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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
JUNE 12, 1997  
SACRAMENTO

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A meeting of the California Law Revision Commission was held in Sacramento on June 12, 1997.

**Commission:**

*Present:* Allan L. Fink, Chairperson  
Christine W.S. Byrd, Vice Chairperson  
Quentin L. Kopp, Senate Member  
Arthur K. Marshall  
Sanford Skaggs  
Colin Wied

*Absent:* Dick Ackerman, Assembly Member  
Robert E. Cooper  
Bion M. Gregory, Legislative Counsel  
Edwin K. Marzec

**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  
Tom Halpern (Student Legal Assistant)

**Consultants:** David M. English, Health Care Decisions  
J. Clark Kelso, Trial Court Unification

**Other Persons:**

Daniel Abbott, Office of Assemblyman Dick Ackerman, Sacramento  
Lenore Alpert, Pacific Bell, San Francisco  
Tony Armstrong, GTE, Sacramento  
Herb Bolz, Office of Administrative Law, Sacramento  
Barbara Burger, GTE, Sacramento  
Tim Davis, MCI, San Francisco  
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento  
Claudine Desmond, Desmond & Desmond, Sacramento

Gerald J. Desmond, Jr., Desmond & Desmond  
Gerald James, Association of California State Attorneys and Administrative Law  
Judges, Professional Engineers in California Government, and California  
Association of Professional Scientists, Sacramento  
Karen Jones, California Public Utilities Commission, San Francisco  
Stella Levy, Legal Section, Department of Motor Vehicles, Sacramento  
Daniel McCarthy, Pacific Bell, San Francisco  
Carolyn McIntyre, Southern California Gas Co., Los Angeles  
Alice Mead, California Medical Association, San Francisco  
Julie Miller, Southern California Edison, Rosemead  
Joel Perlstein, California Public Utilities Commission, San Francisco  
Dick Ratliff, California Energy Commission, Sacramento  
Susan Rossi, GTE, Thousand Oaks  
Ken Snow, GST Telecom, Walnut Creek  
Shannon Sutherland, California Nurses Association, Sacramento  
Tracy Vesely, Judicial Council, San Francisco  
Jean Vieth, California Public Utilities Commission, San Francisco  
Cara Vonk, Administrative Office of the Courts, San Francisco  
Barbara Wheeler, Association for California Tort Reform, Sacramento

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MINUTES OF MAY 1-2, 1997, MEETING

The Commission approved the Minutes of the May 1-2, 1997, Commission meeting with the following revisions:

On page 7, line 18: “It appears to the Law Revision Commission staff that that is a drafting question”

On page 11, line 7: “as which the Legislature expects from the Commission”

ADMINISTRATIVE MATTERS

**Report of Executive Secretary**

The Executive Secretary introduced Tom Halpern, a Stanford Law School student who is working for the Law Revision Commission during the summer of 1997 as a volunteer student legal assistant.

STUDY B-800 – PUBLIC UTILITY DEREGULATION

The Commission considered Memorandum 97-36 and its First Supplement, relating to the Commission's report on its consultation with the Public Utilities Commission concerning Code revisions required for public utility deregulation. Commissioner Skaggs did not participate in, and abstained from voting on, this matter due to a conflict of interest.

The Commission approved the draft report attached to Memorandum 97-36 with the following revisions:

**Conclusion on telecommunications.** The Commission revised its conclusion on the telecommunications industry. Rather than recommending the establishment of criteria and standards for determining when sufficient competition exists for deregulation, the Commission will recommend that a timetable be established for deregulation. The timetable should be rationally based on appropriate criteria.

**Charts.** The charts showing suggested revisions of specific Code sections should be revised and promulgated with the Commission's report. The charts should be organized by category, but should not include the Public Utilities Commission's position on the suggested revisions, since that is still being developed. After the Public Utilities Commission has issued its June 30 report to the Legislature, it will be able to provide its position on the specific revisions. The Law Revision Commission may update and redistribute the charts when it has received this information.

**Technical revisions.** Typographical and other technical errors should be corrected (e.g., "the principle principal area of contention").

STUDY J-1300 – TRIAL COURT UNIFICATION BY COUNTY

**Stop-Gap Provisions**

The Commission considered Memorandum 97-37, relating to stop gap provisions for trial court unification by county. The Commission adopted the proposals in the memorandum, with the following revisions:

**Appellate jurisdiction of courts of appeal.** Subdivision (a) of proposed Code of Civil Procedure Section 46 was revised to read, in substance: “Courts of appeal have appellate jurisdiction in causes within the original jurisdiction of superior courts, excluding causes that would be within the statutory jurisdiction of municipal courts absent unification.” This provision might be split into separate subdivisions for unified and nonunified counties. The Comment should make clear that this rule applies whether or not the case arises in a county whose trial courts have unified.

The following amendment of Code of Civil Procedure Section 911 was added to the draft:

911. A court of appeal may order any case on appeal within the ~~original jurisdiction of the municipal and justice courts~~ a superior court in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein.

A court to which any case is transferred pursuant to this section shall have similar power to review any matter and make orders and judgments as the appellate division of the superior court would have in such case, except that if the case was tried anew in the superior court, the reviewing court of appeal shall have similar power to review any matter and make orders and judgments as it has in a case ~~within the original jurisdiction of the superior court~~ appealed pursuant to Section 904.1.

**Unification voting procedure.** Authority should be added for the vote to be conducted by the county registrar of voters, on request. The authority of the Judicial Council to adopt rules should refer expressly to the manner of voting, replacing the secret ballot requirement. The eligibility of voters should be determined as of the time the vote is taken. The vote requirement should be an

absolute majority of those eligible to vote in each court. Transfer of judgeships on unification should be dealt with separately.

**Conversion of judgeships.** The following technical revisions were made:

When the superior and municipal courts in a county are unified:

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

In subdivision (c) the reference to Section 15 should include a reference to Article VI of the California Constitution.

**Miscellaneous provisions relating to municipal court.** References should be added in this section to jury summons and subpoenas.

**Transitional rules of court.** The introductory provision of this section states that the Judicial Council “shall” adopt traditional rules of court. The staff should consult with the Council and change the provision to “may” if the Council so requests.

Subdivision (a), relating to rules for the conduct of a unification vote, should be deleted in reliance on a similar provision in the unification voting procedure.

### **Code of Civil Procedure Draft**

The Commission considered Memorandum 97-38 concerning revision of the Code of Civil Procedure to implement trial court unification. The draft legislation should be revised to reflect the following decisions:

**Composition of the appellate division (Section 77).** The proposed amendment of Section 77(a) should read:

77. In every county ~~and city and county~~, there is an appellate ~~department~~ division of the superior court consisting of three judges or, when the Chairperson of the Judicial Council Chief Justice finds it necessary, four judges.

(1) ~~In a county with three or fewer judges of the superior court, the appellate department shall consist of those judges, one of whom shall be designated as presiding judge by the Chairperson of the Judicial Council, and an additional judge or judges as designated by the Chairperson of the Judicial Council. Each additional judge shall be a judge of the superior court of another county or a judge~~

retired from the superior court or court of higher jurisdiction in this state.

~~(2) In a county with four or more judges of the superior court, the appellate department shall consist of judges of that court designated by the Chairperson of the Judicial Council, who shall also designate one of the judges as the presiding judge of the department. judges. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence and quality of each appellate division. Each judge assigned to the appellate division of a superior court shall be a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state. The Chief Justice shall designate one of the judges of each appellate division as the presiding judge of the division.~~

The Comment to Section 77 should explain that the provision

requires adoption of court rules intended to foster independence of judges serving in the appellate division. Rules may set forth relevant factors to be used in making appointments to the appellate division, such as length of service as a judge, reputation within the unified court, and degree of separateness of the appellate division workload from the judge's regular assignments (e.g., a superior court judge who routinely handles large numbers of misdemeanors might ordinarily not serve in the appellate division). Review by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the "circuit."

That language comes from the Commission's report on SCA 3 (*Trial Court Unification: Constitutional Revision (SCA 3)*), 24 Cal. L. Revision Comm'n Reports 1, 77 (1994).

**Terms of appointments to the appellate division.** The Chief Justice should continue to have flexibility in specifying the terms of appellate division judges. There should not be any statutory restriction on the length of an appointment.

**Differentiating between types of causes in a unified superior court.** Instead of using the terms "alpha cause," "beta cause," "alpha matter," and "beta matter," the new draft should include a provision (e.g., Section 85) listing all causes now within the original jurisdiction of the municipal courts. In appropriate places, the draft should refer to those causes as "Section 85 causes"

or the equivalent. The new draft should define the appellate jurisdiction of the courts of appeal using this terminology, without reiterating the constitutional language on “causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995” (Cal. Const. art VI, § 11 (as revised by SCA 4)).

**Small claims hearing de novo (Section 116.770).** In a hearing de novo of a small claims matter, the person who presides should not be the judicial officer who originally tried the case. Aside from that requirement, Section 116.770 should not impose any restriction on who conducts the new hearing.

**Relief awardable (Section 580).** The new draft should expressly address the extent of relief that a unified superior court can award in a cause that would be within the statutory jurisdiction of municipal courts absent unification. The staff should explore alternative approaches and consider their merits.

#### STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandum 97-41 concerning health care decisionmaking, and commenced consideration of the staff draft statute attached to the memorandum, focusing on the issues relating to surrogate decisionmaking and family consent, forms, and capacity. Professor David English, a Commission consultant and reporter on the Uniform Health-Care Decisions Act, explained the purpose of and thinking behind provisions in the uniform act that were presented in the staff draft.

The Commission generally approved the drafting approach and placement of the statute set forth in the draft. The staff will prepare a revised or supplemental draft for consideration at the September meeting, but future drafts will not set out the entire text of existing law.

The next draft should implement a policy of making witnessing optional for health care advance directives. Consistency of execution requirements within the health care decisionmaking sphere is probably more important than attempting to preserve partial consistency between powers of attorney for property and powers of attorney for health care.

The existing statutory form with should be replaced by a form drawn from the uniform act. The staff will investigate the possibility of working with the California Medical Association to develop a jointly approved form, which would facilitate acceptance of a new form by the physician and hospital community.

The staff will also provide an analysis of California case law governing consent to medical care on behalf of incapacitated adults. Concern was expressed

that a scheme of priorities among family members and others empowered to make health care decisions might inappropriately disrupt the existing understanding of case law or settled practice. Ideally, the statutory “pecking order” would provide a useful clarification of presumably vague standards applicable under existing law.

Some restrictions should be proposed on the power of a patient to designate a surrogate orally (see draft Section 4771(a)), particularly in view of the possibility that oral designations may conflict with preexisting written advance directives. It may be advisable to restrict the effectiveness of oral designations to the particular period of admission to a hospital or the course of an illness. Otherwise stale oral designations recorded in the patient’s record could be given effect. The staff will review the law of other states with family consent or statutory surrogacy statutes to identify useful approaches as possible alternatives or supplements to the uniform act.

The statute should attempt to provide consistent rules for determining capacity to make health care decisions and designate agents and surrogates. Related statutes, such as the guardianship-conservatorship law and the Due Process in Capacity Determinations Act should be reviewed. Revisions may need to be made in other parts of the Probate Code to provide a consistent scheme.

The statutes governing health care decisionmaking for incapacitated patients without any advance directive, known family, or statutory surrogate should be reviewed and considered for revision. One approach would be to generalize the statutory scheme currently applicable to incapacitated patients in skilled nursing facilities or intermediate care facilities under Health and Safety Code Section 1418.8 (the “Epple bill”). Another option would be to expand the authority of courts under Probate Code Section 3200 *et seq.* (court-authorized medical treatment).

APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary