MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 8, 1995
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on December 8, 1995.

Commission:

Present: Colin Wied, Chairperson
Allan L. Fink, Vice Chairperson
Christine W.S. Byrd
Quentin L. Kopp, Senate Member
Arthur K. Marshall

Absent: Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Edwin K. Marzec
Sanford M. Skaggs

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Robert J. Murphy, Staff Counsel
Deborah Muns, Student Legal Assistant

Consultants: Michael Asimow, Administrative Law
Melvin A. Eisenberg, Corporate Governance

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
William M. Chamberlain, California Energy Commission, Sacramento
Maurice K. DeWolff, State Bar, Corporations Committee, San Francisco
Kim Epstein, Milberg, Weiss, Bershad, Hynes, & Lerach, San Francisco
Martin Fassler, Department of Industrial Relations, San Francisco
Bill Heath, California School Employees' Association, San Jose
John Higgins, California Family Support Council, Visalia
Eugene Huguenin, California Teachers Association, Burlingame
Bernard McMonigle, Public Employment Relations Board, Sacramento
Jeanne Miskel, San Mateo District Attorney's Office, Family Support Division, Redwood City

Jerry Mitchell, Office of Administrative Hearings, Oakland
Joel Perlstein, California Public Utilities Commission, San Francisco
Madeline Rule, Department of Motor Vehicles, Sacramento
Daniel Siegel, Attorney General's Office, Sacramento
Tom Sobel, Agricultural Labor Relations Board, Sacramento

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MINUTES OF NOVEMBER 2, 1995, MEETING

The Commission approved the Minutes of the November 2, 1995, meeting as submitted by the staff, with the following corrections:

On page 4, under the heading "Study B-700 — Unfair Competition", the word "consideration" was substituted for "considered", the reference to the Second Supplement was deleted, and the phrase "approach taken in" was substituted for "approach of".

ADMINISTRATIVE MATTERS

Report of Executive Secretary

The Executive Secretary reported on the following matters.

Commission reappointments. All four Commission members whose terms had expired October 1, 1995 — Commissioners Cooper, Marshall, Marzec, and Wied — were reappointed by the Governor.

Commission budget. The Department of Finance has agreed with the Commission's budget change proposal to eliminate budgeting for salary savings, and will make this part of the Governor's budget for 1996. This will result in a net increase of $23,000. This amount is insufficient to bring the Commission back to an adequate operating level, and an additional $27,000 is needed. It is too late now for a further increase in the Governor's budget for 1996, but it may be feasible to obtain the additional amount in the Legislative budgeting process.

Schedule for consideration of topics. The Chairperson postponed consideration of the unfair competition litigation topic until the January meeting in order to allow time for those Commissioners who wish to do so to seek an FPPC advice letter (or opinion) on conflict of interest issues raised by commentators on the study. This will also allow interested parties additional time to respond to the Commission's inquiry whether there are any real problems in the area that need to be addressed.

Commission office space. The Executive Secretary has inspected the facility at McGeorge Law School that might be available for Commission office space. The situation is a good one, but the staff has not solicited a proposal from McGeorge pending a determination by key staff members whether they would be willing to relocate to Sacramento. The level of staff member interest in such a move is low.

Late-arriving meeting materials. The Executive Secretary inquired whether Commissioners want to receive late arriving meeting materials (typically letters faxed to the staff the day before a Commission meeting) by fax before the meeting or by distribution at the meeting. Commissioners felt that if it were really critical material it should be provided in advance (but not too late in the day and not if the volume of the material makes it impractical); otherwise distribution at the meeting is sufficient.

STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission considered Memorandum 95-71 and the First and Second Supplements to Memorandum 95-71, relating to codification of the business judgment rule. The Commission took the following actions on this matter.

Presumption v. Burden of Proof

The business judgment rule should be phrased as a presumption, but the statute should make clear that the presumption is one affecting the burden of proof. The standard of proof should be a preponderance of the evidence.

Provision in Articles Limiting Liability of Directors

The provision in the staff draft making the business judgment rule inapplicable if the articles contain a provision limiting director liability was deleted. The Comment should note that the business judgment rule does not

limit any other protection that may be available for an officer or director, such as a provision in the articles limiting the liability of a director.

Decisions that Have the Effect of Blocking Unsolicited Tender Offer

The draft should include the provision set out in the First Supplement making the business judgment rule inapplicable to determine whether a decision that has the effect of blocking an unsolicited tender offer should be enjoined or set aside. However, the rule would continue to apply to liability of directors in such a case.

Definition of "Interested" Director

The staff should consider splitting this definition off into a separate section. This might be done as part of a separate article on the business judgment rule, which would enable it to be kept in proximity with the substantive provision to which it relates. Or it might be done by placing it with general provisions and including a specific cross-reference to it in the substantive provision. (In this case, other uses of the term "interested" in the Corporations Code should be examined.)

The definition should be revised so that it is an inclusive rather than an exclusive listing of what it means to be interested. It should refer to a "transaction or conduct" rather than the "subject of a business judgment." It should be expanded to include the special provision found in the ALI Principles of Corporate Governance defining "interested" for purposes of derivative actions.

Application to Officers

The staff should prepare an analysis of the standard of care of officers, and the application of the business judgment rule to them. Because there is little law on these matters, reference should be made to law of other jurisdictions as well as California law. In this connection, a distinction may be drawn between senior executive officers and other officers, and between officers who are directors and other officers.

Commission Procedure on Study

The Commission decided that these issues should be considered with some care and deliberation at a future meeting that Professor Eisenberg is able to attend, and the staff should consult with him in preparing materials.

STUDY B-602 – DEMAND AND EXCUSE IN SHAREHOLDER DERIVATIVE ACTIONS

The Commission considered Memorandum 95-72 and the First Supplement to Memorandum 95-72, together with the attached consultant's background study on demand and excuse in shareholder derivative actions. The Commission's consultant, Professor Mel Eisenberg, presented the background study.

The Commission concluded that issue of the standard applicable to a board action to reject a demand or to dismiss a derivative action is a complex matter that deserves further careful scrutiny. The staff should prepare a memorandum that coalesces the material in Professor Eisenberg's study, and should invite additional comment from interested persons, for consideration at a future Commission meeting that Professor Eisenberg is able to attend.

STUDY D-352 – HOMESTEAD EXEMPTION

The Commission commenced consideration of Memorandum 95-75, and the First and Second Supplements thereto, concerning additional changes in the recommendation on the *Homestead Exemption*. The Commission requested the staff to prepare a memorandum on the policy behind the homestead proceeds exemption for consideration at the next meeting. Consideration of the issues presented in the memorandum and its supplements was postponed.

STUDY J-1200 – TRIAL COURT UNIFICATION BY ATTRITION

The Commission took up the topic of trial court unification by attrition under SB 162 (Lockyer). The Commission did not consider the staff memoranda on the topic prepared for the meeting. The Commission instructed the staff to seek direction from the Legislature whether this is really a matter the Legislature wants the Commission to report on, given the political considerations that went into achieving enactment of SB 162.

The Executive Secretary will make inquiry of Senator Lockyer, President pro Tempore of the Senate concerning this matter, and will report back to the Commission. In this connection, the Executive Secretary will attempt to determine whether the Legislature is looking to the Commission for cleanup legislation in the wake of unification of the justice and municipal courts.

STUDY N-110 – ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

The Commission considered Memorandum 95-74, relating to followup legislation on administrative adjudication by state agencies. The Commission approved for inclusion in the bill a provision for adoption of interim or permanent regulations under both Chapter 4.5 and Chapter 5 of the Administrative Procedure Act. See page 1 of the memorandum. The provision set out at page 2 of the memorandum, continuing existing oil spill cleanup regulations and authority in the Administrator for Oil Spill Response should not be included in the bill unless all affected parties agree that the provision is proper.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 95-67 and First and Second Supplements with comments on the Tentative Recommendation on *Judicial Review of Agency Action*. The Commission made the following decisions:

Agencies to Which Statute Applies

The Commission decided not to exempt from the draft statute the five agencies that now have review by writ of certiorari (writ of review) in the court of appeal — Workers' Compensation Appeals Board, Public Employment Relations Board, Agricultural Labor Relations Board, Department of Alcoholic Beverage Control, and Alcoholic Beverage Control Appeals Board. The closed record requirement (discussed below) makes it harder to justify treating cases reviewed in the court of appeal differently from those reviewed in superior court. The Commission thought the short times applicable to PERB for a petition for review and filing the record with the court of appeal should be preserved. See Gov't Code §§ 3520, 3542, 3564. The Commission asked the staff to provide historical information on why review for these agencies was put in the court of appeal, and how the draft statute would affect their procedures.

The Commission considered whether to exempt power plant siting decisions of the California Energy Commission and rate-making decisions (but not truckers' licensing) of the Public Utilities Commission, agencies that now have direct review by writ of certiorari (writ of review) in the Supreme Court. As an alternative, the special standard review of fact-finding of these two agencies could be preserved (Pub. Util. Code § 1757; Pub. Res. Code § 25531), and they could be given an express delegation of interpretive authority on questions of

law which would result in abuse of discretion review. For the PUC, the Commission was inclined to wait for final action on Senate Bill 1322. The Commission did not resolve this, and asked the staff to bring it back for the next meeting.

Standard of Review of Findings of Fact in Adjudications by Local Agencies

The Commission approved the staff recommendation that the standard of review of findings of fact in adjudications by local agencies is the independent judgment of the court, unless the agency adopts procedural protections to assure due process, in which case substantial evidence review would apply. The Commission wanted to go further than merely requiring the agency to adopt the administrative adjudication bill of rights. The Commission thought agency procedural protections ought to include the right to compel attendance of witnesses and production of documents by subpoena (Gov't Code §§ 11450.10-11450.40), and limited discovery (*cf.* Gov't Code § 11507.6 — to get names, addresses, and statements of witnesses, and to inspect and copy relevant documents). The staff should determine if it would be workable to apply the discovery provisions of the Administrative Procedure Act to local agency proceedings.

There was some thought that fact-finding in environmental and land use cases should be subject to substantial evidence review. The representative of the California Teachers Association had no objection to substantial evidence review of decisions of a Commission on Professional Competence. See Educ. Code § 44944 (independent judgment review).

The Commission asked the staff to bring back a revised provision. The Commission wanted more information about procedures for administrative discovery.

Standard of Review of Agency Application of Law to Facts

The Commission approved the staff recommendation to keep independent judgment review of questions of agency application of law to facts. The Commission asked the staff make clear in the Comment the difference between pure questions of fact (historical facts, such as what happened during the surgery) with application questions (was the doctor negligent). The staff should work with the Attorney General's Office in writing the Comment. It was

suggested that the term "mixed question of law and fact" should be avoided, and instead the term "application of law to facts" should be used.

Standard of Review of Agency Interpretation of Law

The Commission approved delegating to the Public Employment Relations Board and Agricultural Labor Relations Board authority to interpret their statutes on labor law questions (but not on other questions, such as what constitutes a quorum) in adjudicative proceedings (but not for rulemaking), since that will approximate existing law. The Department of Industrial Relations asked for similar authority. The Commission thought this authority should be granted to this and other agencies only if necessary to preserve existing law for each such agency.

The delegation language in the Memorandum should be adjusted to address the problem of the Office of Administrative Law. OAL has a problem with the word "delegate," because it does not have the meaning in existing California law that we are trying to give it in this context. Arguably, all agencies have been delegated authority to interpret their statutes, for example, a school district interpreting the Education Code. OAL suggested delegating "extraordinary" authority to interpret.

The Commission asked the staff to bring back a revised draft. The staff should suggest language for the next meeting to deal with the possible effect of abuse of discretion review on interpretive rule-making where the Legislature expressly delegates interpretive authority to the agency. OAL does not want to import the federal distinction between legislative and interpretive rulemaking, a distinction which OAL says California does not recognize.

Closed Record

There was sentiment to reject the provision in Section 1123.760(b)(2) permitting the court to receive evidence outside the administrative record in cases involving independent judgment review of fact-finding. The Commission was inclined to require review on a closed record, except in the exceptional cases provided in Section 1123.760(b)(1) — improper constitution as a decisionmaking body, improper motive, grounds for disqualification, or unlawfulness of procedure or of the decisionmaking process. Evidence should be admissible in court on these limited issues, because evidence necessary to disclose these grounds for challenge is unlikely to appear from the administrative record.

The Commission wanted to know if case law permits a court to conduct a trial de novo in traditional mandamus to review a discretionary agency decision, rather than reviewing an administrative record. Professor Asimow thought that, if the agency record is insufficient for judicial review, the court should remand to the agency to reconsider the decision or to create a record or file (not necessarily to hold a hearing), rather than having a court trial. This is the federal approach and the rule of Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995) (no court discretion to have a trial). *Cf.* California School Employees Ass'n v. Del Norte County Unified School Dist., 2 Cal. App. 4th 1396, 1405, 4 Cal. Rptr. 2d 35, 39-40 (1992) (proper to exclude oral testimony and decide case on declarations on law and motion calendar). The Commission asked for staff analysis of *Western States*, and what the implications would be of departing from the closed record rule of that case.

☐ APPROVED AS SUBMITTED

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

_____
Date

_____
Chairperson

_____
Executive Secretary