
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JULY 21, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on July 21, 1997.

Commission:

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

Absent: Dick Ackerman, Assembly Member
Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Tom Halpern (Student Legal Assistant)

Consultants: Michael Asimow, Administrative Law
Melvin A. Eisenberg, Business Judgment & Derivative
Actions
J. Clark Kelso, Trial Court Unification
Gregory L. Ogden, Administrative Law

Other Persons:

Daniel Abbott, Office of Assemblyman Dick Ackerman, Sacramento
Jonathan Bles, California Energy Commission, Sacramento
Herb Bolz, Office of Administrative Law, Sacramento
Blanca Breeze, State Board of Equalization, Sacramento
Helen Eisenberg, Berkeley
Dan Friedlander, Office of Senator Quentin Kopp, Sacramento

Bill Heath, California School Employees Association, San Jose
Gerald James, Association of California State Attorneys and Administrative Law
Judges, Professional Engineers in California Government, and California
Association of Professional Scientists, Sacramento
Reed Kathrein, Milberg, Weiss, Bershad, Hynes & Lerach, San Francisco
Ron Kelly, Berkeley
Gene Livingston, Livingston & Mattesich, Sacramento
Charlene Mathias, Office of Administrative Law, Sacramento
Julie Miller, Southern California Edison, Rosemead
Madeline Rule, Legal Office, Department of Motor Vehicles, Sacramento
Jeffrey Sievers, Association for California Tort Reform, Sacramento
Jon D. Smock, California Defense Counsel, Sacramento
Shannon Sutherland, California Nurses Association, Sacramento
Tracy Vesely, Judicial Council, San Francisco
Cara Vonk, Administrative Office of the Courts, San Francisco

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MINUTES OF JUNE 12, 1997, COMMISSION MEETING

The Minutes of the June 12, 1997, Commission meeting submitted by the staff were approved with the following change:

On page 5, line 16, “traditional” should read “transitional”.

ADMINISTRATIVE MATTERS

Election of Officers

The Commission considered Memorandum 97-45, relating to the election of officers of the Commission. By unanimous ballot, the Commission elected Christine Byrd as Chairperson and Ed Marzec as Vice Chairperson for the term beginning September 1, 1997.

Report of Executive Secretary

The Executive Secretary reported that Professor Gregory Weber of McGeorge Law School has resigned as a consultant on administrative rulemaking because he will be out of the country for the next year. The staff will look into retaining another academic consultant who can bring a private sector perspective to this subject.

1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-46, relating to the status of bills in the Commission's 1997 legislative program. The Executive Secretary updated the chart attached to the memorandum with the following information:

AB 939 (Ortiz, Ackerman): Mediation Confidentiality — the Senate Judiciary Committee has set the bill for hearing on July 23.

AB 1258 (Ackerman): Attachment by Undersecured Creditors — the Assembly has concurred in the Senate amendments.

SB 68 (Kopp): Quasi-Public Entity Hearings — the Senate has concurred in the Assembly amendments.

SCR 3 (Kopp): Continuing Authority to Study Topics — the Assembly Judiciary Committee has approved the resolution.

For further information on bills in the Commission's 1997 legislative program, please refer to Studies B-700 (Unfair Competition Litigation), K-401 (Mediation Confidentiality), and N-200 (Judicial Review of Agency Action) in these Minutes.

STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission considered Memorandum 97-17 and its First Supplement, relating to comments received on the business judgment rule discussion draft.

The Commission decided to proceed with the project to codify the business judgment rule, and directed the staff to prepare a revised draft. The revised draft should incorporate the following features:

(1) The draft should make clear that it is intended to apply to for profit corporations, and that the Commission has not studied the circumstances of nonprofit corporations and makes no recommendation on the application of the business judgment rule to nonprofit corporations.

(2) The draft should apply to foreign corporations to which California law is made applicable under Corporations Code Section 2115.

(3) The draft should make clear that it only applies to routine business decisions and does not apply to transactions in control and decisions to block derivative actions. It should also be made clear that the draft only affects liability of directors and does not set out standards for injunctive relief against board decisions.

(4) The draft should not attempt to define disqualifying personal relationships that would cause a director to be “interested” within the meaning of the statute. However, the Comment might point out that general legal doctrines of duress and undue influence may apply if elements of those causes of action are established.

(5) The staff should give further consideration to the utility of the rebuttable presumptions included in the definition of “interested” directors.

(6) The staff should consult with Professor Eisenberg in preparing the revised draft to address other technical and policy issues raised by commentators on the discussion draft.

STUDY B-700 – UNFAIR COMPETITION LITIGATION

The Commission considered Memorandum 97-44 concerning SB 143, the Commission’s unfair competition litigation bill. The staff reported that the bill had failed passage in the Senate Judiciary Committee. The Commission concurred with the staff recommendation that no further consideration should be given to the unfair competition subject at this time. The staff will notify Senator Kopp (who is carrying the bill for the Commission) that he is free to use SB 143 for other purposes as he sees fit.

STUDY J-1300 – TRIAL COURT UNIFICATION BY COUNTY

Code of Civil Procedure

The Commission considered Memorandum 97-47 concerning revision of the Code of Civil Procedure. The Commission directed the staff to make the following revisions in the draft attached to Memorandum 97-47, and then circulate the draft as a tentative recommendation:

(1) *Preliminary part.* At page 3, lines 25 to 26, the draft states that SCA 4 would “freeze the court of appeal jurisdiction as it existed on June 30, 1995....” The word “freeze” is overly strong, so the staff should substitute another term.

(2) *Stopgap measure.* The Judicial Council requested a change in the stopgap implementing legislation, which is attached to the draft as Appendix 2 on pages 12-18. Specifically, Section 70200(c) should be revised to give the Judicial Council authority to adopt rules governing the procedure for selecting the operative date of unification. The Executive Secretary is to contact Senator Lockyer's office about this change.

(3) *Terminology.* Throughout the draft, the phrase "general civil matter" should be replaced with a term that is less likely to cause confusion. Similarly, the phrase "Chapter 5.1 civil matter" should be replaced with another term for cases like those now within the original jurisdiction of the municipal court. The word "case" should be used instead of "matter" and the modifier "civil" should be dropped. "Case" should be defined.

(4) *Section 85 (Chapter 5.1 civil matters and general civil matters).* The amount in controversy limitation in Section 85 should not override SB 150 (Kopp), which would allow a municipal court to award restitution in excess of \$25,000 in specified circumstances. The staff should work on drafting Section 85 to effectively account for joinder of claims. As in the draft attached to Memorandum 97-47, the tentative recommendation should include a comprehensive list of statutes in Section 85 and should also amend each of those statutes.

(5) *Sections 199.2 (Placer County jurors) and 199.3 (Nevada County jurors).* Section 199.2 sets a geographical limit on how far a prospective juror within the Tahoe Division of the Placer County Municipal Court has to travel for jury duty. Section 199.3 establishes a similar limit for a prospective juror within the Truckee Division of the Nevada County Municipal Court. Like the draft attached to Memorandum 97-47, the tentative recommendation should preserve these geographical limits and the underlying policy of juror convenience.

(6) *Sections 425.10 (statement of facts) and 430.10 (objection to complaint or cross-complaint).* Instead of requiring a declaration stating whether a matter is a Chapter 5.1 civil matter or a general civil matter, Section 425.10 should require such a designation in the caption of the complaint. Section 430.10 should be conformed accordingly. The staff should study the current rules for challenging municipal and superior court jurisdiction and for transferring a case from one court to another. Corresponding provisions of the tentative recommendation should track those rules with adjustments for trial court unification.

(7) *Section 580 (relief awardable)*. Likewise, Section 580 should track the current rules on relief awardable, but should accommodate trial court unification.

(8) *Section 904.5 (appellate jurisdiction)*. Subdivision (c) should be revised as follows: “Nothing in this section provides a right of appeal in any civil cause that is ~~nonappealable by law~~ not otherwise appealable by law.”

(9) *Small claims*. The Commission revisited and reaffirmed its decision that references to the “small claims court” should be corrected to “small claims division.”

Judicial Districts

The Commission considered Memorandum 97-52, relating to treatment of judicial districts under trial court unification. The Commission decided that the draft should presumptively make judicial districts countywide in a county in which the courts have unified. The draft should note the practical effect of any changes this would cause under particular statutes. Where it appears necessary to preserve judicial districts for some purpose, the staff should consider whether it makes sense to include the courts in the determination of any revised district boundaries, along with the county supervisors. The staff should raise these concepts with county representatives.

The draft provision that “judicial district” does not include superior court district or court of appeal district should be reviewed with some care. There may be at least a few instances where the term does encompass the other districts. The statutes in those instances might be adjusted accordingly.

The staff should investigate state/county funding issues in a unified court and whether any statutory changes are needed to accommodate unification.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-51, concerning the status of AB 939, the Commission’s bill on mediation confidentiality. The Commission raised no objections to the amendments discussed in that memorandum, but directed the staff to make the following additional amendments:

(1) In proposed Evidence Code Section 1127, the references to a “declaration under Section 1125” should be deleted.

(2) Because a “writing as defined in Section 250” includes a document, the phrase “document or writing as defined in Section 250” should be revised

throughout the bill to eliminate the term “document” or state that a “writing as defined in Section 250” includes a document.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-48 and First Supplement, relating to judicial review of agency action. The Commission made the following decisions:

State Agency Regulations

The Commission approved the staff recommendation to exempt underground regulations of state agencies from the draft statute, but not to exempt duly adopted state agency regulations, as follows:

1121. (a) This title does not apply to any of the following:

(1) Judicial review of agency action by any of the following means:

(A) Where a statute provides for trial de novo.

(B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(C) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(2) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(3) Judicial review of a decision of a court.

(4) Judicial review of an ordinance, ~~regulation rule~~, or resolution, enacted by a county board of supervisors or city council, that is legislative in nature.

(5) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.

(6) Judicial review of a state agency regulation alleged to be in violation of Section 11340.5 of the Government Code.

(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.

11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule,

which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(b) If the office is notified of, or on its own , learns of , the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (g) of Section 11342.

(c) The office shall do all of the following:

(1) File its determination upon issuance with the Secretary of State.

(2) Make its determination known to the agency, the Governor, and the Legislature.

(3) Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

(4) Make its determination available to the public and the courts.

(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to the proceeding.

(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

(1) The court or administrative agency proceeding involves the party that sought the determination from the office.

(2) The proceeding began prior to the party's request for the office's determination.

(3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is the legal basis for the adjudicatory action is a regulation as defined in subdivision (g) of Section 11342.

11340.8. Notwithstanding Section 11350, nothing in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure creates any exceptions to this article or to Article 2 (commencing with Section 11342), Article 3 (commencing with

Section 11343), Article 4 (commencing with Section 11344), Article 5 (commencing with Section 11346), Article 6 (commencing with Section 11349), Article 7 (commencing with Section 11349.7), or Article 9 (commencing with Section 11351) of this chapter.

11350. (a) Except as provided in subdivisions ~~(d) and (e)~~ this section and in Section 1121 of the Code of Civil Procedure, a person may obtain a judicial declaration as to the validity of any regulation under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in a proceeding for judicial review of a regulation.

~~(d) Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review:~~

~~(1) The On judicial review, the court may not require the agency to add to the administrative record an explanation of reasons for a regulation.~~

~~(2) No, and no evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.~~

~~(e) Section 1123.460 Nothing in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to a proceeding under this section prevents judicial review or limits remedies in judicial review of a regulation that is required to be, but was not, adopted in compliance with this chapter.~~

~~(f) No deference shall be given by the court to either of the following:~~

~~(1) An agency regulation or interpretation of a statute when the regulation or interpretation is required to be, but was not, adopted in substantial compliance with this chapter.~~

(2) An agency's determination that a regulation of that agency need not be adopted in compliance with this chapter, or that the regulation was adopted in substantial compliance with this chapter.

11350.3. ~~Any interested~~ A person may obtain a judicial declaration under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure as to the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7 ~~by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.~~ The court may declare the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

The staff should continue working with the Office of Administrative Law to try to resolve any remaining problems with application of the draft statute to review of duly adopted regulations.

§ 1121.150. Application of new law

The Commission approved the staff recommendation to revise Section 1121.150 as follows:

1121.150. (a) This title applies to a proceeding commenced on or after January 1, ~~1998~~ 1999, for judicial review of agency action.

(b) The applicable law in effect before January 1, ~~1998~~ 1999, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1998~~ 1999.

Similar revisions should be made to the uncodified transitional provision at the end of SB 209, and to the double-jointing provision at the end of SB 261.

§ 1121.290. Rule

The Commission approved the staff recommendation to substitute “rule” for “regulation” in Sections 1121, 1123.320, 1123.340, 1123.630(b)(2)(C), and Government Code Section 65009(j)(1), to substitute “a rule” for “rulemaking” in Sections 1123.330 and 1123.850, and to substitute “a regulation” for “rulemaking” where it first occurs in Section 1123.820(b), set out below.

§ 1123.110. Requirements for judicial review

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

~~(b) The court may summarily~~ Nothing in this title limits court discretion conferred by Article VI of the California Constitution summarily to decline to grant judicial review if the petition for review does not present a substantial issue for resolution by the court.

Comment. ... Subdivision (b) recognizes that the California Constitution may confer court discretion summarily to decline to grant judicial review. See *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 351, 595 P.2d 579, 156 Cal. Rptr. 1 (1979). See also Section 1121.120 (judicial review as proceeding for extraordinary relief in the nature of mandamus).

§ 1123.160. Condition of relief

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.160:

Comment. ... In addition to the grounds specified in Article 4 (Sections 1123.410-1123.470), for judicial review of adjudication or ministerial or informal action, the court must determine that the error was prejudicial. See, e.g., *Guilbert v. Regents of the University of California*, 93 Cal. App. 3d 233, 241, 155 Cal. Rptr. 583 (1979) (administrative mandamus: “[t]here is a generally accepted principle that the appellant must show prejudicial error affecting his interests in order to prevail on appeal”); *Neto v. Conselho Amor da Sociedade No. 41*, 18 Cal. App. 234, 239, 122 Pac. 973 (1912) (traditional mandamus: writ “not issued on mere technical grounds,” but is to “prevent substantial injury”).

§ 1123.230. Public interest standing

The Commission approved the staff recommendation to revise Section 1123.230 as follows:

1123.230. Whether or not a person has standing under Section 1123.220:

~~(a) A , a person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest if the person has previously requested the agency to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the~~

~~record in the agency proceeding. The agency may by rule require the request to be directed to the proper agency official. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm.~~

~~(b) Notwithstanding subdivision (a), a person has standing to obtain judicial review of a regulation adopted pursuant to the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the regulation concerns an important right affecting the public interest.~~

§ 1123.310. Exhaustion required

The Commission approved the staff recommendation to revise Section 1123.310 as follows:

1123.310. (a) A person may obtain judicial review of agency action only after exhausting all administrative remedies available within the agency whose action is to be reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time is permitted by this article or otherwise expressly provided by statute.

(b) For the purpose of subdivision (a), an administrative remedy is available within a public agency only if the remedy is provided by statute or rule.

Comment. ... Subdivision (b) codifies *Lopez v. Civil Service Comm'n*, 232 Cal. App. 3d 307, 314, 283 Cal. Rptr. 447 (1991). For a private association, an “available” administrative remedy is one provided by internal procedures of the association. *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 474, 131 Cal. Rptr. 90, 94 (1976).

§ 1123.330. Judicial review of a rule

The Commission approved the staff recommendation to delete subdivision (b) from Section 1123.330, in view of its decision to exempt underground regulations of state agencies from the draft statute:

1123.330. (a) A person may obtain judicial review of rulemaking a rule notwithstanding the person's failure to ~~do either of the following:~~

(1) Participate ~~participate~~ in the rulemaking proceeding on which the rule is based.

(2) ~~Petition , or to petition~~ the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

~~(b) A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.~~

The staff should add a provision to Section 1123.330 to make clear a person may challenge a state agency regulation even though the agency has not commenced an enforcement proceeding against the person.

§ 1123.340. Exceptions to exhaustion of administrative remedies

The Commission rejected the staff recommendation to excuse exhaustion of administrative remedies where review is sought on the ground that a statute or procedure is facially in conflict with statute, since that is not now the law in California.

§ 1123.350. Exact issue rule

The Commission revised Section 1123.350(a) substantially as follows:

1123.350. (a) Except as provided in subdivision (b), if exhaustion of administrative remedies is required, a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking judicial review or by another person.

(b) [exceptions to exact issue rule]

§ 1123.430. Review of agency factfinding

Senator Kopp thought the best way to resolve the issue of standard of review of state agency factfinding is to request an interim hearing by the Senate Judiciary Committee. He agreed to send a letter to the Committee requesting an interim hearing in Sacramento on October 9, to coincide with the Commission meeting.

§ 1123.510. Superior court jurisdiction

The staff should consider whether recognition of constitutional writ jurisdiction in Section 1123.510(b) should include superior court writ jurisdiction.

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

The Commission approved the staff recommendation to revise Sections 1123.630 and 1123.640 as follows, and to put the notice provision in a new Section 1123.650:

1123.630. (a) The petition for review of a decision of an agency, other than a local agency, in an adjudicative proceeding, and of a decision of a local agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by ~~subdivision (e)~~ Section 1123.650 is delivered, served, or mailed, whichever is later.

(b) For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) In an adjudicative proceeding other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, a decision of an agency other than a local agency is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions is satisfied:

(A) Reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A different effective date is provided by statute or regulation rule.

(c) Subject to subdivision (d), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(2) Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(d) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is effective.

~~(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a),~~

~~the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law.”~~

1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section 1123.630, shall be filed not later than 90 days after the decision is announced or after the notice required by subdivision (d) Section 1123.650 is delivered, served, or mailed, whichever is later.

(b) Subject to subdivision (c), the time for filing the petition for review is extended as to a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.

(2) Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(c) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

~~(d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law.”~~

1123.650. In addition to any other notice of agency action required by statute, in an adjudicative proceeding the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law.”

This requires revision of cross-references to these sections in Government Code Section 65009(j)(2) and Public Resources Code Section 21168 (see below), and in SB 261 (conforming revisions).

The Commission asked the staff to consider whether the inconsistency in references in Section 1123.640 to the date a decision is “announced” or is

“effective” is intentional or inadvertent. Mr. Heath pointed out that the effective date may relate back to an earlier date when the agency took action.

§ 1123.820. Contents of administrative record

The Commission approved the staff recommendation to revise Section 1123.820(b) as follows:

(b) The administrative record for judicial review of a regulation adopted under the rulemaking under portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code is the file of the rulemaking proceeding prescribed by Section 11347.3 of the Government Code.

§ 1123.830. Preparation of record

The Commission asked whether under existing law there is an option permitting the petitioner to prepare the record, subject to being supplemented by the agency, and, if so, whether that option should be preserved.

Pub. Res. Code § 21168. Conduct of proceeding

The Commission approved the staff recommendation to revise Public Resources Code Section 21168 as follows:

21168. (a) Except as provided in subdivision (b), an action or proceeding to attack, review, set aside, void , or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The court shall not exercise its independent judgment on the evidence, but shall determine only whether the act or decision is supported by substantial evidence in light of the whole record.

(b) Sections 1123.470, 1123.630 and , 1123.640 , and 1123.650 of the Code of Civil Procedure do not apply to judicial review of proceedings under this division.

Comment. ... Under subdivision (b), some provisions of the judicial review statute do not apply to review of proceedings under this division. Because Section 1123.470 on burden of proof does not apply to review of proceedings under this division, existing law continues to apply. See, e.g., *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 62 Cal. Rptr. 2d 612, 617-18 (1997).

STUDY N-301 – ADMINISTRATIVE RULEMAKING

Interpretive Guidelines

The Commission considered Memorandum 97-49, which addresses the proposed exception to rulemaking procedures for a statement expressing an agency's nonbinding interpretation of law (an "interpretive guideline"). In response to considerable public comment, the Commission instructed the staff to further clarify the scope and effect of an interpretive guideline under the proposed law.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary