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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**MAY 9, 1996, SACRAMENTO**  
**MAY 15, 1996, TELECONFERENCE**

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A meeting of the California Law Revision Commission was held in Sacramento on May 9, 1996, and continued by teleconference on May 15, 1996.

**Commission:**

*Present:* Colin Wied, Chairperson  
Allan L. Fink, Vice Chairperson  
Dick Ackerman, Assembly Member (May 15)  
Christine W.S. Byrd  
Robert E. Cooper (May 15)  
Quentin L. Kopp, Senate Member  
Arthur K. Marshall (May 15)

*Absent:* Bion M. Gregory, Legislative Counsel  
Edwin K. Marzec  
Sanford Skaggs

**Staff:** Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary  
Barbara S. Gaal, Staff Counsel  
Robert J. Murphy, Staff Counsel (May 9)

**Consultants:** Michael Asimow, Administrative Law (May 9)  
Melvin A. Eisenberg, Business Judgment & Derivative  
Actions (May 9)

**Other Persons:**

D. Steven Blake, State Bar Business Law Section, Corporations Committee,  
Sacramento (May 9)  
Herb Bolz, Office of Administrative Law, Sacramento (May 9)  
Karl Engeman, Office of Administrative Hearings, Sacramento (May 9)  
Bill Heath, California School Employees' Association, San Jose (May 9)  
James Ho, Senator Quentin Kopp's Office, Sacramento (May 9)  
Gerald James, California Correctional Peace Officers Association, West Sacramento  
(May 9)  
Ron Kelly, Berkeley (May 9)  
Earl Lui, Consumers Union, San Francisco (May 9)

Thomas A. Papageorge, California District Attorneys Association and Los Angeles District Attorney's Office, Los Angeles (May 9)  
Joel Perlstein, California Public Utilities Commission, San Francisco (May 9)  
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, Los Angeles (May 9)  
Madeline Rule, Department of Motor Vehicles, Sacramento (May 9)  
Tom Sobel, Agricultural Labor Relations Board, Sacramento (May 9)

A quorum not having been present on May 9, the Commission continued the meeting by teleconference on May 15, 1996, at which a quorum was present. Actions reported in these Minutes taken without a quorum on May 9 are subject to ratification at a subsequent meeting, except to the extent the actions were ratified by the Commission on May 15, as reported in these Minutes.

C O N T E N T S	
Minutes of April 12, 1996, Meeting .....	2
Administrative Matters .....	2
Meeting Schedule .....	2
Conflict of Interest Code .....	3
Commissioner Identification .....	3
Commissioner Biographies on Internet .....	3
Consultant Contracts .....	3
1996 Legislative Program .....	3
SB 197 (Kopp) – Homestead Exemption .....	4
SB 392 (Senate Judiciary Committee) – Probate Omnibus Bill .....	4
SB 1510 (Kopp) – Tolling Statute of Limitations .....	4
Study B-601 – Business Judgment Rule .....	4
Study B-700 – Unfair Competition .....	7
Study K-401 – Mediation Communications .....	9
Study L-4000 – Health Care Decisions .....	9
Study N-200 – Judicial Review of Agency Action .....	10

#### MINUTES OF APRIL 12, 1996, MEETING

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

#### ADMINISTRATIVE MATTERS

##### Meeting Schedule

The meeting scheduled for Friday, June 14, was changed to Thursday, June 13. This decision was ratified by the Commission on May 15 by a 6-0 roll call

vote, the following Commission members voting aye: Ackerman, Byrd, Cooper, Fink, Marshall, Wied.

### **Conflict of Interest Code**

The Executive Secretary reported that the Commission's revision of its conflict of interest code to cover new studies now underway or to be activated in the near future has now been completed. Commissioners need take no further action on this matter, since conflict of interest statements already filed this year were based on the code as revised.

### **Commissioner Identification**

The staff should look into providing some sort of name plate or other form of identification of Commission members at meetings so that members of the public who are unfamiliar with the proceedings are able to identify participants.

### **Commissioner Biographies on Internet**

The staff will circulate an inquiry to Commission members whether they are willing to make biographical information about them available on the Commission's world wide web page.

### **Consultant Contracts**

The Commission authorized the Executive Secretary to execute a contract with Professor Eisenberg to pay his travel expenses, and a per diem honorarium equivalent to that paid to Commissioners, when attending Commission meetings and hearings at the Commission's request, to provide expert advice concerning the corporate governance study. This contract is contingent on the Commission receiving adequate funding in its budget for the 1996/97 fiscal year.

## **1996 LEGISLATIVE PROGRAM**

The Commission considered Memorandum 96-29 and the attached chart showing the status of the Commission's 1996 legislative program. The Commission also considered the First Supplement to Memorandum 96-29, relating to tolling the statute of limitations when the defendant is out of state. The staff updated this material with the following information.

**SB 197 (Kopp) – Homestead Exemption**

The homestead bill will not be heard on May 15. The staff has met with Senator Kopp and the California Association of Collectors to discuss issues on the bill. A promising approach may be to reduce the exemption by 25% where there is a voluntary sale of a homestead, analogous to the 25% wage garnishment rule. The Commission approved the staff's continued exploration of this option.

**SB 392 (Senate Judiciary Committee) – Probate Omnibus Bill**

The Senate Judiciary Committee's probate omnibus bill has been amended to include the technical revision of the Uniform Statutory Rule Against Perpetuities referred to in the memorandum.

**SB 1510 (Kopp) – Tolling Statute of Limitations**

The bill to repeal Code of Civil Procedure Section 351 relating to tolling the statute of limitations when the defendant is out of the state was not heard on May 7. The Commission noted the opposition of the Consumer Attorneys of California to the bill, and their suggestion to amend, rather than repeal, by restricting the section to a 3-year maximum tolling period. The Commission instead suggested the staff explore with the opponents the possibility of tolling for out of country, as opposed to out of state, defendants, on the basis of the difficulty of serving out of country defendants.

**STUDY B-601 – BUSINESS JUDGMENT RULE**

The Commission considered Memorandum 96-31, relating to codification of the business judgment rule. The Commission heard remarks of Professor Mel Eisenberg, the Commission's consultant on this study, and of Steve Blake on behalf of the State Bar Corporations Committee. Their remarks are summarized below.

The Commission made inquiry about the impact of provisions in the articles pursuant to Corporations Code Section 204(a)(10) immunizing directors from liability. The consensus of persons present at the meeting was that, although many corporate articles now include such provisions, this does not settle all issues of director liability, and the business judgment rule will have continuing importance.

After a brief discussion, the Commission decided to give further consideration to this matter, and requested the staff to prepare a revised draft to

codify the business judgment rule for consideration. The draft should incorporate ideas of the State Bar Corporations Committee and the State Bar Nonprofit Organizations Committee to the extent both Professor Eisenberg and the staff agree with those ideas. The draft should not incorporate their ideas — and should note them for Commission review — if either Professor Eisenberg or the staff disagrees with them. The staff should get the revised draft out to the committees as soon as reasonably possible so they will have an adequate opportunity to review it before the matter is discussed, possibly at the July Commission meeting.

#### **Summary of Remarks of Steve Blake on Behalf of Corporations Committee**

The Corporations Committee believes there is no demonstrated need to undertake a codification of the business judgment rule, particularly when any codification will be exposed to the vagaries of the legislative process, with potentially unfortunate results. Judges and others have been dealing with the common law in this area with sound results, and it is familiar to those having to use it; codification risks an inadvertent change in the standard and greater confusion and uncertainty than now exists.

The bar committees consist of many lawyers from around the state from a variety of backgrounds, and both committees believe codification is inadvisable. Lawyers on all sides of the issue from all types of practices have managed to read, understand, and apply the common law satisfactorily.

Codification of the law in this area would have the undesirable effect of rigidifying and limiting the dynamic growth and change that goes on all the time in the business sector. Moreover, business persons, business lawyers, and plaintiffs' lawyers are an ingenious lot, and any codification in this area is liable to result in unexpected interpretations and consequences.

Codification of the business judgment rule would not significantly affect the business climate here. The fact that codification has never been tried before would mean that California would serve as a proving ground, which could be detrimental to the business climate. If the Commission is intent on improving the business climate, there are many other issues of greater importance than this.

#### **Summary of Remarks of Professor Mel Eisenberg, Commission Consultant**

Professor Eisenberg observed that there is in fact confusion among many persons dealing in this area about what the law is. The question is not how a

lawyer should advise clients — the standard of care governs this — but what the rules are when litigation occurs. While codification of the business judgment rule is not the most earthshaking project, it nonetheless would be a useful clarification of the law. Professor Eisenberg also noted that, in evaluating his comments, the Commission should be aware that he is not a “proponent” of codification, as suggested in the Corporations Committee letter. He believes common law development is desirable as a general principle, but that it has not worked very well in this area.

Professor Eisenberg disagreed with the concept that it is inappropriate to codify the business judgment rule. The statement of the business judgment rule in the ALI Principles of Corporate Governance was not a matter of significant debate, and in fact there was broad consensus on it. It has not been previously suggested by any of the many corporation law experts involved in the ALI formulation that there is any ambiguity in it. Although the bar committees have asserted that ambiguities may be created, they have not identified any; and nothing could be more ambiguous than the existing inconsistent case law on the matter.

The ALI Principles do not oppose codification; they simply prefer common law implementation, as an accommodation for the ABA Model Act group, which opposed codification. Professor Eisenberg indicated that the ABA Model Act group, which opposed codification of the business judgment rule in the past, may now in fact be undertaking a codification project. In any case, California law in general is better than Model Act law and should not be constrained by it.

Professor Eisenberg found some aspects of the Corporations Committee letter either inconsistent or incorrect, including their suggestion that the uncertainty in existing law is the result of the inherently subjective nature of this area of law and that the existing cases are satisfactory (see, e.g., the *Gaillard* case). On one hand the committee suggests that codification would not change much, and on the other the committee is concerned about changes that would be caused by codification. The committee thinks that the existing business judgment rule is clear to business persons, but in fact it is not now codified and the cases state inconsistent versions of it.

With respect to specifics in the letters of the bar committees, Professor Eisenberg found either desirable or acceptable many of their suggestions, including (1) there should be better articulation between the standard of care and the business judgment rule, (2) it should be made more clear in the draft that the

business judgment rule is a standard of review and not a standard of care, (3) the definition of “interested” should be exclusive rather than inclusive and should be narrower, and (4) officers should not be dealt with in the present recommendation (it can be revisited at a future date). He disagreed with the concept that Section 309 should be referred to as a duty of loyalty statute.

#### STUDY B-700 – UNFAIR COMPETITION

The Commission considered Memorandum 96-30, 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 received 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 Commission approved the tentative recommendation to be distributed for comment, subject to the revisions set out below. This decision was ratified by the Commission on May 15 by a 6-0 roll call vote, the following Commission members voting aye: Ackerman, Byrd, Cooper, Fink, Marshall, Wied.

#### **Explanatory Text**

On page 5, the following revision should be made in lines 10-13:

The ~~There is a~~ potential for abuse where a claim on behalf of the general public is added to a complaint for tactical advantage is mitigated ~~only by the denial of res judicata and collateral estoppel effect as to nonparties.~~

The lack of binding effect in a settlement of a representative cause of action may or may not be a mitigating factor.

#### **Bus. & Prof. Code § 17303. Adequate legal representation and absence of conflict of interest**

The Comment to this section should note that the absence of a conflict of interest is an element of the adequacy of counsel standard, citing class action authorities.

#### **§ 17304. Notice of commencement of representative action**

This section should be revised as follows to add notice to the district attorney and to provide additional protections:

17304. (a) Not later than 10 days after the court makes an order under Section 17303 that the representative action may proceed, the private plaintiff shall give notice of the action, together with a copy of the complaint, to the Attorney General and to the district attorney of the county where the action was commenced.

(b) ~~Receipt of notice~~ Notice under this section does not impose any duty on the Attorney General ~~to take any or district attorney,~~ nor is the Attorney General or district attorney precluded from taking any action as a consequence of not taking action in response to the notice.

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

This section should be revised to make clear that the defendant has a duty to disclose similar actions pending in California if they are known to the defendant. If an action has been filed but notice has not been served, the defendant may not yet know of it.

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

This section should be revised consistently with Section 17304. In addition, notice should be required to be given to “other persons, as ordered by the court.” This facilitates notice to the public, where appropriate, so that interested persons may intervene in the fairness hearing under Section 17307.

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

Subdivision (a) should be revised as follows:

17309. (a) The determination of a representative cause of action in a judgment approved by the court pursuant to Section 17307 is conclusive and bars any further ~~claims on behalf of the general public on that cause of action~~ actions on representative causes of action against the same defendant based on substantially similar facts and theories of liability.

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

Subdivision (d) should be added to deal with the attorney’s fees issue, superseding draft Section 17311:

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

**§ 17311. Attorney's fees**

This section is superseded by subdivision (d) added to Section 17310.

**§ 17319. Application of chapter to pending cases**

The general rule under this section that the new statute applies to all pending actions, unless the court determines that it would be unfair to do so, should not apply to Sections 17301-17303. In other words, the provisions concerning the requirements for pleading a representative cause of action and the conflict of interest and adequacy of counsel rules would apply only to actions filed after the operative date.

**STUDY K-401 – MEDIATION COMMUNICATIONS**

The Commission considered Memorandum 96-33 and the attached draft of the tentative recommendation relating to the confidentiality of mediation communications. It was agreed that the mediation confidentiality provisions would be consolidated in a single article in the Evidence Code. The Commission decided not to try to deal with issues relating to mediation in administrative adjudication in this tentative recommendation. Issues relating to settlement negotiation confidentiality should be made the subject of a separate study, and possibly consolidated with the mediation confidentiality proposals when they are submitted to the Legislature.

The Commission approved the tentative recommendation to be distributed for comment, subject to the specific revisions set out in the draft attached to these Minutes as Exhibit pp. 3-5, a copy of which was provided to Commission members before the meeting on May 15. This decision was ratified by the Commission on May 15 by a 6-0 roll call vote, the following Commission members voting aye: Ackerman, Byrd, Cooper, Fink, Kopp, Wied.

**STUDY L-4000 – HEALTH CARE DECISIONS**

The Commission considered Memorandum 96-34, and the First Supplement thereto, relating to commencement of the study on health care decisionmaking. The Commission approved the approach outlined in the memorandum, focusing on the durable power of attorney for health care and the Uniform Health-Care Decisions Act, but considering the law of other jurisdictions as relevant.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 96-32, the attached staff draft of a Revised Tentative Recommendation on *Judicial Review of Agency Action*, and First Supplement. The Commission approved the revised tentative recommendation to be distributed for comment, subject to the revisions set out below. This decision was ratified by the Commission on May 15 by a 6-0 roll call vote, the following Commission members voting aye: Ackerman, Byrd, Cooper, Fink, Kopp, Wied.

**§ 1120. Application of title**

The Commission revised subdivision (b) of Section 1120 as follows:

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

(1) A trial de novo, ~~including an~~

(2) An action for refund of taxes under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(2) (3) 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.

**§ 1121.230. Agency defined**

The staff should add “private hospital board” to the definition of agency in Section 1121.230.

**§ 1123.440. Review of fact-finding in local agency adjudication**

The Commission approved Section 1123.440 as in the draft statute. The Commission decided not to include optional local agency procedural protections which would, if adopted by a local agency, result in substantial evidence review of fact-finding. Professor Asimow thought the concept was good, but objected to the four proposed procedural protections in the First Supplement (hearing officer selected by agreement of parties, findings after rejected decision prepared jointly by all agency members, report of agency medical expert in disability retirement case admissible only if applicant agreed to expert’s selection, all agency deliberations on the record), because they go far beyond what applies in formal state agency adjudications. He was also concerned about the last part of paragraph (7) of the procedural protections proposed in the basic memorandum which would require every participating agency member to read the entire record, and the potential resulting problem of having agency members deposed

to inquire into their deliberative processes. He had no objection to allowing one peremptory challenge of a hearing officer in a local agency adjudication.

The Commission asked the staff to give the proposed optional procedural protections further study after the judicial review statute is completed. The Commission wanted more information about local agency adjudication procedures before doing so. The staff should get input from local agencies as to which suggested procedural protections might be acceptable.

**§ 1123.445. Review of fact-finding of private hospital board**

The Commission approved the staff recommendation to add a separate section on standard of review of fact-finding in an adjudication by a private hospital to continue existing substantial evidence review:

1123.445. The standard for judicial review of whether action of a private hospital board in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the board is whether the board's determination is supported by substantial evidence in the light of the whole record.

**§ 1123.450. Review of agency exercise of discretion**

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

1123.450. (a) The standard for judicial review of 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), and subject to Section 1123.440, to the extent the agency ~~action exercise of discretion~~ 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.

**§ 1123.630. Notice to parties of period for filing petition for review**

The agency should notify the parties of the last calendar date to file a petition for review, rather than of the "period" for filing the petition. This is especially important if the agency may specify the effective date by regulation, as approved below.

The staff should consider whether the five-day extension of time in Code of Civil Procedure Section 1013 applies when notice is mailed. The Public Employment Relations Board apparently does apply Section 1013.

**§ 1123.640. Time for filing petition for review in adjudication of state agency and formal adjudication of local agency**

The Commission approved the staff recommendation to revise subdivision (b)(2) of Section 1123.640 as follows:

(b) For the purpose of this section:

(1) . . . .

(2) A decision of a state agency other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions exist:

(A) A reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A stay is granted.

(D) A different effective date is provided by a regulation.

The Commission approved the staff recommendation to preserve existing limitations periods for the State Personnel Board (one year), Unemployment Insurance Appeals Board (six months), Department of Social Services (one year), and Department of Motor Vehicles (90 days, Veh. Code § 14401). Either Section 1123.640 or the Comment should refer to these special limitations periods.

The 30-day limitations period in Vehicle Code Section 13559 need not be excepted from the general limitations period of the draft statute. The draft statute does not affect the 10-day requirement in Vehicle Code Sections 13557 and 13558 for a request for an administrative hearing, because the draft statute deals only with judicial review. See also Veh. Code §§ 13953 (order of suspension or revocation not effective until 30 days after notice unless necessary for public safety); 13106 (notice of effective date); 23 (extension of time when notice mailed).

**§ 1123.710. Applicability of rules of practice for civil actions**

The Commission approved the staff recommendation to revise Section 1123.710 as follows:

1123.710. (a) Except as otherwise provided in this title or by rules of court adopted by the Judicial Council not inconsistent with

this title, Part 2 (commencing with Section 307) applies to proceedings under this title.

(b) Section 426.30 does not apply to a proceeding under this title.

(c) A party may obtain discovery . . . [etc.].

#### **§ 1123.720. Stay of agency action**

The Commission approved the staff recommendation to revise Section 1123.720(d) as follows:

(d) The court may condition a stay on appropriate terms, including the giving of security for the protection of ~~third parties~~ others.

#### **§ 1123.730. Type of relief**

The Commission approved the staff recommendation to revise Section 1123.730(c) as follows:

(c) In reviewing a decision in a ~~proceeding under Chapter 5 (commencing with Section 11500) state agency adjudication subject to Chapter 4.5 (commencing with Section 11400)~~ of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment and may order the agency to take further action that is specially enjoined upon it by law.

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

The Commission approved the staff recommendation to add a new subdivision (e) to Section 1123.850(e) as follows:

(e) Nothing in this section precludes the court from taking judicial notice of a decision designated as a precedent decision by the agency pursuant to Section 11425.60 of the Government Code.

The Comment should refer to Evidence Code Section 452(c) (judicial notice of official acts of executive department).

#### **Pub. Util. Code § 1756 (amended). Review of Commission decisions**

The Commission approved the staff recommendation to make regulation of highway carriers by the Public Utilities Commission subject to the draft statute. The provision should be expanded to include suspension or revocation and

possibly also lesser forms of discipline, in addition to issuance or denial. The staff should also make subject to the draft statute regulation of passenger stage corporations (Pub. Util. Code §§ 1031-1043) and integrated intermodal small package carriers (*id.* §§ 4120-4140). The Commission wanted jurisdiction of all these proceedings to be in superior court.

The PUC representative wondered if standard conditions for issuance of a certificate or permit should be subject to challenge by judicial review sought by a competitor. For example, for passenger stage corporations where a monopoly often exists, issuance of a certificate requires discretion and judgment and is more likely to be attacked by a potential competitor, and therefore perhaps should be treated more like regulation of other monopolies. Professor Asimow thought issuance should not be excluded from the draft statute.

The PUC representative wanted to preserve Public Utilities Code provisions on exhaustion of administrative remedies for activities subject to the draft statute. He was also concerned about preserving the process of application for hearing, and the requirement that an applicant must make a formal application to the PUC after staff denial (e.g., for charter party permits). The staff should work with PUC staff to refine the draft.

#### **Writ proceedings under Revenue and Taxation Code**

The Commission approved the staff recommendation to include conforming revisions making Revenue and Taxation Code Sections 2954, 2955, 2956, and 7279.6, dealing with judicial review by writ, subject to the draft statute.

#### **Veh. Code § 13559 (amended). Petition for review**

The Commission approved Vehicle Code Section 13559 as in the draft statute, which preserves the special provision for venue in the licensee's county of residence for judicial review of suspension or revocation of a driver's license.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Chairperson

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