed regulatory action is substantively different from the text that was originally made available for public review and comment.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary