

<p>DATE & TIME:</p> <p>December 1 (Thursday) 1:30 pm - 6:00 pm</p> <p>December 2 (Friday) 9:00 am - 2:00 pm</p>	<p>PLACE:</p> <p>Los Angeles Airport Hyatt at LAX 6225 W. Century Blvd. (213) 670-9000</p>
<p>NOTE: Changes may be made in this Agenda. For meeting information, please call (415) 494-1335.</p>	

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

THURSDAY, DECEMBER 1

1. Minutes of October 24, 1988, Commission Meeting (sent 11/10/88)

2. Administrative Matters

Authorization to Carry Over Excess Vacation Hours
Memorandum 88-85 (sent 11/17/88)

3. 1989 Legislative Program

Oral report at meeting

4. Study D-1000 - Creditors' Remedies—Miscellaneous Matters

Memorandum 88-84 (Comments of State Bar Committee on Administration of Justice) (sent 11/18/88)

5. Study L-3012 - Uniform Management of Institutional Funds Act

Memorandum 88-65 (sent 9/15/88)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 88-65 (Comments of Attorney General) (sent 10/4/88)
Second Supplement to Memorandum 88-65 (Comments of Interested Persons) (sent 10/12/88)
Third Supplement to Memorandum 88-65 (Comments of California Catholic Conference) (sent 10/19/88)
Fourth Supplement to Memorandum 88-65 (More Comments of Attorney General) (sent 11/10/88)

6. Study L-2010 - 1989 Probate Cleanup Legislation (Urgency Bill)

Memorandum 88-68 (sent 10/12/88)
Draft of Bill (attached to Memorandum)
First Supplement to Memorandum 88-68 (Additional Matters for
Inclusion) (enclosed)

7. Study L-3021 - Delivery of Decedent's Personal Property

Memorandum 88-80 (sent 11/7/88)
First Supplement to Memorandum 88-80 (sent 11/17/88)

8. Study L-1061 - Brokers' Commissions in Probate

Memorandum 88-81 (sent 11/7/88)

9. Study L-612 - 120-Hour Survival of Intestate Takers

Memorandum 88-20 (sent 11/17/88)

10. Study L-3007 - In-Law Inheritance

Memorandum 88-21 (sent 11/17/88)

11. Study L-1062 - Priority for Appointment as Administrator

Memorandum 88-82 (sent 11/17/88)

12. Study L-636 - No Contest Clause

Memorandum 88-69 (Comments on Tentative Recommendation) (sent
10/5/88)
Tentative Recommendation (attached to Memorandum)

*Note. We will continue review of this memorandum commencing
with Section 21301 (application of part) on page 6 of the tentative
recommendation.*

First Supplement to Memorandum 88-69 (Further Comments) (sent
11/7/88)

13. Study L-1026 - Payment of Debts in Probate

Memorandum 88-50 (sent 6/22/88)
First Supplement to Memorandum 88-50 (Comments of Bar
Associations) (sent 8/30/88)
Second Supplement to Memorandum 88-50 (Comments of Beverly Hills
Bar Association) (sent 9/2/88)

14. Study L-1058 - Probate Filing Fees

Memorandum 88-83 (sent 11/17/88)
Revised Draft of Tentative Recommendation (attached to Memorandum)

15. More Administrative Matters

Commissioner Attendance at Meetings

Memorandum 88-79 (sent 11/7/88)

Communications from Interested Persons

FRIDAY, DECEMBER 2

16. Study F-641/L-3020 - Limitations on Disposition of Community Property

Memorandum 88-47 (sent 6/6/88)
Draft of Tentative Recommendation (attached to Memorandum)

Note. We will continue review of this memorandum commencing with Section 5125.240 (gifts) on page 14 of the attached draft.

First Supplement to Memorandum 88-47 (Kinyon Letter) (sent 8/15/88)

Second Supplement to Memorandum 88-47 (Comments on Draft) (sent 10/12/88)

Third Supplement to Memorandum 88-47 (More Comments on Draft) (to be sent)

17. Study N - Administrative Law

SPECIAL Memorandum 88-73 (Scope of Study) (sent 11/7/88)

ORDER OF Consultant's Report (attached to Memorandum)

BUSINESS

AT 10:00

MEETING SCHEDULE

December 1988

1 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles
2 (Friday) 9:00 a.m. - 2:00 p.m.

January 1989

12 (Thursday) 1:30 p.m. - 6:00 p.m. Orange County
13 (Friday) 9:00 a.m. - 2:00 p.m.

February 1989

9 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles
10 (Friday) 9:00 a.m. - 2:00 p.m.

March 1989

9 (Thursday) 1:30 p.m. - 6:00 p.m. San Francisco
10 (Friday) 9:00 a.m. - 2:00 p.m.

April 1989

13 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles
14 (Friday) 9:00 a.m. - 2:00 p.m.

May 1989

18 (Thursday) 1:30 p.m. - 6:00 p.m. San Francisco
19 (Friday) 9:00 a.m. - 2:00 p.m.

July 1989

13 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles
14 (Friday) 9:00 a.m. - 2:00 p.m.

September 1989

7 (Thursday) 1:30 p.m. - 6:00 p.m. Sacramento
8 (Friday) 9:00 a.m. - 2:00 p.m.

October 1989

12 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles
13 (Friday) 9:00 a.m. - 2:00 p.m.

November-December 1989

Nov. 30 (Thurs.) 1:30 p.m. - 6:00 p.m. San Francisco
Dec. 1 (Fri.) 9:00 a.m. - 2:00 p.m.

STATUS OF COMMISSION STUDIES

(as of November 16, 1988)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
D-1000	Creditors' Remedies -- Miscellaneous Matters	2/88	7/88	7/88	10/88	10/88
F-641	Limit Dispos Commun Prop	4/88	9/88	[12/88]		
H-111	Commercial Leases -- Assignment & Sublease	2/88	3/88	10/88	[1/89]	
L-1	New Probate Code	2/88				
L-612	Simultaneous Death	2/88	[12/88]			
L-636	No Contest Clause	1987	1/88	7/88	[12/88]	
L-1025	Notice to Creditors-- Tulsa case	5/88	7/88	10/88	[1/89]	
L-1036 /1055	Personal Representative & Attorney Fees in Probate	8/87	1/88	10/88	[1/89]	
L-1060	Multiple-Party Accounts	9/88	10/88	10/88	[1/89]	
L-3005	Anti-Lapse & Other Rules	1/88	5/88			
L-3007	Ancestral Property Doctrine	2/88	[12/88]			
L-3010	Fees of Corporate Trustees	3/88	5/88	10/88	[1/89]	
L-3012	Uniform Management of Institutional Funds Act	8/88	[12/88]			
	1988 Annual Report	7/88	9/88	***	***	9/88

[date] = scheduled

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 1-2, 1988
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on December 1-2, 1988.

Commission:

Present:	Forrest A. Plant Chairperson Edwin K. Marzec Vice Chairperson Roger Arnebergh (Dec. 2)	Arthur K. Marshall Tim Paone (Dec. 1) Ann E. Stodden Vaughn R. Walker
Absent:	Elihu M. Harris Assembly Member Bill Lockyer Senate Member	Bion M. Gregory Legislative Counsel

Staff:

Present:	John H. DeMouilly Nathaniel Sterling	Stan G. Ulrich Robert J. Murphy III
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Consultants:

Michael Asimow, Administrative Law (Dec. 2)

Other Persons:

Ken Cameron, Los Angeles County Bar Association, Administrative Law Committee, Los Angeles (Dec. 2)
Jacqueline Cannon, Vice President of California Association of Public Administrators, Public Guardians, and Public Conservators, Riverside County Public Administrator, Riverside (Dec. 1)
Joy Fisher, Department of Corporations, Sacramento (Dec. 2)
John W. Francis, State Bar Committee on Nonprofit Corporations and Unincorporated Associations, La Habra (Dec. 1)
Carol Gandy, Orange County Member, California Association of Public Administrators, Public Guardians, and Public Conservators, Santa Ana (Dec. 1)
Irwin D. Goldring, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles
Michael Harrington, California Bankers Association, San Francisco
Susan T. House, Los Angeles County Bar Association, Probate and Trust Law Section, Executive Committee, Los Angeles (Dec. 1)

Daniel J. Jaffe, State Bar Family Law Section Executive Committee,
Los Angeles (Dec. 2)
Gene B. Kent, Assistant Public Administrator, Los Angeles County,
Los Angeles (Dec. 1)
James Mattesich, Brandenburger and Davis, Sacramento (Dec. 1)
Valerie J. Merritt, Los Angeles County Bar Association, Probate and
Trust Law Section, Los Angeles
Joanne Morton, Santa Cruz County, Public Administrator's Office,
Member of Legislative Committee of Public Administrators, Public
Guardians, and Public Conservators Association, Santa Cruz (Dec.
1)
Robert Neher, representing self and certain Administrative Law
Judges of the Office of Administrative Hearings, Los Angeles
(Dec. 2)
Kenneth Petruilis, Beverly Hills Bar Association, Probate, Trust and
Estate Planning Section, Beverly Hills
Ron Russo, California Attorney General's Office, Los Angeles (Dec. 2)
James Schwartz, California Attorney General's Office, San Francisco
(Dec. 1)
Howard Serbin, Deputy County Counsel, Orange County, Attorney for
Orange County Public Administrator/Guardian, Santa Ana (Dec. 1)
Paul Wyler, State Bar Public Law Section, Los Angeles (Dec. 2)

ADMINISTRATIVE MATTERS

MINUTES OF OCTOBER 24, 1988, MEETING

The Commission approved the Minutes of the October 24, 1988,
meeting without change.

**RECOGNITION OF DISTINGUISHED SERVICE OF COMMISSIONER STODDEN AS
CHAIRPERSON**

Chairperson Plant, on behalf of the Commission, presented a gavel
plaque to Commissioner Stodden in recognition of her distinguished
service as Chairperson of the Commission.

AUTHORIZATION TO CARRY OVER EXCESS VACATION CREDIT INTO 1989

The Commission considered Memorandum 88-85. The Executive
Secretary was authorized to carry over not more than 186 hours of
excess vacation credit into 1989.

1989 LEGISLATIVE PROGRAM

The staff presented an oral report on the 1989 Legislative Program.

New Probate Code. The Staff suggested the following procedure with respect to the recommendation for the new Probate Code, and the suggested procedure was agreeable to the Commission.

A bill will be introduced early in 1989 that would repeal the existing Probate Code and enact a new Probate Code. The new Probate Code as set out in the bill will be exactly the same as the existing Probate Code as it will be operative on July 1, 1989, except that it will not include the provisions governing attorney and personal representative fees and the provisions relating to multiple-party accounts. The omitted provisions will be the subject of separate recommendations to the 1989 session.

The new code as proposed in the bill will keep the existing section numbers, except for the attorney and personal representative fee provisions (which will be relocated by legislation proposed in a separate Commission recommendation) and the multiple-party account provisions (some of which will be renumbered by legislation proposed in a separate Commission recommendation).

The bill will be amended in 1989 to make technical and conforming revisions considered to be needed or desirable by the staff. When the bill has been reprinted showing these amendments, the bill will be reviewed by the Commission, the State Bar Estate Planning, Trust and Probate Law Section, and others, to determine that the amendments are satisfactory. If any amendments are not satisfactory, they will be corrected the next time the bill is amended. It is anticipated that Comments would be available in September 1989 to each section of the bill as amended. These Comments would retain the portion of the existing Comment or Comments to the section of the existing Probate Code with any needed revisions.

The staff plans to make a careful review of the provisions of the existing Probate Code. If any substantive defects are discovered by the staff or are brought to the attention of the staff by the State Bar Section or others, the staff will prepare a memorandum to present the matter to the Commission for its consideration.

If there are controversial matters, they probably should not be included in the new code. Instead, a separate bill would be introduced dealing with the controversial matter, so that a legislative decision can be made on the matter without jeopardizing the enactment of the new code. The bill proposing the new code can then be amended to incorporate the provisions of any such separate bills that are enacted. For example, if the Commission decides to propose a revision of the law relating to in-law inheritance to the 1989 session, that issue would be presented in a separate bill. If the bill is enacted, its substance would be incorporated into the new code.

When the bills submitted to the 1989 session to effectuate other Commission recommendations have been enacted, the bill proposing the new Probate Code will be amended to reflect the provisions enacted by these other Commission recommended bills. The bill proposing the new Probate Code also will be amended to reflect the provisions enacted by other bills not recommended by the Commission that are enacted in 1989. In addition, any other changes the Commission decides to make in the Probate Code can be made by amendment of the bill proposing the new Probate Code.

The bill proposing the new Probate Code will be pushed for enactment in 1990.

Recommendations to the 1989 Legislative Session. The Commission plans to submit the following recommendations to the 1989 legislative session:

Compensation of Probate Attorney and Personal Representative
(Comments on Tentative Recommendation to be considered at January meeting.) (Bill will be introduced after January meeting.)

Notice to Creditors (Comments on Tentative Recommendation to be considered at January meeting.) (This is an urgency bill and is to be introduced after the December meeting in the form in which it appears in the Tentative Recommendation so that the 30-day period before amendments can be made will start to run.)

No Contest Clauses (This Recommendation has been approved to print.) (Bill will be introduced after December meeting.)

Trustees' Fees (Comments on Tentative Recommendation to be considered at January meeting.) (Bill will be introduced after January meeting.)

Probate Cleanup Bill (Portions of this bill have been approved; additional portions will be approved during the next few months as the Commission discovers matters it wishes to deal with in the cleanup bill.) (This is an urgency bill and is to be introduced after the December meeting with the provisions already approved so that the 30-day period before amendments can be made will start to run.)

Assignment and Sublease (Comments on Tentative Recommendation to be considered at January meeting.) (Bill will be introduced after January meeting.)

Creditors' Remedies (This Recommendation has been approved for submission to the 1989 Legislature.) (Bill will be introduced after December meeting.)

Commission Enabling Statute (The Commission has approved a revision of its enabling statute to permit it to study minor matters without the need for approval by concurrent resolution.) (Bill will be introduced after December meeting.)

Bills will not be set for hearing until they have been amended to conform to the Commission's recommendation on the particular subject.

Other recommendations that may be submitted to the 1989 Legislature (if work can be completed in time to permit submission) include:

Multiple-party Accounts in Financial Institutions (Comments on Tentative Recommendation will be considered at January meeting.)

120-Hour Survival Requirement to Take Title by Intestacy (Tentative Recommendation distributed for review and comment to interested persons and organizations.)

Probate Filing Fees (Work in Progress.)

Uniform Management of Institutional Funds Act (Work in Progress.)

Disposition of Community Property (Work in Progress.)

In-law Inheritance (Work in Progress.)

STUDY D-1000 - CREDITORS' REMEDIES

The Commission considered Memorandum 88-84 concerning the creditors' remedies recommendation. The Commission approved the suggestion of the State Bar Committee on Administration of Justice to increase to 90 days the proposed 60-day period after a sale of property to the judgment creditor during which the judgment debtor may seek to have the sale overturned for irregularities.

STUDY L-602 - 120-HOUR SURVIVAL TO TAKE BY INTESTACY

The Commission considered Memorandum 88-20 and the attached staff draft of a *Tentative Recommendation Relating to 120-Hour Survival to Take by Intestacy*. The Commission approved the *Tentative Recommendation* for distribution for comment.

STUDY L-636 - NO CONTEST CLAUSE

The Commission considered Memorandum 88-69 and the First Supplement thereto, relating to the no contest clause tentative recommendation. The Commission approved the recommendation for printing and submission to the Legislature, subject to the following changes.

Prob. Code § 6112 (amended). Witnesses to wills

This section was revised as set out in Exhibit 1 to the First Supplement to Memorandum 88-69.

Prob. Code § 21300. Definitions

This section was revised as set out in Exhibit 1 to the First Supplement to Memorandum 88-69.

Prob. Code § 21301. Application of part

The Comment should note that the reference to the common law does not refer to the common law as it existed in 1850; rather the reference is to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions.

Prob. Code § 21303. Validity of no contest clause

The introductory clause should read, "Except to the extent otherwise provided in this part."

Prob. Code § 21305. Declaratory relief

The reference to a declaratory relief action under Section 1060 of the Code of Civil Procedure was deleted. The statute should make clear that only a petition for construction of an instrument is exempt from enforcement of a no contest clause under this section.

Prob. Code § 21306. Forgery or revocation

This section was revised to read:

A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest that is limited to either or both of the following grounds:

- (a) Forgery.
- (b) Revocation.

Prob. Code § 21307. Interested participant

Subdivision (b) was revised to refer to "A person who gave directions concerning dispositive or other substantive provisions of the instrument or who directed inclusion of the no contest clause in the instrument."

STUDY L-654 - IN-LAW INHERITANCE

The Commission considered Memorandum 88-21 concerning in-law inheritance. The Commission decided to limit Probate Code Section 6402.5 as follows:

(1) To apply only where the decedent's predeceased spouse died not more than two years before decedent. This would apply both to real and personal property.

(2) To abolish tracing, so the statute would apply only to the specific property received from the predeceased spouse.

The staff should consider whether the statute should be revised to not apply to decedent's quasi-community property. The staff should bring back a draft to the Commission for consideration at a future meeting.

STUDY L-1026 - PAYMENT OF DEBTS IN PROBATE

The Commission considered Memorandum 88-50 and the First and Second Supplements thereto, relating to payment of informal claims. The Commission decided to address the issue raised in the Sturm case (201 Cal. App. 3d 14 [1988]) by adding the following language to Section 9154 (waiver of formal defects): "Nothing in this section limits application of the doctrine of waiver, estoppel, laches, or detrimental reliance, or of other equitable principles." The Comment should illustrate this concept by reference to the Sturm case.

The Commission also decided to revise Section 9250 (allowance and rejection of claims) by adding a new subdivision that states: "This section does not apply to a demand the personal representative elects to treat as a claim under Section 9154."

STUDY L-1058 - PROBATE FILING FEES

The Commission considered Memorandum 88-83 and the revised staff draft of a *Tentative Recommendation Relating to Filing Fees in Probate*. The Commission also received additional analysis from Team No. 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section which was distributed at the meeting. (A

copy is attached as Exhibit 1.) The Commission directed the staff to distribute the draft tentative recommendation to all of the county clerks for their review. The Commission will give substantive consideration to the draft at a later meeting after the county clerks have submitted their comments.

STUDY L-1061 - BROKERS' COMMISSIONS IN PROBATE

The Commission considered Memorandum 88-81 concerning broker's commissions in probate and made the following decisions.

Broker's Commission Where Broker is Purchaser

The Commission disapproved the rule of Estate of Levinthal, 105 Cal. App. 3d 691, 164 Cal. Rptr. 628 (1980), that a broker in an estate sale is entitled to a commission when the purchaser is an entity in which the broker has an insubstantial interest. Instead, the Commission decided to broaden the rule of Estate of Toy, 72 Cal. App. 3d 392, 140 Cal. Rptr. 183 (1977), that a broker may not receive a commission when there is complete identity between broker and purchaser, to apply to the case where the broker has an interest in the purchasing entity, whether or not there is complete identity between broker and purchaser and whether or not the broker's interest is "substantial." The Commission asked the staff to draft statutory language to accomplish this, and to bring back a draft to a future Commission meeting.

The State Bar thought the Judicial Council form should require the broker to disclose whether he or she is the purchaser or has an interest in the purchasing entity. *But see* Report of Sale and Petition for Order Confirming Sale of Real Property, Form Approved by the Judicial Council of California, DE-260 (rev. July 1, 1988) (box 5c: broker "is not buying for his or her own account").

Commission on Exclusive Right to Sell Contract Where Original Bidder
Not Represented by an Agent or Broker

The Commission approved the statutory sections and Comments set out in Exhibit 2 to Memorandum 88-81 to cover the situation where the exclusive listing contract provides that no commission shall be payable if sale is confirmed to a particular person named in the contract. These sections should be included in the Commission's 1989 probate cleanup bill.

STUDY L-2010 - 1989 PROBATE CLEANUP LEGISLATION

The Commission considered Memorandum 88-68 and the First Supplement thereto relating to matters for inclusion in the 1989 urgency cleanup bill on Probate. The Commission approved for inclusion the provisions attached as Exhibit 1 to Memorandum 88-68. The Commission deferred consideration of the time for filing the inventory and appraisal pending receipt of a draft from Chuck Collier on this matter. The Commission also approved the following provisions for inclusion in the probate cleanup bill:

§ 1023. Signing and verification by attorney

This section should be revised to read:

1023. If a petitioner, objector, or respondent is absent from the county or for some other cause is unable to sign or verify a petition, objection, or response, the person's attorney may ~~do either or both of the following:~~

~~(a) Sign the petition, response, or objection, if the petitioner, objector, or respondent is not a fiduciary.~~

~~(b) Verify the petition, objection, or response~~ sign or verify the petition, objection, or response unless the person is a fiduciary appointed in the proceeding.

Comment. Section 1023 is amended to prohibit a fiduciary's attorney from verifying papers for the fiduciary. The prohibition on an attorney signing or verifying papers is limited, however, to a fiduciary appointed in the particular proceeding to which the papers relate. Thus, for example, a petition filed by the personal representative in a probate proceeding would be covered by the prohibition, but an objection or response to such a

petition by the trustee of an intervivos trust or by the conservator of an heir would not be covered, since neither the trustee nor the conservator is a fiduciary appointed in the probate proceeding.

§ 7050. Jurisdiction and authority of court or judge

The following technical correction was made:

7050. (a) The superior court has jurisdiction of proceedings under this code concerning the administration of the decedent's estate.

(b) The court in proceedings under this division code concerning the administration of the decedent's estate is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including but not limited to the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Subdivision (b) of Section 7050 is amended to make clear that the subdivision applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code.

§ 7060. Disqualification of judge

The following technical correction was made:

7060. (a) In addition to any other ground provided by law for disqualification of a judge, a judge is disqualified from acting under this division in proceedings under this code concerning the administration of the decedent's estate, except to order the transfer of a proceeding as provided in Article 3 (commencing with Section 7070), in any of the following cases:

- (1) The judge is interested as a beneficiary or creditor.
- (2) The judge is named as executor or trustee in the will.
- (3) The judge is otherwise interested.

(b) A judge who participates in any manner in the drafting or execution of a will, including acting as a witness to the will, is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation.

Comment. Subdivision (a) of Section 7060 is amended to make clear that the subdivision applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code.

§ 7200. Trial by jury

The following technical correction was made:

7200. Except as otherwise expressly provided in this division code, there is no right to a jury trial in proceedings under this division code concerning the administration of the decedent's estate.

Comment. Section 7200 is amended to make clear that the section applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code.

§ 8482. Amount of bond

This section should be revised to read:

8482. (a) The court in its discretion may fix the amount of the bond, ~~including a fixed minimum amount,~~ but the amount of the bond shall be not more than the sum of:

- (1) The estimated value of the personal property.
- (2) The probable annual gross income of the estate.
- (3) If independent administration is granted as to real property, the estimated value of the decedent's interest in the real property.

(b) Notwithstanding subdivision (a), if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer.

~~(b)~~ (c) If the bond is given by personal sureties, the amount of the bond shall be twice the amount fixed by the court under subdivision (a).

~~(e)~~ (d) Before confirming a sale of real property the court shall require such additional bond as may be proper, not exceeding the maximum requirements of this section, treating the expected proceeds of the sale as personal property.

Comment. Section 8482 is revised to make clear that the fixed minimum bond may exceed the maximum established by subdivision (a).

§ 10902. Procedure on account

The following section should be added to the statute:

10902. The personal representative shall file an account when required under Chapter 2 (commencing with Section 10950) and may file an account at any other time. Whether or not required, the filing of an account shall be deemed to include a petition for approval of the account.

Comment. Section 10902 is new.

§ 11641. Distribution under court order

This section should be revised to read:

11641. When an order settling a final account and for final distribution ~~becomes final~~ is entered, the personal representative may immediately distribute the property in the estate to the persons entitled to distribution, without further notice or proceedings.

Comment. Section 11641 is amended to permit distribution on entry of an order for final distribution. For a stay in case of an appeal, see Section 7241.

§ 11801. Distribution despite death of beneficiary

Subdivision (b) of Section 11801 should be revised to read:

(b) Distribution Subject to Section 21525, distribution may not be made under this chapter if the decedent's will provides that the beneficiary is entitled to take under the will only if the beneficiary survives the date of distribution or other period stated in the will and the beneficiary fails to survive the date of distribution or other period.

Comment. Subdivision (b) of Section 11801 is revised to make clear that, in the case of a marital deduction gift, any survival requirement in the will that exceeds or may exceed six months is construed to be a six month limitation under Section 21525.

§ 12522. Admission of will admitted to probate in sister state

The Comment to Section 12522 should be revised along the following lines:

Comment. Subdivision (a) of Section 12520 makes clear that the procedure of this article applies only where a sister state or foreign nation order admitting a will to probate satisfies the requirements of Sections 12522 or 12523. As provided in subdivision (b), the general provisions concerning opening administration apply where the sister state or foreign nation order is not entitled to recognition under this article. See Section 8000 et seq. This article does not address whether the order or any matter determined in the order may be entitled to recognition for other purposes under other principles such as collateral estoppel. The general provisions also apply in any case where admission has not been sought in the sister state or foreign nation. See also Section 6113 (choice of law as to execution of will).

STUDY L-3012 - UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

The Commission began consideration of Memorandum 88-65, the draft *Tentative Recommendation Relating to the Uniform Management of Institutional Funds Act*, and the First, Second, Third, and Fourth Supplements to Memorandum 88-65. The Commission also received a letter from the Committee on Nonprofit Corporations of the Business Law Section of the State Bar supporting the draft. (A copy of this letter is attached as Exhibit 2.) The Commission approved in principle the proposal to extend UMIFA to cover all educational, religious, charitable, and other eleemosynary organizations.

Further consideration of the draft statute was postponed until the February 1989 meeting. The draft statute should be revised to deal with several issues of particular concern to the Attorney General's office: the relationship between UMIFA and the nonprofit and religious corporation laws, the appropriate scope of the *quasi cy pres* rule in UMIFA, and the expenditure of unrealized gains. The staff will research the legislative history of and the current interpretation given to the provision concerning appropriation of "net appreciation, realized in the fair value of the assets of an endowment fund over the historic dollar value." (See draft Section 18502, continuing the language of Educ. Code § 94602.) The Commission is interested in the interpretation given this language, which varies from the official text of the uniform act. The corresponding part of Section 2 of the uniform act reads: "net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value." It was also noted that the five-year limitation on the determination of fair value of the asset is not consistent with the interpretation that the California variation does not allow use of unrealized appreciation. If the California variation allows only appreciation realized by sale, this intent should be made clear and the five-year limitation should probably be omitted. The intent to limit this provision could be achieved by revising the language as follows: "so much of the realized net appreciation, ~~realized~~ in the fair value of the assets of an endowment fund over the historic dollar value."

STUDY L-3021 - DELIVERY OF DECEDENT'S PERSONAL PROPERTY

The Commission considered Memorandum 88-80, the attached draft of proposed new Section 330 of the Probate Code, and the First Supplement. The representative of the State Bar Estate Planning, Trust and Probate Law Section advised that Bruce Ross is working on a narrower draft of proposed Section 330. Pending receipt of that draft, the Commission decided to include Section 330 as set out below in the Commission's 1989 probate cleanup bill. When the draft is received, the bill can be amended accordingly to take care of the State Bar's concerns.

Probate Code § 330 (added). Delivery of decedent's tangible personal property

SEC. _____. Part 10 (commencing with Section 330) is added to the Probate Code, to read:

PART 10. DELIVERY OF DECEDENT'S
TANGIBLE PERSONAL PROPERTY

330. (a) Except as provided in subdivision (b), a public administrator, government official, law enforcement agency, the hospital or institution in which a decedent died, or the decedent's employer, may, without the need to wait 40 days after death, deliver the tangible personal property of the decedent in its possession, including keys to the decedent's residence, to the decedent's surviving spouse, relative, or conservator or guardian of the estate acting in that capacity at the time of death.

(b) A person shall not deliver property pursuant to this section if the person knows or has reason to believe that there is a dispute over the right to possession of the property.

(c) A person that delivers property pursuant to this section shall require reasonable proof of the status and identity of the person to whom the property is delivered, and may rely on any document described in subdivision (d) of Section 13104 as proof of identity.

(d) A person that delivers property pursuant to this section shall, for a period of three years from the date of delivery of the property, keep a record of the property delivered and the status and identity of the person to whom the property was delivered.

(e) Delivery of property pursuant to this section does not determine ownership of the property or confer any greater rights in the property than the recipient would otherwise have, and does not preclude later proceedings for administration of the decedent's estate. If proceedings for the administration of the decedent's estate are commenced, the person holding the property shall deliver it to the personal representative on request by the personal representative.

(f) A person that delivers property pursuant to this section is not liable for loss of or damage to the property caused by the person to whom the property is delivered.

Comment. Section 330 is added to make clear that the specified officials and agencies need not wait 40 days from the death of the decedent to deliver decedent's personal effects and other tangible personal property to decedent's spouse, relatives, conservator, or guardian. Cf. Section 13100 (40-day delay for use of affidavit procedure). If the official or agency relies on a document described in subdivision (d) of Section 13104 as reasonable proof of identity, the official or agency is not liable for so relying.

STUDY N - ADMINISTRATIVE LAW

The Commission considered Memorandum 88-73, together with a copy of a letter from the Office of the Attorney General (Exhibit 3 of these Minutes), relating to the scope of the administrative law study. The Commissioners, staff, and other persons present at the meeting discussed the advantages and disadvantages of using the 1981 Model State Administrative Procedure Act as a basis for the study of California administrative law, and also discussed the priority for study the various aspects of administrative law should receive.

Among the advantages of using the 1981 Model Act expressed at the meeting were that it deals comprehensively with the entire field, it is a carefully worked out statute representing the most recent thinking of many experts in the area, and to the extent it is adopted elsewhere California will benefit from experience of others under it. Among the disadvantages are that it has not yet been widely adopted in other jurisdictions, and it is unfamiliar to nearly all persons involved in

administrative law in California. While some persons present expressed concern about not making the existing California statute the focus of the study, there was substantial support for the concept of approaching the study from the perspective of the Model Act.

Considerations in setting priorities include the fact that the rulemaking provisions were substantially revised in 1979, that the adjudication issues are more numerous and will require more time as well as some empirical research than some of the other areas, that the matter of judicial review involves major problems that need to be addressed, that reform of adjudication and of judicial review are interrelated in the sense that adequate adjudication procedures may reduce the pressure on judicial review, and that the Commission's research budget for the current fiscal year is limited.

One possible approach to the study that was discussed is to commence work on discrete problems, so that the Commission is involved in drafting and circulating for comment one matter while the consultant is preparing background material on the next, so that gradually the complete statute is built up. For example, individual provisions or chapters of the Model Act could be the focus of separate Commission reports. This was how the Evidence Code was prepared, with a great deal of success.

The Commission requested the staff, in consultation with Professor Asimow and in light of the discussion at the meeting, to bring back to the Commission as soon as possible a specific recommendation and schedule for proceeding on this study.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

Study L-1058
Minutes
December 1-2, 1988

EXHIBIT 1

213\99999-93\88-83 11/28/88

CA LAW REV. COMM'N

NOV 28 1988

RECEIVED

REPORT

TO: JAMES V. QUILLINAN
IRWIN D. GOLDRING
STERLING L. ROSS, JR.
VALERIE J. MERRITT
CHARLES A. COLLIER, JR.
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT

DATE: November 28, 1988

RE: LRC MEMORANDUM 88-83
(Filing Fees in Probate -- Tentative Recommendation)

In view of the Thanksgiving holidays, Study Team #1 had difficulty in arranging for a conference call. Finally, on the afternoon of November 23, Michael V. Vollmer and William V. Schmidt conferred. All other members of the team did not participate. We have the following comments to the tentative recommendation which appears on the white pages at the end of Memorandum 88-83:

Probate First Petition Fee - Sec. 26827 and Probate Opposition Paper Fee - Sec. 26827.2

We are very pleased with both of these sections. We feel that they will be sound law and will provide clear guidance to County Clerks, which will result in a consistent application throughout the state.

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We are pleased with the First Paper approach as it follows the general approach used in civil actions. We are also pleased with the two-tier approach as it also follows the approach used in civil actions. We feel that the hard work by several people over a period of months has finally paid off and that we have now been able to adopt a first-paper and two-tier approach system which now has the necessary modifications which allows it to be applied to filing fees in probate.

We only have minor typing areas to point out. First, the phrase "in a petition under the Probate Code" as it appears in subdivision (a) of Sec. 26827.2, should read "in a proceeding under the Probate Code." This then parallels the language in subdivision (a) of Sec. 26827. Also, in subdivisions (1) and (2) of subdivision (a) of Sec. 26827.2, the words "Eighty-six" should be "Sixty-three," and the words "Sixty-one" should be "Thirty-Five." We believe that these incorrect amounts were inadvertently carried over from Sec. 26827.

Subsequent Paper Fee - Sec. 26827.4

In view of the comments and questions contained in the Note of the Staff and the further fact that we were pleased with Sections 26827 and 26827.2, our Study Team dug more deeply into the question of the subsequent paper fee. After trying to analyze it and the policy behind it from different

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approaches, we have come up with the comments, conclusions and recommendations set forth below, as well as a proposed revised Section, which is attached to the end of this Memorandum as Attachment #1.

1. In looking at the definition of a "subsequent paper" as found in subdivision (a), it was clear that the term included a petition or other initiating paper, but it was not absolutely clear that the term included a responsive paper, such as an objection. After analyzing and reviewing, we felt that the term should include both initiating and responding papers, and we have, therefore, modified subdivision (a) to include not only the language, but the concept for the first paper found in subdivision (a) of Sections 26827 and 26827.2. We feel very good about carrying over the first paper concept into the subsequent paper provisions, as it adds continuity and consistency to the entire probate filing fee system.

2. As you can see from the attachment, we would recommend no change in subdivision (b). We feel that subdivision is fine as it is.

3. We would modify the first portion of subdivision (c) so that its language follows the concept of subdivision (a) without any possible ambiguity. We were concerned with the language "Papers required by any of the following provisions." It could be argued that the only papers required by the

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following provisions would be the petition or initiating paper and that a responsive paper such as an objection is not required by the following provisions. To eliminate this possible ambiguity, we prefer to revise this language.

4. We are once again very concerned about the problem mentioned in the second paragraph of the Note to the section. It makes no sense whatsoever to us that petitions under Probate Code Section 10501 are exempt if the petition is filed by a personal representative with Independent Administration authority, but not exempt when the same petition is filed by a personal representative without such authority. Furthermore, we think it is unfair. It may well be argued that the language of the existing section does not make this distinction, but there is no question whatsoever that some counties, including Orange County, are making this distinction. We agree with William W. Johnson, Probate Examiner, Sacramento County. We feel that there should be consistency throughout the state and the language of the statute should be so clear and free of any possible ambiguity that there will be such consistency. We, therefore, recommend adding the following words to subdivision (1) of subdivision (c): "whether or not the personal representative has been granted authority to administer the estate under the Independent Administration of Estates Act." We have no pride of authorship in these particular words. The

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staff may very well improve upon them. We are only concerned that there be a clear, unambiguous statement somewhere in the statute which accomplishes the result which we seek.

5. We would delete in its entirety subdivision (d), even though we realize that its deletion would result in a higher filing fee. In the fourth paragraph of its Note, the staff states that it is unclear on the purpose of the provision which affords a substantial savings to objectors. We are also unclear. The staff then asks what policy supports the idea that if the petitioner is saved a \$14 fee, the objector should be saved \$49 (the difference between the \$63 first opposition fee and the \$14 fee)? We know of no such policy and we feel that such a result would be a bad one. We would also state the policy question in a slightly different manner. We would ask what policy supports the concept that a person (such as a beneficiary objecting to a final account) who has not theretofore paid a filing fee under either Section 26827 or 26827.2 should be able to pay only a \$14 filing fee instead of the normal \$63 filing fee, merely because he is filing a response or objection to a subsequent paper filed by another, rather than to a first paper filed by another. Again, we are aware of no such policy. We feel that a beneficiary who for the first time appears to object to an accounting or a petition for distribution should pay the full \$63 filing fee under

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Section 26827.2. We feel that this concept is consistent with what many clerks are now doing and what many clerks feel is fair and proper.

6. In view of the fact that under our proposal, a subsequent paper includes a responsive paper and that no filing fee should be charged for a responsive paper which consists merely of a consent or a waiver, we feel that language similar to the language found in subdivision (b) of Section 26827.2 should be added to this section. In the attachment we have added it as a new subdivision (d). Obviously, it could be placed elsewhere if the commission and staff prefers.

SUMMARY OF OUR POSITION REGARDING SECTION 26827.4.

1. A "subsequent paper" should include a responsive subsequent paper as well as an initiating or subsequent paper such as a petition. This carries over the first paper concept and seemingly adds continuity and consistency.

2. If the initiating (petition) subsequent paper is exempt, the responding subsequent paper in the same proceeding should be exempt. However, if the initiating subsequent paper is not exempt, the responding subsequent paper should be not exempt, unless it consists of merely a consent or a waiver thereto. This approach seems both simple and fair. It should

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be easy to administer and clear enough to attain consistency among the counties.

3. A subsequent paper in a proceeding required by Section 10501 should be exempt whether or not the personal representative has the power to administer under the Independent Administration of Estates Act.

ILLUSTRATION OF THE APPLICATION OF THE PROPOSED STATUTE BY HYPOTHETICAL EXAMPLES.

The revised, proposed Section 26827.4 attached hereto would have the following results. Assume that a personal representative who has already paid his first paper filing fee under Section 26827 files a subsequent petition to settle an account, which is an action which requires court supervision under Section 10501. He pays no subsequent paper filing fee because of the Section 10501 exemption. Assume further that a beneficiary who has never made an appearance in the proceeding and who has not paid a filing fee under either Section 26827 or 26827.2 files an objection to the account. Since this is his first appearance, he pays the \$63 first paper filing fee under Section 26827.2. (This, of course, assumes that subdivision (d) in the Tentative Recommendation is deleted.) Three months later, the same personal representative files a petition for a preliminary distribution and again the beneficiary files an objection. Neither would pay a subsequent paper filing fee, as

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each had paid his first paper filing fee and a petition for preliminary distribution is an action which requires court supervision under Section 10501. Two months later, the personal representative files a petition for instruction and the beneficiary once again files an objection. Each pays a subsequent paper filing fee as a petition for instruction is not a proceeding which is exempt from the subsequent paper filing fee. Changing the facts slightly, assume that the beneficiary did not file an objection to the petition for instruction but only filed his consent to such petition or a waiver of notice. In such a case, the personal representative would pay a subsequent paper filing fee, but the beneficiary would not be required to do so.

Please note that under our proposal all of the results above would be exactly the same whether or not the personal representative has the authority to administer the estate under the Independent Administration of Estates Act.

Hopefully, the commission and the staff will agree to the modifications we suggest for Section 26827.4. If so, we are

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for the first time satisfied that we have a sound, fair and workable probate filing fee system.

Respectfully submitted,

STUDY TEAM NO. 1

By: 
William V. Schmidt
Captain

ATTACHMENT #1

Government Code Sec. 26827.4 (added). Probate subsequent paper fee

SEC. 6. Section 26827.4 is added to the Government Code, to read:

26827.4 (a) As used in this section, a "subsequent paper" is petition or other a paper that requires a hearing, or a response to such petition or other paper, filed in a proceeding under the Probate Code, and-that-is-filed by a person who has paid the fee required by Section 26827 or 26827.2.

(b) Except as otherwise provided by statute, the total fee for filing a subsequent paper in a proceeding under the Probate Code, whether filed separately or jointly, is fourteen dollars (\$14).

(c) A subsequent paper filed in connection with a proceeding required by any of the following is exempt from the subsequent paper filing fee set forth in subdivision (b):
~~Papers-required-by-the-following-provisions-are-exempt-from-the subsequent-paper-filing-fee:~~

(1) Section 10501 of the Probate Code whether or not the personal representative has been granted the authority to

Administer the estate under the Independent Administration of Estates Act.

(2) Accountings of trustees of testamentary trusts that are subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9 of the Probate Code.

(3) Division 4 (commencing with Section 1400) of the Probate Code.

~~(d) -- Notwithstanding Section 26827.2, a paper filed in response to a paper exempt from the fee provided by subdivision (b) is subject to a filing fee of fourteen dollars (\$14) --~~

(d) A subsequent paper that is only a consent to an action or relief requested in a proceeding under the Probate Code, or a waiver in connection with such proceeding, is not subject to the fee provided by this Section.

(e) For purposes of this section, all papers filed with the clerk bearing the same action number are part of the same proceeding.

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THE STATE BAR OF CALIFORNIA**

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Vice-Chair North
MARGARET G. GILL, *San Francisco*
Vice-Chair South
ROBERT L. KAHAN, *Santa Monica*
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SUSAN COOPER-PHILPOT, *San Francisco*
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Adviser
HERBERT KRAUS, *Los Angeles*
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ROBERT L. KAHAN, *Santa Monica*
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JOHN B. POWER, *Los Angeles*
TERESA M. QUINN, *Los Angeles*
FRANCIS M. SMALL, JR., *San Jose*
DON L. WEAVER, *Los Angeles*

December 1, 1988

Stan G. Ulrich, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Memorandum 88-65; Study L-3012 Uniform Management of Institutional Funds Act

Dear Stan:

At its meeting on September 9, 1988, the State Bar Committee of the Business Law Section on Nonprofit Corporations and Unincorporated Associations considered the Commission's Staff Report on the subject matter.

The Committee unanimously concluded that the scope of the California version of the Uniform Management of Institutional Funds Act (UMIFA) be expanded from its current applicability to:

*** a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities to the extent that it holds funds exclusively for any such purposes. (Education Code Section 94000(a)).

to the scope originally articulated in Section 1(1) of UMIFA, to:

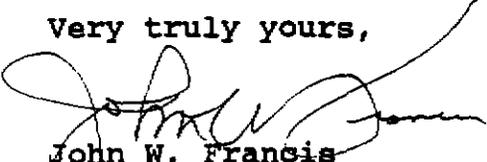
*** an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes.

Stan G. Ulrich, Esq.
December 1, 1988
Page Two

The Committee was aware that only two states that adopted UMIFA (North Carolina and Oregon) do not apply it to funds held by governmental organizations and that none of the 28 states that have adopted UMIFA have any other restrictions on its applicability.

The Committee has not met since September 9, and thus has had no opportunity to consider issues raised by the Attorney General's Office relating to standard of care, investment authority and cy pres in communications to the Commission after that date.

Very truly yours,



John W. Francis
Chair, Committee on Nonprofit Corporations
and Unincorporated Associations

JWF:ao

John W. Francis
Attorney at Law
1901 E. Lambert Road, Suite 100
La Habra, CA 90631
(213) 694-8811



JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

3580 WILSHIRE BOULEVARD, ROOM 800
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(213) 736-2304

November 22, 1988

CA LAW REV. COMM'N

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(213) 736-2010

RECEIVED

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Sterling:

Re: ADMINISTRATIVE LAW STUDY

Thank you for the material that you sent on November 4, 1988. I asked the people in charge of each of our offices to send me any thoughts they have. Enclosed are responses from Supervising Deputy Attorneys General Weston, Bennett and Korobkin.

Over the years the constant complaint we receive is that the process takes too long and costs too much. It may just be the nature of the beast; particularly compared to other forms of legal process. Anything which causes further delay or adds to the cost of the process should be avoided. The system was designed so that it was simple and would allow persons to function without lawyers if they so desired. It seems that judicial review should certainly be examined as the last time we looked, only three states, i.e., Alaska, North Dakota, and Connecticut followed California's weight of the evidence rule. The late Chief Justice Traynor made numerous observations on this issue. I also would imagine that California's Ettinger rule on the degree or quantum proof as "clear and convincing evidence . . ." is unique and questionable.

It would seem to be of little benefit to expand discovery unless it can be shown that it is presently inadequate and unfair. The agency's investigation is basically turned over to the person charged with violating the law. To impose civil discovery would add to delay, cost, complexity, and accomplish little.

One of the unique advantages of administrative law is the consistency in the interpretation of law and standard penalties for various types of misconduct rather than to have this depend on an individual judge's interpretation of law or what is an appropriate penalty. This is presently

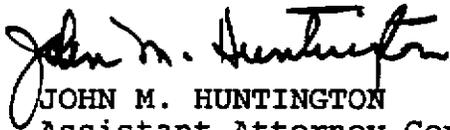
Nathaniel Sterling
November 22, 1988
Page 2

achieved through the ability to reject proposed decisions by Administrative Law Judges, which are considered erroneous in legal interpretation or discipline imposed. Findings of fact are not often disturbed.

Supervising Deputy Attorney General Ron Russo of our Los Angeles office, will be attending the meeting on December 2, 1988, at 10 a.m. at the Airport Hyatt.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General


JOHN M. HUNTINGTON
Assistant Attorney General

JMH:mac
Enclosures

cc: Ron Russo
Daniel J. Weston
Wilbert E. Bennett
Alvin J. Korobkin

Memorandum

To : John Huntington
Senior Assistant Attorney General
Los Angeles

Date : November 22, 1988

File No.

Telephone: ATSS (8) 631-7509
(619) 237-7509

From : Alvin J. Korobkin
Supervising Deputy Attorney General
Office of the Attorney General - San Diego

Subject: California Law Revision Study on Administrative Law

I have reviewed Professor Asimow's report on the possible scope of the California Law Revision Commission's study on Administrative Law. I have the following reactions to some of the issues raised by Professor Asimow, which reactions should be considered to be my personal views only.

Paragraph B1a

I agree with Professor Asimow that the issue of whether each agency should be required to use ALJs assigned by the central panel should be considered separately from the question of whether the APA adjudication procedure should apply to an agency's administrative proceedings. I believe the APA should apply to all state agencies that engages in administrative adjudication, unless the legislature specifically decides to exclude them.

Paragraph B1c

It is my opinion that the adjudication provisions of the APA should apply to every adjudication, including such things as assessment of a civil money penalty.

Paragraph B1d

Although I have not reviewed the 1981 Model Act, I do not support the establishment of a gradation of procedures depending upon the issue to be resolved and the seriousness of the sanction. The APA procedures are not so "formal" as to necessitate turning to more informal procedures in so-called minor issues.

Paragraph B1e

A California law on separation of functions is not necessary. The established procedures used by the agencies we represent guarantee fairness by separating the investigatory and prosecution functions by staff and attorneys from the adjudicatory functions of the agency members themselves.

Paragraph B1f

I believe the administrative law system in California would be improved by having central-panel ALJs being used for all adjudications unless the legislature specifically provides that they shall not be used. Billings of these agencies for their use of central-panel judges should be continued.

Paragraph B1g

I am strongly opposed to the rules of civil discovery applying in administrative cases. There are already many complaints about the length of time it takes to investigate and prosecute an administrative proceeding. Civil discovery would result in much further delay, and would also dramatically increase the costs of administrative hearings.

Paragraph B1h

I would be opposed to dispensing with the "residuum rule" regarding hearsay evidence. This rule allows for a much smoother and efficient hearing, without depriving the parties of the right not to have findings based solely on hearsay evidence.

Paragraph B1i

I believe the rules relating to ex parte contracts should apply to all agency adjudication whether or not it is otherwise subject to APA adjudicatory rules. I fully support these rules, and I do not believe these rules deny needed technical assistance to presiding officers. Any such assistance can be provided by way of sworn testimony introduced at the administrative hearing and subject to cross-examination.

John Huntington
November 22, 1988
Page 3

Paragraph B1m

I am strongly opposed to ALJs having enhanced power to encourage settlements. The present system involving settlements works well in light of the fact that the agencies are the ultimate adjudicators. No changes should be made to enhance the power of ALJs in this area.

Paragraph B3c

I would be in favor of changing the standard of judicial review from "independent judgment" to "substantial evidence." The reason for my position is that superior court judges who are not experts in the areas of specialty governed by many agencies are able to reverse decisions of these agencies by exercising their "independent judgment." I believe the standard of judicial review should be the same as an appellate court reviewing the findings of a lower court, i.e. substantial evidence in light of the whole record.

Paragraph B4b

I have seen no reason to create additional bureaucratic problems by creating an ombudsman to look into complaints arising out of agency action.

ALVIN J. KOROBKIN
Supervising Deputy Attorney General

AJK:tj

Memorandum

To : JOHN HUNTINGTON
Assistant Attorney General
Los Angeles

Date : November 21, 1988

File No.

Telephone: ATSS (8) 597-0503
(415) 557-0503

From : WILBERT E. BENNETT
Supervising Deputy Attorney General
Office of the Attorney General - San Francisco

Subject : Possible Administrative Law Revision

The views herein expressed are my personal views regarding certain matters addressed in Professor Asimow's report entitled Possible Scope of California Law Revision Commission Study of Administrative Law.

Based on my understanding that the current California Administrative Procedure Act represents a reasonable compromise between the demands of due process and administrative efficiency, I approach the subject matter with an "If it ain't broke, don't fix it" perspective. Thus, Professor Asimow begs the question of the necessity for administrative law reform by presenting the 1981 Model Act as a starting point for administrative law reform. In the absence of any hue and cry that the current administrative regulatory system under the APA is not working, I would suggest a more conservative approach than that suggested in Professor Asimow's report.

Professor Asimow noted that "[p]roper separation of adjudication from adversary functions is an essential element of fair administrative procedure," while stating that "California law contains no provision on separation of functions." Interestingly enough, the "separation of functions doctrine" was one of the principles recognized in the Tenth Biannual Report of the Judicial Council of California, dated December 31, 1944, which is generally recognized as the charter document of the California Administrative Procedure Act. The Tenth Biannual Report specifically recognized that "[i]f separation of functions within the agencies is to be achieved and the combination of prosecutor and judge is to be avoided, the parties must be given the right to challenge the qualifications of the trier of fact."

In my view, the separation of powers doctrine is achieved in practice under the adjudicative scheme set up by the California Administrative Procedure Act, which differentiates the persons who investigate the case from the persons who prosecute or decide the case.

The investigative arm of the agency investigates activities

arguably in violation of the laws regulating a particular profession. If the investigation determines that a case is preliminarily meritorious, an investigative file is sent to the Attorney General's office (the prosecuting attorneys, if you will) to determine whether there is merit in filing an accusatory pleading, called an accusation. The filing of the accusation initiates the administrative process, which may eventually culminate in a hearing before an administrative law judge. Again, this process reflects the separation of functions in at least two ways: (1) The accusation is filed not by the state board itself, who is the ultimate adjudicator of the case, but by the executive officer of the state board who is not himself a member of the board and is not involved in the adjudicative process, and (2) The hearing is held before an independent administrative law judge whose decision is subject to adoption or nonadoption by the state board. In the vast majority of cases, the state board will adopt the proposed decision of the administrative law judge as its own decision in a fairly routine manner. If the board is inclined to increase the disciplinary penalty imposed by the administrative law judge, it can only do so after reviewing the entire record, which includes ordering and reviewing the transcript of the hearing.

With reference to discovery, I do not believe that the rules of civil discovery should apply in administrative cases. Such rules are cumbersome, subject to abuse, and would needlessly delay administrative proceedings without any offsetting benefits. Under the current APA discovery procedures, the agency must essentially disclose the evidence upon which it intends to rely.

The subject of the admissibility of hearsay evidence was also indirectly addressed in the Tenth Biennial Report, which stated as follows:

"There are several reasons which led the Council to favor a continuance of the present informal evidence rules in administrative hearings. Many of the court rules of evidence were devised to prevent certain types of evidence from reaching an untrained lay jury selected for one case. * * * More important, perhaps, is the fact that many litigants in agency hearings are not represented by counsel, and they would be penalized if the court rules were applied.

JOHN HUNTINGTON
November 21, 1988
Page 3

"* * * A final consideration leading to a relaxation of the court rules of evidence in agency proceedings stems from the criticism of the rules as applied in the courts. Courts frequently recognize that the rules are too restrictive, and particularly when a case is tried without a jury the tendency is to admit all relevant evidence which will contribute to an informed result."

I would favor a statutory modification of the burden of proof standard in administrative proceedings. Prior to Ettinger, the preponderance of the evidence standard was the operative standard in administrative proceedings under the APA. In my view, the preponderance of the evidence standard represents an appropriate balancing of the respective interests involved.

With respect to the scope of judicial review, elimination of the "independent judgment rule" in favor of a "substantial evidence" standard is a good idea. I agree with the observation that the existence of the former standard creates a statutory invitation for "non-specialist judges to second guess the findings of expert agency members in ways that do not promote good government."

With respect to the last category of Professor Asimow's report, it is my view that non-judicial controls are unnecessary and would simply add levels of bureaucracy which would further complicate and make more cumbersome the administrative regulatory process.

W. E. Bennett
WILBERT E. BENNETT
Supervising Deputy Attorney General

WEB/ddt

m o r a n d u m

John M. Huntington
Assistant Attorney General
Room 523, Los Angeles

Date : November 15, 1988

File No.

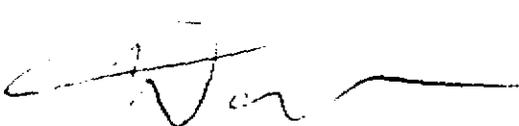
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(916) 324-5375

Daniel J. Weston, Supervising
Deputy Attorney General
Office of the Attorney General - Sacramento

PROPOSED REVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

This communication is in response to your memo of November 8, 1988, wherein you requested our personal views and comments concerning contemplated revisions of the Administrative Procedure Act as tentatively set forth in the California Law Revision Commission Study.

1. Subject to the exceptions noted below, I would not be in favor of any significant changes to the present APA. The present APA has behind it many years of extensive judicial interpretation and constitutes a relatively settled body of law. The enactment of the model act would be like "casting a rudderless ship upon uncharted seas." It would saddle our clients with many years of extensive appeals.
2. I am in favor of statutorily changing the Ettinger Rule to provide that the degree of proof is a preponderance of the evidence. Incidentally the Commission Study refers to the Ettinger case inaccurately as having changed the "burden of proof" which of course it did not. The burden of proof has never been changed.
3. I would be in favor of the creation of a special court to handle judicial reviews of agency actions. This court in a CCP 1094.5 case would act as a substitute for the superior court and an appeal from this special court of judicial review would then go to the District Court of Appeals.



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DJW:hf