

## CALIFORNIA LAW REVISION COMMISSION

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January 28, 2000

<i>Date:</i> February 10-11, 2000	<i>Place:</i> Sacramento
Feb. 10 (Thurs.) 1:00 pm – 5:00 pm Feb. 11 (Fri.) 9:00 am – 4:00 pm	State Capitol Room 317
The meeting will be held at the above location. If it is difficult or impossible to convene a quorum at the meeting, a quorum may be established and other action may be taken at the meeting by teleconference, accessible and audible to the public at the above location.	
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. <b>If you plan to attend the meeting, please leave contact information at 650-494-1335 and you will be notified of any late changes.</b>	
Most Commission meeting materials are available on the Internet at: <a href="http://www.clrc.ca.gov">http://www.clrc.ca.gov</a>	
The California Law Revision Commission certifies that this meeting has been approved for 9.5 hours of MCLE credit by the State Bar of California.	

**FINAL AGENDA***for meeting of the*

## CALIFORNIA LAW REVISION COMMISSION

**Thursday, February 10**

1. MINUTES OF NOVEMBER 30, 1999, MEETING (12/13/99)
2. ADMINISTRATIVE MATTERS
  - Handbook of Practices and Procedures**  
Memorandum 2000-1 (SU) (12/6/99)
  - Conflict of Interest Disclosure and Disqualification Matters**  
Memorandum 2000-2 (BH) (1/10/00)
  - 2000 Strategic Plan**  
Memorandum 2000-16 (NS) (1/12/00)
  - New Topics**  
Memorandum 2000-17 (NS) (1/20/00)
  - Meeting Schedule**  
Memorandum 2000-18 (NS) (1/20/00)
  - Report of Executive Secretary**

3. 2000 LEGISLATIVE PROGRAM  
Memorandum 2000-19 (NS) (to be sent)
4. EXPIRED PILOT PROJECTS [STUDY J-1309]  
Memorandum 2000-3 (BH) (to be sent)
5. ACCESS TO RULEMAKING INFORMATION UNDER THE APA [STUDY N-300]  
**Comments on Tentative Recommendation**  
Memorandum 2000-4 (BH) (1/25/00)
6. FAMILY CONSENT IN HEALTH CARE DECISIONMAKING FOR ADULTS  
[STUDY L-4003]  
Memorandum 2000-5 (SU) (to be sent)
7. REVOCABLE TRUST ACCOUNTING [STUDY L-3059]  
**Comments on Tentative Recommendation**  
Memorandum 2000-6 (SU) (to be sent)
8. DUTIES WHERE SETTLOR OF REVOCABLE TRUST IS INCOMPETENT [STUDY L-3060]  
Memorandum 2000-7 (SU) (to be sent)
9. ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE [STUDY FHL-911]  
**Draft Tentative Recommendation**  
Memorandum 99-84 (BH) (11/3/99)  
First Supplement to Memorandum 99-84 (1/19/00)
10. TRIAL COURT UNIFICATION: REVIEW OF CIVIL PROCEDURES [STUDY J-1320]  
Memorandum 2000-8 (BG) (to be sent)

☞ **Note: Items not completed on February 10 will be continued to February 11.**

### **Friday, February 11**

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11. MECHANIC'S LIENS [STUDY H-820]  
Memorandum 2000-9 (SU) (to be sent)
12. LITIGATION EXPENSES IN EMINENT DOMAIN [STUDY EMH-455]  
**Draft Tentative Recommendation**  
Memorandum 2000-11 (NS) (12/20/99)  
First Supplement to Memorandum 2000-11 (1/28/00)

13. EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN [STUDY EM-458]  
Memorandum 2000-12 (NS) (1/12/00)  
First Supplement to Memorandum 2000-12 (1/28/00)
14. AUTHORITY TO APPOINT A RECEIVER [STUDY J-1302]  
**Comments on Tentative Recommendation**  
Memorandum 2000-15 (BG) (to be sent)
15. AWARD OF COSTS AND CONTRACTUAL ATTORNEY'S FEES TO PREVAILING PARTY [STUDY J-901]  
Memorandum 2000-13 (BG) (to be sent)
16. STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE [STUDY J-111]  
Memorandum 2000-14 (BG) (to be sent)

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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**FEBRUARY 10-11, 2000**  
**SACRAMENTO**

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A meeting of the California Law Revision Commission was held in Sacramento on February 10-11, 2000.

**Commission:**

*Present:* Howard Wayne, Assembly Member, Chairperson  
Sanford M. Skaggs, Vice Chairperson  
Joyce G. Cook  
David Huebner

*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:** Gordon Hunt, Mechanic's Lien Law (Feb. 11)  
Gideon Kanner, Eminent Domain Law & Inverse  
Condemnation (Feb. 11)

**Other Persons:**

Sam Abdulaziz, North Hollywood (Feb. 11)  
Juan Acosta, California Building Industry Association, Sacramento (Feb. 11)  
Yolanda Benson, Mattos & Associates, Sacramento (Feb. 11)  
Eddie Bernacchi, National Electrical Contractors Association, Sacramento (Feb. 11)  
Todd Bloomstine, Assemblyman Margett's Office, Arcadia (Feb. 11)  
Herb Bolz, Office of Administrative Law, Sacramento (Feb. 10)  
Brian Branine, State Board of Equalization, Sacramento (Feb. 10)  
Terra Callonea, Assemblyman Margett's Office, Sacramento (Feb. 11)  
Eric Carlson, Bet Tzedek Legal Services, Los Angeles (Feb. 10)  
Thomas Chapman, Assemblyman Margett's Office, Arcadia (Feb. 11)  
David Collins, Gordon & Rees, San Francisco (Feb. 11)  
Richard Desmond, Desmond, Miller & Desmond, Sacramento (Feb. 11)  
Theresa Drought, California Coalition for Compassionate Care, Oakland (Feb. 10)  
Maxine Ferguson, Caltrans, Sacramento (Feb. 11)  
Ellen Gallagher, Contractors License Board, Sacramento (Feb. 11)  
Charles Goodman, Sacramento (Feb. 10)  
Jan Hansen, Lumber Association of California & Nevada, Sacramento (Feb. 11)  
Keith Honda, Assemblyman Honda's Office, San Jose (Feb. 11)

Eric R. Krebs, California Medical Association, San Francisco (Feb. 10)  
 Deborah Mattos, Mattos & Associates, Sacramento (Feb. 11)  
 Michael Monagan, California Association of Sheet Metal and Air Conditioning  
 Contractors National Association, Sacramento (Feb. 11)  
 Michael R. Nave, San Leandro (Feb. 11)  
 Amber Pearce, Department of Finance, Sacramento (Feb. 10)  
 Matt Petersen, Mead Clark Lumber Company, Santa Rosa (Feb. 11)  
 Dan Pone, Assembly Judiciary Committee, Sacramento (Feb. 10)  
 Eileen Reynolds, California Association of Realtors, Sacramento (Feb. 10)  
 Daniel L. Siegel, Attorney General's Office, Sacramento (Feb. 11)  
 Michael Siegel, California Medical Association, San Mateo (Feb. 10)  
 Donald R. Travers, State Bar Estate Planning, Trust and Probate Law Section,  
 Paradise (Feb. 10)  
 Philip M. Vermeulen, contractors associations, Sacramento (Feb. 11)  
 Sheron Violini, Assemblyman Ackerman's Office, Sacramento (Feb. 11)  
 Stan Wieg, California Association of Realtors, Sacramento (Feb. 10)  
 Richard B. Williams, Caltrans, Sacramento (Feb. 11)  
 Nancy T. Yamada, California State Employees Association and Association of  
 California State Supervisors, Sacramento (Feb. 10)

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1 2001 legislative session. Meanwhile, the staff should begin to collect relevant  
2 material on these matters so that it is in a position to present the material for  
3 Commission consideration if the studies are approved by the Legislature.

#### 4 **Meeting Schedule**

5 The Commission considered Memorandum 2000-18, concerning the  
6 Commission's meeting schedule. The Commission adopted the following revised  
7 meeting schedule for the remainder of 2000:

8	<b>March 2000</b>	<b>No Meeting</b>
9	<b>April 2000</b>	<b>Sacramento</b>
10	Apr. 13 (Thur.)	9:00 am – 5:00 pm
11	<b>May 2000</b>	<b>No Meeting</b>
12	<b>June 2000</b>	<b>Sacramento</b>
13	June 8 (Thur.)	10:00 am – 5:00 pm
14	June 9 (Fri.)	9:00 am – 4:00 pm
15	<b>July 2000</b>	<b>San Diego</b>
16	July 20 (Thur.)	10:00 am – 5:00 pm
17	July 21 (Fri.)	9:00 am – 4:00 pm
18	<b>August 2000</b>	<b>No Meeting</b>
19	<b>September 2000</b>	<b>No Meeting</b>
20	<b>October 2000</b>	<b>San Francisco</b>
21	Oct. 5 (Thur.)	10:00 am – 5:00 pm
22	Oct. 6 (Fri.)	9:00 am – 4:00 pm
23	<b>November/December 2000</b>	<b>Los Angeles</b>
24	Nov. 30 (Thur.)	10:00 am – 5:00 pm
25	Dec. 1 (Fri.)	9:00 am – 4:00 pm

#### 26 **Report of Executive Secretary**

27 The Executive Secretary reported on the following matters:

28 **Staff Attorney.** We have hired a new staff attorney, Michael Edson, who is  
29 currently clerking for a Ninth Circuit judge. He will start in September and will  
30 be based in our Sacramento office.

31 **Consultants on Criminal Sentencing Statute Reorganization.** We have  
32 retained Judge David Wesley of the Los Angeles County Superior Court, Deputy

1 District Attorney David Ross of the Los Angeles County District Attorney's  
2 Office, and defense attorney Mark Overland of Santa Monica, to jointly prepare a  
3 proposed outline or suggested reorganization of the California criminal  
4 sentencing statutes. The proposed outline or suggested reorganization is due  
5 June 1, 2000.

6 **Consultants on Common Interest Development Law.** We have retained  
7 Professors Susan French of UCLA Law School and Roger Bernhardt of Golden  
8 Gate University Law School to jointly prepare a report on the scope of the  
9 Common Interest Development Law project. Their report is due August 1, 2000.

10 **Consultant on Evidence Code Review.** We are pursuing with Professor  
11 Miguel Mendez of Stanford Law School the possibility of his preparing a study  
12 for the Commission comparing the California Evidence Code with the Revised  
13 Uniform Evidence Code and the Federal Rules of Evidence.

14 **Mechanic's Liens.** See the entry in these Minutes under Study H-820  
15 (mechanic's liens).

#### 16 2000 LEGISLATIVE PROGRAM

17 The Commission considered Memorandum 2000-19 and its First Supplement,  
18 concerning the Commission's 2000 legislative program. This was an information  
19 item, and no action was taken, with the exception of the matter reported in these  
20 Minutes under Study K-410 (settlement negotiations).

#### 21 STUDY EM-455 – LITIGATION EXPENSES IN EMINENT DOMAIN

22 The Commission considered Memorandum 2000-11 and its First, Second, and  
23 Third Supplements, concerning litigation expenses in eminent domain  
24 proceedings. The Commission discussed the policy and the politics of the  
25 proposal to substitute a "closer to the award" standard for the existing  
26 "reasonableness" standard in determining when the property owner should be  
27 entitled to an award of litigation expenses. The Commission decided not to  
28 circulate the proposal for comment as a tentative recommendation.

#### 29 STUDY EM-458 – EARLY DISCLOSURE OF VALUATION DATA AND 30 RESOLUTION OF ISSUES IN EMINENT DOMAIN

31 The Commission considered Memorandum 2000-12 and its First, Second, and  
32 Third Supplements, concerning early disclosure of valuation data and resolution  
33 of issues in eminent domain proceedings. The Commission decided to devote

1 further consideration to these concepts, with the objective of developing a  
2 package of consensus improvements in the law that will facilitate resolution of  
3 eminent domain cases without the need for trial. Specific ideas to be developed  
4 include requiring an exchange of valuation data 90 days before trial coupled with  
5 a process enabling early resolution of legal disputes and some form of  
6 encouragement of alternative dispute resolution. More detailed disclosure of  
7 prelitigation appraisal information should also be considered for inclusion in this  
8 package, along with a requirement that positions on loss of goodwill be disclosed  
9 (pursuant to an earlier Commission recommendation).

10           STUDY F-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

11           The Commission considered Memorandum 99-84 and its First Supplement,  
12 presenting a draft tentative recommendation relating to *Changes in Estate Plan*  
13 *During Dissolution of Marriage*. The Commission approved the draft for  
14 circulation as a tentative recommendation, with the following changes:

15           (1) The preliminary part of the tentative recommendation and the Comments  
16 to the proposed legislation should be revised to recognize the recent case, *Estate*  
17 *of Mitchell*, 91 Cal. Rptr. 2d 192 (1999).

18           (2) The list of common nonprobate transfers used in the proposed legislation  
19 should be replaced with the term “nonprobate transfer,” which should be  
20 defined as follows:

21           “Nonprobate transfer” means an instrument, other than a will,  
22 that makes a transfer of property on death, including a revocable  
23 trust, pay-on-death account in a financial institution, Totten trust,  
24 transfer-on-death registration of personal property, or other  
25 instrument of a type described in Section 5000 of the Probate Code.  
26 “Nonprobate transfer” does not include a provision for the transfer  
27 of property on death in an insurance policy or other coverage held  
28 for the benefit of the parties and their child or children for whom  
29 support may be ordered.

30           STUDY H-455 – LITIGATION EXPENSES IN EMINENT DOMAIN

31           See entry in these Minutes under Study Em-455.

32           STUDY H-820 – MECHANIC’S LIENS

33           The Commission considered Memorandum 2000-9 and its First Supplement  
34 concerning the study of mechanic’s lien law. The Commission received the

1 second half of the report prepared by Gordon Hunt (attached to the  
2 memorandum) and heard the comments of interested persons relating to the  
3 scope and direction of the study. Keith Honda, Assemblyman Mike Honda's  
4 chief of staff, presented an analysis of issues (see copy attached to the Second  
5 Supplement to Memorandum 2000-9), and the Commission received a  
6 submission from Ellen Gallagher, on behalf of the Contractors State License  
7 Board (also attached to the Second Supplement).

8 The discussion centered on the desirability of getting empirical evidence on  
9 the double-payment problem and other potential abuses, the constitutionality of  
10 limiting the mechanic's lien right by statute, and alternative remedies such as  
11 bonding, recovery funds, and joint control agencies (escrow). The Commission  
12 requested a review of statutory approaches in other states.

13 The Commission approved the staff's request for authority to make  
14 consultant contracts with James Acret and Professor Justin Sweet.

15 STUDY H-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

16 See entry in these Minutes under Study F-911.

17 STUDY J-111 – STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

18 The Commission considered Memorandum 2000-14, concerning the statute of  
19 limitations for legal malpractice. As recommended in the memorandum, the  
20 Commission directed the staff to prepare a draft revising Code of Civil Procedure  
21 Section 340.6 to expressly incorporate equitable tolling. The staff should attempt  
22 to assess the likelihood that an attorney notified of a potential malpractice claim  
23 would refuse to enter into a tolling agreement. The staff should also consider  
24 tolling the limitations period during an ongoing deal, not just during ongoing  
25 litigation.

26 The Supreme Court's recent decision in *Samuels v. Mix*, 2 Cal. 4th 1, 989 P.2d  
27 701, 91 Cal. Rptr. 2d 273 (1999), addresses a different issue: allocation of the  
28 burden of proving when the client discovered, or through the use of reasonable  
29 diligence should have discovered, the facts constituting the alleged malpractice.  
30 The staff should review and analyze this decision for the Commission.

1                    **STUDY J-901 – AWARD OF COSTS AND CONTRACTUAL**  
2                    **ATTORNEY’S FEES TO PREVAILING PARTY**

3            The Commission considered Memorandum 2000-13, concerning costs and  
4 contractual attorney’s fees. The Commission directed the staff to prepare a new  
5 draft along the following lines:

6            **Determination of Prevailing Party**

7            Draft Code of Civil Procedure Section 1032.5 should be revised as follows:

- 8            • The presumptions for determining the prevailing party  
9 (subdivision (b)(1)-(6)) should be stated first, then the general  
10 standard for determining the prevailing party (subdivision (a)).
- 11           • In claiming costs and fees, the claimant should be required to  
12 specify the basis for claiming to be the prevailing party (e.g., a  
13 particular presumption applies). The burden then shifts to the other  
14 party (the party from whom costs and fees are sought) to file a  
15 motion to tax costs, challenging the assertion that the claimant is  
16 the prevailing party.
- 17           • In ruling on the motion to tax, the court is to apply the general  
18 standard for determining the prevailing party (subdivision (a)).
- 19           • The staff should consider whether to include any requirements  
20 regarding the content of the motion to tax costs.
- 21           • Subdivision (b)(4) should be revised along the following lines: “In a  
22 multi-party action where the court finds that a particular defendant  
23 is not liable to a particular plaintiff, that defendant is the prevailing  
24 party as to that plaintiff.”
- 25           • Another presumption should be added to the list: In a bench trial,  
26 where the court’s decision specifies who prevailed, that party is the  
27 prevailing party for purposes of awarding costs and attorney’s fees.
- 28           • The statute should expressly authorize the court to assess the  
29 reasonableness of the fees charged and adjust the award  
30 accordingly.
- 31           • The statute should address what happens where a contract includes  
32 a definition of “prevailing party.”

33           **Reciprocity**

34           The reciprocity requirement of Civil Code Section 1717 should be extended to  
35 apply where (1) a unilateral attorney’s fee clause covers nonstatutory litigation  
36 expenses and (2) where a unilateral attorney’s fee clause covers attorney’s fees  
37 for noncontract claims.

1 **Nonstatutory Litigation Expenses**

2 The draft should expressly permit parties to contractually agree to shift  
3 reasonable nonstatutory litigation expenses to the loser. The draft should also  
4 allow a party to recover nonstatutory litigation expenses in a costs award, rather  
5 than having to plead and prove them at trial. The same rules for determining the  
6 prevailing party for purposes of awarding contractual attorney's fees should  
7 apply for purposes of awarding nonstatutory litigation expenses. The statute  
8 should not attempt to specify particular language ("magic language") for  
9 covering nonstatutory litigation expenses in an attorney's fee clause. Means of  
10 including such expenses should be discussed in a Comment.

11 **STUDY J-1302 – AUTHORITY TO APPOINT A RECEIVER**

12 The Commission considered Memorandum 2000-15, concerning the tentative  
13 recommendation relating to *Authority to Appoint a Receiver*. The Commission  
14 approved the proposal as a final recommendation, for printing and submission to  
15 the Legislature.

16 **STUDY J-1309 – EXPIRED PILOT PROJECTS**

17 The Commission considered Memorandum 2000-3, reporting on the status of  
18 the staff's efforts to identify obsolete provisions relating to expired pilot projects  
19 that should be repealed. No Commission action was required or taken.

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

21 The Commission considered Memorandum 2000-8, concerning its joint study  
22 with the Judicial Council. No Commission action was required or taken.

23 **STUDY K-410 – SETTLEMENT NEGOTIATIONS**

24 In connection with the Legislative Program, the Commission considered the  
25 First Supplement to Memorandum 2000-19. The Commission revised the  
26 proposed amendment of Government Code Section 11415.60 in SB 1370 (Ortiz) to  
27 read as follows:

28 11415.60. (a) An agency may formulate and issue a decision by  
29 settlement, pursuant to an agreement of the parties, without  
30 conducting an adjudicative proceeding. Subject to subdivision (c),  
31 the settlement may be on any terms the parties determine are  
32 appropriate. ~~Notwithstanding any other provision of law, no~~  
33 ~~evidence of an offer of compromise or settlement made in~~

1 ~~settlement negotiations is admissible in an adjudicative proceeding~~  
2 ~~or civil action, whether as affirmative evidence, by way of~~  
3 ~~impeachment, or for any other purpose, and no evidence of~~  
4 ~~conduct or statements made in settlement negotiations is~~  
5 ~~admissible to prove liability for any loss or damage except to the~~  
6 ~~extent provided in Section 1152 of the Evidence Code. Nothing in~~  
7 ~~this subdivision makes inadmissible any public document created~~  
8 ~~by a public agency.~~

9 ....

10 (d) Sections 1152 and 1154 of, and Chapter 3 (commencing with  
11 Section 1130) of Division 9 of, the Evidence Code apply to  
12 settlement negotiations pursuant to this section. Nothing in this  
13 subdivision makes inadmissible any public document created by a  
14 public agency.

15 STUDY L-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

16 See entry in these Minutes under Study F-911.

17 STUDY L-3059 – REVOCABLE TRUST ACCOUNTING

18 The Commission considered Memorandum 2000-6, concerning comments  
19 received on the tentative recommendation relating to *Revocable Trust Accounting*  
20 (October 1999). The Commission decided not to make a final recommendation at  
21 this time on the limited issues addressed by the tentative recommendation,  
22 which focused on correcting the statutory interpretation in *Evangelho v. Presoto*,  
23 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998). The problems addressed in the  
24 tentative recommendation should be combined with the broader study of rights  
25 and duties under revocable trusts (see entry in these Minutes under Study L-  
26 3060).

27 STUDY L-3060 – DUTIES WHERE SETTLOR OF REVOCABLE TRUST IS INCOMPETENT

28 The Commission considered Memorandum 2000-7, concerning rights and  
29 duties under a revocable trust where the settlor is incapacitated. The Commission  
30 approved the staff recommendation to continue to working with the State Bar  
31 Estate Planning, Trust and Probate Law Section Executive Committee and other  
32 interested persons to address the emerging issues involving revocable trusts.  
33 This study will include matters considered earlier in Study L-3059 (see above).  
34 The goal will be to develop a recommendation in time for the 2001 legislative  
35 session.

1           STUDY L-4003 – FAMILY CONSENT IN HEALTH CARE DECISIONMAKING

2           The Commission considered Memorandum 2000-5 and its First Supplement,  
3 concerning family consent in health care decisionmaking for adults.

4           Eric Carlson, Bet Tzedek Legal Services, presented a supplement to his draft  
5 proposal (attached to the memorandum), that would permit the supervising  
6 health care provider to refuse to accept the authority of a statutory surrogate if  
7 the physician determines, and documents in the patient's health care record, that  
8 the surrogate proposes a course of action (1) that is clearly not in the best interest  
9 of the patient and (2) that is either the result of the surrogate's lack of mental  
10 capacity or motivated by the surrogate's financial interests. Mr. Carlson stated  
11 that this would permit the physician to veto a decision that is clearly wrong,  
12 while preserving the principle that the family should be the surrogate  
13 decisionmaker. He suggested that it might also be possible to permit the family  
14 to select the surrogate, in place of the statutory priority list.

15           The Commission also heard the views of a number of health care  
16 professionals in attendance. It was generally agreed that as a practical matter, in  
17 most cases, people do not go to court over the surrogate decisionmaking issues,  
18 and that a statutory framework should aim at a set of rules that would avoid  
19 court proceedings except where a controversy arises that cannot be otherwise  
20 resolved. An issue that needs to be given further consideration is how to  
21 distinguish in the statute between the choice of a surrogate and the choice of a  
22 treatment. The Commission's family consent proposals have been directed at the  
23 manner of choosing the surrogate, who then is authorized to make health care  
24 decisions according to the statutory standards. It has been argued that the two  
25 types of decisions overlap, so that there is a significant risk that the authority to  
26 choose a surrogate can result in making the health care decision. The statute  
27 needs to address this problem.

28           Commissioners expressed concern that legislating a hierarchy, particularly if  
29 the hierarchy is less flexible than the Commission's earlier proposal, could have  
30 the unintended consequence of rigidifying the surrogate determination against  
31 the interests of patients. Similarly, the statute should not have the effect of  
32 disrupting selection of a surrogate by family consensus, and the next draft  
33 should recognize a priority for surrogates selected or decisions made through  
34 family consensus. Concern was also expressed that the standard for rejecting a

1 surrogate based on questionable motives or other negative factors could expose  
2 the physician to liability for defamation.

3 The Commission recognized that it was too late in the legislative year to be  
4 able to resolve these complex issues in time to present a bill in 2000. In view of  
5 the continuing vacancies in Commission membership, but in the hope that  
6 additional members might be appointed before too long, the Commission  
7 decided to revisit the family consent topic at the July meeting. The staff will  
8 continue to work with interested parties and will present a revised draft, perhaps  
9 including alternative approaches, for consideration at the July meeting. The staff  
10 should also prepare an overview of the issues and alternatives to assist new  
11 Commission members and interested persons. Even if the Commission does not  
12 have new members by July, work will need to continue so that any further  
13 Commission proposals can be ready for the 2001 legislative year.

#### 14 STUDY N-300 – ADMINISTRATIVE RULEMAKING

15 The Commission considered Memorandum 2000-4 reviewing public  
16 comments on the tentative recommendation relating to *Improving Access to*  
17 *Rulemaking Information Under the Administrative Procedure Act*. The Commission  
18 approved the tentative recommendation as its final recommendation, subject to  
19 the following changes:

#### 20 **Gov't Code § 11340.8. Electronic communication**

21 Proposed Section 11340.8 should be revised as follows:

22 11340.8. (a) As used in this section, "electronic communication"  
23 includes electronic transmission of written or graphical material by  
24 electronic mail, facsimile, or other means, but does not include  
25 voice communication.

26 (b) Notwithstanding any other provision of this chapter that  
27 refers to mailing or to oral or written communication:

28 (1) An agency may permit and encourage use of electronic  
29 communication, but may not require use of electronic  
30 communication.

31 (2) An agency may make available in electronic form a  
32 document required by this chapter, but shall not make that the  
33 exclusive means by which the document or a copy of a document is  
34 made available.

35 (3) A communication notice required or authorized by this  
36 chapter including a notice, public comment, request, or petition, or  
37 by a regulation implementing this chapter may be made  
38 electronically with the consent of the recipient delivered to a person

1 by means of electronic communication if the person has expressly  
2 indicated a willingness to receive the notice by means of electronic  
3 communication.

4 (4) A comment or petition regarding a regulation may be  
5 delivered to an agency by means of electronic communication if the  
6 agency has expressly indicated a willingness to receive a comment  
7 or petition by means of electronic communication.

8 (c) An agency that maintains an Internet website or other similar  
9 forum for the electronic publication or distribution of written  
10 material shall publish the following materials on that website or  
11 other forum:

12 (1) Any public notice required by this chapter or by a regulation  
13 implementing this chapter. For the purpose of this paragraph,  
14 “public notice” means a notice that is required to be given by an  
15 agency to persons who have requested notice of the agency’s  
16 rulemaking actions.

17 (2) The initial statement of reasons prepared pursuant to  
18 subdivision (b) of Section 11346.2.

19 (3) The final statement of reasons prepared pursuant to  
20 subdivision (a) of Section 11346.9.

21 (4) Notice of a decision not to proceed prepared pursuant to  
22 Section 11347.

23 (5) The text of a proposed regulation or instructions on how to  
24 obtain a copy of the text.

25 (d) Publication under subdivision (c) ~~is in addition to~~  
26 supplements any other required form of publication or distribution.  
27 Subdivision (c) does not require an agency to establish or maintain  
28 a website or other forum for the electronic publication or  
29 distribution of written material. Failure to comply with subdivision  
30 (c) is not ground for disapproval of a proposed regulation.

31 (e) Nothing in this section precludes the office from requiring  
32 that ~~the text of a proposed regulation material submitted to the~~  
33 office for publication in the California Code of Regulations or the  
34 California Regulatory Notice Register be submitted in electronic  
35 form.

36 **Comment.** Section 11340.8 is new. Subdivision (b) authorizes  
37 the use of electronic communications in adopting a regulation  
38 under this chapter.

39 Subdivision (c) requires electronic publication of certain  
40 rulemaking documents by an agency that maintains a website or  
41 similar electronic communication forum. Provisions requiring a  
42 “public notice” as defined in paragraph (1) include Sections 11346.4  
43 (notice of proposed action), 11346.8(a) (notice of hearing),  
44 11346.8(b) (notice of continuance or postponement of hearing). See  
45 also Section 11342(b) (“office” means Office of Administrative  
46 Law).

1            Use of electronic communications pursuant to this section  
2            supplements other required forms of publication or distribution.  
3            See subdivisions (b)(2) & (d).

4        **§ 11344.1. Publication in California Regulatory Notice Register**

5            Section 11344.1(a)(3) should be amended as follows:

6            11344.1. The Office shall do all of the following:

7            (a) Provide for the publication of the California Regulatory  
8            Notice Register, which shall be an official publication of the State of  
9            California and which shall contain the following:

10            ...

11            (3) All Summaries of all regulation decisions issued in the  
12            previous week detailing the reasons for disapproval of a regulation,  
13            the reasons for not filing an emergency regulation, and the reasons  
14            for repealing an emergency regulation. The California Regulatory  
15            Notice Register shall also include a quarterly index of regulation  
16            decisions.

17            **Comment.** Subdivision (a)(3) of Section 11344.1 is amended to  
18            ratify the existing practice of publishing detailed summaries of  
19            regulation decisions, rather than the decisions themselves. The  
20            complete decisions are public documents and can be obtained from  
21            the Office of Administrative Law.

22        **§ 11347. Notice of decision not to proceed with proposed rulemaking**

23            Proposed Section 11347 should be revised as follows:

24            11347. (a) If, after publication of a notice of proposed action  
25            pursuant to Section 11346.4, but before the notice of proposed  
26            action becomes ineffective pursuant to subdivision (b) of Section  
27            11346.4, an agency decides not to proceed with a proposed  
28            rulemaking action, it shall deliver notice of its decision to the office  
29            for publication in the California Regulatory Notice Register.

30            (b) Publication of a notice under this section terminates the  
31            effect of the notice of proposed action referred to in the notice.  
32            Nothing in this section precludes an agency from proposing a new  
33            rulemaking action that is similar or identical to a rulemaking action  
34            that was previously the subject of a notice published under this  
35            section.

36            **Comment.** Section 11347 is new. The purpose of this section is  
37            to require notice where an agency decides to completely abandon a  
38            proposed rulemaking action. A decision not to proceed with part of  
39            a proposed rulemaking action, while proceeding with the  
40            remainder, would not require notice under this section. See also  
41            Section 11342(b) (“office” means Office of Administrative Law”).

- 1       The recommendation, as revised, will be amended into the pending  
2 Commission bill on administrative rulemaking procedures — AB 1822 (Wayne).

APPROVED AS SUBMITTED

\_\_\_\_\_ Date

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

\_\_\_\_\_ Chairperson

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