CALIFORNIA LAW REVISION COMMISSION
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9/27/96

Date: October 10, 1996	*Place:* Long Beach
Oct. 10 (Thursday) 9:00 am – 4:00 pm	Hyatt Regency – Room: Regency F 200 South Pine Avenue Long Beach, CA 90802 310-491-1234

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FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF SEPTEMBER 12, 1996, MEETING (sent 9/27/96) ($8.50)

2. RATIFICATION OF DECISIONS MADE AT SEPTEMBER 12, 1996, MEETING

3. ADMINISTRATIVE MATTERS

   Report of Executive Secretary

4. 1996 LEGISLATIVE PROGRAM

   Final Report
   Memorandum 96-68 (NS) (to be sent)

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

   Comments on Revised Tentative Recommendation
   Memorandum 96-69 (RM) (to be sent)
   Staff Draft of Recommendation (to be sent)

6. UNFAIR COMPETITION (STUDY B-700)

   Comments on Tentative Recommendation
   Memorandum 96-67 (SU) (to be sent)

7. MEDIATION COMMUNICATIONS (STUDY K-401)

Comments on Tentative Recommendation
Memorandum 96-70 (BG) (to be sent)

8. BEST EVIDENCE RULE (STUDY K-501)

Draft of Recommendation
Memorandum 96-60 (BG) (sent 9/4/96) ($8.50)
First Supplement to Memorandum 96-60 (sent 9/11/96)
Second Supplement to Memorandum 96-60 (to be sent)

9. ATTACHMENT BY UNDERSECURED CREDITORS (STUDY D-331)

Comments on Policy
Memorandum 96-71 (SU) (to be sent)

10. HEALTH CARE DECISIONS (STUDY L-4000)

Natural Death Act
Memorandum 96-66 (SU) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 10, 1996
LONG BEACH

A meeting of the California Law Revision Commission was held in Long Beach on October 10, 1996.

Commission:

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

Absent: Dick Ackerman, Assembly Member
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

Consultant: Michael Asimow, Administrative Law

Other Persons:

Ken Babcock, Public Counsel and State Bar Legal Services Section, Los Angeles
Herb Bolz, Office of Administrative Law, Sacramento
John Daley, State Bar Committee on Administration of Justice, San Francisco
Gail Hillebrand, Consumers Union, San Francisco
Frank Janecek, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego
Ron Kelly, Berkeley
Linus Masouredis, Attorney General's Office, Oakland
Charlene Mathias, Office of Administrative Law, Sacramento
Thomas A. Papageorge, California District Attorneys Association and Los Angeles District Attorney's Office, Los Angeles
Steven R. Pingel, Consumer Attorneys of California, California Employment Lawyers Association, and Los Angeles Police Protective League, Los Angeles

Ron Russo, Attorney General's Office, Los Angeles
Jerome Sapiro, Jr., State Bar Committee on Administration of Justice, San Francisco

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MINUTES OF SEPTEMBER 12, 1996, COMMISSION MEETING

The Commission approved the Minutes of the September 12, 1996, Commission meeting as submitted by the staff.

RATIFICATION OF DECISIONS MADE AT SEPTEMBER 12, 1996, COMMISSION MEETING

The Commission ratified decisions made at the September 12, 1996, Commission meeting at which a quorum was not present. The ratification is subject to:

(1) Conflicting decisions, if any, reported in these Minutes.

(2) Further consideration of Study N-112 as it relates to political activities of administrative law judges. This action was taken at the request of administrative law judges of the California Unemployment Insurance Appeals Board. See Exhibit pp. 1-2.

STUDY B-700 – UNFAIR COMPETITION LITIGATION

The Commission considered Memorandum 96-67 and its First Supplement concerning comments received on the tentative recommendation on *Unfair Competition Litigation* (May 1996). The staff will prepare a draft final recommendation for consideration at the next meeting, implementing the following Commission decisions:

§ 17302. Conflict of interest in pursuing individual and representative claims

This section, which would have codified a special conflict of interest rule prohibiting a private plaintiff from representing the general public while at the same time pursuing an individual cause of action should be deleted. However, the issue should be noted in the Comment to Section 17303 as a matter that the

court should carefully consider in determining whether the plaintiff has a conflict of interest.

§ 17303. Adequate legal representation and absence of conflict of interest

The adequacy standard for the plaintiff's attorney to represent the general public in subdivision (a) and the conflict of interest standard applicable to a private plaintiff in subdivision (b) were approved. However, the procedure in subdivision (c) should be revised to eliminate the requirement that the court determine that subdivisions (a) and (b) have been satisfied "as soon as practicable after commencement of the representative action." Instead, the issues would be considered only on motion of a party or on the court's own motion. Concern was expressed that the issue should be determined early in the proceedings, but this matter will be left to the courts. It should also be made clear that the qualification issues could be raised if the pleadings are amended to add a representative cause of action. The sentence in subdivision (c) providing that the determination "shall" be based on the pleadings should be changed to "may" to avoid conflict with the provision that the court may inquire into the matters in its discretion. The section should also make clear that the court may grant appropriate preliminary relief even if the standards of subdivisions (a) and (b) have not yet been satisfied.

§ 17304. Notice of commencement of representative action to Attorney General and district attorney

The time period for giving notice should run from the commencement of the action, rather than from the making of the order under Section 17303. The issue of whether notice should also be given of any application for preliminary relief was deferred. If public prosecutors believe that such notice would be important, then the section should be revised to provide an appropriate notice of any order to show cause or other application for preliminary relief. If they do not think that such notice would be very useful, then the section should provide only for notice of commencement of the action in the interest of simplicity.

§ 17307. Findings required for entry of judgment

In addition to the findings required by subdivision (b), the section should also specifically require the court to find that the other procedural requirements of the chapter have been satisfied.

§ 17309. Binding effect of judgment in representative action; setoff

This section should be revised as follows:

> 17309. ~~(a)~~ The determination of a representative cause of action brought by a private plaintiff in a judgment approved by the court pursuant to Section 17307 is conclusive and bars any further actions on representative causes of action brought by private plaintiffs against the same defendant based on substantially similar facts and theories of liability.
>
> ~~(b) If a person obtains a judgment against the defendant for damage to the person as an individual arising out of the same facts as the representative cause of action, the defendant is entitled to a setoff in the amount of any monetary recovery directly due to the person and a pro rata share of any indirect restitutionary relief awarded as a result of a representative action or enforcement action.~~

The Comment should be revised along the lines suggested in Memorandum 96-67 (pp. 19-20) to note that res judicata issues are decided by the courts on a case-by-case basis and to make clear that Section 17309 applies only to situations involving private representative actions on behalf of the general public and is not intended to affect any other judicial doctrines. The Comment should also note that the binding effect rule would not apply if the prerequisites to entry of a judgment on behalf of the general public under Section 17307 have not been satisfied.

§ 17310. Priority between prosecutor and private plaintiff

The parts of this section relating to substantial restitution should be stricken. This section would be revised as follows:

> 17310. (a) If a private plaintiff has commenced an action that includes a representative cause of action and a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, the court in which either action is pending, on motion of a party or on the court's own motion, shall stay the private plaintiff's representative cause of action until completion of the prosecutor's enforcement action or, in the interest of justice, may make an order for consolidation of the actions.
>
> (b) The determination under subdivision (a) may be made at any time during the proceedings and regardless of the order in which the actions were commenced~~, but if the prosecutor's enforcement action was the first commenced, a representative action brought by a private plaintiff may not be consolidated with~~

~~the prosecutor's enforcement action, and the private plaintiff may not intervene in the enforcement action, unless the prosecutor's enforcement action does not seek substantial restitution to the general public~~.

~~(c) If the prosecutor's enforcement action does not result in substantial restitution to the general public, the private plaintiff's representative cause of action may be reinstituted. The time during which pursuit of the representative cause of action was stayed is not counted in determining whether the applicable limitations period has expired.~~

~~(d)~~ (c) Nothing in this section affects any right the plaintiff may have to costs and attorney's fees pursuant to Section 1021.5 of the Code of Civil Procedure or other applicable law.

(The motion at the meeting was directed toward deleting subdivisions (b) and (c), but the purpose of the motion was to eliminate the part of the section relating to substantial restitution; the first part of subdivision (b) is purely procedural and is not directly related to the substantial restitution rule.)

§ 17319. Application of chapter to pending cases

The Commission began to consider whether the revisions should apply to all cases or just to cases commenced after the operative date. However, this issue was deferred to the next meeting.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 96-70 and its First Supplement, which discuss comments on the tentative recommendation on mediation confidentiality. Ron Kelly made oral comments, as did Jerome Sapiro, Jr., on behalf of the State Bar Committee on Administration of Justice. The main topics discussed were (1) whether the definition of "mediation" should include a judicial settlement conference or other mandatory mediation, (2) whether the tentative recommendation provides sufficient protection against fraudulent statements in a mediation, (3) whether Sections 1122 and 1127 overprotect the confidentiality of documents prepared for a mediation, and (4) whether to delete subdivision (b) from Section 1128 and subdivision (a)(3) from Section 1129. The Commission will continue consideration of these issues and other comments on the tentative recommendation at its next meeting. The staff will prepare a new memorandum synthesizing the comments and presenting possible approaches.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission began consideration of Memorandum 96-69, attached staff draft of a recommendation on *Judicial Review of Agency Action*, and the First Supplement. The Commission made the following decisions:

§ 1120. Application of title

The Commission approved the staff recommendation to add the following to Section 1120: "(f) This title does not apply to judicial review of an ordinance of a local agency." The Comment should say ordinances of local agencies remain subject to judicial review by traditional mandamus or by an action for declaratory or injunctive relief.

The Commission thought the proposed language to apply the draft statute to a private entity where "[s]tatutory or decisional law requires a hearing, the taking of evidence, and fair procedures, and vests discretion to determine facts in the inferior tribunal, corporation, board, or officer" was too broad. The Commission wanted more emphasis on the public stature or purpose of the private action. Professor Asimow thought the draft statute should apply to private entities only in the kinds of cases where quasi-constitutional issues are implicated, such as those involving a physician's hospital privileges or a member's expulsion from a professional organization, but should not apply where the right to a hearing arises out of private contract. The Commission asked the staff bring back a revised draft.

§ 1121.290. Rule

Subdivision (c) of Section 1121.290 defining "rule" to include a local agency ordinance should be deleted.

§ 1123.220. Private interest standing
§ 1123.230. Public interest standing
§ 1123.240. Standing for review of decision in adjudicative proceeding

The Commission deferred discussing standing pending input from local agency representatives. There was some sentiment to change the word "germane" in the draft of Section 1123.250 to say "related to" or "affecting."

§ 1123.430. Review of agency factfinding

The Commission approved the staff recommendation to revise proposed Section 1123.430, and to amend Government Code Section 11425.50, as follows:

Code Civ. Proc. § 1123.430. Review of agency fact finding

1123.430. (a) Except as provided in Section 1123.440, the standard for judicial review of whether agency action is based on an erroneous determination of fact made or implied by the agency is whether the agency's determination is supported by substantial evidence in the light of the whole record.

(b) If the factual basis for a decision in a state agency adjudication includes a determination of the presiding officer based substantially on the credibility of a witness, the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(c) Notwithstanding ~~subdivision (a)~~ any other provision of this section, the standard for judicial review of a determination of fact made by an administrative law judge employed by the Office of Administrative Hearings that is changed by the agency head is the independent judgment of the court whether the agency's determination of that fact is supported by the weight of the evidence.

Gov't Code § 11425.50 (amended). Decision

11425.50. (a) 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.

(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination of the presiding officer based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on ~~judicial~~ administrative review the ~~court~~ agency shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(c) . . . .

§ 1123.450. Review of agency exercise of discretion

The Commission approved the staff recommendation to delete subdivision (b) from Section 1123.450 and to put its substance in the Comment.

§ 1123.460. Review of agency procedure

Herb Bolz of the Office of Administrative Law thought the Comment language suggested by staff did not adequately address OAL's problem. He wanted to preserve case law saying OAL is entitled to deference on whether state agency rulemaking procedures have been followed. The Commission wanted to take a neutral position on the relative deference to be given to the agency and OAL, and to consider that question in the rulemaking study. The Commission decided to add language to Section 1123.460 substantially as follows: "This section does not apply to state agency rulemaking."

§ 1123.520. Superior court venue

The Commission decided to not to change the venue rules of Section 1123.520.

§ 1123.640. Time for filing petition for review in adjudication of state agency and formal adjudication of local agency
§ 1123.650. Time for filing petition for review in other adjudicative proceedings

The Commission approved the draft language to provide for tolling of the limitations period during preparation of the record. On the question of tolling during a stay, the Commission was concerned about the situation where the agency stays its action to permit judicial review, and thought that in such a case the limitations period should not be tolled indefinitely. For example, a stay by a trial court does not affect the time for appeal. The Commission was inclined not to provide for tolling during a stay. The staff should give further thought to this.

The Commission approved the staff recommendation to preserve the special limitations period in Government Code Section 19815.8 for the Department of Personnel Administration.

§ 1123.710. Applicability of rules of practice for civil actions

The Commission approved the provision in Section 1123.710 making inapplicable to judicial review proceedings the extension of time in Code of Civil Procedure Section 1013(a) for mailed notice.

The Commission did not consider the discussion in the Memorandum of Sections 1123.720, 1123.730, 1123.820, 1123.830, or 1123.840, but skipped forward to Section 1123.850.

§ 1123.850. New evidence on judicial review

There was concern about the proposal to permit the taking of additional evidence only if it was "in existence at the time of the agency proceedings." The staff should give this more thought. Should the closed record requirement of the *Western States* case be limited to review of rulemaking? If additional evidence is to be allowed, should the court be required to remand to the agency for this purpose in every case, or should the court have discretion to receive the evidence itself in appropriate cases? What does "in existence at the time of the agency proceedings" mean? Does it include the case where a witness was unavailable at the time of the agency proceedings? The staff should bring back a revised draft.

☐ APPROVED AS SUBMITTED

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

_____
Date

_____
Chairperson

_____
Executive Secretary

October 1, 1996

Nathaniel Sterling
Executive Director
California Law Revision Commission
4000 Middlefield Road Room D-1
Palo Alto, CA 94303

We are adminstrative law judges at the California Unemployment Insurance Appeals Board. We are writing to voice our objection to the proposal to apply Canon 5 to administrative law judges. We believe that such application unnecessarily restricts the first amendment rights of admininstrative law judges and harms the body politic by limiting administrative law judges involvement .

Unlike constitutional judges, issues involving elections are not likely to come before an adminstrative law judge. An ALJ does not have the authority to declare a statute unconstitutional or an election invalid. ALJ's in most agencies decide a narrow range of issues. There is no need for the broad restrictions in Canon 5.

If there is a need to limit the political activities of ALJ's , beyond Hatch Act limitations, surely it can be done more narrowly. For instance, it might be appropriate to restrict an ALJ from particpating in political activities if the issues involved are likely to come before the ALJ. For instance, an ALJ from the Public Utilities Commisssion would be barred from participating in an inititative campaignwhich affects the regulation of utilities. If an ALJ would be likely to deal with a broader range of issues, then perhaps the restrtictions should be broader, but for most ALJs that is not the case.

Broad restrictions impinge not only on the rights of the ALJ, but are extremely detrimental to the community. They cost the community the active participation of some of its most interested and informed members. For instance, an ALJ in our agency is a member of the school board. After reading the definitions, we assume that leadership of organizations aimed at electing even non-partisan candidates would be barred. By implication election to community councils and boards would also be barred.

We are all members of various interest, ethnic and religious groups, and may feel it necessary as members of these groups to voice our opinions regarding political issues by making speechs on behalf of a political organization. In such situations, we are acting as members of a neighborhood or religious or ethnic group. No mention need be made of our role as ALJs.

In the unlikely event, a party did believe an ALJ deciding an employment dispute, for instance, was baised due to the ALJ's personal political activity, the case can and would be reassigned. Reassignment is a simple and less restrictive safety valve, which should allow administrative law judges to continue to exercise their first amendment rights and avoid any appearance of bias.

We would like the comment period to be extended to allow more comment from ALJs who were unaware of the proposed changes regarding Canon 5.

In short, Canon 5 is too broad and too restrictive to apply to administrative law judges. Any such restriction should be narrowly drawn taking into account the different roles adminsitrative law judges play and the narrow range of issues decided. Otherwise, in an effort , to assure the appearance of propriety, the community's right to the participation some of its most caring members is denied.

Sincerely,

Lita Krowech and the ALJ's listed below

Lita Krowech, Carmen Flores, Robert Mason, Ron Kammann, Robert Marder
Administrative Law Judges
San Francisco Office of Appeals.
California Unemployment Insurance Appeals Board.