

CALIFORNIA LAW REVISION COMMISSION

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April 13, 1995

<i>Date:</i> April 24, 1995	<i>Place:</i> Los Angeles
April 24 (Monday) 9:00 am – 5:00 pm	Hyatt at Los Angeles Airport Conference Center # 1 6225 W. Century Boulevard (310) 337-1234
<p>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.</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

Monday, April 24, 1995

1. MINUTES OF MARCH 30-31, 1995, MEETING (sent 4/6/95)
2. ADMINISTRATIVE MATTERS

Report of Executive Secretary

3. 1995 LEGISLATIVE PROGRAM

Memorandum 95-19 (NS) (enclosed)

4. ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES (STUDY N-100)

Issues on SB 523 (Kopp)

Memorandum 95-26 (NS) (to be sent)

5. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

Memorandum 95-21 (RM) (to be sent)

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

Draft of Tentative Recommendation

Memorandum 95-20 (BSG) (sent 4/7/95) (\$8.50)

7. DEBTOR-CREDITOR RELATIONS

Retirement Account Exemption (Study D-353)

Memorandum 95-23 (SU) (sent 4/6/95) (\$8.50)

8. REAL PROPERTY COVENANTS

Marketable Title: Obsolete Restrictions (Study H-407)

Memorandum 95-24 (NS) (sent 4/10/95) (\$5.50)

Civil Code § 1464: Covenants That Run With The Land (Study H-600)

Memorandum 95-25 (NS) (sent 4/10/95) (\$8.50)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
APRIL 24, 1995
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on April 24, 1995.

Commission:

Present: Colin Wied, Chairperson
Edwin K. Marzec, Vice Chairperson
Christine W.S. Byrd
Robert E. Cooper
Allan L. Fink
Arthur K. Marshall
Sanford Skaggs

Absent: Bion M. Gregory, Legislative Counsel

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:

William M. Chamberlain, California Energy Commission, Sacramento
Karl Engeman, Office of Administrative Hearings, Sacramento
Gloriette Fong, Department of Motor Vehicles, Sacramento
Clark Kelso, Judicial Council, Sacramento
Bernard McMonigle, Public Employment Relations Board, Sacramento
Joel S. Primes, Attorney General's Office, Sacramento

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MINUTES OF MARCH 30-31, 1995, MEETING

The Minutes of the March 30-31, 1995, California Law Revision Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Meeting Schedule

The meeting scheduled for November 30-December 1, 1995, in San Francisco was changed to December 7-8, 1995.

Legislative Membership of Commission

The Executive Secretary reported that he had spoken with staff of the Senate Rules Committee and the Assembly Speaker’s Office concerning the need to fill the vacancies in the legislative membership of the Commission. The staff members indicate they are aware of the situation and steps are being taken to fill the vacancies. The Commission discussed the possibility of encouraging individual legislators to seek appointment, but took no action on this matter.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 95-19, relating to the status of the Commission’s 1995 legislative program. The staff updated the chart attached to the memorandum with the information that ACR 14 (Rainey) had passed the

Assembly on April 20, that SB 523 (Kopp) was last amended on April 18, and that SB 984 (Kopp) was last amended on April 17.

On SB 832 (Kopp), relating to exemptions from execution, the staff reported that Senator Kopp's office had met with Commission staff, consumer bankruptcy attorneys, and creditor representatives, to try to resolve issues on the bill. The outcome of the meeting was an agreement that the motor vehicle exemption would be set at \$1,900, and that the exemption for a motor vehicle used as a tool of the trade would be limited.

STUDY D-353 – DEBTOR-CREDITOR RELATIONS:
RETIREMENT ACCOUNT EXEMPTION

The Commission considered Memorandum 95-23 concerning the retirement account exemption from enforcement of money judgments. The Commission requested additional information from the staff concerning the limits under federal tax law on contributions to defined benefit plans and deferred consideration of the various options presented in the memorandum until additional background was available. The Commission also expressed an interest in investigating whether a broader revision of the retirement account exemption might be appropriate, instead of focusing on one-person or closely-held corporations.

STUDY H-407 – MARKETABLE TITLE: OBSOLETE RESTRICTIONS

The Commission considered Memorandum 95-24, relating to marketable title issues involved in obsolete restrictions. The Commission approved the attached draft tentative recommendation to distribute for comment, after deleting the reference to a "will" in the definition of a restriction.

STUDY H-600 – CIVIL CODE § 1464 (FIRST RULE IN SPENCER'S CASE)

The Commission considered Memorandum 95-25, relating to repeal of Civil Code Section 1464, which codifies the First Rule in Spencer's Case. The staff was directed to incorporate into the Comment more of the discussion from the memorandum, and to distribute the tentative recommendation for comment as so revised.

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

The Commission considered Memorandum 95-20 and the attached draft of a tentative recommendation calling for repeal of Code of Civil Procedure Section 351. The Commission approved the draft for circulation as a tentative recommendation, with two changes:

(1) Government Code Section 68616(a) should require the court to extend the deadline for service of process when the plaintiff shows that service cannot be accomplished within the deadline despite the exercise of due diligence.

(2) Instead of simply deferring the operative date of the repeals, the transitional provision should differentiate between causes of action accruing before the effective date and causes of action accruing on or after the effective date. For causes of action accruing on or after the effective date, there should be no tolling pursuant to the repealed statutes. For preexisting causes of action there should be a grace period of one year from the effective date: The running of the statute of limitations should be tolled as to any time before or during the grace period during which the tolling requirements of Code of Civil Procedure Section 351 or Vehicle Code Section 17463 were met.

STUDY N-100 – ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

The Commission considered Memorandum 95-26, relating to issues on SB 523 (Kopp), which implements the Commission's recommendation on administrative adjudication by state agencies. The staff reported that the Association of California State Attorneys and Administrative Law Judges has requested the Commission to continue deferring the concept of an ALJ code of ethics until it has an opportunity to respond to it.

The staff noted the existence of AB 1069 (Hauser) which would require a proposed decision of the administrative law judge to become the decision of the agency. If this bill proceeds, we will need to coordinate SB 523 with it in some way. In this connection, the staff noted that the Department of Insurance has requested an amendment to SB 523 to require that all proposed decisions be reviewed and adopted or rejected by the agency head.

The Commission decided to devote further work to the issue of stenographic versus electronic reporting if SB 523 is adopted. In this connection, better data should be obtained from the Office of Administrative Hearings and other

agencies that use electronic reporting. The Judicial Council may have useful information on this matter.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 95-21, the attached staff draft of a judicial review statute, and the First Supplement to Memorandum 95-21. The Commission made the following decisions:

§ 1121.230. Agency

The Commission was concerned that the definition of “agency” in Section 1121.230 might not be broad enough to include local government. The staff should consider whether language in Section 1121.270 (“person” includes “governmental subdivision or unit of a governmental subdivision”) might be useful in Section 1121.230.

§ 1123.110. Requirements for judicial review

The Commission considered the revisions to Section 1123.110 proposed in the First Supplement. The reference to issues presented in the notice of review may have to be revised in light of the Commission’s decision, *infra*, to simplify the notice of review.

Court discretion summarily to refuse judicial review may not work well in superior court because of lack of adequate staff to analyze whether there is a “substantial issue for resolution by the court.”

There may be due process problems with denying judicial review without a hearing. Perhaps summary dismissal should be only on petition, and not on the court’s own motion.

Final resolution of the summary dismissal issue depends partly on what will be the proper court for judicial review.

§ 1123.420. Review of agency interpretation or application of law

The list of factors in subdivision (b) to be considered by the court in determining how much deference to give to an agency determination of law should be removed from the statute and put in the Comment.

Subdivision (c), applicable where a statute has delegated determination of an issue of law to the agency, should be a self-contained provision without the cross-reference to subdivision (a). Subdivision (c) should be drafted more

narrowly. Probably there should not be abuse of discretion review where the agency determines constitutional or jurisdictional issues. It should be made clear under subdivision (c), perhaps in the Comment, that mere authority for an agency to make regulations generally or to implement the statute is not authority to construe the meaning of words in the statute. Cases are cited in Professor Asimow's study.

Bernard McMonigle of the Public Employment Relations Board asked for continuation of the "clearly erroneous" standard of review for determinations of labor law questions by PERB and the Agricultural Labor Relations Board. Professor Asimow agreed to provide citations to U. S. Supreme Court cases using independent judgment review with no deference to NLRB interpretations of labor law. The Commission wanted to know what the labor law rule is before resolving this question.

On bargaining unit questions, the labor law agencies have traditionally had discretionary authority, subject to review only for abuse of discretion. And determinations not to issue a complaint in a labor dispute are not reviewable. These rules should not be overturned.

On application of law to facts, a conforming revision will be needed in Government Code Section 3564(c).

The Commission asked the staff to draft a provision, perhaps in a separate section, for abuse of discretion review of a local legislative body interpreting an ordinance which it has enacted. See *Local and Regional Monitor v. Los Angeles*, 16 Cal. App. 4th 630, 638, 20 Cal. Rptr. 2d 228, 239 (1993).

§ 1123.430. Review of agency fact finding

Section 1123.430(c) should be revised to read:

(c) The standard for judicial review under this section is the independent judgment of the court whether the decision is supported by the weight of the evidence ~~where~~ only if both of the following conditions are satisfied:

(1) The proposed decision is made by an administrative law judge employed by the Office of Administrative Hearings in a formal adjudicative proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(2)

With these revisions, the Commission approved the draft of Section 1123.430.

§ 1123.510. Superior court jurisdiction; venue

§ 1123.520. Court of Appeal jurisdiction; venue

The Commission deferred deciding on the proper court for judicial review until it can review statistics being developed by the Attorney General's Office.

In proposing to replace direct review by the Supreme Court with review by the Court of Appeal, the staff should note that power plant siting decisions of the Energy Commission are now subject to direct review by the Supreme Court (Pub. Res. Code § 25531), in addition to decisions of the Public Utilities Commission and State Bar Court.

In subdivision (a) of Section 1123.520, the reference to Section 1123.530 should be corrected to read 1123.510.

§ 1123.620. Contents of notice of review

If judicial review will be a matter of right, the contents of the notice of review should be simplified to make it more like a notice of appeal. Subdivisions (e) and (f) are especially problematic. Issues in the case should be set out in the opening brief, not in the notice of review. If a stay is sought, grounds for the stay should be set out in the application for the stay.

On the other hand, if the court is to have discretion summarily to decline to grant judicial review (see discussion above), it may be necessary to have detailed allegations in the notice of review.

§ 1123.630. Time for filing notice of review of decision in adjudicative proceeding

The provision in subdivision (b) extending the time to file a notice of review when a party seeks reconsideration may encourage applications for reconsideration where there is no statutory authority or procedure for reconsideration, especially in local government proceedings. Perhaps this should be limited to reconsideration pursuant to express statute or regulation.

It is unclear how the court obtains jurisdiction over the party not seeking judicial review. The staff should consider whether something like a summons should be required to bring the other party before the court. Or perhaps service of an endorsed copy of the notice of review should require a response. Perhaps there should be a document for the other party to file, such as a response or notice of appearance.

Although these procedures appear to be intended as the exclusive means of obtaining judicial review, e.g., replacing declaratory relief, this should be made clearer in the draft.

§ 1123.640. Time for filing opening brief

The rest of the briefing schedule should be provided. Probably rules of court are preferable to statute for this purpose, although the rules should be uniform statewide. Perhaps the staff should draft proposed rules of court on this subject. The staff should consider whether the court for good cause should be able to extend the briefing deadlines. Final resolution of these issues depends on what will be the proper court for review, since there are comprehensive rules for briefs in the Court of Appeal, but generally not in superior court. Perhaps by statute Court of Appeal rules could be applied in superior court.

§ 1123.650. Stay of agency action

Paragraph (1) of subdivision (a) should be revised to say the court may grant a stay if it finds the applicant is “likely to prevail ~~when the court finally disposes of the matter~~ ultimately on the merits.” This is the language of existing law (Code Civ. Proc. § 1094.5(h)).

§ 1123.730. Preparation of record

The time for delivery of the record should be 60 days for adjudicative hearings of longer than 10 days, and 30 days for adjudicative hearings of 10 days or less and for nonadjudicative proceedings.

☐ APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary