

**CALIFORNIA LAW REVISION COMMISSION**

4000 MIDDLEFIELD ROAD, SUITE D-2  
PALO ALTO, CA 94303-4739  
(415) 494-1335



January 13, 1995

<i>Date:</i> <b>January 26-27, 1995</b>	<i>Place:</i> <b>San Diego</b>
<b>January 26 (Thursday) 10:00 am – 5:00 pm</b>	<b>Office of San Diego County Bar Association</b>
<b>January 27 (Friday) 9:00 am – 4:00 pm</b>	<b>1333 7th Avenue</b>
	<b>(619) 231-0781</b>
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. <b>If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</b></p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the “California Law Revision Commission”.</p>	

**FINAL AGENDA**

*for meeting of the*

**CALIFORNIA LAW REVISION COMMISSION**

**Thursday, January 26, 1995**

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1. **MINUTES OF NOVEMBER 17-18, 1994, MEETING (sent 12/8/94)**

2. **ADMINISTRATIVE MATTERS**

**Election of Officers**

Memorandum 95-1 (NS) (sent 12/8/94)

**Conflict of Interest Code**

Memorandum 95-9 (SU) (to be sent)

**Report of Executive Secretary**

3. **ADMINISTRATIVE ADJUDICATION (Study N-100)**

**Draft of Recommendation**

Memorandum 95-4 (NS) (sent 12/8/94) (\$25.00)

**Comments of Attorney General, State Bar, and Others**

Memorandum 95-8 (NS) (enclosed) (\$8.50)

First Supplement to Memorandum 95-8 (to be sent)

**Conforming Revisions**

Memorandum 95-5 (RJM) (to be sent)

4. JUDICIAL REVIEW OF AGENCY ACTION

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

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

First Supplement to Memorandum 94-54 (enclosed) (\$5.50)

Background Study (sent 11/5/93; another copy attached to memorandum) (\$18.00)

**Friday, January 27, 1995**

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5. POWER OF ATTORNEY LAW

**Followup Legislation** (Study L-3044.01)

Memorandum 95-7 (SU) (to be sent)

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

**Comments of California Bankers Association**

Memorandum 95-3 (SU) (to be sent)

7. UNFAIR COMPETITION (STUDY B-700)

**Initial Policy Considerations**

Memorandum 95-6 (SU) (to be sent)

Consultant's Background Study (attached to memorandum)

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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**JANUARY 26-27, 1995**  
**SAN DIEGO**

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A meeting of the California Law Revision Commission was held in San Diego on January 26-27, 1995.

**Commission:**

*Present:* Colin Wied, Chairperson  
Edwin K. Marzec, Vice Chairperson (Jan. 26)  
Christine W.S. Byrd  
Allan L. Fink  
Sanford Skaggs

*Absent:* 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 (Jan. 26)

**Consultants:**

Michael Asimow, Administrative Law (Jan. 26)  
Robert C. Fellmeth, Unfair Competition Litigation (Jan. 27)

**Other Persons:**

Herb Bolz, Office of Administrative Law, Sacramento (Jan. 26)  
Steven Boudreau, California Trial Lawyers Association, San Diego Trial Lawyers Association, San Diego (Jan. 27)  
Gary Byrd, Studio City, Los Angeles (Jan. 27)  
Cliff Dobrin, San Diego District Attorney's Office, San Diego (Jan. 27)  
Cynthia Doeve, LCSW, San Diego (Jan. 26)  
Karl Engeman, Office of Administrative Hearings, Sacramento (Jan. 26)  
Virginia H. Gaburo, San Diego County Bar Association Legislation Committee, San Diego (Jan. 27)  
Charlene Mathias, Office of Administrative Law, Sacramento (Jan. 26)  
Denise McGuire, San Diego District Attorney's Office, San Diego (Jan. 27)  
David Mundstock, California Energy Commission, Sacramento (Jan. 26)  
Regina A. Petty, San Diego County Bar Association, San Diego (Jan. 26)  
Joel S. Primes, Office of the Attorney General, Sacramento (Jan. 26)  
Robyn Ranke, San Diego District Attorney's Office, San Diego (Jan. 27)  
Madeline Rule, Department of Motor Vehicles, Sacramento (Jan. 26)

Daniel Siegel, Office of the Attorney General, Sacramento (Jan. 26)  
Dennis Stryker, San Diego County Bar Association Legislation Committee, San Diego  
(Jan. 27)  
Alexis W. Willey, Santa Barbara  
Charles W. Willey, State Bar Committee on Administration of Justice, Santa Barbara

CONTENTS	
Minutes of November 17-18, 1994, Meeting.....	2
Administrative Matters .....	2
Election of Officers.....	2
Conflict of Interest Code.....	3
Report of Executive Secretary .....	3
Study B-700 – Unfair Competition.....	4
Study L-648 – Uniform Prudent Investor Act.....	5
Study L-3044.01 – Power of Attorney Law.....	5
Prob. Code § 4753. Request to forego resuscitative measures.....	5
Study N-100 – Administrative Adjudication .....	5
§ 11415.10. Applicable procedure .....	6
§ 11420.30. Confidentiality and admissibility of ADR communications.....	6
§ 11425.10. Administrative adjudication bill of rights .....	6
§ 11425.20. Open hearings.....	6
§ 11425.30. Neutrality of presiding officer.....	7
§ 11425.50. Decision.....	7
§ 11425.60. Precedent decisions.....	7
§ 11430.50. Disclosure of ex parte communication.....	7
§ 11430.80. Communications between presiding officer and agency head .....	7
§ 11445.20. When informal hearing may be used .....	8
§ 11460.10. Application of article .....	8
§ 11460.40. Emergency decision procedure.....	8
§ 11507.2. Intervention.....	8

#### MINUTES OF NOVEMBER 17-18, 1994, MEETING

The Minutes of the November 17-18, 1994, Commission meeting were approved as submitted by the staff.

#### ADMINISTRATIVE MATTERS

##### **Election of Officers**

The Commission considered Memorandum 95-1, relating to election of Commission officers.

The Commission elected Colin Wied as chairperson for the remainder of the term of Daniel Kolkey, who had resigned. The Commission elected Edwin

Marzec as vice chairperson for the remainder of the term of Colin Wied, who was elected chairperson. The terms of office expire August 31, 1995.

The Commission also revised its handbook of practices and procedures as follows:

### **1.1 Officers**

The officers of the Commission are the Chairperson and the Vice Chairperson. The term of office of the Chairperson and Vice Chairperson is one year, commencing on September 1 of each year. *The officers hold office until election of successors.*

*The Vice Chairperson shall act as Chairperson in the absence of the Chairperson or in case of a vacancy in the office of Chairperson. In case of a vacancy in the office of Chairperson, the Commission shall elect new officers for the remainder of the term.*

No officer is eligible to succeed himself or herself in the same office in which the officer has served a full term. However, an officer who has served for less than a full term may succeed himself or herself in the same office for a full term; and, where the Chairperson is reelected to office, the incumbent Vice Chairperson is eligible for reelection even though reelection may result in the Vice Chairperson succeeding himself or herself for another full term.

### **Conflict of Interest Code**

The Commission commenced, but did not complete, consideration of Memorandum 95-9, relating to the Commission's conflict of interest code. The Commission deferred this for resolution until the meeting scheduled for March 1995.

### **Report of Executive Secretary**

The Executive Secretary made the following report:

*Membership of Commission.* The Governor has not yet appointed a replacement for Daniel Kolkey, who resigned as of January 1. The Speaker of the Assembly has not yet appointed a replacement for Terry Friedman, who is no longer a member of the Legislature. The Senate Rules Committee has not yet appointed a replacement for Tom Campbell, who is no longer a member of the Commission. The Commission asked the chairperson to send letters to the appointing authority in the Legislature expressing appreciation for the assistance received from legislative members in the past and encouraging appointment of members who will be able to give the Commission helpful advice, particularly concerning political ramifications of Commission projects.

*Open Meeting Law.* The Open Meeting Law has been amended to allow teleconference meetings, which might offer a means for a Commissioner to participate who cannot otherwise be present. This may be particularly useful to help establish a quorum, if necessary. The Commission felt that in-person attendance is important, and teleconferencing is not desirable for Commission meetings. The Commission decided not to pursue this option, but to keep it in mind in case of an emergency situation.

*Salary Increase of Commission Staff.* The Commission's staff members received salary increases as of January 1, which will come out of the Commission's budget for operating expenses. The Executive Secretary will propose appropriate budget revisions at the March meeting, once the exact impact of the salary increases is known. Actions might include reinstatement of Commissioner waivers of per diem compensation, if necessary.

*Trial Court Unification.* Senator Lockyer has introduced SCA 4, the successor to SCA 3. The new measure incorporates the Commission's recommendations, with some changes. The Commission asked the staff to prepare a comparison of SCA 4 with the Commission's recommendations.

*Income Tax Return Privilege.* The Commission had decided to study the possibility of codifying the income tax return privilege absent action by the State Bar Conference of Delegates on the matter. The Conference of Delegates is pursuing this, and the staff does not propose to put the matter on the Commission's agenda.

#### STUDY B-700 – UNFAIR COMPETITION

Professor Robert C. Fellmeth, a Commission consultant, presented his background study entitled "California's Unfair Competition Act: Conundrums and Confusions." (The background study was attached to Memorandum 95-6.) The Commission listened to the presentation and the discussion of the issues by those present at the meeting. At the next meeting, the Commission intends to consider a draft statute to implement the proposals for revision of the procedures under the unfair competition statute. A draft statute will help focus the discussion of the issues.

STUDY L-648 – UNIFORM PRUDENT INVESTOR ACT

The Commission considered Memorandum 95-3 and the First Supplement concerning comments on the *Uniform Prudent Investor Act* recommendation by the California Bankers Association. The Commission directed the staff to continue to work with CBA to resolve any problems they may have with the proposal, and reaffirmed its November 1994 decision to print the recommendation and submit it to the Legislature.

STUDY L-3044.01 – POWER OF ATTORNEY LAW

The Commission considered Memorandum 95-7 concerning followup legislation to deal with technical problems under the new Power of Attorney Law. The Commission approved the amendments attached to the memorandum, with the following revision:

**Prob. Code § 4753. Request to forego resuscitative measures**

Rather than adding a comma in the first sentence of subdivision (b), the existing comma following “individual” should be removed. As revised, the sentence would read: “A ‘request to forego resuscitative measures’ shall be a written document, signed by (1) the individual or a legally recognized surrogate health care decisionmaker and (2) a physician and surgeon, that directs a health care provider to forego resuscitative measures.”

STUDY N-100 – ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 95-4 and the attached draft of the recommendation on administrative adjudication by state agencies, along with Memorandum 95-8 and its First, Second, and Third Supplements, containing comments on the draft of the recommendation, and Memorandum 95-5, containing conforming revisions to the draft of the recommendation. The Commission also received the letters attached as Exhibit pp. 1-7 during and following the meeting.

The Commission approved the draft of the recommendation and conforming revisions for printing and submission to the Governor and Legislature with the changes proposed by the staff in the memoranda, subject to the following decisions made at the meeting. The staff noted that due to bill drafting and

introduction deadlines, the bill will have to be introduced in the form of the current draft recommendation, with changes made at the meeting amended in later.

**§ 11415.10. Applicable procedure**

The section or Comment should be fleshed out so that it is clear that the provisions on informal hearings and emergency decisions offer an option available to agencies and do not limit or replace other agency procedures for informal or emergency decisionmaking.

**§ 11420.30. Confidentiality and admissibility of ADR communications**

The reference in subdivision (b) to an award in nonbinding arbitration was limited to a decision rejected by a party. The Comment should note that an award in a binding arbitration is not confidential, and reference should be made to the open hearing provisions. The Comment should note the policy of the statute, which is not to restrict access to information but to encourage dispute resolution. The Comment also should note that subdivision (c) applies to arbitrators in both binding and nonbinding arbitration proceedings.

**§ 11425.10. Administrative adjudication bill of rights**

This section should be revised as set out in Memorandum 95-8 to make clear that the administrative adjudication bill of rights is self-executing, and should note that, pursuant to 1 California Code of Regulations Section 100, an agency may conform its regulations by a simplified rulemaking procedure under the Administrative Procedure Act. The simplified rulemaking procedure should also be noted in the Comment to the transitional provisions.

**§ 11425.20. Open hearings**

Subdivision (a) should be rephrased to state the general rule that hearings must be open but that requirement does not limit the authority of the presiding officer to take protective actions, including closing the hearing or other appropriate action, to the extent required by law, including protection of privileged, confidential, and other protected information. Paragraph (a)(2) should be split into two paragraphs.

The reference in subdivision (c) to alternative dispute resolution should exclude binding arbitration.



The Comment should refer to Financial Code provisions that protect information as well as Evidence Code privilege provisions.

**§ 11425.30. Neutrality of presiding officer**

Subdivision (b)(2) was revised to refer to a person who has participated “only” as decisionmaker “or as advisor to a decisionmaker”.

**§ 11425.50. Decision**

Subdivision (a) was revised to read: “The decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.”

The second sentence of subdivision (c) was deleted: “Evidence of record may include supplements to the record that are made after the hearing, provided that all parties are given an opportunity to comment on it.”

**§ 11425.60. Precedent decisions**

The Comment should make clear that a precedent decision may not be used to revise an existing rule or to adopt a rule that has no adequate legislative basis. The staff should consult with the Office of Administrative Law in developing the precise wording of the Comment language.

**§ 11430.50. Disclosure of ex parte communication**

A provision should be added to this section to allow reopening a case in the discretion of the presiding officer to allow a party to address an ex parte communication. The substantive provisions that refer to this section or procedure should be adjusted accordingly.

**§ 11430.80. Communications between presiding officer and agency head**

Subdivision (a) was revised to read:

There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of 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.

The Comment should note that the types of communications identified by OSHAB would be permissible under this standard.

**§ 11445.20. When informal hearing may be used**

The introductory clause of this section should be revised to make clear that the section is subject to Section 11445.30 (selection of informal hearing).

In addition to the other clarifications noted in the First Supplement to Memorandum 95-8, the staff should develop in cooperation with the Office of the Attorney General language for the Comment that makes clear that an informal hearing may be used where the result of a the hearing is imposition of a lesser sanction even though a greater sanction may be imposed in case of failure to comply with the lesser sanction.

**§ 11460.10. Application of article**

The language suggested in Memorandum 95-5 relating to interim suspension orders should not be added to Section 11460.10, but the concept that the emergency decision provisions supplement and do not replace interim suspension order provisions should be worked into Section 11415.10 or its Comment.

**§ 11460.40. Emergency decision procedure**

The Commission rejected the staff proposal to impose as higher burden of proof for issuance of an emergency decision.

**§ 11507.2. Intervention**

This provision should be relocated to the general provisions on administrative adjudication. It should be limited to proceedings where an agency has adopted a regulation that makes it applicable.

**§ 11513. Evidence**

Proposed subdivision (d) was revised to read:

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. ~~On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of this subdivision, whether or not the objection was previously raised in the adjudicative proceeding. An objection is timely if made before submission of the case or on reconsideration.~~

Subdivision (e) should be split into two sections. The staff should raise the issue of a partial or conditional waiver of a privilege in administrative adjudication as a possible topic for study when the Commission next determines its work schedule and priorities.

Cross-references to Section 11513 in Health and Safety Code §§ 25149, 25299.59, and 25375.5 and in Labor Code §§ 146 and 6603 should be supplemented with cross-references to language assistance provisions which until now have been located in Section 11513.

- ☐ 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