

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-1
 PALO ALTO, CA 94303-4739
 650-494-1335 FAX: 650-494-1827
 Email: agenda@clrc.ca.gov



November 25, 1998

<i>Date:</i> December 10-11, 1998	<i>Place:</i> State Bar of California 555 Franklin Street San Francisco, CA 94102 415-562-8200
Dec. 10 (Thu.) 10:00 am – 5:00 pm	Board Room
Dec. 11 (Fri.) 9:00 am – 4:00 pm	Wailes 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 650-494-1335 and you will be notified of any late changes.	
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov	

FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Thursday, December 10**

1. MINUTES OF SEPTEMBER 24-25, 1998, MEETING (10/21/98)
2. ADMINISTRATIVE MATTERS
 - New Topics and Priorities**
 - Memorandum 98-56 (NS) (9/3/98)
 - First Supplement to Memorandum 98-56 (10/23/98)
 - Second Supplement to Memorandum 98-56 (11/25/98)
 - Annual Report**
 - Memorandum 98-72 (SU) (11/18/98)
 - Report of Executive Secretary**
3. 1998 LEGISLATIVE PROGRAM
 - Final Report**
 - Memorandum 98-73 (NS) (10/7/98)

4. TRIAL COURT UNIFICATION: FOLLOWUP LEGISLATION (STUDY J-1301)
 - New Issues**
Memorandum 98-61 (BG) (9/21/98) (originally issued under Study J-1300)
 - Cleanup Bill**
Memorandum 98-82 (BG) (to be sent)
5. ADMINISTRATIVE RULEMAKING
 - Administrative Review Procedure and Standards (Study N-303)**
Memorandum 98-60 (BH) (9/16/98)
 - Miscellaneous Issues (Study N-300)**
Memorandum 98-71 (BH) (9/16/98)
First Supplement to Memorandum 98-71 (to be sent)
6. ENVIRONMENT CODE (STUDY E-100)
 - Comments on Tentative Recommendation**
Memorandum 98-76 (BH) (11/25/98)
First Supplement to Memorandum 98-76 (to be sent)
 - Update for 1998 Legislation**
Memorandum 98-83 (BH) (11/9/98)
7. CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY (STUDY EMH-451)
 - Comments on Tentative Recommendation**
Memorandum 98-77 (NS) (11/20/98)
8. EMINENT DOMAIN VALUATION EVIDENCE (STUDY EMH-453)
 - Comments on Tentative Recommendation**
Memorandum 98-78 (NS) (11/20/98)
9. DATE OF VALUATION IN EMINENT DOMAIN (STUDY EMH-452)
 - Draft of Tentative Recommendation**
Memorandum 98-79 (NS) (11/3/98)
10. ISSUES RELATING TO COMPENSATION FOR LOSS OF GOODWILL IN EMINENT DOMAIN (STUDY EMH-454)
 - Memorandum 98-85 (NS) (11/5/98)
11. ENFORCEMENT OF JUDGMENTS UNDER THE FAMILY CODE (STUDY F-1300)
 - Draft of Tentative Recommendation**
Memorandum 98-66 (SU) (8/20/98)

☞ **Note: Items not completed on December 10 may be carried over to December 11.**

Friday, December 11

12. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)

Issues on Recommendation

Memorandum 98-80 (BG) (to be sent)

Confidential Settlements

Memorandum 98-81 (BG) (11/23/98)

13. HEALTH CARE DECISIONS (STUDY L-4000)

Comments on Tentative Recommendation

Memorandum 98-63 (SU) (9/18/98)

Draft Recommendation Revisions

Memorandum 98-74 (SU) (to be sent)

14. UNIFORM PRINCIPAL AND INCOME ACT (STUDY L-649)

Draft of Recommendation

Memorandum 98-75 (SU) (to be sent)

15. NEW PROBATE CODE SUGGESTIONS (STUDY L-1100)

Informal Probate Administration

Memorandum 98-84 (NS) (11/3/98)

First Supplement to Memorandum 98-84 (11/25/98)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 10-11, 1998
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on December 10-11, 1998.

Commission:

Present: Arthur K. Marshall, Chairperson
Howard Wayne, Assembly Member, Vice Chairperson
Edwin K. Marzec
Ronald S. Orr
Colin Wied

Absent: Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Pamela L. Hemminger
Sanford M. Skaggs

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
Linda Verheecke, Volunteer Attorney (Dec. 10)

Consultants: Michael Asimow, Administrative Law (Dec. 10)
David M. English, Health Care Decisions (Dec. 11)
Brian E. Gray, Environmental Law (Dec. 10)
J. Clark Kelso, Trial Court Unification, Rulemaking (Dec. 10)

Other Persons:

Cesar Alegria, Pacific Gas and Electric Company, San Francisco (Dec. 10)
Lenore Alpert, Pacific Telesis, San Francisco (Dec. 10)
Sharon Anolik, San Francisco City Attorney's Office, San Francisco (Dec. 10)
David Arrieta, Western States Petroleum Association, Sacramento (Dec. 10)
Traci Bone, San Francisco City Attorney's Office, San Francisco (Dec. 10)
Francis E. Coats, Department of Motor Vehicles, Sacramento (Dec. 10)

- James L. Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (Dec. 11)
Douglas Ditonto, Southern California Edison, Rosemead (Dec. 10)
Walter Finch, Building Owners and Managers Association, Oakland (Dec. 10)
Don Green, Sacramento (Dec. 11)
Les Hausrath, Building Owners and Managers Association, Oakland (Dec. 10)
Bruce Klafter, State Bar Environmental Law Section, San Francisco (Dec. 10)
Quentin L. Kopp, San Francisco (Dec. 11)
David W. Lauer, California Bankers Association, San Francisco (Dec. 11)
Jayne Lee, San Francisco City Attorney's Office, San Francisco (Dec. 10)
Kelly Lund, Department of Fish and Game, Sacramento (Dec. 10)
Alice Mead, California Medical Association, San Francisco (Dec. 11)
Julie Miller, Southern California Edison, Rosemead (Dec. 10)
Lori Ortenstone, Pacific Telesis, San Diego (Dec. 10)
Joel Perlstein, California Public Utilities Commission, San Francisco (Dec. 10)
Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles (Dec. 11)
Stephanie E. Shaw, Public Law Research Institute, Hastings College of the Law, San Francisco (Dec. 11)
Les Spahn, Building Owners and Managers Association, Sacramento (Dec. 10)
Harley Spitler, San Francisco (Dec. 11)
Tom Stikker, San Francisco (Dec. 11)
James C. Sturdevant, Consumer Attorneys of California, San Francisco (Dec. 11)
Alexa A. Sullivan, San Francisco (Dec. 11)
Robert L. Sullivan, Jr., Fresno (Dec. 11)
Barbara Wheeler, Association for California Tort Reform, Sacramento (Dec. 11)

C O N T E N T S

Minutes of September 24-25, 1998, Meeting	3
Administrative Matters	3
Meeting Schedule	3
Recognition of Service of Quentin L. Kopp	3
Report of Executive Secretary	4
1998 Legislative Program	5
Study E-100 – Environment Code.....	5
Study Em-451 – Condemnation by Privately Owned Public Utility	5
Study Em-452 – Date of Valuation in Eminent Domain	7
Study Em-453 – Eminent Domain Valuation Evidence.....	8
Study H-451 – Condemnation by Privately Owned Public Utility	8
Study H-452 – Date of Valuation in Eminent Domain	8
Study H-453 – Eminent Domain Valuation Evidence.....	8
Study J-1301 – Trial Court Unification.....	9
Study K-410 – Settlement Negotiations	9
Study L-649 – Uniform Principal and Income Act	9
Study L-1100 – New Probate Code Suggestions: Informal Probate Administration	10
Study L-4000 – Health Care Decisions	10

Study N-300 – Administrative Rulemaking: Rulemaking Procedures	15
Study N-303 – Administrative Rulemaking: OAL Review	15

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MINUTES OF SEPTEMBER 24-25, 1998, MEETING

The Minutes of the September 24-25, 1998, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission made the following changes in its meeting schedule.

February 1999	Los Angeles
Feb. 18 <u>4</u> (Thur.)	10:00 am – 5:00 pm
Feb. 19 <u>5</u> (Fri.)	9:00 am – 4:00 pm
August 1999	San Diego
Aug. 26 <u>12</u> (Thur.)	10:00 am – 5:00 pm
Aug. 27 <u>13</u> (Fri.)	9:00 am – 4:00 pm

Recognition of Service of Quentin L. Kopp

The Commission expressed its appreciation to Quentin L. Kopp for his outstanding service as Senate member of the Commission from 1995 to 1998. The Commission memorialized its sentiments in a plaque presented to Senator Kopp by the Chairperson.

Senator Kopp responded that he had enjoyed his service on the Commission. The work of the Commission is unheralded but important.

Annual Report

The Commission considered Memorandum 98-72 and the attached draft of the 1998-1999 Annual Report. The Commission approved the draft report, subject to any revisions that are needed to reflect decisions made at the meeting. The staff will defer sending the report to the Office of State Printing for a reasonable time for submission of any relevant information, including activities of Commissioners and consultants relevant to Commission functions.

1 **Report of Executive Secretary**

2 **Volunteer attorney.** The Executive Secretary introduced Linda W. Verheecke,
3 who is currently assisting the Commission's staff on a number of projects as a
4 volunteer attorney.

5 **Senate member of Commission.** The Executive Secretary noted that the
6 Senate Rule Committee has not yet named a replacement for Quentin Kopp as
7 Senate member of the Commission.

8 **New legislator education.** The Executive Secretary reported that the staff has
9 taken steps to have the Commission included among the training presentations
10 for newly elected members of the Legislature.

11 **Branch office.** The Executive Secretary reported that the staff is investigating
12 the possibility of maintaining a small branch Commission office in Sacramento,
13 at McGeorge Law School. The anticipated benefits of this would include an
14 affiliation with the Institute for Legislative Practice located there, as well as
15 savings in travel time and expense when routine Commission business needs to
16 be conducted in the Capitol. In addition, a Sacramento office would provide a
17 placement opportunity for Commission staff who encounter excessive Bay Area
18 housing costs in relation to government salaries.

19 **Amicus submission.** The Executive Secretary reported that the Clerk of the
20 Supreme Court has declined to accept for filing the Executive Secretary's amicus
21 letter bringing to the Court's attention, in connection with *Lamden v. La Jolla*
22 *Shores Clubdominium Owners Association (S070296)*, the Commission's
23 recommendation, *Business Judgment Rule*, 28 Cal. L. Revision Comm'n Reports 1
24 (1998). Court rules require an appearance and brief for an amicus submission,
25 once a hearing has been granted. The Commission agreed with the Executive
26 Secretary that an amicus appearance and brief by the Commission would not be
27 appropriate in this case.

28 **Ethics orientation.** The Executive Secretary noted that legislation enacted in
29 1998 requires state board and commission members to participate in an ethics
30 orientation course every two years, beginning in 1999. The Attorney General and
31 the Fair Political Practices Commission are preparing materials for use by the
32 agencies.

33 **Continuing legal education.** The Executive Secretary noted that the Supreme
34 Court has not yet decided the constitutional challenge to the California
35 continuing legal education program. If the court upholds the program, the staff

1 intends to apply for qualification as a provider for participants in Commission
2 meetings.

3 1998 LEGISLATIVE PROGRAM

4 The Commission considered Memorandum 98-73, containing the final report
5 on the Commission's 1998 legislative program. No Commission action was
6 required or taken on this matter.

7 STUDY E-100 – ENVIRONMENT CODE

8 The Commission considered Memorandum 98-76 and its First Supplement,
9 concerning comments on the tentative recommendation on the *Environment Code:*
10 *Divisions 1-4*. After considering the concerns raised by commentators, the
11 Commission made the following decisions:

12 (1) Assembly Member Wayne will request a joint hearing of the Assembly
13 and Senate environmental committees to consider the merits of the Commission's
14 proposed nonsubstantive reorganization of environmental and natural resource
15 statutes.

16 (2) The staff will prepare a draft of the Water Resources division of the
17 proposed Environment Code.

18 (3) The staff will reopen the public comment period for the tentative
19 recommendation on the *Environment Code: Divisions 1-4*. Further revision of
20 Divisions 1-4 of the proposed Environment Code will be deferred until after the
21 Water Resources division has been drafted.

22 STUDY EM-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

23 The Commission considered Memorandum 98-77 and its First Supplement,
24 relating to comments on the tentative recommendation on condemnation by a
25 privately owned public utility. The Commission also received additional
26 comments presented orally at the meeting by a number of persons in attendance.

27 Among the issues discussed at the meeting were:

28 • The need to develop additional statistical information on this matter. The
29 consensus of persons present at the meeting was that major incumbent utility
30 companies exercise eminent domain authority responsibly and infrequently. The
31 problems, if any, appear to be among newly emerging competitors.

1 • It may be appropriate to distinguish between industries (for example most
2 of the current problems appear to be in the telecommunications rather than the
3 electrical industry) or between types of condemnation (for example to run a
4 transmission line rather than gain access to a building).

5 • Concern was expressed about potential ambiguity in the interaction of
6 Public Utilities Commission and superior court jurisdiction. See, e.g., *Pacific Gas
7 & Electric Co. v. Parachini*, 29 Cal. App. 3d 159, 105 Cal. Rptr. 477 (1972). Could a
8 property owner challenge a Public Utilities Commission decision directly by writ
9 or indirectly in the eminent domain proceeding? Is there an implication that the
10 Public Utilities Commission would have jurisdiction to value property being
11 taken? A distinction might be drawn between Public Utilities Commission
12 control of construction of facilities and superior court control of eminent domain
13 acquisitions.

14 • Clarification may be needed as to whether it is contemplated that the Public
15 Utilities Commission would have rulemaking authority in this area — setting
16 standards for exercise of condemnation — as opposed to individual case review.
17 It was emphasized that in either case, Public Utilities Commission authority
18 should not supplant ultimate judicial review of public use and necessity for a
19 particular condemnation.

20 • Concern was also expressed that a Public Utilities Commission finding that
21 a particular condemnation is appropriate would receive undue weight or
22 deference in an eminent domain proceeding in superior court.

23 • Concern was expressed that the Public Utilities Commission may not be the
24 best choice of entities to regulate in this area, and that the regulatory authority
25 suggested is too open-ended and Public Utilities Commission exercise of the
26 authority is not mandated. There is also some feeling that the Public Utilities
27 Commission may see its mission as being more to grant access to utility
28 companies and foster competition than to provide balanced protection for
29 property owner rights.

30 • On the other hand, there may be problems for the utility companies in a
31 deregulated environment that should be addressed, such as hindrances to getting
32 access to property. This may be a concern particularly where the building owner
33 for economic or other reasons limits access to one of a number of competing
34 service providers, thereby limiting the choices of the tenants.

35 • It was noted that public utility condemnation is the only type of
36 condemnation in California that receives no public entity scrutiny. Public entities

1 must adopt a resolution of necessity after notice and hearing before they may
2 condemn; other private condemners must get a resolution of necessity from the
3 local public entity affected. Should the public hearing and resolution of necessity
4 model be applied to public utility condemnation, and if so, should the local
5 public entity or a state agency such as the Public Utilities Commission have
6 responsibility to make these decisions?

7 The Commission concluded that it will not push the proposed legislation for
8 the coming session, but will continue to explore the problems and possible
9 solutions. In particular:

10 (1) Interested parties will be allowed more time, and encouraged, to develop
11 additional information of a factual nature supporting their positions.

12 (2) The Commission will continue to look into the concept of giving the Public
13 Utilities Commission authority to limit exercise of eminent domain power by
14 privately owned public utilities, but will work to refine the current draft in light
15 of the kinds of issues raised in discussion at the meeting.

16 (3) Concurrently, the Commission will also explore some of the other models
17 that have been suggested, such as application of the quasi-public entity approach
18 (approval of local public entity required), or giving more precise direction to the
19 Public Utilities Commission as to the type of regulation required.

20 (4) The staff will also investigate the possibility of treating different industries
21 differently, depending on the type of deregulation occurring in that industry. For
22 example, there might be one type of approach for telecommunications, another
23 for railroads, and nothing for gas or electric utilities.

24 (5) If other legislation on this matter is introduced in the Legislature in the
25 next legislative session, the Commission will not become involved with it. The
26 Commission will address the matter only by making a recommendation to the
27 Legislature, which it will not do until it has completed its study of the matter.

28 STUDY EM-452 – DATE OF VALUATION IN EMINENT DOMAIN

29 The Commission considered Memorandum 98-77 and its First Supplement,
30 relating to the date of valuation in eminent domain proceedings. Commissioner
31 Orr did not participate in this matter.

32 The staff reported that the Commission's consultant, Gideon Kanner, has
33 concerns about the constitutionality of the proposed solution to the Kirby
34 problem set out in the memorandum in two respects — (1) the determination
35 whether any increase in value of the property is substantial must be a jury, not a

1 court, determination, and (2) the statute cannot impose costs on the property
2 owner even though the owner's demand for additional compensation may be
3 unreasonable.

4 In light of the difficulty the Commission is having in devising a quick and
5 inexpensive solution to the *Kirby* problem, and in light of the relative infrequency
6 of the problem in the courts, the Commission decided to suspend work on this
7 matter. If a court were to determine that a property owner's compensation was
8 inadequate due to an undue delay in payment and a substantial increase in the
9 property's value, the court could simply order a new trial on the issue of
10 compensation.

11 STUDY EM-453 – EMINENT DOMAIN VALUATION EVIDENCE

12 The Commission considered Memorandum 98-78 and its First Supplement,
13 relating to comments on the tentative recommendation to clarify Evidence Code
14 Section 822(a)(1) (valuation evidence). The Commission approved the
15 recommendation for submission to the Legislature, with the clarification set out
16 on page 3 of the memorandum (cross-reference to definition of "property
17 appropriated to public use").

18 Because of the technical nature of this recommendation, the staff will see if it
19 can be included in a legislative committee civil practice bill. If not, we will hold it
20 for later inclusion in an omnibus eminent domain bill. The matter does not
21 warrant a separate bill of its own.

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

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

24 STUDY H-452 – DATE OF VALUATION IN EMINENT DOMAIN

25 See entry in these Minutes under Study Em-452.

26 STUDY H-453 – EMINENT DOMAIN VALUATION EVIDENCE

27 See entry in these Minutes under Study Em-453.

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STUDY J-1301 – TRIAL COURT UNIFICATION

The Commission considered Memorandum 98-61 and Memorandum 98-82, concerning clean-up legislation on trial court unification. The Commission adopted the staff recommendations in those memoranda, with the following exceptions:

(1) The Commission’s implementing legislation for SCA 4 included an amendment of Code of Civil Procedure Section 198. In Memorandum 98-61 at pages 3-4, the staff recommended revising the Comment on this amendment to address a concern raised by the State Bar Litigation Section. The Commission decided not to revise the Comment, because after Memorandum 98-61 was written the bill amending Section 198.5 (SB 2139 (Lockyer)) was signed by the Governor, making further revision of the Comment inappropriate.

(2) In Memorandum 98-82 at pages 9-10, the staff recommended the following amendment of Code of Civil Procedure Section 1068(b):

(b) The appellate division of the superior court may grant a writ of review directed to the superior court in a limited civil case or in a misdemeanor or infraction case, and in that case the superior court is an inferior tribunal for purposes of this chapter.

The Commission directed the staff to break the proposed amendment into two sentences, to improve clarity. The same approach should be taken in the proposed amendments of Code of Civil Procedure Sections 1085 and 1103, which are set forth on pages 10-11 of Memorandum 98-82.

STUDY K-410 – SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 98-81, concerning confidential settlements. The Commission decided to request guidance from the Legislature on whether to study confidential settlements. The Chairperson of the Commission should make the request by writing to the Chairpersons of the Senate Judiciary Committee and the Assembly Judiciary Committee.

STUDY L-649 – UNIFORM PRINCIPAL AND INCOME ACT

The Commission considered Memorandum 98-75 and the First Supplement concerning the draft recommendation proposing the *Uniform Principal and Income*

1 Act. After a discussion of the power to adjust (draft Section 16336), the
2 Commission deferred further action on the recommendation until the next
3 meeting. In view of the absence of sufficient Commission membership to
4 approve a final recommendation, the Commission directed the staff to continue
5 to work with the interested parties, principally the California Bankers
6 Association, the State Bar Estate Planning, Trust and Probate Law Section, and
7 the proponents of the uniform act. The goal is to seek consensus on language to
8 clarify the relationship between the power to adjust and the power to invade
9 principal commonly included in trust instruments, and to present this and any
10 other advisable revisions of the draft recommendation to the Commission at the
11 next meeting. It appears that bill introduction deadlines can be satisfied with this
12 schedule, but the staff will be sure to take necessary steps to move the project
13 forward pending attempts to work with CBA. A final draft recommendation will
14 be presented to the Commission at the February meeting.

15 STUDY L-1100 – NEW PROBATE CODE SUGGESTIONS: INFORMAL PROBATE
16 ADMINISTRATION

17 The Commission took up, but did not discuss or consider Memorandum 98-
18 84 and its First and Second Supplements, concerning informal probate
19 administration. The Commission received additional materials at the meeting,
20 heard presentations by Matthew S. Rae, Jr. and Don Green opposed to a
21 Commission study of the subject, and heard rebuttals to their presentations by
22 Robert Sullivan and Tom Stikker.

23 Due to a shortage in the number of Commissioners present at the time, the
24 Commission decided to defer discussion and decision on this matter until its next
25 meeting, at a time when more Commission members will be present. The staff
26 will preserve and digest the presentations made, along with the additional
27 materials received, for consideration by the Commission at its next meeting.

28 STUDY L-4000 – HEALTH CARE DECISIONS

29 The Commission completed its consideration of the draft recommendation on
30 *Health Care Decisions for Adults Without Decisionmaking Capacity*, which was
31 attached to Memorandum 98-63. The Commission also considered the First
32 Supplement to Memorandum 98-63, and the redrafted material in Memorandum
33 98-74, along with the First, Second, and Third Supplements to Memorandum 98-
34 74.

1 The Commission approved printing of the recommendation, as revised to
2 implement decisions made at the meeting, and introduction of a bill to
3 implement the recommendation.

4 The Commission made the following decisions:

5 **Prob. Code § 4613. Conservator**

6 The reference to “guardian” in this section and elsewhere in the statutory text
7 should be removed for consistency with California statutory language. The
8 Comment will note that the person may have a different name under the law of
9 other states.

10 **§ 4617. Health care decision**

11 The definition of “health care decision” should be revised as follows:

12 4617. “Health care decision” means a decision made by a patient
13 or the patient’s agent, conservator, or surrogate, regarding the
14 patient’s health care, including the following:

15 (a) Selection and discharge of health care providers and
16 institutions.

17 (b) Approval or disapproval of diagnostic tests, surgical
18 procedures, and programs of medication, ~~and orders not to~~
19 ~~resuscitate.~~

20 (c) Directions to provide, withhold, or withdraw artificial
21 nutrition and hydration and all other forms of health care,
22 including cardiopulmonary resuscitation.

23 **§ 4650. Legislative findings**

24 The findings section, intended to continue fundamental statements included
25 in the Natural Death Act, should be revised as follows for consistency with the
26 scope of the recommended law:

27 4650. The Legislature finds the following:

28 (a) ~~An~~ In recognition of the dignity and privacy a person has a
29 right to expect, the law recognizes that an adult has the
30 fundamental right to control the decisions relating to his or her own
31 health care, including the decision to have life-sustaining treatment
32 withheld or withdrawn.

33 (b) Modern medical technology has made possible the artificial
34 prolongation of human life beyond natural limits. In the interest of
35 protecting individual autonomy, this prolongation of the process of
36 dying for a person for whom continued health care does not
37 improve the prognosis for recovery may violate patient dignity and

1 cause unnecessary pain and suffering, while providing nothing
2 medically necessary or beneficial to the person.

3 (c) ~~In recognition of the dignity and privacy a person has a right~~
4 ~~to expect, the law recognizes that an adult has the right to instruct~~
5 ~~his or her physician to continue, withhold, or withdraw life-~~
6 ~~sustaining treatment, in the event that the person is unable to make~~
7 ~~those decisions.~~

8 (d) In the absence of controversy, a court is normally not the
9 proper forum in which to make health care decisions, including
10 decisions regarding life-sustaining treatment.

11 The matters in subdivision (c) are fully covered in the language of subdivision
12 (a), with the relocation of the introductory clause. The revision also eliminates
13 the inconsistent reference to continuing treatment in subdivision (c). The issue of
14 the extent to which treatment can be required to be continued is addressed in
15 substantive rules in Sections 4734-4736. Continuation of care is not referred to in
16 the Natural Death Act findings.

17 **§ 4659. Patient's objections**

18 This section, drawn from the existing durable power of attorney for health
19 care statute, should be deleted. It is not needed since the new statutory scheme
20 fully addresses the issue of revocation of powers of attorney.

21 **§ 4662. Relation to general agency law**

22 This section should be revised as follows and moved to the part of the
23 proposed law governing powers of attorney:

24 4662. Where this division does not provide a rule governing
25 agents under powers of attorney for health care, the law of agency
26 may be applied applies.

27 **§ 4665. Operative date**

28 The operative date of the proposed law should be deferred six months, to July
29 1, 2000, to enable organizations affected by the law to revise their forms and
30 manuals and provide training. Subdivision (e) should be added to this section to
31 validate powers of attorney executed on forms printed before the operative date
32 in compliance with former law.

33 **§ 4673. Witnessing required in skilled nursing facility**

34 This section should be revised to make clear that it is not impermissible for a
35 notary to be an employee of the skilled nursing facility. In other words, the

1 prohibitions on employees acting as witnesses would not apply to notaries. This
2 is appropriate because the notary has independent duties and is only certifying
3 the patient's identity. In addition, a patient advocate or ombudsman is required
4 to witness a power of attorney for health care executed in a skilled nursing
5 facility.

6 **§ 4680. Formalities for executing a power of attorney for health care**

7 Subdivision (a), which states the requirement that a legally sufficient power
8 of attorney for health care is to contain its execution date, should be deleted. This
9 is not to say that dating is not desirable, but is intended to avoid invalidating
10 powers of attorney that are inadvertently left undated. In the usual case, where a
11 person uses a preprinted form or an attorney-drafted form, it is anticipated that a
12 place will be provided for a date and it will be filled in.

13 **§ 4683. Scope of agent's authority**

14 The proposed law should be revised to clarify the relationship between this
15 section, granting automatic authority to the health care agent to make
16 dispositions under the Uniform Anatomical Gifts Act (UAGA) where the power
17 of attorney does not provide otherwise, and the UAGA, which requires express
18 authorization before the agent can make organ donations. See Health & Safety
19 Code § 7151(a).

20 **§ 4688. Application to acts and transactions under power of attorney**

21 This section providing technical rules governing the scope of the proposed
22 law in interstate situations should be deleted. Such rules are appropriate in the
23 statutes governing powers of attorney for property, but are not really needed in
24 this statute, and have the potential to confuse. There is only one patient and the
25 location of the patient is clear, so it would be a highly unusual situation where
26 this section could apply.

27 **§ 4701. Optional form of advance directive**

28 The first sentence in Part 2 of the form ("If you are satisfied to allow your
29 agent to determine what is best for you in making end-of-life decisions, you need
30 not fill out this part of the form.") should be moved to the relevant part of the
31 Explanation at the beginning of the form. As revised, the Explanation statement
32 would read:

1 Part 2 of this form lets you give specific instructions about any
2 aspect of your health care, whether or not you appoint an agent.
3 Choices are provided for you to express your wishes regarding the
4 provision, withholding, or withdrawal of treatment to keep you
5 alive, as well as the provision of pain relief. Space is also provided
6 for you to add to the choices you have made or for you to write out
7 any additional wishes. If you are satisfied to allow your agent to
8 determine what is best for you in making end-of-life decisions, you
9 need not fill out Part 2 of this form.

10 **§ 4736. Duty of declining health care provider or institution**

11 Subdivision (c) should be revised as follows, to make its meaning clearer to
12 the non-specialist:

13 (c) Provide continuing care to the patient until a transfer can be
14 accomplished or until it appears that a transfer cannot be
15 accomplished. In all cases, appropriate pain relief and other
16 palliative care shall be continued.

17 The last sentence of the first paragraph of the Comment to this section should be
18 deleted since the section now does provide a resolution of the conflict between
19 the right to refuse to provide futile care and the duty to provide continuing care.

20 **§ 4740. Immunities of health care provider and institution**

21 Subdivision (d) should be added to this section protecting health care
22 providers and institutions who act in good faith and in compliance with
23 generally accepted health care standards in accordance with Sections 4734-4736,
24 which permit the health care provider to decline to comply with a directive
25 under certain circumstances.

26 **Informed Consent**

27 It was noted that, like the Uniform Health-Care Decisions Act, the proposed
28 law does not refer to “informed consent.” The Commission concluded that
29 specific statutory references to informed consent are not necessary, since the
30 doctrine will take care of itself. The staff will add a reference to the doctrine in an
31 appropriate Comment, such as the definition of “health care decision” in Section
32 4617.

33 **Visitation**

34 The issue of whether to include visitation as an aspect of health care
35 decisions, as suggested by one commentator, was not approved. The

1 Commission recognizes the importance of the issue, but decided not to attempt
2 to set out comprehensive rules on visitation in this recommendation.

3 STUDY N-300 – ADMINISTRATIVE RULEMAKING: RULEMAKING PROCEDURES

4 The Commission directed the staff, in preparing a draft tentative
5 recommendation on rulemaking procedures, to discuss in annotations the issues
6 raised in Memorandum 98-71 and its First Supplement. The Commission did not
7 otherwise consider those memoranda at the meeting.

8 STUDY N-303 – ADMINISTRATIVE RULEMAKING: OAL REVIEW

9 The Commission considered Memorandum 98-60 concerning the procedures
10 and standards governing review of proposed regulations by the Office of
11 Administrative Law (OAL). The Commission made the following decisions:

12 **Gov't Code § 11349. OAL review standards**

13 The staff will draft language implementing the following Commission
14 decisions regarding the “necessity” standard for OAL review of a proposed
15 regulation:

16 (1) Necessity should be evaluated by reference to the purpose of the statute,
17 court decision, or other provision of law that the regulation implements,
18 interprets, or makes specific.

19 (2) An agency should not be required to justify the necessity of every
20 provision of a proposed regulation. Instead, the agency should justify the
21 necessity of the major provisions of a proposed regulation as well as any
22 provision that is the subject of specific objections in the public comment period.

23 (3) A statement of an agency’s rationale for the necessity of a provision should
24 be considered substantial evidence of necessity where the need for a regulation is
25 based on policy judgments and cannot, as a practical matter, be demonstrated by
26 facts or expert opinion.

27 **§ 11349.2. Adding to rulemaking file during OAL review**

28 A provision should be added authorizing the existing OAL practice of
29 allowing agencies to supplement the rulemaking file for a proposed regulation
30 submitted to OAL for review:

1 11349.2. An agency proposing a regulation may add material to
2 a rulemaking file that has been submitted to the office for review
3 pursuant to this article where addition of the material does not
4 violate other requirements of this chapter.

5 **Comment.** Section 11349.2 allows an agency to add
6 inadvertently omitted material to a rulemaking file that has been
7 submitted for review by the Office of Administrative Law. See
8 Sections 11346.8(d) (limitation on addition of material to
9 rulemaking file after close of public comment), 11346.9(a)(1)
10 (limitation on use of new data in final statement of reasons).

11 **§ 11349.3. Approval or disapproval of proposed regulation**

12 The period for review of a proposed regulation, under Section 11349.3, is 30
13 working days. A provision should be added permitting an extension of this
14 period to 45 working days where the director of OAL certifies that additional
15 time is required due to the size or complexity of the regulation being reviewed.

16 **§ 11349.6. OAL review of emergency regulations**

17 Section 11349.6(d) should be revised to change the period for review of an
18 emergency regulation under that subdivision from 30 days to 30 working days. A
19 provision should be added to permit an extension of this period to 45 working
20 days where the director of OAL certifies that additional time is required due to
21 the size or complexity of the regulation being reviewed.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary