
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
APRIL 12, 1996
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 12, 1996.

Commission:

Present: Colin Wied, Chairperson
Christine W.S. Byrd
Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Edwin K. Marzec
Sanford Skaggs

Absent: Allan L. Fink, Vice Chairperson
Quentin L. Kopp, Senate Member
Arthur K. Marshall

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

Consultants: Michael Asimow, Administrative Law

Other Persons:

Christine Albertine, California Correctional Peace Officers Association, Sacramento
Herb Bolz, Office of Administrative Law, Sacramento
Gail Hillebrand, Consumers Union, San Francisco
Frank Janecek, San Diego
Ron Kelly, Berkeley
Evelyn Lewis, Law Professor, UC Davis, State Bar Business Law Section,
Corporations Committee, Davis
Charlene Mathias, Office of Administrative Law, Sacramento
Gabor Morocz, California Department of Motor Vehicles, Sacramento
Thomas A. Papageorge, California District Attorneys Association and Los Angeles
District Attorney's Office, Los Angeles
Joel Perlstein, California Public Utilities Commission, San Francisco

Steven R. Pingel, Consumer Attorneys of California, California Employment
Lawyers Association, Los Angeles Police Protective League, Orange County
Employees Association, and Association of Los Angeles Deputy Sheriffs, Seal
Beach

Lucy Quacinella, Western Center on Law and Poverty, Sacramento

Elizabeth Stein, State Personnel Board, Sacramento

James C. Sturdevant, The Sturdevant Law Firm, San Francisco

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MINUTES OF FEBRUARY 22, 1996, MEETING

The Commission approved the Minutes of the February 22, 1996, Commission meeting submitted by the staff, with the following changes:

On page 5, under the heading “Bus. & Prof. Code § 17308. Notice of terms of judgment”, the first sentence was revised to read, “As in the case of notice of filing, this section providing for giving notice of the terms of judgment should require notice to be published in the state Notice Register and given to any agency that licenses the defendant in the jurisdiction.”

On page 7, under the heading “Study N-111 – Code of Ethics for Administrative Law Judges”, the reference to Memorandum 95-15 was revised to read, “Memorandum 96-15”.

RATIFICATION OF ACTIONS TAKEN AT FEBRUARY 22, 1996, MEETING

A quorum being present, actions reported in the approved Minutes of the February 22, 1996, Commission meeting were ratified by the Commission.

ADMINISTRATIVE MATTERS

Meeting Schedule

The meeting last scheduled for July 25 was changed to July 11, in consideration of a staffing problem for July 25.

STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission commenced, but did not complete, consideration of Memorandum 96-24 and its First and Second Supplements, relating to the business judgment rule. The Commission limited its consideration to the issue whether to discontinue the project to codify the business judgment rule in light of the comments of the State Bar committees and others set out in the supplementary memoranda. The Commission decided to make further inquiry into the matter at a future meeting when more time is available to reflect on the matter and when Professor Eisenberg is able to attend, and invited the continued participation of State Bar representatives. The materials prepared by the staff for the next meeting should address key drafting issues raised by the bar committees that might reflect on the advisability of codification.

STUDY B-700 – UNFAIR COMPETITION

The Commission considered Memorandum 96-23, and the First Supplement thereto, relating to the unfair competition litigation study and reviewed the staff draft tentative recommendation attached to the memorandum. The Commission also considered the oral comments of persons attending the meeting and written comments from Thomas A. Papageorge submitted at the meeting on behalf of the California District Attorneys Association (CDAA). (See Exhibit pp. 1-2.) The staff will prepare a revised draft tentative recommendation for consideration at the next meeting.

The Commission made the following decisions:

Bus. & Prof. Code § 17300. Definitions

As suggested in the CDAA letter, the definition of “enforcement action” should be revised as follows:

- (a) “Enforcement action” means an action by a prosecutor under ~~Section 17204 or 17535 or other provisions of Chapter 5~~

(commencing with Section 17200) or of Part 3 (commencing with Section 17500).

This is a technical clarification, and not a substantive change. It recognizes that prosecutors have authority under a number of specific sections that need not be catalogued in this section.

§ 17302. Combination of individual claims and general public claims

This section should be revised to preclude a situation where a person could bring an individual action and a contemporaneous representative action. The section will also need to be reworded to make clear that it applies to any type of action brought by the individual on the individual's own claim against the defendant and to representative actions under Section 17204 or 17535. The intent of the section is to prevent using representative claims as leverage for settlement of the individual's personal claims. The leverage problem may be more significant if the actions are brought separately than where the claims are asserted in the same action. The interplay of this rule and the binding effect rules in draft Section 17309 will need to be checked. The Commission did not approve the suggestion that an individual cause of action should be tolled if the individual is pursuing a representative cause of action.

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

The staff should review the need for the provision in subdivision (b) of this section relating to a conflict of interest on the part of the plaintiff's attorney. It was suggested that this rule may not be so important in light of the addition to the draft of the rule precluding pursuit of individual claims and representative actions contemporaneously under draft Section 17302. The Comment should make clear that the section is not concerned with the relation between the plaintiff and the plaintiff's attorney.

§ 17304. Notice of commencement of representative action

The plaintiff should be required to give notice only to the Attorney General. The provisions for publication in the Notice Register and giving notice to government agencies were deleted from the section. The section (rather than the Comment) should provide that the notice provision does not impose a duty on the Attorney General to intervene or take any other action.

§ 17306. Notice of terms of judgment

As in draft Section 17304, the provision for giving notice of terms of judgment to government licensing agencies and publishing in the Notice Register should be deleted. Subdivision (a)(1) should be revised to require notice to be given to “other parties with cases pending against the defendant based on substantially similar facts and theories of liability known to the plaintiff.”

§ 17307. Findings required for entry of judgment

This section should be revised as follows:

17307. (a) Before entry of a judgment that is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.

(b) At the hearing, the court shall consider the showing made by the parties and any other persons permitted to appear and shall order entry of judgment only if the court finds that all of the following requirements have been satisfied:

~~(1) The plaintiff and the plaintiff's attorney satisfy the requirements of Section 17303.~~

~~(2) The defendant has disclosed other pending cases pursuant to Section 17305.~~

~~(3) Notice has been given pursuant to Sections 17304 and 17306.~~

~~(4) The pleadings have not been amended, or supplemented by any stipulations or associated agreements, to the detriment of the interests of the general public pled.~~

~~(5) (1) The proposed judgment and any stipulations and associated agreements are fair, reasonable, and adequate to protect the interests of the general public pled.~~

~~(6) (2) Any award of attorney's fees included in the judgment or any stipulation or associated agreements complies with Section 17311.~~

Subdivisions (b)(1)-(3) are not needed because they restate other substantive requirements; subdivision (b)(4) is unnecessary in view of the broad scope of subdivision (b)(5). Additional research should be done on whether it is appropriate to require review of attorney's fees as a condition of approval of the terms of the judgment.

§ 17309. Binding effect of representative action

Subdivision (a) should make clear that its binding effect applies to actions by *private* plaintiffs. The setoff provision in subdivision (b) should apply only to restitutionary recovery, not to civil penalties.

§ 17310. Priority between prosecutor and private plaintiff

The Commission discussed this section giving a priority to prosecutors and heard concerns about the effects of a nearly automatic stay on the ability of private plaintiffs to pursue the defendant if the prosecutor does not obtain substantial restitution. The Commission deferred a decision on the section until it can be fully discussed by Prof. Fellmeth and representatives of the prosecutors and private plaintiff interests.

§ 17311. Attorney's fees

This section should be given further review by the staff to determine whether the prosecutor should be a prevailing party in order for the contributing private plaintiff to be entitled to attorney's fees. It should also be considered whether the rule in subdivision (c) concerning the plaintiff's contribution needs to be in the statute or could be stated in the Comment as a gloss on subdivision (a) which recognizes the right to attorney's fees for benefits conferred on the general public.

§ 17318. Regulation by Office of Administrative Law

This section was deleted because the provisions providing for publishing notice in the California Regulatory Notice Register were deleted from the draft.

Statute of Limitations Issues

The Commission decided not to attempt to deal with the statute of limitations issues raised in Memorandum 96-18 in the course of this tentative recommendation. However, the issue is important and should be considered as a separate issue at a later time.

STUDY D-331 – ATTACHMENT WHERE CLAIM IS PARTIALLY SECURED

The Commission considered Memorandum 96-22 concerning attachment by undersecured creditors and related issues. The staff reported on the status of this issue which derives from a request made by the Senate Judiciary Committee. The Commission discussed the policy questions and practical issues and directed the staff to solicit additional comment from interested persons. The general consensus was that permitting attachment by undersecured creditors raises concerns of fairness, most importantly regarding the difficulty of valuing collateral in the abstract without a sale under the Commercial Code, which is a prerequisite to determining the amount for which an attachment may be issued.

The Commission also recognized, as reported in its 1994 recommendation on this subject, that no evidence of abuse had been reported. After soliciting further comments, the staff will report back and recommend how best to respond to the Senate Judiciary Committee's request.

STUDY D-352 – HOMESTEAD EXEMPTION

The Commission considered Memorandum 96-21 concerning the recommendation on the *Homestead Exemption*. The Commission reaffirmed the earlier recommendation, along with the revisions set out in the memorandum. In addition, the proposed legislation should be amended to clarify the relationship between the proceeds exemption and bankruptcy law, working with the bankruptcy bar.

STUDY J-110 – TOLLING STATUTE OF LIMITATIONS

The Commission considered Memorandum 96-28, which discusses the positions of the State Bar Litigation Section and the Consumer Attorneys of California. The Commission decided to proceed with its recommendation to repeal Code of Civil Procedure Section 351.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 96-17 and its First Supplement, pertaining to mediation confidentiality.

The Commission instructed the staff to prepare a draft of a tentative recommendation for the next Commission meeting. The draft should generally track the staff recommendations in Memorandum 96-17 and its First Supplement.

The protection of Section 1152.5 should extend to arbitration, administrative proceedings, and other civil matters, but not to criminal cases. The staff should suggest a definition of mediation for Commission consideration.

The draft should provide that an executed written agreement is enforceable if it states that it is enforceable. The agreement should not have to say that it is admissible and subject to disclosure.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission began consideration of Memorandum 96-26, the First, Second, and Third Supplements, and the attached letter from the California

Correctional Peace Officers Association (See Exhibit pp. 3-4). The Commission made the following decisions:

§ 1120. Application of title

The Commission approved Section 1120 in the draft statute attached to Memorandum 96-26, with the following revisions:

1120. (a) Except as provided in this section, this title governs judicial review of agency action of any of the following entities:

(1) The state, including any agency or instrumentality of the state, whether in the executive department or otherwise.

(2) A local agency, including a county, city, district, public authority, public agency, or other political subdivision ~~or public corporation~~ in the state.

(3) A public corporation in the state.

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

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

(2) An action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(c) This title does not govern or apply to judicial review of proceedings of the State Bar Court.

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

(e) This title does not govern or apply to a proceeding under Chapter 9 (commencing with Section 860) of Title 10 of Part 2, relating to validating proceedings.

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

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

(h) This title does not govern or apply to judicial review of an award in a binding arbitration under Section 11420.10 of the Government Code.

(i) This title does not govern or apply to a disciplinary decision under Section 19576.1 of the Government Code.

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

Subdivision (b)(2) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (b)(2) does not prevent the claims requirements of the Tort Claims Act from applying to an action seeking primarily money damages and also extraordinary relief incidental to the prayer for damages. See Section 1123.680(b) (damages subject to Tort Claims Act “if applicable”); *Loehr v. Ventura County Community College Dist.*, 147 Cal. App. 3d 1071, 1081, 195 Cal. Rptr. 576 (1983).

The staff should add to the Comment the case of *Eureka Teacher’s Ass’n v. Board of Educ.*, 202 Cal. App. 3d 469, 474-76, 247 Cal. Rptr. 790 (1988) (incidental damages in mandamus proceeding not subject to Tort Claims Act).

By conforming revision, the staff should add language to Government Code Section 19576.1 to say “the court shall not review” a disciplinary decision under that section.

§ 1121.120. Other forms of judicial review replaced

The Commission approved the staff recommendation to revise Section 1121.120(a) as follows:

1121.120. (a) Except as provided in subdivisions (b) and (c), the procedure provided in this title for judicial review of agency action is a proceeding for extraordinary relief in the nature of mandamus and shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief, and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action.

§ 1121.290. Rulemaking

The Commission approved the staff recommendation to delete Section 1121.290 from the draft statute.

§ 1122.010. Application of chapter

The Commission approved the staff recommendation to revise Section 1122.010 as follows:

1122.010. This Notwithstanding Section 1120, this chapter applies if a judicial proceeding is pending and the court determines that an agency has exclusive or concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding.

§ 1123.140. Exceptions to finality and ripeness requirements

§ 1123.145. No prohibition of rulemaking

The Commission approved the staff recommendation to revise Section 1123.140 and to add a new Section 1123.145 as follows:

1123.140. (a) A person may obtain judicial review of agency action that is not final or, in the case of an agency rule, that has not been applied by the agency, if all of the following conditions are satisfied:

(1) (a) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final or, in the case of an agency rule, when it has been applied by the agency.

(2) (b) The issue is fit for immediate judicial review.

(3) (c) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

~~(b) Nothing in this section authorizes a court to enjoin or otherwise prohibit an agency from adopting a rule.~~

1123.145. Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.

The Commission approved the Comment to Section 1123.145 set out in the Third Supplement, but asked the staff to add a sentence noting that a rule is subject to judicial review after it has been adopted, citing Sections 1120 and 1121.240(a).

§ 1123.230. Public interest standing

The Commission approved the staff recommendation to revise Section 1123.230(c) as follows:

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

....

(c) The person has previously 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.

§ 1123.420. Review of agency interpretation or application of law

The Commission approved the staff recommendation to revise Section 1123.420 as follows:

1123.420. (a) The standard for judicial review of any of the following issues is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action:

(1) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.

(2) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.

(3) Whether the agency has decided all issues requiring resolution.

(4) Whether the agency has erroneously interpreted the law.

(5) Whether the agency has erroneously applied the law to the facts.

~~(b) Notwithstanding subdivision (a), the standard for judicial review of the following agency action is abuse of discretion:~~

~~(1) An agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to effectuate the purpose of the statute that authorizes the regulation.~~

~~(2) A local legislative body's construction or interpretation of its own legislative enactment.~~

~~(c) This section does not apply to interpretation or application of law by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board within the regulatory authority of those agencies.~~

The deleted language in subdivision (b)(1) is continued in Section 1123.450, *infra*.

The Comment to Section 1123.420 should say the court may determine that no deference to the agency interpretation is appropriate in a particular case.

§ 1123.430. Review of agency fact finding

The Commission revised Section 1123.430(a) substantially as follows:

1123.430. (a) The Except as provided in Section 1123.440, the standard for judicial review of whether agency action is based on an erroneous determination of fact made or implied by the agency

is whether the agency's determination is supported by substantial evidence in the light of the whole record.

§ 1123.440. Review of fact finding in local agency adjudication

The Commission adopted a new Section 1123.440 substantially as follows, to replace Section 1123.440 in the draft statute:

1123.440. The standard for judicial review of whether a decision of a local agency in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the agency is as follows:

(a) If authorized by law, the independent judgment of the court whether the decision is supported by the weight of the evidence.

(b) In all other cases, whether the decision is supported by substantial evidence in the light of the whole record.

The Comment would say Section 1123.440 continues Code of Civil Procedure Section 1094.5(c) as it applied to local agency adjudication, and cite a few important cases.

The staff should bring back a draft for Commission consideration to provide substantial evidence review of local agency adjudication if the agency affords essential procedural protections in the adjudication.

The Commission's reason for continuing existing law on local agency fact-finding is that no study was made of the procedural fairness of local agency adjudication. Such a study would be necessary before substantial evidence review could be justifiably mandated in every case.

§ 1123.450. Review of agency exercise of discretion

The Commission approved the staff recommendation to revise Section 1123.450 as follows:

1123.450. The standard for judicial review whether agency action is a proper exercise of discretion, including an agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to effectuate the purpose of the statute that authorizes the regulation, is abuse of discretion.

(b) Notwithstanding subdivision (a), to the extent the agency action is based on a determination of fact, made or implied by the agency, the standard for judicial review is whether the agency's determination is supported by substantial evidence in the light of the whole record.

The Commission approved the staff recommendation to add the following to the second paragraph of the Comment:

Section 1123.450 also applies to a decision to rescind a prevailing wage determination for a particular job classification, *Independent Roofing Contractors v. Department of Industrial Relations*, 23 Cal. App. 4th 345, 28 Cal. Rptr. 2d 550 (1994), to refuse to publish a jurisdictional agreement between unions as part of a prevailing wage determination, *Pipe Trades Dist. Council No. 51 v. Aubry*, 41 Cal. App. 4th 1457, 49 Cal. Rptr. 2d 208 (1996), to reduce the prevailing wage for construction electricians in certain areas, *International Brotherhood of Electrical Workers, Local 11 v. Aubry*, 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (1996).

☐ APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary