CALIFORNIA LAW REVISION COMMISSION
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November 1, 1996

| *Date:* November 14-15, 1996 | *Place:* Sacramento |
|---|---|
| Nov. 14 (Thursday) 9:00 am – 5:00 pm<br>Nov. 15 (Friday) 8:30 am – 3:00 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.** | |
| Most Commission meeting materials are available on the Internet at: `http://www.clrc.ca.gov` | |

# FINAL AGENDA

*for meeting of the*

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF OCTOBER 10, 1996, MEETING (sent 10/24/96)

2. ADMINISTRATIVE MATTERS

   **Report of Executive Secretary**

3. LEGISLATIVE PROGRAM

   **Final Report on 1996 Legislative Program**
   Memorandum 96-68 (NS) (sent 10/2/96)

   **1997 Legislative Program**
   Memorandum 96-72 (NS) (sent 10/24/96)

4. NEW TOPICS AND PRIORITIES

   Memorandum 96-58 (NS) (sent 8/30/96)
   Second Supplement to Memorandum 96-58 (to be sent)
   (Note: First Supplement has previously been considered)

5. 1996-97 ANNUAL REPORT

   Memorandum 96-73 (SU) (sent 10/29/96)

Special Order of Business Thurs. 10:00 am

6. BUSINESS JUDGMENT RULE (STUDY B-601)

   **Revised Draft**
   Memorandum 96-80 (NS) (sent 11/1/96)

7. MEDIATION COMMUNICATIONS (STUDY K-401)

**Comments on Tentative Recommendation**
Memorandum 96-75 (BG) (to be sent)

8. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)

Memorandum 96-59 (BG) (sent 10/28/96)

9. BEST EVIDENCE RULE (STUDY K-501)

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

Special Order of Business Thurs. 1:00 pm

10. UNFAIR COMPETITION (STUDY B-700)

**Draft of Recommendation**
Memorandum 96-74 (SU) (to be sent)

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

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

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

Special Order of Business Friday 9:00 am

**Draft of Statute**
Memorandum 96-76 (RM) (sent 11/1/96)

**Conforming Revisions**
Memorandum 96-77 (RM) (sent 11/1/96)

13. ETHICAL STANDARDS FOR ADMINISTRATIVE LAW JUDGES (STUDY N-111)

**Political Activities**
Memorandum 96-78 (NS) (sent 10/25/96)

14. ADMINISTRATIVE RULEMAKING (STUDY N-300)

**Revision of Rulemaking Procedure**
Memorandum 96-79 (NS) (sent 10/24/96)

15. HEALTH CARE DECISIONS (STUDY L-4000)

**Natural Death Act**
Memorandum 96-66 (SU) (sent 10/4/96)

# MINUTES OF MEETING
# CALIFORNIA LAW REVISION COMMISSION
# NOVEMBER 14-15, 1996
# SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on November 14-15, 1996.

**Commission:**

*Present:* Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Dick Ackerman, Assembly Member (Nov. 14)
Quentin L. Kopp, Senate Member (Nov. 14)
Sanford Skaggs (Nov. 15)
Colin Wied

*Absent:* Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall
Edwin K. Marzec

**Staff:** Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Robert J. Murphy, Staff Counsel
Brian P. Hebert, Graduate Legal Assistant
Lauren Trevathan, Administrative Assistant

**Consultants:** Michael Asimow, Administrative Law (Nov. 15)
Melvin A. Eisenberg, Business Judgment & Derivative Actions (Nov. 14)
Robert C. Fellmeth, Unfair Competition Litigation (Nov. 14)
Gregory S. Weber, Administrative Law (Nov. 15)

**Other Persons:**

John Andrew, California Retailers Association, JC Penney Company, Sacramento (Nov. 14)
Jennifer Berry, Department of Motor Vehicles, Sacramento (Nov. 15)
D. Steven Blake, State Bar Business Law Section, Corporations Committee, Sacramento (Nov. 14)

Herb Bolz, Office of Administrative Law, Sacramento
Mark De Boer, California State Employees' Association, Sacramento (Nov. 15)
Karl Engeman, Office of Administrative Hearings, Sacramento (Nov. 15)
Dugald Gillies, Sacramento (Nov. 15)
Louis Green, County Counsels' Association of California, County of El Dorado (Nov. 15)
Gerald James, Association of California State Attorneys and Administrative Law Judges, Sacramento (Nov. 15)
Judy Janes, Northern California Association of Law Librarians, Davis (Nov. 15)
Ron Kelly, Berkeley (Nov. 14)
Lita Kroweck, CUIAB, Administrative Law Judges, San Francisco (Nov. 15)
Carol Livingston, Livingston & Mattesich, Sacramento (Nov. 14)
Earl Lui, Consumers Union, San Francisco (Nov. 14)
Charlene Mathias, Office of Administrative Law, Sacramento (Nov. 15)
Julie Miller, Southern California Edison, Rosemead (Nov. 15)
Dick Ratliff, California Energy Commission, Sacramento, (Nov. 15)
Daniel L. Siegel, Attorney General's Office, Sacramento (Nov. 15)
Ruth Sorensen, County Counsels' Association of California and California State Association of Counties, Sacramento (Nov. 15)
James C. Sturdevant, The Sturdevant Law Firm and Consumer Attorneys of California, San Francisco (Nov. 14)
Ann Trowbridge, Miller, Karp & Grattan, Sacramento (Nov. 15)
Barbara Wheeler, Association for California Tort Reform, Sacramento (Nov. 14)

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## MINUTES OF OCTOBER 10, 1996, MEETING

The Minutes of the October 10, 1996, Commission meeting in Long Beach were approved as submitted by the staff.

## ADMINISTRATIVE MATTERS

### Schedule of Future Meetings

The Commission relocated the December 1996 and January 1997 Commission meetings from Sacramento to Los Angeles in order to minimize potential tule fog interference with travel to the meetings. The Commission also rescheduled the January meeting from Thursday, January 23, to Friday, January 24, as an accommodation for the legislative session.

### Scheduling of Topics for Discussion

The Commission suggested that we try scheduling topics for discussion in a way that will enable us to devote, for example, a half-day at a time to a single topic. This would mean that we might devote an entire afternoon to a major topic such as administrative rulemaking, but not revisit that topic for a few months until we are able to schedule another large block of time for it.

The staff will begin to implement this approach as soon as reasonably convenient, after work on recommendations for the 1997 legislative session is wrapped up.

### New Staff Members

The Executive Secretary introduced two newly-hired members of the Commission's staff. Brian Hebert is a new staff attorney and a recent Boalt Hall graduate. Lauren Trevathan is the new administrative assistant.

### Annual Report

The Commission considered Memorandum 96-73 and its First Supplement concerning the draft *1996-97 Annual Report*. The Commission approved the report as submitted, except that the staff will need to correct the inconsistent statements of term expiration dates on pages 127-28.

## LEGISLATIVE PROGRAM

### Final Report on 1996 Legislative Program

The Commission considered Memorandum 96-68, containing the final report on the Commission's legislative program for 1996. No Commission action was required or taken on this matter.

### 1997 Legislative Program

The Commission considered Memorandum 96-72, relating to the Commission's legislative program for 1997.

Of the matters we have completed work on, we have sent the real property covenant proposals to Senator Calderon for review, and will send the administrative law judge ethics proposal to Assembly Member Leonard for review. Senator Kopp has expressed an interest in the proposals on administrative adjudication by quasi-public entities, best evidence rule, and unfair competition. The staff will discuss tolling statutes of limitations with Assembly Member Ackerman; our action on this matter may depend on the new composition of the Assembly Judiciary Committee. With respect to attachment by undersecured creditors, we will consult with the State Bar to determine who their preferred author would be.

We have not yet completed work on judicial review of agency action or mediation confidentiality, and so are not yet in a position to place these two proposals.

The Commission's annual resolution of authority will be revised to reflect the decisions reported below on new topics and priorities.

## NEW TOPICS AND PRIORITIES

The Commission considered Memorandum 96-58, and its Second and Third Supplements (the First Supplement to Memorandum 96-58 was considered at a previous meeting), along with a letter from Ken Petrulis (Exhibit p. 1-2). The Commission made the following decisions concerning the proposed new topics and priorities for 1997.

**Publication of legal notices.** The Commission will not undertake a new study of publication of legal notices. The staff will pull together material on the 1969 Commission recommendation relating to fictitious business name publication for Senator Kopp.

**Criminal restitution.** Senator Kopp reported that legislation he authored on criminal restitution has been enacted, and other steps are now being taken to improve this area of law. Based on this information, the Commission will not request authority to study this matter.

**Gender-neutral statutes.** The Commission will not undertake a project to revise existing statutes for the purpose of rephrasing them in a gender-neutral fashion.

**Community property and joint tenancy.** The Commission will not do another review of community property and joint tenancy problems, but will narrowly address the issue presented in Estate of Layton, 52 Cal. Rptr. 2d 251 (1996) — whether divorce should sever a joint tenancy.

**Insolvency issues.** The Commission decided to undertake the studies suggested by Commissioner Wied concerning insolvency — increasing the options of state and local agencies and nonprofit corporations that administer government funded programs to elect Bankruptcy Code Chapter 9 (adjustment of debts of governmental entities) treatment, and codifying the law governing assignments for the benefit of creditors, including expansion of the assignment concept to include reorganization. Although the Commission is already authorized to act in this area under its creditor remedies authority, that authority should be augmented to specifically refer to "insolvency". The bankruptcy issues should receive some priority. The assignment project might start with an academic consultant, and the project might be assisted by an advisory committee of assignees, debtors' counsel, academics, and other interested persons. A budget augmentation might be appropriate for this project.

**Application of family protection provisions to nonprobate transfers.** The Commission will not get involved with issues relating to application of family protection provisions to nonprobate transfers. The staff will continue to monitor developments in this area.

**Discovery in civil cases.** The Commission will study the matter of the time for responding to a demand for production of documents. The Commission was also interested in reviewing developments to improve discovery in other jurisdictions. An academic consultant might be retained for this purpose, and a budget augmentation might be appropriate. No new authority would be required for this study, since the Commission has existing authority to study discovery issues.

**Rules of conduct for judges pro tem.** Senator Kopp will forward the staff correspondence he has received concerning rules of conduct for judges pro tem, who appear to fall between the cracks of the rules of conduct for judges and for attorneys. This may be appropriate for Commission study.

**Trial court unification.** The staff is delaying work on trial court unification pending word from Senator Lockyer on the Judicial Council's request to do the statutory revisions necessary for trial court unification.

**Environmental law consolidation.** The staff is collecting information and reviewing experience in other jurisdictions, and will have a suggested approach to handling the logistical problems involved in environmental law consolidation for the Commission in the near future.

**Contract law.** The staff will start the search for an academic consultant on the newly-authorized study of contract law, particularly issues involved in the impact of electronic communications on contract formation. Such a consultant might also be able to address evidentiary issues involved in electronic communications, which are the subject of a separate Commission study.

**Family law.** The currently authorized studies of family law, child custody, adoption, guardianship, and adjudication of child and family civil proceedings should be combined into one topic on the Commission's agenda:

> **4. Family Law**
> Whether family law (including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code) should be revised.

**Topics to be dropped from Commission agenda.** The Commission will request that the studies of prejudgment interest, injunctions, and inverse condemnation be dropped from its agenda.

## STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission considered Memorandum 96-80 and its First and Second Supplements, relating to codification of the business judgment rule. The Commission approved the draft attached to the memorandum to be circulated for comment as a discussion draft, with the following changes.

**Preliminary part.** The staff should review the grammar of the sentence on page 4 of the preliminary part that "The ALI Principles of Corporate Governance clearly lays out the elements".

**"Business judgment" defined.** The language in the Comment to Section 320 to the effect that in order for a decision to qualify as a "business judgment" it must have been consciously made and judgment in fact exercised, was moved towards the beginning of the Comment.

**"Rationality" test.** The Comment to Section 320 was revised to note that a decision is considered rational if it "has a rational business purpose".

**Validity of corporate action.** The Comment to Section 320 was revised along the following lines: "Nothing in Section 320 is intended to validate a corporate action that is not ~~authorized~~ otherwise in accordance with law, whether due to illegality, failure to follow proper procedure, or other cause."

**"Interested" director.** Subdivision (c) of Section 321 was revised so its application is limited to subdivision (b)(3) (as in the original ALI definition), and paragraphs (1) and (2) were revised to state that "the director's judgment is ~~not~~ presumed not to be adversely affected".

The Comment should note that subdivision (c) creates presumptions that are rebuttable, and whether the director's relationship with a business organization would reasonably be expected to affect the director's judgment with respect to a transaction or conduct in a manner adverse to the corporation or its shareholders will depend on the circumstances. An interest greater than 10% might not reasonably be expected to affect the director's judgment, for example, if the interest is in a small, privately held business and the value of the ownership interest is insubstantial for that director. On the other hand, an interest less than 10% might reasonably be expected to affect the director's judgment, for example, if the interest is in a large, publicly held business and the value of the ownership interest is substantial for that director.

**Lee v. Interinsurance Exchange.** The staff should incorporate appropriate references to *Interinsurance Exchange* in the preliminary part and Comments.

## STUDY B-700 – UNFAIR COMPETITION LITIGATION

The Commission considered Memorandum 96-74 and its First Supplement presenting a draft final recommendation on *Unfair Competition Litigation*. The Commission also considered a faxed letter from Thomas A. Papageorge, California District Attorneys Association, delivered at the meeting. (See Exhibit

p. 3.) The Commission approved the recommendation for printing and introduction in the 1997 legislative session, subject to the following revisions:

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

The last sentence of this section should be revised as follows: "Notice of an application for preliminary relief shall be given in the same manner as notice is given to the defendant."

**§ 17305. Disclosure of similar cases against defendant**

This section should be revised to make clear that the defendant's duty to give notice of similar cases arises only when the defendant has been served with process in the action.

**§ 17306. Notice of terms of judgment**

This section providing for 45 days' notice to interested persons before entry of judgment should also apply to enforcement actions brought by public prosecutors, other than cases where the action is filed and the stipulated judgment entered at the same time. This revision would not interfere with the practice applicable where prosecutors obtain a settlement before the action is filed, but would give minimal notice to other persons in cases where the matter may be litigated. Several Commissioners noted that it would be appropriate to hear the views of the California District Attorneys Association and the Attorney General on this change, since their representatives were not present at the meeting.

**§ 17307. Findings required for entry of judgment**

Subdivision (b) of this section should specifically list the conflict of interest rule applicable to a private plaintiff (Section 17303(a)) and the adequacy standard applicable to the private plaintiff's attorney (Section 17303(b)) as findings that the court is required to make before entering a judgment in a representative action.

**§ 17309. Binding effect of judgment in representative action**

The Comment to this section should note that the court should consider as a setoff any monetary recovery in a prior action. The language on fraud as a ground for attacking a judgment, as set out in the First Supplement, should be expanded to discuss material omissions and misleading statements as potential

grounds for refusing to give binding effect to a judgment in a representative action.

**§ 17310. Priority between prosecutor and private plaintiff**

Subdivision (a) of this section should be revised to require the court to make an order staying the private plaintiff's action or consolidating or coordinating it with the public prosecutor's action:

> 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 or coordination of the actions, or make any other order in the interest of justice.

**§ 17311. Effect on prosecutors**

The first sentence of this section should be revised for clarity as follows: "Notice to the Attorney General or a district attorney under Section 17304 or 17306 does not impose any duty on the Attorney General or district attorney."

**§ 17319. Application of chapter**

The new statute should apply only to actions filed after its operative date, but it may be applied where the parties have substantially complied with its provisions in actions filed before the operative date. This exception to the prospective application rule would permit the parties to take advantage of the new rules if they desire to do so.

STUDY D-331 – ATTACHMENT BY UNDERSECURED CREDITORS

The Commission considered Memorandum 96-71 concerning attachment by undersecured creditors under Code of Civil Procedure Sections 483.010-483.015. The Commission approved resubmission of the 1995 recommendation to the Legislature, which would repeal the sunset clause and make related technical corrections. Some additional technical changes will be needed to update the recommendation. The revised recommendation should also summarize policy arguments relating to attachment by undersecured creditors under the existing

statute and reaffirm that the Commission concludes there is no sufficient reason to discontinue the existing statute. The Commission's conclusions will be reported to the Senate Judiciary Committee, as requested, and the staff will seek an appropriate legislative vehicle for inclusion of this material, perhaps in a State Bar omnibus bill. Senator Kopp also expressed his willingness to add it to his omnibus civil procedure bill.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 96-75. For the Commission's next meeting, the staff is to prepare a draft recommendation revising the tentative recommendation as follows:

**Section 1120. "Mediation" and "mediator" defined**

*Settlement conferences and court-ordered mediations.* The Commission decided to exclude settlement conferences from the definition of "mediation." The staff is to add a new subdivision to Section 1120 stating: "This chapter does not apply to a court settlement conference." The Comment should refer to cases interpreting the "before the court" requirement of Code of Civil Procedure Section 664.6. The Comment should also state: "Pursuant to subdivision _, settlement conferences are not mediations. A settlement conference is conducted under the aura of the court, whereas a mediation is not."

*Special masters.* The second sentence of Section 1120(a)(2) should state that a mediator "has no authority to compel a result or render a decision on any issue in the dispute." The Comment should explain that because a special master's role is to resolve issues or make recommendations to the court, a special master is not a "mediator" within the meaning of Section 1120.

*Mediation format.* In discussing the definition of "mediation," the Comment to Section 1120 should state: "To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator."

*Assistants.* The following sentence should be added to the Comment: "This definition of 'mediator' encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary."

*Mediation-arbitration.* Section 1120(c) should be deleted. A new section should be added to the proposal as follows:

> 1121. (a) Section 1120 does not prohibit either of the following:
>
> (1) A pre-mediation agreement that, if mediation does not fully resolve the dispute, the mediator will then act as arbitrator or otherwise render a decision in the dispute.
>
> (2) A post-mediation agreement that the mediator will arbitrate or otherwise decide issues not resolved in the mediation.
>
> (b) Notwithstanding Section 1120, if a dispute is subject to an agreement described in subdivision (a)(1) or (a)(2), the neutral person who facilitates communication between disputants to assist them in reaching a mutually acceptable agreement is a mediator for purposes of this chapter. In arbitrating or otherwise deciding all or part of the dispute, that person may not consider any information from the mediation, unless the protection of this chapter does not apply to that information or all of the mediation parties expressly agree before or after the mediation that the person may use specific information.
>
> **Comment.** Section 1121 neither sanctions nor prohibits mediation-arbitration agreements. It just makes the confidentiality protections of this chapter available notwithstanding existence of such an agreement.

**Section 1122. Mediation confidentiality**

*Subdivision (a): Admissibility, disclosure, and confidentiality.* The introductory clause should read: "When persons conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, the following apply." Subdivision (a)(3), which makes mediation communications confidential, should remain unchanged. It may be a topic of future study. The Comment should explain that subdivision (a)(4) "limits the scope of subdivisions (a)(1)-(a)(3), preventing parties from using mediation as a pretext to shield materials from disclosure."

*Subdivision (d): Attorney's fees.* Subdivision (d) should be revised to read:

> (d) If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body finds that the testimony is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making that finding shall award reasonable attorney's fees and costs to the mediator against the person seeking that testimony or document.

The Comment should be revised accordingly.

*Subdivision (f): Intake.* The Comment should state that subdivision (f) "continues without substantive change the protection for intake communications provided by 1996 Cal. Stat. ch. 174, which amended former Section 1152.5." The staff should contact supporters of that amendment and make sure that the Commission's draft is acceptable to them. A new subdivision should be added to Section 1122 stating:

> (h) Nothing in this section prevents disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.
>
> **Comment.** Subdivision (h) makes clear that Section 1122 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator.

*Subdivision (g): Research; observers.* The staff should delete Section 1122(g) of the tentative recommendation, which reads: "Nothing in this section prevents the gathering of information for research or educational purposes, so long as the parties and the specific circumstances of the parties' controversy are not identified or identifiable." A new subdivision (g) should be inserted, stating:

> (g) The protection of subdivisions (a)(1), (a)(2), and (a)(3) applies to a mediation notwithstanding the presence of a person who observes the mediation for the purpose of training or evaluating the neutral or studying the process.
>
> **Comment.** …. In recognition that observing an actual mediation may be invaluable in training or evaluating a mediator or studying the mediation process, subdivision (g) protects confidentiality despite the presence of such an observer. If a person both observes and assists in a mediation, see also Section 1120(a)(2) ("mediator" defined).

*Post-agreement interviews.* At an appropriate point, the Comment to Section 1122 should point out that mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

**Section 1123. Mediator evaluations**

Section 1123 should be revised to provide:

> 1123. (a) Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing before the mediation.
>
> (b) This section does not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.
>
> **Comment.** Section 1123 continues former Section 1152.6 without substantive change, except it makes clear that (1) the statute applies to all submissions, not just filings, (2) the statute is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, and (3) the statute applies to any evaluation or statement of opinion, however denominated. The statute does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

**Section 1127. Consent to disclosure of mediation communications**

The Commission decided that Section 1127(b)'s reference to "anything said or any admission made" should be changed to "anything said or done or any admission made." The Commission did not reach any of the other issues relating to Section 1127, or any of the issues discussed at pages 24-27 of Memorandum 96-75.

STUDY K-501 – BEST EVIDENCE RULE

The Commission considered Memorandum 96-60, its first and second supplements, and the revised staff draft recommendation attached to Memorandum 96-60. The Commission approved the draft recommendation for printing and submission to the Legislature, with revisions:

(1) The grammar of Sections 1520 and 1521(a) should be revised to eliminate ambiguity about what must be "otherwise admissible."

(2) Section 1521(b) on page 12 should be deleted. The recommendation should incorporate the other version of the special provision for criminal cases. See

Memorandum 96-53 at page 14 (Section 1520.5). With adjustment for renumbering, that version reads:

> 1522. (a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action or proceeding the court shall exclude secondary evidence of the content of a writing if the court finds both of the following:
>
> (1) The original is in the proponent's possession, custody, or control.
>
> (2) The proponent has not made the original reasonably available for inspection at or before trial.
>
> (b) Subdivision (a) does not apply to any of the following:
>
> (1) A duplicate as defined in Section 260.
>
> (2) A writing that is not closely related to the controlling issues in the action or proceeding.
>
> (3) A copy of a writing in the custody of a public entity.
>
> (4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

(3) To avoid narrowing the doctrine of spoliation of evidence, Section 1521 should not be revised as proposed on page 2 of the First Supplement to Memorandum 96-60. Instead, the Comment should state that Section 1521(a)(2) requires exclusion if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation of evidence otherwise applies.

(4) The recommendation needs to incorporate Evidence Code Section 1500.6, which was enacted after the tentative recommendation was circulated.

STUDY N-111 – ETHICAL STANDARDS FOR ADMINISTRATIVE LAW JUDGES

The Commission considered Memorandum 96-78 and its First Supplement, relating to political activities of administrative law judges. The Commission revised its recommendation on this matter along the following lines:

> 11475.40. The following provisions of the Code of Judicial Ethics do not apply under this article:
>
> ….
>
> (e) Canons ~~5B and 5C. The remaining provisions of Canon 5 apply~~ 5A-5D. The introductory portion of Canon 5 applies under this article notwithstanding Chapter 9.5 (commencing with Section 3201) of Division 4 of Title 1, relating to political activities of public employees.

**Comment**. ….

~~Subdivision (e) excepts Canons 5B and 5C, relating to candidacy for judicial office. It reflects the fact that the position of administrative law judge is not an elective office.~~

~~The remainder of Canon 5~~ Subdivision (e) applies the introductory portion of Canon 5 to an administrative law judge or other presiding officer, but not Canons 5A-5D. Under this provision an administrative law judge or other presiding officer must avoid political activity that may create the appearance of political bias or impropriety. This would preclude participation in political activity related to an issue that may come before the administrative law judge or other presiding officer.

Subdivision (e) limits the political activities of administrative law judges even though other public employees might be able to participate in those activities under the *Hatch Act* (Sections 3201-3209). This subdivision is not intended to preclude an administrative law judge or other presiding officer to which this article applies from appearing at a public hearing or officially consulting with an executive or legislative body or public official in matters concerning the judge's private economic or personal interests, or to otherwise engage in political activities relating to salary, benefits, and working conditions ~~for the improvement of the administration of justice. See Canons 4C(1) and 5D~~.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 96-76, attached draft statute, First and Second Supplements, and two letters attached to these Minutes from Louis Green for the County Counsel's Association of California and the California State Association of Counties as Exhibit pages 4-9. The Commission made the following decisions:

**§ 1120. Application of title**

The Commission approved the staff recommendation to revise Section 1120 as follows:

1120. ~~Except as provided by statute~~:

(a) ~~This~~ Except as provided by statute, this title governs judicial review of agency action of any of the following entities:

….

(b) This title ~~does not apply to~~ governs judicial review of ~~action~~ a decision of a nongovernmental entity if any of the following conditions is satisfied:

(1) A statute expressly so provides.

(2) The decision is made in a proceeding to which Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code applies.

(3) The decision is made in an adjudicative proceeding required by law, is quasi-public in nature, and affects fundamental vested rights, and the proceeding is of a kind likely to result in a record sufficient for judicial review.

**Comment.** … Paragraph (1) of subdivision (b) applies this title to judicial review of a decision of a nongovernmental entity if a statute expressly so provides. For a statute applying this title to a nongovernmental entity, see Health & Safety Code § 1339.63 (adjudication by private hospital board).

Paragraph (2) of subdivision (b) recognizes that Government Code Sections 11400-11470.50 apply to some private entities. See Gov't Code § 11410.60 [in Commission's recommendation on *Administrative Adjudication by Quasi-Public Entities*].

Paragraph (3) of subdivision (b) is drawn from a portion of the first sentence of Code of Civil Procedure Section 1094.5(a) (decision made in "proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer") and from case law on the availability of administrative mandamus to review a decision of a nongovernmental entity. See, e.g., Anton v. San Antonio Community Hospital, 19 Cal. 3d 802, 814, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979); Pomona College v. Superior Court, 45 Cal. App. 4th 1716, 53 Cal. Rptr. 2d 662 (1996); Delta Dental Plan v. Banasky, 27 Cal. App. 4th 1598, 33 Cal. Rptr. 2d 381 (1994); Wallin v. Vienna Sausage Mfg. Co., 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375 (1984); Bray v. International Molders & Allied Workers Union, 155 Cal. App. 3d 608, 202 Cal. Rptr. 269 (1984); Coppernoll v. Board of Directors, 138 Cal. App. 3d 915, 188 Cal. Rptr. 394 (1983). The requirement in paragraph (3) that the proceeding be of a kind likely to result in a record sufficient for judicial review is new, and is necessary to avoid the unfairness that might result from applying the closed record requirement of this title. See Sections 1123.810, 1123.850.

Subdivision (b) applies this title only to nongovernmental action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person, and not to quasi-legislative acts. See Section 1121.250 ("decision" defined). If this title is not available to review a decision of a nongovernmental entity because the requirements of subdivision (b) are not met, traditional mandamus may be available under Section 1085. See California Civil Writ Practice §§ 6.16-6.17, at 203-05 (Cal. Cont. Ed.

Bar, 3d ed. 1996). If the person seeking review uses the wrong procedure, the court should ordinarily permit amendment of the pleadings to use the proper procedure. See, e.g., Scott v. City of Indian Wells, 6 Cal. 3d 541, 549-50, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972) (reversible error to sustain general demurrer to complaint for declaratory relief without leave to amend when proper remedy is administrative mandamus).

**§ 1121. Proceedings to which title does not apply**

The Commission approved the staff recommendation to add a new subdivision (e) to Section 1121 as follows:

> 1121. This title does not apply to any of the following:
> ….
> (e) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.
>
> **Comment.** … Subdivision (e) makes clear this title does not apply where an agency acts as referee in a court-ordered reference. See, e.g., Water Code §§ 2000-2048. However, notwithstanding subdivision (e), Chapter 2 (commencing with Section 1122.010) on primary jurisdiction may still apply. Section 1122.010; see generally National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 451, 658 P.2d 709, 731, 189 Cal. Rptr. 346, 368, *cert. denied*, 464 U.S. 977 (1983); Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 193-200, 605 P.2d 1, 5-9, 161 Cal. Rptr. 466, 470-74 (1980).

The Commission approved the staff recommendation not to try to clean up Public Utilities Commission regulation of charter party carriers, passenger stage corporations, and household good carriers in the wake of Senate Bill 1322, but to leave that to the PUC and regulated carriers.

The Commission discussed application of the draft statute to local agencies. The strongest argument for exempting local agencies seemed to be for original legislative action under the home rule power (ordinances and resolutions) where no statutory standards apply, since that could only be challenged on constitutional grounds where an open record would be necessary. The Commission decided to have open record review in such cases (see below), which weakens the argument for exempting local legislative action.

The next strongest argument for exempting local agencies from the draft statute is for original legislative action where standards or limitations are prescribed by a statute or ordinance. Weaker still is for legislative action where

the authority is delegated to the local agency by statute, if any. There was no Commission sentiment to exempt regulations of components of local government, such as regulations of a local civil service commission, or local agency adjudication or ministerial or informal action. The staff should give more thought to this, and should consult with the County Counsel's Association of California, California State Association of Counties, and League of California Cities.

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

The Commission asked the staff to be sure that the distinction under the California Environmental Quality Act between judicial review by administrative mandamus and by traditional mandamus is eliminated, and replaced by the single review proceeding of the draft statute.

**§ 1123.220. Private interest standing**

**§ 1123.230. Public interest standing**

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

The Commission approved the staff recommendation to revise Sections 1123.220 and 1123.240, and to add a new Section 1123.250, as follows:

> 1123.220. ~~(a)~~ An interested person has standing to obtain judicial review of agency action. For the purpose of this section, a person is not interested by the mere filing of a complaint with the agency where the complaint is not authorized by statute or ordinance.
>
> ~~(b) An organization that does not otherwise have standing under subdivision (a) has standing if an interested person is a member of the organization, or a nonmember the organization is required to represent, and the agency action is germane to the purposes of the organization.~~
>
> **Comment.** …If a person is authorized by statute or ordinance to file a complaint with the agency and the complaint is rejected, the person is "interested" within the meaning of Section 1123.220. Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 130, 173 P.2d 545 (1946). See also Spear v. Board of Medical Examiners, 146 Cal. App. 2d 207, 303 P.2d 886 (1956) (standing to challenge agency refusal to file charges of person expressly authorized by statute to file complaint).
>
> 1123.240. Notwithstanding any other provision of this article, a person does not have standing to obtain judicial review of a

decision in an adjudicative proceeding unless one of the following conditions is satisfied:

(a) The person ~~is a party to a proceeding under Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code~~ was a party to the proceeding.

(b) The person ~~is~~ was a participant in a the proceeding ~~other than a proceeding described in subdivision (a) and satisfies Section 1123.220 or 1123.230.~~ , and is either interested or the person's participation was authorized by statute or ordinance. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(c) The person has standing under Section 1123.230.

**Comment.** … Subdivision (c) is consistent with Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). Thus a person may have public interest standing for judicial review of adjudication if the right to be vindicated is an important one affecting the public interest, the person resides or conducts business in the jurisdiction of the agency or meets the requirements for organizational standing, the person will adequately protect the public interest, and the person has requested the agency to correct the action and the agency has not done so within a reasonable time. Section 1123.230. Moreover, the requirement of exhaustion of administrative remedies must be satisfied, including the rule that the issue on judicial review must have been raised before the agency by someone. Section 1123.350. See also See & Sage Audubon Soc'y v. Planning Comm'n, 34 Cal. 3d 412, 417-18, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); California Aviation Council v. County of Amador, 200 Cal. App. 3d 337, 246 Cal. Rptr. 110 (1988); Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 895, 236 Cal. Rptr. 794, 799 (1987).

1123.250. An organization that does not otherwise have standing under this article has standing if a person who has standing is a member of the organization, or a nonmember the organization is required to represent, the agency action is related to the purposes of the organization, and the person consents.

**Comment.** Section 1123.250 codifies case law giving an incorporated or unincorporated association, such as a trade union or neighborhood association, standing to obtain judicial review on behalf of its members. See, e.g., Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P. 2d 158, 32 Cal. Rptr. 830

> (1963); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). This principle extends to standing of the organization to obtain judicial review where a nonmember is adversely affected, as where a trade union is required to represent the interests of nonmembers.

The staff should confer further with the County Counsel's Association, California State Association of Counties, and League of California Cities to make sure this draft is acceptable.

The Commission approved the staff recommendation not to delete the requirements in Section 1123.230 that to have public interest standing the petitioner must adequately protect the public interest and must request the agency to correct its action.

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

The Commission suggested that the Comment to Section 1123.420(a)(1) make clear that, although the court uses independent judgment in deciding whether agency action, or the statute or regulation on which the agency action is based, is unconstitutional as applied, the standard of review of the underlying factfinding is prescribed in Section 1123.430 (substantial evidence).

**§ 1123.630. Notice to parties of last day to file petition for review**

The Commission approved the staff recommendation to add the following to Section 1123.630:

> 1123.630. In addition to any notice of agency action required by statute, in an adjudicative proceeding, the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law."
>
> **Comment.** … The introductory clause of Section 1123.630 makes clear that notice of agency action required by other special provisions do not override this section. Special provisions include those for judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), for an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), for denial by a county of disability retirement (Gov't Code § 31725), and under the California Environmental Quality Act (Pub. Res. Code §§ 21108 (state agency),

> 21152 (local agency)). See Section 1121.110 (conflicting or inconsistent statute controls).

The staff should also add language to the special statutes to make clear that, if notices required by the draft statute and by the special statutes are given separately, the applicable limitations period runs from the later of these.

The staff should consider if this provision works satisfactorily with the California Environmental Quality Act. It may be impossible for the agency to know the applicable limitations period, because it depends on the nature of the challenge, and in some cases runs from filing and not issuance of the notice. Pub. Res. Code § 21167. The Commission was also concerned that the agency could undesirably extend the period for judicial review under CEQA by providing a later date in the notice, thus being equitably estopped to assert an earlier date. These problems may be especially serious where, as is often the case, the agency is not the real party in interest. The staff confer with the County Counsel's Association, California State Association of Counties, and League of California Cities on this.

The Commission was concerned that local agencies may generally lack the legal expertise to give accurate advice of the last day for judicial review.

**§ 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 decided there should be no tolling of the limitations period during an agency-ordered stay.

The Commission decided to add the following to Government Code Sections 51286, 65009, 66639, and 66641.7, and Public Resources Code Section 21167:

> Notwithstanding Sections 1123.640 and 1123.650 of the Code of Civil Procedure, [the applicable limitations period is, etc.]

The Commission approved the staff recommendation to put the following in the Comment to Section 1123.650, rather than in the Comment to Section 1123.640:

> Section 1123.650 does not override special limitations periods applicable to particular proceedings, such as for cancellation by a city or county of a contract limiting use of agricultural land under

the Williamson Act (Gov't Code § 51286), California Environmental Quality Act (Pub. Res. Code § 21167), decision of a local legislative body adopting or amending a general or specific plan, regulation attached to a specific plan, or development agreement (Gov't Code § 65009), or a cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (Gov't Code §§ 66639, 66641.7). See Section 1121.110 (conflicting or inconsistent statute controls).

**§ 1123.720. Stay of agency action**

The Commission rejected the staff recommendation to add two new provisions to the Public Contract Code to provide a 30-day time limit for an application for a stay of an award of a public contract. The Commission thought that, in the absence of a showing of changed circumstances, courts would routinely disapprove a stay application long after a contract award.

The Commission declined to make the revisions to Section 1123.720 suggested by the Polaroid Corporation.

**§ 1123.730. Type of relief**

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.730:

> Subdivision (c) applies to state agency adjudications subject to Government Code Sections 11400-11470.50. These provisions apply to all state agency adjudications unless specifically excepted. Gov't Code § 11410.20 and Comment.

**§ 1123.810. Administrative record exclusive basis for judicial review**

The Commission generally approved the staff recommendation to revise Section 1123.810 as follows:

> 1123.810. (a) Except as provided in Section 1123.850 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action if both of the following requirements are satisfied:
>
> (1) The agency gave interested persons notice and an opportunity to submit oral or written comment.
>
> (2) The agency maintained a record or file of its proceedings.
>
> (b) If the requirements of subdivision (a) are not satisfied, the court may either receive evidence itself or may remand to the agency to do so.

> **Comment.** … The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995).
>
> If the closed record requirement of Section 1123.810(a) applies, the court still has some discretion to remand to the agency. See Section 1123.850(c).

The Commission thought the open record provision should be expanded to apply also to cases where the only attack is on constitutional grounds. *Cf.* Hensler v. City of Glendale, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 253 (1994).

**§ 1123.830. Preparation of record**

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.830:

> Although subdivision (a) requires the agency to prepare the record on request of the petitioner for review, in state agency rulemaking under the Administrative Procedure Act, the file is already complete at the time of review. See Gov't Code § 11347.3.

**§ 1123.840. Disposal of administrative record**

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.840:

> Rulemaking records should be carefully safeguarded by the agency. Concerning retention of rulemaking records by the Secretary of State, see Gov't Code §§ 11347.3, 12223.5, 14755 [1996 Cal. Stat. ch. 928 — SB 1507].

**§ 1123.850. New evidence on judicial review**

The staff should add the following to the Comment to Section 1123.850:

> Section 1123.850 does not address the question of whether the evidence must have been in existence at the time of the agency proceeding. For state agency rulemaking, this is governed by Government Code Section 11350. For other action, it is governed by

case law. See, e.g., Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995) (quasi-legislative action); Elizabeth D. v. Zolin, 21 Cal. App. 4th 347, 356-57, 25 Cal. Rptr. 2d 852, 856-57 (1993) (administrative adjudication); Toyota of Visalia, Inc. v. New Motor Vehicle Bd., 188 Cal. App. 3d 872, 881-82, 233 Cal. Rptr. 708 (1987) (same); Windigo Mills v. Unemployment Ins. Appeals Bd., 92 Cal. App. 3d 586, 596-97, 155 Cal. Rptr. 63 (1979) (same).

**§ 1123.940. Proceedings in forma pauperis**

The Commission approved the staff recommendation to limit Section 1123.940 to adjudicative proceedings as under existing law:

> 1123.940. Notwithstanding any other provision of this article, if the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and if the transcript is necessary to a proper review of ~~the administrative proceedings~~ an adjudicative proceeding, the cost of preparing the transcript shall be borne by the agency.

**Gov't Code § 11350 (amended). Judicial declaration on validity of regulation**

The Commission tentatively approved the staff recommendation to revise Government Code Section 11350 as follows:

> 11350. (a) ~~Any interested~~ Except as provided in subdivisions (d) and (e), a person may obtain a judicial declaration … [etc.].
>
> ….
>
> (d) Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review:
>
> (1) The court may not require the agency to add to the administrative record an explanation of reasons for a regulation.
>
> (2) No evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.
>
> (e) Section 1123.460 of the Code of Civil Procedure does not apply to a proceeding under this section.

The staff should consider whether similar language should be applied to state agency rulemaking not under the Administrative Procedure Act, such as Water Board regional water quality control plans (Gov't Code § 11353), State Personnel Board, Industrial Welfare Commission, California community colleges, California State University, California Coastal Commission (interpretive guidelines). This should probably turn on whether the applicable statute requires the rulemaking file to be complete at the end of the rulemaking proceeding,

similar to Government Code Section 11347.3. The staff should confer with Herb Bolz of the Office of Administrative Law on this.

The Commission approved the staff recommendation to add the following to the Comment to Section 11350:

> For judicial review of rulemaking, the provision in Code of Civil Procedure Section 1123.850(a), permitting new evidence on judicial review if it could not in the exercise of reasonable diligence have been produced in the administrative proceeding, should be very narrowly construed. Such evidence is admissible only in rare instances. See Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995).

## STUDY N-300 – ADMINISTRATIVE RULEMAKING

The Commission considered Memorandum 96-79, together with a letter from the California Energy Commission distributed at the meeting (Exhibit pp. 10-15), relating to administrative rulemaking. The Commission made the following decisions concerning this study.

**Priorities in rulemaking study.** In light of the significant current problems in the law relating to treatment of interpretive guidelines, the Commission will give priority to this matter, with the possibility of a separate bill addressing it. It was noted that one of the factors driving the tendency of agencies to avoid the rulemaking process through interpretive guidelines is the burdensome complexity of the rulemaking process.

**Text of proposed regulation.** The "plain English" requirement should be retained, but the "eighth grade" aspect of it should be deleted and the requirement should combine the summary and overview in a plain English informative digest. This should apply to all regulations, not just those that may affect small business.

In this connection, the staff should review the rulemaking statute's definition of "small business" and the specific provisions that relate to small businesses. The small business provisions might be generalized to apply to all regulations, where appropriate. The staff should contact the small business community in this connection.

**Statement of reasons and notice of proposed rulemaking.** The staff should propose simplifications in the statement of reasons and notice of proposed rulemaking, such as, for example, consolidating the statement of problem and

purpose as suggested by the Energy Commission, and eliminating matters that cannot be determined until the agency has received comments on the proposed regulation. The documents prepared by the agency might include some indication of the economic impact of the regulation. We should seek to obtain private sector input on these proposals. OAL agreed to provide the staff contacts for active private sector interests.

**Electronic communications.** The statutes should be expanded to permit (but not require) electronic communications in the rulemaking process.

**Public hearing.** The Commission considered the concept of allowing an agency to cancel a hearing if it requests notice from any person wishing to be heard and no person responds to the request. The Commission saw a number of problems with such a scheme, but decided to seek additional input on the concept.

**Response to comments.** The statute and Comment should make clear that irrelevant comments can be grouped, swiftly summarized, and summarily dismissed without having to name each of the commentators. This is consistent with existing practice.

**Ex parte contacts.** The Commission was not inclined to attempt to limit or regulate ex parte communications in the rulemaking process. In this connection, the staff will develop a proposal to provide notice, electronic or otherwise, to persons who have requested it when an agency submits a regulation to OAL for review.

**One-year rule.** The Commission did not consider the one-year rule due to insufficient meeting time.

☐ APPROVED AS SUBMITTED

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

_____
Date

_____
Chairperson

_____
Executive Secretary

**BRYAN CAVE LLP**

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November 6, 1996

California Law Revision Commission
4000 Middlefield Road
Palo Alto, California 94303

Attn: Nathaniel Sterling

Dear Mr. Sterling:

I am writing in the hope that the Law Revision Commission might once again take up the issue of property acquired in joint tenancy form by spouses. Despite the overwhelming sentiments of experienced estate planning attorneys, spouses continue to acquire joint tenancy form property. Because of our transmutation statutes and the way they have been interpreted by the Courts, it is difficult or impossible to ever know if the property is acquired as community property and is merely in joint tenancy form, or, is half the separate property of each in a true joint tenancy situation.

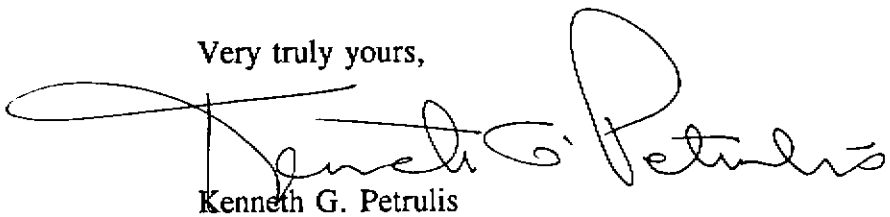
When the Law Revision Commission last considered the problem, the solution upset banks and title companies who could no longer determine who had legal ownership of the property.

I hope that the Law Revision Commission will re-look at the problem with an eye toward respecting the formalities of title, while at the same time, retaining for spouses, the benefits (and disadvantages) of community property for tax purposes. Simply put, I believe that the joint tenancy form of title be a right of survivorship imposed on community property. It should allow the property to pass to the surviving spouse without being affected by Will, just as spouses can now do on a pension plan, IRA or insurance policy.

I believe other States, such as Wisconsin, have already adopted such concept and see no reason why California should be behind other States in making the law more convenient and more sensible for citizens.

Regardless of the outcome, I think that it is important that the problems created by the present state of the law be solved.

Very truly yours,



KGP:saj

Kenneth G. Petrulis

OFFICE OF THE DISTRICT ATTORNEY
County of Los Angeles
Consumer Protection Division
201 N. Figueroa St., Room 1600
Los Angeles, California 90012

November 14, 1996

California Law Revision Commission
c/o State Capitol, Room 2040

DELIVERED BY FAX

Re: Study B-700 (Unfair Competition)

Dear Chairman Fink, Members and Staff:

Unfortunately, due to airline equipment failure, I will not be able to attend today's Commission hearing. Southwest Flight 676 from San Diego was canceled this morning after a lengthy delay, and the airlines were unable to book us on a flight to Sacramento arriving before 3:10 this afternoon. I am faxing this brief comment from my home in Dana Point in lieu of an appearance.

The members of the California District Attorneys Association, and the staff of my office, view the Final Recommendation Draft attached to Memorandum 96-74 as a thoughtful and sound compromise to resolve the remaining concerns in the B-700 study. Although the final draft incorporates changes which we did not advocate (including modest erosion of the prosecutors priority in proposed §17310), we believe the compromises in this and other provisions to be fair and workable.

The present draft is properly focused and carefully balanced to avoid undue burdens while promoting the Commission's goals of greater certainty and finality in representative actions brought under §17200. My informal canvass of private practitioners indicates that most find this draft to be a reasonable solution. In light of this, I urge the Commission to resist last-minute requests to broaden the scope of the proposal. For example, one recent commentator asked you to revisit the issue of applying 45-day notice and hearing requirements to public law enforcement actions, a change which would jeopardize at least 50% of all law enforcement stipulated judgments. These late requests for major changes will only jeopardize the consensus I believe is emerging.

Thank you for your continuing consideration of our views.

Very truly yours,

Tom Papageorge

THOMAS A. PAPAGEORGE, Head Deputy
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November 14, 1996



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VIA FACSIMILE (415) 494-1827 and U.S. MAIL

**Re: Judicial Review of Agency Action**

Dear Mr. Murphy:

This is in response to your letter of September 26, 1996 regarding proposed language addressing the issue of standing and the application of the rule in Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105 (1975). I apologize for the delay in getting these comments to you.

I have reviewed your letter and applicable case law. I have also discussed this matter with colleagues. The issue is complicated and I hope the following is helpful. However, I should note that this is not a formal response on behalf of the County Counsels' Association.

We appreciate your efforts to eliminate any open-ended exception to the standing requirements as they relate to land use decisions. The language you propose takes some significant steps toward providing some statutory definition around "public interest" standing. There are, however, some additional considerations you may wish to incorporate in the proposal.[1,2]

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[1]I would note that, to my knowledge, the "public interest" rule articulated in Corte Madera has never been formally adopted by the California Supreme Court, although the concept has received fairly broad acceptance at the appellate court level. In the one Supreme Court case I found with any substantive discussion of the subject, the court declined to pass on the validity of the Corte Madera rule since it found it unnecessary to do so. Sea & Sage Audubon Society, Inc. v. Planning Commission of the City of Anaheim, 34 Cal. 3d 412, 194

First, as you note in your letter, the rule articulated in Corte Madera relates to the doctrine of "exhaustion of administrative remedies". It is not truly a "standing" case. While we welcome statutory clarification of the rules of standing which often seems to be unrestricted, I believe a distinction should be drawn between the standing and exhaustion of administrative remedies doctrines. Exhaustion of administrative remedies is one element of standing. A person may lack necessary elements of standing, wholly aside from the question of exhaustion of administrative remedies. In this respect, the proposed Section 1123.220 may not sufficiently spell out the standards of "standing" for persons not parties to a proceeding. In particular, the standard contained in subsection (a), that the person reside or conduct business in the jurisdiction, will often, but not necessarily always, confer standing in an environmental case. If Section 1123.220 is to address the issue of standing, some additional reference to an interest in the subject matter of the case should be incorporated as a requirement.

Section 1123.220 may inadvertently broaden the Corte Madera exception to the exhaustion of administrative remedies doctrine. Corte Madera was concerned with allowing persons who represent generalized public interests, but who were not parties to a proceeding, to seek judicial review without necessarily having exhausted administrative remedies. However, the concept of not being a "party" is ambiguous and has been the subject of interpretation by the courts. Generally, the Corte Madera rule has been applied where the plaintiff is not a formal party, represents significant public interests, and either has not had an administrative remedy available (e.g. not being an interested party entitled to an administrative appeal) or has not received notice of the proceedings.

The Supreme Court has held that the Corte Madera rule will not be applied where the person bringing the challenge in fact appeared and participated in the proceedings. Sea & Sage Audubon Society, Inc. v. Planning Commission of the City of Anaheim, 34 Cal. 3d 412, 418, 195 Cal. Rptr. 357 (1983). Also, at least one appellate court has held that the Corte Madera exception does not apply where appropriate notice has been given, and that statutorily required publication of notice in a land use proceeding is adequate to afford the public the opportunity to participate in the proceedings. The general trend seems to be to apply the exception where the member of the public, aside from not being a formal party to the action, did not have an adequate opportunity to participate. Where that opportunity is available, whether or not the person takes advantage of it, courts seem reluctant to allow a party to refrain from participation

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Cal. Rptr. 357 (1983).

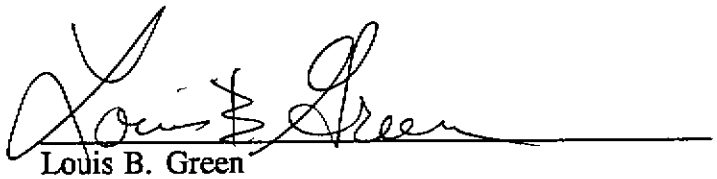
[2]On a related matter, your letter refers to the "exact issue" rule which is codified in Section 1123.350. The comment under that section refers to it as being a codification of caselaw. However, this rule is also codified in various forms elsewhere such as in CEQA (Government Code Section 21177). Since the proposed statute is procedural in nature, it may be appropriate to include a statement that nothing in the proposed legislation is intended to eliminate any defense provided in any other provision of law, nor is it intended to supersede limitations on or prerequisites to the filing of litigation contained in any other body of law.

and then seek exemption from the exhaustion doctrine.

Section 1123.220 does not adequately take these factors into account. If redrafted as an exception to the exhaustion doctrine rather than a standing rule, it should make clear that the exception is not available if the party actually participated in the public input process, or if statutory notice was given and the person had the opportunity to participate. This would be consistent with the trend of the case law as I read it.

Thank you for the opportunity to provide input. This particular issue involves a particularly difficult drafting problem. I hope my comments are of assistance.

Very truly yours,



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VIA FACSIMILE (415) 494-1827 and U.S. MAIL

**Re: Judicial Review of Agency Action**

Dear Mr. Murphy:

After transmitting my letter to you earlier today on the issues of standing and exhaustion of administrative remedies under the Corte Madera case, I received additional comments on the subject from my colleague, Dwight Herr, County Counsel for Santa Cruz County. Mr. Herr included specific proposed changes to Sections 1123.220, 1123.230, 1123.240 and 1123.250 which I am forwarding to you.

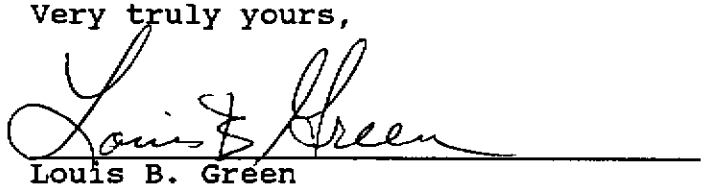
Mr. Herr's suggestions are consistent with the comments in my letter. However, please note that his input relates primarily to the standing issue and the type of interest needed to establish standing in land use cases, supplementing a comment I made but as to which I did not make specific recommendations. The standing issue raised by Mr. Herr is separate from the exception from the exhaustion of administrative remedies issue on which I focused and, therefore, his suggestions would be in addition to, and not in place of, my earlier comments.

Mr. Herr suggests using the concept of a "cognizable private interest" of the type the court found in Horn v. County of Ventura (1979) 24 Cal. 3d 605 to be possessed by an owner of property near a proposed minor division of land for due process purposes as the basis for standing in land use cases. In addition, his proposals reflect a concern that Section 1123.230(c) contains no time limit within which a person must make a request for an agency to "correct the agency action". This is particularly problematic if the Commission does not eliminate local legislative actions from the

definition of "local action" as we have requested the Commission to do.

Thank you for your consideration of these items.

Very truly yours,



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Subsection (a) of Section 1123.220 be revised as follows:

(a) ~~An interested person has standing to obtain judicial review of agency action. For the purpose of this section, a person is not interested by the mere filing of a complaint with the agency where the complaint is not authorized by statute or ordinance.~~ The person either has a cognizable private interest adversely affected by an agency action, or the person expressly filed a complaint with the agency as authorized by statute or ordinance and the agency action rejected the complaint.

Subsection (c) of Section 1123.230 be revised as follows:

(c) ~~The person has previously requested the agency 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. The agency may by rule require the request to be directed to the proper agency official. 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 person is seeking judicial review of an issue which another person with standing presented as part of the agency proceeding on the action.

Subsection (b) of Section 1123.240 be revised as follows:

(b) The person was a participant in the proceeding and ~~is either interested~~ either has a cognizable private interest adversely affected by the decision or the person's participation was expressly authorized by statute or ordinance. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Section 1123.250 be revised as follows:

1123.250. An organization that does not otherwise have standing under this article has standing if a person who has standing under this article is a member of the organization or a nonmember the organization is required to represent, the agency action is germane to the purposes of the organization, and the person consents.

STATE OF CALIFORNIA—THE RESOURCES AGENCY

PETE WILSON, Governor

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November 13,1996

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SUBJECT: ADMINISTRATIVE RULEMAKING STUDY (STUDY 9-300); COMMENTS ON PROFESSOR ASIMOV'S PROPOSALS

Dear Mr. Sterling:

The California Energy Commission (CEC) is keenly interested in the ongoing discussion over revisions to the APA rulemaking provisions. The CEC is an agency with multi-faceted duties requiring extensive rulemaking for power plant siting, appliance energy efficiency, building energy efficiency, utility forecasting information, utility load management, and various other statutorily prescribed duties. In adopting rules in these areas the CEC has gained intimate familiarity with the challenges confronting agencies regarding the rulemaking process, Office of Administrative Law (OAL) review, and the nuanced issues regarding "underground regulations."

Professor Asimov's September 16, 1996, proposals for APA reform provide an insightful look at agency rulemaking in California. Along with prior proposals offered by OAL, this paper should be the starting point for drafting revisions to the current law. The following comments respond to some of the points raised by the Asimov paper.

1. Stringency of California Rulemaking Law. Professor Asimov properly notes that the rules governing the promulgation of regulations in California are probably the most stringent and resource-intensive in the entire world. Unfortunately, hardly a legislative session concludes without the additional "piling on" of new restrictions on rulemaking agencies that increase the burden of an already overly elaborate government process. This piling on of thoughtless and overlapping or redundant requirements increases the incentive for agencies to resort to unofficial and unadopted rules--"underground regulations."

"Underground regulations," though undesirable and subject to legal invalidity, are increasingly the only way many agencies are able to readily respond to their regulated constituencies because rulemaking has become so burdensome and time-consuming. Although the stereotype underground regulation is often portrayed as oppressive and hostile to California business, they are frequently the result of efforts to find solutions to problems of regulatees that were unforeseen when a particular regulation was adopted by the agency and approved by OAL.

Professor Asimov indirectly describes the reasons agencies resort to underground regulations. First, the rulemaking process is lengthy, bureaucratic, and resource-intensive, making rapid solutions to arising problems impossible. Even a simple, uncontested rulemaking can easily take more than six months from the time a problem is discovered until the effective date of the new regulation. For building standards, which must be approved (or adopted) and published by the Building Standards Commission, the process literally takes one to three years, and sometimes longer, before even a slight change in a standard can take effect.

Second, as Asimov observes, emergency regulations are usually unavailable because of the narrow definition of "emergency," and the requirement that an agency's finding of emergency be approved by OAL (or the Building Standards Commission).

Third, formal interpretations of regulations, which might keep the bureaucratic wheels turning for both agencies and their regulated constituents, are currently disallowed by the APA. OAL takes a very stringent position against any "standards of general application" that would interpret agency regulations. In the past, OAL has opined that even informal conversations with agency staff concerning the application of a regulation, or a staff "advice letter" on how to resolve an issue regarding the application of a regulation, constitute "underground regulations[1]."

In reality, it is impractical, undesirable, and politically unacceptable for agencies to remain totally silent when a regulated business or industry asks what a regulation means with regard to a particular issue, and millions of dollars may hang in the balance concerning what the answer may be. Faced with this situation, it

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[1] The Building Standards Commission has traditionally taken a more pragmatic approach to regulatory interpretations. It has informally acknowledged the existence and necessity of agency interpretation of building standards, and suggested that agencies that interpret building standards formalize their interpretations and submit them to the Building Standards Commission for publication.

is unrealistic and irresponsible for an agency to respond only with, "we'll cover it next year in our rulemaking." California business would be even less tolerant than the general public of such agency unresponsiveness. Thus, as a practical matter, agencies issue interpretations of their statutes. These are expressed in various form, sometimes oral, sometimes by staff letter, and occasionally by formal agency action. In my experience, these interpretations are typically solicited by California business confronted with a regulatory problem, seeking relief from regulatory inflexibility or ambiguity.

2. The Role for OAL. The CEC agrees with Asimov's general observations about OAL. Although OAL can make things difficult for rulemaking agencies, its review function unquestionably results in better (and fewer) government regulations. Under its current director and leadership, OAL has indeed become much more helpful, cooperative, and reasonable in its relationship with rulemaking agencies. Most of this credit should go to its current personnel and leadership. As Asimov observes, earlier regimes were at best erratic, and frequently hostile to rulemaking agencies.

Understandably, OAL's operative vision is that of protector of the regulated public against power-hungry bureaucracies. This vision is not necessarily mistaken, but it is definitely overly narrow and simplistic. OAL would benefit from greater familiarity with the issues rulemaking agencies face. As discussed above, many of the actions that OAL would characterize as "underground regulations" are specific, informal interpretations by agencies to provide flexibility and reason to regulations. These actions are often necessary and helpful to the regulated public.

The above should not be read as an attack on the prohibition against "underground rules." The APA should continue to restrict agencies from issuing general rules without rulemaking, and OAL should continue to play an enforcement role. But there needs to be some balance that allows agencies to address (formally or informally) arising issues by interpretation, without resort to the panoply of requirements that now constitute the rulemaking process.

3. Rulemaking Notice Requirements. As Asimov notes, there has been a steady accumulation of new requirements for the documents that agencies must prepare and issue for rulemaking. In 1993 a new requirement was added to the contents of the notice of rulemaking, requiring agencies to include in the notice a statement that the agency has "determined" or "finds" that the regulation

either will or will not have "a significant adverse economic impact on business." (Govt. Code, § 11346.5, subds. (7) and (8).)[2]

The finding in question is clearly intended to be a factual finding, as the agency must "provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support the finding." (§ 11346.5(8).) This requirement is buttressed by the requirement that the initial statement of reasons, which must be prepared with and issued with the notice of rulemaking, include the "[f]acts, evidence, documents, testimony, or other evidence upon which the agency relies to support a finding that the action will not have a significant adverse impact on business." (§ 11346.2(b)(5).)

In essence, the above provision requires a rulemaking agency to make a finding, based on a record, regarding business impact of a proposed regulation before it even issues the rulemaking notice. For a multimember decision-making body like the CEC, this clearly requires a noticed hearing. This hearing would presumably be necessary even if the entire purpose of the rulemaking was to repeal or make less stringent regulations affecting business.

The requirement in question is burdensome, inefficient, and unnecessary. Agencies commence the creation of their rulemaking records when they issue the rulemaking notice. At the CEC, the rulemaking proposal itself usually changes in response to the public comment received during workshops and committee hearings. Only at the conclusion of the process is it apparent what the final regulation will be, and only then does it make sense, based on the record, to make findings regarding the impact of the proposed regulation on business.

Agencies should not be required to hold public hearings and develop a record before the issuance of the rulemaking notice. Indeed, the burden of conducting a pre-notice hearing prior to initiating a rulemaking may make agencies even less likely to resort to formal rulemaking, and may reduce responsiveness to public comment in the rulemaking proceeding because of the greater investment in resources the agency must make to even initiate the rulemaking.

4. Eliminating Redundancy in the Initial Statement of Reasons. Section 11346.2(b) prescribes the contents of the initial statement of reasons. The first two requirements are as follows:

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[2] Unless otherwise indicated, all statutory references are to the Government Code.

> (1) A description of the public problem, administrative requirement, or other condition or circumstance that each adoption, amendment, or repeal is intended to address.
>
> (2) A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed . . . .

The "public problem" and the "specific purpose" are, almost inevitably and without exception, the same thing. I have never found an attorney who prepares rulemaking documents who could tell me how (1) would not include (2), and vice-versa. Particularly when viewed in the full context of the other initial statement requirements, the "public problem" requirement appears to add nothing to the statement.

5. Response to Comments. Summary of objections or comments should be specifically allowed, as Asimov suggests. He correctly notes that OAL apparently does not object to this practice.

6. Emergency Regulations. Asimov's proposal that the 120 day period of validity be lengthened to 180 days is sound; most rulemakings need at least that much time to successfully conclude. More important, the CEC strongly supports Asimov's proposal to include (1) economic emergencies and (2) compliance with imminent statutory deadlines as part of the definition of emergency. The CEC must currently grapple with implementation of electric industry restructuring legislation without formal rulemaking because the rulemaking process simply takes too long, and because implementing the statute is not an "emergency" that would allow for emergency rulemaking.

The proposal that one week's notice should be given prior to emergency rulemaking unless it is impracticable to do so is reasonable.

7. "Direct Final" Rulemaking and "Guidance Documents". The "direct final" concept is one way to meet the need of agencies to provide guidance to its regulatees outside of formal rulemaking. Non-binding advisory documents, clearly labelled as such (the Washington model), would also be a useful way to address this need. Clearly, allowing legally binding guidance documents would promote underground rulemaking and make impossible OAL's enforcement role.

8. Ex Parte Contacts. As Asimov suggests, applying the ex parte rule to rulemaking would cut the agency off from the information it needs to have intelligent and responsive regulations. At the CEC, rulemaking has become an increasingly collaborative process--much like the "negotiated rulemaking" referred to by Asimov. There should be absolutely no restrictions on communications during the comment period.

9. OAL "Necessity" Review. As Asimov observes, the "necessity" review for specific regulations can lead to absurd results, particularly when the regulation in question sets a numerical minimum (or maximum) standard. For instance, how does an agency justify setting a landfill "coverage" limit of seven percent, as opposed to six or eight percent? How does it justify the necessity of an outlet hot water temperature of 110 degrees, as opposed to 109 or 111? Frequently it makes no real difference; the only real factor is that 110 degrees (not 109) is in the model code, or that the 7 percent standard was agreed upon as a compromise after extensive political bargaining.

The rationale for such "line drawing" should not be subject to a "factual support" or "evidence" requirement. Asimov's proposal for a "statutory comment" that addresses this problem should be further explored.

Thank you for considering these commments.

Yours truly,

DICK RATLIFF
Senior Staff Counsel