MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 12, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on December 12, 1997.

Commission:

Present: Edwin K. Marzec, Vice Chairperson
Quentin L. Kopp, Senate Member
Sanford Skaggs
Colin Wied

Absent: Dick Ackerman, Assembly Member
Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall

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

Consultants: John. P. Dwyer, Environmental Law
Brian E. Gray, Environmental Law
J. Clark Kelso, Trial Court Unification

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
Frank Coats, Department of Motor Vehicles, Sacramento
Timothy G. Hoxie, State Bar Business Law Section, Corporations Committee, San Francisco
Gerald James, Association of California State Attorneys and Administrative Law Judges, Professional Engineers in California Government, and California Association of Professional Scientists, Sacramento
Kip Lipper, Staff Director, Senate Environmental Quality Committee, Sacramento
Charlene Mathias, Office of Administrative Law, Sacramento
Larry McDaniel, Office of Oil Spill Prevention and Response, Department of Fish and Game, Sacramento

Nini Redman, Judicial Council, Sacramento
Robert Ryan, County Counsels' Association of California, Sacramento
Peter Shack, Attorney General's Office, Sacramento
Mary Shallenberger, Senator Lockyer's Office, Sacramento
Daniel L. Siegel, Attorney General's Office, Sacramento
Jeffrey Sievers, Association for California Tort Reform, Sacramento
Ruth Sorensen, County Counsels' Association of California, Sacramento
Shannon Sutherland, California Nurses Association, Sacramento
Cara Vonk, Administrative Office of the Courts, San Francisco
Barbara Wheeler, Association for California Tort Reform, Sacramento
Nancy T. Yamada, California State Employees Association, Sacramento

A quorum not being present, the Commission acted as a subcommittee, all decisions being subject to ratification at a subsequent meeting of the Commission.

CONTENTS

MINUTES OF NOVEMBER 13, 1997, MEETING

The Commission approved the Minutes of the November 13, 1997, Commission meeting submitted by the staff, with the following change:

On page 1, the list of Commission members absent from the meeting should include Commissioner Marshall.

ADMINISTRATIVE MATTERS

Report of Executive Secretary

The Executive Secretary reported he had been approached by a representative of the State Bar Probate Section about the possibility that the Commission could study the newly revised Uniform Principal and Income Act. The Executive Secretary will indicate to the representative that the Commission has a rather full

agenda for the coming year but will perform the study if there is legislative interest in having this done.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-78 relating to the Commission's 1998 legislative program. The Commission took the following actions.

Real Property Covenants. The Commission agreed to delete the obsolete restrictions portion of the bill, leaving the portions on the statute of limitations for enforcement of a restriction and repeal of the First Rule in Spencer's Case. The bill might also be used as a vehicle for other noncontroversial Commission recommendations.

Best Evidence Rule. The Commission agreed that this recommendation might be limited to civil cases if necessary to obtain approval of the Senate Judiciary Committee.

Annual Resolution of CLRC Authority. The staff will make inquiry of Senator Lockyer's office whether it would make sense to add authority for a study of judicial administration procedures identified in the trial court unification project to the SCA 4 legislation rather than to the Commission's resolution of authority.

STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission considered Memorandum 97-72, concerning comments on the business judgment rule recommendation.

The Commission approved the staff proposal in the memorandum to adopt the revisions marked by Bradbury Clark on the attached draft, with the exceptions noted. In addition, the word "only" should not be stricken from the sentence that, "This recommendation applies only to directors of business corporations."

With respect to the comments of the State Bar Corporations Committee, the Commission decided to integrate proposed Section 322 into the definition of "interested", along the following lines:

321. (a) For the purpose of Section 320, a director is "interested" in a transaction or conduct that is the subject of a business judgment only if any of the following conditions is satisfied:

(1) The director, or an associate of the director, is a party to the transaction or conduct.

(2) The director or an associate of the director has a material economic interest in the transaction or conduct (other than usual and customary directors' fees and benefits) of which the director knows or should be aware, that would reasonably be expected to affect the director's judgment in a manner adverse to the corporation or its shareholders.

(3) The director is subject to controlling influence by a party to the transaction or conduct (other than the corporation) or by a person who has a material economic interest in the transaction or conduct of which the director knows or should be aware, and that controlling influence would reasonably be expected to affect the director's judgment with respect to the transaction or conduct in a manner adverse to the corporation or its shareholders.

(b) As used in this section, "associate" means any of the following persons:

(1) The spouse of the director; a child, grandchild, parent, sibling, uncle, aunt, nephew, niece, step-child, stepparent, or step-sibling of the director, including adoptive relationships, and the spouse of such a person; a mother-in-law, father-in-law, brother-in-law, or sister-in-law of the director; a person, other than a domestic employee, having the same home as the director; and a trust or estate of which the director or a person designated in this paragraph is a substantial beneficiary.

(2) A trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

(3) A person with respect to whom the director has a business or economic relationship except a person described in paragraph (1) or (2), but if and only if the relationship would reasonably be expected to affect the director's judgment with respect to the transaction or conduct in question in a manner adverse to the corporation or its shareholders.

(c) Nothing in this section limits the authority of the court to determine whether and to what extent a director is "interested" in the subject of a business judgment in the following circumstances:

(1) Where the challenge to the business judgment seeks injunctive or other relief, other than damages, for conduct alleged to be an unreasonable response to an unsolicited tender offer.

(2) Where the conduct challenged is a board or committee request for dismissal of a derivative action as not in the best interests of the corporation.

> **Comment.** Subdivision (c) qualifies the definition of an "interested" director under this section. Courts of other jurisdictions that have applied the business judgment rule have limited the application of that rule in certain kinds of cases that fall between traditional duty of care cases and traditional duty of loyalty cases. In particular, courts have limited application of the rule in cases involving transactions incident to contests for control, such as defensive actions to takeover bids, and in cases involving the effect of a board or committee determination that a derivative action against a corporate director or officer is not in the best interests of the corporation. See, e.g., Unocal v. Mesa Petroleum Corp., 493 A.2d 946 (Del. 1985); Zapata Corp. v. Maldonado, 420 A.2d 799 (Del. 1981). The determination of whether a director is "interested" for these purposes under subdivision (c) encompasses a wide range of considerations,. See, e.g., ALI Principles of Corporate Governance §§ 1.23(c) ("interested" as applied to director named as defendant in derivative action), 7.10(b) (effect of retention of significant improper benefit) (1992).

This draft is subject to review at a subsequent Commission meeting, but the staff should proceed with this version of the provision for purposes of meeting bill deadlines.

STUDY E-100 – ENVIRONMENTAL LAW CONSOLIDATION

The Commission considered Memorandum 97-79 discussing public comments regarding the proposed outline of an Environmental Code. The Commission decided to proceed with the creation of an Environmental Code and instructed the staff to prepare a memorandum discussing the principles to be applied in deciding whether a particular body of statutory law should be included in the Environmental Code. This memorandum will include a more detailed summary of the contents of the proposed outline.

The Commission intends to develop and introduce legislation in parts, rather than waiting until the entire code is complete to introduce legislation. The staff will begin by drafting one or more divisions of the new Environmental Code. Suggested divisions for this initial work include Divisions 2 (Air Quality) and 3 (Water Resources).

The Commission made the following changes to the proposed outline:

(1) Exclude Part 4 (Pollution Control Financing Authority) of Division 1 (General).

(2) Exclude Parts 12 (Sacramento Regional County Solid Waste Management District) and 13 (Ventura County Waste Management Authority) of Division 7 (Solid and Hazardous Waste).

(3) Exclude Parts 2 (Open Space Maintenance Districts), 6 (Fort Ord Reuse Authority), 7 (Military Base Reuse Authority Act), and 9 (Planning and Land Use) of Division 8 (Land Use and Conservation).

(4) Exclude Part 6 (Surveying and Mapping) of Division 12 (Parks, Wilderness, and Public Lands).

(5) Exclude Division 13 (Energy). The Commission will study whether this division should instead be consolidated as a separate Energy Code.

The Commission noted that statutes that are environmental in character, but are excluded from the consolidated Environmental Code, may still be appropriate subjects for review and reorganization within existing codes.

STUDY J-1300 – TRIAL COURT UNIFICATION

The Commission considered Memoranda 97-81, 97-82 and its First Supplement, 97-83, 97-84, and 97-85, relating to comments on the trial court unification tentative recommendations. The Commission approved the staff recommendations in the memoranda, with the exceptions noted below.

Court reporters. The Commission approved the proposed revision of Government Code Section 72194.5, relating to electronic recording in a municipal court when a reporter is unavailable. Questions were raised as to how the proposed revisions might affect felony proceedings, and also as to how the provision would operate in a unified court. The Commission requested further review of this provision by Professor Kelso and the Judicial Council.

Judicial districts. The Commission noted the question of the meaning of statutory references to "judicial districts" as applied in Los Angeles County, which has both municipal and superior court districts. The Commission directed the staff to include language in the recommendation to the effect that if the municipal and superior courts in a county unify, the Legislature should at that time address the question whether judicial district statutes should be construed to refer to the county or to the superior court districts.

Nomenclature of civil cases. References to "limited cases" should be converted to "limited civil cases". The Commission did not select a term to refer to cases like those now brought in superior court.

Small claims. Code of Civil Procedure Section 116.250 should be amended as follows:

> 116.250. (a) Sessions of the small claims court may be scheduled at any time and on any day, including Saturdays, but excluding other judicial holidays. They may also be scheduled at any public building within the judicial district, including places outside the courthouse.
>
> (b) Each small claims division of a municipal court with four or more judicial officers, and each small claims division of a superior court with seven or more judicial officers, shall conduct at least one night session or Saturday session each month for the purpose of hearing small claims cases other than small claims appeals. The term "session" includes, but is not limited to, a proceeding conducted by a member of the State Bar acting as a mediator or referee.
>
> **Comment.** Section 116.250 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). For guidance in applying Section 116.250, see Section 38 (judicial districts) & Comments.

This amendment combines the clarifications recommended at pages 11-13 of Memorandum 97-82 with the numerical change recommended at pages 5-6 of Memorandum 97-81 (seven judicial officers, not eight).

The amendment of Code of Civil Procedure Section 116.770 (small claims hearing de novo) should remain as in the tentative recommendation.

Pleadings. The amendment of Code of Civil Procedure Section 422.30 (caption) should remain as in the tentative recommendation.

Misclassification of civil case. Proposed Code of Civil Procedure Section 395.9 should be revised as on pages 3-4 of the First Supplement to Memorandum 97-82, but the last clause of subdivision (h) should be redrafted to improve clarity.

Change of venue. A provision along the following lines should be added to the draft legislation:

> **Code Civ. Proc. § 402.5 (added). Change of venue in limited civil cases**
>
> 402.5. The superior court in a county in which there is no municipal court may transfer a limited civil case to another branch or location of the superior court in the same county.
>
> **Comment.** Section 402.5 is amended to accommodate unification of the municipal and superior courts in a county. Cal.

> Const. art. VI, § 5(e). The section makes clear that even though a limited civil case is triable in the superior court in a county in which there is no municipal court, there may be circumstances where it is appropriate to transfer the case for trial within the same county rather than to another county. This parallels statutory authority for change of venue in misdemeanor and infraction cases. Penal Code § 1038 (Judicial Council rules). See also Cal. Const. art. VI, § 6 ("To improve the administration of justice the council shall … adopt rules for court administration, practice and procedure, not inconsistent with statute ….").

County-specific statutes. Proposed Government Code Section 70215 should refer to officers of the court "including subordinate judicial officers". The same phrase should be added where other references to court officers are made in transitional provisions. Appropriate commentary from the Commission's report on SCA 3 might be referenced in the Comments.

Personnel issues and judges' salaries. The Commission's recommendation to the Legislature should note the effect of unification on judges' salaries absent special legislation. The recommendation should also note that absent special legislation, the effect of unification on salaries of other court officers and employees is impossible to generalize due to county-specific statutes. The recommendation should advise the Legislature that this is a matter that must be dealt with, and that it is not covered by the Commission's recommendation.

Gov't Code § 68513. Uniform court data in civil cases in superior court. This section should be limited to collection of data other than in limited civil cases.

Gov't Code § 70212. Transitional provisions. The Commission decided not to inquire further into the possibility of requiring appellate division review where statutes provide for review of one superior court judge's decision by another.

Gov't Code § 72193. City prosecutor. The draft revision of Section 72193 should be added to the proposed legislation, and comment requested from the city attorneys' and district attorneys' associations.

Gov't Code §§ 72400, 72450. Traffic referees and trial commissioners. These sections should not be amended. A general transitional provision should be added to deal with appointment authority in a unified court. See discussion in Memorandum 97-81.

Penal Code § 1538.5. The Commission decided to add to the Comment the language suggested by the Attorney General's office to the effect that

reenactment of Penal Code Section 1538.5 in the context of trial court unification is not intended to modify the Victims Bill of Rights.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-80, First Supplement, and a letter of December 11, 1997, from the Office of Administrative Law, a copy of which is attached to these Minutes. The Commission made the following decisions:

§ 1121.150. Application of new law
Uncodified. Application of new law

The Commission authorized the staff to defer the operative date of SB 209 for one year if necessary to address Senate Judiciary Committee concerns about the bill's scope and complexity:

> 1121.150. (a) This title applies to a proceeding commenced on or after January 1, ~~1999~~ 2000, for judicial review of agency action.
>
> (b) The applicable law in effect before January 1, ~~1999~~ 2000, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1999~~ 2000.
>
> (c) On and after January 1, 1999, the Judicial Council may adopt any rules of court necessary so that this title may become operative on January 1, 2000.

> SEC. 57. (a) This act applies to a proceeding commenced on or after January 1, ~~1999~~ 2000, for judicial review of agency action.
>
> (b) The applicable law in effect before January 1, ~~1999~~ 2000, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1999~~ 2000.
>
> (c) On and after January 1, 1999, the Judicial Council may adopt any rules of court necessary so that this act may become operative on January 1, 2000.

§ 1123.110. Requirements for judicial review; court discretion not limited

The Commission decided to revise Section 1123.110 along the lines requested by OAL, substantially as follows:

> 1123.110. (a) Subject to ~~subdivision~~ subdivisions (b) and (c), a person who has standing under this chapter and who satisfies the requirements governing exhaustion of administrative remedies,

~~ripeness~~, time for filing, and other preconditions is entitled to judicial review of final agency action.

(b) Nothing in this title precludes the court from exercising its discretion to decline to grant judicial review on the ground that the case is not ripe for review.

(c) Nothing in this title limits court discretion conferred by Article VI of the California Constitution summarily to decline to grant judicial review.

Comment. Subdivision (a) of Section 1123.110 is drawn from 1981 Model State APA Section 5-102(a). It ties together the threshold requirements for obtaining judicial review of final agency action, and guarantees the right to judicial review if these requirements are met. See, e.g., Sections 1123.120 (finality), 1123.210 (standing), 1123.310 (exhaustion of administrative remedies)~~, 1123.630-1123.640 (time for filing petition for review of decision in adjudicative proceeding). The ripeness doctrine mentioned in subdivision (a) is not codified in this title. It is left to court discretion as under case law. See, e.g., Pacific Legal Foundation v. California Coastal Comm'n, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982) (challenge to Commission's public access guidelines); Planning & Conservation League v. Department of Fish & Game, 54 Cal. App. 4th 140, 62 Cal. Rptr. 2d 510, 513-14 (1997) (facial challenge to emergency management measures permit); Planning & Conservation League v. Department of Fish & Game, ___ Cal. App. 4th ___, 67 Cal. Rptr. 2d 650, 653-54 (1997) (case ripe for review where issues are purely legal); State Water Resources Control Bd. v. Office of Admin. Law, 12 Cal. App. 4th 697, 707-08, 16 Cal. Rptr. 2d 25, 31-32 (1993) (judicial review of rulemaking). See generally 5 B. Witkin, California Procedure *Pleading* § 815, at 270-72 (4th ed. 1997)~~. The provisions in this title on time for filing apply only to adjudicative proceedings. See Sections 1123.630-1123.640. With respect to all other proceedings, the time limits under existing law continue to apply. These depend on the nature of the right or obligation sought to be enforced, usually three or four years. California Civil Writ Practice § 6.25, at 211 (3d ed., Cal. Cont. Ed. Bar 1997); 2 G. Ogden, California Public Agency Practice § 51.10[2][a]; 3 B. Witkin, California Procedure *Actions* § 624, at 802 (4th ed. 1996).

. . . .

Subdivision (b) preserves the ripeness doctrine which is not codified in this title, but is left to case law.

Subdivision ~~(b)~~ (c) recognizes that the California Constitution may confer . . . .

The staff should consider whether the meaning of the reference in Section 1123.110(a) to "other preconditions" for review could be clarified.

§ 1123.120. Finality

The Commission approved the staff recommendation to put the following in the Comment:

> **Comment.** . . . Emergency regulations of a state agency adopted under Government Code Section 11346.1 are final for the purpose of Section 1123.120.

§ 1123.330. Judicial review of rulemaking

The Commission revised Section 1123.330 along the lines requested by OAL, substantially as follows:

> 1123.330. (a) A person may obtain judicial review of a rule notwithstanding the person's failure to participate in the rulemaking proceeding on which the rule is based, or to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.
>
> (b) A person may obtain judicial review of a rule whether or not a proceeding to enforce the rule has been commenced.
>
> (c) Without exhausting administrative remedies, a person may obtain judicial review of a state agency regulation adopted or amended under the rulemaking portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, on the ground that the regulation is not authorized by or is facially inconsistent with statute, if the person seeking review is not a party to an agency adjudicative proceeding in which the validity of the regulation is at issue, commenced before the filing of the petition for review.
>
> **Comment.** Subdivision (a) of Section 1123.330 continues the former second sentence of subdivision (a) of Government Code Section 11350, and generalizes it to apply to local agencies as well as state agencies. See Sections 1120 (application of title), 1121.230 ("agency" defined), 1121.290 ("rule" defined). The petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.
>
> Subdivision (b) continues existing law. See 1 G. Ogden. California Public Agency Practice § 22.01 (rev. June 1989) (judicial review of a rule may be had before commencement of enforcement proceedings). ~~Subdivision (b) does not limit preconditions for~~

~~judicial review, including exhaustion of administrative remedies and that the controversy be ripe for judicial review. See Section 1123.110 and Comment.~~

Section 1123.330 states exceptions to the exhaustion requirement of Section 1123.310. Under subdivision (c), the exhaustion requirement applies to judicial review of a state agency regulation adopted or amended under the APA only if the person seeking review is already raising, or has the opportunity to raise, the same issue in a pending administrative adjudication. See also Gov't Code § 11342.2 (state agency regulation adopted under Administrative Procedure Act must be authorized by and consistent with statute). The administrative adjudication will ordinarily be an agency-initiated enforcement action, but could be a proceeding initiated by the party seeking review. The exhaustion requirement only applies if the person seeking review is the same person involved in a pending administrative adjudication in which the issue of the legality of the regulation is raised. Subdivision (c) does not deal with ripeness for review, which is left to court discretion as under case law. See Section 1123.110(b). For a discussion in the rulemaking context, see 5 B. Witkin, California Procedure *Pleading* § 815, at 270-72, §§ 817-18, at 273-75 (4th ed. 1997).

§ 1123.340. Exceptions to exhaustion of administrative remedies

The Commission approved the staff recommendation to revise the Comment as follows:

Comment. . . . The exceptions to the exhaustion of remedies requirement consolidate and codify a number of existing case law exceptions, including:

. . . .

Futility. ~~The exhaustion requirement is excused under subdivision (b) if it is certain, not merely probable, that the agency would deny the requested relief.~~ See, e.g., Grier v. Kizer, 219 Cal. App. 3d 422, 432, 268 Cal. Rptr. 244, 249 (1990) (exhaustion futile if agency takes unyielding position that regulation was validly adopted); Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974) (exhaustion futile if aggrieved party can positively state how agency would decide). See also Hollon v. Pierce, 257 Cal. App. 2d 468, 476, 64 Cal. Rptr. 808 (1967).

§ 1123.410. Standards of review of agency action

The Commission approved the staff recommendation to revise the Comment as follows:

Comment. Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). ~~The~~ It is the court's independent responsibility to choose and apply the section or sections of this article with the appropriate review standard ~~of this article to be applied by the court depends~~ , depending on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion. Or, if judicial review is sought on the ground that the agency has failed to perform a duty mandated by statute, the court would use the standard of Section 1123.420 in determining whether or not a statutory duty exists. If the court determines the agency has discretion under the statute to act or not act, the court would use the standard of Section 1123.450 in determining whether the agency exercised its discretion properly.

§ 1123.420. Review of agency interpretation of law

The Commission approved the staff recommendation to revise the Comment as follows:

Comment. Section 1123.420 clarifies and codifies existing case law on judicial review of agency interpretation of law. It is not the intent of Section 1123.420 to require the courts to give greater deference to agency interpretation of law than under existing law.

. . . .

Under subdivision (a), the question of the appropriate degree of judicial deference to the agency interpretation of law is treated as "a continuum with nonreviewability at one end and independent judgment at the other." See Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995). ~~Subdivision (a) is consistent with and continues the substance of cases saying courts must accept statutory interpretation by an agency within its expertise unless "clearly erroneous" as that standard was applied in Nipper v. California Auto. Assigned Risk Plan, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect "administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose"). The "clearly erroneous" standard was another way of~~

~~requiring the courts in exercising independent judgment to give appropriate deference to the agency's interpretation of law. See Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941).~~

. . . .

§ 1123.430. Review of agency factfinding

The Commission declined to change its position on replacing independent judgment review with substantial evidence review of state agency factfinding where a fundamental vested right is involved. The Commission continues to believe strongly that substantial evidence review is the best policy. However, recognizing that the Senate Judiciary Committee is unlikely to approve SB 209 with that provision in it, the Commission decided to leave it to the discretion of the bill's author, Senator Kopp, whether to restore existing law, and to continue to recommend the bill however Senator Kopp decides to proceed on this issue.

§ 1123.445. Review of agency application of law to fact

The Commission considered the staff suggestion to add a section to SB 209 to codify existing law on standard of review of application of law to fact. The Commission decided not to include this provision unless the local agency working group and Professor Asimow had no objection to it.

§ 1123.460. Review of agency procedure

The Commission approved the staff recommendation to revise the Comment as follows:

Comment. Section 1123.460 is consistent with existing law concerning the independent judgment of the court on questions of a legal character, including whether the administrative proceedings have been fair. See Bekiaris v. Board of Educ., 6 Cal. 3d 575, 587, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). *Cf.* 5 U.S.C. § 706(2)(d) (federal APA); Mathews v. Eldridge, 424 U.S. 319 (1976). Section 1123.460 is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act within the prescribed time upon a matter submitted to the agency.

~~As used in subdivision (a), "unfair" procedures are not limited to those that offend due process or violate a statute. 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 degree of deference to be given to the agency's determination under Section 1123.460 is for the court to determine. The deference is not absolute. Ultimately, the court must still use its judgment on the issue. The court should defer to the agency's determination only where it finds that deference is appropriate (sometimes called "weak" deference). The court is not required to uphold an agency's determination that the court believes is extremely unwise (sometimes called "strong" deference). See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1194-95 (1995).

For a special rule for judicial review of state agency rulemaking, see Gov't Code § 11350.

The Commission decided not to delete from Section 1123.460 the provision for judicial deference to the agency's determination of its procedures as requested by Earl Lui of the Consumers Union. The Commission declined to give the staff authority to do so at the Senate Judiciary Committee hearing in January.

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

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

Comment. . . . Section 1123.630 does not apply to agency action other than an adjudicative proceeding. Existing limitations periods continue to govern such action, which depend on the nature of the right or obligation sought to be enforced, usually three or four years. California Civil Writ Practice § 6.25, at 211 (3d ed., Cal. Cont. Ed. Bar 1997); 2 G. Ogden, California Public Agency Practice § 51.10[2][a]; 3 B. Witkin, California Procedure *Actions* § 624, at 802 (4th ed. 1996).

§ 1123.710. Applicability of rules of practice for civil actions

The Commission approved the staff recommendation to revise Section 1123.710(c) and Comment as follows, and approved the staff's oral recommendation to delete subdivision (d) as unnecessary:

1123.710. . . .

(c) ~~A~~ In a proceeding under this title, a party may obtain discovery ~~in a proceeding under this title~~ under Article 3

(commencing with Section 2017) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure only of the following:

(1) Matters reasonably calculated to lead to the discovery of evidence admissible under Section 1123.810 or 1123.850.

(2) Matters in possession of the agency for the purpose of determining the accuracy of the affidavit of the agency official who compiled the administrative record for judicial review.

~~(d) The Judicial Council may adopt rules of court governing proceedings in the Supreme Court and courts of appeal for judicial review of agency action, which may be inconsistent with this title~~.

Comment. . . . Subdivision (c)(1) codifies City of Fairfield v. Superior Court, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). If the closed record rule of Section 1123.810 does not apply because the agency did not give interested persons notice and an opportunity to submit oral or written comment or did not maintain a record or file of its proceedings, a party may obtain discovery to the same extent as in a civil action generally. See Section 2017 (party may obtain discovery of matter that "either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence"). The affidavit referred to in subdivision (c)(2) is provided for in Section 1123.820.

§ 1123.810. Administrative record exclusive basis for judicial review

The Commission approved the staff recommendation to revise the Comment as follows:

Comment. . . . The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995). If the closed record rule of subdivision (a) does not apply and the court receives evidence itself under subdivision (b), general rules of civil practice apply to the proceeding. See Section 1123.710. In such cases, the court may receive testimonial and documentary evidence as in civil actions generally.

§ 1123.950. Attorney fees in action to review administrative proceeding

The Commission approved the staff recommendation to delete Section 1123.950 and to restore Government Code Section 800 from which Section 1123.950 came. The staff should also say in an appropriate Comment that the draft statute does not affect existing law on attorneys' fees in judicial review of agency action, with a reference to Government Code Section 800 and Code of Civil Procedure Section 1021.5 (private attorney general).

Concerns of Office of Administrative Law

The Commission directed the staff to continue working with OAL and Professor Kelso. The Commission authorized the staff to make any nonsubstantive changes to SB 209 before or at the Senate Judiciary Committee hearing necessary to address OAL concerns.

☐ APPROVED AS SUBMITTED

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

_____
Date

_____
Chairperson

_____
Executive Secretary

STATE OF CALIFORNIA PETE WILSON, *Governor*

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
SACRAMENTO, CA 95814
(916) 323-6225

December 11, 1997

California Law Revision Commission
Att'n: Nat Sterling
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: (1) December 3, 1997 Senate Judiciary Committee *Staff Study Group on SB 209* ("Judicial Review of Agency Action")

(2) Alternative Approaches to Resolving Problems with SB 209's Handling of Judicial Review of *Duly Adopted* Regulations (all references to Sept. 11, 1997 version of bill)

Dear Mr. Sterling:

Summary: plan A rejected; plan B proposed; outcome uncertain; Commission policy decision requested authorizing staff to work closely with OAL to resolve OAL concerns

The Office of Administrative Law ("OAL") continues to have serious concerns about SB 209, despite the amendments reflected in the September 11 version of the bill.

On December 3, 1997, we offered amendments to SB 209 which would quickly and easily resolve our concerns. See Attachment "A" for the OAL proposal. These amendments would simply exempt **preenforcement** judicial review of duly adopted state agency regulations from SB 209. This would have the effect of preserving existing law. We will refer to these OAL-developed amendments as "plan A." Commission representative Bob Murphy rejected these amendments. Mr. Murphy stated that the Commission would prefer to work with OAL toward the end of revising SB 209 to eliminate particular problems involving judicial review of duly adopted state agency regulations (notably preconditions). We will refer to this Commission proposal as "plan B."

OAL is willing to work with the Commission to determine whether or not plan B can resolve OAL's concerns about SB 209. We don't know yet whether plan B will work. We do know that taking this route will be a complex and time-consuming process. It will be important to obtain additional public input, especially from those persons and entities regulated by state agencies. OAL particularly suggests that legislative intent material found in official comments be made available to the public in a format that clearly indicates changes from the February 1997 *Recommendation*, such as strikeout/underline, rather than the "clean copy" style found in the November 25 revised comment document. (See Attachment "B" for fuller discussion of concerns re official comments.)

OAL requests that the Commission make the following policy decision: to instruct Commission staff to work closely with OAL between now and the January 13, 1998 meeting of the Senate Judiciary Committee, in order to resolve OAL concerns involving SB 209's treatment of judicial review of duly adopted regulations, primarily in the area of preconditions to review (exhaustion, ripeness, standing, time for filing, and other preconditions), with an eye toward preserving existing law in which, for instance, in the context of facial preenforcement challenges to duly adopted regulations on consistency/authority grounds, the exhaustion requirement doesn't apply and ripeness is rarely invoked. As OAL's plan A indicates, we are also deeply concerned about amendments to Government Code section 11350. And, other parts of SB 209 need to be carefully reviewed to make sure they don't create unintended problems in the duly adopted regulation context.

By "working closely," we mean such things as Commission staff sharing with us copies of revised text and comment language and allowing us to comment on it prior to formally distributing it as a staff proposal or sending it to the Committee.

OAL is optimistic about the prospects of such a plan for four reasons. First, there was substantial progress toward resolving our concerns in the Study Group on December 3. Second, Professor Asimow's comments during the meeting were constructive and forthright, especially on the exhaustion question. Third, Commission consultant Professor Clark Kelso, who had been asked by the Commission to offer comments from a private sector perspective, has provided insightful comments, frequently helping to bridge the gap between opposing

viewpoints. Fourth, Judiciary Committee Counsel Dana Mitchell is effective in listening to opposing viewpoints and seeking common ground.

At the meeting, Professor Asimow stated that he could not oppose the proposition that the exhaustion of administrative remedies requirement was inapplicable to preenforcement facial challenges to duly adopted regulations because he could not think of any administrative remedies that would apply. Section 1123.330(a), he pointed out, provides a person may obtain judicial review of a regulation despite that person's failure to (1) participate in the rulemaking proceeding or (2) file a rulemaking petition advocating revision of the regulation. If neither of these procedures must be exhausted, there would appear to be nothing remaining.

As we see it, the basic principle should be that the exhaustion requirement *does not apply* to preenforcement, facial challenges to duly adopted regulations. Two specific applications of this general principle involve the (a) rulemaking proceeding and (b) rulemaking petition procedures. Perhaps the general principle should be set out first, followed by the two specific situations.

Memo 97-80 (p. 6) includes a revised version of section 1123.330. As noted above, it would seem best to further revise 1123.330 so that the general principle that exhaustion does not apply is stated first. Also, the underlying concept is that once an administrative proceeding is underway, the private party is precluded from obtaining judicial review until the party has finished (or "exhausted") the administrative remedy--whether the administrative proceeding has been initiated by the agency (such as an enforcement action) or initiated by the private party (such as an appeal). Cf. Government Code section 11340.5(e). The proposed language in Memo 97-80 (and in the September 11 version of SB 209) appears to pose a problem because it recognizes only the *agency-initiated* enforcement proceeding. Similarly, it should be made clear that the fact that Company A is in the midst of administrative proceeding with Agency X and is raising a particular consistency issue does not preclude Company B--which is not involved in administrative proceedings--from going to court to challenge the same regulation as facially inconsistent with statute.

We look forward to working closely with Commission staff in ironing out remaining areas of concerns. Further letters will follow shortly.

Sincerely,

Herbert F. Bolz

cc

Dana Mitchell, Counsel, Senate Judiciary Committee
Dan Friedlander, Senator Kopp's Office

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APPENDIX "A"

The following proposal was presented to the Study Group. The main part of the proposal is set out below. The part of the proposal containing the current texts of Government Code section 11350 and 11350.3 follows.

Proposed amendments to SB 209, as amended Sept. 11, 1997

1. Proposed Code of Civil Procedure section 1121 provides in part (page 5, line 29):

   "(a) This title [proposed title 2] does not apply to any of the following:

   (1) . . .

   ***Suggestion*: add after line 12 of page 6:**

   "(7) Judicial review of regulations adopted pursuant to the rulemaking part of the Administrative Procedure Act, chapter 3.5, part 1, division 3, title 2 of the Government Code." [Government Code sections 11340-11359]

2. **Delete section 25 (beginning at page 33, line 21).** This will have the effect of preserving Government Code section 11350 (declaratory relief re state agency regulations) as it stands today. Current law allows interested parties (in the pre-enforcement context) to seek declaratory, mandamus, and injunctive relief against state agency regulations (both duly adopted regulations and "underground" regulations) . Typical grounds: regulation on its face is inconsistent with or not authorized by statute.

3. **Delete section 26 (beginning at page 34, line 32).** This will have the effect of preserving Government Code section 11350.3 as it stands today. Section 11350.3 permits judicial review of Office of Administrative Law decisions disapproving proposed regulations. [i:\sb209.app]

Government Code Section 11350. Declaratory Relief; Grounds for Declaration of Invalidity

(a) Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. The right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulations. The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in any action for declaratory relief brought with respect to a regulation.

Government Code Section 11350.3. Judicial Declaration as to Validity of Regulation Disapproved or Ordered Repealed; Action for Declaratory Relief

Any interested person may obtain a judicial declaration as to the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7 by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. The court may declare the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

APPENDIX "B"

STATEMENTS OF LEGISLATIVE INTENT: OFFICIAL COMMENTS

According to the California Supreme Court, the official comments drafted by the Commission are legislative history and entitled to substantial weight in construing the statutory provisions. *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 249-250. According to the California Supreme Court:

> "To ascertain legislative intent, courts have resorted to many rules of construction. However, when the Legislature has stated the purpose of its enactment in unmistakable terms [e.g., in official comments], we must apply the enactment in accordance with the legislative direction, and all other rules of construction must fall by the wayside. Speculation and reasoning as to legislative purpose must give way to expressed legislative purpose." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d, 829, 831, 196 Cal.Rptr. 38, 39.)

After a Commission-sponsored bill becomes law, the comments drafted by the Commission are printed in the annotated codes immediately below each code section, and are heavily relied upon by practitioners and judges. **Thus, parties interested in SB 209 as it is heard by legislative committees should in all cases read the official comment accompanying the code section.** Many important interpretations, clarifications, and policy statements are found in the comments.

Accordingly, we will need to carefully review the wording of the revised official comments, as well as the wording of comments that have not yet been revised to ensure that the comment does not contain material (a) inconsistent with the policy stated in the text of the proposed statute, or (b) inconsistent with policy decisions to delete certain material from the text.

(At the December 3 meeting, Mr. Murphy provided the Study Group with copies of a previously-undistributed 16 page, single-spaced document consisting of the 31 official comments *revised* as of Nov. 25, 1997. Though a few sentences came up for discussion, there was not enough time during the meeting to read over the 16-page document. Also, most participants did not have with them copies of the 116 original comments contained in the Recommendation dated February 1997.)

An example of a comment problem came up this fall. In response to concerns about choking off pre-enforcement challenges to duly adopted regulations by enacting stringent preconditions to judicial review, Commission staff recommended revising proposed Code of Civil Procedure section 1123.330(b) to read:

> "A person may obtain judicial review of a rule whether or not a proceeding to enforce the rule has been commenced."(Memo 97-56, p. 6.)

Though clearly first-draft language, this was a reasonable, good faith effort to respond to the concerns. However, at the Commission meeting, Professor Asimow strongly objected to this language, resulting in the following addition to the official comment to section 1123.330(b):

> "Subdivision (b) does not limit preconditions for judicial review, including exhaustion of administrative remedies and that the controversy be ripe for judicial review. See section 1123.110 and Comment."

Thus, we went through three stages, eventually coming back roughly to where we started.

(1) Litigants *cannot* obtain judicial review of a duly adopted regulation, unless (at a minimum) each and every one of four explicit precondition "requirements" are satisfied: exhaustion, ripeness, finality, and time for filing.

(2) Litigants *can* obtain judicial review even if they have not exhausted administrative remedies by taking part in an enforcement proceeding, etc.

(3) Litigants *can* obtain judicial review even though an enforcement proceeding has not commenced, *but* they nonetheless must first exhaust administrative remedies and satisfy the ripeness "requirement" or "precondition."

Though bearing an intriguing similarity to Hegelian philosophy (thesis, antithesis, synthesis), this was getting really murky. Appellate interpretation would be necessary. And, after all that, preenforcement review of duly adopted regulations

would likely still be more difficult than under current law. On current law, see Government Code section 11350 (any interested person may seek declaratory relief concerning validity of regulation); Ogden, *California Public Agency Practice*, sec. 22.02[1] (if regulation has not yet been enforced against a person, that person may seek the preenforcement remedy of declaratory relief, often coupled with a petition for injunction and/or writ of mandate).

OAL's understanding is that the consensus of the Study Group was that the confusing language on preconditions would be deleted from the comment to section 1123.330(b). See Consumers Union letter of Dec. 7, 1997, p. 4 ("appeared to be a consensus that there is **no** need to require exhaustion when a party seeks pre-enforcement review of agency action")(emphasis in original). According, the following should be deleted from the comment:

> "Subdivision (b) does not limit preconditions for judicial review, including exhaustion of administrative remedies and that the controversy be ripe for judicial review. See section 1123.110 and Comment."

This comment language was not recommended for deletion in Commission Memo 97-80, presumably due to time constraints on its drafting.