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

April 29, 1994

Date: May 12-13, 1994		*Place:* Sacramento
May 12 (Thursday)	10:00 am – 5:00 pm	State Capitol, Room 2040 Note: Senate Rules Committee requests no food or drink in room.
May 13 (Friday)	9:00 am – 4:00 pm	State Capitol, Room 113 Note: Senate Rules Committee requests no food or drink in room.

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 any late changes.**

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 correct amount made out to the "California Law Revision Commission".

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

Thursday, May 12, 1994

1. MINUTES OF FEBRUARY 10-11, MEETING
   (sent 3/14/94)

2. ADMINISTRATIVE ADJUDICATION (Study N-100)

   Proposed Restructuring of Statute
   Memorandum 94-18 (NS) (sent 4/13/94) ($25)

   Comments on Tentative Recommendation
   Memorandum 94-19 (RJM) (sent 4/20/94) ($35)
   First Supplement to Memorandum 94-19 (to be sent) ($)

3. ADMINISTRATIVE MATTERS

CLRC Conflict of Interest Code
Memorandum 94-20 (SU) (to be sent)

CLRC Handbook of Practices and Procedures
Memorandum 94-21 (SU) (sent 3/10/94)

Communications from Interested Persons

4. 1994 LEGISLATIVE PROGRAM

Status of Bills
Memorandum 94-14 (NS) (enclosed)

Family Code Cleanup — 1994 (Study F-1002)
Memorandum 94-22 (SU) (to be sent) ($)

Comprehensive Power of Attorney Law (Study L-3044)
Memorandum 94-23 (SU) (to be sent) ($)

Effect of Joint Tenancy Title on Marital Property (Study F/L-521.1)
Memorandum 94-24 (NS) (to be sent) ($)

5. TRIAL COURT UNIFICATION

Transitional Provisions (Study J-1090)
Memorandum 94-15 (NS) (sent 4/20/94) ($5.50)

6. DEBTOR-CREDITOR RELATIONS

Attachment Where Claim Is Partially Secured (Study D-331)
Memorandum 94-16 (SU) (to be sent) ($)

Exemptions from Enforcement of Money Judgments: Decennial Review (Study D-351)
Memorandum 94-17 (SU) (to be sent) ($)

Miscellaneous Debtor-Creditor Issues (Study D-1002)
Memorandum 94-25 (SU) (to be sent) ($)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
MAY 12-13, 1994
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 12-13, 1994.

Commission:

Present: Sanford Skaggs, Chairperson
Daniel M. Kolkey, Vice Chairperson
Christine W.S. Byrd
Tom Campbell, Senate Member (May 12)
Allan L. Fink
Arthur K. Marshall
Colin Wied

Absent: Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel
Edwin K. Marzec

Staff:

Present: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Robert J. Murphy, Staff Counsel

Absent: Barbara S. Gaal, Staff Counsel

Consultant:

Michael Asimow, Administrative Law (May 12)

Other Persons:

Larry Alamao, California Department of Real Estate, Sacramento (May 12)
Scott Beseda, Judicial Council, San Francisco (May 13)
Herb Bolz, Office of Administrative Law, Sacramento (May 12)
James Browning, Parole Hearings, Department of Corrections, Sacramento (May 12)
William M. Chamberlain, California Energy Commission, Sacramento (May 12)
Michael M. Connolly, Parole Hearings Division, Department of Corrections, Sacramento (May 12)
Karl Engeman, Office of Administrative Hearings, Sacramento (May 12)
Jeffrey Fine, Unemployment Insurance Appeals Board, Sacramento (May 12)
Gary Gallery, Public Employment Relations Board, Sacramento (May 12)
John Glidden, Office of Senator Tom Campbell, Sacramento (May 13)
Bill Heath, California School Employees' Association, San Jose (May 12)
Gary Hori, Commission on State Mandates, Sacramento (May 12)

Gary Jugum, State Board of Equalization, Sacramento (May 12)
Julie Montoya, Department of Motor Vehicles, Sacramento (May 12)
Ted O'Toole, California Student Aid Commission, Sacramento (May 12)
Craig C. Page, California Land Title Association, Sacramento (May 13)
Joel Perlstein, Legal Division, California Public Utilities Commission, San Francisco (May 12)
Madeline Rule, Department of Motor Vehicles, Sacramento (May 12)
Daniel Siegel, Office of the Attorney General, Sacramento (May 12)
James D. Simon, State Department of Social Services, Sacramento (May 12)
Norma Turner, Agricultural Labor Relations Board, Sacramento (May 12)
Stan Wieg, California Association of Realtors, Sacramento (May 13)
James Wolpman, Occupational Safety and Health Appeals Board, Sacramento (May 12)
Steve Zimmerman, Commission on State Mandates, Sacramento (May 12)

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MINUTES OF FEBRUARY 10-11, 1994, COMMISSION MEETING

The Minutes of the February 10-11, 1994, Commission meeting were approved as submitted by the staff, except that on page 6 and in the Contents on page 2, the reference to Study J-1150 was changed to J-1090.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission added a one-day meeting on June 17, 1994, in order to complete its review of comments on the administrative adjudication draft. The

preference was to meet in the Bay Area, perhaps San Jose, in the vicinity of an airport.

Commission Conflict of Interest Code

The Commission considered Memorandum 94-20 concerning the new procedure for determining disclosable financial interests under the Commission's Conflict of Interest Code. The Commission approved the suggested approach and requested that the Executive Secretary immediately file the initial letter with the Fair Political Practices Commission to establish the current disclosable interest list.

Commission Handbook of Practices and Procedures

The Commission considered Memorandum 94-21 and the attached draft of the text of the Commission's Handbook of Practices and Procedures. The Commission approved the Handbook with the addition of the rule proposed in the memorandum concerning participation of the Chairperson in Commission proceedings. The Handbook will be prepared and distributed to Commissioners when all the appendices have been completed.

1994 LEGISLATIVE PROGRAM

The Commission considered Memorandum 94-14, concerning the status of bills in the Commission's 1994 legislative program. The Executive Secretary updated the chart attached to the memorandum with the information that AB 3600 was approved by the Assembly Judiciary Committee on May 11, and that SB 1868 and 1907 are set for hearing in the Senate Judiciary Committee on May 17. [Detailed discussion of issues concerning the legislative program may be found elsewhere in these Minutes under Studies F-521.1, F-1002, and L-3044.]

STUDY D-331 – ATTACHMENT WHERE CLAIM IS PARTIALLY SECURED

The Commission considered Memorandum 94-16 concerning issuance of attachment where a claim is partially secured by personal property. The staff should make another effort to obtain comments on the experience under the 1990 amendments to Code of Civil Procedure Sections 483.010 and 483.015. Based on the evidence at hand, however, the draft report to the Legislature on continuation or modification of this statute should outline the efforts the

Commission made to solicit comments, summarize comments received, and conclude that the Commission has not found any grounds to modify the rule and based on experience under the new rule does not find any convincing reason not to renew the 1990 amendments by removal of the sunset clause.

STUDY D-351 – DECENNIAL REVIEW OF EXEMPTIONS FROM ENFORCEMENT OF MONEY JUDGMENTS

The Commission considered Memorandum 94-17 concerning exemptions from enforcement of money judgments. The Commission considered the proposals concerning revision of exempt amounts and tentatively approved the approach of adding a $5000 wildcard or homestead substitute exemption in place of raising exempt amounts based on the Consumer Price Index. The exemption would not be doubled for married persons. The staff will prepare a draft report to implement this decision for consideration at a later meeting. As a general approach, the Commission has adopted the approach of making a minimal number of amendments necessary to discharge the statutory duty to review exempt amounts every 10 years imposed by Code of Civil Procedure Section 703.120(a) and not to undertake a general review of exemptions and procedural rules.

STUDY D-1002 – MISCELLANEOUS DEBTOR-CREDITOR ISSUES

The Commission considered Memorandum 94-25 concerning several miscellaneous debtor-creditor issues. The Commission did not approve the proposal to impose additional sanctions on employers for failing to mail an employer's return to a wage garnishment within 15 days. The Commission deferred consideration of the issue relating to enforceability and renewal of family code judgments.

STUDY F-521.1 – EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

The Commission considered Memorandum 94-24 and the First Supplement to 94-24, relating to the effect of joint tenancy title on marital property and the political opposition to SB 1868 (Campbell), which would implement the Commission's recommendation on the subject. Present at the meeting were Jon Glidden of Senator Campbell's office, Craig Page of the California Land Title

Association, and Stan Wieg of the California Association of Realtors. The State Bar Estate Planning, Trust & Probate Law Section was unable to send a representative, but left a phone message to the effect that the bill is very important and should not be allowed to die.

The Commission reviewed the background of the current recommendation, the problems of the title companies, banks, and realtors, and other possible approaches to resolving the problems caused by imposition of joint tenancy title on marital property. After a wide-ranging discussion of the issues, the Commission directed the staff to continue discussions with the interested parties in an effort to find common ground before June 14, the last realistic opportunity to have the bill heard this year in Senate Judiciary Committee with a rule waiver. If the staff is able to develop a satisfactory agreement with the interested parties, and if the agreement is approved by the Chairperson and Vice Chairperson, the staff should proceed on that basis. If no satisfactory agreement is achieved or if an agreement is not approved by the Commission officers, the staff should return the matter to the Commission for further consideration with the objective of a revised recommendation for the 1995 legislative session.

Mr. Page agreed to make an effort to obtain the involvement of CLTA earlier in the process on future Commission projects of interest to CLTA.

STUDY F-1002 – FAMILY CODE CLEANUP (1994)

The Commission considered Memorandum 94-22 concerning preparation of a report on Family Code amendments in Assembly Bill 2208 that have been drawn from Commission materials. The Commission approved the draft report attached to the memorandum for inclusion as an appendix to the *Annual Report for 1994*, subject to any revisions necessary to reflect amendments made to the bill. The final draft report will be included in the draft annual report submitted to the Commission at the end of the year.

STUDY J-1090 – TRIAL COURT UNIFICATION (TRANSITIONAL PROVISIONS)

The Commission considered Memorandum 94-15, relating to trial court unification transitional provisions and comments received on the draft personnel decision structure. The Commission approved the proposed legislation that had been circulated for comment, which was attached to the memorandum as Exhibit pp. 1-2. The commentary to the proposed legislation was revised as set out on

page 2 of the memorandum, except that the word "delegation" was replaced by the word "implementation" in line 2 of the Comment.

As thus revised and approved, the proposed legislation reads:

Gov't Code § 70200 (added). Transitional rules of court

SECTION 1. Chapter 5.5 (commencing with Section 70200) is added to Title 8 of the Government Code to read:

CHAPTER 5.5. THE UNIFIED SUPERIOR COURTS

70200. The Judicial Council shall, before July 1, 1996, adopt rules of court not inconsistent with statute for:

(a) The orderly conversion on July 1, 1996, of proceedings pending in municipal and justice courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after July 1, 1996.

(b) Selection of persons to coordinate implementation activities for the unification of municipal and justice courts with superior courts in each county, including:

(1) Selection of a presiding judge for the unified superior court.

(2) Selection of a court executive officer for the unified superior court.

(3) Appointment of court committees or working groups to assist the presiding judge and court executive officer in implementing trial court unification.

(c) The authority of the presiding judge, in conjunction with the court executive officer and appropriate individuals or working groups of the unified superior court, to act on behalf of the court to implement trial court unification.

(d) Preparation and submission of a written personnel plan to the judges of the unified superior court for adoption.

(e) Preparation of any necessary local court rules that shall, on July 1, 1996, be the rules of the unified superior court.

(f) Other necessary activities to facilitate the transition to a unified court system.

Comment. Section 70200 is a statutory implementation of authority to coordinate and guide the trial courts in effectively implementing trial court unification. See Cal. Const. Art. VI, §23(c) (constitutional transitional provisions for trial court unification subject to contrary action pursuant to statute); see also Cal. Const. Art. VI, § 6 (4th ¶) (Judicial Council shall adopt rules for court administration, practice and procedure, not inconsistent with statute). Section 70200 mandates that the Judicial Council adopt rules of court for this purpose.

Subdivision (a) provides generally that the rules will ensure the orderly conversion of proceedings in the unified superior court as

of July 1, 1996, the operative date of Senate Constitutional Amendment No 3 .

Subdivision (b) provides for the selection of the presiding judge, court executive officer, and appropriate committees or working groups to assist the presiding judge. The method of selection, and the specific duties and authorities for each will be set forth in the rules, as is currently the case in existing Rules 204, 205, 207, 532,5, 532.6, and 573 of the California Rules of Court. This preserves the balance of power that currently exists between the legislature and the judiciary.

Subdivision (c) is intended to encourage the presiding judge to work closely with the court executive officer and court committees or other working groups to implement unification decisions.

Subdivision (d) provides that the courts will develop and adopt a personnel plan. The section parallels Rule 205(11). Decisions on the appropriate personnel system and related labor relations matters can only be made after comprehensive study and with input from all affected entities.

Subdivision (e) provides for local rule adoption before July 1, 1996. As under current practice, the Judicial Council will determine which procedural issues shall be addressed by local rule and which by statewide rule.

Examples of issues that may be addressed by rule of court under subdivision (f) include the development of informational programs for the public and the Bar about unification, and education and training programs for judicial officers and court staff to facilitate the effective transition to a unified court system. See also Cal. Const. Art. VI, § 23(b) (Judicial Council may prescribe appropriate education and training for judges with regard to trial court unification).

Operative date

SEC. 2. This act shall become operative only if Senate Constitutional Amendment No. 3 is approved by the voters at the November 8, 1994, general election, in which case this act shall become operative on the day after the election.

Urgency clause

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning or Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Senate Constitutional Amendment No. 3, if approved by the voters at the November 8, 1994, general election, would unify the trial courts operative July 1, 1996. It is necessary that implementing

steps be taken immediately so that an orderly transition of the trial court system will occur on that date.

The Commission directed that the proposed legislation be submitted to the Governor and Legislature as a supplemental report on SCA 3.

STUDY L-521.1 – EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

See Study F-521.1.

STUDY L-3044 – COMPREHENSIVE POWER OF ATTORNEY LAW

The Commission considered Memorandum 94-23 and the First Supplement concerning amendments to Senate Bill 1907, the bill implementing the Commission's recommendation proposing the Comprehensive Power of Attorney Law.

The Commission learned at the meeting that the California Bankers Association (CBA) had withdrawn the April 8, 1994, letter attached to Memorandum 94-23, thereby negating the amendments that had been worked out among interested persons and submitted to the Commission for approval. A new letter from Maurine Padden, on behalf of CBA, dated May 12, was distributed at the meeting. (See Exhibit pp. 1-7.) Based on this new letter, the Commission approved the following amendments to SB 1907, as amended in the Senate, May 11, 1994, in order to remove the opposition of CBA:

Amendment 1 — Section 4302 (new language)

On page 24, line 27, after "the" insert:

principal and the

Amendment 2 — Section 4302 (new language)

On page 24, line 29, after the period, insert:

A third person may require an attorney-in-fact to provide the current and permanent residence addresses of the principal before agreeing to engage in a transaction with the attorney-in-fact.

Amendment 3 — Sections 4305-4306 (restored)

On page 26, strike out lines 18 to 40, inclusive, strike out page 27, strike out page 28, lines 1 to 19, inclusive, and insert:

4305. (a) As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney-in-fact under a power of attorney, whether durable or nondurable, stating that, at the time of the exercise of the power,

the attorney-in-fact did not have actual knowledge of the termination of the power of attorney or the attorney-in-fact's authority by revocation or of the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable.

(b) This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

4306. (a) If the attorney-in-fact furnishes an affidavit pursuant to Section 4305, whether voluntarily or on demand, a third person dealing with the attorney-in-fact who refuses to accept the exercise of an attorney-in-fact's authority referred to in the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the attorney-in-fact's qualifications or authority, unless the court determines that the third person believed in good faith that the attorney-in-fact was not qualified or was attempting to exceed or improperly exercise the attorney-in-fact's authority.

(b) A third person's failure to demand an affidavit pursuant to Section 4305 does not affect the protection provided the third person by this chapter, and no inference as to whether a third person has acted in good faith may be drawn from the failure to demand an affidavit from the attorney-in-fact.

Amendment 4 — Sections 4309-4310 (new)

On page 29, strike out lines 13 to 23, inclusive, and insert:

4309. Nothing in this chapter requires a third person to engage in transactions with the attorney-in-fact if the attorney-in-fact has previously breached any agreement with the third person.

4310. Without limiting the generality of Section 4300, nothing in this chapter requires a financial institution to open a deposit account for the principal at the request of an attorney-in-fact if the principal is not currently a depositor of the financial institution or to make a loan to the attorney-in-fact on the principal's behalf if the principal is not currently a borrower of the financial institution.

Amendment 5 — Section 4406 (restored)

On page 38, between lines 7 and 8, insert:

4406. (a) If a third person to whom a properly executed statutory form power of attorney under this part is presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, except that the third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances.

(b) If an action is brought under this section, the court shall award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority if the refusal is authorized or required by provision of a state or federal statute or regulation.

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this part is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.

(e) The remedy provided in this section is cumulative and nonexclusive.

This set of amendments removes some amendments made in response to the first CBA letter and makes new revisions to the bill in response to the second, superseding CBA letter. The purpose of the new language in Section 4310 above was the cause of some concern. The Commission accepted inclusion of this amendment in the bill if necessary to remove opposition, but the staff was instructed to attempt to locate the CBA representative before the amendments were offered to see if CBA would withdraw that section or would accept addition of language in a Comment to deal with the concern.

Other amendments discussed in Memorandum 94-23 were approved as presented. It was also the understanding at the meeting that the California Land Title Association would go along with the new CBA letter and therefore was withdrawing the letter from Craig Page attached to the First Supplement to Memorandum 94-23 which suggested further revisions in the language that had been earlier amended into SB 1907 to deal with the first CBA letter.

The Commission also approved amendments to deal with the concerns of Len Pollard relating to the duty of loyalty (as set out in Memorandum 94-23) and James Sepulveda, Deputy District Attorney, Contra Costa County, relating to gifts made by an attorney-in-fact (as set out in the First Supplement to Memorandum 94-23).

STUDY N-100 – ADMINISTRATIVE ADJUDICATION

General Comments

Dan Siegel of the Attorney General's office delivered a letter to the Commission from the Attorney General, attached to these Minutes as Exhibit pp. 8-22. Mr. Siegel explained that the Attorney General does not believe a comprehensive revision of the Administrative Procedure Act is warranted, since its costs of implementation will outweigh any benefits to be obtained from the revision. Mr. Siegel indicated that only limited changes are needed to address specific problems, as identified in Attachment A of the Attorney General's letter. Other than these specific problems, the Attorney General has seen no systematic documentation of abuses that would justify an overhaul of the system.

Professor Asimow stated his belief that the Attorney General's position is short-sighted on the major benefits of procedural reform in this area for all who become involved with administrative adjudication. He noted that, while specific instances of abuse can be identified, the kind of systematic documentation requested by the Attorney General would be difficult to compile other than anecdotally. The major benefits of a comprehensive revision are to be found in modernization and increased uniformity of procedures, and a sound structure for future development. He noted that these benefits have been recognized everywhere throughout the country at both the federal and state levels, except in California and Connecticut.

Bill Heath of the California School Employees Association stated that there are major problems in state administrative procedure from the perspective of the private sector. In particular, there are abuses of separation of powers, where in some agencies the prosecutor and hearing officer in a case are the same individual. He felt the reforms being proposed by the Commission were of fundamental importance, and expressed appreciation for the efforts of the Commission to build greater fairness into the system in light of demonstrated problems.

Herb Bolz of the Office of Administrative Law supported the approach of the draft to require either that an agency follow a standard procedure or a procedure that is stated in regulations accessible to the public. He indicated that the problem of unwritten procedural rules known only to insiders and experts is substantial and is a major concern to the public.

Karl Engeman, Director of the Office of Administrative Hearings, indicated that the primary concern of OAH is to maintain the uniformity and efficiency of hearings conducted by that office. He felt that the reforms included in the Commission were helpful in that respect. The reforms are relatively modest but will improve efficiency, e.g. the improvement in resolving discovery disputes at the administrative level without having to go to court. Mr. Engeman noted that any time there is a change in statutory wording there is the possibility of increased litigation to resolve unresolved issues, but that in his experience litigation over the meaning of administrative procedure statutes is not a significant factor, and the possibility of some increased litigation should not deter enactment of beneficial improvements of the type embodied in the Commission's proposals.

Commissioners noted that their personal experiences dealing with state agency procedures from a private practitioner perspective indicates a need for overhaul of the system as well as greater uniformity. It is difficult to practice before different state agencies because of the lack of accurate information about the procedural rules followed by a particular agency, either because the rules are unwritten or because the actual procedures do not conform to the written rules. It was noted that there also is a substantial cost to the state, including the Attorney General's office itself, in coping with variant procedures from agency to agency. It is believed that, with standardization and regularity of administrative procedures, over time agency procedures as a whole will become more uniform rather than following the current pattern of greater diversity.

The Commission will take into account the Attorney General's concerns as it works through a restructuring of the statute and specific problems on the draft of the formal hearing procedure. The Commission requested that the Attorney General's office give further consideration to this matter after the Commission has completed its restructuring of the statute and made detailed changes in the draft in response to comments of the Attorney General in Attachment B to the Attorney General's letter and in response to the many other comments received on the tentative recommendation.

Proposed Restructuring of Statute

The Commission considered Memorandum 94-18 and the First Supplement to Memorandum 94-18, relating to the proposed restructuring of the administrative adjudication statute.

The Commission approved the general approach of the staff-proposed restructuring of the administrative adjudication statute. The staff should prepare a memorandum describing the new approach for distribution to agencies and other interested persons. The memorandum might be publicized through the California Notice Register.

The Commission's goal is to complete a revision of the restructured statute and the detailed provisions of the formal hearing procedure by summer, with the objective of circulating a revised tentative recommendation for comment by agencies and interested persons. The Commission may solicit comment in this connection on whether a more modest approach such as that proposed by the Attorney General would be preferable to comprehensive legislation on the subject. A more modest approach could incorporate the template concept for non-OAH hearings, with OAH hearings continuing to be governed by the existing APA, as modified in specific instances, such as the 17 specific improvements identified in Attachment A to the Attorney General's letter.

Agencies the Commission had previously determined should be exempt from the proposed administrative adjudication statute should be exempt from the proposed restructuring of the statute as well, since the exemption is based on substantive differences in function rather than on the burden of adopting regulations.

INFORMAL HEARING

§ 632.010. Purpose of informal hearing procedure. The term "presiding officer" appears somewhat formal for the informal hearing. A definition should be added, with a note in the Comment that the term does not signify formality in the hearing process.

§ 632.030. Procedure for informal hearing. The order of subdivisions (a) and (b) of this section should be reversed to help make clear that the general evidentiary limitations of the formal hearing procedure, such as the residuum rule for hearsay evidence, apply in the informal hearing procedure.

AGENCY HEARING

§ 633.010. Agency hearing procedure authorized. A better term should be found for the agency hearing procedure, such as "internal", "template", "special", or "non-OAH" hearing procedure.

§ 633.030. Requirements of agency hearing procedure. The provisions of the formal hearing procedure referred to in individual subdivisions of this section should be revised to separate out procedural provisions, so that it is only the substantive requirements that are incorporated by reference in Section 633.030.

(f) Ex parte communications. The reference to Section 648.510 should be changed to 648.520.

(h) Precedent decisions. The provision of Section 649.320, incorporated by this subdivision, that requires an agency to designate precedent decisions, should be made discretionary rather than mandatory, but indexing should still be required for decisions designated as precedential. The wording of subdivision (h) should be revised accordingly.

§ 633.040. Regulations governing agency hearing procedure. The provision of subdivision (c) that an agency's regulations may state provisions equivalent to, or more protective of the rights of the parties than, the relevant provisions of the formal hearing procedure should be relocated to Section 633.030.

A provision should be added to the effect that an agency's regulations under the template are not subject to challenge as not conforming to the template except to the extent the alleged nonconformance has caused prejudice in a particular case. The Comment should note the "clearly erroneous" standard for judicial review and deference to properly adopted agency regulations in such a case. The Commission will solicit comments from agencies on whether this is a satisfactory way to handle the potential for litigation of agency regulations under the template approach.

§ 633.050. Transitional provision for adoption of regulations. The staff should review this provision in connection with existing OAL provisions for adoption of nonsubstantive regulations or statutorily required provisions in regulations. The concept of eliminating necessity review for agency hearing procedures should be extended to regulations adopted under other provisions of the APA, with OAL review possibly being limited to consistency with statute and clarity.

FORMAL HEARING

§ 648.310. Proceeding commenced by agency pleading. The reference to "agency pleading" should be changed to "notice of commencement of proceeding".

§ 648.550. Disqualification of presiding officer. The reference to this "section" should be changed to this "article".

Comments on Tentative Recommendation

The Commission commenced, but did not complete, consideration of Memorandum 94-19 and the attached letters commenting on the Tentative Recommendation on administrative adjudication. The Commission considered comments on Sections 614.020 through 636.110 of the restructured statute (pages 1 to 14 of the memorandum), plus Section 643.320. The Commission also considered the Attorney General's letter attached to these Minutes as Exhibit pp. 8-22

The Commission approved the staff-recommended revisions to the Comments to Sections 631.030, 632.020, 634.010, 634.020, 634.050, 635.010, and 635.020. The Commission made the following decisions on proposed statutory revisions:

§ 614.020. Presiding officer [§ 614.120 in Tentative Recommendation]

The Commission approved the following revision to Section 614.020:

> 614.020. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the ~~officer or official~~ agency head shall ~~secure the appointment of~~ appoint a successor to preside over or be responsible for the new proceeding.

§ 632.020. When informal hearing may be used [§ 647.110 in TR]

The Commission considered a suggestion from the Attorney General that an agency holding a hearing not required by statute but which is being held to meet due process requirements may use the informal hearing procedure if the agency states in the notice of hearing that the hearing is to meet due process requirements. The Attorney General was particularly concerned about imposing an unanticipated requirement of a formal hearing on land use decisions. There was some sentiment for expanding subdivision (b) of Section 632.020 to permit use of the informal hearing procedure where a party asserts a due process right to a hearing not provided by statute or regulation, and the agency decides to provide a hearing. The Commission asked the staff to confer with the Attorney General's Office to draft language and report back.

§ 634.020. When emergency decision available [§ 641.320 in TR]

The Commission did not adopt the language set out on page 6 of the memorandum, and decided to leave Section 634.020 unchanged.

§ 634.040. Emergency decision [§ 641.340 in TR]

The Commission approved the following revision to subdivision (b) of Section 634.040:

> (b) The agency shall give notice to the extent practicable to the person to which the agency action is directed. The emergency decision is effective when issued or as provided in the decision.

§ 634.060. Agency record [§ 641.360 in TR]

The Commission considered the staff recommendation to delete subdivision (b) of Section 634.060, which says that the agency record need not constitute the exclusive basis for an emergency decision or for administrative or judicial review of an emergency decision. The Commission noted this provision came from the 1981 Model State APA. The Commission was inclined to delete it, but asked the staff to discuss the reason for and desirability of this provision with Professor Asimow and to report back.

§ 634.070. Agency review [formerly § 641.370]

The Commission decided to delete Section 634.070 because it provides too little time for review of an emergency decision (15 days), the record for review may not be useful, it seems to make little sense to have the agency head review the emergency decision at the same time the agency is holding a hearing to confirm it, and because the section does not provide a useful remedy in light of the expedited agency hearing procedure in Section 634.060 and the availability of immediate judicial review under Section 634.080.

§ 635.020. Notice of application [formerly § 641.230]

The Commission approved the following revision to Section 635.020:

> 635.020. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application, and of the right to intervene, to all persons to which notice of an adjudicative proceeding is otherwise required, and may give notice to any other person.

§ 636.110. Office of Administrative Hearings [§ 641.410 in TR]

The Commission rejected the suggestion to rename the Office of Administrative Hearings as the Administrative Law Court and the Director as Chief Administrative Law Judge.

§ 643.320. When separation required

The Commission reaffirmed its previous decision to exempt from the separation of functions requirement the issuance, denial, revocation, or suspension of a driver's license pursuant to Division 6 (commencing with Section 12500) of the Vehicle Code. The Commission noted this would not exempt school bus driver certificates, ambulance certificates, and license endorsements pursuant to other parts of the Vehicle Code. The Department of Motor Vehicles representative agreed to provide cost estimates of what it might cost to require separation of functions for hearings on school bus driver and ambulance certificates and other license endorsements.

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

_____
Date

_____
Chairperson

_____
Executive Secretary

Study L-3044

California Bankers Association
Established 1891

May 12, 1994

The Honorable Tom Campbell
California State Senate
State Capitol, Room 3048
Sacramento, CA 95814

RE: PROPOSED AMENDMENTS TO SB 1907 (Campbell)

Dear Senator Campbell:

Thank you for allowing California Bankers Association (CBA) the opportunity to attempt to resolve our objections to SB 1907 with the staff of the Law Revision Commission (LRC).

We have spent many hours attempting to devise amendments to the bill which will assure that the measure facilitates use of powers of attorney in transactions with financial institutions while at the same time, protects financial institutions and other third parties relying on such documents. An additional concern for financial institutions and most certainly, all other interested parties dealing with this issue is the prevention of fraud by unauthorized agents or agents acting outside the scope of their powers to the detriment of principals.

With these multiple goals in mind, I offer the following suggested amendments which, if taken, will remove CBA opposition to the bill:

1. We have two objections to the proposed LRC amendments dated April 29, 1994 which are enclosed with this memorandum. Although we sincerely appreciate the efforts of the LRC to attempt to deal with concerns we have previously raised, we believe Amendment #4 should be dropped from consideration. By way of background, Amendment #4 came about as a result of a request by CBA that SB 1907 contain amendments with the protections for third parties that are currently set forth in Probate Code section 18100.5.

In lieu of that suggested amendment, the LRC staff drafted amendments to introduce the entire certificate process in lieu of providing the power of attorney document to the third party. The amendment was initially attractive because it offered a simplified process for the attorney-in-fact dealing with a third party but financial institutions believe the potential for fraud is too great and thus recommend rejection of Amendment #4 in it's entirety.

In addition, we believe that Section 4309 (a) and (b) which is

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set forth in the LRC Amendment #9 should be dropped from the bill. The rest of Amendment #9 should be inserted into the measure. Section 4309 (a) and (b) are unnecessary if we make it clear that the third party can request identification and other documentation establishing the identity of the principal and the attorney-in-fact. In lieu of inserting Section 4309 (a) and (b) in the bill, we suggest an amendment to Section 4302 as follows: [the proposed amendment is placed in underline format]

Section 4302. Identification of attorney-in-fact

4302. When requested to engage in transactions with an attorney-in-fact, a third person, before incurring any duty to comply with the power of attorney, may require the attorney-in-fact to provide identification, specimens of the signatures of the principal and the attorney-in-fact, and any other information reasonably necessary or appropriate to identify the principal or the attorney-in-fact and to facilitate the actions of the third person in transacting business with the attorney-in-fact.

This amendment makes it clear that we may confirm the identity of the principal and the attorney-in-fact by asking for information that is "reasonably necessary". As long as we can be assured of the identity of the persons with which we are dealing, we can satisfy our regulators concerns under the Bank Secrecy Act and substantially reduce the risk of fraud to our customers. The CBA's original concerns regarding fraud led to the LRC drafting of section 4309 (a) and (b) but CBA believes section 4309 is unnecessary if section 4302 amendments are enacted.

2. We are concerned that we have the ability to refuse to do business with an attorney-in-fact on behalf of a principal when we have no existing relationship with the principal. As you know, our federal regulators insist that we abide by the caveat, "know your customer".

This general rule could raise problems for financial institutions faced with a power of attorney document. For example, we need clarifying language that is specific to federally insured financial institutions which makes it very clear that if the principal does not have a deposit account relationship with the financial institution, the financial institution does not have to open a deposit account for principal pursuant to an attorney-in-fact operating under a power of attorney document. In addition, if the principal is not a borrower, the financial institution does not have to grant a loan to the principal through his or her attorney-in-fact operating under a power of attorney.

Additionally, if we are aware of prior bad acts by the attorney-in-fact in his or her dealings with the financial institution, we

need to make it clear in this bill that we can refuse to transact business with that agent without liability. The remainder of the suggested amendment allows the financial institution to require disclosure of key information from the attorney-in-fact regarding his or her current address and the address of the principal.

We note that the LRC attempted to deal with this issue in their amendment #3 which is beneficial for third parties in general, but CBA believes we need specific language as follows;

Add a new section 4310:

(a) Nothing in this Chapter shall require a financial institution to open a deposit account or grant a loan to a principal based on a power of attorney if any of the following circumstances exist:

(1) if the power of attorney to be exercised is to open a deposit account and the principal is not currently a depositor of the financial institution or if the power of attorney to be exercised is to grant a loan and the principal is not currently a borrower of the financial institution; or,

(2) the attorney-in-fact has previously breached any agreement with the financial institution.

(b). A financial institution may require an attorney-in-fact to provide it with the current and permanent residence addresses of the principal before it agrees to act upon the power of attorney.

If you will accept these amendments and adopt the amendments proposed by the LRC with the exception of Amendment # 4 (LRC amendments are enclosed), CBA will remove its opposition to SB 1907. Thank you in advance for your cooperation.

Sincerely,

LCPL

Maurine C. Padden
VP/Legislative Counsel

MCP:yle
Enclosure(s)
cc: Jon Glidden, Consultant, The Honorable Tom Campbell
Stan Ullrich, Law Revision Commission
Nat Sterling, Law Revision Commission
Craig Page, California Land Title Association
Ed Levy, California League of Savings Institutions

STATE OF CALIFORNIA

PETE WILSON, Governor

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

April 29, 1994

FAXED

To: Maurine Padden, CBA

Draft Amendments to Senate Bill 1907

Amendment 1

On page 6, lines 10 and 11, strike out "4304, and 4305" and insert: and 4304

Amendment 2

On page 23, strike out lines 32 and 33, and insert:

(d) Exercise the right to make a disclaimer on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.

Amendment 3

On page 24, line 19, after the period, insert:

However, a third person is not required to honor the attorney-in-fact's authority or conduct business with the attorney-in-fact if the principal cannot require the third person to act or conduct business in the same circumstances.

Amendment 4

On page 25, strike out lines 29 to 40, inclusive, on page 26, strike out lines 1 to 22, inclusive, and insert:

4305. (a) An attorney-in-fact may present a certificate to any person instead of providing a copy of the power of attorney to establish the existence or terms of the power of attorney. A certificate may be executed by the attorney-in-fact voluntarily or at the request of the person with whom the attorney-in-fact is dealing.

(b) The certificate may confirm the following facts or contain the following information:

(1) The existence of the power of attorney and date of its execution.

(2) The identity of the principal and the currently acting attorney-in-fact.

(3) The authority of the attorney-in-fact.

(4) The identity of any persons granted authority under the power of attorney to determine whether the principal lacks capacity or whether the power of attorney is in effect.

(5) If there are multiple attorneys-in-fact, whether all or less than all of the currently acting attorneys-in-fact may exercise the authority under the power of attorney.

(c) The certificate shall contain the following statements:

(1) That the power of attorney has not been revoked or modified in any manner that would cause the statements contained in the certificate to be incorrect.

(2) That the certificate is being signed by all of the currently acting attorneys-in-fact.

(d) The certificate shall be in the form of an acknowledged declaration (1) signed by all attorneys-in-fact currently acting under the power of attorney and (2) either signed by the principal or accompanied by a copy of the part of the power of attorney showing its execution in compliance with Section 4121.

(e) The certificate may not be required to contain other provisions of the power of attorney unrelated to the pending transaction.

(f) A person may require that the attorney-in-fact offering the certificate provide copies of those excerpts from the original power of attorney and any modifications that designate the attorney-in-fact and grant authority to the attorney-in-fact to act in the pending transaction.

4306. (a) A person who acts in reliance on a certificate presented pursuant to Section 4305 without actual knowledge that the statements in the certificate are incorrect is not liable to any person for so acting.

(b) A person who does not have actual knowledge that the statements in the certificate are incorrect may assume without inquiry the existence of the facts stated in the certificate. Actual knowledge may not be

inferred solely from the fact that a copy of all or part of the power of attorney is held by the person relying on the certificate. Any transaction, and any lien created thereby, entered into by the attorney-in-fact and a person acting in reliance on the certificate is enforceable against the principal's property involved. However, if the person has actual knowledge that the attorney-in-fact is acting outside the scope of the authority granted, the transaction is not enforceable against the principal's property.

(c) A person's failure to demand a certificate does not affect the protection provided by this chapter, and no inference as to whether the person has acted in good faith may be drawn from the failure to demand a certificate.

(d) Except in the context of litigation and subject to subdivision (f) of Section 4305, a person making a demand for the power of attorney in addition to a certificate to prove facts set forth in the certificate acceptable to the third party is liable for damages, including attorney's fees, incurred as a result of the refusal to accept the certificate in place of the requested documents, if the court determines that the person acted in bad faith in requesting the documents.

(e) Nothing in this section is intended to create an implication that a person is liable for acting in reliance on a certificate under circumstances where the requirements of this section or Section 4305 are not satisfied.

(f) Nothing in this section limits the rights of the principal or the principal's successors against the attorney-in-fact.

Amendment 5

On page 26, line 37, after "4308." insert:

(a)

Amendment 6

On page 27, line 2, strike out "(a)" and insert:

(1)

Amendment 7

On page 27, line 5, strike out "(b)" and insert:

(2)

Amendment 8

On page 27, between lines 8 and 9, insert:

(b) Knowledge of an employee in one branch or office of an entity that conducts business through branches or multiple offices is not attributable to an employee in another branch or office.

4309. (a) A principal and a third person may execute a written agreement directing and authorizing the third person to refuse to honor any power of attorney concerning all or part of the principal's property or affairs or any power of attorney with respect to a particular attorney-in-fact. The agreement shall be a separate writing and may not be required by a third person as a routine matter or as a condition of doing business.

(b) An agreement complying with subdivision (a) is enforceable notwithstanding any other section in this chapter.

Amendment 9

On page 32, strike out lines 18 to 40, inclusive, and on page 33, strike out lines 1 to 7, inclusive

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

May 11, 1994

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

RE: Commission's May 1993 Tentative Recommendation:
Administrative Adjudication by State Agencies

Dear Commission Members:

Earlier this year, senior members of my office had the pleasure of discussing with Professor Michael Asimow the work of the California Law Revision Commission in drafting the May 1993 tentative recommendation for legislative revision of administrative adjudication by state agencies. The discussion included what I believe was a candid exchange of views concerning the prospect of a revision of current practice under the existing Administrative Procedure Act, and exploration of a number of the specific changes embodied in the Commission's tentative recommendation. The recommendation significantly expands upon the existing APA, which applies primarily to trial-type proceedings, by bringing all state agencies within coverage of a single act. In the interest of flexibility it allows agencies to adopt regulations altering its provisions for hearings which are not required by other statutes to be heard by administrative law judges (ALJs) of the Office of Administrative Hearings (OAH).

I have serious concerns about the Commission's recommendation that California's existing APA should be substantially changed in order to expand its coverage. The proposed massive expansion and revision of California's administrative law will be very costly. It should therefore only be done if it will result in significant benefits to the people of the State. At this point, I do not believe that sufficient benefits have been identified to justify most proposed changes.

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In particular, a need to overhaul the existing APA has not been documented. The current system, honed by 45 years of legislative and judicial input, is fundamentally sound. The system in its present form has consistently been upheld as meeting due process standards and there is, therefore, no need to alter the current system for due process purposes. As the recommendation proposes to replace an existing statute which has proved workable over time, with supplanting provisions which in many cases may specifically be modified by newly-covered agencies to conform to their perceived needs, it appears doubtful that the stated objective of greater uniformity of process is likely to be served in a manner that justifies substantial displacement of existing procedures among agencies already covered by the current APA.

While I am certainly not opposed to the concept of a uniform system of administrative adjudication, I do not believe that there is adequate documentation of a need to extend the coverage of the APA in the manner proposed by the recommendation. Although the Commission's consultant has identified a handful of relatively benign differences among various hearing proceedings currently conducted by statewide agencies, (see Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals* (1992) 39 UCLA L. Rev. 1067, 1078, fn. 26), these can be addressed, if necessary, through individual legislative acts. Many agencies not presently covered by the APA employ effective, relatively uncomplicated hearing processes that feature easy access by the public and provide an adequate basis for the agency to reach fair and legally correct decisions with minimal cost and expenditure of resources. It appears that the changes proposed by the Commission would add substantially to the costs of government agencies -- including those agencies already covered by the APA in its current form -- without necessarily promoting greater efficiency, at a time when virtually all governmental agencies are trying to hold down costs because of inadequate funding.

For example, substantial agency resources will be required to draft and process the modifying regulations contemplated by the recommmendation. Attorney and other technical staff will need to analyze and draft new regulations for promulgation by the affected agencies. Public comment will be required for that purpose as well, and review by the Office of Administrative Law of all regulations will likewise be necessary. Even agencies which decide not to propose new regulations will be required to expend considerable resources to analyze the new statutory requirements and modify current procedures to conform to them. Further, given the breadth of proposed inclusivity, bringing

hundreds of new hearing categories within the extended coverage of the modified APA, a fair amount of litigation arising from these procedural changes must realistically be anticipated and added to the exertions of agency counsel, the services of this office as the State's lawyer, and and the efforts of public law practitioners, in calculating the public costs of compliance with revisions to established procedures. Although these costs would be a concern during any economic period, they are particularly troubling given currently-severe budgetary constraints. I am unconvinced of the need to so radically alter the status quo under these circumstances.

I therefore suggest that the Commission reconsider its recommendation, and instead adopt an approach recommending specific solutions to problems specifically identified in the course of the Commission's work. In Attachment A, I identify specific problems which may constructively be addressed by the Commission through solutions now enmeshed in the proposal for revision. I support the Commission's proposed solutions identified in Attachment A, and would urge their retention and inclusion in a more focused recommendation by the Commission.

In the event that the Commission decides to pursue its current approach, however, I believe that a number of specific modifications to the current recommendation are needed. In Attachment B, I specify a number of provisions of the recommendation which in the view of this office should be deleted or substantially changed in order to meet the practical needs of administrative litigation.

Once again, I want to emphasize my concern that the proposed overhaul and expansion of the APA do not appear to be justified by demonstrable benefits. Although some modifications to the current system would be beneficial, the recommendation's wholesale approach will be very costly to implement, and the need for it has not been demonstrated. I therefore suggest that the APA not be expanded, and that specific modifications only be pursued with circumspection.

My staff and I look forward to working with you in future phases of this important project.

Sincerely,

DANIEL E. LUNGREN
Attorney General of the
State of California

Attachments

ATTACHMENT A

SPECIFIC PROPOSALS SUPPORTED BY ATTORNEY GENERAL

Declaratory Decisions. Declaratory decisions have proved to be very useful in judicial proceedings. The proposal to make this procedure available in administrative hearings should similarly be useful. (See section 641.210 et seq.) Please see Attachment "B," however, concerning a technical modification which is believed needed.

Emergency Decisions. The proposal to authorize agencies to pass regulations which allow temporary relief aimed at preventing immediate danger to the public health, safety or welfare, is believed to be a beneficial addition to existing law. (See section 641.310)

Continuing Duty to Disclose. The proposal to require a continuing duty to disclose and make available "any supplemental matter" in the course of discovery will facilitate the disclosure of evidence. (See section 645.210.)

Motion to Compel. Allowing parties to bring motions to compel discovery before the presiding officer would promote fair and orderly hearings. (See section 645.320.)

Issuance of Subpoena. Under existing APA practice, attorneys are allowed to issue subpoenas. This practice works well. Codification of this practice would be beneficial. (See section 645.420.) It would both provide clear authorization for the practice and promote public awareness of the procedure.

Telephonic Hearings. The provision allowing prehearing conferences by telephone, television or other electronic means is a good idea which would make these proceedings more accessible to the parties. (See section 646.120.)

Alternative Dispute Resolution. ADR should be advocated in appropriate cases. ADR techniques can lead to creative solutions which are more advantageous to the parties than the win/loss outcomes of most adjudications. ADR can also significantly reduce the high costs to the parties and to the public of most adjudications. The Recommendation's explicit ADR authorization represents a useful addition to current law. (See section 647.210, et seq.)

Settlements. The Recommendation's codification of agency authority to settle cases (see section 646.210.) will facilitate appropriate settlements, and is therefore a positive step. Addition of two provisions would, however, be appropriate. The first is language stating that agencies with authority over a matter have the right to disapprove settlements. This will insure that agencies have the right to disapprove settlements which are contrary to that agency's laws. (For example, in a

dispute before the State Personnel Board, the Board should have the right to disapprove a settlement between an employee and a state agency which would contravene State Personnel Board regulations.) The second suggestion is that language be added to specify that the statute does not authorize any settlement which is inconsistent with an agency's governing statute or regulations. This is to prevent abuses in which settlement is used as a means of avoiding statutory and regulatory requirements.

Consolidation/Severance. Although consolidation and severance currently occurs for hearings now covered by the APA, there are no statutes or regulations notifying parties that these procedures are available. A provision such as that contained in section 648.130 would have two positive aspects: it would notify parties that these procedures are available, and it would provide explicit authority for the procedures.

Closing Hearings. Codification of the existing practice, under which presiding officers may close hearings where required by the circumstances of the particular case, is a good and useful idea. (See section 648.140(a).) Closed hearings can be beneficial in some situations such as where a child witness is testifying. Codification notifies the parties that this procedure is available.

Ex Parte Contacts. Prohibiting material ex parte contacts for all administrative hearings, not only those currently under the APA, is an excellent idea. Ex parte contacts concerning issues material to the proceeding are unfair. Extension of such a prohibition to the reviewing authority is likewise desirable. See Attachment B, however, for modifications of section 648.510 which are believed needed.

Misconduct In Proceedings. Expanding grounds for contempt to included prohibited ex parte communications is a positive step. (See section 648.610.)

Contempt. Extension of authority to presiding officers, to certify the facts to the superior court which justify the contempt sanction, is a useful change. (See section 648.620.) Presiding officers are frequently in the best position to evaluate hearing misconduct.

Technical Changes to Decision. Authorizing reviewing authorities to make technical changes to decisions is a sound idea that will promote efficiency without sacrificing fairness. (See section 649.140(a)(2).)

Remand to Different Presiding Officer. Permitting reviewing authorities to remand cases to a different presiding officer where remand to the same officer is impractical adds useful flexibility to the hearing process. (See section 649.240.)

Temporary Relief When Ordering Remand. Allowing reviewing authorities to order temporary relief is a positive recommendation. (See section 649.250.) It permits the tailoring of relief to a case's particular facts.

Precedent Decisions. The Recommendation adds a new APA provision which allows both current APA agencies, and agencies not now covered by the APA, to designate significant decisions as precedent decisions. (See section 649.320.) This authority is useful to state agencies (although, as outlined in Attachment B, one minor modification is needed). This would add to the agency's ability to elucidate its interpretation and implementation of the law it administers through its operation upon specific factual situations, as well as through the more abstract context of its rulemaking authority.

ATTACHMENT B

PROVISIONS IN RECOMMENDATION REQUIRING MODIFICATION

Conversion of Proceedings. A proceeding, such as an informal hearing, should not be instantaneously converted into a different proceeding, such as a formal hearing, absent sufficient time to prepare for the new proceeding. Although section 614.110(b) appears to prohibit on the spot conversions, since "notice" is required, clearer language to this effect is needed. The same clarification is needed under the sections for each particular proceeding which may be converted.

Declaratory Decisions. Section 641.220(c) states that applicants need not apply for a declaratory decision in order to exhaust their administrative remedies. This could be interpreted as allowing one who disagrees with an agency's action, but who failed to seek the timely administrative or judicial review of that action, to nevertheless seek a declaratory judgment in court. To prevent this abuse, section 641.220(c) should be modified to provide that it does not permit an applicant to seek a declaratory judgment concerning an adverse agency decision where the applicant failed to seek timely administrative or judicial review of that decision.

Time for Agency Action. Although the concept of the 30 and 90 day time limits in section 642.240 is positive, the Commission should insure that the time limits are realistic. They may be particularly difficult for agencies which handle large volumes of applications or cases, and for agencies whose matters tend to arise during a limited time of the year.

Judicial Review of Procedural Decisions. Procedural determinations by the presiding officers are either explicitly or implicitly reviewed by the courts after the agency issues its final decision.[1/] In contrast, the current Administrative Procedure Act (APA) generally requires an immediate judicial challenge. (See, for example, Government Code section 11524.) Both private practitioners and agency representatives have indicated that they prefer the current approach. So do I.

The current approach works smoothly. Although in theory it can be disruptive, in practice it is not. Challenges are uncommon. Moreover, when successful, they allow an immediate rectification of the problem. In contrast, postponing these challenges will promote delay. Long after a hearing and administrative review have concluded, a court may order a new

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1. Under section 642.420, for example, continuance decisions are explicitly challenged at the judicial review stage. Venue decisions under section 642.430 are implicitly challenged at that stage.

hearing due to a procedural error. It would be far preferable to resolve these matters at the time of the hearing.

Customizing Provisions. A technical change in the Recommendation's customizing provisions is needed. These provisions are intended to apply to all current non-APA proceedings. (See the note at the top of page 109, which explicitly states this intention.) As currently worded, however, the Recommendation fails to carry out this intention. This is because the Recommendation's customizing language generally allows for changes by regulation "in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings [OAH/ALJ]." (See, for example, § 645.110 [emphasis added].) Many proceedings, however, are not currently exempt by statute. Rather, they are exempt because they involve agencies that are not enumerated in Government Code section 11501. (In contrast, where an agency is enumerated, the exemption must be by statute - see, for example, Welfare and Institutions Code § 10953, which exempts welfare hearings.)

Section 643.120 should therefore list all proceedings which are not exempt from the OAH/ALJ requirement, and the customizing sections should state that their provisions apply to proceedings other than those listed in section 643.120. (Please note that under the staff's suggested "template" approach, the customizing language which will need to be modified is in section 633.020.)

Separation of Functions. If the proposed prohibition on investigators/advocates giving advice to a presiding officer (see § 643.310, et seq.) is pursued, it should, at minimum, be modified for some proceedings, such as those involving land use and environmental matters. Staff of the California Coastal Commission and regional water quality control boards, for example, frequently review permit applications, and recommend that their governing bodies take specified actions. These staff might therefore be deemed "investigators" or "advocates." These persons, however, frequently provide valuable technical and policy advice to board members during the review of applications at public hearings. Prohibiting these communications in all proceedings is unnecessary, and would unduly hamper these hearings.[2/]

For proceedings which are exempted from the requirement that they be heard by an OAH/ALJ, the advice prohibition should not apply to advice given in a public proceeding.

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2. The section 643.330(a)(5) exception for advice concerning technical issues where the advice is necessary for and not otherwise reasonably available to the presiding officer is too narrow. It would not cover policy input, and would be very inhibiting and difficult to administer, given the "necessary" and "not otherwise reasonably available" requirements.

Moreover, section 643.340 prohibits all staff from aiding a presiding officer if the staff have received an ex parte communication which the officer could not have received. Again, given the nature of certain agencies' staff activities (which often involve numerous informal fact gathering communications), this prohibition would be very burdensome and unnecessary. The Legislature has recognized this. (See, for example, Public Resources Code § 30322(b)(1), which excludes staff members from the California Coastal Commission's ex parte communications restrictions.)

Therefore, agencies should be allowed to modify this section, by regulation, for proceedings which are exempt from the OAH/ALJ requirement, such that staff who are directly subject to agency control and supervision can receive ex parte communications. Given the broad range of proceedings which would be covered by the recommended APA, agencies should be given some flexibility in determining the exact type of disclosure to be required.

Finally, the section 643.340 prohibition of staff assistant input which could "furnish, augment, diminish, or modify the evidence in the record" is too broad. The quoted language should be replaced with a phrase such as: "add evidence outside of the record." The Recommendation's language would appear to prohibit the type of communication which a law clerk would routinely have with a judge. A law clerk's analysis of evidence presented at a hearing might be negative, and thereby arguably "diminish ... the evidence in the record." This type of communication, however, is both proper and highly desirable. A phrase should be used which only prohibits the presentation of evidence to the presiding officer which the parties never had an opportunity to comment on.

Intervention. Section 644.110, which allows for intervention in the administrative proceeding, is unnecessary, and is likely to be highly disruptive for many hearings, such as those currently covered by the APA. In these hearings, the issues are generally framed in the pleadings by the agency and the licensee. Intervention will likely lead to attempts to introduce, or the actual introduction, of extraneous evidence and arguments, resulting in significant confusion and delay.

Depositions. Although section 645.130, pertaining to depositions, is included under a chapter entitled "Discovery", it really concerns preservation of testimony. To avoid confusion, this section should be retitled (possibly to "preservation of testimony through depositions"). In addition, authority to order the taking of this testimony should remain with the agency. (See Government Code section 11511.) Section 645.130 transfers this authority to the presiding officer. The change is likely to result in the excessive and therefore costly use of this process.

Motions to Compel or to Quash Subpoena. Authorization of motions to compel and quash subpoenas before the presiding officer is a useful concept. (See 645.320; 645.430.) As

indicated above under Judicial Review of Procedural Decisions," however, parties challenging the presiding officer's ruling on the motion should be required to do so immediately after the ruling is made.

Subpoena Authority. Section 645.410 expands current law by creating the right to subpoena documents "at any reasonable time and place." Under the current law (Government Code section 11510), production may only be required at the hearing. The proposed extension of the production requirement is unnecessary, and will be costly. The current approach works smoothly. The proposed expansion will be time consuming and could cause unnecessary delays.

Holding Party in Default. The Recommendation includes provisions that parties may be held in default for failing to attend a prehearing or mandatory settlement conference. (See §§ 646.120(e), 646.220(e) and 648.130(a).) Allowing a party's default to be taken is too drastic a remedy for failing to attend these intermediate proceedings. Parties to administrative hearings frequently appear without representation. Although they would be provided notice of the default potential, many may nevertheless not realize the consequences of failing to attend a prehearing or mandatory settlement conference. The availability of lesser sanctions should suffice.

Conference Hearings. If the APA is expanded, a critical component for some agencies will be the informal conference hearing. (See § 647.110.) For example, most land use and environmental hearings are not covered by the current APA and are informal. This process works to the advantage of all involved. Applicants benefit because they can present their positions without being hampered by numerous formalities. The public benefits because these hearings allow for broad public input. Finally, everyone benefits because these proceedings are conducted without undue delays.

Any expanded APA should therefore ensure that these important informal proceedings continue. To do so, the following modifications would be needed:

1. Most land use and environmental matters would not fall within subsections 647.110(a) or (b), which allow agencies to hold conference hearings where specified conditions exist (e.g., there is no disputed issue of material fact, or there is such a dispute, but the matter involves less than $1,000). As pointed out on pages 23 and 24 of the Recommendation's overview, however, informal hearings are particularly appropriate for land use and environmental cases. A provision should be added which will clearly allow the use of informal hearings for these matters.

2. The above suggestion will not accommodate the relatively rare hearing which is not required by statute, but which is being held to meet due process requirements. Since these hearings can be difficult to anticipate in advance,

agencies may not be aware of the need to adopt a conference hearing regulation covering them. It should therefore be specified that an agency holding a hearing which is not required by statute, but which is being held to meet due process requirements, may use a conference hearing if the agency states, in its hearing notice, that such a hearing will be consistent with due process requirements.

3. Section 647.120(b), which essentially defines these proceedings, requires clarification. Although the comment to that section states that conference hearings do not require prehearing conferences, discovery or non-party testimony, the draft statute is ambiguous. (It states, "The presiding officer shall regulate the course of the proceeding and may limit witnesses, testimony, evidence, rebuttal, and argument . . .") It should explicitly state that the presiding officer's authority to regulate the course of proceedings includes the authority to preclude prehearing conferences, discovery and non-party testimony.[3/]

4. Section 647.130 prohibits conference hearings unless the presiding officer determines that cross-examination of witnesses is not necessary, or that it would not significantly disrupt proceedings. This provision could lead parties or others to argue that cross-examination is required even at hearings, such as land use proceedings which involve broad public input, in which cross-examination is clearly inappropriate. To avoid unnecessary, time-consuming deliberations at numerous proceedings regarding the propriety of cross-examination, section 647.130(a)(1) should be modified to state that agencies may adopt regulations specifying categories of matters for which cross-examination is not necessary.

Emergency Decisions. The emergency decision section does not apply to an emergency decision "issued pursuant to another express statutory authority." (See § 647.310(c).) Although this appears to include cease and desist orders (see, for example, Public Resources Code §§ 30809 and 30810, regarding the California Coastal Commission), language specifically stating this would avoid any confusion.

Burden of Proof. Section 648.310(b), pertaining to burden of proof, is objectionable for two reasons. First, occupational licencing agencies should not be allowed to alter the burden of proof by regulation. Authorization of different burdens of proof

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[3.] The exclusion of non-party testimony should not create due process problems so long as persons with sufficient interest in a proceeding are deemed "parties." See *Horn* v. *County of Ventura* (1979) 24 Cal. 3d 605, 614, 615. (Neighbors are entitled to procedural due process regarding the proposed approval of a subdivision.) Similarly, any evidence limitations must be consistent with the due process requirement that parties be given an adequate opportunity to be heard.

for license discipline, at the discretion of the licensing agencies for the various professions is inequitable. Second, "clear and convincing proof" is nonstandard nomenclature in the law of administrative burden of proof. This phrase should be changed to "clear and convincing evidence."

Hearsay Evidence. Under section 648.450(b), a party may challenge a decision in court on the ground that a finding is only supported by hearsay evidence even where the party failed to raise a hearsay objection at the hearing. This approach is unfair. An objection at the hearing should be required to give the opposing party an opportunity to remedy any defect. Although the Recommendation's approach might aid some unsophisticated parties who do not understand hearsay rules, it will also encourage some practitioners to "sandbag" opponents by withholding objections at hearings and raising them for the first time in court, upon judicial review. On balance, the interests of justice are served by requiring objections at the hearing before evidence can be challenged on hearsay grounds in court.

Scientific Evidence. The prohibition on scientific evidence which is not generally accepted as reliable should be modified so that such evidence "may" rather than "shall" be excluded. (See § 648.460.) Evidence in some evolving scientific areas may not yet be "generally accepted", yet it may have sufficient probative value to aid the presiding officer in reaching a decision. Allowing this evidence would be similar to the federal approach. (See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, __U.S.__, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).) Moreover, it would be consistent with the current evidentiary standard used in California administrative hearings. (See Government Code section 11513(c).)

Ex Parte Communications. Section 648.520 of the Recommendation defines ex parte communications broadly and then carves out exceptions. The existing Administrative Procedures Act (APA) starts out with a more limited definition (the communication must, *inter alia*, be "upon the merits of a contested matter while the proceeding is pending." (See Government Code section 11513.5(a) and (b).) The current approach is believed preferable.

The current language of Government Code section 11513.5(a) and (b) should be retained, but should be modified to reflect the fact that many non-prosecutorial hearings will be covered. This can be done by replacing the references to "employees of the agency that filed the complaint", with "employees of an agency that is a party."

The concepts embodied in section 648.520 should be enacted through addition of language to the current APA which states, in substance:

> "A communication otherwise prohibited by this article is permissible in any of the following circumstances:

"(1) The proceeding is nonprosecutorial in character, provided the content of the communication is disclosed in the manner prescribed in Section 648.540 and all parties are given an opportunity to comment on it.

"(2) The proceeding is nonprosecutorial in character, and the communication is for the purpose of assistance and advice to the presiding officer by an employee of the agency that is a party or the attorney or other authorized representative of the agency, or for the purpose of assistance and advice to the reviewing authority by the presiding officer[4], provided in either case that the assistance or advise does not violate Section 643.320 (separation of functions) or Section 643.340 (staff assistance for presiding officer).

"(3) The communication is required for the disposition of an ex parte matter specifically authorized by statute."

Sanctions for Bad Faith Actions or Tactics. Two modifications of section 648.630 are appropriate.

First, the granting of sanctioning authority to agencies is problematic. To the extent that this provision would permit sanctions for proceedings which are or were before the presiding officer, they are inappropriate. The presiding officer has first hand knowledge of any abuse, and should be the person authorized to impose sanctions. Allowing an agency to impose sanctions "after-the-fact," is unfair.

Second, sanctions for frivolous "actions" (as opposed to "tactics") should be deleted. Through inexperience, parties appearing without counsel may request hearings even though they have no legal grounds to support their positions. Allowing sanctions for these actions may chill the important right of citizens to challenge governmental actions.

Form and Content of Decision. With respect to section 649.120, the current Government Code section 11518 requirement that decisions include findings of fact and a determination of the issues presented is preferable to the Recommendation's section 649.120(a). The current language is effective and clearly understood; it has been interpreted by a settled body of case law. The change will unnecessarily promote new litigation.

In addition, section 649.120(b) is opposed for the reasons outlined under "*`Great Weight' to Credibility Decisions on Review,*" below.

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[4] These communications, which would be prohibited under the recommendation, are desirable. They can enable the reviewing authority to efficiently communicate with the presiding officer to clarify apparent ambiguities in the decision under review.

Finally, section 649.120(c) specifies that "evidence of record", upon which the statement of decision is exclusively to be based, "may include facts known to the presiding officer..." The meaning of this provision is uncertain and therefore of concern. It is generally recognized that administrative adjudication entails application of agency expertise to the factual issues raised by the evidence in a given proceeding. This expertise is often embodied in the agency head, or at the agency head's level, though not necessarily in the ALJ serving as presiding officer. Regardless of whether the presiding officer is the agency head or an ALJ, however, the expertise of the agency is presumptive, and the elements of expertise brought to bear in a given case will not necessarily be present in the "evidence of record." To the extent that section 649.120(c) suggests such expertise may be required to be placed on the record as "facts known to the presiding officer", it is inconsistent with current law and practice. Uncertainty in this regard is aggravated by the provision's placement of "facts known to the presiding officer" alongside "supplements to the record made after the hearing, provided the evidence is made part of the record and all parties are given an opportunity to comment on it." The provision requires clarification so as to distinguish, for purposes of "evidence of record", facts which are adjudicative in nature and required to be adduced as evidence, from "facts known to the presiding officer" which inhere in the expertise of the agency.

Final Decisions. The references to "final decision" in sections 649.150, 649.160 and 649.210 are confusing. The last section allows an agency to review "a proposed or final decision." When the agency reviews a final decision, what is the decision that results from that review? Section 649.240 indicates that the new decision may be the final decision. If so, is it the old or the new decision which triggers the judicial review provisions of section 649.160(a)? This confusion needs to be clarified.

Time to Initiate Judicial Review. Section 649.160 states that "Failure to state the time within which judicial review may be initiated extends the time to six months after service of the (final) decision." That sentence implies that a shorter time limit applies when an appropriate statement is contained in the decision. The Recommendation does not, however, specify what that time limit is.

Administrative Review of Decisions.

Section 649.230 permits the reviewing authority to decide the case after only examining "a summary of evidence." Although this may meet minimal due process requirements, it is better policy to require a more thorough review of the record. For that reason, that quoted phrase should be deleted.

The proposed limitation on the taking of new evidence is imprudent. Under the current APA, when an agency decides not to adopt an Administrative Law Judge's (ALJ) decision, the agency may decide the case "with or without taking additional evidence ...." (See Government Code § 11517(c).) Under the proposal, however, this right to take additional evidence would be severely limited; only evidence that could not have reasonably been produced at the hearing would be admissable.

This change unnecessarily diminishes agency authority. Although a similar rule applies to the judicial review of agency decisions, that rule is consistent with the deference which courts generally give to agency authority and expertise. In contrast, the proposal diminishes this respect. Instead, the right of an agency head to reject an ALJ decision (see § 649.240(a)(3)) should not only include the unfettered right to take new evidence; it should also include the explicit right to hold a de novo hearing, or to have such a hearing held before a delegate.

Precedent Decisions. Section 649.320 appears to mandate that agencies designate certain decisions as precedent decisions, since it uses the word "shall." It goes on, however, to state that a failure to designate is not subject to judicial review. Because a decision not to designate a particular decision as a precedent should not be subject to judicial review, the word "shall" should be changed to "may" in order to eliminate this apparent inconsistency.

"Great Weight" to Credibility Decisions on Review. The Recommendation provides that courts are to give "great weight" to certain credibility decisions of presiding officers. (Conforming revision for Code of Civil Procedure section 1094.5.) Where hearings are initially heard and decided by Administrative Law Judges, the provision would significantly diminish the authority of agency heads to review those decisions. Such a provision is imprudent. Agency heads are accountable, since they either derive their authority from the electoral process, or are appointed by elected officials. Given this accountability, their authority should be maintained.

In addition, the "great weight" provisions are premised on the notion that the officer viewing the appearance and demeanor of a witness will have a significantly better ability than agency heads to make credibility determinations. There is, however, substantial empirical evidence indicating that credibility determinations based upon transcripts are at least as effective as those based upon observing witnesses. (See Wellborn, *Demeanor*, 76 Cornell Law Review 1075 (1991), which reaches this conclusion after reviewing numerous controlled experiments.) In view of the doubtfulness of the premise on which this provision is apparently founded, and the undesirability of reducing the authority of agency heads, the "great weight" requirement should be rejected.