

CALIFORNIA LAW REVISION COMMISSION

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



March 17, 1995

<i>Date:</i>	March 30-31, 1995	<i>Place:</i>	Sacramento
March 30 (Thursday)	10:00 am – 5:00 pm	Office of Legislative Counsel 925 L Street, Lower Level	
March 31 (Friday)	9:00 am – 4:00 pm	State Capitol, Room 2040	
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**Thursday, March 30, 1995**

-
1. MINUTES OF JANUARY 26-27, 1995, MEETING (sent 3/6/95)
 2. 1995 LEGISLATIVE PROGRAM
 - Memorandum 95-10 (NS) (sent 3/6/95) (\$8.50)
 3. UNIFORM PRUDENT INVESTOR ACT (STUDY L-648)
 - Comments of California Bankers Association**
 - Memorandum 95-13 (SU) (to be sent)
 4. STATUTE OF LIMITATIONS IN TRUST MATTERS:
 - PROBATE CODE § 16460 (STUDY L-3057)
 - Memorandum 95-16 (SU) (to be sent)

5. INHERITANCE FROM OR THROUGH CHILD BORN OUT OF WEDLOCK
(STUDY L-659.02)

Memorandum 95-17 (RJM) (sent 3/6/95) (\$8.50)

Special
Order of
Business:

1:00 pm

6. UNFAIR COMPETITION (STUDY B-700)

Consultant's Recommendations

Memorandum 95-14 (SU) (sent 3/15/95) (\$8.50)

First Supplement to Memorandum 95-14 (to be sent)

7. TOLLING STATUTES OF LIMITATION (STUDY J-110)

Memorandum 95-15 (BSG) (sent 3/6/95) (\$18.00)

Friday, March 31, 1995

8. ADMINISTRATIVE ADJUDICATION (STUDY N-100)

Issues on SB 523 (Kopp)

Memorandum 95-18 (NS) (to be sent)

9. 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 (sent 1/13/95) (\$5.50)

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

Standing, Timing, and Scope of Review (Study N-201/202)

Memorandum 95-11 (NS) (sent 3/1/95) (\$8.50)

10. ADMINISTRATIVE MATTERS

Budget Considerations

Memorandum 95-12 (NS) (enclosed)

Conflict of Interest Code

Memorandum 95-9 (SU) (sent 1/20/95)

Report of Executive Secretary

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
MARCH 30-31, 1995
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on March 30-31, 1995.

Commission:

Present: Colin Wied, Chairperson
Edwin K. Marzec, Vice Chairperson (Mar. 31)
Christine W.S. Byrd (Mar. 30)
Allan L. Fink
Arthur K. Marshall
Sanford Skaggs

Absent: Bion M. Gregory, Legislative Counsel
Robert E. Cooper

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 (Mar. 31)
Robert C. Fellmeth, Unfair Competition Litigation (Mar. 30)

Other Persons:

Chris Ames, Consumer Law Section, Attorney General's Office, San Francisco (Mar. 30)
Herb Bolz, Office of Administrative Law, Sacramento (Mar. 31)
William M. Chamberlain, California Energy Commission, Sacramento (Mar. 31)
Jan T. Chilton, Severson & Werson, San Francisco (Mar. 30)
Clifford P. Dobrin, San Diego District Attorney's Office, San Diego (Mar. 30)
John Donhoff, Antitrust Section, Attorney General's Office, San Francisco (Mar. 30)
Margaret Farrow, Office of Administrative Hearings, Sacramento (Mar. 31)
Merielle K. Flood, Consumer Law Section, Attorney General's Office, San Francisco (Mar. 30)
Gloriette Fong, Department of Motor Vehicles, Sacramento (Mar. 31)
Fred Kosmo, Association of Business Trial Lawyers, San Diego (Mar. 30)
Charlene Mathias, Office of Administrative Law, Sacramento (Mar. 31)

Bernard McMonigle, Public Employment Relations Board, Sacramento (Mar. 31)
 Frank Murphy, Jr., California Court Reporters Association, California Association of
 State Hearing Reporters, Consumer Attorneys of California, Sacramento
 (Mar. 31)
 Thomas A. Papageorge, Los Angeles District Attorney's Office, Los Angeles
 (Mar. 30)
 Joel S. Primes, Office of the Attorney General, Sacramento (Mar. 31)
 Dick Ratliff, California Energy Commission, Sacramento (Mar. 31)
 Al Shelden, Consumer Law Section, Attorney General's Office, San Diego (Mar. 30)
 Harry Snyder, Consumer's Union of U.S., Inc., San Francisco (Mar. 30)

CONTENTS	
Minutes of March 30-31, 1995, Meeting	3
Administrative Matters	3
Meeting Schedule	3
Budget Considerations	3
Conflict of Interest Code	4
Report of Executive Secretary	4
1995 Legislative Program	4
Study B-700 – Unfair Competition	4
Study J-110 – Tolling Statute of Limitations When Defendant Is Out of State	5
Study L-648 – Uniform Prudent Investor Act	5
Study L-659.02 – Inheritance From or Through Child Born Out of Wedlock	5
Study L-3057 – Statute of Limitations in Trust Matters: Probate Code § 16460	5
Study N-100 – Administrative Adjudication	6
Code of Ethics for Administrative Law Judges	6
Peremptory Challenges	6
Electronic Reporting of Proceedings	6
Administrative Review of Proposed Penalty	6
Study N-201/202 – Judicial Review of Agency Action: Standing, Timing, and	
Scope of Review	6
§ 1121.230. Agency	6
§ 1121.280. Rule	7
§ 1123.130. Ripeness	7
§ 1123.140. Exception to finality and ripeness requirements	7
§ 1123.230. Standing for review of rulemaking	7
§ 1123.240. Private interest standing	7
§ 1123.330. Exceptions to exhaustion of administrative remedies	7
§ 1123.340. Interim review of prehearing determination	8
§ 1123.420. Review of agency interpretation of law	8
§ 1123.430. Review of agency fact finding	8
§ 1123.510. Private interest standing	9
§ 1123.610. Administrative record exclusive basis for judicial review	9
Attorney's fees on judicial review	9
Study N-203 – Judicial Review of Agency Action: Mandamus, Venue, and Stays	9

MINUTES OF MARCH 30-31, 1995, MEETING

The Commission approved the Minutes of the March 30-31, 1995, Commission meeting submitted by the staff with the following changes:

On page 8, line 7, the word “a” was deleted.

On page 8, line 17, “as” was changed to “a”.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission revised its meeting schedule as follows:

April 1995	Los Angeles
April 24 (Mon.)	9:00 am – 5:00 pm
June 1995	San Diego
June 29 (Thur.)	10:00 am – 6:00 pm
June 30 (Fri.)	9:00 am – 4:00 pm
September 1995	San Francisco
Sept. 28 (Thur.)	10:00 am – 5:00 pm
Sept. 29 (Fri.)	9:00 am – 4:00 pm
Nov./Dec. 1995	San Francisco
Nov. 30 (Thur.)	10:00 am – 6:00 pm
Dec. 1 (Fri.)	9:00 am – 4:00 pm

Budget Considerations

The Commission considered Memorandum 95-12 relating to the Commission’s budget. The Commission approved the Executive Secretary’s recommendations for dealing with the budget deficit for the 1994-95, 1995-96, and 1996-97 fiscal years. The Commission also requested the Executive Secretary to send to Commissioners a waiver form for per diems for the 1995-96 fiscal year, so that individual Commissioners may waive their per diems if they so desire to help ameliorate the projected deficit. Depending on the return of the waiver forms, the Executive Secretary may be able to modify some of the recommended actions for dealing with the deficit.

Conflict of Interest Code

The Commission considered Memorandum 94-9 concerning revisions to the Commission's Conflict of Interest Code. The Commission approved the staff recommendations. The Commission also directed the staff to investigate seeking an exemption from the Fair Political Practices Commission from the Form 730 filing requirement on the ground that the Commission is an advisory body whose agenda is controlled by the Legislature.

Report of Executive Secretary

The Executive Secretary reported that no replacements of the legislative members of the Commission have been made yet. The Executive Secretary will make inquiry concerning the status of the appointments.

1995 LEGISLATIVE PROGRAM

The Commission considered Memorandum 95-10, along with an updated chart attached to these Minutes as Exhibit p. 1. No action was taken on this matter.

STUDY B-700 – UNFAIR COMPETITION

The Commission considered Memorandum 95-14 concerning unfair competition, and the First and Second Supplements to the memorandum. The Commission heard the views of its consultant, Prof. Robert Fellmeth, and of other persons in attendance, and received a letter and article from Jan T. Chilton, which were distributed at the meeting. (The letter is attached as Exhibit pp. 2-9.) The Commission directed the staff to prepare a memorandum for consideration at the June meeting, outlining the issues and presenting different approaches for Commission consideration. The staff will prepare this memorandum, or a similar paper, for presentation to the California District Attorneys Association Economic Crimes Conference, scheduled for May 30 through June 2, so that views of public officials engaged in unfair competition litigation can be assessed.

**STUDY J-110 – TOLLING STATUTE OF LIMITATIONS
WHEN DEFENDANT IS OUT OF STATE**

The Commission considered Memorandum 95-15 regarding Section 351 of the Code of Civil Procedure. The Commission directed the staff to prepare a draft of a tentative recommendation calling for repeal of Section 351.

STUDY L-648 – UNIFORM PRUDENT INVESTOR ACT

The Commission considered Memorandum 95-13 concerning comments on the *Uniform Prudent Investor Act* recommendation by the California Bankers Association. The Commission also received a letter from Valerie J. Merritt expressing the approval of the State Bar Estate Planning, Trust and Probate Law Section. (See Exhibit p. 10.) The Commission approved the amendments to SB 222, which would implement the Commission's recommendation, as set out in the memorandum.

**STUDY L-659.02 – INHERITANCE FROM OR THROUGH
CHILD BORN OUT OF WEDLOCK**

The Commission considered Memorandum 95-17 and attached staff draft of a Tentative Recommendation on Inheritance From or Through Child Born out of Wedlock. The Commission approved the proposal.

**STUDY L-3057 – STATUTE OF LIMITATIONS IN TRUST MATTERS:
PROBATE CODE § 16460**

The Commission considered Memorandum 95-16 concerning revision of Probate Code Section 16460, the statute of limitations in breach of trust proceedings. The Commission also received a letter from Valerie J. Merritt expressing the approval of four members of the State Bar Estate Planning, Trust and Probate Law Section. (See Exhibit p. 10.) The Commission approved the proposed amendments as set out in the memorandum and directed the staff to seek an appropriate vehicle for implementing the amendments in the current legislative session.

STUDY N-100 – ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 95-18, relating to issues on SB 523 (Kopp).

Code of Ethics for Administrative Law Judges

The Commission deferred decision on this matter until the Association of California State Attorneys and Administrative Law Judges (ACSA) has an opportunity to provide input on it.

Peremptory Challenges

The Commission approved addition of a peremptory challenge provision to the bill in the form set out in the memorandum, understanding that ACSA has not yet formulated a position on the matter.

Electronic Reporting of Proceedings

The Commission reconfirmed the approach of its recommendation on this matter: The administrative law judge may select stenographic or electronic reporting, with the opportunity of a party to demand stenographic reporting at the party's expense if not selected by the administrative law judge.

Administrative Review of Proposed Penalty

The Commission decided not to pursue the concept of the agency head increasing the proposed penalty without a review of the record.

STUDY N-201/202 – JUDICIAL REVIEW OF AGENCY ACTION: STANDING, TIMING, AND SCOPE OF REVIEW

The Commission considered Memorandum 95-11 and attached draft statute on standing, timing, and scope of review, along with a letter from Professor Asimow, attached as Exhibit pp. 12-14. The Commission made the following decisions:

§ 1121.230. Agency

The staff should review the definition of "agency" to make sure it ties in with Section 1120 (application of title).

§ 1121.280. Rule

The definition of “regulation” in Government Code Section 11342(g) should be preserved. Possibly that definition could be used in the draft statute.

§ 1123.130. Ripeness

§ 1123.140. Exception to finality and ripeness requirements

The Commission approved draft Sections 1123.130 and 1123.140. The staff should preserve the parts of Government Code Section 11350 that are not superseded by the general judicial review statute.

§ 1123.230. Standing for review of rulemaking

The Commission deleted Section 1123.230 from the draft statute. The staff should consider whether the introductory clause of Sections 1123.240 and 1123.250 (“[e]xcept as otherwise provided in this article”) is still necessary.

§ 1123.240. Private interest standing

Section 1123.240 should be rewritten to use the language from Government Code Section 11350 that an “interested person” has standing. The staff should check Professor Asimow’s study to make sure this codifies existing law. The Comment should say it codifies existing law, and that an interested person is one who is adversely affected by the action.

The word “as” should be inserted in the second sentence of the Comment (“as in a case where . . .”).

§ 1123.330. Exceptions to exhaustion of administrative remedies

The staff should make sure subdivision (a) (“remedies would be inadequate”) is consistent with existing law. The Comment to subdivision (a) should cite the cases instead of referring to Professor Asimow’s study. Dick Ratliff of the Energy Commission agreed to send citations.

The provision in Government Code Section 11350, that the right to judicial review is not affected by failure to file a rulemaking petition with the agency (see Gov’t Code § 11340.5), should be preserved. The recommendation should make clear that exhaustion of remedies does not require filing a complaint with OAL that an agency rule is an underground regulation.

§ 1123.340. Interim review of prehearing determination

The Commission deleted Section 1123.340 from the draft statute. The existing Administrative Procedure Act (Gov't Code § 11524) should be conformed to eliminate interim judicial review for denial of a continuance. Similarly, there would be no interim judicial review of discovery orders.

§ 1123.420. Review of agency interpretation of law

The Commission discussed, but did not resolve, a number of issues relating to the standard of review of agency interpretations of law where the agency's own law is involved. Among the options considered were (1) an abuse of discretion standard where a statute delegates determination of questions of law to the agency; (2) a "clearly erroneous" test (Bernard McMonigle of the Public Employment Relations Board agreed to provide citations to some of the labor cases using the "clearly erroneous" standard in judicial review of questions of law, and some alternate statutory language for consideration); (3) greater deference for agency interpretation of statutes expressed through the rulemaking process with attendant public notice and comment or in a carefully crafted opinion in an adjudicative proceeding (this should be elaborated in the Comment; perhaps the abuse of discretion standard is appropriate here); (4) an abuse of discretion standard where a local agency is interpreting an ordinance which it enacted. The staff should determine existing law on these matters.

§ 1123.430. Review of agency fact finding

The Commission deferred deciding questions of the application of the independent judgment and substantial evidence standards, and asked the staff to bring back a draft with alternatives. For review of local agency action, the alternatives could include (1) Professor Asimow's suggestion to use only a substantial evidence test and (2) subdivision (b) in its present form. For review of state agency action, the alternatives could include (1) eliminating the independent judgment rule and applying a substantial evidence test in all cases, and (2) narrowing the independent judgment rule of subdivision (c) to apply only where the case is heard by an ALJ from OAH. The staff should alert the private bar and try to find a representative, such as a city attorney, who can present the views of local agencies.

§ 1123.510. Private interest standing

Subdivision (b) should say the notice of review is filed with the court, not the agency. Subdivision (d) should say the party seeking review files an opening brief, not pleadings. The Commission wanted to avoid multiple step procedures such as filing a notice of appeal, and then filing a separate petition for review. The brief is the document that frames the issues. (An extra step will be necessary if a stay order is needed pending the appeal, with the filing of a petition and supporting declarations.)

§ 1123.610. Administrative record exclusive basis for judicial review

Professor Asimow thought we probably should keep de novo hearings on review of decisions of State Board of Equalization, because that agency's hearing procedures are so defective. If the administrative adjudication bill of rights in SB 532 is enacted, that may improve the Board's procedures and this question can be revisited. There should be no general exception at this point for agencies that now have de novo review.

Attorney's fees on judicial review

The Commission took up the issue of assessment of attorney's fees for unmeritorious appeals, and decided not to become involved in this matter.

**STUDY N-203 – JUDICIAL REVIEW OF AGENCY ACTION:
MANDAMUS, VENUE, AND STAYS**

The Commission considered Memorandum 95-54, First Supplement, and consultant's background study. The Commission approved the basic policy recommendation in Professor Asimow's study to replace California's administrative and traditional mandamus statutes, Code of Civil Procedure Sections 1094.5 and 1085, with straightforward judicial review procedures based on normal rules of civil practice. This would apply to review of state and local agency regulations and formal and informal adjudication.

The question of whether venue for judicial review should be in the Court of Appeal or kept in superior court was deferred pending receipt of statistics from the Attorney General's Office on the number of writs of mandate under CCP 1094.6 filed in superior court, and what percentage of these are appealed to the Court of Appeal. Joel Primes agreed to try to provide these statistics in time for the April meeting. If present superior jurisdiction is to be kept, there was some sentiment for making review of superior court decisions by the Court of Appeal

discretionary with the Court of Appeal. The staff should review *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119 (1913), for possible constitutional limitations on venue.

There should be one standard for obtaining stay orders in place of the various standards in Section 1094.5 of the Code of Civil Procedure. The standard should not turn on whether the agency head did or did not adopt the decision of the administrative law judge. In addition to factors relating to the public interest and likelihood of success on the merits, the court should consider the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties as under the Model Act or for preliminary injunctions in civil practice. A stay for payment of state taxes probably cannot be provided because of limitations in the California constitution. See Cal. Const. Art. XIII, § 32.

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

Date

Chairperson

Executive Secretary