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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**FEBRUARY 4-5, 1999**  
**LOS ANGELES**

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A meeting of the California Law Revision Commission was held in Los Angeles on February 4-5, 1999.

**Commission:**

*Present:* Arthur K. Marshall, Chairperson  
Howard Wayne, Assembly Member, Vice Chairperson  
Edwin K. Marzec  
Sanford M. Skaggs  
Colin Wied

*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:** Michael Asimow, Administrative Law  
Gideon Kanner, Eminent Domain Law & Inverse  
Condemnation

**Other Persons:**

Betty Barrington, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Feb. 4)  
Herb Bolz, Office of Administrative Law, Sacramento (Feb. 4)  
Julian Chang, AT & T, San Francisco (Feb. 5)  
Frank Coats, Department of Motor Vehicles, Sacramento (Feb. 4)  
Susan Cooley, Los Angeles County Bar Association, Trust and Estates Section, Los Angeles (Feb. 4)  
Douglas Ditonto, Southern California Edison, Rosemead (Feb. 5)  
A.J. Gardner, California Cable TV Association, Oakland (Feb. 5)  
K. Martin, Pacific Telesis Group, Los Angeles (Feb. 5)  
Joel Perlstein, California Public Utilities Commission, Legal Division, San Francisco (Feb. 5)  
Karen Potkul, Nextlink California, Santa Ana (Feb. 5)

Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles  
(Feb. 4)

Cindy Richburg, Sprint, Sacramento (Feb. 5)

Les Spahnn, Building Owners and Managers Association, Sacramento (Feb. 5)

Barbara Wheeler, Association for California Tort Reform, Sacramento (Feb. 5)

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1                                   MINUTES OF DECEMBER 10-11, 1998, MEETING

2           The Commission approved the Minutes of the December 10-11, 1998,  
3 Commission meeting as submitted by the staff.

4                                   ADMINISTRATIVE MATTERS

5   **Meeting Schedule**

6           The Commission made the following changes in its meeting schedule.

7	<b>April 1999</b>	<b>Sacramento</b>
8	Apr. 15 <u>8</u> (Thur.)	10:00 am – 5:00 pm
9	Apr. 16 <u>9</u> (Fri.)	9:00 am – 4:00 pm
10	<b>June 1999</b>	<b>Sacramento</b>
11	June 10 <u>24</u> (Thur.)	10:00 am – 5:00 pm
12	June 11 <u>25</u> (Fri.)	9:00 am – 4:00 pm

1   **New Topics and Priorities**

2       The Commission considered Memorandum 98-56 and its First and Second  
3   Supplements, relating to new topics and priorities. The Commission made the  
4   following decisions.

5       **New Topics.** The Commission will request the Legislature to add the  
6   following topics to its calendar:

7           Statutes of Limitation in Legal Malpractice Actions  
8           Common Interest Developments (the Commission had  
9           previously approved this for study)  
10          Public Records Law (including enforcement mechanisms and  
11          clarification of exceptions, as well as integration with  
12          privacy laws and adaptation for electronic records)  
13          Criminal Sentencing

14       **New Priorities.** The Commission will give priority to study of the following  
15   aspects of topics currently on its calendar:

16          Attorney's Fees — harmonize the standards for awarding the  
17          “prevailing party” in a contract action (1) costs under Code  
18          of Civil Procedure Sections 1032 and 1033.5 and (2)  
19          attorney's fees under Civil Code Section 1717  
20          Rules of Construction of Estate Planning Instruments — the  
21          staff should seek an appropriate consultant to prepare a  
22          background study on the matter  
23          Miscellaneous Probate Issues — the staff will work some of  
24          these into the Commission's agenda from time to time on  
25          a low priority basis  
26          Judicial Review of Agency Action — the staff will bring back  
27          some of the salutary provisions of the judicial review  
28          recommendation as free-standing proposals

29       **Deletions from Calendar.** The Commission will request the Legislature to  
30   delete the following topics from its calendar:

31          Class Actions  
32          Procedure for Removal of Invalid Liens  
33          Unfair Competition Litigation  
34          Shareholders' Rights and Corporate Director Responsibilities  
35          Tolling Statute of Limitations While Defendant Is Out of  
36          State

37       Also in connection with its consideration of new topics and priorities, the  
38   Commission made the following decisions:

1 (1) The Commission will explore the possibility of proposing annual omnibus  
2 legislation to clean out statutes that have been held unconstitutional or repealed  
3 by implication during the preceding year. The concept would be to include  
4 decisions of the Court of Appeal as well as of the Supreme Court. The staff will  
5 prepare materials for a subsequent meeting, using 1998 as a base year for  
6 demonstration purposes.

7 (2) The staff should circulate Professor Reppy's article on mixed community  
8 and separate property assets to the Chair of the State Bar Family Law Section  
9 with a request for practitioner feedback on the suggested approach.

10 (3) The staff should circulate the Commission's recommendation on joint  
11 tenancy and community property to the banks, real estate brokers, and title  
12 insurance companies to see whether there has been enough of a change in  
13 attitudes over the past five years to warrant reintroduction of the  
14 recommendation.

#### 15 **Report of Executive Secretary**

16 The Executive Secretary reported that the Commission currently has four  
17 vacancies. The positions held by former Commissioners Kopp (whose Senate  
18 term ended), Hemminger and Orr (whose appointments were rescinded by  
19 Governor Davis), and Cooper (who resigned) have not yet been filled. The  
20 Executive Secretary has requested the appointing authorities to act promptly in  
21 filling these vacancies.

22 The Executive Secretary noted that, pursuant to a Commission directive, he  
23 has reviewed the Commission's practices and procedures for compliance with  
24 the Open Meeting Law. The Executive Secretary certified that the Commission is  
25 in compliance with the law.

#### 26 **LEGISLATIVE PROGRAM**

27 The Commission considered Memorandum 99-1. The staff supplemented the  
28 memorandum with the information that the trial court unification followup  
29 legislation has been introduced as SB 210 (Senate Judiciary Committee). No  
30 Commission action was required or taken on this matter.

#### 31 **STUDY D-354 – HOMESTEAD ISSUES**

32 The Commission considered Memorandum 99-5 concerning the homestead  
33 exemption statutes. The Commission approved the proposal to distribute a

1 revised version of the recommendation on the *Homestead Exemption*, 26 Cal. L.  
2 Revision Comm'n Reports 37 (1996), as a tentative recommendation. Revisions  
3 should be made to implement some technical and substantive improvements  
4 made in the bill during the 1996 legislative session, as described in the  
5 memorandum.

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

7       The Commission considered Memorandum 99-6, relating to condemnation by  
8 a privately owned public utility. The Commission also considered a letter from  
9 Pacific Telesis (Exhibit pages 1-4) and copies of Connecticut Gen. Stat. § 16-2471,  
10 Telecommunications Act of 1996 § 253, and PUC Decision 98-10-058 (October 22,  
11 1998), all of which were provided by attendees at the meeting. Commissioner  
12 Skaggs did not participate in this matter.

13       After reviewing various options that have been suggested and hearing the  
14 comments of interested persons in attendance at the meeting, the Commission  
15 instructed the staff to develop an approach along the lines of that found in the  
16 Connecticut statute, taking into account comments of telecommunications  
17 providers and building owners. Dispute resolution under this approach would  
18 be before the Public Utilities Commission, possibly with alternative dispute  
19 resolution incentives. The Commission will proceed along these lines but will not  
20 seek legislative action until the fate of SB 177 (Peace) has been determined.

21       STUDY EM-454 – COMPENSATION FOR LOSS OF GOODWILL

22       The Commission considered Memorandum 98-85 and its First Supplement,  
23 involving issues relating to compensation for loss of goodwill. The Commission  
24 approved for circulation as a tentative recommendation a requirement that the  
25 statement of valuation data supporting an opinion as to loss of goodwill include  
26 the method used to determine loss of goodwill and a summary of the data  
27 supporting the opinion. The tentative recommendation should also require that  
28 the final offer and demand include statutorily or constitutionally required  
29 compensation, including compensation for loss of goodwill, and indicate  
30 whether interest and costs are included. The tentative recommendation should  
31 also make inquiry whether under accounting practice goodwill is considered to  
32 be an asset for purposes of calculating the return on the assets of a business.

1                   STUDY EM-550 – EXHAUSTION OF ADMINISTRATIVE  
2                   REMEDIES IN INVERSE CONDEMNATION

3       The Commission's consultant on the study of exhaustion of administrative  
4 remedies in inverse condemnation (Gideon Kanner) reported to the Commission  
5 on the progress of the background study he is preparing. He noted that the  
6 recent California Supreme Court case of *Landgate, Inc. v. California Coastal*  
7 *Comm'n*, 17 Cal. 4th 1006 (1998), has complicated the matter by an expansive  
8 reading of exhaustion procedures, implicating substantive compensation issues.  
9 He requested Commission guidance on whether to expand the scope of the study  
10 to address necessarily implicated substantive issues.

11       The Commission indicated that its mandate is limited to procedural issues,  
12 but that it may be necessary to understand the substantive context in order to  
13 appropriately address the procedural issues. The Commission requested Prof.  
14 Kanner to expand the scope of the study accordingly.

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

16       See entry in these Minutes under Study Em-451.

17                   STUDY H-454 – COMPENSATION FOR LOSS OF GOODWILL

18       See entry in these Minutes under Study Em-454.

19                   STUDY H-550 – EXHAUSTION OF ADMINISTRATIVE  
20                   REMEDIES IN INVERSE CONDEMNATION

21       See entry in these Minutes under Study Em-550.

22                   STUDY J-1301 – TRIAL COURT UNIFICATION

23       The Commission considered Memorandum 99-16 and its First Supplement,  
24 relating to followup legislation for trial court unification.

25       **Revision of Court Procedures**

26       In connection with the major study of revision of court procedures, which is a  
27 joint Law Revision Commission/Judicial Council study, the Commission  
28 approved the following approach outlined by the staff in Memorandum 99-16:

29                   We have agreed that during the next two years the Judicial  
30                   Council will gather detailed procedural data concerning cases in

1 unified courts. During the same period we will retain an expert  
2 civil procedure consultant to prepare a background study on issues  
3 and possible approaches. The expense of the consultant is to be  
4 shared between the two agencies (with the possible participation of  
5 the State Bar; we have not yet approached them about this  
6 possibility). We may also be able to use the assistance of the  
7 Hastings Public Law Research Institute in developing papers on  
8 individual aspects of judicial procedures. At the end of the two year  
9 period we will be in a position to focus on the issues and start  
10 developing recommendations for the Legislature.

#### 11 **Reclassification Procedure**

12 The Commission approved the concept of repealing the reclassification  
13 provisions (Code of Civil Procedure Sections 395.9 and 399.5) and reorganizing  
14 them in a new chapter of the Code of Civil Procedure, with appropriate  
15 modifications to address the ambiguities identified in the First Supplement to  
16 Memorandum 99-16. The staff should work on the details with the Judicial  
17 Council and the State Bar, and then report back to the Commission. With regard  
18 to fees if a court grants a motion to reclassify a case that was erroneously  
19 classified as a limited civil case, the defendant should pay the difference between  
20 the fee for filing the defendant's first paper in a limited civil case and the larger  
21 fee for filing the defendant's first paper in a case other than a limited civil case.

#### 22 **Law Library Board in San Diego County**

23 The following amendment of Business and Professions Code Section 6301.1  
24 should be inserted into the trial court unification clean-up bill (SB 210 (Senate  
25 Judiciary Committee)), subject to the Judicial Council's approval:

#### 26 **Bus. & Prof. Code § 6301.1 (amended). Board of law library** 27 **trustees in San Diego County**

28 SEC. \_\_\_\_\_. Section 6301.1 of the Business and Professions Code  
29 is amended to read:

30 6301.1. Notwithstanding Section 6301, in San Diego County the  
31 board of law library trustees shall be constituted, as follows:

32 (a) Two Four judges of the superior court, to be elected by and  
33 from judges in the San Diego County Judicial District the superior  
34 court judges of the county. Each superior court judge so elected  
35 shall serve a three-year term. In order to maintain overlapping  
36 terms, those judges holding office as of the date of unification of the  
37 municipal and superior courts of San Diego County shall remain in  
38 office until the expiration of their original terms.

1       ~~(b) Two judges from the municipal courts of the county. The~~  
2       ~~courts may, by joint agreement, determine the pattern of~~  
3       ~~representation on the board. Each municipal court judge so elected~~  
4       ~~shall serve a three-year term.~~

5       (e) (b) The board of supervisors shall appoint three attorneys  
6       resident in the county to the board of law library trustees, to serve  
7       overlapping three-year terms. In order to stagger the three  
8       appointments, the board of supervisors shall, in January of 1997,  
9       appoint one attorney to a one-year term, one attorney to a two-year  
10      term, and one attorney to a three-year term; and as each term  
11      expires, the new appointee shall thereafter serve three-year terms.  
12      At least one attorney appointed pursuant to this subdivision shall  
13      be a member of the San Diego County Bar Association.

14      ~~(d)~~ (c) In the event a trustee cannot serve a full term, the  
15      appointing authority for that individual shall appoint another  
16      qualified person to complete that term. Interim appointments may  
17      be made by the board of law library trustees in accordance with  
18      Section 6305.

19      **Comment.** Section 6301.1 is amended to accommodate  
20      unification of the municipal and superior courts in San Diego  
21      County. Cal. Const. art. VI, § 5(e).

## 22      **Small Claims Advisory Committee**

23      The following amendment of Code of Civil Procedure Section 116.950 should  
24      be inserted into the trial court unification clean-up bill:

### 25      **Code Civ. Proc. § 116.950 (amended). Advisory committee;** 26      **operation of section**

27      SEC. \_\_\_\_\_. Section 116.950 of the Code of Civil Procedure is  
28      amended to read:

29      116.950. (a) This section shall become operative only if the  
30      Department of Consumer Affairs determines that sufficient private  
31      or public funds are available in addition to the funds available in  
32      the department's current budget to cover the costs of implementing  
33      this section.

34      (b) There shall be established an advisory committee,  
35      constituted as set forth in this section, to study small claims practice  
36      and procedure, with particular attention given to the improvement  
37      of procedures for the enforcement of judgments.

38      (c) The members of the advisory committee shall serve without  
39      compensation, but shall be reimbursed for expenses actually and  
40      necessarily incurred by them in the performance of their duties. The  
41      advisory committee shall report its findings and recommendations  
42      to the Judicial Council and the Legislature.

43      (d) The advisory committee shall be composed as follows:



1 (1) The Attorney General or a representative.

2 (2) Two consumer representatives from consumer groups or  
3 agencies, appointed by the Secretary of the State and Consumer  
4 Services Agency.

5 (3) One representative appointed by the Speaker of the  
6 Assembly and one representative appointed by the President pro  
7 Tempore of the Senate.

8 (4) Two representatives, appointed by the Board of Governors  
9 of the State Bar.

10 (5) Two representatives of the business community, appointed  
11 by the Secretary of the Trade and Commerce Agency.

12 (6) ~~Six judges of the municipal court, or of the superior court in~~  
13 ~~a county in which there is no municipal court, who have had~~  
14 ~~extensive experience as judges of small claims court, appointed by~~  
15 ~~the Judicial Council~~ judicial officers who have had extensive  
16 experience presiding in small claims court, appointed by the  
17 Judicial Council. Judicial officers appointed under this subdivision  
18 may include judicial officers of the superior court, judicial officers  
19 of the municipal court, judges of the appellate courts, and retired  
20 judicial officers.

21 (7) One representative appointed by the Governor.

22 (8) Two clerks of the court, appointed by the Judicial Council.

23 (e) Staff assistance to the advisory committee shall be provided  
24 by the Department of Consumer Affairs, with the assistance of the  
25 Judicial Council, as needed.

26 **Comment.** Section 116.950(d) is amended to broaden the range  
27 of judicial officers eligible to serve on the Small Claims Advisory  
28 Committee.

29 STUDY K-410 – SETTLEMENT NEGOTIATIONS

30 The Commission considered Memorandum 99-4 and its First Supplement,  
31 concerning the admissibility, discoverability, and confidentiality of settlement  
32 negotiations. The Commission directed the staff to prepare a new draft and  
33 circulate it to interested parties for review and comment prior to the next  
34 Commission meeting. In preparing the new draft, the staff should attempt to  
35 make it user-friendly. The draft should incorporate the following revisions (and  
36 appropriate conforming revisions) of the staff draft recommendation attached to  
37 Memorandum 99-4:

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

39 It may be misleading to define “settlement negotiations” to include a  
40 settlement agreement. The staff should address this problem, perhaps by deleting

1 “settlement agreement” from the definition of “settlement negotiations” and  
2 adding a provision that defines “evidence of settlement negotiations” to include  
3 a settlement agreement.

4 The Commission specifically considered and approved the portion of the  
5 Comment on when discussions become settlement negotiations, as opposed to  
6 business communications (page 23, line 33, to page 24, line 2, of the staff draft  
7 recommendation).

8 **§ 1131.5. Role of court or other tribunal in applying chapter**

9 Section 1131.5 should be deleted because it is vague and unclear.

10 **§§ 1132-1133.5. Admissibility, discoverability, and confidentiality of settlement**  
11 **negotiations**

12 To respond to concerns of the State Bar Committee on Administration of  
13 Justice, the Comments to Sections 1132 through 1133.5 should make clear that a  
14 number of provisions govern conduct during settlement negotiations. The staff  
15 should revise the proposed language on this point (page 26, lines 26-32, page 27,  
16 lines 36-42, and page 28, lines 39-44, of the staff draft recommendation) to  
17 improve the transition.

18 The proposed explanations of the concept of confidentiality (page 14, line 19  
19 through page 15, line 26, and page 28, lines 14 through 47, of the staff draft  
20 recommendation) are acceptable, but the draft should be revised to ensure that  
21 an agreement making settlement negotiations confidential is admissible to prove  
22 breach of the agreement.

23 **§ 1135. Partial satisfaction of undisputed claim or acknowledgment of**  
24 **preexisting debt**

25 The Comment to Section 1135 should be revised to read:

26 **Comment.** Section 1135 continues former Section 1152(c)  
27 without substantive change, except that it extends the principle to  
28 discovery and confidentiality, as well as admissibility. ~~Although~~  
29 ~~this chapter does not exclude evidence of partial satisfaction of an~~  
30 ~~undisputed debt or acknowledgment of a preexisting debt, such~~  
31 ~~evidence is not necessarily admissible or subject to disclosure.~~  
32 ~~There may be other bases for exclusion. See, e.g., Section 352.~~

1 The deleted language is unnecessary, because the Comment to Section 1132  
2 (admissibility of settlement negotiations) contains similar but more broadly  
3 applicable language.

4 **§ 1136. Cause of action, defense, or other legal claim arising from conduct**  
5 **during settlement negotiations**

6 Section 1136 is acceptable as set forth in the staff draft recommendation. The  
7 provision is not intended to permit a defendant to prove a statute of limitations  
8 defense by introducing evidence that the plaintiff admitted in a negotiation that  
9 he or she was aware of a claim earlier than previously asserted. The Commission  
10 considered stating as much in the Comment, but decided that such an  
11 explanation was unnecessary because Section 1136 expressly applies only where  
12 evidence of settlement negotiations is “introduced or relevant to support or rebut  
13 a cause of action, defense, or other legal claim *arising from conduct during the*  
14 *negotiations.*” (Emphasis added.) A preexisting statute of limitations defense  
15 clearly is not a “defense ... *arising from conduct during the negotiations.*”

16 **§ 1137. Obtaining benefits of settlement**

17 The Comment to Section 1137 should be revised to make clear that proof of  
18 performance pursuant to a settlement may include proof of failure to perform.

19 **§ 1139. Prevention of felony**

20 Section 1139 should be limited to prevention of a “violent felony”. The  
21 Comment should refer to the Penal Code provision defining a “violent felony”.

22 **§ 1141.5. Bias**

23 Section 1141.5 should be revised to read:

24 1141.5. Section 1132 does not apply where evidence of a  
25 settlement agreement is introduced to show bias of a witness who  
26 is a party to the agreement.

27 **§ 1142. Admissibility in evaluating attorney’s fees and class action settlements**

28 Section 1142 should be deleted.

29 **§ 1143. Admissibility to prove liability for or show invalidity of underlying**  
30 **claim**

31 The concept of this provision is good but the drafting should be improved,  
32 perhaps by moving the provision into Section 1132.

1                   STUDY L-649 – UNIFORM PRINCIPAL AND INCOME ACT

2           The Commission considered Memorandum 99-2 and its First Supplement  
3 concerning the draft recommendation proposing the *Uniform Principal and Income*  
4 Act. The Commission approved the recommendation for printing and  
5 introduction in the 1999 legislative session. The Commission recognized that  
6 additional revisions may need to be made to resolve controversy concerning the  
7 power to adjust in Section 16336 (UPAIA Section 104). It was also noted that  
8 expert practitioners were still debating advisable revisions in Section 16361  
9 relating to treatment of deferred compensation and individual retirement  
10 accounts.

11                   STUDY L-1100 – NEW PROBATE CODE SUGGESTIONS

12           The Commission considered Memorandum 99-3 and Memorandum 98-84 and  
13 its First and Second Supplements, relating to informal probate administration.  
14 The Commission received at the meeting the additional materials attached as  
15 Exhibit pp. 5-7.

16           After hearing from interested persons in attendance at the meeting, the  
17 Commission concluded that it would not study the concept of informal probate  
18 administration.

19           In connection with this matter, the Commission observed that part of the  
20 impetus for the proposal is an increase in problems and litigation in trust  
21 administration, which has been noted by all parties to these discussions. The  
22 Commission raised the question whether these problems ought not to be  
23 identified and perhaps addressed directly. Mr. Rae volunteered to get feedback  
24 to the Commission from probate judges and staff on this matter.

25                   STUDY N-300 – ADMINISTRATIVE RULEMAKING

26           The Commission considered Memorandum 99-8 and its First Supplement,  
27 presenting a draft tentative recommendation to improve administrative  
28 rulemaking procedures. The Commission made the following decisions and  
29 requested that the staff revise the draft tentative recommendation accordingly:

30           (1) The APA should contain an express exception for agency advice that is  
31 directed to a specifically named person who has requested advice from the  
32 agency. Such advice should not be entitled to any judicial deference and should

1 not be binding on the person who requested it. Agency personnel should not be  
2 able to request such advice. The exception should be drafted to make clear that  
3 such advice should not be used to promulgate underground regulations.

4 (2) The APA should not include an express exception for an agency  
5 interpretation arising out of case-specific adjudication, or for a policy manual  
6 that is nothing more than a restatement or summary, without commentary, of the  
7 agency's prior decisions in specific cases and its prior advice letters.

8 (3) The current construction of the internal management exception to the APA  
9 definition of "regulation", which precludes its application to an agency rule that  
10 has any effect on persons outside the agency, is too narrow. Instead, the  
11 exception should cover any internal management rule except one that affects the  
12 legal rights or obligations of members of the public. The internal management  
13 exception should not apply to a rule that affects the legal rights of state  
14 employees or of persons in the custody of the Department of Corrections.

15 (4) A provision should be added to exempt agency audit and enforcement  
16 criteria from the rulemaking requirements and from disclosure under the Public  
17 Records Act where such criteria should properly be kept secret. The staff should  
18 examine Section 3-116(2) of the Model State Administrative Procedure Act (1981)  
19 as a possible model.

20 (5) A list of statutory exemptions from the APA rulemaking requirements  
21 should be published in the California Regulatory Notice Register for public  
22 comment. The Commission will study any problems with these exceptions that  
23 are identified by the public.

24 (6) The effective period of an emergency regulation should be extended from  
25 120 to 180 days.

26 (7) The staff should draft provisions authorizing and encouraging negotiated  
27 rulemaking as a prelude to the regular rulemaking procedure.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

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