

CALIFORNIA LAW REVISION COMMISSION

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May 22, 1998

<i>Date:</i> June 4, 1998	<i>Place:</i> Sacramento
June 4 (Thur.) 9:00 am – 5:00 pm	State Capitol, Room 2040
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FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. **MINUTES OF APRIL 23, 1998, MEETING (sent 5/4/98)**
2. **ADMINISTRATIVE MATTERS**
 - Meeting Schedule Considerations**
Memorandum 98-7 (NS) (sent 5/22/98)
 - Report of Executive Secretary**
3. **1998 LEGISLATIVE PROGRAM**
 - Memorandum 98-32 (NS) (sent 5/22/98)
4. **TRIAL COURT UNIFICATION (STUDY J-1300)**
 - Judicial Elections**
Memorandum 98-33 (BG) (to be sent)
 - Miscellaneous Issues**
Memorandum 98-41 (BG) (to be sent)
5. **UNIFORM TOD SECURITY REGISTRATION ACT (STUDY L-3023)**
 - Comments on Tentative Recommendation**
Memorandum 98-34 (RM) (to be sent)
 - Tentative Recommendation**

6. EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE TRANSFERS
(STUDY FHL-910)
Comments on Tentative Recommendation
Memorandum 98-35 (BH) (sent 5/15/98)
Tentative Recommendation
7. COURT-AUTHORIZED HEALTH CARE DECISIONS (STUDY L-4001)
Memorandum 98-42 (SU) (to be sent)
8. ENVIRONMENT CODE (STUDY E-100)
Division 4 — Air Resources: Part 4
Memorandum 98-37 (BH) (sent 5/22/98)
9. EMINENT DOMAIN LAW
Eminent Domain Law Update (Study EmH-450)
Memorandum 98-39 (NS) (sent 5/19/98)
Condemnation by Privately Owned Public Utility (Study EmH-451)
Memorandum 98-40 (NS) (sent 5/19/98)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JUNE 4, 1998
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on June 4, 1998.

Commission:

Present: Edwin K. Marzec, Chairperson
Quentin L. Kopp, Senate Member
Sanford M. Skaggs
Howard Wayne, Assembly Member
Colin Wied

Absent: Arthur K. Marshall, Vice Chairperson
Robert E. Cooper
Bion M. Gregory, Legislative Counsel

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Robert J. Murphy, Staff Counsel
Deborah Bardwick, Student Legal Assistant

Consultants: J. Clark Kelso, Trial Court Unification

Other Persons:

Steven Belzer, Livingston & Mattesich Law Corporation, Sacramento
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
Douglas Ditonto, Southern California Edison, Rosemead
Andy Jacobson, Building Owners and Managers Association, Oakland
Martha Johnson, Pacific Telesis, Sacramento
Alice Mead, California Medical Association, San Francisco
Julie Miller, Southern California Edison, Rosemead
Barry Ross, California Telephone Association, Sacramento
Mark Timmerman, Pacific Gas and Electric Company, Sacramento
Kathleen Walsh, Air Resources Board, Sacramento

1 The location of the September meeting will be decided later, based in part on
2 the likely subject matter to be considered at that meeting and on availability of
3 direct air service to the location.

4 **Report of Executive Secretary**

5 The Executive Secretary reported on the following matters:

6 **Membership of the Commission.** The Governor has not yet filled the two
7 vacancies on the Commission. The Senate has confirmed the appointment of
8 Commissioner Skaggs.

9 **Office Space.** Discussions with Santa Clara University Law School on
10 possible office space for the Commission are on hold because the space under
11 consideration has become unavailable.

12 **Consultant on Assignments for Benefit of Creditors.** The Executive
13 Secretary will pursue the possibility of engaging David Gould as a consultant on
14 the study on assignments for the benefit of creditors. Mr. Gould is a bankruptcy
15 attorney with extensive experience with assignments for the benefit of creditors.

16 **Summer Law Student.** The Executive Secretary introduced Dee Bardwick,
17 who is assisting the Commission this summer as a volunteer. Ms. Bardwick is a
18 Stanford law student who has completed one year of law school and is
19 particularly interested in environmental law.

