

CALIFORNIA LAW REVISION COMMISSION

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(415) 494-1335



01/10/92

DATE: • January 23 & 24	PLACE: • Sacramento
• Jan. 23 (Thursday) 1:30 pm - 5:00 pm --	State Capitol, Room 3191
• Jan. 24 (Friday) 9:00 am - 11:45 am --	State Capitol, Room 127
1:15 pm - 4:00 pm --	
<p>NOTE: 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, January 23, 1992

1. MINUTES OF OCTOBER 31/NOVEMBER 1, 1991, COMMISSION MEETING (sent 11/20/91) (\$8.50)

2. ADMINISTRATIVE MATTERS

Communications from Interested Persons

3. STUDY F-1000 - FAMILY CODE

Approval for Introduction as Commission Bill

Memorandum 92-7 (SU) (enclosed)

First Supplement to Memorandum 92-7 (to be sent)

Family Code: Staff Working Draft (December 1991) (enclosed) (\$25.00)

4. 1992 LEGISLATIVE PROGRAM

General Matters

Memorandum 92-3 (NS) (to be sent)

Study F-3050/L-3050 - Nonprobate Transfers of Community Property

Memorandum 92-8 (NS) (sent 1/3/92) (\$8.50)

Study L-3052 - Nonprobate Transfer to Trustee Named in Will

Memorandum 92-9 (RJM) (sent 1/3/92) (\$5.50)

Study L-3013.01 - Perpetuities and Honorary Trusts

Memorandum 92-11 (SU) (to be sent)

5. STUDY L-708 - SPECIAL NEEDS TRUST FOR DISABLED MINOR OR INCOMPETENT PERSON

Draft of Recommendation

Memorandum 92-5 (RJM) (enclosed) (\$8.50)

6. STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Comments on Revised Tentative Recommendation

Memorandum 92-6 (RJM) (enclosed) (\$8.50)

7. 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) (\$8.50)

First Supplement to Memorandum 91-10 (sent 5/13/91 for June meeting) (\$5.50)

Second Supplement to Memorandum 91-10 (sent 5/30/91 for June meeting) (\$5.50)

Third Supplement to Memorandum 91-10 (sent 6/7/91 for June meeting) (\$5.50)

Fourth Supplement to Memorandum 91-10 (sent 11/7/91) (\$5.50)

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

Memorandum 92-2 (NS) (sent 1/8/92) (\$8.50)

9. STUDY J-03.01 - Translation of Foreign Language Documents for Recordation

Memorandum 92-1 (PKM) (enclosed) (\$8.50)

Friday, January 24, 1992

10. STUDY N-100 - ADMINISTRATIVE ADJUDICATION

N-106 - IMPARTIALITY OF DECISION MAKER

Staff Draft

Memorandum 91-74 (NS) (sent 10/10/91 for October meeting)
(\$8.50)

First Supplement to Memorandum 91-74 (to be sent)

N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION

Consultant's Background Study

Memorandum 92-4 (NS) (to be sent)

Background Study (sent 10/4/91) (\$25.00)

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MEETING SCHEDULE

January 1992

Jan. 23 (Thur.) 1:30 p.m. - 5:00 p.m.
Jan. 24 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

February 1992

No Meeting

March 1992

Mar. 12 (Thur.) 10:00 a.m. - 5:00 p.m.
Mar. 13 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

April/May 1992

April 30 (Thur.) 10:00 a.m. - 6:00 p.m.
May 1 (Fri.) 9:00 a.m. - 4:00 p.m.

San Francisco

June 1992

No Meeting

July 1992

July 9 (Thur.) 10:00 a.m. - 6:00 p.m.
July 10 (Fri.) 9:00 a.m. - 4:00 p.m.

San Diego

August 1992

No Meeting

September 1992

Sep. 10 (Thur.) 10:00 a.m. - 5:00 p.m.
Sep. 11 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

October 1992

No Meeting

November 1992

Nov. 12 (Thur.) 10:00 a.m. - 6:00 p.m.
Nov. 13 (Fri.) 9:00 a.m. - 4:00 p.m.

Los Angeles

December 1992

No Meeting

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JANUARY 23-24, 1992
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on January 23 and 24, 1992.

Commission:

Present:	Edwin K. Marzec Chairperson Arthur K. Marshall Vice Chairperson Christine Byrd	Daniel M. Kolkey (Jan. 24) Forrest A. Plant Sanford Skaggs Colin Wied (Jan. 23)
Absent:	Bill Lockyer Senate Member Terry B. Friedman Assembly Member	Bion M. Gregory Legislative Counsel

Staff:

Present:	Nathaniel Sterling Stan Ulrich	Robert J. Murphy III (Jan. 23) Pamela K. Mishey
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Consultants:

Michael Asimow, Administrative Law (Jan. 24)
Preble Stolz, Administrative Law (Jan. 24)

Other Persons:

Seymour R. Appleby, California Probate Referees Association, Hayward
Mimi Budd, Assemblywoman Speier's Office, Sacramento (Jan. 23)
Candice Christensen, California Unemployment Insurance Appeals Board, Sacramento (Jan. 24)
Monica Dell'Osso, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Jan. 23)
Joe Egan, Department of Developmental Services, Sacramento (Jan. 23)
Karl Engeman, Office of Administrative Hearings, Sacramento (Jan. 24)
Gloriette Fong, Department of Motor Vehicles, Sacramento (Jan. 24)
Aronne Granick, Board of Accountancy, Sacramento (Jan. 24)
Bill Heath, California School Employees Association, San Jose (Jan. 24)
Judith A. Imel, Department of Health Services, Sacramento (Jan. 23)
Tim McArdle, California Unemployment Insurance Appeals Board, Sacramento (Jan. 24)
Melanie McClure, State Teachers' Retirement System, Sacramento (Jan. 24)

Charlene Mathias, Office of Administrative Law, Sacramento (Jan. 24)
Ronald C. Pearson, Executive Committee, Probate and Trust Law
Section, Los Angeles County Bar Association, Los Angeles (Jan. 23)
Joel T. Perlstein, Public Utilities Commission, San Francisco
(Jan. 24)
Elise S. Rose, State Personnel Board, Sacramento (Jan. 24)
Sterling (Terry) Ross, Executive Committee, State Bar Estate
Planning, Trusts and Probate Law Section, Mill Valley (Jan. 23)
Bill Shank, Public Employment Relations Board, Sacramento (Jan. 24)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning,
Trust and Probate Law Section, San Francisco (Jan. 23)
John D. Wagner, Sacramento (Jan. 24)
Stuart Wein, Occupational Safety and Health Appeals Board,
Sacramento (Jan. 24)

MINUTES OF OCTOBER 31/NOVEMBER 1, 1991, COMMISSION MEETING

The Commission approved the Minutes of the October 31/November 1,
1991, Commission meeting with the following changes:

On page 7, lines 1 and 3, "might" was changed to "should".

On page 18, line 9, "possible" was changed to "possibly".

On page 23, line 15, "of" was changed to "or".

ADMINISTRATIVE MATTERS

MEETING SCHEDULE

The Commission changed the date of the April/May, 1992, meeting in
San Francisco to May 14 and 15 to enable attendance by the chairperson.

GUBERNATORIAL APPOINTMENTS TO THE COMMISSION

The Commission welcomed the new gubernatorial appointees to the
Commission, Christine W.S. Byrd, Daniel M. Kolkey, and Colin W. Wied.

COMMENDATION OF FORMER COMMISSIONER ROGER ARNEBERGH

The Commission expressed its appreciation and thanks for the
service of Roger Arnebergh on the Commission, and authorized the
chairperson to send Roger a letter of commendation on behalf of the
entire Commission.

COMMENDATION OF FORMER COMMISSIONER ANN E. STODDEN

The Commission expressed its appreciation and thanks for the service of Ann E. Stodden on the Commission, and authorized the chairperson to send Ann a letter of commendation on behalf of the entire Commission.

1992 LEGISLATIVE PROGRAM

The Commission reviewed Memorandum 92-3, presenting the prospective 1992 legislative program. The Commission discussed the problem of obtaining authors for Commission recommendations. The Commission suggested that the matter be taken up with Commissioners Friedman and Lockyer. Commissioner Skaggs expressed a willingness to meet with Senator Lockyer and the Executive Secretary at the Senator's district office. Chairperson Marzec might also be able to attend the meeting with Senator Lockyer, and to meet with Assembly Member Friedman, depending on the meeting dates.

The Executive Secretary reported the following changes from the tentative placement of bills set out in the memorandum:

Trusts. Assembly Member Friedman will not author the trust bill. Tentatively it will be included in the omnibus probate and estate planning bill.

Nonprobate Transfer of Community Property. This bill was approved by the Assembly Judiciary Committee on January 22, with one technical change--a reference to dissolution of marriage was expanded to refer to dissolution or legal separation.

Relocation of Powers of Appointment. This bill was approved by the Assembly Judiciary Committee on January 22.

Family Code. It appears likely that Assembly Member Speier, rather than the Assembly Judiciary Committee, will be the author of this bill.

The issue was raised of the status of the Commission's recommendation for repeal of the in-law inheritance statute. The staff reported that in light of the Commission's inability to obtain repeal at several legislative sessions, we would not pursue the matter further

unless the State Bar probate section became actively involved in the effort and was able to provide an author willing to fight the opposition of the heir-tracing lobby. A representative of the State Bar probate section reported that the Executive Committee strongly supports repeal and will actively pursue it.

STUDY F-1000 - FAMILY CODE

The Commission considered Memorandum 91-7 and the First Supplement concerning the Family Code. The staff reported on the progress in preparing the bill for printing and the expected time table on introduction and hearing. The staff distributed examples of some objections the Assembly Judiciary Committee had been receiving, largely based on a misapprehension of the code's purpose and content. The Commission reaffirmed the policy that the Family Code is to be a reorganization of existing family law statutes, and is not a substantive revision. The Commission also discussed the fast-track schedule for the Family Code bill and decided to continue this approach, particularly since the bill is intended to continue existing law and will have a one-year deferred operative date, during which time any defects can be corrected and interested persons can become familiar with the new code.

The Commission suggested that the staff contact the supervising judges of the family courts in larger counties concerning the availability of the draft for review.

The Commission approved introduction of the bill based on the December 1991 Staff Working Draft, which was attached to Memorandum 91-7. The explanatory text of the recommendation (draft attached to the First Supplement to Memorandum 92-7) should emphasize that the new code is not intended to make substantive changes, consistent with the legislative charge. This point should be made at the beginning of the explanatory text.

The staff reported on the workshops that have been scheduled to work out technical problems with interested groups. Questions raised and issues identified at the workshops are being placed in three

categories: (1) technical, nonsubstantive, noncontroversial changes, which would be included in the Family Code bill this year, (2) technical and minor changes that require some additional study, but that are likely to be noncontroversial after review, which would be included in the follow-up bill in the 1993 legislative session, (3) difficult and controversial issues that require more study and would result in significant substantive change. As these topics are identified, the staff will prepare a list of possible topics for Commission consideration.

STUDY F-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

The Commission considered Memorandum 92-8, relating to problems raised concerning the Commission's recommendation on nonprobate transfers of community property. The staff noted that Professor Blumberg's comments are printed in 8 California Family Law Monthly 239 (January 1992), along with comments of Judge LaDoris Cordell.

With respect to the concern that a spousal consent to a nonprobate transfer might not be a knowing consent, the Commission felt that this problem can arise in any context. It is not unique to nonprobate transfers, and general principles governing the validity of a consent would apply. Moreover, it would be inadvisable to prescribe statutory forms of consent for a number of reasons, including the variety of situations that would have to be covered, the unwanted interference in contractual relationships, and the likelihood that extensive fine print or large print warning notices and the like would be less rather than more informative. Professor Kasner should be invited to address this issue at committee hearings if it arises.

With respect to the concern that during the interim period between the death of the consenting spouse and the death of the donor spouse, the Commission did not adopt the suggestion that the share of the consenting spouse reverts to the consenting spouse's successors. In addition to the problems that solution has, it would also have the undesirable result of defeating the consenting spouse's estate plan.

The Commission decided to make no change in the proposed legislation in response to these comments.

STUDY H-501 - QUIETING TITLE TO PERSONAL PROPERTY

The Commission considered Memorandum 92-2, relating to quieting title to personal property. The Commission directed the staff to convert the memorandum into a tentative recommendation making clear the right to quiet title to personal property based on adverse possession, and to circulate the tentative recommendation for comment.

STUDY J-03.01 - TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS
FOR RECORDATION

The Commission considered Memorandum 92-1 concerning revision of Government Code Section 27293 to allow for recordation of translated documents without a judicial certification of accuracy where the translation is accompanied by a translator affidavit. The Commission approved the staff's recommendation that this matter be referred to the Judicial Council in light of the on-going work that they are engaged in regarding the related topic of competency of courtroom interpreters.

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

The Commission considered Memorandum 92-6, the attached *Revised Tentative Recommendation: Deposit of Estate Planning Documents With Attorney*, and First Supplement. The Commission accepted the staff recommendation to refer the matter to Team 4 of the State Bar Estate Planning, Trust and Probate Law Section to try to resolve the problems of the State Bar central staff with the proposal.

STUDY L-708 - SPECIAL NEEDS TRUST FOR
DISABLED MINOR OR INCOMPETENT PERSON

The Commission considered Memorandum 92-5, the attached staff draft of a *Recommendation: Special Needs Trust for Disabled Minor or Incompetent Person*, and First Supplement. The Commission approved the draft with the revisions recommended by staff in the First Supplement, and with the addition of language to deal with the statute of limitations problem raised by the Department of Developmental Services. The department was concerned that the language in Section 3605 giving the agency four months after notice in which to make a claim against the trust might be insufficient to revive claims where the statute of limitations has run. The staff should consider adding language to give the agency four months after notice to make the claim "whether or not the statute of limitations otherwise applicable has run," or possibly a provision tolling the statute of limitations while the trust is in existence. The staff should work with the department to develop appropriate language.

With these revisions, the Commission approved the *Recommendation* for printing and submission to the Legislature.

STUDY L-3013.01 - PERPETUITIES AND HONORARY TRUSTS

The Commission considered Memorandum 92-11 concerning a technical revision in a conforming amendment to the Uniform Statutory Rule Against Perpetuities enacted on Commission recommendation in 1991. The Commission approved the staff proposal to amend Probate Code Section 15211 to clarify its application to honorary trusts. The clarifying amendment will be included in the Commission's 1992 probate bill.

STUDY L-3042 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

The Commission heard a summary of the contents of Memorandum 91-10 and the First through Fourth Supplements to Memorandum 91-10, relating to the concept of developing a procedure for a creditor to reach nonprobate assets of a decedent. The Commission also heard comments from representatives of the State Bar and Los Angeles County Bar probate sections to the effect that such a procedure is not needed because it is not a significant problem in practice and because the newly-enacted trust claims procedure should take care of any problems that exist.

The Commission decided to defer this matter for six months while the trust claims procedure has a chance to operate. The staff should report back at that time on experience under the trust claims procedure. If at that time the Commission concludes that the trust claims procedure has not resolved all the problems in the area, or if the Commission so concludes after extending the time to observe experience under the trust claims procedure, the Commission will proceed with the effort to draft a general procedure for creditors to reach nonprobate assets.

STUDY L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

See discussion in these Minutes under STUDY F-3050.

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

The Commission considered Memorandum 92-9 concerning its *Recommendation: Nonprobate Transfer to Trustee Named in Will*. The California Bankers Association's State Trust Governmental Affairs Committee recommended revising subdivision (b)(3) of Probate Code Section 6320 to read:

(3) Self-employed retirement plans, employee welfare benefit plans, and individual retirement annuities or accounts, established or held pursuant to the Internal Revenue Code as now or hereafter amended.

The Commission asked the staff to make sure these proposed additions are consistent with the Internal Revenue Code. See, e.g., I.R.C. § 408 ("individual retirement account" and "individual retirement annuity"). If the staff is so satisfied, the Commission approved the addition of this language.

The Commission was puzzled by the reference to the Internal Revenue Code as "now" or hereafter amended. The Commission asked the staff to consider whether Section 6320 should be revised to refer to the Internal Revenue Code "as now existing or hereafter amended." Cf. Evid. Code § 6 (reference to statute includes amendments and additions "heretofore or hereafter made"); Gov't Code § 9 (reference to laws includes amendments and additions "now or hereafter made"); Prob. Code § 7 (reference to laws includes amendments and additions "heretofore or hereafter made"). The staff should report back to the Commission.

STUDY N-100 - ADMINISTRATIVE ADJUDICATION

In connection with the general study of administrative adjudication, Tim McArdle, General Counsel to the Unemployment Insurance Appeals Board, addressed a few remarks to the Commission to add some perspective to the Commission's administrative law study. Mr. McArdle noted that his agency fully supports the study. He informed the Commission that in recent months UIAB has experienced an unprecedented increase in its administrative adjudication case load from a base of 125,000 cases annually to 160,000 in 1990 and 193,000 in 1991. UIAB currently has a backlog of 62,000 cases awaiting hearing; this causes problems because of the need to promptly dispose of unemployment insurance claims, and federal regulations require disposition of 60% of cases within 30 days of appeal. The backlog has been the subject of criticism from a number of different quarters. In response, UIAB has formulated a workload reduction plan that includes increasing the caseload on administrative law judges, employment and

training of new administrative law judges on a limited term basis, use of mass calendaring techniques, formation of mobile units to address overload areas in impacted areas of the state, and possible relocation and addition of field offices around the state.

Mr. McArdle also noted that UIAB has received a substantial amount of press attention recently because of the appointment of former San Francisco Mayor Agnos to the board. Mr. McArdle observed that board appointments are not intended as permanent but are limited term appointments. From UIAB's perspective it is an excellent appointment, giving the agency for a time the talents, expertise, and access to resources of an individual of very high caliber.

STUDY N-106 - IMPARTIALITY OF DECISION MAKER

The Commission considered Memorandum 91-74, relating to impartiality of the decision maker. The Commission made the following decisions concerning the draft attached to the memorandum.

§ 642.240. Grounds for disqualification of decision maker

Subdivision (b) should be limited by language indicating that the grounds set out in paragraphs (1)-(3) are not alone or in themselves the basis for disqualification without further evidence of bias, prejudice, or interest in the particular matter being adjudicated. Subdivision (b)(2) should be revised to include expression of a view on a policy issue presented in the proceeding. Subdivision (b)(3) should be revised to refer to laws "or regulations", and the "unless" clause should be deleted from the paragraph.

§ 642.250. Voluntary disqualification

Subdivision (a) should be revised to provide that the decision maker "shall disqualify himself or herself" and withdraw. The reference to "voluntary" disqualification should be deleted from subdivision (b). Subdivision (b) should have added to it a provision that the waiver is effective only when signed by all parties and

accepted by the decision maker. The Comment should note that a waiver is a voluntary relinquishment by the parties, and that the judge need not accept the waiver.

In connection with this section, a general provision should be added to the statute that any act that may be done by a party may be done by the attorney or other authorized representative of the party. A note should be added to the provision that individual statutes must be checked to ensure that the general provision operates properly in all instances.

§ 642.260. Procedure for disqualification of decision maker

In subdivision (a), the requirement that a disqualification request be made "promptly" was replaced by a 10-day filing requirement. Subdivision (c) should have added to it a provision that an agency may by regulation provide for early review of a determination of a disqualification request.

§ 642.270. Separation of functions

An exception to the separation of functions provision should be made for Department of Motor Vehicles licensing determinations. This is for the practical reason that the department would not be able to handle the huge volume of licensing hearings if a separate prosecutor and hearing officer had to be assigned to every case. In this situation licensing determinations must be distinguished from certificate determinations, such as school bus driver certificates, which involve different issues and for which separation of functions is required.

An exception to the separation of functions provision should be drafted by the staff with the concept that in nonprosecutorial cases, advice in a limited technical area may be given to the decision maker by an investigator, prosecutor, or advocate, if the advice is summarized and the summary entered in the record and provided to all parties. In developing this draft, the staff should consult rules in this area developed by the Public Utilities Commission, a copy of which the PUC representative will provide to the staff.

The staff was directed to draft language to enable a prosecutor to advise the agency head concerning settlement matters. This might take the form of a provision added to subdivision (c) that if the agency so provides by regulation, a person disqualified from serving as decision maker or advisor under paragraph (a) can consult with the decision maker concerning settlement of the case.

The staff should look into making more clear the interrelation of the separation of functions requirements with the ex parte communications prohibitions.

In subdivision (e), the reference to individualized ratemaking proceedings should be changed to "nonprosecutorial proceedings", and the Comment should note that this would include individualized ratemaking as well as such matters as power plant site decisions.

Subdivision (g) should be revised or eliminated in light of the Commission's decision not to provide a statutory procedure for voluntary temporary assignment of hearing personnel.

In the Comment to this section and other references to this section, there should be deleted any implication that the section relates only to agency personnel. The separation of functions prohibitions would also preclude, for example, a deputy attorney general who prosecuted the case at the trial level from advising the reviewing authority at the administrative review level. This limitation would not apply to settlement discussions, however.

The reference in the Comment to informal adjudications should be deleted. The provisions governing application of the entire formal adjudication structure to conference and emergency hearings should be reviewed for consistency.

§ 642.280. Substitution of decision maker

Subdivision (b)(1), relating to substitution of a disqualified elected official, was deleted. The Comment should note that the statute does not cover this situation, and the rule of necessity would apply.

The Comment should make clear that a substitute is required only if disqualification leaves the decision maker with less than a quorum so that the decision maker is otherwise unable to act.

§ 642.820. Ex parte communications prohibited

The omission in the introductory clause of subdivision (a) should be corrected.

In subdivision (a)(1), the reference to ex parte communications with a "party" should include the attorney or other authorized representative of the party. This would supplement the general provision that is being added to the statute to the effect that acts by a party include acts by the party's attorney or authorized representative. The reference to an "accusation" should be replaced by whatever general terminology is adopted for the statute, e.g. a "complaint".

The Public Utilities Commission representative noted that the PUC has developed an elaborate ex parte rule tailored to its needs, and would prefer to be governed by its own rule. The representative will send the staff a current copy of the rule for examination.

§ 642.830. Prior ex parte communication

This section should be limited to the person appointed presiding officer in the case after the complaint is served or the proceeding is otherwise determined to have been commenced or be pending.

§ 642.840. Disclosure of ex parte communication received

The terminology of whether a person is "advised" or "notified" of an ex parte communication should be made consistent.

STUDY N-107 - THE PROCESS OF ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 92-4 and the First Supplement to Memorandum 92-4, along with Professor Asimow's background study, relating to the process of administrative adjudication. The staff also noted receipt of a letter from the Agricultural Labor Relations Board suggesting use of contempt and financial sanctions for obstructive behavior in administrative hearings, which the staff will analyze for

Commission consideration at its next meeting. The Commission made the following policy decisions concerning the process of administrative adjudication.

Structure of statute

Many of the rules adopted for the process of administrative adjudication will take the form of default rules, which can be modified by the particular agency if need be. The default rules will be geared to agencies currently under the administrative procedure act, with the result that they would not be authorized to adopt variant rules. Any special rules adopted by an agency would take the form of regulations pursuant to the general rulemaking statute.

When the drafting is complete, the staff should catalog the number of areas where variation is allowed. This will give the Commission an overview of the possible diversity being built into the law; the Commission may wish to reconsider some of these matters at that time.

Initiating the proceeding

The statute should attempt to standardize terminology. The pleading initiating an administrative adjudication should be the "complaint" and the responsive pleading, the "answer".

The procedural details on initiating the proceeding such as contents of complaint, manner of service, venue, and the like should be specified by statute drawn from the existing administrative procedure act, with authority for non-APA agencies to vary this by regulation.

The existing provisions should be supplemented by a provision for a 30-day period to acknowledge receipt of an application and indicate any formal defects in it, and a 90-day period to grant or deny the application or set it for hearing. The staff might refer to the Permit Streamlining Act in this connection. The complaint would be prepared by the applicant, rather than the agency, in cases where the applicant has the burden of justifying a change. These rules would also be subject to variation by regulation to suit the needs of individual agencies. The Comment should recognize that agencies, in tailoring regulations for their own purposes, may provide shorter times for emergencies and the like.

Private Prosecution

The statutory implication that a right exists to enable a private person to compel agency prosecution should be eliminated.

Intervention

A provision should be included, drawn from the 1981 Model State APA, permitting intervention by an interested person, but subject to the discretion of the presiding officer. This would not be variable by regulation. The statute should be drafted in such a way as to minimize the possibility of appeal on the issue of denial of intervention.

Discovery

Discovery rules should be based on the existing administrative procedure act discovery rules, with other agencies having an opportunity to expand or narrow them by regulation, subject to any specifically applicable statutes. The regulations could provide for protection of confidential information or other privileges.

The discovery rules should provide for a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing; any objections to the terms of the subpoena should be resolved by the presiding officer.

Prehearing Conference

The existing administrative procedure act provisions for prehearing conferences should be retained, but other agencies should have the opportunity to vary this by regulation.

Declaratory Orders

The statute should provide for declaratory orders in the discretion of the agency in cases of actual controversy; the agency should by regulation be able to make declaratory relief unavailable. The Commission discussed but did not resolve the issues of whether discretionary denial of declaratory relief is judicially reviewable by writ for abuse, whether application for declaratory relief is required for exhaustion of administrative remedies, and what time limits and other procedural details would apply to declaratory relief.

Consolidation and Severance

Code of Civil Procedure provisions relating to consolidation and severance should be adapted for administrative adjudication. The adjudicating agency should have control of consolidation and severance issues.

Alternative Dispute Resolution

Agencies should be authorized to require mediation, conciliation, or nonbinding arbitration of disputes being heard before them.

Evidence

The Evidence Code should not be applied in administrative adjudications except where the agency by regulation adopts it.

Existing law should be continued that precludes admission of unreliable scientific evidence.

Affidavit evidence should be admissible, subject to some procedural and timing limitations. An agency by regulation should be allowed to vary these rules.

The presiding officer should have discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

The exclusionary rule should continue to be left to case law, as it is now.

Evidentiary determinations by the presiding officer should be reviewable by the reviewing authority on administrative review.

The residuum rule should continue to apply to those agencies now subject to it. Other agencies would also be made subject to it, unless they by regulation adopt a different rule. An objection based on the residuum rule need not be made at the hearing. An objection might be required to be made on administrative review or on motion for reconsideration or some other appropriate procedure, before the issue can be raised on judicial review. The staff should draft alternative approaches for further Commission consideration.

Burden of Proof

The burden of proof should be on the proponent in an administrative hearing. In the case of an occupational license, the burden of proof should be clear and convincing evidence. An agency by regulation should be able to provide a standard of preponderance of the evidence.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary