

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335



1/15/93

<p>DATE: • January 28 & 29</p> <ul style="list-style-type: none"> • January 28 (Thursday) 10:00 am - 6:00 pm • January 29 (Friday) 9:00 am - 4:00 pm 	<p>PLACE: • Los Angeles</p> <p>Sheraton Plaza La Reina 6101 W. Century Blvd. Los Angeles, CA 90045 (310) 642-1111</p>
<p>NOTE: Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the proper amount made out to the "California Law Revision Commission".</p>	

FINAL AGENDA*for meeting of***CALIFORNIA LAW REVISION COMMISSION**Thursday, January 28, 1993

1. MINUTES OF OCTOBER 29-30, 1992, COMMISSION MEETING (sent 12/4/92)

2. ADMINISTRATIVE MATTERS

Quorum Rules for Commission Meetings

Memorandum 93-01 (NS) (sent 11/20/92) (\$5.50)

Communications from Interested Persons

3. 1993 LEGISLATIVE PROGRAM

Memorandum 93-15 (NS) (to be sent)

4. STUDY J-02.01/D-02.01 - CONFLICTS OF JURISDICTION MODEL ACT

Staff Draft

Memorandum 92-65 (RJM) (sent 9/30/92) (\$8.50)

First Supplement to Memorandum 92-65 (sent 11/12/92) (\$5.50)

Second Supplement to Memorandum 92-65 (sent 12/4/92) (\$5.50)

5. STUDY F-1000 - FAMILY CODE

STUDY F-1001 - FAMILY CODE GENERALLY

Miscellaneous Revisions

Memorandum 93-06 (SU) (to be sent)

STUDY F-1010 - PRELIMINARY PROVISIONS AND DEFINITIONS

Comment on Definition of "Community Estate"

Memorandum 93-02 (SU) (to be sent)

STUDY F-1090 - CUSTODY OF CHILDREN

Comments on Tentative Recommendation

Memorandum 93-03 (PKM) (enclosed) (\$18.00)

STUDY F-1100.4 - FAMILY SUPPORT

Technical Revisions

Memorandum 93-08 (PKM) (sent 1/12/93) (\$5.50)

STUDY F-1110.1 - ATTORNEY'S FEES

Technical Revisions

Memorandum 93-07 (RJM) (sent 11/24/92) (\$8.50)

STUDY F-1120 - PREVENTION OF DOMESTIC VIOLENCE

Comments on Discussion Draft

Memorandum 93-04 (PKM) (to be sent)

STUDY F-1130 - JUVENILE COURT LAW

Relocation of Juvenile Dependency Statute

Memorandum 93-05 (NS) (sent 1/13/93) (\$8.50)

6. STUDY F-521.1/L-521.1 - EFFECT OF JOINT TENANCY TITLE ON COMMUNITY
PROPERTY

Basic Principles Revisited

Memorandum 93-10 (NS) (sent 1/5/93) (\$8.50)

7. STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Letters from State Bar and County Clerks

Memorandum 92-16 (RJM) (sent 12/4/92) (\$5.50)

First Supplement to Memorandum 92-16 (sent 1/13/93) (\$5.50)

8. STUDY L-659.01 - PARENT-CHILD RELATIONSHIP FOR INTESTATE SUCCESSION

Revised Draft of Recommendation

Memorandum 93-11 (RJM) (sent 11/12/92) (\$8.50)

9. STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Revised Draft

Memorandum 93-12 (SU) (enclosed) (\$25.00)

Friday, January 29, 1993

10. STUDY N-201 - JUDICIAL REVIEW OF AGENCY ACTION

Preliminary Issues--Consultant's Background Study

Memorandum 92-71 (NS) (sent 9/30/92) (\$25.00)

Note. We will continue consideration of this memorandum beginning at page 30 of the background study (timing of judicial review).