20 **Relations with Legislature**

21 In connection with the discussion of its legislative program, the Commission
22 discussed the need for an ongoing process of educating new legislators about the
23 function and procedures of the Commission. This is particularly important in an
24 era of high turnover in the Legislature resulting from term limits.

25 The staff should continue its recent practice to send an information packet to
26 new legislators. In this connection, the staff should poll Commission members to
27 determine whether they may have a personal relationship with any new
28 legislators to whom they might transmit the information packet. In addition, the
29 staff should follow up on the offer of Professor Kelso and the Institute for
30 Legislative Practice to make the Commission a part of the orientation program
31 for new legislators that informs them about legislative resources.

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LEGISLATIVE PROGRAM

The Commission considered Memorandum 98-32, relating to the Commission's 1998 legislative program. The Commission made the following decisions concerning the legislative program.

AB 2164 (Wayne) — Administrative Law Judge Code of Ethics. In connection with this measure, the staff should check Proposition 221 relating to discipline of subordinate judicial officers to see whether it might have any application to administrative law judges.

SB 2063 (Kopp) — Business Judgment Rule. The Commission will not seek to reintroduce this proposal next session.

STUDY E-100 – ENVIRONMENTAL LAW CONSOLIDATION

The Commission continued its consideration of new material proposed for inclusion in the draft Environment Code. The Commission considered Memorandum 98-37, relating to Part 4 of Division 4 of the Environment Code (Air Resources). The Commission approved the draft attached to the memorandum for inclusion in the draft code when it is circulated for comment.

STUDY EM-450 – EMINENT DOMAIN LAW UPDATE

The Commission considered Memorandum 98-39, reviewing matters to be considered in the Commission's eminent domain law update project. This was an informational item only. No Commission action was taken.

STUDY EM-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

The Commission considered Memorandum 98-40, relating to condemnation by privately owned public utilities. The Commission heard comments of a number of utility companies, as well as from the Building Owners and Managers Association, concerning whether or not there is a need to regulate exercise of eminent domain authority by privately owned public utilities.

Among the points made, pro and con, were:

(1) While there have been some complaints, these appear to be limited to the telecommunications industry. Complaints concerning the electrical industry have not been heard, and regulation of condemnation in that industry is not warranted.

(2) The Public Utilities Commission already has adequate authority to control exercise of eminent domain by private condemners, and in fact provides a

1 mechanism for review of property owner concerns in the placement of electrical
2 lines under General Order No. 131-D.

3 (3) The problems in the telecommunications industry have been limited to
4 facilities-based utilities. It is not infrequent that property owners are threatened
5 with eminent domain by facilities-based telecommunications companies if they
6 do not cooperate.

7 (4) The Public Utilities Commission is currently considering a proposal to
8 require non-telecommunications utilities to condemn rights of way on behalf of
9 local telecommunications providers.

10 (5) A command economy tool such as eminent domain is inappropriate in a
11 competitive environment.

12 (6) The eminent domain authority granted to public utilities by the
13 Legislature is predicated on exercise by a limited number of controlled utilities,
14 and does not contemplate expanded numbers of unregulated utilities exercising
15 the power.

16 (7) There are inherent limitations on exercise of eminent domain authority in
17 the eminent domain law, which requires a showing of public necessity for its
18 exercise.

19 (8) The threat of exercise of eminent domain is a powerful tool for utility
20 companies against property owners because the cost of litigating an eminent
21 domain case is high and the right of prejudgment possession may render
22 litigation problematic.

23 The Commission requested the staff to provide further information
24 concerning the incidence eminent domain, or its threat, by privately-owned
25 public utilities. Also, the staff should review the statutory, regulatory, and other
26 mechanisms that may already exist to control use of eminent domain by public
27 utilities. The staff research might include experience from the electrical utilities
28 Independent Service Operator.

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

31 See entry in these Minutes under Study L-910.

32 STUDY H-450 – EMINENT DOMAIN LAW UPDATE

33 See entry in these Minutes under Study Em-450.

1 STUDY H-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

2 See entry in these Minutes under Study Em-451.

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

5 See entry in these Minutes under Study L-910.

6 STUDY J-1300 – TRIAL COURT UNIFICATION

7 The Commission considered Memorandum 98-33 on judicial elections and
8 Memorandum 98-41 on miscellaneous issues relating to trial court unification.
9 The Commission made the following decisions:

10 **Judicial Elections**

11 Proposed Government Code Section 70211 should be revised along the
12 following lines:

13 **Government Code § 70211 (added). Conversion of judgeships**

14 SEC. __. Section 70211 is added to the Government Code, to
15 read:

16 70211. When the municipal and superior courts in a county are
17 unified:

18 (a) The judgeships in each municipal court in that county are
19 abolished and the previously selected municipal court judges
20 become judges of the superior court in that county. Until revised by
21 statute, the total number of judgeships in the unified superior court
22 shall equal the previously authorized number of judgeships in the
23 municipal court and superior court combined.

24 (b) The term of office of a previously selected municipal court
25 judge is not affected by taking office as a judge of the superior
26 court. A previously selected municipal court judge is entitled to
27 hold office for the same time period as if the judge had remained a
28 judge of the municipal court. Until a previously selected municipal
29 court judge leaves office or a successor is elected and qualifies, the
30 time for election of a successor is governed by the law otherwise
31 applicable to selection of a municipal court judge. Thereafter,
32 selection of a successor to the office is governed by the law
33 governing selection of a superior court judge.

34 (c) The 10-year membership or service requirement of Section 15
35 of Article VI of the California Constitution does not apply to a
36 previously selected municipal court judge.

37 **Comment.** Subdivision (a) of Section 70211 restates the first
38 three sentences sentence of Constitution Article VI, Section 23(b),
39 with the addition in-subdivision (a) of a provision maintaining the

1 total number of judgeships in the county. The Legislature
2 prescribes the number of judges. Cal. Const. art. VI, §§ 4, 5.

3 Subdivision (b) restates the second sentence of Constitution
4 Article VI, Section 23(b), and clarifies how that provision applies.
5 For provisions governing the timing of municipal court elections,
6 see Government Code Sections 71141, 71145, 71180.

7 Subdivision (c) restates the third sentence of Constitution
8 Article VI, Section 23(b).

9 The references in this section to a “previously selected” judge
10 includes selection by election or by appointment to fill a vacancy.
11 *Cf. Trial Court Unification: Constitutional Revision (SCA 3), 24 Cal. L.*
12 *Revision Comm’n Reports 1, 82 (1994) (Article VI, § 23(b)*
13 *Comment).*

14 For the next meeting, the staff should explore means of ensuring that unification
15 during the process of a municipal court election does not disrupt the election.

16 **Civil Cases of Same Classification**

17 A definition of “jurisdictional classification” should be added to the
18 proposed SCA 4 implementing legislation, along the following lines:

19 **Code Civ. Proc. § 32.5 (added). “Jurisdictional classification”** 20 **defined**

21 SEC. __. Section 32.5 is added to the Code of Civil Procedure, to
22 read:

23 32.5. The “jurisdictional classification” of a case means its
24 classification as a limited civil case or otherwise.

25 **Comment.** Section 32.5 is added to accommodate unification of
26 the municipal and superior courts in a county. Cal. Const. art. VI, §
27 5(e). See Section 85 (limited civil cases) & Comment.

28 The proposed amendment of Code of Civil Procedure Section 1140 should be
29 revised as shown in boldface below:

30 **Code Civ. Proc. § 1140 (amended). Enforcement and appeal of** 31 **judgment where controversy is submitted on agreed statement of** 32 **facts**

33 SEC. __. Section 1140 of the Code of Civil Procedure is amended
34 to read:

35 1140. The judgment may be enforced in the same manner as if it
36 had been rendered in an action of the same jurisdictional
37 classification (~~limited civil case or otherwise~~) in the same court,
38 and is in the same manner subject to appeal.

39 **Comment.** Section 1140 is amended to accommodate unification
40 of the municipal and superior courts in a county. Cal. Const. art. VI,

1 § 5(e). See Sections **32.5 (jurisdictional classification)**, 85 (limited
2 civil cases), 86(a)(8) (enforcement of judgment in limited civil case),
3 904.1 (taking appeal), 904.2 (taking appeal in limited civil case). See
4 also Section 85 Comment.

5 Similar revisions should be made in the proposed amendments of Code of Civil
6 Procedure Sections 996.430, 1171, 1206, and 1287.4.

7 **Application for Reclassification**

8 Proposed Code of Civil Procedure Section 395.9 should be revised along the
9 following lines:

10 **Code Civ. Proc. § 395.9 (added). Misclassification as limited civil**
11 **case or otherwise**

12 SEC. _____. Section 395.9 is added to the Code of Civil Procedure,
13 to read:

14 395.9. (a) In a county in which there is no municipal court, if the
15 caption of the complaint, cross-complaint, petition, or other initial
16 pleading erroneously states or fails to state, pursuant to Section
17 422.30, that the action or proceeding is a limited civil case, the
18 action or proceeding shall not be dismissed, except as provided in
19 Section 399.5 or ~~subdivision (b)(1) paragraph (1) of subdivision (b)~~
20 of Section 581, but shall, on the ~~duly noticed application motion~~
21 of the defendant or cross-defendant within the time allowed for that
22 party to respond to the initial pleading, or on the court's own
23 motion at any time, be reclassified as a limited civil case or
24 otherwise. The action or proceeding shall then be prosecuted as if it
25 had been so commenced, all prior proceedings being saved. ~~If a~~
26 ~~party applies for reclassification, the time for the party to answer or~~
27 ~~otherwise plead shall date from the denial or of reclassification or,~~
28 ~~if reclassification is granted, from service upon the party of written~~
29 ~~notice that the clerk has refiled the case pursuant to Section 399.5~~ A
30 motion for reclassification does not extend the moving party's time
31 to answer or otherwise plead.

32 (b) If an action or proceeding is commenced as a limited civil
33 case or otherwise pursuant to Section 422.30, and it later appears
34 from the verified pleadings, or at the trial, or hearing, that the
35 determination of the action or proceeding, or of a cross-complaint,
36 will necessarily involve the determination of questions inconsistent
37 with that classification, the court shall, on the application motion of
38 either party within 30 days after the party is became or reasonably
39 should be have been aware of the grounds for misclassification, or
40 five days in a proceeding for unlawful detainer, forcible detainer, or
41 forcible entry, or on the court's own motion at any time, reclassify
42 the case.

1 (c) ~~An application~~ A motion for reclassification pursuant to this
2 section shall be supported by a declaration, affidavit, or other
3 evidence if necessary to establish that the case is misclassified. A
4 declaration, affidavit, or other evidence is not required if the
5 grounds for misclassification appear on the face of the challenged
6 pleading. All moving and supporting papers, opposition papers,
7 and reply papers shall be served and filed in accordance with
8 Section 1005.

9 (d) An action or proceeding which is reclassified under the
10 provisions of this section shall be deemed to have been commenced
11 at the time the complaint or petition was initially filed, not at the
12 time of reclassification.

13 (e) Nothing in this section shall be construed to preclude or
14 affect the right to amend the pleadings as provided in this code.

15 (f) Nothing in this section shall be construed to require the
16 superior court to reclassify any action or proceeding because the
17 judgment to be rendered, as determined at the trial or hearing, is
18 one which might have been rendered in a limited civil case.

19 (g) In any case where the erroneous classification is due solely to
20 an excess in the amount of the demand, the excess may be remitted
21 and the action may continue as a limited civil case.

22 (h) Upon the making of an order for reclassification,
23 proceedings shall be had as provided in Section 399.5. Unless the
24 court ordering the reclassification otherwise directs, the costs and
25 fees of those proceedings, and other costs and fees of reclassifying
26 the case, including any additional amount due for filing the initial
27 pleading, are to be paid by the party filing the pleading that
28 erroneously classified the case.

29 **Comment.** Section 395.9 is added to accommodate unification of
30 the municipal and superior courts in a county. Cal. Const. art. VI, §
31 5(e). See Section 85 (limited civil cases) & Comment.

32 ~~For the briefing schedule on an application for reclassification,~~
33 ~~see Section 1005.~~

34 Throughout the SCA 4 implementing legislation, references to an “application for
35 reclassification” (or equivalent terminology) should be replaced with “motion for
36 reclassification” (or equivalent terminology).

37 Proposed Section 399.5(e) should be revised along the following lines:

38 (e) The court shall have and exercise over the refiled action or
39 proceeding the same authority as if the action or proceeding had
40 been originally commenced as reclassified, all prior proceedings
41 being saved. The court may allow or require whatever amendment
42 of the pleadings, filing and service of amended, additional, or
43 supplemental pleadings, ~~or~~ giving of notice, or other appropriate

1 action as may be necessary for the proper presentation and
2 determination of the action or proceeding as reclassified.

3 The Comment should explain that Section 399.5(e) enables a court to make
4 appropriate adjustments where a case is reclassified after the defendant has
5 responded to the complaint in accordance with pleading rules that become
6 inapplicable upon reclassification.

7 The amendments of Code of Civil Procedure Sections 585 and 586 should be
8 deleted from the SCA 4 implementing legislation.

9 **Access to Juror Information**

10 The amendment of Code of Civil Procedure Section 237 should be deleted
11 from the SCA 4 implementing legislation.

12 **Child Passenger Restraint Systems**

13 The following amendment of Vehicle Code Section 27360(d)(1) should be
14 added to the SCA 4 implementing legislation:

15 (d) Notwithstanding any other provision of law, the fines
16 collected for a violation of this section shall be allocated as follows:

17 (1) Sixty percent to county health departments where the
18 violation occurred, to be used for a child passenger restraint low-
19 cost purchase or loaner program which shall include, but not be
20 limited to, education on the proper installation and use of a child
21 passenger restraint system. The county health department shall
22 designate a coordinator to facilitate the creation of a special account
23 and to develop a relationship with the municipal court system to
24 facilitate the transfer of funds to the program. The county may
25 contract for the implementation of the program. Prior to obtaining
26 possession of a child passenger restraint system pursuant to this
27 section, a person shall receive information relating to the
28 importance of utilizing that system.

29

30 **Comment.** Section 27360(d)(1) is amended to accommodate
31 unification of the municipal and superior courts in a county. Cal.
32 Const. art. VI, § 5(e).

33 **Jury Selection**

34 For the next meeting, the staff should reexamine the proposed amendment of
35 Code of Civil Procedure Section 198.5.

1 **Future Study Topics**

2 The following revisions should be made in the list of future study topics in
3 the Commission's report:

4 (1) The entry for "special sessions of the superior court" should
5 be expanded to cover both regular and special sessions of the
6 superior court.

7 (2) A new topic should be added: Duplicate Chapters 2.1
8 (commencing with Section 68650) of Title 8 of the Government
9 Code.

10 (3) Code of Civil Procedure Section 1167.3 (defaults in unlawful
11 detainer cases) should also be added to the list of topics for future
12 study in the Commission's report.

13 (4) The entry on "Obsolete statutes relating to expired pilot
14 projects" should be revised to read: "Obsolete statutes relating to
15 expired pilot projects or other expired programs." A reference to
16 Government Code Section 68520 should be inserted into the
17 corresponding footnote.

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

20 The Commission considered Memorandum 98-35, discussing public
21 comments regarding the Commission's tentative recommendation on the effect
22 of dissolution of marriage on nonprobate transfers. The Commission approved
23 the preparation of a final recommendation, subject to the following changes:

24 (1) *Affidavit procedure.* The proposed law should include an affidavit
25 procedure that can be used to certify the rights of a surviving spouse under the
26 proposed law. Reliance on such an affidavit will protect the rights of a bona fide
27 purchaser or encumbrancer for value, of real property that has passed to the
28 surviving spouse by operation of a nonprobate transfer. The staff will consult
29 with the California Land Title Association in developing this procedure.

30 (2) *Transitional provision.* The proposed law should not apply where a
31 dissolution or annulment of marriage terminating a former spouse's status as a
32 surviving spouse occurs before the operative date of the proposed law. The
33 proposed law should otherwise apply to all instruments making a nonprobate
34 transfer, whenever created. Proposed Probate Code Section 5602 will be
35 redrafted to reflect these changes.

1 (3) *Certification of trust's irrevocability.* Language should be added to the
2 Comment to proposed Probate Code Section 5600 explaining how existing
3 provisions of the Trust Law may be used to certify that a trust is irrevocable.

4 (4) *Clear and convincing evidence standard.* The final recommendation should
5 include a brief discussion of the basis for the evidentiary standard used in
6 proposed Probate Code Sections 5600(b)(2) and 5601(b)(2).

7 STUDY L-3023 – UNIFORM TOD SECURITY REGISTRATION ACT

8 The Commission considered Memorandum 98-34 and attached staff draft of a
9 final recommendation on the Uniform TOD Security Registration Act. The
10 Commission made the following decisions:

11 **§ 5510. Terms, conditions, and forms for registration**

12 The Commission approved the staff recommendation to add the following to
13 the Comment: “For distributions to lineal descendants per stirpes, see Section
14 246.”

15 **§ 5511. Community property rights of nonconsenting spouse; effect of**
16 **dissolution of marriage**

17 The Commission approved the staff recommendation to add the following to
18 the community property section (Section 5507.5 in the staff draft, to be
19 renumbered as Section 5511 to correspond to AB 1683 (Kuykendall)):

20 5511. Nothing in this part alters the community character of
21 community property or community rights in community property.
22 This part is subject to Chapter 2 (commencing with Section 5010) of
23 Part 1.

24 The Commission approved the recommendation, as revised above, for
25 printing and submission to the Legislature.

26 STUDY L-4000 – COURT-AUTHORIZED HEALTH CARE DECISIONS

27 The Commission considered Memorandum 98-42 concerning revision of the
28 procedure for obtaining court authorization of medical decisions under Probate
29 Code Sections 3200-3211. The Commission decided that the draft of the revised
30 procedure should be included with the Tentative Recommendation on Health
31 Care Decisions for Incapacitated Adults when it is distributed for comment later
32 this month. The staff should make appropriate revisions in the draft attached to
33 the memorandum to permit the court to resolve issues where a surrogate

1 committee (under draft Sections 4720-4725 in the tentative recommendation) is
2 unable to reach a decision. The statute should reaffirm the policy that courts are a
3 last resort in making health care decisions; where judicial proceedings are
4 commenced, the court should be encouraged to use a surrogate committee or
5 order creation of a surrogate committee, if possible.

6 The draft should adopt a uniform approach to decisions by surrogates under
7 the Health Care Decisions Law, by courts under the Section 3200 procedure, and
8 by both private and public conservators under the Guardianship-
9 Conservatorship Law. In other words, all surrogate decisionmakers should make
10 health care decisions in accordance with the patient's desires, where known, and
11 if not, based on a determination of the patient's best interest, taking into
12 consideration the patient's personal values to the extent known. A related
13 provision should be included making clear that public guardians and
14 conservators have the same power and duty to make a decision under this
15 standard as other surrogates.

16 The Commission discussed the best drafting approach, i.e., whether the
17 Section 3200 procedure should be left where it is and amended or whether it
18 should be merged into the Health Care Decisions Law (proposed Section 4600 *et*
19 *seq.*). In order to facilitate early distribution of the tentative recommendation, it is
20 simplest to include the modified Section 3200 procedure as a set of amendments
21 when the tentative recommendation is distributed. After comments are received
22 on the draft, the optimal drafting approach can be evaluated. The alternative
23 drafting approach can be described in a staff note in the tentative
24 recommendation.

25 The question whether further study should be made of the medical
26 decisionmaking rules in the Guardianship-Conservatorship Law as a whole was
27 deferred.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary