

**CALIFORNIA LAW REVISION COMMISSION**

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1/5/96

<i>Date:</i> <b>January 19, 1996</b>	<i>Place:</i> <b>Los Angeles</b>
<b>Jan. 19 (Friday)       9:00 am – 5:00 pm</b>	<b>Conference Center 1 Wyndham Hotel, Los Angeles Airport 6225 West Century Boulevard Los Angeles, CA 90045 Tel: 310-670-9000</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>	
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**FINAL AGENDA***for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Friday, January 19**

1. MINUTES OF DECEMBER 8, 1995, MEETING (sent 12/12/95) (\$5.50)
2. ADMINISTRATIVE MATTERS
  - Schedule of Future Meetings**  
Memorandum 96-1 (NS) (sent 12/12/95) (\$5.50)
  - Report of Executive Secretary**
3. HOMESTEAD EXEMPTION (STUDY D-352)
  - Proceeds Exemption**  
Memorandum 96-2 (SU) (to be sent)
4. UNFAIR COMPETITION (STUDY B-700)
  - Status of Study**  
Memorandum 96-3 (SU) (to be sent)

5. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)  
**Comments on Tentative Recommendation**  
Memorandum 96-4 (RM) (sent 1/5/95) (\$25.00)  
Tentative Recommendation (sent 9/95) (\$18.50)
6. TRIAL COURT UNIFICATION (J-1200)  
**Scope of Study**  
Memorandum 96-5 (NS) (to be sent)
7. COLLECTING SMALL ESTATE WITHOUT ADMINISTRATION (L-1030)  
**Comments on Tentative Recommendation**  
Memorandum 96-6 (RM) (sent 1/5/95) (\$5.50)  
Tentative Recommendation (sent 11/95) (\$5.50)
8. 1996 LEGISLATIVE PROGRAM  
Memorandum 96-7 (NS) (to be sent) (\$5.50)

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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**JANUARY 19, 1996**  
**LOS ANGELES**

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A meeting of the California Law Revision Commission was held in Los Angeles on January 19, 1996.

**Commission:**

*Present:* Colin Wied, Chairperson  
Allan L. Fink, Vice Chairperson  
Christine W.S. Byrd  
Arthur K. Marshall  
Sanford M. Skaggs

*Absent:* Robert E. Cooper  
Bion M. Gregory, Legislative Counsel  
Quentin L. Kopp, Senate Member  
Edwin K. Marzec

**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  
Robert C. Fellmeth, Unfair Competition Litigation

**Other Persons:**

Ken Babcock, Public Counsel, Los Angeles  
Herb Bolz, Office of Administrative Law, Sacramento  
Bill Chamberlain, California Energy Commission, Sacramento  
Karl Engeman, Office of Administrative Hearings, Sacramento  
Steven Gourley, attorneys who appear before the Department of Corporations and the Department of Real Estate, Culver City  
Bill Heath, California School Employees' Association, San Jose  
John Higgins, California Family Support Council, Visalia  
Earl Lui, Consumers Union, San Francisco  
Alan M. Mansfield, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego  
Bernard McMonigle, Public Employment Relations Board, Sacramento  
Thomas A. Papageorge, California District Attorneys Association, Los Angeles

Joel Perlstein, California Public Utilities Commission, San Francisco  
Steven Pingel, Consumer Attorneys of California, Seal Beach  
Joel S. Primes, Attorney General's Office, Sacramento  
Madeline Rule, Department of Motor Vehicles, Sacramento  
Daniel Siegel, Attorney General's Office, Sacramento  
Tom Sobel, Agricultural Labor Relations Board, Sacramento  
Bruce Telkamp, Coalition for Responsible Administration of Proposition 65, Los Angeles  
Mark Thompson, Los Angeles Daily Journal, Los Angeles  
Daniel Wax, Coalition for Responsible Administration of Proposition 65, Los Angeles

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## MINUTES OF DECEMBER 8, 1995, MEETING

The Commission approved the Minutes of the December 8, 1995, Commission meeting, as submitted by the staff.

## ADMINISTRATIVE MATTERS

### Schedule of Future Meetings

The Commission considered Memorandum 96-1, concerning the schedule for future Commission meetings. The Commission adopted the following schedule for 1996:

<b>February 1996</b>	<b>Sacramento</b>
Feb. 22 (Thu.)	9:00 am – 5:00 pm
<b>April 1996</b>	<b>Sacramento</b>
Apr. 12 (Fri.)	9:00 am – 5:00 pm

<b>May 1996</b>	<b>Sacramento</b>
May 9 (Thu.)	9:00 am – 5:00 pm
<b>June 1996</b>	<b>Sacramento</b>
June 14 (Fri.)	9:00 am – 5:00 pm
<b>July 1996</b>	<b>Sacramento</b>
July 11 (Thu.)	9:00 am – 5:00 pm
<b>September 1996</b>	<b>Sacramento</b>
Sept. 12 (Thu.)	9:00 am – 5:00 pm
<b>October 1996</b>	<b>Long Beach</b>
Oct. 10 (Thu.)	9:00 am – 5:00 pm
<b>November 1996</b>	<b>Sacramento</b>
Nov. 14 (Thu.)	9:00 am – 5:00 pm
<b>December 1996</b>	<b>Sacramento</b>
Dec. 12 (Thu.)	9:00 am – 5:00 pm

An individual Sacramento meeting is subject to relocation to Los Angeles if administrative law issues will not be considered at that meeting.

#### 1996 LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-7, relating to the Commission's legislative program for 1996. The staff updated the chart attached to the memorandum with the information that SB 392 (Senate Judiciary Committee) has been approved by the Senate Judiciary Committee, and that SB 794 (Kopp) has been approved by the Senate Governmental Organization and Insurance Committees.

In connection with its consideration of the legislative program, the Commission took action on the following matters, reported elsewhere in these Minutes:

Homestead Exemption (Study D-352)

Inheritance From or Through Child Born Out of Wedlock (Study L-659.02)

Collecting Small Estate Without Administration (Study L-1030)

Statute of Limitations in Trust Matters (Study L-3057)

#### STUDY B-700 — UNFAIR COMPETITION

The Commission considered Memorandum 96-3, and the First, Second, and Third Supplements to the memorandum, concerning the issue of whether to continue with the unfair competition litigation study. The Commission heard the views of persons attending the meeting on this issue. The Commission decided to continue with the study. Continuation of the study does not predetermine its outcome. The Commission may recommend statutory revisions or may conclude that no changes are needed or practicable. The staff will prepare a new draft statute for consideration at the next meeting, in consultation with the Commission's consultant, Prof. Robert C. Fellmeth.

#### STUDY D-352 — HOMESTEAD EXEMPTION

The Commission considered Memorandum 96-2 and the First Supplement thereto concerning additional changes in the recommendation on the *Homestead Exemption*. The Commission approved the approach of the draft set out in the memorandum, with several changes.

The language of Section 704.720 needs to be expanded to cover the case where the debtor has received the proceeds before the creditor's lien attaches, such as in a case where there is no judgment lien on the home and the creditor levies on the proceeds of sale in a deposit account. The exemption of proceeds may be claimed after a levy but the debtor will have to deposit the proceeds in court to qualify the proceeds for protection, unless otherwise agreed by the parties. If the debtor or someone else has received the proceeds from sale of the property, and the creditor levies on the proceeds, the exemption is not lost because the debtor did not first deposit the proceeds into court. Subdivision (e) of Section 704.720 will need to be revised substantially as follows:

(e) ~~Unless otherwise agreed by the judgment debtor and judgment creditor, proceeds exempt or claimed to be exempt~~ An exemption may be claimed for proceeds under this section shall be only if the proceeds are deposited with the court, except as otherwise agreed by the judgment debtor and judgment creditor. At any time during the applicable six-month exemption period provided in subdivision (b), the court shall, on noticed motion of the judgment debtor, make an order applying the proceeds to the purchase of another dwelling ~~in this state~~ that qualifies for a homestead exemption under this article. Unless the judgment debtor purchases another dwelling ~~in this state~~ that qualifies for a

homestead exemption under this article during the six-month exemption period, the court, on noticed motion, shall order the proceeds applied to the satisfaction of the judgment.

In subdivision (b)(1), applicable to proceeds from an execution sale, insurance, or condemnation, the six-month exemption period should run from *either* the date proceeds are actually received or become payable to the debtor in an amount certain, whichever is the earlier time.

The special rule in subdivision (d) governing the proceeds exemption in the case of support enforcement should be revised to provide that the debtor may obtain an equitable allocation of the exemption only where the debtor has other obligations for child, family, or spousal support. The effect of this limitation is that the debtor would not qualify for an equitable allocation based solely on the debtor's own claimed needs. The Commission decided not to adopt the factors drawn from the Oregon statute as set out in the First Supplement.

The staff will prepare amendments to implement these decisions for review at the next meeting, but the bill (SB 1368) may be amended before the next meeting if necessary to meet legislative schedules.

The staff is to continue to seek the input of the title companies to make sure that the procedure is technically practicable in the case of a sale of a home that is subject to a judgment lien.

#### STUDY J-1200 — TRIAL COURT UNIFICATION

The Commission considered Memorandum 96-5, relating to trial court unification. The Commission decided to continue to defer work on this matter until it receives further direction from the Legislature.

#### STUDY L-659.02 — INHERITANCE FROM OR THROUGH CHILD BORN OUT OF WEDLOCK

In connection with its consideration of the Legislative Program, the Commission considered the Second Supplement to Memorandum 96-7, relating to inheritance from or through a child born out of wedlock. The Commission decided to make no change in this recommendation. The staff reported that this proposal may be combined with minor State Bar probate proposals in an omnibus probate bill.

**STUDY L-1030 — COLLECTING SMALL ESTATE WITHOUT ADMINISTRATION**

The Commission considered Memorandum 96-6, reporting comments on the tentative recommendation on collecting small estates without administration. The staff reported that this proposal has been made part of the Senate Judiciary Committee's omnibus probate bill for 1996. The Commission approved the proposal as a final recommendation.

**STUDY L-3057 — STATUTE OF LIMITATIONS IN TRUST MATTERS**

In connection with its consideration of the Legislative Program, the Commission considered the First and Third Supplements to Memorandum 96-7, relating to the statute of limitations in trust matters. The Commission decided to make no change in this recommendation. The staff reported that this proposal may be combined with minor State Bar probate proposals in an omnibus probate bill.

**STUDY N-200 — JUDICIAL REVIEW OF AGENCY ACTION:  
COMMENTS ON TENTATIVE RECOMMENDATION**

The Commission considered Memorandum 96-4 and First Supplement. The Commission made the following decisions:

**Agencies to Which Statute Applies**

The Commission approved the staff recommendation to exempt the State Bar Court from the draft statute. The Commission deferred the question of whether to exempt the Public Utilities Commission and Energy Commission pending legislative action on Senate Bill 1322.

**§ 1120. Application of title**

The Commission approved the staff recommendation to revise subdivision (b) of Section 1120 as follows:

1120. (a) . . . .

(b) This title does not govern or apply where a statute provides for judicial review of agency action by any either of the following means:

(1) A trial de novo, including an action for refund of taxes under the Revenue and Taxation Code.

(2) An action under Division 3.6 (commencing with Section 810) of the Government Code.



~~(3) An action for refund of taxes under Chapter 5 (commencing with Section 5096) of Part 9 of Division 1 of, or Article 2 (commencing with Section 6931) of Chapter 7 of Part 1 of Division 2 of, the Revenue and Taxation Code.~~

(c) This title does not govern or apply to judicial review of action of a nongovernmental entity, except a decision of a private hospital board in an adjudicative proceeding.

(d) This title does not govern litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(e) This title does not govern a proceeding under Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

(f) This title does not govern judicial review of a decision of a court.

#### **§ 1121.110. Conflicting or inconsistent statute controls**

The staff should add language to the Comment to Section 1121.110 to make clear that “statute” does not include a local ordinance. See Cal. Const. Art. IV, § 8(b) (statute enacted only by bill in the Legislature); *id.* Art. XI, § 7 (local ordinance).

#### **§ 1121.150. Operative date; application to pending proceedings**

##### **Uncodified. Operative date; application to pending proceedings**

The two operative date provisions should be revised as follows:

1121.150. (a) Except as provided in this section, this title becomes operative on January 1, 1998 1999.

(b) This title does not apply to a proceeding for judicial review of agency action pending on the operative date, and the applicable law in effect continues to apply to the proceeding.

(c) On and after January 1, 1997 1998, the Judicial Council may adopt any rules of court necessary so that this title may become operative on January 1, 1998 1999.

SEC. \_\_\_\_ (a) Except as provided in this section, this act becomes operative on January 1, 1998 1999.

(b) This act does not apply to a proceeding for judicial review of agency action pending on the operative date, and the applicable law in effect continues to apply to the proceeding.

(c) On and after January 1, 1997 1998, the Judicial Council may adopt any rules of court necessary so that this act may become operative on January 1, 1998 1999.

**§ 1121.280. Rule**

The staff should consult with the Office of Administrative Law to draft a satisfactory definition of “rule,” taking into account the comments of the Department of Health Services and Energy Commission. The staff should bring back a revised draft.

**§ 1122.030. Concurrent agency jurisdiction**

The Commission approved the staff recommendation in the First Supplement to add a new subdivision (b) to Section 1122.030 as follows:

(b) This section does not apply to a criminal proceeding. Nothing in this section confers concurrent jurisdiction on a court over the subject matter of a pending disciplinary proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

The first paragraph of Section 1122.030 should be designated as subdivision (a), and subdivisions (a) through (g) should be redesignated as paragraphs (1) through (7).

**§ 1123.120. Finality**

The Commission approved the staff recommendation to add “typically” to the third sentence of the Comment to Section 1123.120

Agency action is typically not final if the agency intends that the action is preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

**§ 1123.140. Exceptions to finality and ripeness requirements**

The Commission asked the staff to redraft the proposal in the First Supplement simply to prohibit an action to enjoin a rulemaking proceeding. This would continue *State Water Resources Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 707-708, 16 Cal. Rptr. 2d 25 31-32 (1993). The staff should consult with the Office of Administrative Law and bring back revised language.

**§ 1123.220. Private interest standing**

The Commission approved the staff recommendation to revise the Comment to Section 1123.220 as follows:

It should be noted that the standing of a person to obtain judicial review under this section is not limited to private persons, but extends to public entities as well, whether state or local. See Section 1121.270 ("person" includes governmental subdivision). See also Bus. & Prof. Code § 23090 (Department of ABC may get judicial review of decision of ABCAB); Veh. Code § 3058 (DMV may get judicial review of order of New Motor Vehicle Board); Martin v. Alcoholic Beverage Control Appeals Bd., 52 Cal. 2d 238, 243, 340 P.2d 1, 4 (1959) (Department of Alcoholic Beverage Control could get judicial review of decision of Alcoholic Beverage Control Appeals Board); Tieberg v. Superior Court, 243 Cal. App. 2d 277, 283, 52 Cal. Rptr. 33, 37 (1966) (Director of Department of Employment could get judicial review of decision of Unemployment Insurance Appeals Board, a division of that department); Los Angeles County Dep't of Health Serv. v. Kennedy, 163 Cal. App. 3d 799, 209 Cal. Rptr. 595 (1984) (county department of health services could get judicial review of decision of county civil service commission); County of Los Angeles v. Tax Appeals Bd. No. 2, 267 Cal. App. 2d 830, 834, 73 Cal. Rptr. 469, 471 (1968) (county could get judicial review of tax appeals board decision); County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 471, 18 Cal. Rptr. 573, 575 (1962) (county could get judicial review of State Social Welfare Board decision ordering county to reinstate welfare benefits); Board of Permit Appeals v. Central Permit Bureau, 186 Cal. App. 2d 633, 9 Cal. Rptr. 83 (1960) (local permit appeals board could get traditional mandamus against inferior agency that did not comply with its decision). This reverses a contrary case law implication. See But cf. Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1, 719 P.2d 987, 227 Cal. Rptr. 391 (1986) (city or county standing to challenge state action as violating federal constitutional rights); cf. County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 18 Cal. Rptr. 573 (1962).

### **§ 1123.230. Public interest standing**

The Commission considered the Attorney General's suggestion to limit public interest standing to selected areas, such as proceedings to vindicate environmental, consumer, and civil rights protections. The Attorney General is concerned about attorneys' fees that may be awarded under Code of Civil Procedure Section 1021.5. Dan Siegel agreed to suggest language to do this for Commission consideration.

The Commission revised subdivision (c) of Section 1123.230 substantially as follows:

1123.230. A person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest if all of the following conditions are satisfied:

....

(c) The person has previously served on requested the agency a written request to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the record in the agency proceeding. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm. This subdivision does not apply to judicial review of an agency rule.

The Comment should say the requirement of a request to the agency does not supersede the California Environmental Quality Act, citing Section 1121.110 (conflicting or inconsistent statute controls).

**§ 1123.240. Standing for review of decision in adjudicative proceeding**

The Commission noted that the staff has written to the Department of Health Services requesting a statutory citation to the proceedings DHS wants excepted from the provision giving standing to a “participant.”

**§ 1123.330. Judicial review of rulemaking**

The Commission approved the staff recommendation to revise Section 1123.330 as follows:

1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person’s failure to do either of the following:

(a) ~~Petition~~ petition the agency promulgating the rule for, or otherwise seek, amendment, repeal, or reconsideration of the rule.

(b) ~~Object to a state agency that a rule of that agency was not submitted for review to the Office of Administrative Law, or that the agency failed to comply with~~ A person may obtain judicial review of an agency’s failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person’s failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.

The Comment should say the petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

**§ 1123.340. Exceptions to exhaustion of administrative remedies**

There was Commission sentiment to excuse failure to exhaust administrative remedies if the person lacked notice of the proceeding, but not if the person lacked notice of the availability of a remedy. In such a case, the court should remand to the agency for further proceedings. Mr. Siegel of the Attorney General's Office agreed to suggest language.

**§ 1123.420. Review of agency interpretation or application of law**

The Commission approved the staff recommendation to revise subdivision (c) of Section 1123.420 as follows:

1123.420. (a) . . . .

(c) The standard for judicial review under this section of the following agency action is abuse of discretion:

(1) An agency's interpretation of a statute, where a statute expressly delegates that function to the agency primary authority to interpret the statute and expressly provides that the delegation is for the purpose of this section.

(2) An agency's application of law to facts, where a statute expressly delegates that function to the agency primary authority to apply the statute and expressly provides that the delegation is for the purpose of this section.

(3) An agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to effectuate the purpose of the statute that authorizes the regulation.

(3) (4) A local legislative body's construction or interpretation of its own legislative enactment.

The staff should consider whether express language should be added to subdivision (c) to limit abuse of discretion review to cases where the court finds the statute or legislative enactment ambiguous. Professor Asimow believes this to be existing law.

The Commission approved abuse of discretion review of agency interpretation or application of substantive statutes within its expertise only for the three labor law agencies — Public Employment Relations Board, Agricultural Labor Relations Board, and Workers' Compensation Appeals Board. This would be justified on the basis that the Legislature wants labor law matters resolved expeditiously and definitively. The delegation language would read substantially as follows, but should be revised to exclude procedural rules not within agency expertise, such as what constitutes a "quorum":

For the purpose of Section 1123.420 of the Code of Civil Procedure, the board is delegated primary authority to interpret and apply this [“chapter” for PERB, “part” for ALRB, “division” for WCAB].

The Commission deferred the question of whether to give the Public Utilities Commission and Energy Commission a delegation of authority to construe its statute for the purpose of application of law to fact, pending legislative action on SB 1322. However, if such a delegation is to be considered, it should be limited to the question of reasonableness of rates.

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.420:

Agency application of law to facts should not be confused with basic fact-finding. Typical findings of facts include determinations of what happened or will happen in the future, when it happened, and what the state of mind of the participants was. These findings may be subject to substantial evidence review under Section 1123.430 or 1123.435. After fact-finding, the agency must decide abstract legal issues that can be resolved without knowing anything of the basic facts in the case. Finally, the agency must apply the general law to the basic facts, a situation-specific application of law which will be subject to independent judgment review under Section 1123.420. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1211-12 (1995).

Agency application of law to facts should not be confused with an exercise of discretion that is based on a choice or judgment. See the Comment to Section 1123.440. Typical exercises of discretion include whether to impose a severe or lenient penalty, whether there is cause to deny a license, whether a particular land use should be permitted, and whether a corporate reorganization is fair. Asimow, *supra*, at 1224. The standard of review for an exercise of discretion is provided in Section 1123.440.

The last paragraph of the Comment to Section 1123.420 should be revised as follows:

Subdivision (c)(1) codifies the rule that, where the legislature has expressly delegated authority to the agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. See, e.g., *Henning v. Division of Occupational Safety & Health*, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990). But The requirement that the statute must expressly

provide that the delegation is for the purpose of this section makes clear that mere authority for an agency to make regulations generally or to implement a statute is not in itself a delegation of authority to construe the meaning of words in the statute. And a delegation of authority to construe a statute is not to be implied merely because the statute is ambiguous. Subdivision (c)(1) applies only when a statute expressly delegates to the agency the power to interpret particular statutory language. See Asimow, *supra* at 1198. The same rule applies under subdivision (c)(2). For statutes delegating authority to interpret or apply a statute, see Gov't Code §§ 3520, 3542, 3564 (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5954 (Workers Compensation Appeals Board). The absence of a delegation of authority to an agency to interpret or apply its statute should not be construed to weaken the deference appropriate under subdivision (b) to the agency interpretation or application.

There was no Commission sentiment to reconsider abuse of discretion review for a local legislative body's interpretation of its own legislative enactment.

**§ 1123.430. Review of agency fact finding**

**§ 1123.435. Review of fact finding in local agency adjudication**

The Commission asked the staff to revise subdivision (b) of Section 1123.435 (set out in the Memorandum) to limit independent judgment review of local agency adjudication to employment actions to which independent judgment now applies (especially termination and discipline, drivers' licensing, and possibly pension cases), and not to expand independent judgment review to apply to cases now subject to substantial evidence review. Independent judgment should not apply, for example, to environmental cases or to business regulation.

The Comment to Section 1123.435 should say that independent judgment review of fact-finding under subdivision (b) only applies to a local agency "decision" — action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person, and not to action of general application, such as quasi-legislative action. See Section 1121.250. For local agency action that is not a "decision," substantial evidence review will apply under Section 1123.430.

Mr. Heath of the California School Employees Association agreed to suggest possible additions to local agency procedures to obtain substantial evidence review under subdivision (c) of Section 1123.435 for Commission consideration at the next meeting. These may include some limitation on what a board can do

when reviewing a decision of a hearing officer (*cf.* Gov't Code § 11517), and no increase in penalty in an employee discipline case unless the local agency reviews the entire record.

**§ 1123.450. Review of agency procedure**

The Commission approved the staff suggestion to add the following to the Comment to Section 1123.450:

The degree of deference to be given to the agency's determination under subdivision (c) is for the court to determine. This deference is not absolute. Ultimately, the court must still use its own judgment on the issue.

**§ 1123.510. Superior court proper court for judicial review**

The Commission approved the staff suggestion to add a new subdivision (b) to Section 1123.510:

1123.510. (a) Except as otherwise provided by statute, the superior court is the proper court for judicial review under this chapter.

(b) Nothing in this section prevents the Supreme Court or courts of appeal from exercising original jurisdiction under Section 10 of Article VI of the California Constitution.

The statement in the Comment that the superior court is the proper court for judicial review "whether or not issues of great public importance are involved" should be deleted. The Comment should say that, although the Supreme Court and courts of appeal may exercise original mandamus jurisdiction in exceptional circumstances, the superior court is in a much better position to determine questions of fact than is an appellate tribunal and is therefore the preferred court, citing *Roma Macaroni Factory v. Giambastiani*, 219 Cal. 435, 437, 27 P.2d 371 (1933).

The Commission was inclined to authorize the practice of some health care providers of suing in small claims court for payment of a denied claim. The Commission noted that the staff has asked the Department of Health Services for a citation to the statute that gives it authority to determine these claims. Such a statute would require a health care provider to use judicial review to challenge denial of a claim, rather than suing in small claims court. The Commission wanted to know the nature of the cause of action when a health care provider sues the state for payment, whether on contract, tort, statute, or something else.



Mr. Bolz said DHS has an internal administrative procedure for appealing a denied claim which may have to be exhausted before judicial review. Also, the Commission noted the California Tort Claims Act applies to some contract claims. The staff should report back after DHS responds.

**§ 1123.520. Superior court venue**

The Commission decided to add Sacramento County to the counties in which venue is proper (county where cause of action arose) in a case involving state agency action.

**§ 1123.610. Petition for review**

The Commission approved the staff suggestion to revise Section 1123.610 as follows:

1123.610. (a) A person seeking judicial review of agency action may initiate judicial review by filing a petition for review with the court.

(b) The petition shall name as respondent only the agency whose action is at issue, and not individual employees of the agency.

~~(b)~~ (c) The petitioner shall cause a copy of the petition for review to be served on the other parties in the same manner as service of a summons in a civil action.

The Comment should note that, under Section 1121.230 (“agency” defined), “agency” includes the agency head.

**§ 1123.630. Contents of petition for review**

The Commission approved the staff recommendation to revise Section 1123.630 as follows:

1123.630. The petition for review shall state all of the following:

(a) The name and mailing address of the petitioner.

(b) The address and telephone number of the petitioner or, if the petitioner is represented by an attorney, of the petitioner’s attorney.

(c) . . . .

**§ 1123.640. Time for filing petition for review in adjudicative proceeding**

The Commission approved the staff recommendation to add a new Section 1123.635, and to revise Section 1123.640, as follows:

1123.635. (a) This section applies to a decision in an adjudicative proceeding other than a decision governed by Section 1123.640, but does not apply to other agency action.

(b) The petition for review of a decision shall be filed not later than 90 days after the decision is announced. The time for filing the petition for review is extended as to a party during any period when the party is seeking reconsideration of the decision pursuant to express statute, regulation, charter, or ordinance.

(c) The agency shall in the decision or otherwise notify the parties of the period for filing a petition for review. If the agency does not notify a party of the period at the time the decision is announced or when reconsideration is rejected, whichever is later, the party may file the notice within the earlier of the following times:

(1) Ninety days after the agency notifies the party of the period.

(2) One hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

1123.640. (a) This section applies to a decision of a state agency in an adjudicative proceeding, and to a decision of any agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, but does not apply to other agency action.

(b) The petition for review shall be filed not later than 30 days after the decision is effective. For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) A decision of a state agency not in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless a reconsideration is ordered within that time pursuant to express statute or regulation, or the agency orders that the decision is effective sooner, or a stay of execution is granted.

(c) The time for filing the petition for review is extended as to a party during any period when the party is seeking reconsideration of the decision pursuant to express statute or regulation.

(e) (d) The agency shall in the decision or otherwise notify the parties of the period for filing a petition for review. If the agency does not notify a party of the period before the decision is effective, the party may file the notice within the earlier of the following times:

(1) Thirty days after the agency notifies the party of the period.

(2) One hundred eighty days after the decision is effective.

The Commission asked the staff to try to simplify the drafting of these two sections if possible, and to try to minimize internal statutory cross-references.

The Commission wanted to achieve uniformity of limitations periods to the extent possible. The Commission thought the general rules of Sections 1123.635 and 1123.640 (30 days from the effective date for state agency adjudication, 90 days from the effective date for local agency adjudication, or 180 days for either if the agency fails to give notice of the limitations period) should supersede the special limitations periods for particular agencies. The Commission noted that the limitations period for judicial review of planning and zoning decisions has been shortened from 120 days to 90 days. See Gov't Code § 65009, *as amended by* 1995 Cal. Stat. ch. 253.

**§ 1123.650. Stay of agency action**

The Commission approved the staff recommendation to revise subdivisions (e) and (f) of Section 1123.650 as follows:

(e) If an appeal is taken from a denial of relief by the superior court, the ~~decision of the agency~~ action shall not be further stayed except on order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay is continued by operation of law for a period of 20 days after the filing of the notice.

(f) If an appeal is taken from a granting of relief by the superior court, the ~~decision of the agency~~ action is stayed pending the determination of the appeal unless the court to which the appeal is taken orders otherwise. Notwithstanding Section 916, the court to which the appeal is taken may direct that the appeal shall not stay the granting of relief by the superior court.

The Comment should say the second sentence of subdivision (f) is drawn from Section 1110b, and make clear it replaces Section 1110b for judicial review proceedings under the draft statute.

**§ 1123.660. Type of relief**

The Commission approved the staff suggestion to revise Section 1123.660 as follows:

1123.660. (a) The court may award damages or compensation ~~only to the extent expressly authorized by statute , subject to Division 3.6 (commencing with Section 810) of the Government Code, if applicable, and to other express statute.~~

(b) ~~The~~ Except as provided in subdivision (c), the court may grant other appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.

(c) ~~The court may grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld, but the~~

(c) In reviewing a decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment and may order the agency to take further action that is specially enjoined upon it by law.

(d) The court shall only grant relief justified by the general set of facts alleged in the petition for review.

(e) ~~The~~ the court may award attorney's fees or witness fees only to the extent expressly authorized by statute.

(d) ~~(f)~~ If the court sets aside or modifies agency action or remands the matter for further proceedings, the court may make any interlocutory order necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

(e) ~~(g)~~ All proceedings shall be heard by the court sitting without a jury.

Subdivision (a) should be revised to make clear the court may grant relief incidental to the petition, such as back pay in an employee reinstatement, without being subject to the claims requirements of the Tort Claims Act. *Cf.* Gov't Code § 905 (claim for salary or wages not subject to claims requirements of Tort Claims Act). See also *Snipes v. City of Bakersfield*, 145 Cal. App. 3d 861, 193 Cal. Rptr. 760 (1983).

The Comment should say subdivision (a) continues the effect of Code of Civil Procedure Section 1095 permitting the court to award damages in an appropriate case, citing *O'Hagan v. Board of Zoning Adjustment*, 38 Cal. App. 3d 722, 729, 113 Cal. Rptr. 501, 506 (1974). The Comment also should say nothing in this section authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion, citing Section 1121.140. This

is consistent with the last clause in Code of Civil Procedure Section 1094.5(f) (“the judgment shall not limit or control in any way the discretion legally vested in the respondent”).

The Public Utilities Commission asked for language similar to that in subdivision (c) for the relief permitted in its non-APA adjudications. If the PUC is ultimately not exempted from the draft statute, the staff will revisit this question.

#### **§ 1123.730. Preparation of record**

The Commission approved the staff recommendation to revise subdivision (a) of Section 1123.730 as follows:

1123.730. (a) On request of the petitioner for the administrative record for judicial review of agency action:

(1) If the agency action is a decision in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code by an administrative law judge employed by the Office of Administrative Hearings, the administrative record shall be prepared by the Office of Administrative Hearings.

(2) If the agency action is other than that described in paragraph (1), the administrative record shall be prepared by the agency.

The Comment should say that, although Section 1123.730 requires the agency to prepare the record, the burden is on the petitioner attacking the administrative decision to show entitlement to judicial relief, so it is petitioner’s responsibility to make the administrative record available to the trial court. *Foster v. Civil Service Commission*, 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893, 899 (1983).

#### **§ 1123.760. New evidence on judicial review**

The Commission revised Section 1123.760 substantially as follows:

1123.760. (a) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in subdivision (b), the court shall not admit the evidence on judicial review without remanding the case.

(b) The court may receive evidence described in subdivision (a), in addition to that contained in the administrative record for judicial review, in any of the following circumstances:

(1) The evidence relates to the validity of the agency action and is needed to decide any of the following disputed issues:

(A) Improper constitution as a decision making body, or ~~improper motive or~~ grounds for disqualification, of those taking the agency action.

(B) Unlawfulness of procedure or of decision making process.

(2) The agency action is a decision in an adjudicative proceeding and the standard of review by the court under Section 1123.435 is the independent judgment of the court.

(c) Notwithstanding subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case if all of the following conditions are satisfied:

(1) The agency proceedings were other than rulemaking.

(2) No hearing was held by the agency.

(3) The court finds that (i) remand to the agency would be unlikely to result in a better record for review and (ii) the interests of economy and efficiency would be served by receiving the evidence itself.

~~(c)~~ (d) If pursuant to statute the proper court for judicial review is the Supreme Court or court of appeal and evidence is to be received pursuant to this section, the court shall appoint a referee, master, or trial court judge for this purpose, having due regard for the convenience of the parties.

As subdivision (c) was proposed by staff, evidence the court could receive was limited to that described in subdivision (a) — “could not have been produced or that was improperly excluded in the agency proceedings.” The limitation was deleted by the Commission because subdivision (c) is limited to the case where there was no agency hearing, i.e., ministerial, discretionary, or informal action. In such cases, there is typically no opportunity to build a record for judicial review at all.

To permit a challenge to the accuracy or completeness of the record, the Commission asked the staff to add a provision permitting a motion to augment the record, analogous to civil appeals. See 9 B. Witkin, *California Procedure Appeals* §§ 466-467, at 457-59 (3d ed. 1985).

The Commission deleted “improper motive” from paragraph (1)(A) of subdivision (b) to avoid affecting existing law that prevents inquiry into mental processes of agency personnel to determine how the administrative decision was reached or what evidence was considered. See, e.g., *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 772, 537 P.2d 375, 122 Cal. Rptr. 543 (1975).

The following should be added to the Comment:

Section 1123.760 deals only with admissibility of new evidence on issues involved in the agency proceeding. It does not limit evidence on issues unique to judicial review, such as petitioner's standing or capacity, or affirmative defenses such as laches for unreasonable delay in seeking judicial review. For standing rules, see Sections 1123.210-1123.240.

The Comment should also make clear that "hearing" as used in paragraph (2) of subdivision (d) includes both informal and formal hearings.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary