
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 27, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on February 27, 1997.

Commission:

Present: Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Dick Ackerman, Assembly Member
Quentin L. Kopp, Senate Member

Absent: Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall
Edwin K. Marzec
Sanford Skaggs
Colin Wied

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

Consultants: Michael Asimow, Administrative Law
Gregory L. Ogden, Administrative Law

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
Tom Cadell, Division of Labor Standards Enforcement, San Francisco
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
Dorothy Dickey, Coastal Commission, San Francisco
Karl Engeman, Office of Administrative Hearings, Sacramento
Joan Eubanks, Regulations, Department of Motor Vehicles, Sacramento
Dugald Gillies, Sacramento Nexus, Sacramento
Louis Green, County Counsels' Association of California, Placerville
Heather Halsey, Hastings Public Law Research Institute, San Francisco

K. Sue Hummel, Attorney, Roseville
Gerald James, Association of California State Attorneys and Administrative Law
Judges, Professional Engineers in California Government, and California
Association of Professional Scientists, Sacramento
Jason Kaune, Hastings Public Law Research Institute, San Francisco
Ron Kelly, Berkeley
Gene Livingston, Livingston & Mattesich, Sacramento
Charlene Mathias, Office of Administrative Law, Sacramento
Tim McArdle, California Unemployment Insurance Appeals Board, Sacramento
Julie Miller, Southern California Edison, Rosemead
Dana Mitchell, Senate Judiciary Committee Counsel, Sacramento
Lucy Quacinella, Western Center on Law and Poverty, Northern California Office,
Sacramento
Dick Ratliff, California Energy Commission, Sacramento
Madeline Rule, Legal Office, Department of Motor Vehicles, Sacramento
Elizabeth Saviano, California Primary Care Association, Sacramento
Daniel L. Siegel, Attorney General's Office, Sacramento
Shannon Sutherland, California Nurses Association, Sacramento

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A quorum of the Commission not being present at the meeting, decisions reported in these Minutes are subject to ratification at a subsequent meeting,

subject to the following actions taken pursuant to the Commission's rules of practice and procedure:

(1) *Decisions on legislative program.* Decisions concerning the legislative program should be implemented pursuant to acting authority of the Chairperson and Vice Chairperson.

(2) *Nonfinal action.* The Chairperson determined, the Vice Chairperson concurring, that a quorum not otherwise being established at the meeting, the members present constituted a quorum acting as a subcommittee for the purpose of taking the nonfinal action of circulating for comment the tentative recommendations on inheritance by a foster child or stepchild (Study L-659) and confidentiality of settlement negotiations (Study K-410).

MINUTES OF JANUARY 24, 1997, COMMISSION MEETING

The Minutes of the January 24, 1997, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Schedule of Future Meetings

The Commission rescheduled the May 8 meeting to May 1 and 2 in Sacramento in order to provide time to consider matters relating to the Public Utilities Code revision.

Meeting Attendance

Noting the continuing problem in achieving a quorum, the Commission decided that the Chairperson will send a letter to all non-legislative Commission members emphasizing the importance of regular attendance at Commission meetings.

Report of the Executive Secretary

The Executive Secretary reported on the following matters.

Public Utilities Code revision. The draft report on revision of the Public Utilities Code prepared by the Public Utility Commission for consultation with the Law Revision Commission is expected on March 31, 1997. Law Revision Commission staff will analyze the report and seek public comment for consideration beginning at the May 1-2, 1997, Law Revision Commission meeting.

Trial court unification. Commission consideration of this study continues to be deferred while the Executive Secretary tries to develop a working relationship with the Judicial Council on it.

Eminent Domain and Inverse Condemnation. Professor Gideon Kanner, a former Commission consultant in the fields of eminent domain and inverse condemnation, has indicated to the Executive Secretary that there are problems in both fields the Commission should address.

The problems in the eminent domain field are fairly minor and ought to be easily addressed. The Executive Secretary indicated that Commissioner Skaggs has in the past also noted the existence of issues that should be dealt with. The Commission directed the staff to receive all the suggestions and work them into the Commission's agenda on a low priority basis.

With respect to inverse condemnation, Professor Kanner indicated that the problems are more significant and that he would be willing to prepare a scholarly research paper if the Commission is interested. The problems he is concerned about relate to procedural impediments to filing an inverse condemnation action. A case involving this matter is currently pending before the United States Supreme Court.

The Executive Secretary noted that the Commission's concurrent resolution would drop inverse condemnation from the Commission's agenda because just compensation issues are constitutional rather than statutory. Procedural elements of inverse condemnation may be statutory to some extent and relate to exhaustion of administrative remedies. The Commission accepted Professor Kanner's offer and will consider the matter under its authority to study administrative law.

Hastings Public Law Research Institute. The Executive Secretary introduced Hastings law students Heather Halsey and Jason Kaune. Ms. Halsey and Mr. Kaune are members of the Hastings Public Law Research Institute and are assisting Assembly Member Ackerman in the analysis of staff materials.

Law Reform Commission of British Columbia. The Executive Secretary noted the passing of the Law Reform Commission of British Columbia. The Law Reform Commission was similar in size and purpose to the California Law Revision Commission. It had done outstanding work in law reform.

1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-5 and its First and Second Supplements, relating to the Commission's 1997 legislative program.

Status of Bills

The Executive Secretary supplemented the chart attached to the memorandum with the following information.

- Senate Judiciary Committee review of SB 68 (Kopp), relating to administrative adjudication by quasi-public entities, was deferred until April 8 in order to amend other provisions into the bill.
- Senator Calderon has introduced the administrative law judge Code of Ethics recommendation as SB 653.
- Assembly Member Ackerman has introduced the recommendations relating to real property covenants (repeal of the First Rule in Spencer's Case and elimination of obsolete restrictions) as AB 707.
- Assembly Member Ackerman has agreed to author the recommendation on attachment by undersecured creditors. This may be combined with a State Bar proposal on a related topic.

Administrative Adjudication by Quasi-Public Entities

Commission action to amend SB 68 (Kopp) is reported in these Minutes under Study N-112.

Best Evidence Rule

Commission action on SB 177 (Kopp) is reported in these Minutes under Study K-501.

Mediation Confidentiality

Commission action to revise the recommendation on mediation confidentiality is reported in these Minutes under Study K-401.

Tolling Statute of Limitations when Defendant Is Out of State

The Commission decided not to reintroduce its recommendation on tolling the statute of limitations when the defendant is out of state. As a low priority, the staff will draft proposed language to amend Code of Civil Procedure Section 351, rather than repeal it, to codify existing case law and resolve other identified problems.

Homestead Exemption

The Commission decided to revisit the recommendation on the homestead exemption in light of a recent Ninth Circuit decision (*Jones v. Heskett & Kelleher Lumber Co.*). As a low priority, the staff will investigate how best to resolve technical problems in the application of statutory homestead law.

STUDY E-100 – ENVIRONMENTAL LAW

The Commission considered Memorandum 97-6, relating to the organization of the environmental law consolidation study.

The Commission decided to develop an outline of a California Environmental Code. For this purpose, it approved the contracts with the academic consultants described in the memorandum.

The Commission will circulate the outline to interested persons, organizations, entities, and agencies for comment, prefaced by the Mission Statement set out in the memorandum. The language “This is a nonsubstantive project,” should be replaced with “This is not a policy revision.”

The request for comments should include an inquiry as to (1) whether the project is desirable, (2) whether the outline is sound, (3) whether the contents identified in the outline are correct, and (4) whether the commentator is willing to review drafts or otherwise assist in the preparation of the new code.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered the Second Supplement to Memorandum 97-5, relating to mediation confidentiality. Proposed Evidence Code Sections 1116 and 1117 should be replaced with a provision that reads substantially as follows:

§ 1116. Scope of chapter

1116. (a) Except as provided in subdivision (b), this chapter applies to a mediation, regardless of whether participation in the mediation is voluntary, pursuant to an agreement, pursuant to order of a court or other adjudicative body, or otherwise.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 222 of the California Rules of Court.

(c) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

The Commission approved the following change in the conforming revision to Labor Code Section 65, which was implemented to eliminate the fiscal committee designation:

65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. Records Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.

STUDY K-410 – CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 97-10 and the revised staff draft tentative recommendation attached to Memorandum 97-10. The Commission approved the draft as a tentative recommendation, with the following revisions.

§ 1132. Protection of act of compromise

Section 1132 should be revised to refer to “a civil action, administrative adjudication, arbitration, or other noncriminal proceeding.”

§ 1137. Sliding scale recovery agreement

Section 1137 should be redrafted to refer to Code of Civil Procedure Section 877.5.

§ 1138. Miscarriage of justice

Section 1138 should be deleted.

§ 1139. Least restrictive means

As suggested by the State Bar Litigation Section and State Bar Committee on Administration of Justice, the provision on least restrictive means should be

reworded. Section 1139(a) should refer to Evidence Code Section 352 or incorporate language from that section. In redrafting Section 1139(b), staff should examine standards for protective orders.

§ 1152. Payment of medical or other expenses

Section 1152 should be revised to read:

1152. Evidence of furnishing or offering or promising to pay medical, hospital, or similar other expenses occasioned by an injury is not admissible to prove liability for the injury.

Compromise Evidence in Criminal Action

A new provision, governing admissibility and discoverability of compromise evidence in a criminal action, should be added to the draft. It should be similar to Section 1132, but should include an exception for compromise efforts that amount to an obstruction of justice. The tentative recommendation should also include a severability clause.

Settlement Conference Pursuant to Rule 222 of Rules of Court

An appropriate Comment should explain that the provisions on confidentiality of settlement negotiations apply to a settlement conference pursuant to Rule 222 of the California Rules of Court.

STUDY K-501 – BEST EVIDENCE RULE

In connection with review of its legislative program, the Commission considered how to respond if asked to limit its bill on the best evidence rule to civil cases. The Commission was inclined not to take that approach.

STUDY L-659 – INHERITANCE BY FOSTER CHILD OR STEPCHILD

The Commission considered Memorandum 97-9 and attached staff draft of a tentative recommendation on *Inheritance by Foster Child or Stepchild*. The Commission approved the tentative recommendation for distribution for comment.

STUDY N-112 – ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

The Commission considered the First Supplement to Memorandum 97-5, proposing clarifying amendments to SB 68 (Kopp). The Commission approved the amendments as set out in the memorandum.

STUDY N-116 – ADMINISTRATIVE ADJUDICATION: TELEPHONE HEARINGS

The Commission considered Memorandum 97-14 and its First Supplement together with a letter from the California Unemployment Insurance Appeals Board (copy attached to these Minutes as Exhibit p. 1), relating to telephone hearings.

The Commission approved a provision along the following lines for inclusion in pending administrative adjudication legislation:

Unemp. Ins. Code § 1953.5 (added). Telephone hearings:

1953.5. The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means, notwithstanding a party's objection pursuant to Section 11440.30 of the Government Code, on a showing of good cause by the party requesting the hearing by telephone, television, or other electronic means.

Comment. Good cause, within the meaning of Section 1953.5, may include circumstances where a party resides out of state or at a location distant from the hearing site and it is not practical for the party to appear in person, particularly where the amount in controversy is relatively small. However, the presiding officer may require the parties to appear in person if warranted by the circumstances of the case.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-11 and its First Supplement. The Commission made the following decisions:

§ 1121. Proceedings to which title does not apply

The Commission approved the staff recommendation to revise Section 1121 as follows:

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

(a) Judicial review of agency action ~~provided by statute~~ by any of the following means:

(1) Trial ~~Where a statute provides for trial~~ de novo.

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

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

....

(d) Judicial review of an ordinance of a local agency, either of the following enacted by a county board of supervisors or city council:

(1) An ordinance or regulation.

(2) A resolution that is legislative in nature.

....

The Commission approved the draft Comment for Section 1121. The staff should include case law defining “legislative in nature.”

In the exemption in subdivision (a)(2), the staff should add two sections in Division 1 of the Revenue and Taxation Code that provide for trial de novo — Sections 5140 and 5148 — unless there is a persuasive reason not to do so.

§ 1121.240. Agency action

The Commission revised Section 1121.240 as follows:

1121.240. “Agency action” means any of the following:

....

(c) An agency’s performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

(d) An agency’s failure to perform any duty, function, or activity, discretionary or otherwise, that the law requires to be performed or that would be an abuse of discretion if not performed.

The staff should add to the Comment a reference to Section 1123.110(b) (court may summarily decline to grant review if petition does not present substantial issue).

The staff should prepare a memorandum for the next meeting analyzing Herb Bolz’ concern, expressed at the meeting, that Sections 1121.240(b), 1123.460, and others may change existing law on judicial review of state agency underground regulations, what sanctions are available (injunctive relief?), and whether the ripeness doctrine applies. See Exhibit pp. 2-6.

§ 1123.150. Proceeding not moot because penalty completed

The Commission approved the staff recommendation to revise Section 1123.150 as follows:

1123.150. A proceeding under this chapter is not made moot by satisfaction during the pendency of the proceeding of a penalty imposed by the agency during the pendency of the proceeding.

§ 1123.240. Standing for review of decision in adjudicative proceeding

The Commission approved the staff recommendation to revise Section 1123.240 as follows:

1123.240. ~~Notwithstanding any other provision of this article Sections 1123.220 and 1123.230,~~ a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding unless one of the following conditions is satisfied:

(a) The person was a party to the proceeding.

(b) The person was a participant in the proceeding ; and (1) is either interested or the person's participation was authorized by statute or ordinance, or (2) the person has standing under Section 1123.230. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

~~(c) The person has standing under Section 1123.230.~~

The staff should consider whether, in the first line of subdivision (b), "(1)" should precede "a participant in the proceeding."

§ 1123.420. Review of agency interpretation or application of law

The Commission revised Section 1123.420 substantially as follows:

1123.420. (a) The standard for judicial review of ~~the following issues~~ agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action:

~~(1) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.~~

~~(2) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.~~

~~(3) Whether the agency has decided all issues requiring resolution.~~

~~(4) Whether the agency has erroneously interpreted the law.~~

~~(5) Whether the agency has erroneously applied the law to the facts.~~

(b) This section does not apply to interpretation or application of law by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board within the regulatory authority of those agencies.

The substance of deleted paragraphs (1)-(4) should be put in the Comment as examples of what constitutes agency interpretation of law. The Comment should also say the draft statute does not provide a standard of review for application of law to fact, and that existing law remains unaffected. The Comment to Section 1123.160 (condition of relief) should be revised to eliminate the reference to the deleted material above.

The staff should consider whether to revisit the question of application of law to fact in a memorandum for a future meeting.

§ 1123.520. Superior court venue

The Commission approved the staff recommendation to revise Section 1123.520(a) as follows:

1123.520. (a) Except as otherwise provided by statute, the proper county for judicial review under this chapter is:

(1) In the case of state agency action, the county where the cause of action, or some part thereof, arose, or Sacramento County.

(2) In the case of action of a nongovernmental entity, the county where the entity is located.

(3) In cases not governed by paragraph (1) or (2), including local agency action, the county or counties of jurisdiction of the agency.

....

Comment. Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954). Subdivision (a)(2) continues what appears to have been existing law for judicial review of action of a nongovernmental entity. See California Administrative Mandamus, *supra*, § 8.16, at 270.

Subdivision (a)(3) is new, but is probably not a substantive change for local agencies, since the cause of action is likely to arise in the county of the local agency's jurisdiction. In addition to applying to local agencies (defined in Section 1121.260), subdivision

(a)(3) applies to agencies that are neither state nor local. See, e.g., Gov't Code § 66801 (Tahoe Regional Planning Agency).

....

The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute applicable to a particular entity (Section 1121.110), such as Business and Professions Code Section 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Health & Safety Code § 1339.63(b).

§ 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:

~~1123.630. In addition to any 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."~~

~~1123.640~~ 1123.630. (a) The petition for review of a decision of a state an agency , other than a local agency, in an adjudicative proceeding, and of a decision of any 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 ~~Section 1123.630~~ subdivision (e) 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) A decision of a state agency in~~ 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.

(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) If 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, until 30 days after the record is delivered to the party.

(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 another statute provides a longer period or the time is extended as provided by law."

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

(b) Subject to subdivision (c), 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, rule, charter, or ordinance.

(2) If 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, until 30 days after the record is delivered to the party.

(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 may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the required notice is filed.”

The staff should consider whether the last line in Section 1123.640(d) above — “after the required notice is filed” — should be revised to read “after the time begins to run.” The notice language appears to refer to the California Environmental Quality Act, which has been exempted from this section.

The Comment should refer to the provisions of the Code of Civil Procedure for calculating these time periods. See, e.g., Code Civ. Proc. §§ 12-12b.

§ 1123.820. Administrative record exclusive basis for judicial review

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

1123.820. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all of the following:

....

(7) Any other matter expressly prescribed for inclusion in the administrative record by rules of court adopted by the Judicial Council.

§ 1123.830. Preparation of record

The Commission revised subdivision (c) of, and added subdivision (d) to, Section 1123.830 as follows:

(c) The time limits provided in subdivision (b) may be extended by the court for good cause shown by either or both of the following:

(1) By the court for a reasonable period.

(2) By the agency for a period not exceeding 190 days after the request and payment of the fee and cost provided in Section 1123.910. This paragraph does not apply to review of an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(d) If the agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief for failure to comply with any such order.

§ 1123.850. New evidence on judicial review

The Commission approved the staff recommendation to delete paragraph (2) from subdivision (c) of Section 1123.850:

(c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case in either of the following circumstances:

(1) ~~No if no~~ hearing was held by the agency, and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself. This paragraph subdivision does not apply to judicial review of rulemaking.

(2) ~~Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional.~~

The staff should consider adding to the Comment cases, if there are any, involving a constitutional challenge where the court is authorized to take evidence directly as a matter of constitutional law.

Pub. Res. Code § 21168. Conduct of proceeding

The Commission approved the staff recommendation to restore the existing standard of review language to the California Environmental Quality Act, to read substantially as follows:

In any such proceeding, 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.

STUDY N-300 – ADMINISTRATIVE RULEMAKING

The Commission considered Memorandum 97-12 and its First Supplement concerning interpretive guidelines. The Commission heard public comment on the issues raised by the memorandums, the substance of which is summarized below.

Professor Michael Asimow, Commission Consultant

Professor Asimow spoke on his own behalf. He noted that his views have been stated at length and in detail in articles and memoranda that are before the Commission.

In summary, agencies frequently must interpret the meaning of governing statutes or regulations in order to implement them. Everyone agrees that public participation is important, but agencies typically lack the resources to adopt interpretations through formal rulemaking procedures. It would be better for the regulated community to know an agency's interpretation than for the agency to keep that interpretation a secret. Therefore it makes sense to create an exception to detailed rulemaking procedures for purely interpretive agency guidelines. An interpretive guideline would have no force or effect of law.

Dugald Gillies, Sacramento Nexus

Mr. Gillies has experience as a lobbyist representing clients before administrative agencies. Mr. Gillies spoke on his own behalf.

Practical Effect. Interpretive guidelines have great practical effect, even if they have no legal effect, and should therefore be subject to adoption through formal rulemaking procedures.

An example of an interpretive guideline that has practical effect are the Guidelines for Unlicensed Assistants, distributed by the Department of Real Estate (Exhibit pp. 7-8). Despite their apparent invalidity as underground regulations, many in the regulated community rely on these guidelines in conducting their business.

The guidelines adopted were contrary to those recommended by the committee that heard public comment on the matter. Compliance with formal rulemaking procedure would have improved the result by requiring that the decision to adopt guidelines different from those recommended be explained.

Minor Matters. Some exception to rulemaking procedures might be useful for "minutiae," but should still be subject to public notice, followed by full rulemaking procedures if substantial public interest is expressed.

Any simplified procedures for interpretive guidelines should include a clear definition of matters that may not be adopted as interpretive guidelines (the approach taken in Washington state). Proposed draft language for such a definition was distributed (Exhibit p. 9).

Herb Bolz, Office of Administrative Law

Mr. Bolz spoke on behalf of the Office of Administrative Law.

Agency Adoption of Interpretive Guidelines. Each year more than 10,000 interpretive guidelines are adopted through formal rulemaking procedures as part of an integrated regulatory scheme. As a regulation requires additional interpretation over time an agency can revise its regulation through the rulemaking process.

Judicial Review. One critical feature of any exception for interpretive guidelines is the availability of judicial review to invalidate a rule that was improperly adopted as an interpretive guideline.

Gene Livingston, Livingston & Mattesich

Mr. Livingston has experience in rulemaking as the former head of the Employment Development Department and as the first director of the Office of Administrative Law. He currently represents private clients before regulatory agencies and assists agencies in compliance with rulemaking procedure. Mr. Livingston spoke on his own behalf.

Importance of Rulemaking Procedure. Historically, strict rulemaking procedures were adopted in reaction to a demonstrated tendency on the part of agencies to take the easiest path, to the detriment of public participation and rationalized process.

The regulated community in California is subject to enforcement by agencies and by the public through statutory private rights of action, such as action under Business & Professions Code Section 17200.

Despite agency claims to the contrary, rulemaking procedures are not unduly burdensome. Necessity review helps avoid arbitrary agency action and public participation legitimates the resulting rule, increasing voluntary compliance.

The Commission's experience with the public participation process demonstrates the value of public comment in agency decisionmaking.

No Bright Line Exists. All regulations are interpretations of law. For example, the statutory guidance to Cal-OSHA simply directs the standards board to adopt standards to protect the health and safety of workers. The standards board has adopted thousands of regulations interpreting that general instruction.

No bright line can be established between "big interpretations" and "little interpretations" for which full rulemaking procedures are unnecessary.

Force and Effect of Law. For two reasons, interpretive statements cannot be distinguished from rules simply by declaring that they have no force and effect of law.

First, because the regulated community will often comply with an interpretive statement out of fear that the agency or a member of the public will attempt to enforce the statement despite its nominal lack of legal force and effect. An interpretive statement therefore has de facto force and effect of law.

Second, because courts may defer to an agency interpretive statement despite its lack of legal force and effect. The Asimow-Ogden proposal suggests that courts give an interpretive statement deference in appropriate circumstances (e.g., where an interpretation is long standing or was adopted after careful consideration.) Courts may also use an interpretive statement to construe a statute to counter a defense of vagueness in a criminal prosecution. If a court may grant deference to an interpretive statement then the interpretive statement has actual legal force and effect.

Any proposed simplification of procedures for interpretive statements should expressly prohibit any enforcement of or deference to an interpretive statement.

Safe Harbor. A party who complies with an interpretive statement should not be subject to enforcement for violation of the statute that statement interprets. Many existing interpretive statements expressly declare that the agency is not bound by their terms, providing no estoppel against subsequent agency enforcement. Any proposal permitting interpretive statements should include a safe harbor provision preventing enforcement against those who comply with the interpretive statement.

Alternatives. The choice is not between simplified procedures for interpretive guidelines and agency secrecy as to its interpretations of law. A better alternative is to continue to require that agency interpretive statements be adopted through full rulemaking procedures.

Shannon Sutherland, California Nurses Association

Ms. Sutherland spoke on behalf of the California Nurses Association.

Practical Effect. Interpretive guidelines can be likened to “mom rules.” Just as most teenage children comply with parental rules regardless of whether they are actually enforceable, members of the regulated community will often comply with unenforceable interpretive guidelines because of their apparent authority.

Interpretive guidelines therefore have great practical effect even if technically invalid.

Importance of Procedures. Agency expertise is often overstated. For example, health care regulators often have no current practical experience in the field. Health care is rapidly changing and practitioners are more aware than regulators of these changes. Education of the regulators is an important consequence of public participation.

Alternatives. The choice between agency secrecy and an exception to rulemaking procedures for interpretive guidelines is a false one. A third alternative is for agencies to adopt interpretive guidelines through the existing rulemaking procedure. Noncontroversial interpretations will receive little comment and the process will not be burdensome. Controversial interpretations will properly receive extensive public input, as they should.

Julie Miller, Southern California Edison

Ms. Miller spoke on behalf of Southern California Edison.

Brush-back Letters. An agency can often be dissuaded from attempting to enforce a harmful underground regulation by means of a “brush-back letter.” A brush-back letter is a letter threatening to challenge the validity of an underground regulation in court.

Public Comment Period. Provision of a public comment period in rulemaking is not only important for the information it provides to the rulemaking agency. It also provides the regulated community with time to conform their practice to the pending regulation or to challenge its adoption before it becomes effective.

Publication of Interpretive Guidelines. Any proposed exception to rulemaking procedure for interpretive guidelines should require that interpretive guidelines be published electronically and through the Office of Administrative Law. Existing underground regulations of the Public Utilities Commission are distributed to the legislature only and are not generally available to the public.

Lucy Quacinella, Western Center on Law and Poverty

Ms. Quacinella spoke on behalf of the Western Center on Law and Poverty.

Importance of Public Participation. Public input is important because it educates regulators who may otherwise lack expertise in the subject to be regulated. For example, the Department of Health Services must implement the

transition from MediCal to managed care. The Department has little experience with managed care and can learn much through public comment by health care experts.

Dick Ratliff, California Energy Commission

Mr. Ratliff spoke on behalf of the California Energy Commission.

Scope of Underground Regulations. Underground regulations include a broad range of communications, including phone responses to a request for interpretation of a statute or regulation, formal and informal advice letters, and written interpretive guidelines. It is ironic that these are perceived as problematic because they are often in response to requests from regulated businesses seeking clarification of the law. An agency facing such a request must either adopt an underground regulation or remain silent.

Rulemaking Procedures Cumbersome. Formal rulemaking procedures are very cumbersome. To adopt a new building standard, unopposed by anyone, takes over three years. Non-building standard regulations don't take as long but the process is still slow. A recent statute provided the Energy Commission five months in which to implement the restructuring of the electrical industry. The Commission did so without regulations because regulations could not be adopted in the five-month statutory time frame.

Supports Proposal. Agencies must interpret the meaning of statutes and regulations on a regular basis. Regulatory language inevitably requires reinterpretation in the context of new facts and unforeseen circumstances. Agencies need to be able to communicate their interpretations to the regulated public.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary