

CALIFORNIA LAW REVISION COMMISSION

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 (415) 494-1335



07/12/91

<i>DATE:</i> • July 25 & 26	<i>PLACE:</i> • Sacramento
• July 25 (Thursday) 1:30 pm - 5:00 pm -- State Capitol, Room 317	
• July 26 (Friday) 9:00 am - 2:00 pm -- State Capitol, Room 126 [no lunch break]	
<p><i>NOTE:</i> 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>	

FINAL AGENDA*for meeting of*

CALIFORNIA LAW REVISION COMMISSION

Thursday, July 25, 1991

1. MINUTES OF APRIL 11-12, 1991, COMMISSION MEETING (sent 4/26/91 for June meeting)
2. MINUTES OF JUNE 13-14, 1991, COMMISSION MEETING (sent 7/3/91)

RATIFICATION OF SUBCOMMITTEE ACTIONS

3. ADMINISTRATIVE ADJUDICATION

STUDY N-106 - FACT FINDER IMPARTIALITY

Consultant's Background Study

Memorandum 91-6 (NS) (sent 3/27/91 for June meeting)

Background Study (sent 1/17/91 for June meeting)

First Supplement to Memorandum 91-6 (sent 4/5/91 for June meeting)

Second Supplement to Memorandum 91-6 (sent 7/11/91)

12. STUDY L-3055 - COMPENSATION IN GUARDIANSHIP AND CONSERVATORSHIP
PROCEEDINGS

Memorandum 91-41 (RJM) (sent 7/10/91)

13. STUDY L-812 - INDEPENDENT ADMINISTRATION OF ESTATES ACT (PRELIMINARY
DISTRIBUTION WITHOUT COURT SUPERVISION)

Draft of Tentative Recommendation

Memorandum 91-33 (RJM) (sent 4/25/91 for June meeting)

First Supplement to Memorandum 91-33 (sent 5/24/91 for June meeting)

Second Supplement to Memorandum 91-33 (sent 6/5/91 for June meeting)

Third Supplement to Memorandum 91-33 (sent 6/21/91)

14. STUDY L-3051 - TRANSFER OF OMITTED PROPERTY TO TRUST BY CONSERVATOR

Revised Draft of Tentative Recommendation

Memorandum 91-36 (RJM) (sent 4/17/91 for June meeting)

First Supplement to Memorandum 91-36 (sent 5/24/91 for June meeting)

Second Supplement to Memorandum 91-36 (sent 7/10/91)

15. STUDY L-603 - SELF-PROVING WILL

Draft of Tentative Recommendation

Memorandum 91-23 (RJM) (sent 4/17/91 for June meeting)

First Supplement to Memorandum 91-23 (sent 5/16/91 for June meeting)

Second Supplement to Memorandum 91-23 (sent 6/7/91 for June meeting)

16. STUDY L-3052 - NONPROBATE TRANSFER TO TRUSTEE NAMED IN WILL

Revised Draft of Tentative Recommendation

Memorandum 91-39 (RJM) (sent 4/25/91 for June meeting)

First Supplement to Memorandum 91-39 (sent 5/24/91 for June meeting)

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

Staff Draft

Memorandum 91-40 (SU) (sent 5/30/91 for June meeting)

First Supplement to Memorandum 91-40 (to be sent)

18. STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

Policy Issues

Memorandum 91-10 (NS) (sent 12/18/90; another copy sent 4/16/91 for
June meeting)

First Supplement to Memorandum 91-10 (sent 5/13/91 for June meeting)

Second Supplement to Memorandum 91-10 (sent 5/30/91 for June
meeting)

Third Supplement to Memorandum 91-10 (sent 6/7/91 for June meeting)

MEETING SCHEDULE

July 1991

July 25 (Thur.)	1:30 p.m. - 5:00 p.m.	Sacramento
July 26 (Fri.)	9:00 a.m. - 2:00 p.m.	

August 1991

No Meeting

September 1991

Sep. 12 (Thur.)	1:30 p.m. - 6:00 p.m.	San Francisco
Sep. 13 (Fri.)	9:00 a.m. - 2:00 p.m.	

October 1991

Oct. 10 (Thur.)	1:30 p.m. - 5:00 p.m.	Sacramento
Oct. 11 (Fri.)	9:00 a.m. - 2:00 p.m.	

November 1991

Nov. 14 (Thur.)	1:30 p.m. - 6:00 p.m.	Los Angeles
Nov. 15 (Fri.)	9:00 a.m. - 2:00 p.m.	

December 1991

No Meeting

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JULY 25-26, 1991
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on July 25-26, 1991.

Commission:

Present:	Roger Arnebergh Chairperson	Arthur K. Marshall Forrest A. Plant
	Edwin K. Marzec Vice Chairperson	Sanford Skaggs Ann E. Stodden
Absent:	Bill Lockyer Senate Member	Bion M. Gregory Legislative Counsel
	Terry B. Friedman Assembly Member	

Staff:

Present:	John H. DeMouilly (July 25)	Robert J. Murphy III
	Nathaniel Sterling	Steve Zimmerman (July 25)
	Stan Ulrich	

Consultants:

Michael Asimow, Administrative Law (July 25)
Edward C. Halbach, Jr., Probate Law (July 26)
Preble Stolz, Administrative Law (July 25)

Other Persons:

Joni S. Ackerman, Legislative Committee, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Los Angeles (July 26)
Larry Alamao, Department of Real Estate, Sacramento (July 25)
Candice Christensen, Unemployment Insurance Appeals Board (July 25)
Edmond R. Davis, Los Angeles (July 25)
Karl Engeman, Director, Office of Administrative Hearings, Sacramento (July 25)
Margaret Farrow, Office of Administrative Hearings, Sacramento (July 25)
Gary Gallery, Chief Administrative Law Judge, Public Employment Relations Board, Sacramento (July 25)
Browne Green, past President California Trial Lawyers Association, Los Angeles (July 25)
Bill Heath, California School Employees Association, San Jose (July 25)
Judith A. Imel, Department of Health Services (July 25)
Gary Jugum, Assistant Chief Counsel, State Board of Equalization, Sacramento (July 25)
Daniel Louis, Department of Social Services, Sacramento (July 25)

Tim McArdle, Chief Counsel, California Unemployment Insurance Appeals Board, Sacramento (July 25)
Melanie McClure, State Teachers' Retirement System, Sacramento (July 25)
Valerie Merritt, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles
David Mundstock, California Energy Commission (July 25)
Joel T. Perlstein, California Public Utilities Commission, San Francisco (July 25)
Carol A. Reichstetter, Probate and Trust Law Section, Los Angeles County Bar Association, Los Angeles (July 26)
Elise Rose, State Personnel Board, Sacramento (July 25)
Marilyn Schaff, Chief Counsel, Department of Motor Vehicles, Sacramento (July 25)
Arthur Taggart, Office of Attorney General, Sacramento (July 25)
Stuart Wein, Occupational Safety and Health Appeals Board, Sacramento (July 25)
Shirley Yawitz, California Probate Referees Association, San Francisco

MINUTES OF APRIL 11-12, 1991, COMMISSION MEETING

The Minutes of the April 11-12, 1991, meeting of the California Law Revision Commission were approved as submitted by the staff.

MINUTES OF JUNE 13-14, 1991, COMMISSION MEETING

The Minutes of the June 13-14, 1991, meeting of the California Law Revision Commission were approved after correcting the reference on page 9, from Section 610.640 to Section 610.460.

The Commission ratified decisions made and actions taken by the Commission acting as a subcommittee at the June 13-14 meeting.

ADMINISTRATIVE MATTERS

ELECTION OF OFFICERS

The Commission considered Memorandum 91-48 relating to election of Commission officers for 1991-92. The Commission by unanimous ballot elected Edwin K. Marzec as Chairperson and Arthur K. Marshall as Vice Chairperson for one year terms commencing on September 1, 1991, and concluding on August 31, 1992.

BUDGET AND PERSONNEL MATTERS

The Commission considered Memorandum 91-49, relating to budget and personnel issues. The memorandum reported to the Commission events that had occurred with respect to reductions in the Commission's budget and staff personnel changes, and indicated the actions the staff proposed to take to deal with these events. The Commission approved the staff proposals and also took the following actions:

(1) The Commission adopted a revised meeting schedule that includes less frequent meetings of longer duration in order to save travel and other meeting costs. The revised schedule is set out below under the heading, MEETING SCHEDULE FOR THE REMAINDER OF 1991 AND FOR 1992.

(2) The Commission voted voluntarily to reduce the salaries of the Commission members by 5% in recognition of the state budget deficit.

(3) The Commission approved a consultant contract with John H. DeMouilly, described below under the heading, CONTRACT WITH JOHN H. DEMOULLY.

(4) The Commission approved extension of the contract with Professor Michael Asimow, described below under the heading, EXTENSION OF CONTRACT WITH MICHAEL ASIMOW.

(5) The Commission approved a policy of charging for Commission materials, outlined below under the heading, DISTRIBUTION OF LAW REVISION COMMISSION MATERIALS.

(6) The staff should make inquiry into the possibility of augmenting the Commission's budget from other sources, for example State Bar donations. The staff should also make an effort to maximize reimbursement from the state for expenses incurred in producing materials to the extent the materials generate revenues for the state under the Commission's new charging policy.

DISTRIBUTION OF LAW REVISION COMMISSION MATERIALS

The Commission considered the portion of Memorandum 91-49 relating to restricted distribution of meeting materials and tentative recommendations. The Commission adopted the following policy on

charging for Commission materials. The Commission will review the policy at the end of the fiscal year to see how it is working and in light of the budget for next fiscal year.

The Commission will not charge for materials provided to Commission and staff members, consultants, members of the Legislature, Governor, and government depository libraries. The Commission will not charge for meeting agendas. The Commission will notify persons on its mailing list of the availability of tentative recommendations and Commission reports, of the general tenor of the items, and of the opportunity to request a copy. The Commission will charge for material sent on request of a person, as follows:

(1) If the item is less than 10 pages, \$5.50 per item, representing an averaged cost of \$5 for handling and shipping plus \$.02 per page photocopier cost plus tax.

(2) If the item is between 10 and 50 pages, \$8.50 per item, representing an averaged cost of \$7.50 for handling and shipping plus \$.02 per page photocopier cost plus tax.

(3) If the item is between 50 and 100 pages, \$18.00 per item, representing an averaged cost of \$15 for handling and shipping plus \$.02 per page photocopier cost plus tax.

(4) If the item exceeds 100 pages, a special price will be set for that item.

(5) Subscriptions for all materials on a particular topic will be offered at \$200 annually, representing an averaged annualized cost of materials for a major Commission study.

(6) Printed materials will be charged at the same rate as photocopied materials, for simplicity, even though the marginal cost is lower.

Notification of the new policy will be sent to all persons on the Commission's mailing list, with the explanation that charges are necessitated by the state's budget situation. A Commissioner or staff member may request that an individual item be sent to a person without charge in a case where that appears appropriate, such as where the person is providing material needed by the Commission in exchange, or where providing background information will help solve a problem in the legislative process, or where the Commission is requesting the assistance of the person on a particular matter.

CONTRACT WITH JOHN H. DEMOULLY

The Commission approved a contract with John H. DeMouly to complete the Family Code project after his retirement. As draftsman of the new code, Mr. DeMouly is in a unique position to be able to complete this project at small cost to the Commission.

The contract would require Mr. DeMouly to complete the following tasks in preparation of the new code:

1. Prepare division on minors for inclusion in Family Code.
2. Incorporate all 1991 enactments into draft of Family Code, prepare or revise Comments as necessary, and revise disposition table.
3. Check Agnos Child Support Standards Act of 1984 in light of 1991 enactments, and determine whether or not to add it to Staff Working Draft. If it needs to be added, draft necessary provisions for Family Code and Comments.
4. Draft amendments and repeals for Conforming Revisions in Other Statutes with Comments.
5. Prepare Comments to repealed sections that will be continued in Family Code and Comments to existing sections that will not be continued.
6. Review comments from interested persons and organizations that identify technical defects in Staff Working Draft and make any necessary revisions.
7. Review comments from interested persons and organizations that suggest revisions in Staff Working Draft and revise draft to make revisions if they appear desirable and do not present any significant policy issue.
8. Prepare Memorandum (with possible revisions in Staff Working Draft) for Commission consideration presenting comments from interested persons and organizations that suggest revisions that appear to present a policy issue.
9. Prepare revised draft of new Family Code in form suitable for introduction as a preprinted bill. This should be prepared in time for introduction early in the 1992 legislative session.
10. Review comments and suggestions from interested persons and organizations on preprinted bill and make any necessary revisions.
11. Revise Comments and Disposition Table to reflect revisions.

Compensation for this project would be \$9,000, plus travel expenses to attend a Commission meeting if requested by the Commission. A partial payment of \$8,000 would be made on completion of task 9.

EXTENSION OF CONTRACT WITH MICHAEL ASIMOW

The Commission approved extension of Professor Michael Asimow's contract to prepare a background study on administrative adjudication to June 30, 1993. The purpose of the extension is payment of Professor Asimow's travel expenses in attending Law Revision Commission meetings, when requested by the Commission, for the purpose of presenting the study to the Commission and responding to comments received on the study.

MEETING SCHEDULE FOR THE REMAINDER OF 1991 AND FOR 1992

The Commission adopted the following meeting schedule for the remainder of 1991 and for 1992.

<u>August 1991</u>	No Meeting	
<u>September 1991</u>		
Sep. 12 (Thur.)	10:00 a.m. - 12:00 noon	Anaheim or
	1:30 p.m. - 6:00 p.m.	Los Angeles
Sep. 13 (Fri.)	9:00 a.m. - 12:00 noon	
	1:30 p.m. - 4:00 p.m.	
<u>October/November 1991</u>		
Oct. 31 (Thur.)	10:00 a.m. - 12:00 noon	Sacramento
	1:00 p.m. - 5:00 p.m.	
Nov. 1 (Fri.)	9:00 a.m. - 12:00 noon	
	1:00 p.m. - 4:00 p.m.	
<u>December 1992</u>	No Meeting	
<u>January 1992</u>		
Jan. 23 (Thur.)	10:00 a.m. - 12:00 noon	Los Angeles
	1:30 p.m. - 6:00 p.m.	
Jan. 24 (Fri.)	9:00 a.m. - 12:00 noon	
	1:30 p.m. - 4:00 p.m.	
<u>February 1992</u>	No Meeting	
<u>March 1992</u>		
Mar. 12 (Thur.)	10:00 a.m. - 12:00 noon	Sacramento
	1:00 p.m. - 5:00 p.m.	
Mar. 13 (Fri.)	9:00 a.m. - 12:00 noon	
	1:00 p.m. - 4:00 p.m.	
<u>April/May 1992</u>		
April 30 (Thur.)	10:00 a.m. - 12:00 noon	San Francisco
	1:30 p.m. - 6:00 p.m.	
May 1 (Fri.)	9:00 a.m. - 12:00 noon	
	1:30 p.m. - 4:00 p.m.	

<u>June 1992</u>	No Meeting	
<u>July 1992</u>		
July 9 (Thur.)	10:00 a.m. - 12:00 noon	San Diego
	1:30 p.m. - 6:00 p.m.	
July 10 (Fri.)	9:00 a.m. - 12:00 noon	
	1:30 p.m. - 4:00 p.m.	
<u>August 1992</u>	No Meeting	
<u>September 1992</u>		
Sep. 10 (Thur.)	10:00 a.m. - 12:00 noon	Sacramento
	1:00 p.m. - 5:00 p.m.	
Sep. 11 (Fri.)	9:00 a.m. - 12:00 noon	
	1:00 p.m. - 4:00 p.m.	
<u>October 1992</u>	No Meeting	
<u>November 1992</u>		
Nov. 12 (Thur.)	10:00 a.m. - 12:00 noon	Los Angeles
	1:30 p.m. - 6:00 p.m.	
Nov. 13 (Fri.)	9:00 a.m. - 12:00 noon	
	1:30 p.m. - 4:00 p.m.	
<u>December 1992</u>	No Meeting	

1991 LEGISLATIVE PROGRAM

The Commission considered Memorandum 91-43 and the attached report on the status of the Commission's 1991 legislative program. With respect to Senate Bill 271 (Kopp), relating to transfer on death beneficiary designations for vehicles, the Commission indicated it is prepared to amend the bill to increase the registration fees if necessary to obtain its enactment. Also, if the occasion arises to amend the bill, technical corrections should be made in the language of the provisions relating to access to a decedent's safe deposit box to eliminate references to copies being "on file" in the safe deposit box and to the personal representative "of the estate". The Commission also approved the Commission Reports attached to the memorandum revising Comments to reflect amendments made during the legislative process.

STUDY F-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

The Commission considered Memorandum 91-44 and the First Supplement to Memorandum 91-44, relating to donative transfers of community property. The Commission made the following decisions with respect to the staff draft statute attached to the memorandum. In implementing the Commission decisions, the staff should consider the suggestions of the State Bar on organization and drafting in the First Supplement.

§ 5001. Property subject to nonprobate transfer

After discussing the possibility of revising subdivision (c) to provide that the transferor may dispose of all the transferor's quasi-community property subject to Probate Code Section 102, the Commission finally concluded to omit Section 5001 from the present draft. The issue will be revisited when the Commission separately deals with quasi-community property specifically.

§ 5002. Limitation on authority to make nonprobate transfer

The terminology used in this section, and throughout the draft, should be revised for clarity. Thus, a transferor does not "make" a nonprobate transfer, but "directs" it, or other language indicating that it may be a third party that actually transfers the property in accordance with the transferor's direction. And a third party holding the property that is the subject of the transfer should not be referred to as a "fiduciary", but some neutral term used, such as "assetholder", "stakeholder", or "custodian"; the phrase "person holding property" should not be used, since the term "person" becomes confusing as used in different contexts in the statute.

In the Comment, the reference to an uninsured spouse making a nonprobate transfer should be revised to refer to a nonowner spouse.

§ 5003. Protection of fiduciary

The order of the sentences in subdivision (b) should be reversed for clarity. The reference in subdivision (b) to a court order restraining transfer should be replaced by a reference to a "contrary" court order, or other broader concept. After discussing whether a court order should be required, or whether a simple written notice should suffice to restrain transfer, the Commission directed the staff

to investigate the facility of payments statutes and to draw a provision that will be consistent with the general statutory treatment of this problem.

§ 5013. Fiduciary

A better term should be used than "fiduciary". See discussion under Section 5002.

§ 5020. Controlling provision of transfer, consent, instrument, or law

The Commission deleted the reference to contrary state law from subdivision (c). The staff should research whether there is any contrary California law. The Commission's report on this matter should criticize the problems in this area created by ERISA, as illustrated in the Ablamis case.

§ 5021. Governing provisions

The staff will devise a better lead line for this section. The staff should consider combining this section with Section 5003.

§ 5022. Waiver of rights in community property

Subdivision (b), relating to waiver of a joint and survivor annuity right, should be relocated with the transmutation provisions in the Civil Code. A cross reference to the section should be included in Section 5131 or its Comment.

§ 5030. Joinder or written consent required

This section should be rephrased to preclude transfer of the other spouse's interest in community property, or of more than 50% of community property, without the joinder or consent of the other spouse. The language of Section 5150 should be conformed.

The statute should make clear that either the joinder or the consent must be written. This could be done expressly, or by means of a definition. A shorthand could be used, such as a reference to "written consent" throughout, with a definition or comment that it includes written joinder.

The staff grammarian should investigate whether a transfer "other than to" the surviving spouse, or a transfer "to other than" the surviving spouse, is more proper.

The numbering of the sections preceding and following this section should be reviewed for consistency.

§ 5131. Effect of joinder or written consent

The staff should review the language of the draft that refers to a joinder or consent as a nonprobate transfer rather than as the initiation of a nonprobate transfer.

The second sentence of subdivision (b) should be revised to provide that "this chapter does not apply to" a joinder or consent that is a transmutation under the Civil Code. A cross-reference to this provision should be included in the Civil Code transmutation provisions or their Comments.

§ 5132. Effect of change in terms of nonprobate transfer

Subdivision (b), which permits the surviving spouse to revoke or make changes in the terms of a nonprobate transfer of community property after the death of the consenting spouse, should be subject to a prior revocation of the consenting spouse's consent by will or other writing.

§ 5140. Revocability of joinder or written consent

Subdivision (c) should be revised to make clear that on the death of the consenting spouse, the transferor spouse may revoke the joinder in the nonprobate transfer as to the one-half interest of the transferor spouse, subject to a contrary agreement of the parties.

§ 5141. Form and delivery of revocation

A consenting spouse should be able to revoke the consent by an express provision in a will; this would apply to a life insurance policy (changing existing law) as well as to other types of nonprobate transfer. A stakeholder would not be affected by a contrary provision in a will, unless before the property is transferred a written claim against the property is received.

Otherwise, a consent is revocable by a writing delivered to the other spouse, except as the particular instrument prescribes the manner of revocation of consent.

§ 5142. Effect of revocation

The drafting of this section might be simplified along the lines suggested by the State Bar.

§ 5150. Effect of transfer

Subdivision (b) should be rephrased so as not to require a court order; the statute should merely state that the court has authority to consider equitable factors in making an order to enforce subdivision (a). The staff should also research the issue of whether there would be any applicable limitation periods, bona fide purchaser protections, and the like, absent such a provision.

STUDY L-708 - DEPOSIT OF MONEY OF MINOR OR INCOMPETENT PERSON
IN SPECIAL NEEDS TRUST

The Commission considered Memorandum 91-51 and First and Second Supplements concerning special needs trusts. The Commission thought the law should authorize special needs trusts for a minor or incompetent person with severe permanent disability who receives proceeds of a tort settlement or judgment, so the minor or incompetent person may have the benefit of Medi-Cal when eligible and have the trust pay for items such as special transportation needs not covered by Medi-Cal. The Commission viewed a special needs trust as more analogous to the protection given in subdivision (b) of Probate Code Section 15306 to a voluntary trust created for a disabled person, than to the lack of protection given to money inherited by a disabled person.

The Commission rejected the Uniform Custodial Trust Act as a possible solution to this problem. The Commission accepted the suggestion of Sterling Ross (letter attached to First Supplement) to give the State Bar Probate Section time to talk to the California Bankers Association and to develop language to authorize special needs trusts. The Commission thought a narrow statute to deal with this specific problem -- handling of proceeds of a personal injury settlement or judgment for a disabled minor or incompetent person -- should be drafted, so the proposed legislation will have a reasonable chance of passage.

The Commission thought the legislation should provide that if the proceeds are not exhausted at the death of the minor or incompetent person, the proceeds should be subject to general provisions of law for

reimbursing the government for public benefits such as Medi-Cal. See, e.g., Welf & Inst. Code § 14009.5 (Medical reimbursement where decedent over 65 with no surviving spouse and no disabled or minor children). There was some sentiment on the Commission that the public agencies (e.g., Department of Health Services) should be required to accept the remaining proceeds in full satisfaction of their claim, and to discharge all liens, including liens on attorney's fees. Any excess would pass according to the terms of the settlement agreement (possibly back to the insurer of the liable party?), or to beneficiaries of the decedent's estate the same as other estate property.

STUDY L-3010 - TRUSTEES' FEES (NOTICE OF FEE INCREASE)

The Commission considered Memorandum 91-45 and the First Supplement thereto concerning notice of increased trustees' fees. The Commission approved the staff draft recommendation to be distributed for comment. It was reported that both the California Bankers Association and the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section had approved the approach of the draft recommendation.

STUDY L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

See discussion under Study F-3050.

STUDY N-106 - FACT FINDER IMPARTIALITY

The Commission considered Memorandum 91-6 and the First and Second Supplements to Memorandum 91-6, along with the consultant's background study, relating to fact finder impartiality in administrative adjudications. Professor Asimow presented the background study, and persons present at the meeting commented on the study. The Commission made the following policy decisions with respect to issues raised in the study.

Exclusive Record

The statute should include a requirement that findings of fact should be based exclusively on the record in the adjudicative proceeding and on matters officially noticed in the proceeding. The statute should make clear that:

Evidence of record may include factual knowledge of the presiding officer and supplements to the record which are made subsequent to a proceeding provided that such evidence is made a part of the record and that all interested persons are given an opportunity to comment on it.

Ex Parte Communications

The statute should prohibit adjudicators from communicating ex parte with persons outside the agency having an interest in the proceeding as a general rule. In the case of a ratemaking or initial licensing proceeding, ex parte communications should be allowed provided they are disclosed on the record and all parties are given an opportunity to address the communication.

Bias

The statute should include among the grounds for disqualification that a reasonable person would entertain a doubt that the adjudicator would be impartial ("appearance of bias"); the judicial disqualification statute should be consulted for circumstances that fall outside this standard. The presiding officer should make a self-determination on the issue of bias. A special appeal from the determination would not be available, but the determination could be reviewed by the agency head (unless limited by regulation) and by judicial review.

Separation of Functions

The statute should prohibit persons involved in the investigation or prosecution of a case from being involved in adjudication of the case. However, the prohibition would not apply in lengthy individualized ratemaking cases. Nor would the prohibition apply where the agency uses an informal adjudication procedure. When the

Commission drafts the informal adjudication procedure, it will review the issue of whether the agency may elect to use the procedure in all cases or whether a formal procedure will be required in some cases.

Command Influence

The statute should include a provision that the presiding officer may not be the subordinate of an investigator, prosecutor, or advocate in the case. But an advisor to the presiding officer could be a subordinate. If the entire staff would be precluded from acting as presiding officer under these rules, the agency would go outside (possibly to the Office of Administrative Hearings) for a hearing officer.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary