
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
APRIL 10, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 10, 1997.

Commission:

Present: Allan L. Fink, Chairperson
Dick Ackerman, Assembly Member
Bion M. Gregory, Legislative Counsel
Quentin L. Kopp, Senate Member
Sanford Skaggs
Colin Wied

Absent: Christine W.S. Byrd, Vice Chairperson
Robert E. Cooper
Arthur K. Marshall
Edwin K. Marzec

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Brian P. Hebert, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultants: J. Clark Kelso, Trial Court Unification

Other Persons:

Geoffrey L. Berman, Development Specialists, Inc., Los Angeles
Craig Chargulaf, Christian Brothers High School, Sacramento
Suzie Davila, Christian Brothers High School, Sacramento
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
Michael Fischer, Judicial Council, San Francisco
Heather Halsey, Hastings Public Law Research Institute, San Francisco
Robert Hargrove, Department of Motor Vehicles, Sacramento
Gerald James, Association of California State Attorneys and Administrative Law
Judges, Professional Engineers in California Government, and California
Association of Professional Scientists, Sacramento
Jason Kaune, Hastings Public Law Research Institute, San Francisco
Ron Kelly, Berkeley

Melvin H. Kirschner, MD, LACMA-LACBA Joint Committee on Biomedical Ethics,
Los Angeles
John Kubasak, Christian Brothers High School, Sacramento
Gene Livingston, Livingston & Mattesich, Sacramento
Charlene Mathias, Office of Administrative Law, Sacramento
Julie Miller, Southern California Edison, Rosemead
Dick Ratliff, California Energy Commission, Sacramento
Janice Shaw, California Correctional Peace Officers Association, Sacramento
Daniel L. Siegel, Attorney General's Office, Sacramento
Shannon Sutherland, California Nurses Association, Sacramento
Eric Taylor, Institute for Legislative Practice, Sacramento
David Verhey, Institute for Legislative Practice, Davis
Tracy Vesely, Judicial Council, San Francisco
Tom Willoughby, State Bar Business Law Section, Debtor/Creditor Relations and
Bankruptcy Committee, Sacramento
Michael Wu, Christian Brothers High School, Sacramento

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A quorum of the Commission not being present during the meeting, decisions reported in these Minutes are subject to ratification at a subsequent meeting.

ADMINISTRATIVE MATTERS

Report of Executive Secretary

Commissioner Meeting Attendance. The Executive Secretary reported that the Chairperson had sent a letter to each gubernatorial Commission appointee encouraging more regular meeting attendance. In light of the continuing attendance problem, it was decided that the Chairperson will send a followup letter to each Commissioner, along with a copy of the Commissioner's attendance record for 1996 and 1997.

Executive Secretary Meeting Attendance. The Executive Secretary noted that he has an opportunity for an Asia trip that may conflict with Commission's scheduled July meeting. The Commission excused the Executive Secretary from attendance at the July meeting. If the conflict occurs, material for which other staff members are responsible will be scheduled for that meeting.

Foreign Law Reform Commissions. The Executive Secretary reported continuing troubles for the Canadian law reform commissions. The Ontario commission ceased operations at the end of 1996 and the Manitoba commission will discontinue operations in mid-1997.

Public Records Policy

The Commission considered Memorandum 97-20 concerning the Commission's records policy. The Commission approved the proposed Appendix L to be added to the CLRC Handbook of Practices and Procedures. The appendix will be redrafted to clarify that it expresses the Commission's understanding of the requirements of public records law and does not create any new rights or obligations, and to clarify limitations on the disclosure of names and addresses of persons requesting Commission materials.

The Commission agreed that public records law might be an appropriate topic for future study. The issue will be raised when the Commission next considers its topics and priorities.

1997 LEGISLATIVE PROGRAM

The Executive Secretary updated the chart attached to Memorandum 97-15 with the following information:

AB 707 (Ackerman): Real Property Covenants (includes First Rule in Spencer's Case and Obsolete Restrictions). This bill is tentatively set for hearing on April 30 in the Assembly Judiciary Committee, but it is likely that the hearing will be canceled and the bill put over until May 7.

AB 939 (Ortiz, Ackerman): Mediation Confidentiality. This bill is set for hearing on April 16 in the Assembly Judiciary Committee. There is broad support for this bill in the mediation community. The staff has responded to a letter from the State Bar Committee on Administration of Justice (indicating support if amended) with the information that some of their minor clarifications might be incorporated in the bill but their major proposals have previously been considered and rejected by the Commission.

AB 1258 (Ackerman): Attachment by Undersecured Creditors. This bill is tentatively set for hearing on April 30 in the Assembly Judiciary Committee, but it is likely that the hearing will be canceled and the bill put over until May 7.

SB 68 (Kopp): Quasi-Public Entity Hearings. This bill now includes the Unemployment Insurance Appeals Board telephone hearings provision and legislation sponsored by the Department of Health Services to consolidate their formal hearings under the Administrative Procedure Act. The bill was approved by the Senate Judiciary Committee on April 8, after removing a provision that would have allowed DHS to use electronic, rather than stenographic, recording of proceedings.

SB 143 (Kopp): Unfair Competition Litigation. This bill has been put over for hearing by the Senate Judiciary Committee until May 13, to be heard in conjunction with the Governor's proposal on unfair competition litigation. See Study B-700 in these Minutes.

SB 177 (Kopp): Best Evidence Rule. This bill has been referred to two policy committees in the Senate. The Senate Criminal Procedure Committee has approved the bill; it has not yet been set for hearing in the Senate Judiciary Committee. For Commission action on the bill, see Study K-501 in these Minutes.

SB 209, 261 (Kopp): Judicial Review of Agency Action. Senate Bill 209 contains substantive provisions on judicial review and Senate Bill 261 contains technical conforming revisions. These bills have been put over for hearing on April 22 in order to allow time for interested persons to review the bills as reprinted. For Commission action on the bills, see Study N-200 in these Minutes.

SB 653 (Calderon): ALJ Code of Ethics. This bill has been approved by the Senate Judiciary Committee on the consent calendar.

SCR 3 (Kopp): Continuing Authority to Study Topics. This resolution has been approved by the Senate and is awaiting action in the Assembly.

Budget Bill. The Senate budget subcommittee approved an augmentation of the Commission's operating expenses to enable progress on major projects. The Assembly budget subcommittee will hear the Commission's budget on May 7.

STUDY B-700 – UNFAIR COMPETITION LITIGATION

The Commission considered Memorandum 97-22 concerning SB 143, the Commission's unfair competition litigation bill. The staff reported on amendments that had been made in anticipation of the hearing originally scheduled for April 8 (postponed to May 13). The Commission confirmed the

amendments that had been made with the approval of the Chairperson and Vice Chairperson. The Commission's bill provides a distinct alternative to the other bills on this subject currently before the Legislature, and further amendments affecting the core policies of the bill should not be made.

STUDY D-400 – ASSIGNMENT FOR BENEFIT OF CREDITORS

The Commission considered Memorandum 97-7 and its First Supplement concerning organization of the study on assignment for the benefit of creditors. The Commission decided to proceed with the study, focusing on specific problem areas, and approved the proposal to contract with an expert consultant. The staff will make recommendations on who should act as consultant at a later meeting. The consultant will be asked to confer with bar and industry groups, identify issues, and make recommendations for revision of the law concerning assignments for the benefit of creditors as well as state law approaches to reorganization.

STUDY D-1100 – BANKRUPTCY CODE CHAPTER 9 ISSUES

The Commission considered Memorandum 97-19 concerning issues under Chapter 9 of the Bankruptcy Code relating to municipal reorganization. The Commission concluded that this area of the law is in need of revision and directed the staff to further investigate the background behind proposed legislation on this subject in the last legislative session. The Commission tentatively concluded to proceed with a study of municipal reorganization under Chapter 9 if it does not appear that there are insurmountable political obstacles.

STUDY J-1300 – TRIAL COURT UNIFICATION BY COUNTY

The Commission considered Memorandum 97-8 concerning trial court unification by county. SCA 4 will be on the statewide ballot in June 1998, if not before. To ensure that implementing legislation is in place by then, the Commission needs to finalize its recommendation by January 1998. That will require intense work on this study during the remainder of this year.

Professor Clark Kelso, the Commission's consultant, has been working on drafts of the implementing legislation. Before circulating any draft publicly, he will submit it to the Judicial Council for comment. A working group of the Judicial Council will review each draft and make suggestions, which Professor

Kelso will either incorporate or comment on (as he sees fit) in the draft he submits to the Law Revision Commission. Some issues may be referred to the full Judicial Council for consideration.

Types of statutory changes necessary to implement SCA 4 include:

- (1) Technical changes, such as removing references to the justice courts.
- (2) Revisions relating to appellate court jurisdiction.
- (3) Government Code provisions on creating and authorizing unified superior courts.
- (4) Provisions on voting to unify.
- (5) Miscellaneous changes to reflect unification by county option.

The various potential amendments of Penal Code Section 990 discussed in Memorandum 97-8, Exhibit pages 6-12, fall in the last of these categories.

Upon considering the possible approaches to Penal Code Section 990, the Commission was inclined to keep the basic policy and the court-based trigger for non-unified counties, but remove the court-based trigger for unified counties. See Memorandum 97-8, Exhibit pages 11-12. That would leave the law exactly as is in non-unified counties, while facilitating changes in unified counties. Although the Commission favors that approach in drafting legislation implementing SCA 4, the approach should not be used inflexibly. In some situations, another approach may be preferable. In general, the implementing legislation should not attempt to effect policy changes, because of the time constraints on this study and the volume of statutes to consider.

STUDY K-501 – BEST EVIDENCE RULE

The Commission considered Memorandum 97-21 concerning SB 177, the Commission's bill on the best evidence rule, and directed the staff to prepare the following amendment of the transitional provision in the bill (Section 9 of SB 177 (Kopp)):

SEC. 9. (a) This act shall become operative on January 1, ~~1998~~
1999.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, ~~1998~~ 1999.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, ~~1998~~ 1999, that evidence is inadmissible pursuant to former Article 1 (commencing with Section 1500) of

Chapter 2 of Division 11 of the Evidence Code. However, if an action or proceeding is pending on January 1, 1998 1999, the proponent of evidence excluded pursuant to former Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code may, on or after January 1, 1998 1999, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandum 97-4 concerning health care decisionmaking. The Commission reviewed the differences between California law and the Uniform Health-Care Decisions Act as set out in the memorandum and generally concurred in the staff recommendations. In order to focus the discussion on specific language, when this subject is next considered, the staff will present a draft statute implementing recommended parts of the uniform act within the context of California law.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-16 and its First Supplement concerning SB 209, the Commission's bill on judicial review of agency action. The Commission made the following decisions:

§ 1121. Proceedings to which title does not apply

The Commission approved the staff recommendation to revise Section 1121 as follows:

1121. (a) This title does not apply to any of the following:

(a) (1) Judicial review of agency action by any of the following means:

(1) (A) Where a statute provides for trial de novo.

(2) (B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

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

(b) (2) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(c) (3) Judicial review of a decision of a court.

~~(d) (4) Judicial review of either of the following an ordinance, regulation, or resolution, enacted by a county board of supervisors or city council: ,~~

~~(1) An ordinance or regulation.~~

~~(2) A resolution that is legislative in nature.~~

~~(e) (5) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.~~

(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.

§ 1123.130. Judicial review of agency rule

The Commission deleted subdivision (b) (ripeness) from Section 1123.130:

1123.130. (a) Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.

~~(b) A person may not obtain judicial review of an agency rule until the rule has been applied by the agency.~~

The Comment (perhaps to Section 1123.110) should make clear the ripeness question is to be determined under case law. See generally 5 B. Witkin, *California Procedure Pleading* § 815, at 270-72 (4th ed. 1997). The staff should consider whether deleting subdivision (b) from Section 1123.130 requires revisions to Sections 1123.110 and 1123.140.

§ 1123.230. Public interest standing

The Commission ratified the decision of the Chairperson and Vice Chairperson to revise Section 1123.230 as follows:

1123.230. Whether or not a person has standing under Section 1123.220, a :

(a) 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:

~~(a) The person resides or conducts business in the jurisdiction of the agency or is an organization that has a member that resides or conducts business in the jurisdiction of the agency and the agency action is germane to the purposes of the organization.~~

~~(b) The person will adequately protect the public interest.~~

(c) The 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.~~

(b) Notwithstanding subdivision (a), a person has standing to obtain judicial review of a regulation adopted pursuant to the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the regulation concerns an important right affecting the public interest.

§ 1123.430. Review of agency factfinding

The Commission declined to ratify the decision of the Chairperson and Vice Chairperson to restore existing law on standard of review of state agency factfinding. Sections 1123.430 (state agency factfinding: substantial evidence) and 1123.440 (local agency factfinding: independent judgment or substantial evidence, the same as existing law) should be restored to Senate Bill 209 in the same form as they were in the bill as introduced.

§ 1123.460. Review of agency procedure

The Commission approved the staff recommendation to revise the introductory clause of Section 1123.460 as follows:

1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving appropriate deference to the agency's determination of appropriate its procedures:

§ 1123.720. Stay of agency action

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

1123.720. (a) The filing of a petition for review under this title does not of itself stay or suspend the operation of any agency action.

(b) Subject to subdivision (g) [no stay to prevent collection of a tax], the reviewing court may grant a stay of the agency action pending the judgment of the court if it finds that all of the following conditions are satisfied:

(1) The petitioner is likely to prevail ultimately on the merits.

(2) ~~Without a stay the petitioner will suffer irreparable injury.~~

~~(3) The grant of a stay to the petitioner will not cause substantial harm~~ The harm petitioner will suffer without a stay outweighs the possible harm a stay will cause to other parties to the proceeding.

(4) (3) The grant of a stay to the petitioner will not substantially threaten the public health, safety, or welfare.

The Comment should make clear Section 1123.720 may not be used to stay or otherwise prohibit an agency from adopting a rule, citing Section 1123.130.

State Agency Regulations

The Office of Administrative Law still has concerns about the impact of many provisions of Senate Bill 209 on state agency regulations. OAL agreed to work with the staff to try to resolve these concerns, and not to oppose the bill in the Senate Judiciary Committee. If these concerns have still not been satisfied when the bill reaches the Assembly Judiciary Committee, the Commission agreed not to set the bill for hearing until these concerns have been addressed.

☐ APPROVED AS SUBMITTED

Date

☐ APPROVED AS CORRECTED

Chairperson

(for corrections, see Minutes of next meeting)

Executive Secretary