
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
AUGUST 12-13, 1999
SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on August 12-13, 1999. It being difficult or impossible to convene at one location a quorum for the meeting, a quorum was convened by teleconference on August 12, 1999.

Commission:

Present: Arthur K. Marshall, Chairperson (Aug. 12, teleconference)
Howard Wayne, Assembly Member, Vice Chairperson
Edwin K. Marzec
Sanford M. Skaggs
Colin Wied

Absent: Bion M. Gregory, Legislative Counsel

Staff: Nathaniel Sterling, Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Julian Davis, Student Legal Assistant

Consultants: Michael Asimow, Administrative Law (Aug. 13)
Gideon Kanner, Eminent Domain Law & Inverse
Condemnation (Aug. 12)
J. Clark Kelso, Trial Court Unification, Administrative
Rulemaking

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento (Aug. 13)
Charles Collier, Pasadena (Aug. 12)
Dorothy Dickey, Coastal Commission, San Francisco (Aug. 13)
Walter Heiser, University of San Diego Law School, San Diego (Aug. 13)
Paula J. Negley, California State Employees Association, Sacramento, Los Angeles
(Aug. 13)
William A. Reich, Division of Labor Standards Enforcement, Ventura (Aug. 13)
Anne Samuelson, Arter & Hadden, Los Angeles (Aug. 13)

1 The action was taken by teleconference on a 5-0 roll call vote, the following
2 Commission members voting aye: Marshall, Marzec, Skaggs, Wayne, Wied.

3 ADMINISTRATIVE MATTERS

4 **Election of Officers**

5 The Commission considered Memorandum 99-43, relating to election of
6 officers. The Commission elected Howard Wayne as Chairperson and Sanford M.
7 Skaggs as Vice Chairperson for the term commencing September 1, 1999.

8 The action was taken by teleconference on a 5-0 roll call vote, the following
9 Commission members voting aye: Marshall, Marzec, Skaggs, Wayne, Wied.

10 **Quorum of Commission**

11 The Commission ratified the revision of the Commission's quorum rules
12 made at the Commission's June 24-25, 1999, meeting, as reported at page 3 of the
13 Minutes of that meeting:

14 **2.4.1. Quorum**

15 Five members of the Commission constitute a quorum, except
16 that:

17 (1) If there are three or four vacancies in the membership of the
18 Commission, four members of the Commission constitute a
19 quorum.

20 (2) If there are five or more vacancies in the membership of the
21 Commission, three members of the Commission constitute a
22 quorum.

23 If a quorum is established at any time during a meeting of the
24 Commission, the Commission may thereafter act for the duration of
25 the meeting notwithstanding the absence of any member who is
26 part of the quorum. Any action may be taken by a majority of those
27 present after a quorum is established, but any final
28 recommendation to the Legislature must be approved by a
29 minimum of ~~four~~ three affirmative votes. ~~The~~

30 The Chairperson is authorized to determine that fewer than five
31 the prescribed number of members constitutes a quorum if a
32 quorum is not otherwise established at a particular meeting and
33 members attending the meeting are entitled to per diem and travel
34 expenses, but in such case the members present act as a
35 subcommittee and no final action may be taken at the meeting.
36 Decisions of a Commission subcommittee may be ratified by the
37 Commission when a quorum is attained, whether at the same
38 meeting or a later meeting.

1 STUDY EM-454 – EMINENT DOMAIN LAW: COMPENSATION FOR LOSS OF GOODWILL

2 The Commission considered Memorandum 99-35, relating to comments on
3 the Commission's tentative recommendation on compensation for loss of
4 goodwill. After discussion of the issue raised by the Business Valuation Section
5 of the Litigation Services Section of the California Society of Certified Public
6 Accountants that a provision be added giving the appraiser discretion as to
7 choice of valuation techniques, the Commission decided to leave the statute
8 silent on this matter. The Commission approved as a final recommendation only
9 the technical changes previously proposed in the tentative recommendation.

10 These decisions were ratified by teleconference on a 5-0 roll call vote, the
11 following Commission members voting aye: Marshall, Marzec, Skaggs, Wayne,
12 Wied.

13 STUDY EM-455 – EMINENT DOMAIN LAW: ATTORNEY FEES

14 The Commission considered Memorandum 99-7 and its First Supplement,
15 relating to the award of attorney fees in eminent domain based on the
16 reasonableness of the final offer and demand of the parties (viewed in light of the
17 evidence admitted and the compensation awarded in the proceeding).

18 After reviewing the development of the law on this point, the Commission
19 concluded that a more "mechanical" approach to an award of attorney's fees
20 would be preferable to the current "reasonableness of the condemnor's actions"
21 approach. To this end, the staff should prepare a draft tentative recommendation
22 to impose litigation expenses on the condemnor if the award exceeds the
23 condemnor's final offer by 25% or more. The staff should attempt to develop data
24 that would enable a reasonable projection of the consequences of such a scheme
25 for acquisition costs of public entities.

26 The Commission decided not to provide special rules for redevelopment
27 condemnations. The Commission also decided not to address the problem of a
28 "lowball" condemnation deposit, raised by Gideon Kanner in the First
29 Supplement to Memorandum 99-7. (This decision is subject to reconsideration if
30 Mr. Kanner should further develop the proposal for later Commission review.)

31 These decisions were ratified by teleconference on a 5-0 roll call vote, the
32 following Commission members voting aye: Marshall, Marzec, Skaggs, Wayne,
33 Wied.

1 **STUDY EM-456 – EMINENT DOMAIN LAW: WITHDRAWAL**
2 **OF PREJUDGMENT DEPOSIT**

3 The Commission considered Memorandum 99-54, relating to withdrawal of a
4 prejudgment condemnation deposit in which a third party may have an interest.
5 The Commission directed the staff to develop a tentative recommendation on
6 this matter that would do the following:

7 (1) Correct the inconsistency in the language of Code of Civil Procedure
8 Section 1255.230(c) between (i) the provision that default of the third party
9 waives rights and (ii) the provision that service on the third party terminates
10 rights.

11 (2) Provide for reimbursement by the condemnor of a loss suffered by the
12 third party if the party has taken all available steps to protect the party's rights. It
13 is contemplated that this situation will rarely arise under the law.

14 These decisions were ratified by teleconference on a 5-0 roll call vote, the
15 following Commission members voting aye: Marshall, Marzec, Skaggs, Wayne,
16 Wied.

17 **STUDY F-910 – EFFECT OF DISSOLUTION OF MARRIAGE**
18 **ON NONPROBATE TRANSFERS**

19 The Commission considered Memorandum 99-48 which presented
20 alternatives to the Commission's recommendation on the Effect of Dissolution of
21 Marriage on Nonprobate Transfers. The Commission decided not to pursue any
22 of the alternatives described in the memorandum. Instead, the staff will attempt
23 to arrange a meeting with the Chair of the Assembly Judiciary Committee to
24 discuss the relationship between the recommendation and the problem of
25 spousal support arrearages.

26 Memorandum 99-48 also presented a draft tentative recommendation relating
27 to the automatic temporary restraining order that takes effect during a
28 proceeding for dissolution or annulment of marriage. The Commission
29 instructed the staff to work with representatives of the family law and estate
30 planning sections of the State Bar to further explore the issues raised in the draft
31 tentative recommendation.

32 **STUDY H-454 – EMINENT DOMAIN LAW: COMPENSATION FOR LOSS OF GOODWILL**

33 See entry in these Minutes under Study Em-454.

1 **STUDY H-455 – EMINENT DOMAIN LAW: ATTORNEY FEES**

2 **See entry in these Minutes under Study Em-455.**

3 **STUDY H-456 – EMINENT DOMAIN LAW: WITHDRAWAL OF PREJUDGMENT DEPOSIT**

4 **See entry in these Minutes under Study Em-456.**

5 **STUDY H-910 – EFFECT OF DISSOLUTION OF MARRIAGE**
6 **ON NONPROBATE TRANSFERS**

7 **See entry in these Minutes under Study F-910.**

8 **STUDY J-1080 – TRIAL COURT UNIFICATION: ELECTION OF JUDGES**

9 **The Commission considered Memorandum 99-47, concerning superior court**
10 **elections. The Commission decided not to propose legislation on the timing of an**
11 **election to fill a superior court vacancy. The matter is already addressed in**
12 **Article VI, Section 16(c), of the state Constitution.**

13 **STUDY J-1300 – TRIAL COURT UNIFICATION: STATUS OF FUTURE STUDY ISSUES**

14 **See entry in these Minutes under Study J-1320.**

15 **STUDY J-1303 – TRIAL COURT UNIFICATION: JURISDICTIONAL**
16 **CLASSIFICATION OF GOOD FAITH IMPROVER CLAIM**

17 **The Commission considered Memorandum 99-56 on jurisdictional**
18 **classification of good faith improver claims. The Commission approved the**
19 **attached draft as a tentative recommendation for distribution for comment.**

20 **STUDY J-1311 – TRIAL COURT UNIFICATION: GRAND JURY ISSUES**

21 **The Commission considered Memorandum 99-46, concerning technical**
22 **defects in provisions relating to selection of a grand jury. As recommended by**
23 **the staff, the Commission decided to consider this matter in its annual review of**
24 **topics and priorities. The staff should investigate whether another entity is**
25 **better-suited to address the issues and problems identified in the memorandum.**

1 STUDY J-1320 – TRIAL COURT UNIFICATION: REVIEW OF CIVIL PROCEDURES

2 The Commission considered Memorandum 99-55, reporting on the
3 Commission's joint study with the Judicial Council on reexamination of civil
4 procedure in light of trial court unification. The Commission discussed different
5 ways of conducting the study and coordinating decision-making with the
6 Judicial Council. To facilitate identification of matters warranting attention in this
7 study, Commissioners should review and provide input on the list of issues and
8 ideas attached to the memorandum (Exhibit pp. 1-8).

9 STUDY L-910 – EFFECT OF DISSOLUTION OF MARRIAGE
10 ON NONPROBATE TRANSFERS

11 See entry in these Minutes under Study F-910.

12 STUDY L-3056 – PROBATE CODE: SELECTED ISSUES

13 The Commission considered Memorandum 99-49 and its First Supplement,
14 relating to selected issues in probate law and procedure. The Commission made
15 the following decisions with respect to the issues dealt with in the memoranda.

16 **Problems in trust litigation.** The staff will continue to gather information on
17 this matter before presenting issues for Commission resolution.

18 **Issues under Probate Code Section 3100 et seq.** The staff will continue to
19 gather information on this matter before presenting issues for Commission
20 resolution.

21 **Community property in joint tenancy form.** The Commission will continue
22 to monitor developments on this matter.

23 **Alternate beneficiaries for unclaimed distribution.** The Commission
24 directed the staff to recirculate the Commission's tentative recommendation on
25 this matter for comment.

26 **Joinder of estates of spouses.** The staff should consider administrative
27 complications that could arise under the proposal to allow joint administration
28 where there are two wills, with different fiduciaries and different dispositive
29 provisions.

30 **Determination or confirmation of property belonging or passing to**
31 **surviving spouse.** The concept of allowing the surviving spouse to probate in the
32 decedent's estate property determined or confirmed to the surviving spouse as

1 set out in the memorandum should be added to the tentative recommendation on
2 probate law and procedure to be circulated for comment.

3 **Duty to account under revocable trust.** The Commission discussed issues
4 surrounding the *Evangelho* case. There was a sense that an accounting should not
5 be required for the period when the settlor acted as sole trustee of a revocable
6 trust. Likewise, an accounting should not be required of a successor trustee for
7 the period before the successor trustee became a trustee.

8 The Commission may also review the language of Probate Code Section 15800
9 et seq., which may be read to imply that beneficiaries of a revocable trust have
10 enforcement rights when the settlor becomes incompetent, rather than when the
11 trust becomes irrevocable. However, there was no consensus on the question
12 whether remedies should be enforceable by beneficiaries acting on behalf of the
13 settlor as well as by others (e.g., a conservator or an agent under a power of
14 attorney). The Commission may leave this issue unaddressed.

15 The staff will prepare a draft tentative recommendation addressing these
16 matters, for Commission review at its next meeting.

17 **STUDY N-300 – ADMINISTRATIVE RULEMAKING**

18 The Commission considered Memorandum 99-51, discussing public comment
19 on the tentative recommendation relating to administrative rulemaking
20 procedures. The Commission instructed the staff to prepare a draft
21 recommendation, with the following changes from the tentative
22 recommendation:

23 **Gov't Code § 11340.5(a). Policy manual exception**

24 The language providing that an agency may not use a policy manual that
25 restates or summarizes its prior advice letters and adjudicative decisions without
26 first adopting it as a regulation should be deleted. The Comment to Section
27 11340.5 should note that the proposed law is not intended to ratify or abrogate
28 the opinion in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996).

29 **§ 11340.9(d). Internal management exception**

30 The proposed modification of the internal management exception will be
31 replaced with language continuing the existing internal management exception.

1 **§ 11340.9(e). Individual advice exception**

2 The provision partially codifying the individual advice exception stated in
3 *Tidewater* should be deleted. The Comment to Section 11340.9 should note that
4 the proposed law is not intended to ratify or abrogate the opinion in *Tidewater* .

5 **§ 11340.9(f). Audit protocol exception**

6 Criteria or guidelines relating to financial “examinations” conducted by the
7 Department of Corporations should be added to the list of matters that may be
8 exempt from rulemaking procedures pursuant to proposed Section 11340.9(f).
9 The staff will work with the California State Employees Association to develop
10 language implementing this decision. The staff will also investigate whether the
11 exemption should apply to material relating to a state-administered test.

12 **§ 11340.9(g). Only legally tenable interpretation exception**

13 Subdivision 11340.9(g) or its Comment will be revised to make clear that the
14 language providing an exception from the rulemaking requirements for an
15 agency interpretation of law that is the only legally tenable interpretation is not
16 intended to imply that all other agency interpretations of law are regulations
17 subject to the rulemaking procedures. The staff will consult with the legal staff of
18 the California Coastal Commission in developing this revision.

19 **§ 11346(b). Pre-adoption communication**

20 The comment to Section 11346(b) should be revised to state that Section
21 11346(b) expresses existing law.

22 **§ 11346.4(b). Extension of duration of notice of proposed action**

23 A note should be added specifically soliciting input on the merits of the
24 proposed provision authorizing an extension for good cause of the effective
25 period of a notice of proposed action.

26 **§ 11349(a). Necessity standard for review of regulations**

27 The provision limiting application of the necessity standard to “major
28 provisions” and “challenged provisions” of a regulation should be deleted. The
29 remaining amendments should be redrafted to preserve existing language to the
30 greatest extent possible.

1 **§ 11349(b)-(f). Regulation review standards**

2 The proposed amendments to Section 11349(b)-(f) should be deleted,
3 preserving the existing language.

4 **§ 11349.3(e). Extension of time for review by the Office of Administrative Law**

5 The provision authorizing an extension for good cause of the time for review
6 of a proposed regulation should be deleted.

7 **§ 11350(d). Record of review in declaratory relief action**

8 The proposed subdivision specifying the record in a proceeding under
9 Section 11350 should be revised to read as follows:

10 11350. ...

11 (d) In a proceeding under this section, a court may only
12 consider the following evidence:

13 (1) The rulemaking file prepared under Section 11347.3.

14 (2) The written statement prepared under paragraph (b) of
15 Section 11346.1.

16 (3) An item that is required to be included in the rulemaking file
17 but is not included in the rulemaking file, for the sole purpose of
18 proving its omission.

19 **Comment. ...**

20 Subdivision (d) is added to clarify the record of review in a
21 proceeding under this section. Subdivision (d)(1) restates part of the
22 substance of the former second paragraph of Section 11350(b)(2),
23 limiting the record of review to the rulemaking file prepared under
24 Section 11347.3. Subdivision (d)(2) permits consideration of an
25 agency statement prepared under Section 11346.1(b) (justifying
26 emergency regulation). Such a statement is not part of a rulemaking
27 file prepared under Section 11347.3. See Section 11346.1(a).
28 Subdivision (d)(3) permits consideration of a document that should
29 have been included in the rulemaking file but was not, in order to
30 prove its omission. Such evidence may be necessary to prove a
31 substantial failure to follow required procedures. For example, an
32 agency's failure to include a public comment in the rulemaking file
33 may constitute a substantial failure to follow required procedures.
34 See Section 11347.3(b)(6) (written public comments must be
35 included in rulemaking file). Proof of such an omission requires
36 consideration of the omitted comment.

37 In addition, a new paragraph should be added, allowing the admission of
38 affidavits to prove that an agency rule is an "underground regulation" — i.e., it
39 should have been adopted as a regulation but was not. Because there is no

1 rulemaking file in such cases, it is necessary to consider other evidence to
2 determine whether a rule used by the agency is subject to the rulemaking
3 procedures. A note should be added, specifically requesting input on whether it
4 is proper to use Section 11350 to challenge an underground regulation and, if so,
5 what evidence should be admissible.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary