

## CALIFORNIA LAW REVISION COMMISSION

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(415) 494-1335



05/08/92

<b>DATE:</b> • May 21 & 22	<b>PLACE:</b> • Sacramento
• May 21 (Thursday) 10:00 am - 12:00 noon 1:00 pm - 5:00 pm	-- 3191 State Capitol
• May 22 (Friday) 9:00 am - 3:00 pm	-- 3191 State Capitol
<p><b>NOTE:</b> Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the proper amount made out to the "California Law Revision Commission".</p>	

**FINAL AGENDA***for meeting of***CALIFORNIA LAW REVISION COMMISSION**Thursday, May 21, 1992

1. MINUTES OF APRIL 23-24, 1992, COMMISSION MEETING (sent 4/30/92)
2. STUDY N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION

Revised Draft of Statute

Memorandum 92-28 (NS) (enclosed) (\$18.00)

Sanctions in Proceedings

Memorandum 92-22 (RJM) (sent 2/26/92) (\$5.50)

First Supplement to Memorandum 92-22 (sent 4/9/92) (\$5.50)

Second Supplement to Memorandum 92-22 (sent 4/20/92) (\$5.50)

3. STUDY H-501 - QUIETING TITLE TO PERSONAL PROPERTY

Comments on Tentative Recommendation

Memorandum 92-31 (NS) (sent 4/28/92) (\$5.50)

NOTE. Agenda item 3 will be considered on Friday, May 22, if time does not permit on Thursday, May 21.

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

Memorandum 92-36 (RJM) (to be sent)

NOTE. Agenda item 4 will be considered on Friday, May 22, if time does not permit on Thursday, May 21.

5. ADMINISTRATIVE MATTERS

Priorities and New Topic Suggestions

Memorandum 92-14 (NS) (sent 2/28/92) (\$8.50)

Communications from Interested Persons

NOTE. Agenda item 5 will be considered on Friday, May 22, if time does not permit on Thursday, May 21.

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Friday, May 22, 1992

6. 1992 LEGISLATIVE PROGRAM

Memorandum 92-29 (NS) (to be sent)

7. STUDY F-1000 - FAMILY CODE

Amendments to AB 2650 & 2641 (Speier)

Memorandum 92-32 (SU) (to be sent)

Comments for Family Code and Conforming Changes

Memorandum 92-35 (PKM) (enclosed) (\$25)

9. STUDY L-659.01 - INHERITANCE INVOLVING ADOPTED CHILD (PROBATE CODE § 6408)

Policy Issues

Memorandum 92-26 (RJM) (sent 4/30/92) (\$8.50)

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

Policy Issues and Statute Draft

Memorandum 92-30 (SU) (enclosed) (\$8.50)

Memorandum 91-40 (SU) (attached to Memorandum 92-30) (\$18.00)

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MEETING SCHEDULE

<u>May 1992</u>		<u>Sacramento</u>
May 21 (Thur.)	10:00 a.m. - 12:00 noon 1:00 p.m. - 5:00 p.m.	
May 22 (Fri.)	9:00 a.m. - 3:00 p.m.	
<u>June 1992</u>	No Meeting	
<u>July 1992</u>		<u>San Diego</u>
July 9 (Thur.)	10:00 a.m. - 6:00 p.m.	
July 10 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>August 1992</u>	No Meeting	
<u>September 1992</u>		<u>Oakland</u>
Sep. 10 (Thur.)	10:00 a.m. - 6:00 p.m.	
Sep. 11 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>October 1992</u>	No Meeting	
<u>November 1992</u>		<u>Los Angeles</u>
Nov. 12 (Thur.)	10:00 a.m. - 6:00 p.m.	
Nov. 13 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>December 1992</u>	No Meeting	

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
MAY 21-22, 1992  
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 21 and 22, 1992.

Commission:

Present:	Edwin K. Marzec Chairperson	Daniel M. Kolkey (May 21) Forrest A. Plant
	Arthur K. Marshall Vice Chairperson	Sanford Skaggs
	Christine Byrd	Colin Wied
Absent:	Bill Lockyer Senate Member	Bion M. Gregory Legislative Counsel
	Terry B. Friedman Assembly Member	

Staff:

Present:	Nathaniel Sterling	Pamela K. Mishey
	Stan Ulrich	Robert J. Murphy III

Consultant:

Michael Asimow, Administrative Law (May 21)

Other Persons:

Kathryn A. Ballsun, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (May 22)  
Herb Bolz, Office of Administrative Law, Sacramento (May 21)  
Victoria Cline, Office of Administrative Law, Sacramento (May 21)  
Karl Engeman, Office of Administrative Hearings, Sacramento (May 21)  
Gloriette Fong, Department of Motor Vehicles, Sacramento (May 21)  
Lawrence M. Gassner, State Bar Family Law Section, Ontario (May 22)  
Don E. Green, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (May 22)  
Bill Heath, California School Employees Association, San Jose (May 21)  
Steve Kahn, Office of Attorney General, Department of Justice, Sacramento (May 21)  
Lawrence J. Kalfayan, Probate and Trust Law Section, Los Angeles County Bar Association, Los Angeles (May 22)  
Tim McArdle, California Unemployment Insurance Appeals Board, Sacramento (May 21)  
Bernard McMonigle, California Public Employment Relations Board, Sacramento (May 21)  
Rod Margo, Condon & Forsyth, Los Angeles (May 21)  
Joel T. Perlstein, Public Utilities Commission, San Francisco (May 21)

Anita Scuri, Department of Consumer Affairs, Sacramento (May 21)  
James D. Simon, Department of Social Services, Sacramento (May 21)  
Robert Temmerman, Executive Committee, State Bar Estate Planning,  
Trust and Probate Law Section, Campbell (May 22)  
Thomas J. Stikker, Executive Committee, State Bar Estate Planning,  
Trust and Probate Law Section, San Francisco (May 22)  
Stuart Wein, California Occupational Safety and Health Appeals  
Board, Sacramento (May 21)  
James Wolpman, California Agricultural Labor Relations Board,  
Sacramento (May 21)

MINUTES OF APRIL 23-24, 1992, COMMISSION MEETING

The Minutes of the April 23-24, 1992, Commission meeting were approved as submitted by the staff, with the following correction:

On page 5, line 9, "Senate Appropriations Committee" should be substituted for "Assembly Ways and Means".

ADMINISTRATIVE MATTERS

The Commission discussed the current budget situation and the shortage of funds for publishing the Family Code recommendation and other Commission recommendations. A number of possible approaches were raised in the discussion, including:

(1) Recasting the preliminary part of the recommendation as a general Comment to the statute, for publication by law publishers as part of the annotated codes.

(2) Publication of Commission reports in legal newspapers. The staff reported that its efforts to have Commission reports published in the monthly review supplement of the Daily Journal were unsuccessful. The other legal newspapers apparently do not have the resources to do this.

(3) The Commission has had two items published in the CEB Estate Planning and Probate Reporter. This will be ongoing for a while. There is a timing problem here in meeting comment deadlines, given publication lead time requirements.

(4) Publication of a periodic column concerning activities of the Commission in a legal newspaper or California Lawyer.

(5) Publication of recommendations by a major legal publisher such as West or Bancroft-Whitney. West currently publishes Uniform Law Commission proposals, and may be publishing Connecticut or New York Law Revision Commission recommendations.

(6) Joint publication with CEB or another continuing legal education publication. The Commission in the past has done this for major projects with CEB, wherein the Commission provides camera-ready copy of material to CEB and CEB publishes and markets and material.

The staff will pursue some of these possibilities over the next few months, as time permits. The staff noted that the Commission's enabling statute requires Commission reports to be printed by the Office of the State Printer. The staff also noted that it would limit the amount of time spent pursuing these possibilities, since it diverts the limited resources of the Commission from actual productive work.

#### 1992 LEGISLATIVE PROGRAM

The Commission considered Memorandum 92-29, relating to the Commission's 1992 legislative program, updated by the Executive Secretary as follows:

SB 1372 (Deddeh) - Wage Garnishment and Other Matters

Set for hearing in Assembly Judiciary Committee on June 3.

SB 1455 (Mello) - Guardianship/Conservatorship Compensation and Other Matters

On special consent calendar on Senate floor. Scheduled for April 22.

SB 1496 (Senate Judiciary Committee) - Omnibus Probate Bill

Set for hearing in Assembly Judiciary Committee on June 3.

AB 1719 (Horcher) - Nonprobate Transfers of Community Property

Approved by Governor May 8, chaptered by Secretary of State on May 11 as 1992 Cal. Stats. ch. 51.

The Executive Secretary reported receipt of a copy of a letter to the Governor from Jeff Strathmeyer of CEB urging veto of the bill. The copy was received after the bill had been signed. The Executive Secretary wrote back to Mr. Strathmeyer indicating the bill dealt with a complex matter and a veto request is inappropriate. The Commission requested the staff to provide Commissioners with a copy of the correspondence.

AB 1722 (Horcher) - Powers of Appointment

Enacted as 1992 Cal. Stats. ch. 30.

AB 2641 & 2650 (Speier) - Family Code and Conforming Revisions

Set for hearing in Senate Judiciary Committee on June 9.

AB 3328 (Horcher) - Special Needs Trusts

Set for hearing in Senate Judiciary Committee on June 9.

SCR 66 (Senate Judiciary Committee) - Continuing Authority to Study Topics

Passed Senate. Not yet set for hearing in Assembly Judiciary Committee.

STUDY D-02.01 - CONFLICTS OF JURISDICTION AND  
ENFORCEMENT OF FOREIGN JUDGMENTS (MODEL ACT)

See Minutes under Study J-02.01.

STUDY F-1000 - FAMILY CODE

The Commission considered Memorandum 92-32 and the First Supplement concerning amendments to the Family Code bills, AB 2641 and AB 2650. The Commission approved the amendments. The staff also briefed the Commission on technical amendments requested by the Department of Social Services. The Commission reaffirmed the approach



of declining to make substantive changes, and authorized the staff to accept additional technical amendments to answer any concerns that might be raised in the final stages of legislative consideration of the bills.

The Commission considered Memorandum 92-35 and the First Supplement concerning revised comments to the Family Code bills. The suggestion was made that the Comment to Family Code Section 1 could be expanded to include the overview of the study. This would be a convenient place to state the guiding principle of the preparation of the code, i.e., to consolidate, coordinate, and resolve inconsistencies, without making substantive changes in the law. The Commission approved the proposal to print a report on the Family Code. Suggestions for alternative means of obtaining publication are discussed under Administrative Matters, *supra*.

STUDY J-02.01 - CONFLICTS OF JURISDICTION AND  
ENFORCEMENT OF FOREIGN JUDGMENTS (MODEL ACT)

The Commission considered Memorandum 92-36, the attached staff draft of a Tentative Recommendation, *Conflicts of Jurisdiction and Enforcement of Foreign Judgments*, and the First Supplement. The TR was drawn from the Conflicts of Jurisdiction Model Act.

There was concern that the provision that plaintiff's choice of forum should "rarely be disturbed" gives too much weight to the choice of the party who commences the action first. This may encourage a race to the courthouse so the court where the action is first filed will be likely to designate itself as the adjudicating forum. There was some sentiment for the proposal in the First Supplement to say instead that the party challenging the choice of forum by the party first to file has the burden of showing some other forum is preferable.

There was concern that if the Model Act is adopted in California but not in other states and countries, it will have a parochial, perhaps Balkanizing, effect. Litigants in jurisdictions that do not have the Model Act may be unfamiliar with the act and thus be at a disadvantage (1) if the litigant receives notice of a motion in

California to designate an adjudicating forum or (2) if the litigant comes to California solely to enforce a foreign judgment. The view was expressed that in international business transactions there are often two or more jurisdictions that would be equally appropriate as the adjudicating forum, and that to adopt the Model Act in California would be a trap for the unwary.

There was concern that if an action is first filed in a foreign country and a parallel action is later filed in a Model Act jurisdiction, the foreign court may not have a procedure for designating an adjudicating forum. In that case, perhaps an application to designate an adjudicating forum should be permitted in the Model Act jurisdiction early in the proceedings, rather than when judgment is sought to be enforced in the Model Act jurisdiction. See proposed Section 1720(d).

There was concern over the lack of reciprocity under the Model Act resulting from the discretion of a Model Act jurisdiction not to enforce a foreign judgment valid and conclusive in the country where it was made. The view was expressed that the Model Act scheme is too complicated.

There was some sentiment not to adopt the Model Act, but rather to strengthen the provision in Code of Civil Procedure Section 1713.4 allowing California to decline to enforce a foreign judgment if the "judgment conflicts with another final and conclusive judgment." This could be done by adding a section to the Uniform Foreign Money-Judgments Recognition Act to say that where there are two judgments and one was made in a forum substantially less convenient than the forum where the other judgment was made, the judgment in the inconvenient forum need not be enforced in California.

The view was expressed that perhaps we should not be eager to join Connecticut in enacting pioneering legislation in this area, but that we should wait to see if the Model Act is enacted in a significant number of other states.

The Commission decided to put this over to the November meeting in Los Angeles so Mr. James Wawro, one of the proponents of the Model Act, can be present to express his views and address some the Commission's

concerns. The Commission asked that the staff draft a section to be added to the Uniform Foreign Money-Judgments Recognition Act as an alternative to the Model Act, as suggested above.

STUDY L-659.01 - PARENT-CHILD RELATIONSHIP FOR  
INTESTATE SUCCESSION (PROBATE CODE § 6408)

The Commission decided to put Memorandum 92-26 and First and Second Supplements over to the September meeting in Oakland so Professor Halbach can be present. The staff reported that Professor Halbach will meet with representatives of the State Bar Probate Section and a Commission staff member before the September meeting to try to narrow areas of disagreement.

STUDY L-3044 - COMPREHENSIVE POWER OF ATTORNEY STATUTE

The Commission considered Memorandum 92-30 concerning policy issues regarding the comprehensive power of attorney statute and concluded its review of the draft statute attached to Memorandum 91-40. The Commission also considered a memorandum from Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, which was distributed at the meeting. (See Exhibit 1.)

The Commission made the following decisions:

Scope of Study

The next draft of the comprehensive power of attorney statute should include the durable power of attorney for health care. The staff will note on a section by section basis where there are variant rules in the two types of powers. This will enable the Commission to approach overlapping rules issue by issue and determine whether common rules can be developed. The Commission decided to consider the durable power of attorney for health care statute for the purpose of determining the feasibility of general rules, not for the purpose of reviewing major policy issues. The primary focus of the study will

continue to be reform of the power of attorney for property matters. The staff will prepare a draft on this basis for consideration at the September meeting.

Location of Power of Attorney Statute

When the new draft is prepared, it will be placed at the end of the Civil Code where the section numbers will not overlap existing numbers and where the numbering system is not cramped.

Relation to General Agency Statute

The power of attorney statute will make clear that it prevails over conflicting general agency rules and the staff will examine the general agency statutes to make sure that a specific overriding rule is included in the power of attorney statute where necessary to override a confusing or undesirable general rule.

Terminology

"Attorney-in-fact" will be used in the next draft statute, rather than "agent," but the use of "agent" in statutory forms will not be changed.

Personal Care Powers

A definition of "durable power of attorney for personal care" or a similar term will be included in the next draft.

Acknowledgment & Witnessing

Execution of a durable power of attorney for property should be acknowledged before a notary or witnessed by two witnesses. The new execution requirements would apply only to durable powers, not to nondurable powers of attorney. The notary or witnesses would attest to the execution of the power of attorney, not to the principal's capacity or the absence of duress, fraud, or undue influence. For future consideration, the staff should prepare a revision of Civil Code 2432 governing execution of health care powers to eliminate the special qualifications for witnesses and the requirement that the notary

declare that the principal appears to be of sound mind and under no duress, fraud, or undue influence. This revision would make consistent the execution formalities applicable to the two types of powers.

Dating Requirement

The lack of a date should not affect the validity of a power of attorney, but in cases where two or more powers are in conflict or there is doubt about the principal's capacity, the issue would be determined in court proceedings, as in the case of undated holographic wills. The staff should also consider whether the strict dating requirement in the durable power of attorney for health care can be conformed to this standard. The goal is to develop a common rule for both types of powers.

§ 2415.080. Agent's authority when principal missing or held captive in foreign country

The section should be revised to eliminate any implication that a power of attorney terminates if the agent and principal cannot communicate.

§ 2415.090. Termination of agent's authority

The list of circumstances that terminate an agent's authority should be expanded to include revocation of the agent's authority on dissolution, annulment, or legal separation under Section 2415.100.

§ 2415.100. Effect of dissolution or annulment

Entry of a judgment of legal separation should be included in this section, along with dissolution and annulment. The provision in subdivision (a) concerning revival of the agent's authority on remarriage of the parties should be deleted. The phrasing of the section should be revised to use "terminates" instead of "revokes." Subdivision (b), the federal absentee statute, should also be reviewed to see if it can be made more consistent with other rules. The Comment should make clear that it is the termination of the marital status and not the division of the property that is the date of termination of authority in the case of dissolution or annulment. The issue of

revival on remarriage should be considered in connection with the rule applicable to wills and the views of the estate planning bar should be sought.

§ 2418.010. When duties of agent commence

The substance of draft Section 2418.010 was approved, but should be expanded to make clear that an attorney-in-fact has the duty to complete a transaction that has been commenced.

STUDY N-100 - ADMINISTRATIVE ADJUDICATION

In the context of its discussion of Study N-107 (The Process of Administrative Adjudication) (see Minutes, below), the Commission reviewed its tentative schedule on the remainder of the administrative adjudication project.

Because most of the policy decisions on administrative adjudication have now been made, and the Commission is in the process of refining and wrapping up the drafting, the Commission felt it was not essential to do this work only at its Sacramento meetings. This will expedite the process of preparing a completed draft for general review and comment by interested persons, organizations, and agencies.

The Commission also discussed the issue of whether the administrative adjudication draft should be submitted to the Legislature when it is completed, or whether it should be packaged with the work to be done on judicial review and submitted together. The Commission had previously decided to package the two. The Commission did not change this decision, but adopted the policy of pushing on to complete the administrative adjudication portion. When we have completed this portion and have comments on it, the Commission may revisit the issue of whether it should be part of a package or stand alone.

STUDY N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION --  
SANCTIONS IN PROCEEDINGS

The Commission considered Memorandum 92-22 and the First and Second Supplements concerning sanctions in administrative proceedings. The Commission approved the proposed section on contempt, and made the following decisions on the section on bad faith tactics:

Monetary sanctions should apply to non-attorney representatives in administrative hearings, not limited to "the party's attorney." The Comment that "administrative agencies" may impose monetary sanctions should be revised to make clear, as the statutory language does, that sanctions may be imposed on administrative agencies as well as private parties. An order for monetary sanctions should be enforceable by execution as under the Agricultural Labor Relations Act, as well as by contempt. See Lab. Code § 1160.8 (court shall enforce order "by writ of injunction or other proper process").

The staff should consider whether an order for sanctions should be separate from the decision and enforceable as such. The staff should also consider whether an order for sanctions against the agency should be reviewable by the agency. The view was expressed that agencies would not lightly overturn sanction orders against the agency because of the substantial costs of ordering a transcript of the hearing. It was also observed that agencies review other aspects of the decision that are adverse to the agency. The staff should also look at Rule 11 of the Federal Rules of Civil Procedure.

These two sections will be incorporated into the overall draft of the administrative adjudication statute, so the Commission will see them again in that context.

STUDY N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION --  
REVISED DRAFT OF STATUTE

The Commission considered Memorandum 92-28 and the attached revised draft statute relating to the process of administrative

adjudication. The Commission made the following decisions concerning the provisions of the draft.

§ 613.310. Self representation

The Comment should make clear that an entity is not limited in its choice of its members to represent it, but that the entity is bound by the acts of the person it authorizes to represent it.

§ 613.320. Representation by attorney

Subdivision (b), allowing an agency to preclude lawyer representation in certain cases, was deleted from the draft.

§ 613.330. Lay representation

The provision precluding authorization of lay representation in an adjudication required to be conducted by Office of Administrative Hearings personnel was deleted from the draft.

§ 613.410. Conversion authorized

This section might be prefaced by the provision that it is subject to regulations adopted under Section 613.450 (agency regulations). The Comment should note that the reference to "parties" means parties to an adjudicative proceeding or, in the case of rulemaking, the persons primarily interested in the outcome of the proceeding. The Comment should emphasize that the basic standard for conversion is whether the type of proceeding being converted to would be appropriate for the agency action being taken. The Comment should also give some meaning to the concept that a conversion may not "substantially prejudice the rights of a party"; this includes both the right to an appropriate type of procedure and freedom from great inconvenience in terms of the time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of a conversion.

§ 613.450. Agency regulations

Adoption of agency regulations to govern conversions should be permissive rather than mandatory.



§ 641.120. When adjudicative proceeding not required

The Comment should note that initiation of a proceeding, within the meaning of this section, includes issuance of an initial pleading.

§ 641.130. Modification or inapplicability of statute by regulation

Subdivision (a) was revised to read, "The agency may adopt, to that extent, a regulation ... and in such a case the regulation, and not this part, governs the matter."

Subdivision (b) was revised to read, "Notwithstanding subdivision (a), such a provision does not apply ..."

The staff noted that Legislative Counsel disfavors use of the word "such". The provision will be redrafted along the lines indicated, but rephrased to comport with Legislative Counsel style.

§ 641.330. Notice of application

It should be made clear that notice under this section is required for persons for whom notice of an adjudicative proceeding is required.

§§ 641.410-420. Alternative Dispute Resolution

The provisions on alternative dispute resolution should be combined in a single section, including binding arbitration along with nonbinding arbitration, subject to the consent of all parties. The cost and fee shifting penalties should be eliminated. The section should make clear that it does not supersede any special statutes that require mediation or arbitration. An agency by regulation should be able to make the section inapplicable. The section should refer to a "neutral" rather than an "outside" mediator or arbitrator, and should refer to a dispute that is "subject of" rather than "subject to" an adjudicative proceeding.

The Commission discussed the problem of adoption of regulations by agencies. Office of Administrative Hearings regulations could be made applicable to the agencies unless modified or made inapplicable. Or, an agency could adopt a rule that incorporates by reference Office of Administrative Hearings regulations. However, this would cause a proliferation of places where the governing laws and regulations are found. An agency may be encouraged to compile and publish in one place

the governing law, consisting of the Administrative Procedure Act, any special statutes governing the agency, the agency's regulations, and Office of Administrative Hearings regulations. The staff should address this matter further in the next draft.

§ 641.430. Confidentiality of communications in alternative dispute resolution

The reference to "persons" in subdivision (b) should be changed to "parties", subject to staff review of the source of this provision in the Evidence Code.

§ 641.510. When conference hearing may be used

This section should be recast to permit an agency to conduct a conference hearing in the cases specified in Alternative 2, but to allow an agency by regulation to authorize a conference hearing in other cases (a variation on Alternative 1). Paragraph (b)(4) of Alternative 2, allowing a conference hearing in a disciplinary action against a public employee that involves suspension for 10 days or fewer, should be reviewed for a possible due process concern in light of the lack of a full evidentiary hearing.

§ 641.520. Procedure for conference adjudicative hearing

Subdivision (b) should provide that a prehearing conference is not required to be held.

Subdivision (d) should be revised to read, "The presiding officer shall regulate the course of the proceeding and shall limit witnesses, testimony, evidence, rebuttal, and argument, provided that the parties and others may offer written or oral comments on the issues."

With respect to cross-examination, the next draft should include two alternative approaches for Commission review:

(1) Cross-examination is not allowed in conference hearings.

(2) Cross-examination is normally not allowed, but is permitted in an extreme and unusual case in the discretion of the presiding officer. In either of these two cases, the statute should make clear that matters authorized for conference hearing should be susceptible of

determination without the need for cross-examination, and the statute or Comment should make clear that conversion to a full evidentiary hearing is appropriate where it appears cross-examination is needed.

§ 641.610. Agency regulation required

Transitional provisions should be built into the draft to enable agencies to get necessary regulations in place before the new provisions take effect. The draft should make inapplicable to an agency the requirement that a regulation be adopted in cases where a statute already governs the matter. The Commission discussed, but did not resolve, the question whether adoption of a regulation should be prerequisite to use of the emergency adjudicative procedure.

§ 641.620. When emergency adjudicative proceeding available

This section should make explicit that only interim or temporary relief is available under the emergency procedure, that the temporary relief is subject to prompt review within the times in Section 641.670, and that the emergency relief is subject to regular administrative adjudication of the underlying claim.

§ 641.650. Completion of proceedings

This section should more clearly reflect the concept that the emergency adjudication provides only interim relief, subject to a full hearing on the merits. The reference to a hearing on the merits "as quickly as practicable" should be reviewed to see whether it can be made more precise in light of the time limits developed in Section 641.670.

§ 641.670. Immediate judicial review

This section, providing for judicial review under Code of Civil Procedure Section 1094.5, should be replaced by a provision that ties into something analogous to the TRO/preliminary injunction framework, only at the agency level. The agency emergency decision would be on a TRO type hearing, with a preliminary injunction type agency review within 15 days. A party adversely affected could appeal after either stage immediately to the superior court. The court's review of the agency action would be on an "abuse of discretion" basis.

§ 642.030. Agency action on application

In order to clarify the operation of this section, subdivision (a) should be moved up into the introductory portion of the section.

§ 643.220. Contents of initial pleading

The initial pleading should specify the relief requested.

§ 643.230. Service of initial pleading and other information

The form in subdivision (b) should be simplified. It might track the language of Section 643.250 (responsive pleading).

§ 643.320. Continuances

Subdivision (c), providing for judicial review of denial of an application for a continuance, should be discontinued. This action should be flagged in the Commission's tentative recommendation, for purposes of drawing comment.

§ 643.340. Notice of hearing

The "19\_\_" entry on the form should be deleted.

§ 645.050. Participation short of intervention

The language of this section should be improved, perhaps by rephrasing it to state that it does not preclude an agency "from adopting a regulation ..."

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

**TO:** CALIFORNIA LAW REVISION COMMISSION  
**FROM:** TEAM 4 (Don Green)  
**DATE:** May 20, 1992  
**SUBJECT:** Overlap of Health Care and Property Powers of Attorney)

Durable powers of attorney for health care and property are commonly drafted either in a single document, or in some hybridization (e.g. a health care power will include authorization to pay or contract for the services). Even if drafted as entirely separate documents, for estate planning purposes these two documents are conceptually welded together as a bulwark against conservatorship (which is seen by some as intrusive, cumbersome, inflexible and expensive).

These two types of powers of attorney are both commonly used, and are seen as simple procedures which do not require any legal sophistication or specialization to execute, implement or operate.

Accordingly, having entirely separate bodies of law defining the terms and governing the operation of these two types will cause serious and unnecessary confusion. This will incidentally increase litigation and may ultimately discourage the utilization of these valuable tools. Specifically, the following are issues which should be coordinated and standardized as much as possible:

Capacity and procedure to execute, modify and revoke.

Terminology.

Liability and obligation of the agent to act.

Standing and procedures for judicial resolution of disputes.

Third parties' obligation to accept the power, and protection for doing so.