
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JUNE 24-25, 1999
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on June 24-25, 1999.

Commission:

Present: Howard Wayne, Assembly Member, Vice Chairperson
Sanford M. Skaggs
Colin Wied

Absent: Arthur K. Marshall, Chairperson
Bion M. Gregory, Legislative Counsel
Edwin K. Marzec

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

Consultant: J. Clark Kelso, Trial Court Unification, Administrative Rulemaking

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento (June 24)
Ed Bouillon, California Energy Commission, Sacramento
Frank Coats, Department of Motor Vehicles, Sacramento (June 24)
W. Gregory Day, State Board of Equalization, Sacramento (June 24)
Martha Johnson, Pacific Telesis Group, Sacramento (June 25)
Catherine Kennedy, California State Employees Association, Sacramento (June 24)
Miles E. Locker, Division of Labor Standards Enforcement, San Francisco (June 24)
Julie Miller, Southern California Edison, Rosemead (June 25)
Tony Nevarez, Council of California County Law Libraries, Sacramento (June 24)
Robert Orr, California Medical Association Council on Ethical Affairs, Loma Linda (June 24)
Karen Short, California Nurses Association, Sacramento (June 24)

Donald R. Travers, State Bar Estate Planning, Trust and Probate Law Section,
Paradise (June 24)

Joshua Weinstein, Judicial Council of California, San Francisco (June 24)

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A quorum not being present, the Commission acted as a subcommittee. Decisions made at the meeting are subject to ratification by the Commission at a subsequent meeting.

MINUTES OF APRIL 8, 1999, MEETING

The Commission approved the Minutes of the April 8, 1999, Commission meeting as submitted by the staff, subject to the following corrections:

On page 3, lines 1-5 should be indented and single spaced.

On page 5, line 1, the word “of” should be inserted after “obligation”.

On page 10, line 31, “Equalization” should replace “Equalizations”.

ADMINISTRATIVE MATTERS

Commission Quorum Issues

The Commission considered Memorandum 99-41, relating to Commission quorum issues. The Commission decided to revise its existing quorum rules to provide:

2.4.1. Quorum

Five members of the Commission constitute a quorum, except that:

(1) If there are three or four vacancies in the membership of the Commission, four members of the Commission constitute a quorum.

(2) If there are five or more vacancies in the membership of the Commission, three members of the Commission constitute a quorum.

If a quorum is established at any time during a meeting of the Commission, the Commission may thereafter act for the duration of the meeting notwithstanding the absence of any member who is part of the quorum. Any action may be taken by a majority of those present after a quorum is established, but any final recommendation to the Legislature must be approved by a minimum of ~~four~~ three affirmative votes. ~~The~~

The Chairperson is authorized to determine that fewer than five the prescribed number of members constitutes a quorum if a quorum is not otherwise established at a particular meeting and members attending the meeting are entitled to per diem and travel expenses, but in such case the members present act as a subcommittee and no final action may be taken at the meeting. Decisions of a Commission subcommittee may be ratified by the Commission when a quorum is attained, whether at the same meeting or a later meeting.

The Commission directed the staff to investigate the Open Meeting Law provisions concerning, and the equipment and service requirements for,

establishing a quorum at a Commission meeting by telephone conference in a case where a quorum at the meeting cannot otherwise be obtained.

Meeting Schedule

The Commission made the following change in its meeting schedule:

October 1999	Los Angeles
Oct. 21 (Thur.)	10:00 am – 5:00 pm
Oct. 22 (Fri.)	9:00 am – 4:00 pm
October 1999	Sacramento
Oct. 14 (Thur.)	10:00 am – 5:00 pm
Oct. 15 (Fri.)	9:00 am – 4:00 pm

Statutes Held Unconstitutional or Repealed by Implication – Court of Appeal Decisions

The Commission considered Memorandum 99-27 analyzing the proposal made at the February meeting to review statutes held unconstitutional by the California courts of appeal, in addition to the California and US Supreme Courts. The Commission decided not to pursue this project, mainly because it would be difficult to determine when court of appeal decisions would provide appropriate authority for legislation. It was recognized that the Commission has long had an informal practice of reviewing important court of appeal decisions bearing on subjects the Commission is working on or monitoring as the result of past Commission activity.

The Commission also directed the staff to conduct a follow-up study of California and US Supreme Court cases holding California statutes unconstitutional (or repealed by implication) to determine how the unconstitutionality was addressed. With the assistance of student researchers, volunteered by Prof. Clark Kelso, it would be interesting to determine how the Legislature has responded to holdings of unconstitutionality over the last 10 or 20 years. The staff will forward the list of cases identified in the Commission's Annual Reports to Professor Kelso for review and the staff will report back to the Commission at an appropriate time.

Report of Executive Secretary

Personnel matters. The Executive Secretary reported on the following personnel matters:

- The Commission's Chairperson, Art Marshall, has been unable to attend the past two meetings due to illness. He is out of the hospital now and is recuperating.

- Bob Murphy, Staff Counsel for the Commission, is retiring after 24 years of service with the Commission. The staff is planning a low-key event at which his service will be recognized. We plan to recruit for his replacement at the entry level, but will not be able to fill the position immediately due to the need to pay Mr. Muphy's accrued vacation and to apply the funding for the position to cover additional expenses.

- The Executive Secretary introduced Julian Davis, a Stanford Law student serving as a volunteer law clerk this summer with the Commission under the auspices of the Stanford Public Interest Law Foundation.

- The Executive Secretary indicated his intent to take a month off during May 2000 for a family vacation. While this is somewhat problematic for the Commission's legislative program, the Executive Secretary will make sure that matters for which he is responsible are adequately covered by other members of the Commission's legal staff.

Office space. The Executive Secretary reported that the Commission has opened a small office at McGeorge Law School, in conjunction with the Institute for Legislative Practice. The office is staffed by Brian Hebert, who has relocated to the Sacramento area. At present we're working out the communications issues and other logistical complications of having offices in two different locations. Assuming these matters can be worked out, we will be in a position gradually to reduce our Palo Alto operation and increase our Sacramento operation. This opportunity will be helpful in recruiting new legal talent for the Commission on state salary, due to the significantly lower cost of living in the Sacramento area.

Ethics orientation. The Executive Secretary indicated that there is a new statutory requirement of an ethics orientation course for Commission members and key staff members. The staff will provide the Commission with the necessary materials in the near future.

Priorities for study. The Executive Secretary noted that suggestions have been made that the Commission do a comprehensive revision of the mechanics lien law. We anticipate receiving such a request from the Legislature in the near future.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 99-26, reviewing the status of bills in the Commission's 1999 legislative program.

In connection with the proposed clarification of Evidence Code Section 822(a)(1) in AB 321 (Wildman), the Commission approved the alternate approach, as set out in the memorandum, of deleting the problem language from the section.

In connection with the recommendation relating to step child and foster child inheritance, discussed in the memorandum, the Commission decided to discontinue efforts to obtain enactment of the recommendation.

For other Commission action on the 1999 legislative program, see the entries in these Minutes under the following studies:

Study L-649 – Uniform Principal and Income Act

Study L-4000 – Health Care Decisions

Study N-301 – Administrative Rulemaking: Advisory Interpretations

Study N-302 – Administrative Rulemaking: Consent Regulations

STUDY E-100 – ENVIRONMENTAL LAW

Reorganization of Environmental and Natural Resource Statutes

The Commission considered Memorandum 99-42, presenting a draft report that describes the course of the environmental statute reorganization study and recommends that California's environmental and natural resource statutes not be reorganized. The Commission approved the report for publication.

Air Resources Technical Revisions

The Commission considered Memorandum 99-36, presenting a draft tentative recommendation that would correct technical defects in Parts 1 to 4 of the Air Resources Division of the Health and Safety Code (Health & Safety Code §§ 39000-42708). The Commission approved the tentative recommendation for circulation for comment.

STUDY EM-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

The Commission considered Memorandum 99-34 and its First Supplement, relating to telecommunications access. Commissioner Skaggs did not participate in this matter.

The Commission made the following policy decisions, but decided to defer circulation of a tentative recommendation on this matter until the outcome of SB 177 (Peace & Burton) and AB 651 (Wright) and the need for further legislative action can be assessed.

Obligation to Provide Service

The Commission approved the staff proposal to make clear the authority of the Public Utilities Commission to regulate the obligation to provide service, except that any obligation to provide service should be on request of a user of the service (tenant), as opposed to a building owner.

Removal of Wiring

The Commission approved the approach of AB 651 (Wright) to provide for removal of a telecommunications installation to the extent it is obsolete and hinders a new installation.

Public Utilities Commission Approval of Compensation Agreement

The Commission agreed that the statute should not require the Public Utilities Commission to approve a compensation agreement entered into between a telephone corporation and a building owner.

Elimination of Eminent Domain Authority

The Commission approved elimination of condemnation authority for purposes for which the administrative access procedure is available, subject to fine-tuning the specific language set out in the staff draft.

Technical and Minor Substantive Revisions

The technical and minor substantive issues present in the draft will be subject to further review when and if the Commission circulates a tentative recommendation on this matter for comment.

Judicial Review

The question was raised to what extent Public Utilities Commission decisions under the proposed statute would be judicially reviewable, and whether there should be any time limits for the PUC to act under the statute. The Commission decided that implementing regulations under the statute should be adopted within 18 months, using a notice and comment type of procedure. The

Commission will further address this issue before any tentative recommendation is circulated on the matter.

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

Changes to Recommendation

The Commission considered Memorandum 99-33 discussing changes that might be made to the Commission's recommendation relating to the *Effect of Dissolution of Marriage on Nonprobate Transfers* in order to increase the likelihood of its legislative enactment. Rather than make the changes described in the memorandum, the Commission will study whether to abandon the mechanical approach taken in the recommendation in favor of a flexible approach allowing a court to set aside a nonprobate transfer to a former spouse in certain defined circumstances. The Commission will also consider whether to apply the same approach to wills.

Automatic Temporary Restraining Order on Dissolution of Marriage

Memorandum 99-33 also described a related problem — existing law may automatically restrain a party to a dissolution of marriage from severing a joint tenancy or changing a nonprobate transfer beneficiary designation during the pendency of the proceeding. The Commission decided to study whether to eliminate the automatic restraint on changes of this type, while allowing a court to restrain such changes on the application of a party.

STUDY H-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

See entry in these Minutes under Study Em-451.

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

See entry in these Minutes under Study F-910.

STUDY J-1302 – APPOINTMENT OF RECEIVER

The Commission considered Memorandum 99-9, on conforming the statutes governing appointment of a receiver. The Commission approved the attached draft as a tentative recommendation for distribution for comment.

STUDY J-1303 – JURISDICTIONAL CLASSIFICATION OF GOOD FAITH IMPROVER CLAIM

The Commission considered Memorandum 99-10 on jurisdictional classification of good faith improver claims. The Commission decided to pursue two options:

(1) Keep and clarify existing law for all courts (option 1).

(2) After all the trial courts have unified, revisit the question of whether the law/equity distinction makes sense for purposes of jurisdictional classification (option 5).

STUDY J-1304 – STAY OF LIEN ENFORCEMENT ACTION PENDING ARBITRATION

The Commission considered Memorandum 99-11, concerning stay of a mechanics' lien foreclosure action pending arbitration. The Commission approved the attached draft as a tentative recommendation for distribution for comment.

STUDY J-1305 – PENAL CODE CLEANUP

The Commission considered Memorandum 99-12, concerning Penal Code provisions relating to defense counsel in a criminal case. As recommended by the staff, the Commission decided not to propose legislation in this area. The staff should prepare a draft report explaining this decision to the Legislature.

STUDY J-1306 – CASES IN WHICH COURT REPORTER IS REQUIRED

The Commission considered Memorandum 99-13 on cases in which a court reporter is required. The Commission approved the attached draft as a tentative recommendation for distribution for comment.

STUDY J-1307 – LAW LIBRARY BOARD IN UNIFIED COURT

The Commission considered Memorandum 99-14, concerning law library boards of trustees. The proposed amendment of Business and Professions Code Section 6301 should read:

Bus. & Prof. Code § 6301 (amended). Board of law library trustees
SECTION 1. _____. Section 6301 of the Business and Professions Code is amended to read:

6301. A Except as otherwise provided by statute, a board of law library trustees is constituted as follows:

(a) In a county where there are no more than three judges of the superior court, each of the judges is ex officio a trustee; in a county where there are more than three judges of the superior court, the judges of the court shall elect three of their number to serve as trustees. However, where there are no more than three judges of the superior court, the judges may at their option select only one of their number to serve as a trustee, and in that event they shall appoint two additional trustees who are members of the bar of the county.

Any judge who is an ex officio or elected member may at the judge's option designate a member of the bar of the county to act for the judge as trustee.

(b) In a county with one or two municipal courts the judges of the court or courts shall elect one of their number to serve as trustee. In a county with three or more municipal courts the judges of the courts may elect two of their number to serve as trustees. In a county in which there is no municipal court, the judges of the superior court may elect one or ~~more~~ two of their number to serve as trustee, in addition to the trustees elected pursuant to subdivision (a), ~~so that the number of judges elected shall not exceed the number of judge trustees authorized as of January 1, 1998.~~ Any judge who is an elected member may at the judge's option designate a member of the bar of the county to act for the judge as trustee.

(c) The chair of the board of supervisors is ex officio a trustee, but the board of supervisors at the request of the chair may appoint a member of the bar of the county or any other member of the board of supervisors of the county to serve as trustee in place of said the chair. The appointment of the person selected in lieu place of the chair of the board of supervisors shall expire when a new chair of the board of supervisors is selected, and the appointment shall not be subject to the provisions of Section 6302.

(d) The board of supervisors shall appoint as many additional trustees, who are members of the bar of the county, as may be necessary to constitute a board of ~~six members in any county where one member is elected pursuant to subdivision (b), or of seven members in any county where two members are elected to serve as trustees pursuant to subdivision (b)~~ at least six and not more than seven members.

With that revision and conforming changes, the Commission approved the draft attached to Memorandum 99-14 as a tentative recommendation for distribution for comment.

STUDY J-1308 – AFFIDAVIT UNDER FISH AND GAME CODE SECTION 2357

The Commission considered Memorandum 99-15 concerning affidavits under Fish and Game Code Section 2357. The Commission asked the staff to prepare a tentative recommendation proposing repeal of Section 2357.

STUDY J-1309 – EXPIRED PILOT PROGRAMS

The Commission considered Memorandum 99-30 concerning obsolete statutes relating to expired pilot projects and programs. The Commission approved the staff recommendation that a letter be sent to each cognizant agency to determine whether there is any reason why the pertinent pilot project statute should not be repealed. The Commission also approved the staff recommendation that related statutes with obsolete reporting requirements be identified (e.g., Gov't Code § 68520) and included in eventual cleanup legislation.

**STUDY J-1310 – CATALOG OF CASES WITHIN JURISDICTION OF COURT OF APPEAL
ON JUNE 30, 1995**

The Commission considered Memorandum 99-31 and its First Supplement, concerning preparation of a catalog of cases within the jurisdiction of the court of appeal on June 30, 1995. As recommended in the First Supplement, the Commission decided to defer to the Judicial Council as the agency with primary responsibility for this study and, for the time being, not to develop legislation along the lines suggested in Memorandum 99-31. The staff should continue conferring with the Judicial Council about the best way to proceed. Judicial Council staff agreed to give the Commission a status report on the study at the October meeting.

STUDY J-1320 – TRIAL COURT UNIFICATION: REVIEW OF CIVIL PROCEDURES

The Commission considered Memorandum 99-29, concerning the Commission's joint study with the Judicial Council on revising civil procedure to take full advantage of trial court unification. The staff asked the Commission what ideas should be considered in that study. The Commission suggested that the study include exploration of the following ideas:

(1) Adjusting the amount-in-controversy limits for small claims cases and economic litigation cases.

(2) Permitting greater flexibility in determining which set of procedures applies to a case (small claims procedures, economic litigation procedures, etc.).

(3) Simplifying procedures wherever possible, eliminating unnecessary distinctions and complexities. This could perhaps include eliminating disparities in filing fees.

(4) Creating a new Code of Civil Procedure, perhaps in bite-size chunks.

(5) Increasing the extent to which procedures are specified in court rules, rather than legislation.

(6) Using smaller juries for smaller cases.

(7) Using simplified evidentiary rules or other simplified procedures in cases that are not economic to litigate, to help enable parties to pursue such cases without incurring prohibitive litigation expenses.

(8) Making the appeal path for a case dependent upon the result obtained, at least to some extent.

(9) Creating regional appellate divisions.

(10) Increasing the extent to which appellate divisions render written opinions.

(11) Using a “notice of intended action” approach in specified circumstances, as is done in bankruptcy cases.

(12) After all the trial courts have unified, revisiting the question of whether the law/equity distinction makes sense for purposes of jurisdictional classification. (See entry in these Minutes under Study J-1303.)

STUDY K-410 – CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 99-23 and its First and Second Supplements, concerning admissibility, discoverability, and confidentiality of evidence of settlement negotiations. The Commission made the following decisions:

Evid. Code § 1130. “Settlement negotiations” defined

The staff should prepare a new draft of the proposal, in which the proposed new provisions on admissibility, discoverability, and confidentiality (Evid. Code §§ 1130-1144) apply only to post-litigation negotiations. As under existing law, the new draft should make prelitigation negotiations inadmissible for purposes of proving liability, but admissible for other purposes.

Section 1130(a) should be deleted as redundant.

Evid. Code § 1137. Cause of action, defense, or other legal claim arising from conduct during settlement negotiations

Section 1137 should remain as in the draft attached to Memorandum 99-23.

Backstop Provision on Proof or Disproof of Liability

The staff should continue to work on the backstop concept (ensuring that if evidence of settlement negotiations is admitted pursuant to an exception to the proposed new provisions on admissibility, the evidence is nonetheless inadmissible for purposes of proving liability, except where admissibility for that purpose is appropriate).

STUDY L-649 – UNIFORM PRINCIPAL AND INCOME ACT

The Commission considered Memorandum 99-40 concerning AB 846, which would implement the Commission's recommendation on the *Uniform Principal and Income Act*. The Commission approved the amendments and revised Comments set out in the memorandum. The staff reported on the bill's progress. The bill has been on consent as a result of the preliminary work at a number of meetings involving representatives of the California Bankers Association, the State Bar Estate Planning, Trust and Probate Law Section Executive Committee, other interested persons, and the Assistant Executive Secretary.

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

See entry in these Minutes under Study F-910.

STUDY L-4000 – HEALTH CARE DECISIONS

The Commission considered Memorandum 99-38 concerning AB 891, which would implement the Commission's recommendation on *Health Care Decisions for Adults Without Decisionmaking Capacity*. The Commission also received a letter from Dr. Robert D. Orr, Chair of the California Medical Association's Council on Ethical Affairs (attached as Exhibit pp. 1-2).

The Commission discussed the progress of the bill and approved amendments that had been made since the April meeting. The Commission discussed the various options for addressing the concerns of the Assembly

Judiciary Committee consultant, as outlined in the memorandum, and concluded that the staff should continue to work for a consensus on the issues concerning the family consent provisions (proposed Prob. Code §§ 4710-4716). In an effort to reach a consensus, several acceptable possibilities were discussed, including omission of the provision in Section 4710 concerning physician determinations of capacity, providing a procedure whereby potential surrogates could request an ethics consultation, and providing for a second opinion in sensitive situations involving capacity. The Commission concurred with the staff assessment that it would not be desirable to make AB 891 a two-year bill.

The Commission also approved the amendments proposed in the memorandum. The most important of these would be to provide a standard for surrogate decisionmaking, even if we are unable to agree on a procedure for selecting surrogates in this legislative year. Amending Section 4714 back into the bill would accomplish one goal of the recommendation, i.e., to provide uniform standards for surrogate decisionmaking, whether made by an agent, family member, friend, conservator, public guardian, or court.

STUDY M-1306 – CASES IN WHICH COURT REPORTER IS REQUIRED

See entry in these Minutes under Study J-1306.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 99-28 and attached draft of a tentative recommendation on *Mandamus to Review Agency Action: Selected Issues*. The Commission approved the tentative recommendation for distribution for comment. The staff should seek comment from the Judicial Council on the proposal to include Sacramento County as a permissible place of venue for mandamus to review state agency action.

STUDY N-300 – ADMINISTRATIVE RULEMAKING GENERALLY

In the course of discussing possible changes to the consent regulation provisions of Assembly Bill 486 (see entry in these Minutes under Study N-302), the Commission decided to expand the study of general rulemaking procedures to investigate whether review of a proposed regulation by the Department of Finance should be subject to a time limit and some form of administrative or judicial review.

STUDY N-301 – ADMINISTRATIVE RULEMAKING: ADVISORY INTERPRETATIONS

Assembly Bill 486 (Wayne) implements the Commission’s recommendation relating to *Administrative Rulemaking: Advisory Interpretations*. The Commission considered Memorandum 99-37 describing suggested amendments to the advisory interpretation provisions of AB 486, and decided to make the following changes:

Gov’t Code § 11340.6. Petition for adoption of regulation

The provision amending this section should be deleted from the bill. See Section 11360.085 for the advisory interpretation petition procedure.

Gov’t Code § 11340.7. Petition for adoption of regulation

The provision amending this section should be deleted from the bill. See Section 11360.085 for the advisory interpretation petition procedure.

Gov’t Code § 11360.010. Purpose and application

A number of changes should be made to Section 11360.010:

(1) Add a provision exempting rulings of counsel of the Franchise Tax Board and the State Board of Equalization from the advisory interpretation procedure. This would not preclude these agencies from using the advisory interpretation procedure for other purposes.

(2) Add a provision authorizing agencies to adopt regulations to implement the advisory interpretation procedure. These regulations would be subordinate to regulations of the Office of Administrative Law.

(3) Provide that an advisory interpretation is exempt from Article 5 of the rulemaking chapter, rather than from the entire rulemaking chapter.

(4) Revise the Comment to further clarify that the advisory interpretation procedure does not affect the prohibition on use of “underground regulations” and to refer to the “safe harbor” effect of an advisory interpretation.

These changes will be implemented by revising Section 11360.010 as follows:

11360.010. ...

(b) ~~Except as expressly provided in this chapter, an An advisory interpretation adopted pursuant to this article is not subject to the~~

requirements of the ~~other provisions of this chapter~~ Article 5 (commencing with Section 11346).

...

(f) This article does not apply to legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization.

(g) An agency may adopt a regulation for the purpose of implementing this article. A regulation adopted pursuant to this subdivision shall not be inconsistent with a regulation adopted pursuant to Section 11342.4.

Comment. While an advisory interpretation is not binding on the public, it is binding on the adopting agency in some circumstances. See Section 11360.030.

~~Although subdivision (b) generally provides that an advisory interpretation adopted under this article is not subject to other provisions of this chapter, there may be express exceptions. See, e.g., Sections 11340.6-11340.7 (governing petition for adoption, amendment, or repeal of regulation or advisory interpretation).~~

...

Subdivision (f) provides that the advisory interpretation procedure may not be used by the Franchise Tax Board or State Board of Equalization to issue legal rulings of counsel. However, the subdivision does not preclude the Franchise Tax Board or State Board of Equalization from using the advisory interpretation procedure for any other purpose. Note that legal rulings of counsel of the Franchise Tax Board and State Board of Equalization are not “regulations” for the purposes of this chapter. See Section 11342(g).

Subdivision (g) provides that an agency may adopt a regulation to implement this article, so long as that regulation is not inconsistent with a regulation adopted by the Office of Administrative Law (OAL) pursuant to Section 11342.4. For example, an agency could adopt a regulation governing the circumstances in which the agency will honor a request for an advisory interpretation, so long as the regulation is not inconsistent with an applicable OAL regulation.

~~Nothing in subdivision (e) this article affects the prohibition against the issuance or use of regulations that have not been properly adopted. See Section 11340.5 (prohibiting use of “underground regulations”). See, e.g., United Systems of Arkansas v. Stamison, 63 Cal. App. 4th 1001, 74 Cal. Rptr. 2d 407 (1998).~~

Gov’t Code § 11360.030. Effect of advisory interpretation

The terminology in Section 11360.030 should be revised as follows:

11360.030....

(b) In an enforcement action or adjudicatory proceeding, an agency may not assert or rely on an interpretation of law ~~contradicting~~ that is inconsistent with an advisory interpretation adopted by the agency, where events material to the enforcement action or adjudicatory proceeding occurred while the advisory interpretation was in effect.

Comment...

Subdivision (c) provides that the adopting agency is not bound, under subdivision (b), by an advisory interpretation that is inconsistent with an interpretation in a published opinion of the California Supreme Court or a California court of appeal. This does not affect any other possible limits on an agency's ability to ~~contradict~~ act on an interpretation that is inconsistent with an advisory interpretation (e.g., in some circumstances, an agency might be equitably estopped from ~~contradicting~~ an asserting an interpretation that is inconsistent with its advisory interpretation).

Gov't Code § 11360.040. Effective date of advisory interpretation

The terminology in Section 11360.040 should be revised as follows:

11360.040....

(b) An advisory interpretation remains in effect until one of the following occurs:

...

(2) The advisory interpretation is disapproved or superseded by a statute or regulation or is ~~contradicted~~ by inconsistent with a published opinion of the California Supreme Court or the California Court of Appeal.

Gov't Code § 11360.050. Adoption procedure

Section 11360.050 should be revised to make clear that the public comment period begins on publication of notice, rather than on mailing:

11360.050. ...

(c) Accept written public comment for at least 45 calendar days after ~~providing the notice required in subdivision (b)~~ publication of the notice pursuant to subdivision (a) of Section 11360.080.

Gov't Code § 11360.085. Petition for adoption, amendment, or repeal of advisory interpretation

Section 11360.085 should be added to provide a straightforward petition procedure for advisory interpretations:

11360.085. (a) Any interested person may request, in writing, that an agency adopt, amend, or repeal an advisory interpretation. The request shall clearly and concisely explain the need for the requested action and the agency's authority to take the requested action.

(b) Within 30 days of receipt of a request, the agency shall respond in writing to the person making the request, indicating whether the agency will take the requested action and explaining the agency's decision.

(c) A decision to deny a request made under this section shall be submitted to the office for publication in the California Regulatory Notice Register at the earliest practicable date.

Comment. Section 11360.085 provides a procedure for any interested person to request that an agency adopt, amend, or repeal an advisory interpretation. An agency is never required to adopt or amend an advisory interpretation. See Section 11360.010(e). However, an agency must respond to a request made under this section and must publish a decision to deny the request in the California Regulatory Notice Register. *Cf.* Section 11340.7 (petition for adoption, amendment, or repeal of regulation under Article 5 (commencing with Section 11346)).

Gov't Code § 11360.090. Administrative review

Two changes should be made to Section 11360.010:

(1) A decision by the Office of Administrative Law (OAL) not to review an advisory interpretation, or to approve or disapprove an advisory interpretation after review, should not be subject to judicial review.

(2) OAL should be required to publish its decision, rather than notice of its decision.

These changes will be made by revising Section 11360.090 as follows:

11360.090....

(c) On reaching a decision pursuant to subdivision (b), the office shall do all of the following:

(1) Mail ~~notice explaining~~ its decision to the person who made the request and to the agency that adopted the advisory interpretation.

(2) If the office approves or disapproves the advisory interpretation, it shall publish a ~~notice explaining~~ its decision in the California Regulatory Notice Register.

...

(g) A decision by the office under this section is not subject to judicial review.

Comment...

Review under this section is intended only to ensure that an advisory interpretation is authorized, properly adopted, and consistent with the law it interprets. Such review is not intended to limit the jurisdiction of the courts as the ultimate authority on the proper interpretation of a statute. See *Bodinson Mfg. Co. v. Cal. Employment Comm'n*, 17 Cal. 2d 321, 326, 109 P.2d 935 (1941) (“The ultimate interpretation of a statute is an exercise of the judicial power.”); Cal. Const. art. VI, § 1 (judicial power vested in the courts).

...

~~A decision under this section is subject to judicial review. See Section 11360.100 & Comment. Subdivision (g) provides that an OAL decision under this section is not subject to judicial review. However, this does not preclude judicial review of the validity of an advisory interpretation by other means. See, e.g., Civil Code § 3422 (injunction); Code Civ. Proc. § 1085 (ordinary mandamus), 1094.5 (administrative mandamus); Gov’t Code § 11350 (review of validity of regulation).~~

...

Additionally, the staff will inquire with the Governor’s Legal Affairs Secretary to determine whether adding a provision for discretionary review of a decision by OAL to disapprove an advisory interpretation would constitute an unwarranted burden on the Governor’s resources.

Gov’t Code § 11360.100. Declaratory relief

Section 11360.100, providing for a judicial declaration of the validity or invalidity of an advisory interpretation should be deleted from AB 486. This change would not preclude judicial review of the validity of an agency’s interpretation of law by other means.

Lab. Code § 1198.4. Guidance from Division of Labor Standards Enforcement

An advisory interpretation of the Division of Labor Standards Enforcement should not be precluded from receiving judicial deference. This change will be made by amending Labor Code Section 1198.4, as follows:

1198.4 (a) Upon request, the Chief of the Division of Labor Standards Enforcement shall make available to the public any enforcement policy statements or interpretations of orders of the

Industrial Welfare Commission. Copies of such policy statements shall be furnished to the Industrial Welfare Commission.

(b) Notwithstanding subdivision (a) of Section 11360.030 of the Government Code, a court is not precluded from giving judicial deference to the extent it deems appropriate to an advisory interpretation adopted by the Division of Labor Standards Enforcement pursuant to Article 10 (commencing with Section 11360.010) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.

Comment. Section 1198.4 is amended to permit a court to give an advisory interpretation of the Division of Labor Standards Enforcement whatever deference is deemed appropriate to the circumstances.

STUDY N-302 – ADMINISTRATIVE RULEMAKING: CONSENT REGULATIONS

Assembly Bill 486 (Wayne) implements the Commission's recommendation relating to *Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations*. The Commission considered Memorandum 99-37 describing suggested amendments to the consent regulation provisions of AB 486, and decided to make the following changes:

Gov't Code § 11346.9. Post-comment requirements

Section 11346.9 should be amended to authorize incorporation by reference of material prepared by an agency before public comment in preparing the material required after public comment:

~~11346.9. Except as provided in Section 11347, every~~ Every agency subject to this chapter shall do the following:

...

(d) If an agency determines that a requirement of this section can be satisfied by reference to an agency statement made pursuant to Sections 11346.2 to 11346.54, inclusive, the agency may satisfy that requirement by incorporating the relevant statement by reference.

Comment: ~~Section 11346.9 is amended to make an exception for regulations that do not elicit any adverse comment. See Section 11347 (noncontroversial regulatory action).~~ Section 11346.9(d) authorizes incorporation of prior statements by reference. This reflects the fact that no purpose is served by requiring an agency to reiterate a statement that was made earlier in the rulemaking process. For example, where an agency determines pursuant to

Section 11346.5(a)(6) that a proposed rule would not impose a cost on a local agency or school district and, at the time of preparing the final statement of reasons, determines that its prior determination is correct and complete, the agency may incorporate the statement made pursuant to Section 11346.5(a)(6) in complying with Section 11346.9(a)(2).

Gov't Code § 11347. Noncontroversial regulations

Section 11347 should be deleted from the bill. The purpose served by that section can be better achieved by amending Section 11346.9, as described above.

Gov't Code § 11349.1. Administrative review of proposed regulation

Section 11349.1 should be revised to require the return of a proposed consent regulation where the adopting agency has not prepared the required fiscal analysis or demonstrated a source of funding for any reimbursement of local costs that is required:

11349.1....

(d) The office shall return any regulation adopted pursuant to ~~Article 5 (commencing with Section 11346)~~ to the adopting agency if any of the following occur:

(1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.

(2) The In adopting a regulation under Article 5 (commencing with Section 11346), the agency has not complied with Section 11346.3.

...

Gov't Code § 11349.3. Return of regulation

Two changes should be made to Section 11349.3:

(1) A provision should be added authorizing the Office of Administrative Law to disapprove a proposed consent regulation if there is an adverse comment in the rulemaking file.

(2) It should be made clear that the one year time period for issuance of a regulation begins on publication of the notice of proposed action:

These changes will be made by revising the proposed amendments to Section 11349.3 as follows:

11349.3....

(b) If the office disapproves a regulation, it shall return it to the adopting agency within the 30-day period specified in subdivision (a) accompanied by a notice specifying the reasons for disapproval. Within seven calendar days of the issuance of the notice, the office shall provide the adopting agency with a written decision detailing the reasons for disapproval. No regulation shall be disapproved except for failure to comply with the standards set forth in Section 11349.1 or for failure to comply with this chapter. The office shall disapprove a regulation adopted under Article 11 (commencing with Section 11365.010) if the rulemaking file contains an adverse comment.

(c) If an agency determines, on its own initiative, that a regulation submitted pursuant to subdivision (a) should be returned by the office prior to completion of the office's review, it may request the return of the regulation. All requests for the return of a regulation shall be memorialized in writing by the submitting agency no later than one week following the request. Any regulation returned pursuant to this subdivision shall be resubmitted to the office for review within one year of distribution publication of a notice pursuant to Section 11346.4 or Section 11365.040, or shall comply with Article 5 (commencing with Section 11346) or Article 11 (commencing with Section 11365.010) prior to resubmission.

Gov't Code § 11365.020. Adoption procedure

Two changes will be made to Section 11360.020:

(1) It should be made clear that the public comment period begins on publication of notice, rather than on mailing.

(2) An agency should be required to use strikeout and underscore or italics in the text of a proposed consent regulation to show any changes from an existing regulation.

These changes will be made by revising Section 11365.020 as follows:

11365.020....

(d) Accept written public comments for at least 45 days after giving publication of the public notice.

...

(h) In preparing the preliminary and final text of a proposed regulatory action, the agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

Gov't Code § 11365.030. Effect of adverse comment

Two changes should be made to the Comment to Section 11365.030:

- (1) The definition of "adverse comment" should be elaborated.
- (2) A reference to the new language in Section 11349.3 authorizing disapproval of a consent regulation if there is an adverse comment in the rulemaking file should be added.

This will be done by revising the Comment to Section 11365.030, as follows:

Comment. Section 11365.030 is similar to Section 11347(e) (noncontroversial regulatory action) provides that the consent regulation procedure cannot be used if an agency receives an adverse comment in response to a proposed consent regulation. An adverse comment includes a comment objecting to the substance of the proposed regulatory action. For example, a comment pointing out an alternative to the proposed regulation that would be more effective in achieving the purpose of the proposed regulation, or as effective and less burdensome than the proposed regulation, would be an adverse comment.

An agency's determination that no adverse comment was received in response to a proposed consent regulation is subject to review by the Office of Administrative Law. See Section 11349.3(b) (Office of Administrative Law shall disapprove consent regulation if rulemaking file contains adverse comment).

Gov't Code § 11365.040. Public notice

Section 11365.040 should be amended to incorporate Section 11346.5(a)(5)-(6) for the purpose of assessing the fiscal impact of a proposed consent regulation:

11365.040...

(b) Notice of a proposed regulatory action shall include each of the following:

...

(6) A determination of the financial impact of the regulatory action on California businesses, individuals, and housing costs, a determination of any costs that the regulatory action will impose on state agencies, or on local agencies or school districts entitled to reimbursement under Part 7 (commencing with Section 17500) of Division 4, and a statement of the basis for these determinations.

(7) The determination and estimate required by paragraphs (5) and (6) of subdivision (a) of Section 11346.5.

(8) A statement of the basis for the determinations and estimates made pursuant to paragraphs (6) and (7).

Gov't Code § 11365.060. Publication of notice

Section 11365.060 will be revised to clarify the authority of the Office of Administrative Law to refuse to publish a notice of a proposed consent regulation where the agency has not complied with the requirements of the consent regulation procedure:

11365.060....

(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~~ failed to comply with this article.

APPROVED AS SUBMITTED ^{Date}

APPROVED AS CORRECTED ^{Chairperson}

(for corrections, see Minutes of next meeting)

Executive Secretary



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4000 Middlefield Road, Room D-1
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June 19, 1999

RE: Health Care Decisions for Adults Without Decisionmaking Capacity

Dear CLRC Members:

The CMA's Council on Ethical Affairs would like to commend the Commission for their work on this issue which is so vital to the citizens of California and to medical professionals throughout the state. As the proposal moves to and through the legislature, we would like to address two points:

(1) **Surrogate Committee for Patients without Surrogates (Sec 4720-25)** - It is our understanding from CMA's legal counsel that this section is felt to be sufficiently contentious that it may be withdrawn in order to facilitate passage of the remainder of the proposal. We recognize such political exigencies, and support this move if it will facilitate implementation of the remainder of the major improvements contained in this proposal.

At the same time, we would encourage the Commission to pursue the issue of decision-making for socially isolated individuals in subsequent legislative sessions. Our Council believes that local multidisciplinary in-patient is both necessary and sufficient to make important treatment decisions for patients who have neither decision-making capacity (DMC) or surrogate. Whether this is an already existing forum such as a hospital ethics committee or an ad hoc committee is not as critical. However, the lack of ethics committees in most nursing homes, and the need for decisions for out-patients, makes us favor the ad hoc committee in the current proposal which has representation from bedside caregivers and non-involved patient or community representatives.

Some have criticized this Surrogate Committee approach from the standpoint of professional conflict of interest. We believe that the centuries-old fiduciary relationship of medical professionals is still intact, such that they can continue to be trusted to seek the patient's best interests. In my experience doing hundreds of bedside ethics consultations, most of which involve significant conflict, it is rare indeed when I see a physician who puts other interests ahead of those of the individual patient.

Critics often cite *Thor*, *Bouvia*, and *Bartling* as showing judicial precedent for not allowing professionals to enforce their decisions on patients. However, these 3 cases involve patients with

DMC who disagreed with their professionals. The cases to be referred to a Surrogate Committee are quite different, i.e. patients without DMC or surrogate. Some also cite *Drabick*, but in that case there were several valid surrogates, again a very different situation.

(2) **Selection of statutory surrogate (Sec 4712)** - Our Council very strongly supports the retention of this section. Currently, without statutory guidance on this issue, physicians follow tradition and seek family consensus or, failing consensus, endeavor to identify the person who knows the patient best and has demonstrated caring for the patient. That is, the proposal merely codifies current practice. But the proposal does 2 additional very important things:

(a) It gives formal recognition to the moral standing of domestic partners. It is not uncommon currently for such individuals to be pushed to the sidelines by estranged family.

(b) It gives statutory guidance to physicians in the selection of a surrogate when there is more than one individual who might qualify or think they might qualify. Currently, physicians are on their own in deciding who to choose. We believe it is this non-directed physician authority to which critics appeal when they claim that physicians may merely choose the family member who agrees with them. Therefore the flexibility and statutory guidance given in Sec 4712 (b) and (c) is a major improvement over the current practice.

Let me give one recent example of a situation where the provisions of this proposal would have been very helpful to me. A business executive in her early 50's suffered a devastating stroke about 2 weeks ago which would clearly leave her permanently totally paralyzed except for eye movements ("locked-in syndrome"), but able to breathe on her own and cognitively clear. Her unemployed (second) husband immediately called for withdrawal of all supportive treatment so that she would die, but her brother and children (from first marriage) wanted to continue support until it was clear that she understood her situation and her potential for long-term survival, and could then make her own decision. It seemed that they were acting in her best interests, but I was suspicious that her husband might not be. While there is a clear ethical obligation to try to determine her wishes, her husband saw no reason to wait the several days that would be necessary and threatened to get a lawyer to enforce his "rightful" instruction. I made a recommendation, without statutory backing, that we must ignore the husband's request until (a) it was clear what she wanted or (b) it was clear that she would not be able to make a decision. Last Saturday, after about 10 days in the fog, she became mentally clear and said she wanted to continue current treatment at least until she could learn about her rehab potential. Had we honored the husband's demands, she very likely would have died prematurely.

The provisions of Chapter 3, including both the flexibility of the hierarchy and the guidance to physicians in altering that hierarchy, are vitally important to the appropriate impact of this legislation and to the protection of patients' best interests.

Sincerely,


Robert D. Orr, M.D., Chair, CMA's Council on Ethical Affairs