

CALIFORNIA LAW REVISION COMMISSION

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August 4, 1995

<i>Date:</i> August 18, 1995	<i>Place:</i> Los Angeles
August 18 (Friday) 10:00 am – 4:00 pm	Wyndham (formerly Hyatt) at Los Angeles Airport Conference Center # 1 6225 W. Century Boulevard (310) 670-9000
<p>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 any 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 correct amount made out to the "California Law Revision Commission".</p>	
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FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Friday, August 18, 1995**

1. MINUTES OF JUNE 29-30, 1995, MEETING (sent 8/2/95)
2. RATIFICATION OF ACTIONS TAKEN AT JUNE 29-30, 1995, MEETING
3. ADMINISTRATIVE MATTERS

Election of Officers

Memorandum 95-27 (NS) (sent 5/2/95)

Schedule of Future Meetings

Memorandum 95-40 (NS) (sent 7/13/95)

Report of Executive Secretary

4. 1995 LEGISLATIVE PROGRAM

Memorandum 95-36 (NS) (enclosed)

5. ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES (STUDY N-100)

Issues on SB 523 (Kopp)

Memorandum 95-37 (NS) (enclosed) (\$8.50)

6. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

Draft of Tentative Recommendation

Memorandum 95-38 (RM) (sent 8/2/95) (\$25)

First Supplement to Memorandum 95-38 (to be sent)

7. HOMESTEAD EXEMPTION (STUDY D-352)

Draft of Tentative Recommendation

Memorandum 95-39 (SU) (to be sent)

8. ADMISSIBILITY OF ELECTRONIC DOCUMENTS (STUDY K-500)

Scope of Project

Memorandum 95-34 (BG) (sent 6/26/95) (\$18)

First Supplement to Memorandum 95-34 (enclosed) (\$5.50)

Best Evidence Rule

Memorandum 95-41 (BG) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
AUGUST 18, 1995
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on August 18, 1995.

Commission:

Present: Colin Wied, Chairperson
Edwin K. Marzec, Vice Chairperson
Robert E. Cooper
Allan L. Fink
Arthur K. Marshall
Sanford Skaggs

Absent: Bion M. Gregory, Legislative Counsel
Christine W.S. Byrd

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultant: Michael Asimow, Administrative Law

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
Bernard McMonigle, Public Employment Relations Board, Sacramento
Dick Ratliff, California Energy Commission, Sacramento
Madeline Rule, Department of Motor Vehicles, Sacramento
Ron Russo, Attorney General's Office, Los Angeles
John Sikora, Association of California State Attorneys and Administrative Law
Judges, Sacramento

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MINUTES OF JUNE 29-30, 1995, MEETING

The Commission approved the Minutes of the June 29-30, 1995, meeting as submitted by the staff.

RATIFICATION OF ACTIONS TAKEN AT JUNE 29-30, 1995, MEETING

The Commission ratified decisions made and actions taken at the June 29-30, 1995, meeting as reflected in the Minutes of the meeting.

ADMINISTRATIVE MATTERS

Election of Officers

The Commission considered Memorandum 95-27, relating to election of officers for 1995-96. The Commission elected Colin Wied as Chairperson and Allan Fink as Vice Chairperson. Their terms of office commence September 1, 1995.

Schedule of Future Meetings

The Commission considered Memorandum 95-40, relating to the scheduling of future Commission meetings. The Commission approved the concept of more frequent one-day meetings. The meetings should generally be scheduled monthly (except August), subject to cancellation if the staff is unable to produce sufficient material for a particular meeting. The meetings should generally be held in Sacramento on the third Friday of each month, subject to variation to accommodate holiday weekends and for other considerations. If a two-day meeting is necessary, it should be Friday/Saturday rather than Thursday/Friday. The Executive Secretary should propose a revised meeting schedule based on these principles for Commission consideration at the next meeting. The previously-scheduled September and December meetings in San Francisco should be retained but the December meeting should be reduced to one day.

Report of Executive Secretary

The Executive Secretary reported on the following matters:

CLRC on Internet. The Commission now is accessible electronically on the Internet, and copies of selected Commission materials are available electronically. The Commission's e-mail address is:

[addressee]@clrc.ca.gov

The Commission's homepage on the world wide web can be found at:

<http://www.clrc.ca.gov>

Defunding of NYLRC. The New York Law Revision Commission, which was created in the 1930's and served as the model for the California Law Revision Commission and others around the world, has been defunded due to New York budgetary problems.

1995 LEGISLATIVE PROGRAM

The Commission considered Memorandum 95-36, relating to the Commission's 1995 legislative program. The staff supplemented the attached chart with the information that the hearing on ACR 14 (Rainey) scheduled for August 21 had been rescheduled for August 23. SB 832 (Kopp) is now operative as an urgency measure. The budget bill, and not SCA 4 (Lockyer) as erroneously indicated on the chart, is Chapter 303 (August 3).

STUDY D-352 – HOMESTEAD EXEMPTION

The Commission considered Memorandum 95-39 and the attached staff draft tentative recommendation on the *Homestead Exemption*. The Commission approved distribution of the tentative recommendation for comment, subject to the following revisions:

Bus. & Prof. Code § 17537.6 (amended). Unlawful to offer homestead filing service

The regulatory scheme concerning homestead filing services should be repealed. This section should simply provide a definition of a homestead filing service and provide that it is unlawful to offer such a service after the operative date of the repeal of the homestead declaration procedure.

Code Civ. Proc. § 704.850 (amended). Distribution of proceeds of sale of homestead

The comment to this section should make clear that the first two classes in the list of priorities for distribution of proceeds of sale — liens and encumbrances senior to the judgment creditor's lien and the judgment debtor's homestead exemption — are of equal priority by virtue of the rule under Section 704.800 precluding a sale unless the minimum bid is sufficient to pay these amounts in full.

STUDY K-500 – ADMISSIBILITY OF ELECTRONIC DOCUMENTS

The Commission considered Memorandum 95-34 and its first supplement, as well as Memorandum 95-41. Rather than undertaking a comprehensive review of the Evidence Code at this time, the Commission decided to address specific

evidentiary issues relating to electronic evidence and other new technology as the need appears and the Commission's workload permits. As a first step, the Commission will consider reform of the best evidence rule.

The Commission is also interested in contract formation and discovery issues relating to electronic evidence. For the next meeting, the staff should brief the scope of SB 1034, Senator Calderon's pending bill on discovery of computer evidence. With regard to contract formation, the Commission would like to obtain legislative authorization to study the topic.

Assistance from an expert would be desirable, but no funding is available in the Commission's current budget. The staff is to investigate the possibility of obtaining volunteer assistance.

STUDY N-100 — ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

The Commission considered Memorandum 95-37, relating to issues on SB 523 (Kopp). The Commission made the following decisions concerning the issues:

Code of Ethics for ALJs

The Commission approved the concept of development of a code of ethics for administrative law judges. A number of models could be considered, as indicated in the memorandum. There was some support for incorporating an existing code by reference, rather than codifying individual rules in a statute, and for making a violation of the code grounds for disciplinary action. The question whether the code should be applied to all hearing officers, including lay hearing officers, was also discussed. The staff should pursue this matter with the interested and affected parties, and present a specific proposal for Commission consideration at a future meeting. This would not be made a part of SB 523.

Finality of ALJ Decision

The Commission declined to get involved in the issue whether the hearing officer's decision should be final (not subject to administrative review). This issue is presented by pending legislation, and the outcome of that legislation will become part of the Administrative Procedure Act.

Individualized Ratemaking

The staff reported that Southern California Edison Company is concerned about ex parte communications in individualized ratemaking cases, and has

suggested categorizing issues as “quasi-legislative” or “quasi-judicial”. In dealing with their concern the staff should resist injecting this sort of terminology into the bill.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 95-38, the attached draft of a Tentative Recommendation on Judicial Review of Agency Action, and First and Second Supplements. The Commission approved the Tentative Recommendation for distribution for comment, with the following revisions.

Review of Action of Nongovernmental Entity

The Commission approved the staff recommendation to revise Section 1120 as follows:

§ 1120. Application of title

1120. (a) This title governs judicial review of agency action of any of the following entities:

(a) (1) The state, including any agency or instrumentality of the state, whether in the executive department or otherwise.

(b) (2) A local agency, including a county, city, district, public authority, public agency, or other political subdivision or public corporation in the state.

(b) This title does not govern judicial review of action of a nongovernmental entity, except a decision of a private hospital board in an adjudicative proceeding.

Comment. . . .

In applying this title to judicial review of a decision of a private hospital board, subdivision (b) continues the effect of subdivision (d) of former Section 1094.5 of the Code of Civil Procedure.

General Provisions

The Commission approved the staff recommendation to add the following three sections to general provisions in the Tentative Recommendation:

§ 1121.120. Exclusive procedure

1121.120. This title provides the exclusive means of judicial review of agency action and replaces other forms of judicial review of agency action, including administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, and injunctive relief. Other types of actions may not be joined with a proceeding under this title.

Comment. Section 1120.120 is drawn from 1981 Model State APA § 5-101. By establishing this title as the exclusive method for review of agency action, Section 1120.120 continues and broadens the effect of former Section 1094.5. See, e.g., *Viso v. State*, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979). Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.660 (type of relief).

§ 1121.125. Injunctive relief ancillary

1121.125. Injunctive relief is ancillary to and may be used as a supplemental remedy in connection with a proceeding under this title.

§ 1121.140. Exercise of agency discretion

1123.140. Nothing in this title authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion.

Court Discretion To Dismiss Summarily on the Pleadings

The Commission approved the staff recommendation to revise Section 1123.110 as follows:

§ 1123.110. Requirements for judicial review

1123.110. A (a) Subject to subdivision (b), a person who qualifies under this chapter regarding standing and who satisfies other applicable provisions of law regarding exhaustion of administrative remedies, ripeness, time for filing, advancement of costs, and other pre-conditions is entitled to judicial review of final agency action.

(b) The court may summarily decline to grant judicial review if the notice of review does not present a substantial issue for resolution by the court.

Comment. . . .

Subdivision (b) continues the former discretion of the courts to decline to grant a writ of administrative mandamus. *Parker v. Bowron*, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 796, 136 P.2d 304, 308 (1943); *Berry v. Coronado Board of Education*, 238 Cal. App. 2d 391, 397, 47 Cal. Rptr. 727 (1965); California Administrative Mandamus § 1.3, at 5 (Cal. Cont. Ed. Bar, 2d ed. 1989). *Cf.* Code Civ. Proc. § 437c (summary judgment in civil action on ground that action has no merit).

Finality

The Commission deleted the second sentence from Section 1123.120 specifying when agency action is not final. This language should be put in the Comment instead.

Exact Issue Rule

The Commission approved the staff recommendation to revise Section 1123.350 as follows:

§ 1123.350. Exact issue rule

1123.350.

(a) The court may permit judicial review of an issue that was not raised before the agency if any of the following conditions is satisfied:

.

(4) The agency action subject to judicial review is a decision in an adjudicative proceeding and the person was not adequately notified of the adjudicative proceeding. If a statute or regulation requires the person to maintain an address with the agency, adequate notice includes notice given to the person at the address maintained with the agency.

The Commission asked if this provision could be generalized to apply to notice generally, but noted that, while the draft statute requires service of a petition for review (Section 1123.610), it does not have other general notice provisions. These will be provided by Judicial Council rule. Section 1123.620. Adjudications under the Administrative Procedure Act (as amended by SB 523) will be subject to similar general provisions. See Gov't Code §§ 11440.20, 11505.

The Comment should make clear that subdivision (b)(4) of Section 1123.350 does give standing to a person not otherwise entitled to notice of the adjudicative proceeding.

Standard of Review

Questions of law. The Commission revised subdivision (c) of Section 1123.420 as follows:

§ 1123.420. Review of agency interpretation or application of law

1123.420.

~~(c) If a statute delegates to an agency interpretation of a statute or application of law to facts, the standard for judicial review of the agency's determination is abuse of discretion. The standard for judicial review under this section of the following agency action is abuse of discretion:~~

(1) An agency's interpretation of a statute, where a statute expressly delegates that function to the agency.

(2) An agency's application of law to facts, where a statute expressly delegates that function to the agency.

(3) A local legislative body's construction or interpretation of its own legislative enactment.

The Commission asked the staff to recheck to see if the labor law cases cited in the Comment to Section 1123.420(b) say that ALRB and PERB have delegated authority to interpret their statutes on pure questions of law, or whether that authority is limited to application questions. If the cases say these agencies have delegated authority to interpret their statutes on pure questions of law, the Commission may wish to revisit the question of whether these agencies should have abuse of discretion or independent judgment review on pure questions of law.

Herb Bolz of the Office of Administrative Law thought subdivision (c) of Section 1123.420 (abuse of discretion review where statute delegates interpretive power to the agency) does not reflect existing law as it applies to review of agency regulations. He agreed to confer with Professor Asimow to try to resolve this question.

Questions of fact. The Commission deleted subdivision (c) from Section 1123.430 (independent judgment review of certain fact-finding). Thus the standard for judicial review of agency fact-finding will be whether the agency's determination is supported by substantial evidence, without exception.

The Commission did not adopt the suggestion of William Heath of the California School Employees Association to have independent judgment review of local agency determinations where the agency has not elected to proceed under the Administrative Procedure Act. The staff should invite Mr. Heath to submit specific information about which local agency hearings lack procedural protections for licensees. The Commission may revisit this question when more specific information is available.

Hospital boards. The Commission approved the staff recommendation to delete Section 1123.460 from the draft statute concerning review of hospital decisions.

Venue

The Commission decided not to limit venue for judicial review to Sacramento County or, if the agency is represented by the Attorney General, to the four counties where the Attorney General has an office. The Commission approved Section 1123.520 in the draft statute which preserves existing venue rules.

Name of Initiating Document; Contents

The Commission approved the staff recommendation to call the initiating document a “petition” for review, rather than a “notice” of review. The Commission decided to keep the requirement in Section 1123.620 of factual allegations in the petition for review to expose it to possible summary dismissal.

Limitations Period for Judicial Review

The Commission decided to keep the 30-day limitations period in Section 1123.630 for adjudicatory action.

Briefing Schedule

The Commission approved the staff recommendation to delete Section 1123.645 from the draft statute, leaving the briefing schedule to be provided by Judicial Council rule.

Time To Prepare the Record; Cost of Preparing the Record

The Commission approved the staff recommendation to revise subdivision (b) of Section 1123.730 as follows:

§ 1123.730. Preparation of record

1123.730. . . .

(b) Except as otherwise provided by statute, the administrative record shall be delivered to the person seeking judicial review ~~within 30 days after the request, except in the case of an adjudicative proceeding involving an evidentiary hearing of more than 10 days, in which case the administrative record shall be delivered within 60 days after the request.~~
as follows:

(1) Within 60 days after the request in a nonadjudicative proceeding, and in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

(2) Within 30 days after the request in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.

(c) The times time limits provided in this subdivision may (b) shall be extended by the court for good cause shown.

The Commission approved Section 1123.740 in the draft statute concerning cost of preparing the record.

Joining Cause of Action for Inverse Condemnation

The Commission thought the rule should be preserved permitting a cause of action for inverse condemnation to be joined with a proceeding for judicial review of administrative action. See *Hensler v. City of Glendale*, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 253 (1994). It should be made clear that these issues may be bifurcated for trial. Ron Russo of the Attorney General's office agreed to give staff a copy of their memorandum on this issue.

Civil Enforcement of Agency Rule or Order

The Commission decided not to include in the draft statute the sections drawn from the Model Act on civil enforcement of an agency rule or order.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary