# MINUTES OF MEETING
# CALIFORNIA LAW REVISION COMMISSION
# MAY 1-2, 1997
# SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 1-2, 1997.

**Commission:**

*Present:* Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Dick Ackerman, Assembly Member (May 1)
Bion M. Gregory, Legislative Counsel (May 1)
Arthur K. Marshall
Colin Wied

*Absent:* Robert E. Cooper
Quentin Kopp, Senate Member
Edwin K. Marzec
Sanford Skaggs

**Staff:** Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel (May 1)
Brian P. Hebert, Staff Counsel (May 1)
Robert J. Murphy, Staff Counsel (May 1)

**Consultants:** Michael Asimow, Administrative Law (May 1)
J. Clark Kelso, Trial Court Unification (May 1)

**Other Persons:**

Lenore Alpert, Pacific Bell, San Francisco (May 2)
Bradford Barnum, California Public Utilities Commission, Sacramento (May 2)
Herb Bolz, Office of Administrative Law, Sacramento (May 1)
Larry Cassidy, California Association of Collectors, Sacramento (May 1)
Gretchen Dumas, California Public Utilities Commission, San Francisco (May 2)
Joan Eubanks, Department of Motor Vehicle Regulations, Sacramento (May 1)
James S. Hamasaki, Pacific Bell, San Francisco (May 2)
Cheryl Hills, AT & T, San Francisco (May 2)

Gerald James, Association of California State Attorneys and Administrative Law Judges, Professional Engineers in California Government, and California Association of Professional Scientists, Sacramento (May 1)
Kent Kauss, California Public Utilities Commission, Sacramento (May 2)
Ron Kelly, Berkeley (May 1)
Jackie Kinney, Citizens Communications, Sacramento (May 2)
Stella Levy, Legal Section, Department of Motor Vehicles, Sacramento (May 2)
Rich Mason, AT & T, Sacramento (May 2)
Carolyn McIntyre, Southern California Gas Co., Sacramento & Los Angeles (May 2)
Julie Miller, Southern California Edison, Rosemead
Steven Patrick, Southern California Gas Co., Los Angeles (May 2)
Roy M. Pérez, GTE, Sacramento (May 2)
Joel Perlstein, California Public Utilities Commission, San Francisco (May 2)
Stephen Pickett, Southern California Edison, Rosemead (May 2)
Dick Ratliff, California Energy Commission, Sacramento
Susan Rossi, GTE, Thousand Oaks (May 2)
Madeline Rule, Legal Office, Department of Motor Vehicles, Sacramento (May 1)
Daniel L. Siegel, Attorney General's Office, Sacramento (May 1)
Shannon Sutherland, California Nurses Association, Sacramento (May 1)
Jean Vieth, California Public Utilities Commission, San Francisco (May 2)
David Verhey, Institute for Legislative Practice, Davis (May 1)
Tracy Vesely, Judicial Council, San Francisco (May 1)
Cara Vonk, Administrative Office of the Courts, San Francisco (May 1)
Jenny Wong, GTE, Thousand Oaks (May 2)

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MINUTES OF FEBRUARY 27, 1997, MEETING

**Approval of Minutes**

The Commission approved the Minutes of the February 27, 1997, Commission meeting as submitted by the staff.

**Ratification of Actions**

The Commission ratified decisions made at the February 27, 1997, Commission meeting as reported in the Minutes of the meeting.

MINUTES OF APRIL 10, 1997, MEETING

**Approval of Minutes**

The Commission approved the Minutes of the April 10, 1997, Commission meeting submitted by the staff, with the following revision:

On page 8, lines 25 and 26, the words "and Vice Chairperson" were deleted.

**Ratification of Actions**

The Commission ratified decisions made at the April 10, 1997, Commission meeting as reported in the Minutes of the meeting. Commissioner Gregory abstained from this action.

ADMINISTRATIVE MATTERS

**Meeting Schedule**

The Commission identified potential attendance problems at the meeting scheduled for July 10 in Sacramento. After considering a number of alternative meeting dates and places, the Commission concluded that Monday, July 21, in Sacramento offered the best prospect for Commissioner attendance. Accordingly, the Commission changed the July meeting date to Monday, July 21.

**1997 Budget**

The Executive Secretary reported that Assembly Budget Subcommittee #4 has approved a $31,000 augmentation for the Commission's budget, consistent with the augmentation given by Senate Budget Subcommittee #2.

## 1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-23, relating to the status of the Commission's 1997 legislative program. The Executive Secretary augmented the chart attached to the memorandum with the information that AB 939 (mediation) passed the Assembly on April 24 and that SB 177 (Best Evidence Rule) is set for hearing in Senate Judiciary Committee on May 13.

## STUDY B-800 – PUBLIC UTILITY DEREGULATION

### General Considerations

The Commission considered Memorandum 97-28, relating to general considerations on the public utility deregulation study. These Minutes include a reasonably detailed summary, but not an exhaustive treatment, of the wide-ranging discussion of these matters that occurred at the meeting.

The Commission's intention is to submit a report for consideration by the Public Utilities Commission and the Legislature by the June 30, 1997, statutory deadline of SB 960 that the Public Utilities Commission "in consultation with the Law Revision Commission" shall submit a report to the Legislature on needed revisions of the Public Utilities Code that result from utility restructuring. The Law Revision Commission's report will be based on written materials received and oral remarks made at the Law Revision Commission meetings. The Law Revision Commission plans to consider the staff draft of the Commission's report, and finalize the report, at its June 12 meeting.

The Law Revision Commission asked interested parties in several industries, and the parties agreed, to recast their concerns about Public Utilities Code revision by category, according to the following general scheme.

**Categorization of Policy Issues in Public Utilities Code Revision**
(importance of particular issue may vary with industry)

**(1) Direct Regulation of Service Providers**

Is there a need for continuing traditional regulation of how a utility runs its business with respect to:

- planning for the future — expansion, facilities, markets
- audits and inspections
- new entrants (certification)

**(2) Rates and Pricing**

Is there a need to continue traditional regulation in the areas of:

- retail, wholesale
- antitrust matters

**(3) Consumer Protection**

Should the law continue to regulate such matters as:

- fraud
- information / misinformation
- access (universal service)

**(4) Safety of Public**

Is continuing protection needed for physical safety of the public, e.g.:

- gas pipelines
- railroad crossings

**(5) Transitional Issues**

Does the deregulation process itself require interim regulation for such matters as:

- stranded investments
- equal footing
- wheeling

The purpose of this categorization is to help provide a more useful overview of issues by type of issue rather than by Code section number. To this categorization, Southern California Edison would add reform of Public Utilities Commission procedures.

Within these categories, the Law Revision Commission report will attempt to identify those revisions on which all parties agree (such as repeal of obsolete or preempted statutes), those revisions that will require a legislative policy determination, and those revisions that fall somewhere in between and may present drafting issues.

It was noted that, in trying to make this assessment, we are proceeding on the basis of rather limited input from interested parties. It was also noted that the Public Utilities Commission appears to be reacting to suggestions for Code revisions rather than actively reviewing the Code and making its own suggestions; this may be due in part to the burden on the Commission and its staff at the moment of coping with the mechanics of opening markets to competition.

Some commentators suggested that Public Utilities Commissioners personally might wish to address some of these matters to the Law Revision Commission. PUC staff indicated that it in fact speaks for the Commissioners and not for itself.

**Electrical Industry**

The Commission considered Memorandum 97-29, along with a letter from Southern California Edison, attached to these Minutes as Exhibit pp. 1-3, relating

to deregulation in the electrical industry. In the electrical industry, the underlying issue appears to be whether deregulation is timely. Southern California Edison takes the position that the industry will be open to competition beginning January 1, and therefore deregulation is necessary to allow all parties to compete in the open market — monopoly-style regulation will no longer be appropriate. The Public Utilities Commission believes transitional regulation is necessary to allow new entrants to establish a foothold to promote effective competition.

The Public Utilities Commission believes it is too early to contemplate broad revision of the Code, at least during 1997. Southern California Edison has suggested that for the June 30 report of the Law Revision Commission, we should at least have specific language on Code changes that can be agreed upon, and a suggested path and timeline for completing work. They suggest that sunsetting provisions of the Code would force the process.

The parties felt that it would advance the process to categorize the types of Code changes upon which there is agreement and disagreement. They will consult with each other on this and submit materials in a timely fashion for the next meeting of the Law Revision Commission, with a view to drafting our report for the Legislature on this matter.

**Gas Industry**

The Commission considered Memorandum 97-30, relating to deregulation in the natural gas industry. Restructuring of the natural gas industry is further along than in the electrical industry. The Public Utilities Commission is currently engaged in an intensive review of the regulatory statutes, in the process of developing a natural gas strategy. They expect to complete their report on this matter this summer. The report will detail the status of deregulation and what needs to be done next.

The Southern California Gas Company has identified a number of problem areas in the Code it believes need to be addressed to implement deregulation. However, it believes all parties would be best served to address these issues in the context of the Public Utilities Commission's development of its strategic plan for natural gas, with one exception. Southern California Gas believes that Code provisions should be repealed immediately that require parity of rates for gas used in cogeneration technology with those used as fuel by an electric plant —

this is an artificial subsidy that is no longer appropriate in competitive gas and electricity markets.

The parties agreed that they would develop a categorized statement of areas of agreement and disagreement for the Law Revision Commission's report on this matter.

**Transportation Industry**

The Commission considered Memorandum 97-31, relating to deregulation in the transportation industry. The main factor in Public Utilities Commission regulation or deregulation of the transportation industry has been federal preemption. PUC agrees that many of the statutes in the Public Utilities Code are ripe for review to reflect this trend. Work is ongoing in reviewing existing statutes. PUC hopes to identify a number of statutes for reform in its June 30 report to the Legislature.

**Railroads.** The Public Utilities Commission's economic regulatory authority is limited to intrastate railroads that have no interstate connection. PUC is concerned that Union Pacific's proposed revisions of the statutes to reflect this could impact PUC's regulatory authority over safety issues. It appears to the Law Revision Commission staff that is a drafting question, rather than a policy dispute. We will try to confirm this with the interested parties before the next Law Revision Commission meeting.

**Highway Property Carriers.** The Public Utilities Commission's role in this field is terminating. The main statutes have been revised accordingly. However, there are a few missed provisions and cleanup legislation is expected this session.

**Household Goods Carriers.** The one industry letter on this matter, from the California Moving and Storage Association, indicates existing statutes are satisfactory. The Public Utilities Commission believes some adjustment is needed to reflect further federal preemption in some areas.

**Passenger Carriers.** There is full Public Utilities Commission regulation in this area. The PUC does not see a need for statutory change here.

**Water Vessel Carriers.** No significant issues have been identified in this area.

**Airlines.** Federal preemption in this area has made large segments of the Public Utilities Code ripe for review. The Public Utilities Commission retains authority to receive proofs of insurance of air carriers. PUC plans to review this matter to determine the extent to which this authority is still necessary.

**Telecommunications Industry**

The Commission considered Memorandum 97-32, along with the written submissions attached as Exhibit pp. 4-35, relating to deregulation in the telecommunications industry. (Note: The binder of attachments to the GTE letter of May 2, 1997, is not reproduced as an Exhibit but is available for inspection in the office of the Law Revision Commission.) The principle area of contention in the telecommunications industry concerns competition and deregulation in the local telephone service sector.

The Public Utilities Commission has been active in revising the Public Utilities Code to reflect restructuring in the telecommunications industry, which has been going on for some years. There is pending legislation to eliminate obsolete reporting requirements. PUC currently has an internal group actively studying the Code, and expects to have affirmative recommendations for its June 30 report to the Legislature on needed Code revisions. PUC anticipates meetings with interested persons in the fall to seek out areas of consensus on Code changes.

The Public Utilities Commission sees the need for continuing regulation in the local telephone service sector until a fully competitive environment is established. During this transition phase, regulation is still necessary to promote competition by new entrants in the market with the large former monopolies that still dominate the market. PUC views itself as the rational middle between contending parties in this area, with the purpose of fostering competition by an appropriate transitional level of regulation.

The Public Utilities Commission indicates that it is moving in the direction of competitiveness and away from heavy-handed regulation. However, it believes this whole area is very complex, and any deregulation must be instituted with great care. For example, factors that influence the direction of deregulation include such matters as market share, type of market (facilities-based v. resale), ability of competitors to cross-subsidize, etc. PUC has been issuing decisions that depend on the competitive environment, and these are very difficult and lengthy cases.

The Public Utilities Commission is supported in this approach by AT&T, which recites its own experience in moving from a monopolistic environment to a competitive environment in the long distance sector. Deregulation is not appropriate until the regulated monopolies lose market share and real choices are available to consumers of local telephone services.

Pacific Bell disagrees with this assessment, noting that the local telephone service sector is open to competition right now. While actual competition is not as great in the residential sector at present as it is in the business sector, the Public Utilities Commission is moving much too slowly. Telecommunications should be exempted from PUC economic regulation now. The 80 companies now entering the local telephone service market are large and fiercely competitive corporations like AT&T, and do not need special protection by PUC.

Pacific Bell is supported in this position by GTE California, which indicates that heavy-handed regulation by the Public Utilities Commission is still in place in the Code. GTE distinguishes between PUC oversight in the wholesale market, which may still be appropriate, and the retail market, where PUC regulation should be eliminated. There may be a continuing need for PUC regulation in the area of consumer protection, but this should apply to all carriers equally, not just to the former monopolies.

Pacific Bell and GTE take the position that the evidence is overwhelming that competition is here now. What is needed is not more meetings, but the specifics of deregulation during the competition period. There is a need to reform Public Utilities Commission regulation as soon as possible.

Based on this input, the Law Revision Commission concluded that several actions would be helpful. The Public Utilities Commission should establish criteria and standards for determining when sufficient competition exists for each phase of deregulation. This should be done in consultation with all interests. It would also be helpful to indicate what PUC's role will be when full competition exists and deregulation is complete — for example, will PUC be involved basically with licensing or certifying entrants into the market and ensuring consumer protection?

The Law Revision Commission asked the interested parties to consult with each other and consolidate their areas of agreement and disagreement on these issues in terms of the general categories set out above.

## STUDY H-603 – SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

The Commission considered Memorandum 97-18 and its First Supplement discussing comments received on the Tentative Recommendation relating to Severance of Joint Tenancy by Dissolution of Marriage.

A revised staff draft recommendation will be prepared to reflect the following decisions:

**Legal Separation**

The Commission affirmed its earlier decision that legal separation should not sever a marital joint tenancy. This is consistent with the treatment of legal separation under the Probate Code.

**Revival on Remarriage**

The Commission decided that remarriage of former spouses to each other should not revive a joint tenancy severed by their earlier divorce. The notice provided on the petition and judgment forms should alert divorcing parties of the need to reestablish a joint tenancy if it is their wish to do so.

**Effect of an Invalid Divorce**

The staff will attempt to conform the definition of dissolution and annulment to that used in Probate Code Section 6122. Particular care will be taken to protect third parties who rely on an apparently effective severance that is later determined to be ineffective as based on an invalid divorce.

**Supplemental Study**

As a supplement to Study H-603, the staff will study whether divorce should also revoke other non-probate testamentary transfers.

STUDY J-1300 – TRIAL COURT UNIFICATION

The Commission considered Memorandum 97-25 concerning revisions to the Code of Civil Procedure if SCA 4 passes. Due to time constraints, the draft revisions prepared by the Commission's consultant, Professor J. Clark Kelso, were attached to Memorandum 97-25 without any staff notes. In the future, the staff will add staff notes to Professor Kelso's drafts before presenting his drafts to the Commission.

**Stopgap Measure**

The Executive Secretary reported that there may be a statewide election in November 1997, with SCA 4 on the ballot. To prepare for that possibility, he has drafted a stopgap measure to take effect until more complete implementing legislation can be prepared. The Judicial Council and Professor Kelso are reviewing the draft, which will be on the agenda for the Commission's next meeting.

**Policy Changes**

The Commission revisited and reaffirmed its previous decision (April 10, 1997, Minutes, p. 6) that, in general, the legislation implementing SCA 4 should not attempt to effect policy changes. Otherwise, it would be extremely difficult to introduce the legislation, have it approved by as many as four policy committees in each house (Judiciary, Public Safety, Governmental Organization, and Fiscal), and have it enacted as an urgency measure by June 1998, as the Legislature expects from the Commission. As the study progresses, the Commission will compile a list of areas warranting future attention, including the jurisdictional limits for economic litigation procedures and small claims cases, and the justifications for providing a small claims retrial in a unified court. Assembly Member Ackerman will explore with Assembly and Senate leadership the possibility of obtaining broad authority for the Commission to study court processes and administration. He believes that the Commission is well-suited to the task, because of its thorough, nonpartisan study process with broad notice and good input.

**Differentiating Between Municipal and Superior Court Causes when a Court Unifies**

The Commission reviewed the proposed revision of CCP § 30 of Professor Kelso's draft and considered how to preserve the current differentiation between municipal and superior court causes when a court unifies. Options include:

> (1) Create two categories of causes, such as "minor civil action" and "major civil action." Compile in one provision the statutes that give jurisdiction to the municipal courts. State that an action arising exclusively under one or more of those statutes is, for example, a "minor civil action," and any other action is a "major civil action." See Sections 30(b)(1)-(56), (c) in Professor Kelso's draft (Memorandum 97-25, Exhibit pp. 1-2).
>
> (2) Create two categories of causes, one of which consists of actions that are within the original jurisdiction of the municipal court as that jurisdiction exists in a county in which the superior and municipal courts are not unified. See Section 30(b)(57) in Professor Kelso's draft (*Id.* at Exhibit p. 2).
>
> (3) Combine the first two approaches, as in Section 30 of Professor Kelso's draft. See *id.* at Exhibit pp. 1-3.
>
> (4) Have the Judicial Council maintain by court rule a list of statutes that give jurisdiction to the municipal courts, rather than trying to compile a list in statutory form. Alternatively, the Commission could include such a list in a Comment.

> (5) Amend each section setting forth a cause. The amendment would state whether the cause is a "minor civil action" (or whatever terminology is chosen). A separate statute would provide that in a non-unified county, the municipal court has jurisdiction of any "minor civil action."

The second approach and, to a lesser extent, the third approach would be unworkable if all trial courts unify. For that reason, and because of the difficulties involved in maintaining a comprehensive list of the causes like those now in municipal court, the Commission selected the last approach, under which each statute setting forth a cause would be amended to state the category to which the cause belongs. For the next meeting, the staff should present suggestions for naming the categories of causes, as well as for labeling matters consisting of multiple causes.

**Code Civ. Proc. § 77: Appellate Division**

SCA 4 would amend Article VI, Section 4 of the California Constitution to read in part:

> In each superior court there is an appellate division. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division.

The Commission considered how to implement that constitutional mandate.

The Commission decided to redraft Code of Civil Procedure Section 77 such that the Chief Justice has broad discretion in appointing judges to the appellate division. The staff is to propose language along those lines and seek input from Professor Kelso and the Judicial Council before the next meeting. As in Professor Kelso's draft, references to "the appellate department" should be changed to "appellate division," to conform to the language in SCA 4.

**Small Claims Cases**

The Commission considered, but did not resolve, how to provide a meaningful small claims retrial in a unified court (not just a chance to retry the case before a different judge of the same court). As recommended by Professor Kelso, statutory references to the "small claims court" should be corrected to

"small claims division," but the implementing legislation should continue to permit colloquial use of the term "small claims court."

**Next Step**

For the next meeting, the staff will revise the Code of Civil Procedure draft to incorporate the Commission's decisions, make stylistic revisions, add Commission Comments and a preliminary part, and insert staff notes on significant issues. Draft revisions of other Codes are also in progress and should be ready for the Commission to review at its next meeting, so that a tentative recommendation (or several tentative recommendations) can be issued soon.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-33, which discusses concerns relating to the Commission's bill on mediation confidentiality (AB 939 (Ortiz, Ackerman)). To address the concerns raised, the Commission decided to amend the bill as follows:

**Evid. Code § 1115. Definitions**

The definition of "mediation" should be amended to incorporate the existing definition in Code of Civil Procedure Section 1775.1:

> "Mediation" means a process in which a neutral person ~~facilitates communication between~~ or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement ~~compromising, settling, or resolving a dispute in whole or in part~~.

The definition of "mediation consultation" should be amended to cover efforts to reconvene a mediation:

> "Mediation consultation" means a communication between a person and a mediator for the purpose of ~~initiating or considering~~ initiating, considering, or reconvening a mediation or retaining the mediator.

To make clear that the bill neither endorses nor prohibits mandatory mediation, the following language should be added to the bill:

> Nothing in this chapter expands a court's authority to order participation in a dispute resolution proceeding. Nothing in this

chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

**Evid. Code § 1119. Recorded oral agreement**

Section 1119(b) should be amended to read:

> (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

**Evid. Code § 1121. Types of evidence not covered**

As suggested by the State Bar Committee on Administration of Justice, Section 1121 should be amended to read:

> 1121. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.
>
> (b) This chapter does not limit any of the following:
>
> (1) The admissibility of an agreement to mediate a dispute.
>
> (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
>
> (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

**Evid. Code § 1124. Written settlements and oral agreements reached through mediation**

**Evid. Code § 1125. When mediation ends**

Sections 1124 and 1125 should be reorganized into parallel provisions on written settlements and oral agreements, respectively. Section 1124 should be amended along the following lines:

> 1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:
>
> (1) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
>
> (2) The agreement provides that it is enforceable or binding or words to that effect.

(3) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.

(4) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) ~~Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.~~ Unless the parties expressly agree otherwise, in writing or orally in accordance with Section 1119:

(1) When a written settlement fully resolving the dispute is fully executed, the mediation ends.

(2) When a written settlement partially resolving the dispute is fully executed, the mediation ends as to the issues resolved.

The Comment to Section 1124 should be revised to explain that the provision does not affect the use of confidential settlement agreements.

Section 1125 should be amended along the following lines:

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

~~(1) A written settlement fully resolving the mediated dispute is fully executed.~~

~~(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.~~

~~(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.~~

~~(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.~~

~~(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:~~

~~(1) A written settlement partially resolving the dispute is fully executed.~~

~~(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.~~ Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation may be admitted in evidence or disclosed if any of the following conditions is satisfied:

(1) The agreement is in accordance with Section 1119.

(2) The agreement is in accordance with subdivisions (a) and (b) of Section 1119, and all parties to the agreement expressly agree, in

writing, or orally in accordance with Section 1119, to disclosure of the agreement.

(3) The agreement is in accordance with subdivisions (a) and (b) of Section 1119, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) Unless the parties expressly agree otherwise, in writing or orally in accordance with Section 1119:

(1) When an oral agreement fully resolving a dispute is reached in accordance with Section 1119, the mediation ends.

(2) When an oral agreement partially resolving a dispute is reached in accordance with Section 1119, the mediation ends as to the issues resolved.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION: SB 209

The Commission considered Memorandum 97-26, the First Supplement to Memorandum 97-26, and a letter from Robert Bezemek, a copy of which is attached to these Minutes as Exhibit p. 36. The Commission asked the staff to continue working with the organizations that opposed the bill and the Office of Administrative Law to try to resolve their concerns. The staff should point out to organizations that opposed the bill that the bill generally continues existing law on the rights and remedies in traditional mandamus. In addressing OAL concerns, the staff should consider whether to exempt preenforcement review of underground regulations from the bill, or whether a satisfactory substantive provision can be drafted. The staff should also confer with Senate Judiciary Committee staff to help with the bill analysis.

The Commission made the following decisions on sections in the bill:

**§ 1123.120. Finality**
**§ 1123.140. Exception to finality requirement**

The Commission approved the staff recommendation to consolidate Sections 1123.120 (finality) and 1123.140 (exception to finality) as follows:

1123.120. ~~A~~ (a) Except as provided in subdivision (b), a person may not obtain judicial review of agency action unless the agency action is final.

(b) A person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:

(1) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.

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

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

~~1123.140. Notwithstanding Section 1123.120 and subject to 1123.130, a person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:~~

~~(a) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.~~

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

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

**§ 1123.130. Agency may not be prohibited from adopting a rule**

The Commission approved the staff recommendation to delete Section 1123.130 from the bill and to cite the *State Water Resources* case in the Comment to Section 1123.110:

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

**§ 1123.160. Condition of relief**

The Commission approved the staff recommendation to delete subdivision (b) (harmless error rule) from Section 1123.160 and to note in the Comment that Section 1123.710(a) (applicability of rules of practice for civil actions) applies the harmless error rule of Code of Civil Procedure Section 475. The staff should consider whether the reference to the harmless error rule should go in the Comment to Section 1123.160, Section 1123.710, or both, and whether the Comment should say omission of a procedural step required by statute, especially in the rulemaking context, is per se prejudicial. See, e.g., Gov't Code § 11350(a) (regulation may be declared invalid for "substantial failure to comply" with chapter). The staff should also consider whether Section 475 applies to judicial review of an administrative proceeding. See California Civil Writ Practice § 3.29 (Cal. Cont. Ed. Bar, 3d ed. 1996) (suggesting that Section 475 does apply to judicial review of an administrative proceeding).

**§ 1123.230. Public interest standing**
**§ 1123.310. Exhaustion required**
**§ 1123.340. Exceptions to exhaustion of administrative remedies**

The staff should prepare a memorandum for a future meeting dealing with concerns about exhaustion of remedies. Should a person be required to request the agency to correct its action before judicial review is available? Should the exhaustion requirement apply if there are no prescribed administrative procedures? Can a regulation be attacked in court as facially invalid without first resorting to administrative challenges?

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

The Commission approved the staff recommendation to delete from the Comment the sentence that says, "Often, the determination of such [i.e., legislative] facts requires specialized expertise and the fact findings involve guesswork or prophecy."

**§ 1123.460. Review of agency procedure**

The Commission approved the staff recommendation to revise subdivision (a) 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 its procedures:
>
> (a) Whether the agency has engaged in an unlawful or unfair procedure or decisionmaking process, or has failed to follow prescribed procedure.
>
> (b) ….

The Comment should say "unfair" procedures need not be merely those that offend due process or violate a statute, and that this rejects the rule of Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council, 435 U.S. 519 (1978) (courts may not require agencies engaged in rulemaking to take procedural steps not required by constitution or statute).

The staff should deal in the statute, possibly in Government Code Section 11350, with continuing OAL concerns about the effect of standards of review on the deference required to be given to an agency's determination that, in adopting a regulation, it need not comply with the rulemaking provisions of the Administrative Procedure Act. Herb Bolz of OAL suggested the statute might

say, "If an agency fails to follow the mandated rulemaking procedure for adopting a regulation, the regulation is invalid."

**§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency**

The Commission approved the staff recommendation to revise Section 1123.630(e) as follows:

> (e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless ~~another statute provides a longer period or~~ the time is extended as provided by law."
>
> **Comment.** …. If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that fact. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

**§ 1123.640. Time for filing petition for review in other adjudicative proceedings**

The Commission approved the staff recommendation to revise Section 1123.640(d) as follows:

> (d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision ~~may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental law, as early as 30 days after the time begins to run~~ is [date] unless the time is extended as provided by law."
>
> **Comment.** …. Section 1123.640 does not override special limitations periods applicable to particular proceedings, such as for cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (180 days, Gov't Code § 51286), decision of a local legislative body adopting or amending a general or specific plan, zoning ordinance, regulation attached to a

> specific plan, or development agreement (90 days, Gov't Code § 65009), or a cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (30 days, Gov't Code §§ 66639, 66641.7). See Section 1121.110 (conflicting or inconsistent statute controls). Section 1123.640 does not apply to proceedings under the California Environmental Quality Act. Pub. Res. Code § 21168(b).
>
> If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that fact. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

The staff should consider whether the notice provisions in Sections 1123.630 and 1123.640 might be consolidated in a separate section, since they are now substantively identical.

**§ 1123.730. Type of relief**

The Commission approved the staff recommendation to delete subdivision (d) from Section 1123.730:

> ~~(d) The court may award attorney's fees or witness fees only to the extent expressly authorized by statute.~~

STUDY N-300 – ADMINISTRATIVE RULEMAKING

**Rulemaking Procedure**

The Commission considered Memorandum 97-13 and its First Supplement concerning procedural reforms to the rulemaking provisions of the APA. The staff's recommendations were approved and will be incorporated into the draft tentative recommendation.

In addition, the staff will draft language allowing an agency to cancel a noticed hearing if no one notifies the agency of an intention to speak at the hearing, and allowing OAL to grant an extension of the one year rulemaking time limitation on a showing of good cause. This language will be incorporated into the tentative recommendation with a specific request for additional public comment.

**Interpretive Guidelines**

The Commission considered Memorandum 97-27, discussing whether an exception to rulemaking procedures for a statement expressing an agency's nonbinding interpretation of law is justified, and presenting a preliminary staff proposal to implement such an exception. The staff proposal exempts a self-identified "interpretive guideline," which by statute would lack the force and effect of law, from full rulemaking procedure. Adoption, amendment, or repeal of an interpretive guideline would instead be subject to streamlined notice and comment procedures.

The Commission endorsed the staff's general approach and instructed the staff to further refine the proposal by addressing the following points raised at the meeting:

• The need for an interpretive guideline exception should be reviewed in light of the availability of other means of communicating an agency interpretation of law, such as a declaratory decision in an administrative adjudication.

• The definition of interpretive guideline should be more clearly limited regarding the matters that can be expressed in an interpretive guideline. A purported interpretive guideline that contains language appearing to bind or compel could then be challenged as an improperly adopted regulation.

• It should be clear that an agency is free to act on an interpretation of law before that interpretation is expressed in an effective interpretive guideline.

• Post-adoption OAL review of an interpretive guideline should be available on request.

• Interpretive guidelines should be published in some place in addition to the California Regulatory Notice Register and agency interpretive guideline compilations.

☐ APPROVED AS SUBMITTED

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

_____
Date

_____
Chairperson

_____
Executive Secretary