11. STUDY N-100 - ADMINISTRATIVE ADJUDICATION

Revised Draft of Statute

Memorandum 92-70 (NS) (sent 10/13/92) (\$25.00)

Revised Preliminary Part of Tentative Recommendation

Memorandum 93-13 (NS) (sent 1/12/93) (\$8.50)

\$\$\$

MEETING SCHEDULE

<u>January 1993</u>		<u>Los Angeles</u>
Jan. 28 (Thur.)	10:00 a.m. - 6:00 p.m.	
Jan. 29 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>February 1993</u>	No Meeting	
<u>March 1993</u>		<u>Sacramento</u>
Mar. 25 (Thur.)	10:00 a.m. - 5:00 p.m.	
Mar. 26 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>April 1993</u>	No Meeting	
<u>May 1993</u>		<u>Sacramento</u>
May 13 (Thur.)	10:00 a.m. - 5:00 p.m.	
May 14 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>June 1993</u>	No Meeting	
<u>July 1993</u>		<u>Sacramento</u>
July 22 (Thur.)	10:00 a.m. - 5:00 p.m.	
July 23 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>August 1993</u>	No Meeting	
<u>September 1993</u>		<u>Sacramento</u>
Sep. 23 (Thur.)	10:00 a.m. - 5:00 p.m.	
Sep. 24 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>October 1993</u>	No Meeting	
<u>November 1993</u>		<u>Los Angeles</u>
Nov. 18 (Thur.)	10:00 a.m. - 6:00 p.m.	
Nov. 19 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>December 1993</u>	No Meeting	

ad08

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JANUARY 28-29, 1993
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on January 28-29, 1993.

Commission:

Present:	Arthur K. Marshall Chairperson Sanford Skaggs Vice Chairperson	Daniel M. Kolkey Edwin K. Marzec Forrest A. Plant Colin Wied
Absent:	Bill Lockyer Senate Member Terry B. Friedman Assembly Member	Christine W.S. Byrd Bion M. Gregory Legislative Counsel

Staff:

Present:	Nathaniel Sterling Pamela K. Mishey (Jan. 28)	Stan Ulrich (Jan. 28) Robert J. Murphy
----------	--------------------------------------------------	-------------------------------------------

Consultants:

Michael Asimow, Administrative Law (Jan. 29)

Other Persons:

Joyce M. Aiello, Los Angeles County Counsel, Monterey Park (Jan. 28)
Joseph S. Avila, Probate Referee's Association, Los Angeles (Jan. 28)
Herb Bolz, Office of Administrative Law, Sacramento (Jan. 29)
William M. Chamberlain, California Energy Commission, Sacramento (Jan. 29)
Ralph Dash, Office of Administrative Hearings, Los Angeles (Jan. 29)
Frieda Gordon Daugherty, Executive Committee, Family Law Section, Los Angeles County Bar Association, Association of Certified Family Law Specialists, Beverly Hills (Jan. 28)
Monica Dell'Osso, State Bar Estate Planning, Trust and Probate Law Section, Oakland (Jan. 28)
Lawrence M. Gassner, Executive Committee, State Bar Family Law Section, Ontario (Jan. 28)
Inez D. Hope, Children's Advocacy Institute, Center for Public Interest Law, San Diego University Law School, Sacramento (Jan. 28)
John Huntington, California Attorney General, Los Angeles (Jan. 29)

Melanie McClure, State Teachers' Retirement System, Sacramento (Jan. 29)
Valerie Merritt, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Jan. 28)
Diane Nunn, Judicial Council, Administrative Office of the Courts, San Francisco (Jan. 28)
Banzragchiin Odonjil, State Great Hural (Parliament of Mongolia), Ulaanbaatar, Mongolia (Jan. 28)
Kenneth G. Petrulis, Legislative Committee, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Los Angeles (Jan. 28)
Matthew S. Rae, Jr., State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Jan. 28)
Mary Anne Rathmann, Los Angeles County Counsel, Monterey Park (Jan. 28)
Miles J. Rubin, Executive Committee, Family Law Section, Los Angeles County Bar Association, Los Angeles (Jan. 28)
Bill Shank, California Public Employment Relations Board, Sacramento (Jan. 29)
Jim Wawro, Private Attorney, Los Angeles (Jan. 28)

MINUTES OF JANUARY 28-29, 1993, COMMISSION MEETING

The Minutes of the January 28-29, 1993, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Quorum Rules for Commission Meetings

The Commission considered Memorandum 93-01, relating to the quorum rules for Commission meetings. The Commission adopted the following revision of the Handbook of Practices and Procedures, as proposed in the memorandum:

Five members of the Commission constitute a quorum and must be present before the Commission may act. If a quorum is established at any time during a meeting of the Commission, the Commission may thereafter act for the duration of the meeting notwithstanding the absence of any member who is part of the quorum. Any action may be taken by a majority of those present ~~if a quorum is present~~ after a quorum is established, but any final recommendation to the Legislature must be approved by a minimum of four affirmative votes. The Chairperson is authorized to determine that fewer than five members constitutes a quorum ~~for the purposes of~~ if a quorum is not otherwise established at a particular meeting and members attending the meeting are entitled to per diem

and travel expenses, but in such case the members present act as a subcommittee and no final action may be taken at the meeting.

Budget Matters

The Commission considered Memorandum 93-17, concerning the proposed 15% (\$71,000) reduction in the Commission's budget for the 1993-94 fiscal year. The Commission approved the Executive Secretary's proposal to find \$45,000 in temporary help, reimbursements, and postage. The Commission decided to waive Commissioner compensation for the year, resulting in a savings of \$8,000; the Executive Secretary should obtain written waivers from Commissioners as soon as possible in order reliably to budget for this. The remaining \$18,000 would be realized by a reduction of a second staff counsel time base from full time to 3/5 time.

The Executive Secretary should investigate the possibility of reducing its rental expense through donated space. He should continue to pursue the possibility of space at University of Santa Clara Law School, and should look into University of San Francisco Law School. Local law firms might also have surplus space available that they might donate. Inexpensive state office building space might also be available in the area.

1993 LEGISLATIVE PROGRAM

The Commission considered Memorandum 93-15, concerning the Commission's legislative program for 1993. The Executive Secretary supplemented the memorandum with the information that the deposit of estate planning documents proposal has now been introduced as AB 209 (Horcher). The Commission approved the litigation involving decedents cleanup as set out in Exhibit pp. 6-12 of the memorandum.

D-02.01 - CONFLICTS OF JURISDICTION
AND ENFORCEMENT OF FOREIGN JUDGMENTS

See Study J-02.01.

F-521.1 - EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

The Commission considered Memorandum 93-10 and its First Supplement, along with a letter from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar distributed at the meeting (attached to these Minutes as Exhibit), relating to the effect of joint tenancy title on community property.

The Commission made the following decisions concerning the draft tentative recommendation attached to the memorandum:

(1) Section 862 (transmutation of community property to joint tenancy) should state that the community property presumption may be rebutted only by evidence of a transmutation. The parenthetical reference to Section 861 should conform to the leadline of Section 861, and the staff should revise the entire draft for consistency of usage of such terms as "title", "form", "interest", "property", etc., taking into consideration the suggestions made in the letter from the Legislative Committee of the Beverly Hills Bar Association, Probate and Trust Section.

(2) Section 864 (statutory form) should state in the notice to the signer of a joint tenancy declaration that if the declaration is signed, the property will pass to the surviving spouse and "You cannot will your one-half interest in the property to anyone else."

(3) Section 867 (transitional provision) should be revised to make the statute retroactive, in light of the Hilke decision.

The Commission decided to circulate the draft tentative recommendation for comment as so revised by a 5-1 vote. Commissioner Wied dissented from this decision.

The draft should be circulated as broadly as possible, not only to persons interested in family law and probate law, but also to persons interested in property law and business law. Specific organizations suggested included the State Bar Business Law Section, the California Bankruptcy Forum, the stock transfer associations, the California Bankers Association, and the California Association of Realtors. The staff should attempt to get legal newspapers and other legal publications to reproduce the tentative recommendation, or at least a summary of it. More time than usual should be allowed for soliciting and receiving comments on this tentative recommendation.

STUDY F-1010 - FAMILY CODE (PRELIMINARY PROVISIONS AND DEFINITIONS)

The Commission considered Memorandum 93-2 concerning the definition of "community estate." The Commission approved the draft as set out in the memorandum and rejected the suggestion to use the phrase "community property assets and liabilities" for the reason that it does not make sense to modify "liabilities" with "community property." The purpose of the proposed amendment (substituting "assets and liabilities" for "property") is to clarify the section, but not to make any substantive change.

STUDY F-1090 - FAMILY CODE (CUSTODY OF CHILDREN)

The Commission considered Memorandum 93-03 and the attached draft recommendation relating to custody issues. The Commission approved the draft recommendation for inclusion in the 1993 Family Code Cleanup Bill. The Commission authorized the staff to revise additional statutes, as necessary, to meet concerns raised by current attempts to amend the grandparent visitation rules. The staff is to bring the draft recommendation back to the Commission prior to publication as a final recommendation.

The Commission also heard testimony concerning proposed revision of Family Code Section 3064 to allow ex parte custody orders with 48 hours written notice, except that in cases involving immediate risk of harm to the child the matter could be heard in a shorter period of time or, possibly, without notice. The Commission decided the matter is not appropriate for the 1993 Family Code Cleanup Bill, since it would involve a controversial substantive change. However, the issue should be included on "The List" of Family Code issues that the Commission will review in the future to determine which, if any, issues are appropriate for future work.

STUDY F-1100.4 - FAMILY CODE (FAMILY SUPPORT)

The Commission considered Memorandum 93-08 and approved the draft statutes in the attached Exhibit 1 for inclusion in the 1993 Family Code Cleanup Bill.

STUDY F-1110.1 - ATTORNEY'S FEES

The Commission considered Memorandum 93-7 and the attached technical and minor substantive revisions to the Family Code provisions on attorney's fees. A question was raised whether the staff proposal to relocate some attorney's fee provisions from general provisions in the front of the Family Code to Division 6 (dissolution, nullity, and legal separation) might prevent application of these provisions to custody proceedings under the Uniform Parentage Act or to domestic violence proceedings.

Section 7640 authorizes attorney's fees in Uniform Parentage Act proceedings. The staff should consider whether attorney's fees are now authorized in domestic violence proceedings and in custody proceedings where the parents are not married to each other, and whether such fees should be authorized in these cases.

There was some concern about the language of Section 271, but the Commission decided not to try to clarify Section 271 in this proposal. The Commission approved the draft legislation for inclusion in the 1993 Family Code cleanup bill.

STUDY F-1120 - FAMILY CODE (PREVENTION OF DOMESTIC VIOLENCE)

The Commission considered Memorandum 93-04, the attached exhibits, and the draft recommendation regarding the prevention of domestic violence. The Commission approved the statutes for inclusion in the 1993 Family Code Cleanup Bill.

STUDY F-1130 - FAMILY CODE (JUVENILE COURT LAW)

The Commission considered Memorandum 93-05, along with its First Supplement (distributed at the meeting), relating to possible relocation of the juvenile dependency statute to the Family Code. After further discussion of this matter with persons present at the meeting, the Commission concluded not to pursue relocation of the juvenile dependency statute.

STUDY F-1170, 1180 - FAMILY CODE (MISCELLANEOUS REVISIONS)

The Commission considered Memorandum 93-6 and the First Supplement concerning miscellaneous conforming revisions and technical amendments to the Family Code. The staff noted that the present plan, consistent with the desires of the author's staff, was to include the maximum amount of material in the bill before it is introduced. The Commission approved the draft legislation as submitted for inclusion in the 1993 Family Code cleanup bill.

STUDY J-02.01 - CONFLICTS OF JURISDICTION AND
ENFORCEMENT OF FOREIGN JUDGMENTS

The Commission considered Memorandum 92-65, the attached staff study on *Conflicts of Jurisdiction and Enforcement of Foreign Judgments*, and the First and Second Supplements. The Commission approved the staff recommendation to substitute the version of Alternative #2 attached to the Second Supplement for the version of Alternative #2 in the staff study attached to the basic memorandum. The Commission made the following revisions to the draft sections:

ALTERNATIVE #1 (MODEL ACT)

§ 1721. Enforcement of judgment in multiple proceedings

1721. (a) As used in this section, "foreign judgment" and "foreign state" have the meaning given those terms in Section 1713.1.

~~(a)~~ (b) Where two or more proceedings arising out of the same transaction or occurrence were pending, the courts of this state may refuse to enforce a foreign judgment made in any such proceeding ~~in a foreign state as defined in Section 1713.1~~, unless application for designation of an adjudicating forum was timely made to one of the following:

(1) The first known court of competent jurisdiction where one of the proceedings was commenced.

(2) The adjudicating forum after its selection.

(3) Any court of competent jurisdiction if the foregoing courts are not courts of competent jurisdiction.

~~(b)~~ (c) An application for designation of an adjudicating forum is timely if made within either of the following times:

(1) Six months after reasonable notice that there were multiple proceedings arising out of the same transaction or occurrence.

(2) Six months after reasonable notice of the selection of an adjudicating forum.

~~(e)~~ (d) An appearance solely to oppose an application for designation of an adjudicating forum is not a general appearance.

~~(d)~~ (e) For the purpose of enforcement of judgments in this state, the designation of an adjudicating forum is binding on a person served with notice of the application to designate. Except as provided in subdivision (c) of Section 1713.4, the courts of this state shall enforce the judgments of the designated adjudicating forum pursuant to the ordinary rules for enforcement of judgments. The designation of an adjudicating forum is presumptively valid in this state if the decision designating the adjudicating forum shows that the court evaluated the substance of the factors in Section 1722.

~~(e)~~ (f) If no conclusive designation of an adjudicating forum has been made by another court as provided in this section, the court of this state requested to enforce the judgment shall designate the proper adjudicating forum as provided in this chapter.

ALTERNATIVE #2 -- STAY OF CALIFORNIA ACTION
OR NON-ENFORCEMENT OF FOREIGN JUDGMENT

§ 410.84. Stay

410.84. (a) If the court determines that a foreign state in which one of the proceedings is pending is the most appropriate forum for litigating the dispute, the court may shall stay the proceeding in this state in whole or in part on any conditions that are just.

(b) If the court determines that this state is the most appropriate forum for litigating the dispute, the courts in this state may decline to recognize a judgment in any of the foreign proceedings, including declining to give the judgment res judicata effect.

§ 410.86. Factors in determining most appropriate forum;
burden of proof

410.86. (a) Subject to subdivision (b), in determining whether this state or a foreign state is the most appropriate forum for litigating the dispute under Section 410.82, the court shall consider all of the following factors:

- (1) The interests of justice among the parties.
- (2) The public policies of the foreign states having jurisdiction of the dispute, including the interest of the affected courts in having proceedings take place in their respective forums.
- (3) The place of the transaction or occurrence out of which the dispute arose, and the place of any effects of that transaction or occurrence.
- (4) The nationality of the parties.
- (5) The substantive law likely to apply and the relative familiarity of the affected courts with that law.
- (6) The availability of a remedy and the forum likely to afford the most complete relief.
- (7) The location of witnesses and availability of compulsory process.
- (8) The location of documents and other evidence, and the ease or difficulty in obtaining, reviewing, or transporting the evidence.
- (9) The place of first filing, how long the case has been pending in that place, and the connection of that place with the dispute.
- (10) Whether the foreign state has jurisdiction over the persons and property that are the subject of the proceeding.
- (11) Whether determining that a foreign state is the most appropriate forum is preferable to having parallel proceedings in adjudicating the dispute.
- (12) The nature and extent of past litigation over the dispute and whether determining that a foreign state is the most appropriate forum will unduly delay the adjudication or prejudice the rights of the original parties.
- (13) The presence of additional parties to any of the proceedings in the affected courts.

~~(b) The court shall determine the most appropriate forum as provided in any~~ Notwithstanding subdivision (a), if an agreement between the parties specifying specifies the forum in which the dispute is to be litigated, and need not consider the factors set out in subdivision (a), the court shall determine that that forum is the most appropriate forum unless there is a showing that the agreement is unreasonable.

With these revisions, the staff should circulate the staff study for comment. Commissioner Kolkey opposed this decision.

STUDY L-521.1 - EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

See Study F-521.1.

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

The Commission considered Memorandum 93-16, the attached revised draft of a recommendation on *Deposit of Estate Planning Documents With Attorney*, and the First Supplement. The Commission approved the staff recommendation to revise proposed Section 733 of the Probate Code as follows:

§ 733. Notice to State Bar

733. (a) An attorney transferring one or more documents ~~to another attorney~~ under Section 732 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, the name, address, and State Bar number of the transferring attorney, and whether any documents are transferred to an attorney, the name, address, and State Bar number of the attorney to whom the documents are transferred, and whether any documents are transferred to a superior court clerk.

(b) The State Bar shall record only one notice of transfer for each transferring attorney. The State Bar shall prescribe the form for the notice of transfer. On request by any person, the State Bar shall give that person information in the notice of transfer. At its sole election, the State Bar may give the information orally or in writing.

Representatives of the State Bar Probate Section said they had no objection to the \$14 filing fee provided in the recommendation for the superior court clerk, but noted that clerks now charge \$2.25 to lodge a will under Probate Code Section 8200. The Commission decided to reduce the clerk's fee from \$14 to \$2.25 by revising proposed new Government Code Section 26827.6 as follows:

Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document

26827.6. (a) The fee for receiving and storing a document transferred to the clerk of the superior court under Section 632 of the Probate Code is ~~fourteen dollars (\$14)~~ is the same as the fee under Section 26850.

(b) The fee for searching a document transferred to the clerk of the superior court under Section 632 of the Probate Code is the same as the fee under Section 26854 for searching records or files.

To support this fee, the staff should try to estimate what a reasonable cost of microfilming and storing documents would be.

STUDY L-659.01 - PARENT AND CHILD RELATIONSHIP
FOR INTESTATE SUCCESSION

The Commission considered Memorandum 93-11 and the attached revised draft of a recommendation, *Parent and Child Relationship for Intestate Succession*. The Commission authorized the staff to make nonsubstantive editorial revisions in the Comments. The Commission approved the revised draft for inclusion in the Commission's 1993 legislative program.

The State Bar Probate Section said it may oppose this recommendation in the Legislature and seek to enact the complete substitution rule after adoption.

STUDY L-3044 - COMPREHENSIVE POWER OF ATTORNEY STATUTE

The Commission considered Memorandum 93-12 concerning the comprehensive power of attorney statute.

Scope of Statute; Durable and Nondurable Powers

The Commission considered the issue of whether the statute should be limited to durable powers or should also apply to nondurable powers of attorney, and if so, to what extent. To assist the Commission in analyzing this issue, the staff should continue to seek the views of other segments of the bar, including the State Bar Business Law Section and financial institutions, to determine how durable and nondurable powers of attorney are being used in the business and commercial world.

Durable Power of Attorney for Personal Care (§§ 8035, 8056, 8062)

The Commission discussed the concept of the durable power of attorney for personal care and decided to keep it in the draft for purposes of discussion, although it is recognized that it may not ultimately be retained and that there is a danger of fractionalization from creating new types of powers of attorney.

§ 8400. General powers of attorney-in-fact

The Commission decided to delete subdivision (b) which provides that the attorney-in-fact has the following powers:

Except as limited in the power of attorney, the powers conferred by statute, including all of the powers provided an attorney-in-fact under a statutory form power of attorney by [Chapter 5 (commencing with Section 8500)].

STUDY N-100 - ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 92-70 and the attached revised draft of the administrative adjudication statute, along with Memorandum 93-13 and the attached revised draft of the preliminary part of the administrative adjudication tentative recommendation. The Commission approved the preliminary part for inclusion in the tentative recommendation. The Commission made the following decisions concerning the first 47 pages of the statute.

§ 613.220. Mail or other delivery

The Comment should refer to the Code of Civil Procedure proof of service provisions for guidance of persons dealing with administrative proceedings.

§ 613.320. Representation by attorney

The Comment should cross-refer to the administrative adjudication disciplinary provisions, Sections 648.610-648.630.

§ 615.150. Assignment of administrative law judges

The statute should be drafted so that hearings are conducted by OAH personnel unless excepted by statute. The statutes relating to existing hearings that are not conducted by OAH personnel should be amended to excuse them from the OAH requirement. The recommendation should flag this drafting technique for review by affected agencies.

§ 641.210. Declaratory decision

The Comment should make reference to Government Code Sections 11347 and 11347.1, a collateral procedure for petitioning an agency for review of a regulation.

§ 641.240. Applicability of rules governing administrative adjudication

The reference in the Comment to public inspection and indexing of agency decisions should make clear that a declaratory decision may be made precedential, and in that case would be subject to the provisions governing precedential decisions.

§ 641.250. Action of agency

The provision of subdivision (a)(4) requiring a statement of reasons for declining to issue a declaratory decision was deleted. A provision should be added that a declination to issue a declaratory decision is nonreviewable. Commissioner Kolkey opposed this change.

§ 641.310. Emergency decision

When the tentative recommendation goes out for comment, the staff should write a letter to the Commission's private practitioner consultants asking them to elaborate in writing their concerns about this and other provisions of the draft.

§ 642.360. Amended and supplemental pleadings

In the Comment, the language of the second sentence should be reconfigured for clarity of reading.

§ 642.440. Notice of hearing

The Comment should refer to the Code of Civil Procedure proof of service provisions for guidance of persons dealing with administrative proceedings.

§ 643.210. Grounds for disqualification of presiding officer

The Commission began, but did not complete, consideration of issues relating to disqualification of the presiding officer.

The "appearance of bias" standard was deleted from subdivision (a).

The staff should draft for Commission consideration language that would expand subdivision (b) so that:

(1) Activities that do not violate the separation of functions provisions are not in and of themselves ground for disqualification.

(2) Prior knowledge and work experience involving the issues being determined are not in and of themselves ground for disqualification.

The Comment should indicate types of situations that might cause disqualification, such as financial interest, personal relation, and other matters itemized in the Code of Civil Procedure.

The Commission asked to see, in connection with this section, provisions of the Model Code of Judicial Conduct for Administrative Law Judges of State Central Panels.

STUDY N-201 - JUDICIAL REVIEW OF AGENCY ACTION

The Commission continued its consideration of Memorandum 92-71 and the attached consultant's background study relating to standing and time issues involved in judicial review of agency action. The Commission's consultant, Professor Michael Asimow, presented the material in the background study relating to timing (pages 30-104). The Commission made the following initial decisions with respect to timing issues discussed at the meeting.

Exhaustion of Remedies

Jurisdictional or discretionary. It was noted that at the last meeting the Commission had made one decision with respect to timing--that the exhaustion of remedies requirement should be jurisdictional rather than discretionary with the court.

Reconsideration. A litigant need not request reconsideration from the agency before pursuing judicial review. This would not apply to the Public Utilities Commission or other agencies for which reconsideration is required by statute. Nor would it preclude a litigant from requesting reconsideration or an agency on its own motion from reconsidering.

Continuances and discovery. There should be no right of immediate appeal for continuance and discovery orders; rather judicial review of these orders should not occur until conclusion of the proceedings. However, there might be permitted an interim challenge on a writ procedure for abuse of discretion or irreparable injury; possibly this remedy could be extended to other pre-hearing decisions besides continuance and discovery decisions. There was concern such a provision would create problems particularly in non-OAH agencies where there is now no interim review of continuance or any other orders. The Commission deferred decision on this matter until non-OAH agencies can be heard from.

Exceptions. The exhaustion rule should be jurisdictional, subject to exceptions for irreparable injury and inadequate remedies. The exceptions should be phrased along the lines of "the court may not relieve a petitioner of the requirement to exhaust any or all administrative remedies unless the administrative remedies are inadequate, or unless requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit derived from requiring exhaustion." The Comment might note that this should not be used as a means of avoiding compliance with other requirements for judicial review, such as the exact issue rule. The Comment should note that the concept of inadequacy of remedies includes such existing excuses as futility, inadequate remedy, lack of due process, and lack of notice. The exception for a local tax assessment alleged to be a nullity should not be continued.

Primary Jurisdiction

The statute should articulate the doctrine that a court should decline jurisdiction in the case of legislative intent that an agency have exclusive jurisdiction, and should have discretion to decline jurisdiction on the basis that agency determination is more appropriate. To the extent practical, the statute should state standards for exercise for the court's discretion. The Comment might flesh this out with examples.

Ripeness

The ripeness requirement for judicial review of an administrative action, articulated in case law, should be codified.

Statutes of Limitation on Seeking Review

There should be one statute of limitations for judicial review of all state and local adjudications (as opposed to other agency actions). The limitations period should be 60 days, which represents an increase from the existing 30-day APA period and a decrease from the 90-day CCP § 1094.6 period. Special limitations periods supported by policy reasons, such as the 30-day PERB and ALRB judicial review periods, should be preserved. The short CEQA limitations period should be investigated in this respect. The period should start to run from the date the agency decision becomes effective (generally 30 days after issuance of decision). The decision should inform the parties of the judicial review period; failure to do so would extend the period to six months. If a transcript is requested within 30 days after the decision becomes effective, the limitations period is tolled until delivery of the transcript. The question of other stays was deferred for later discussion. The Commission took no action on the question of the type or contents of the pleading that initiates judicial review.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

Chair
VALERIE J. MERRITT, *Glendale*
Vice-Chair
MICHAEL V. VOLLNER, *Newport Beach*

Executive Committee
JAMES E. BIRNBERG, *Los Angeles*
BANDRA J. CHAN, *Los Angeles*
MONICA DELL'OSSO, *Oakland*
J. ROBERT FOSTER, *Morgan Hill*
MARY F. GILICK, *San Diego*
DON E. GREEN, *Sacramento*
MARC BARRY HANKIN, *Encino*
DIANA M. HASTINGS, *San Francisco*
SUSAN T. HOUBE, *Pasadena*
JONNIE H. JOHNSON-PARKER, *Inglewood*
VALERIE J. MERRITT, *Glendale*
LETTICE OTERO, *San Jose*
NANCY L. POWERS, *San Francisco*
JULES ROBINSON, *Orange*
THOMAS J. STIRKER, *San Francisco*
ROBERT E. TEMMERMAN, JR., *Campbell*
MICHAEL V. VOLLNER, *Newport Beach*



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 581-8206

January 27, 1993

REPLY TO:

Advisors
ARTHUR H. BREDBENBECK, *Burlingame*
CLARK R. BYAM, *Pasadena*
MICHAEL G. DESMARAIS, *San Jose*
ROBERT J. DURHAM, JR., *La Jolla*
MELITTA FLECK, *Los Angeles*
ANDREW B. GARR, *Los Angeles*
JOHN T. HARRIS, *Oridley*
BEATRICE L. LAWSON, *Los Angeles*
JAMES V. QUILINAN, *Mountain View*
BRUCE S. ROSS, *Essex Hills*
WILLIAM V. SCHMIDT, *Newport Beach*
ROBERT L. SULLIVAN, JR., *Fresno*

Reporter
LEONARD W. POLLARD II, *San Diego*
Section Administrator
LINDA L. SCHILLING, *San Francisco*

Valerie J. Merritt
(818) 545-7595

BY FACSIMILE

California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94303-4739

Re: Memorandum 93-10

Dear Commissioners:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California strongly urges the Commission to send out the staff draft contained in Memorandum 93-10 as a Tentative Recommendation.

As you know, our Team 2 has extensively studied this issue and our Executive Committee has come to some prior close votes on aspects of the issue. We strongly believe that there is a current problem and it needs a solution. While the current draft is not perfect, it is the best seen to date. We support circulation of this draft as a Tentative Recommendation in order to obtain commentary from a broader spectrum of participants. We will also be giving you more detailed commentary on the specific provisions we believe could be improved during the period the Tentative Recommendation is out for commentary.

I will be appearing at the meeting of the Commission on Thursday, January 28, 1993, and will be happy to answer any questions of the Commission at that time.

Sincerely,

Valerie J. Merritt
Chair

VJM: