

**CALIFORNIA LAW REVISION COMMISSION**

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November 4, 1994

<i>Date:</i>	<b>November 17-18, 1994</b>	<i>Place:</i>	<b>Sacramento</b>
<b>Nov. 17 (Thursday)</b>	<b>10:00 am – 5:00 pm</b>	<b>State Capitol, Room 2040</b>	
<b>Nov. 18 (Friday)</b>	<b>9:00 am – 4:00 pm</b>	<b>Office of Legislative Counsel Lower Level Conference Room 925 L Street</b>	

Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. **If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.**

Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the “California Law Revision Commission”.

**FINAL AGENDA**

*for meeting of the*

**CALIFORNIA LAW REVISION COMMISSION**

1. MINUTES OF SEPTEMBER 22-23, 1994, MEETING  
(sent 10/25/94)

2. ADMINISTRATIVE MATTERS

**Annual Report for 1994**

Memorandum 94-48 (SU) (sent 11/2/94)

**Report of Executive Secretary****Communications from Interested Persons**

3. 1994 LEGISLATIVE PROGRAM

**Final Report**

Memorandum 94-49 (NS) (sent 10/5/94)

4. DEBTOR-CREDITOR RELATIONS: COMMENTS ON TENTATIVE  
RECOMMENDATIONS

**Tentative Recommendations** (sent 10/5/94) (\$8.50)

**Wild Card Exemption (Study D-351)**

Memorandum 94-51 (SU) (to be sent)

**Attachment Where Claim Is Partially Secured (Study D-331)**

Memorandum 94-52 (SU) (to be sent)

**Miscellaneous Debtor-Creditor Issues (Study D-1002)**

Memorandum 94-53 (SU) (to be sent)

5. UNIFORM PRUDENT INVESTOR ACT (STUDY L-648)

**Comments on Tentative Recommendation**

Memorandum 94-55 (SU) (to be sent)

Tentative Recommendation (sent 9/30/94) (\$8.50)

Special  
Order of  
Business:

Thurs.  
1:30 pm

6. ADMINISTRATIVE ADJUDICATION (Study N-100)

**Choice of Drafts for Recommendation to Legislature**

Memorandum 94-50 (NS) (sent 11/3/94) (\$25)

First Supplement to Memorandum 94-50 (to be sent)

**Conforming Revisions**

Memorandum 94-46 (RJM) (sent 11/2/94) (\$8.50)

7. JUDICIAL REVIEW OF AGENCY ACTION

**Mandamus, Venue, and Stays (Study N-203)**

Memorandum 94-54 (NS) (sent 10/25/94) (\$8.50)

Background Study (sent 11/5/93; another copy attached to memorandum)  
(\$18)

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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**NOVEMBER 17-18, 1994**  
**SACRAMENTO**

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A meeting of the California Law Revision Commission was held in Sacramento on November 17-18, 1994.

**Commission:**

*Present:* Daniel M. Kolkey, Chairperson  
Colin Wied, Vice Chairperson  
Christine W.S. Byrd (Nov. 17)  
Allan L. Fink (Nov. 17)  
Edwin K. Marzec (Nov. 18)  
Sanford Skaggs

*Absent:* Tom Campbell, Senate Member  
Terry B. Friedman, Assembly Member  
Bion M. Gregory, Legislative Counsel  
Arthur K. Marshall

**Staff:**

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

**Consultants:**

Michael Asimow, Administrative Law

**Other Persons:**

Larry Alamao, California Department of Real Estate, Sacramento (Nov. 17)  
Herb Bolz, Office of Administrative Law, Sacramento  
Dan Buntjer, Consumer Affairs Department, Sacramento (Nov. 17)  
William M. Chamberlain, California Energy Commission, Sacramento (Nov. 17)  
Karl Engeman, Office of Administrative Hearings, Sacramento  
Margaret Farrow, Office of the Administrative Hearings, Sacramento  
Ellen Gallagher, State Personnel Board, Sacramento (Nov. 17)  
Gary Gallery, Public Employment Relations Board, Sacramento (Nov. 17)  
Bill Heath, California School Employees' Association, San Jose  
Julian C. Isham, Association of Engineering Geologists, Sacramento (Nov. 17)  
Joe Jackson, American Institute of Architects, California Council, Sacramento  
(Nov. 17)  
David Launderville, California Association of Collectors, Sacramento (Nov. 17)  
Susan Lynx, California Nurses' Association, Sacramento (Nov. 17)

Richard Markuson, Consulting Engineers and Land Surveyors of California,  
Sacramento (Nov. 17)  
Charlene Mathias, Office of Administrative Law, Sacramento  
Ronald Mealor, State Teachers' Retirement System, Sacramento (Nov. 17)  
Joel Perlstein, Legal Division, California Public Utilities Commission, San Francisco  
(Nov. 17)  
Joel S. Primes, Office of the Attorney General, Sacramento  
Dick Ratliff, California Energy Commission, Sacramento  
Yvonne M. Renfrew, State Bar Committee on Administration of Justice, Santa  
Monica (Nov. 17)  
Madeline Rule, Department of Motor Vehicles, Sacramento  
Daniel Siegel, Office of the Attorney General, Sacramento (Nov. 17)  
John Sikora, Association of California State Attorneys and Administrative Law  
Judges, Sacramento (Nov. 17)  
Brad Taylor, Assembly Minority Ways and Means Committee, Sacramento (Nov. 17)  
Charles W. Willey, State Bar Committee on Administration of Justice, Santa Barbara  
(Nov. 17)  
James Wolpman, Occupational Safety and Health Appeals Board, Sacramento  
(Nov. 17)

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#### MINUTES OF SEPTEMBER 22-23, 1994, MEETING

The Minutes of the September 22-23, 1994, Commission meeting were approved as submitted by the staff.

#### ADMINISTRATIVE MATTERS

##### **Resignation of Commissioner Kolkey**

Commissioner Kolkey announced his resignation from the Commission as of the first of the year to become the Governor's legal counsel and Legal Affairs Secretary. He made the following remarks:

It has been a great honor to serve on the Commission. It's been a great honor to serve as chair, for a short period of time. I'm sorry that I need to submit my resignation, but I think that it's the best thing in light of my new position.

I want the Commissioners to know that I have not found a better group of people to work with than this group of Commissioners, who I think are really first-rate.

And I want to say to the staff that I think the Law Revision Commission is fortunate to have as devoted, and capable, and as diligent a staff as this. It really allows the Commission to do some very significant, substantial things.

So, I thank both my co-Commissioners and the staff.

Commissioner Wied responded for the Commission:

The feelings of the Commission are reciprocal. We've greatly enjoyed having you here. We congratulate you on your new assignment, but note with great regret that we are not going to be able to have you with us.

### **Report of Executive Secretary**

The Executive Secretary reported on the following matters:

*Relations with Legislature.* The Executive Secretary met with majority and minority consultants to the Assembly Ways and Means Committee to explain the Commission's function. Commissioner Skaggs suggested it might also be possible to arrange a meeting with the Republican Caucus. The staff should send a personal letter to new legislators noting that the Legislature sets the Commission's agenda, and that the Commission is something the legislators should be aware of in case there are issues they think the Commission should address; the letter should enclose material on who we are and how we work.

*Efforts to Obtain Attendance of Local Bar Members.* The Executive Secretary again alerted the local bar leadership to the Commission meeting and invited attendance of persons interested in the topics considered at the meeting, without any noticeable effect. The Commission directed the staff to keep on trying, at least for one more meeting. Commissioner Wied offered to try to help stimulate interest in the San Diego area, where the next meeting will be held, by notifying the county bar association and by feeding information to the legal newspapers. The staff should provide him with material that will be useful for this purpose.

*Trial Court Unification.* The Executive Secretary will cooperate with the California Judges Association working group on implementation of Proposition 191, unifying the municipal and justice courts.

*Jury Instruction on Burden of Proof in Criminal Cases.* Recent cases have cast doubt on the constitutionality of California's criminal jury instruction, and Commissioner Skaggs has suggested the Commission ought to do something about if no one else does. It turns out that both the Department of Justice and the California District Attorneys Association are pursuing this matter, both to correct the CALJIC jury instruction and possibly to revise the underlying statute. The Commission need not get involved in this.

### **Annual Report**

The Commission considered Memorandum 94-48 and the attached draft of the Commission's *Annual Report for 1994*. The Commission approved the report

for printing, subject to the following revisions: The letter of transmittal (p. 908) should note that, based on issues raised by other organizations, any further action on the joint tenancy title on marital property recommendation is being left to the State Bar, and that the SCA 3 report was prepared at the direction of the Legislature. The last sentence of the discussion of the Commission's budget (p. 919) should be deleted. The discussion of Activities of Commission and Staff (pp. 919-20) should mention studies published by Commission consultants and other Commission-related activities by consultants.

### **Handbook of Practices and Procedures**

The staff distributed to Commission members an updated California Law Revision Commission Handbook of Practices and Procedures.

### **1994 LEGISLATIVE PROGRAM**

The Commission considered Memorandum 94-49, containing a final report on the Commission's 1994 legislative program. No action was taken on this item.

The staff noted that we are in the process of printing our report on the Power of Attorney Law as enacted, with hyphens. The staff reported that enrollment and engrossing clerks had deleted the hyphens from the phrase "attorney-in-fact" before sending the bill to the Governor for his signature. The staff's Herculean efforts to restore the hyphenation after the bill was signed and chaptered appear to have been successful.

### **STUDY D-331 – ATTACHMENT WHERE CLAIM IS PARTIALLY SECURED**

The Commission considered Memorandum 94-52 concerning comments on the tentative recommendation on *Attachment Where Claim Is Partially Secured*. The recommendation was approved to print and for submission to the Legislature without change.

### **STUDY D-351 – EXEMPTIONS FROM ENFORCEMENT OF MONEY JUDGMENTS**

The Commission considered Memorandum 94-51 concerning comments on the tentative recommendation on *Exemptions from Enforcement of Money Judgments: Decennial Review*. The Commission approved the recommendation to print and for submission to the Legislature, subject to the following decisions:

**Code Civ. Proc. § 704.220. Wildcard exemption**

The wildcard exemption provision should be deleted from the recommendation. The Commission heard concerns expressed by David Launderville, representing the California Association of Collectors, that the whole amount of the \$5000 wildcard exemption could be added to one of the existing exemptions and defeat creditors in a case where the debtor has only one meaningful asset, such as a motor vehicle worth as much as \$6200. Mr. Launderville stated that most debtors do not claim more than one or two of the dollar amount exemptions. As drafted, the wildcard would disrupt the existing balance between debtors and creditors by permitting exemption of property that has not been given protected status in the past.

**Code Civ. Proc. § 704.010. Motor vehicle exemption**

**Code Civ. Proc. § 704.030. Residential repair materials exemption**

**Code Civ. Proc. § 704.040. Jewelry, heirlooms, works of art exemption**

**Code Civ. Proc. § 704.060. Tools of trade, business, or profession exemption**

**Code Civ. Proc. § 704.100. Life insurance loan value exemption**

Instead of the wildcard exemption, the major monetary exemptions (motor vehicle, jewelry, heirlooms, works of art, tools of trade, life insurance loan value), along with the residential repair materials exemption, would be doubled in amount, to take account of inflation from 1982 to 1992. The doubling is appropriate because the actual rate is in excess of 1.5 or 1.67 (depending on the index used) and by the time the law goes into effect, would be closer to the actual change in the value of the dollar plus an added cushion. Doubling is also appropriate in light of the recent federal legislation doubling the bankruptcy exemption amounts. (The inmate trust fund exemption in Section 704.090 would not be changed.) Mr. Launderville indicated that the California Association of Collectors could accept doubling these exemptions as a realistic change.

**Code Civ. Proc. § 704.080. Social security direct deposits exemption**

The exemption for deposit accounts into which social security funds are directly deposited should be quadrupled to \$2000 and \$3000 respectively.

**Code Civ. Proc. § 703.140. Alternative bankruptcy exemptions**

Now that the federal bankruptcy exemptions have been doubled, it is appropriate to double the California alternative bankruptcy exemptions in Section 703.140. The amounts of the two sets of bankruptcy exemptions were the



same until the recent federal amendments. Without reexamining the advisability of the alternative bankruptcy exemption scheme, these exemptions should be doubled to maintain the coordination of state and federal exemptions.

### **Cash and Deposit Account Exemption**

The possibility of adding an exemption for cash and deposit accounts may be considered in connection with the subject of retirement account exemptions approved for further study at the September meeting.

### **Preliminary Part of Recommendation**

The preliminary part of the recommendation will be redrafted to reflect the substantive revisions and to state the justification for doubling, and circulated for review by Commissioners. The revised recommendation will not be scheduled for consideration at a future meeting unless a Commissioner requests it to be placed on the agenda.

### **STUDY D-1002 – MISCELLANEOUS DEBTOR-CREDITOR ISSUES**

The Commission considered Memorandum 94-52 concerning comments on the tentative recommendation on miscellaneous debtor-creditor issues. The recommendation was approved to print and for submission to the Legislature without change.

### **STUDY L-648 – UNIFORM PRUDENT INVESTOR ACT**

The Commission considered Memorandum 94-55 and the staff draft of a recommendation on the *Uniform Prudent Investor Act*. The Commission approved the draft to print and for submission to the Legislature, subject to the following revisions:

#### **Prob. Code § 16045. Short title and definition**

This section should be revised as follows:

16045. This article, together with subdivision (a) of Section 16002 and Section 16003, constitutes the prudent investor rule and may be cited as the Uniform Prudent Investor Act.

This permits use of the term “prudent investor rule” to encompass the entire article commencing with Section 16045 along with Sections 16002 and 16003, effectively equating the “rule” and the Uniform Prudent Investor Act. Surplus

language, such as “provided in this article” in Section 16046, may be deleted in reliance on the definition in Section 16045.

**Prob. Code § 16050. Investment costs**

The Comment to this section should be expanded in response to the State Bar’s concern that unsophisticated trustees may feel compelled to hire expensive financial advisers. The Comment should make clear that the prudent investor rule places a duty on trustees to avoid unnecessary costs, such as hiring advisers in inappropriate circumstances. Thus, the new rule should not be read to require hiring advisers except where justified by the amount and complexity of the trust assets.

**Prob. Code § 16052. Delegation of investment and management functions**

This section should be revised to clarify the exceptions to the excuse from liability for actions of agents in subdivision (c).

16052. (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in the following:

- (1) Selecting an agent.
- (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.
- (3) Periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation.
- (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated, except where the trustee knows of the agent’s acts or omissions and either conceals the act of the agent, or neglects to take reasonable steps to ~~compel the agent to redress the wrong, or fails to terminate the~~ delegation.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

The clause concerning termination of the delegation, which had been suggested to deal with a concern raised by the State Bar, was not approved. The need to terminate the delegation depends on the circumstances of the case. If termination

of the delegation is required to redress the wrong, then it is already covered by the general language in the section as revised. But it cannot be said as a mandatory rule that the delegation must be terminated in every case.

A similar change (deleting “to compel the agent”) should be made in the general rule in Section 16401.

#### STUDY N-100 – ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 94-50 and its First Supplement, concerning the advantages and disadvantages of the administrative adjudication comprehensive revision and alternate draft, and presenting specific issues in administrative adjudication. The Commission also considered Memorandum 94-46, relating to conforming revisions for administrative adjudication. The Commission made the following decisions on these matters.

##### **Choice of Drafts for Recommendation to Legislature**

After hearing comments from interested persons and further discussion among Commission members, the Commission concluded it would recommend the alternate draft to the Governor and Legislature. The alternate draft would leave existing agency procedures intact, would superimpose an administrative adjudication bill of rights on all agency procedures, would make available to all agencies flexibility-enhancing procedures, and would modernize the 1945 California APA.

The Commission will not finalize its recommendation on administrative adjudication until its January 1995 meeting, after it has reviewed further comments to be provided by the Attorney General and the State Bar Committee on Administration of Justice. In the meantime, a draft should be prepared that incorporates the Commission decisions made at the current meeting, and either a preprint bill or an actual bill should be introduced, as determined by the staff in consultation with legislative members and staffers. The draft will be amended after Commission decisions at the January meeting. The Commission at that time will also decide whether, based on input at the meeting, the recommendation should be pursued as a one-year or two-year bill.

##### **Specific Issues in Draft**

The Commission’s decisions regarding specific issues in administrative adjudication are set forth below. As to issues raised in Memorandum 94-50 and

its First Supplement that the Commission did not discuss, the staff is to implement the staff recommendation.

**§ 11410.20. Application of statute**

The administrative adjudication provisions should not be applied to entities that make decisions under the jurisdiction of state agencies, such as the Escrow Agents' Fidelity Corporation, at this time. This concept may be investigated after the basic statute is enacted.

The Administrative Procedure Act does not apply to the State Bar. See Bus. & Prof. Code § 6001. This should be referenced in a Comment.

**§ 11425.50. Form and contents of decision**

Section 11425.50 should not be revised to incorporate the formulation of Government Code Section 11529(g): A decision must include "findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached."

**§ 11430.30. Permissible ex parte communications from agency personnel**

The Commission confirmed its previous decision to delete the following language from Section 11430.30:

11430.30. A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor shall not receive ~~ex parte communications of a type the presiding officer would be prohibited from receiving, or~~ furnish, augment, diminish, or modify the evidence in the record.

The Commission also considered the concerns of the State Bar Committee on Administration of Justice regarding (1) authority of an agency employee or representative to communicate with the presiding officer concerning a settlement proposal, and (2) permitting cross-examination regarding ex parte communications from nonprosecutorial agency personnel in technical cases. The Commission decided against making the proposed changes.

**§ 11430.80. Ex parte communications between presiding officer and agency head**

The Commission approved the staff recommendation to broadly prohibit ex parte communications between the presiding officer and the agency head. Section 11430.80 should read:

11430.80. (a) There shall be no communication, direct or indirect, regarding any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head.

The Comment should point out that the statute does not restrict the presiding officer and the agency head from communicating with each other on the record.

**§ 11440.30. Hearing by electronic means**

Recognizing the importance of the right of confrontation, the Commission instructed the staff to revise Section 11440.30 substantially as follows:

11440.30. (a) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party shows that ~~a determination in the proceeding will be based substantially on the credibility of a witness and that a hearing by telephone, television, or other electronic means will impair a proper determination of credibility~~ objects .

**§ 11501. Application of chapter**

The Commission decided to delete the listing of agencies set forth in Section 11501 of the Government Code, which is misleading. The Commission directed the staff to investigate the possibility of requiring agencies to include, in the rules of procedure that are made available to parties, a statement regarding whether the proceeding is covered by the Administrative Procedure Act.

**§ 11507.2. Intervention**

The Attorney General opposes the intervention provision, whereas the State Bar Committee on Administration of Justice would expand it to make intervention orders reviewable in court. In light of these conflicting views, the Commission decided to leave the current proposal intact, but to attempt to gather additional information regarding intervention. In the next draft, the staff should solicit comments on whether a right to intervene would be useful.

**§ 11507.3. Consolidation and severance**

The following language was deleted from Section 11507.3(c): “If the agency and administrative law judge make conflicting orders under this section, the agency’s order controls.” The Commission directed the staff to substitute language giving administrative law judges authority over consolidation and severance of proceedings before them. The new language should be more general than the staff’s recommendation in Memorandum 94-50, which reads: “The administrative law judge may reverse an order of the agency or judge under this section on a determination that the consolidation or severance will substantially prejudice the rights of a party.”

**§ 11508. Venue**

The Commission rejected the proposal to allow venue in each place where the Court of Appeal sits, rather than in the cities designated in the Commission’s draft venue provision. The cities designated are places where OAH maintains hearing facilities. Section 11508(a) should be revised as follows to incorporate OAH’s San Diego facility:

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District other than the County of Imperial or San Diego, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or Fifth Appellate District, and in the County of San Diego if the transaction occurred or the respondent resides within the Fourth Appellate District in the County of Imperial or San Diego.

**§ 11511.5. Prehearing conference**

The Commission discussed whether it should be possible to convert a prehearing conference to an informal hearing on the spot. The Commission decided that would be unreasonable. The staff should revise Section 11511.5 to clearly preclude such an immediate conversion, absent consent of the parties.

At a prehearing conference the administrative law judge should be able to convert the proceeding to an informal hearing to be held at another time, subject to consent of the agency and subject to any rights of a party to object to use of the informal hearing procedure. The staff is to redraft Section 11511.5 accordingly.

**§ 11511.7. Mandatory settlement conference**

The State Bar Committee on Administration of Justice opposes allowing the same presiding officer to conduct both a settlement conference and the actual hearing in a case. Due to its decision to proceed with the alternate draft rather than the comprehensive revision, the Commission determined that it was unnecessary to take up this issue.

**§ 11512. Presiding officer; electronic reporting**

OAH should be given control over the method of reporting, rather than the agency, in subdivision (d) of Section 11512:

(d) The proceedings at the hearing shall be reported by a stenographic reporter or electronically, ~~in the discretion of the agency. If an agency elects as determined by the administrative law judge. If the administrative law judge selects~~ electronic reporting of proceedings, (i) ~~the administrative law judge may require stenographic reporting if the judge determines electronic reporting will not provide an adequate record of the proceedings, or~~ (ii) a party may at the party's own expense require stenographic reporting.

**§ 11516. Amendment of accusation after submission of case for decision**

The Commission rejected the proposal to delete Section 11516 (which allows an agency to order amendment of an accusation following submission of the case for decision) in light of comments emphasizing the importance of the provision.

**§ 11517. Decision in contested cases**

Section 11517(c) was revised as follows:

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence. The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.

The Commission discussed Section 11517(d)'s restrictions regarding how long an agency has to decide a case once it receives the proposed decision. Subdivision (d) was revised to read:

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time (i) the agency notifies the parties that the proposed decision is not adopted as provided in subdivision (b) and commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or (ii) the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

In addition, the provision should be further revised to clarify that when an agency commences proceedings to decide a case on the record, it must render its decision within 100 days of receipt of the transcript. Section 11517 should specify



the sanction for failure to meet the 100 day deadlines: the proposed decision is deemed adopted.

### **§ 11519. Restitution**

Section 11519(d) should be simplified as follows:

(d) As used in subdivision (b), specified terms of probation may include an order of restitution which requires the party or parties to a contract damaged as a result of a breach of contract by the party against whom the decision is rendered. In such case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of such breach . Where restitution is ordered and paid pursuant to the provisions of this subdivision, such amount shall be credited to any subsequent judgment in a civil action based on the same breach of contract .

### **Exemption requests; proposed rule of substantial compliance**

The Commission considered but rejected a rule of substantial compliance with the administrative adjudication bill of rights. The bill of rights establishes minimum standards that should not be weakened through a rule of substantial compliance.

The Commission also considered whether it should be possible to override the administrative adjudication bill of rights by statute. The Commission concluded that prohibiting this would be a practical impossibility. In preparing conforming revisions, however, the staff should be aggressive in suggesting repeal of statutes that conflict with the bill of rights.

Further, the bill of rights should be strengthened by adding a guaranty of notice and an opportunity to be heard, including the right to present and rebut evidence.

### **Disciplinary guidelines and other underground regulations**

The Commission considered whether it should be stated expressly that the decision in an administrative adjudication cannot be based on an underground regulation, such as a disciplinary guideline that has not been adopted as a regulation. The Commission concluded that although a prohibition against underground regulations already exists (Gov't Code § 11340.5, formerly § 11347.5), the Administrative Procedure Act should reinforce that prohibition by providing that "[t]he penalty may not be based on a guideline, criterion, bulletin,

manual, instruction, order, standard of general application, or other rule unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).” The Commission deliberately chose the narrower term “penalty,” rather than “decision.” In the Comment, the staff should make clear that a penalty may be based on a precedent decision even though the precedent decision has not been adopted as a regulation. The Comment should also note that a violation of this rule does not automatically require reversal of the decision unless there has been prejudicial error; Professor Asimow agreed to offer language along these lines.

#### **Administrative review as a matter of right**

The Commission rejected the proposal that a party to an administrative proceeding should as a matter of right be entitled to seek reconsideration of an ALJ’s decision by the head of the agency. This proposal is inconsistent with the objective of enhancing flexibility in administrative adjudication.

#### **Hearing costs and attorney fees**

The Commission decided not to get involved in fee allocation provisions relating to administrative adjudication. That might entail undoing recent political compromises that should not be disturbed.

#### **Judicial review costs and attorney fees**

The Commission will consider, in connection with its work on judicial review, Senator Campbell’s suggestion that when a party seeks judicial review of an agency decision and then loses in the review process, the party should be required to pay the agency’s costs and attorney fees pertaining to the judicial review.

#### **Conforming Revisions**

The Commission directed the staff, in developing conforming revisions for the administrative adjudication recommendation, to be aggressive in eliminating conflicts with the recommendation, in the interest of uniformity.

- ☐ **APPROVED AS SUBMITTED**  
☐ **APPROVED AS CORRECTED**  
(for corrections, see Minutes of next meeting)

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Date

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Chairperson

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Executive Secretary