
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
APRIL 23, 1998
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 23, 1998.

Commission:

Present: Edwin K. Marzec, Chairperson
Arthur K. Marshall, Vice Chairperson
Bion M. Gregory, Legislative Counsel
Sanford Skaggs
Howard Wayne, Assembly Member
Colin Wied

Absent: Robert E. Cooper
Quentin L. Kopp, Senate Member

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: David M. English, Health Care Decisions

Other Persons:

Frank Coats, Department of Motor Vehicles, Sacramento
Alice Mead, California Medical Association, San Francisco
Ronald Baker Miller, Council on Ethical Affairs, California Medical Association,
Anaheim Hills and Irvine

C O N T E N T S

Minutes of March 19-20, 1998, Meeting	2
Administrative Matters	2
1998 Legislative Program	2
Study B-601 – Business Judgment Rule	3
Study E-100 – Environmental Law Consolidation	3

Study J-1300 – Trial Court Unification	4
Study L-4000 – Health Care Decisionmaking	9
Study N-200 – Judicial Review of Agency Action	12
Study N-302 – Consent Regulations and Other Noncontroversial Regulations	12

MINUTES OF MARCH 19-20, 1998, MEETING

The Minutes of the March 19-20, 1998, Commission meeting were approved with the following corrections:

On page 5, line 12, revise “Memorandum 98-2” to read “Memorandum 98-22”

On page 5, line 24, after “Memorandum 98-13” insert “and its First Supplement”

ADMINISTRATIVE MATTERS

The Executive Secretary reported that the Governor has not yet acted to fill the two vacancies on the Commission.

1998 LEGISLATIVE PROGRAM

The Commission considered Memorandum 98-23, relating to the Commission’s 1998 legislative program. The staff supplemented this memorandum with the information that (1) SCR 65 has been approved by Senate Appropriations Committee, and (2) the proposal to have the Public Utilities Commission report annually to the Legislature on telecommunications deregulation “in consultation with the Law Revision Commission” has been amended into AB 1973 (Campbell) and approved by the Assembly Committee on Utilities and Commerce.

Assembly Member Wayne reported that he has located a vehicle for the ALJ Code of Ethics recommendation — AB 2164 (Wayne). On the issue of application of Canon 3D(3) of the Code of Judicial Ethics (requiring that criminal prosecutions be reported to the Commission on Judicial Performance) to administrative law judges, the Commission suggested that in the case of an administrative law judge the report be made to the appropriate disciplinary authority. Assembly Member Wayne inquired whether infractions are required to be reported. [Staff Note: Canon 3D(3) excludes infractions, as well as misdemeanors not involving moral turpitude.]

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

2 The Commission considered Memorandum 98-24, relating to the business
3 judgment rule. The Commission adopted the staff recommendation for Comment
4 revisions set out in the memorandum, except as follows:

5 **Definition of interested director.** The Comment should deal narrowly with
6 ownership of shares in the corporation by the director.

7 **Protection for board (as opposed to individual director).** The Commission
8 decided not to attempt to address this matter in the Comment.

9 **STUDY E-100 – ENVIRONMENTAL LAW CONSOLIDATION**

10 The Commission considered new issues relating to material that it had
11 previously approved for inclusion in the draft Environment Code. The
12 Commission also continued its consideration of new material proposed for
13 inclusion in the draft Environment Code.

14 **Division 1 — Rules of Construction and Definitions**

15 The Commission considered Memorandum 98-31, relating to Division 1 of the
16 Environment Code (Rules of Construction and Definitions). The Commission
17 made the following decisions relating to Division 1:

18 **Title.** The Commission approved the use of “title” as a hierarchical division in
19 the proposed Environment Code. Titles will be used between parts and chapters,
20 as necessary. Conforming changes will be made to proposed Sections 5 and 8.

21 **Definitions.** Generally applicable definitions of the terms “oath,” “public
22 agency,” and “state” will be added as proposed Sections 65, 75, and 80,
23 respectively.

24 **Division 2 — General Provisions**

25 The Commission considered Memorandum 98-26, relating to Division 2 of the
26 Environment Code (General Provisions). In light of the potential for political
27 opposition to codification of the Governor’s Reorganization Plan No. 1 of 1991,
28 the Commission decided that Part 1 of Division 2 of the proposed Environment
29 Code will be withdrawn from the draft and the part reserved for future use. Once
30 the political controversy relating to the Plan is resolved, the Commission will
31 return to this material to consider how best to continue the law relating to
32 environmental agencies. Sections affected by the Plan that are not included in
33 Part 1 of Division 2 of the proposed Environment Code will not be withdrawn.

1 **Division 3 — California Environmental Quality Act**

2 The Commission considered Memorandum 98-21 and its First Supplement,
3 relating to Division 3 of the Environment Code (California Environmental
4 Quality Act). The Commission approved the draft attached to the memorandum
5 for inclusion in the draft code when it is circulated for comment.

6 **Division 4 — Air Quality**

7 The Commission considered Memorandum 98-27, relating to Part 3 of
8 Division 4 of the Environment Code (Air Resources). The Commission approved
9 the draft attached to the memorandum for inclusion in the draft code when it is
10 circulated for comment.

11 **STUDY J-1300 – TRIAL COURT UNIFICATION**

12 The Commission considered Memorandum 98-25 and its First Supplement,
13 relating to implementing legislation for SCA 4. The Commission made the
14 following decisions:

15 **Issues in Judicial Administration Appropriate for Future Study**

16 The implementing legislation would preserve existing procedural distinctions
17 between traditional superior court cases, traditional municipal court cases, and
18 small claims cases. The Commission's report should make clear that although the
19 implementing legislation preserves this three track system, the Commission
20 strongly recommends reexamining the system and its underlying policies in light
21 of unification.

22 **Appeals in Civil Cases**

23 As suggested by the State Bar Litigation Section and the State Bar Committee
24 on Administration of Justice, proposed Code of Civil Procedure Section 904.3
25 should be deleted from the draft legislation. The amendments of Code of Civil
26 Procedure Sections 904.1 and 904.2 should be revised to read:

27 **Code Civ. Proc. § 904.1 (amended). Taking appeal**

28 SEC. _____. Section 904.1 of the Code of Civil Procedure is
29 amended to read:

30 904.1. (a) ~~An appeal may be taken from a superior court in the~~
31 following cases An appeal, other than in a limited civil case, is to
32 the court of appeal. An appeal, other than in a limited civil case,
33 may be taken from any of the following:

1 (1) From a judgment, except (A) an interlocutory judgment,
2 other than as provided in paragraphs (8), (9), and (11), (B) a
3 judgment of contempt which is made final and conclusive by
4 Section 1222, or (C) ~~a judgment on appeal from a municipal court or~~
5 ~~a justice court or a small claims court, or~~ (D) a judgment granting or
6 denying a petition for issuance of a writ of mandamus or
7 prohibition directed to a municipal court or a ~~justice court~~ the
8 superior court in a county in which there is no municipal court or
9 the judge or judges thereof which relates to a matter pending in the
10 municipal or justice superior court. However, an appellate court
11 may, in its discretion, review a judgment granting or denying a
12 petition for issuance of a writ of mandamus or prohibition, or a
13 judgment or order for the payment of monetary sanctions, upon
14 petition for an extraordinary writ.

15 (2) From an order made after a judgment made appealable by
16 paragraph (1).

17 (3) From an order granting a motion to quash service of
18 summons or granting a motion to stay or dismiss the action on the
19 ground of inconvenient forum.

20 (4) From an order granting a new trial or denying a motion for
21 judgment notwithstanding the verdict.

22 (5) From an order discharging or refusing to discharge an
23 attachment or granting a right to attach order.

24 (6) From an order granting or dissolving an injunction, or
25 refusing to grant or dissolve an injunction.

26 (7) From an order appointing a receiver.

27 (8) From an interlocutory judgment, order, or decree, hereafter
28 made or entered in an action to redeem real or personal property
29 from a mortgage thereof, or a lien thereon, determining the right to
30 redeem and directing an accounting.

31 (9) From an interlocutory judgment in an action for partition
32 determining the rights and interests of the respective parties and
33 directing partition to be made.

34 (10) From an order made appealable by the provisions of the
35 Probate Code or the Family Code.

36 (11) From an interlocutory judgment directing payment of
37 monetary sanctions by a party or an attorney for a party if the
38 amount exceeds five thousand dollars (\$5,000).

39 (12) From an order directing payment of monetary sanctions by
40 a party or an attorney for a party if the amount exceeds five
41 thousand dollars (\$5,000).

42 (b) Sanction orders or judgments of five thousand dollars
43 (\$5,000) or less against a party or an attorney for a party may be
44 reviewed on an appeal by that party after entry of final judgment in
45 the main action, or, at the discretion of the court of appeal, may be
46 reviewed upon petition for an extraordinary writ.

Code Civ. Proc. § 904.2 (amended). Taking appeal in limited civil case

SEC. _____. Section 904.2 of the Code of Civil Procedure is amended to read:

904.2. An appeal may be taken from a municipal or justice court in the following cases An appeal in a limited civil case is to the appellate division of the superior court. An appeal in a limited civil case may be taken from any of the following:

(a) From a judgment, except (1) an interlocutory judgment, or (2) a judgment of contempt which is made final and conclusive by Section 1222.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order changing or refusing to change the place of trial.

(d) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(e) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(f) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(g) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(h) From an order appointing a receiver.

~~(i) From a judgment of the small claims court.~~

Application for Reclassification

The Commission requested further research and analysis of whether an application for reclassification should extend the time to answer or otherwise respond to the initial pleading. In the interim, proposed Code of Civil Procedure Section 395.9 should be revised along the following lines:

Code Civ. Proc. § 395.9 (added). Misclassification as limited civil case or otherwise

SEC. _____. Section 395.9 is added to the Code of Civil Procedure to read:

395.9. (a) In a county in which there is no municipal court, if the caption of the complaint, cross-complaint, petition, or other initial pleading erroneously states or fails to state, pursuant to Section 422.30, that the action or proceeding is a limited civil case, the action or proceeding shall not be dismissed, except as provided in Section 399.5 or subdivision (b)(1) of Section 581, but shall, on the duly noticed application of either party within 30 days after service of the defendant or cross-defendant within the time allowed for

1 that party to respond to the initial pleading, or on the court's own
2 motion at any time, be reclassified as a limited civil case or
3 otherwise. The action or proceeding shall then be prosecuted as if it
4 had been so commenced, all prior proceedings being saved. If
5 summons is served before the court rules on reclassification of the
6 action or proceeding, as to any defendant, so served, who has not
7 appeared in the action or proceeding, the time a party applies for
8 reclassification, the time for that party to answer or otherwise plead
9 shall date from the denial of reclassification or, if reclassification is
10 granted, from service upon that defendant party of written notice
11 that the clerk has refiled the case pursuant to Section 399.5.

12 (b) If an action or proceeding is commenced as a limited civil
13 case or otherwise pursuant to Section 422.30, and it later appears
14 from the verified pleadings, or at the trial, or hearing, that the
15 determination of the action or proceeding, or of a cross-complaint,
16 will necessarily involve the determination of questions inconsistent
17 with that classification, the court shall, on the application of either
18 any party within 30 days after the party is or reasonably should be
19 aware of the grounds for misclassification, or five days in a
20 proceeding for unlawful detainer, forcible detainer, or forcible
21 entry, or on the court's own motion at any time, reclassify the case.

22 (c) An application for reclassification pursuant to this section
23 shall be supported by a declaration, affidavit, or other evidence if
24 necessary to establish that the case is misclassified. A declaration,
25 affidavit, or other evidence is not required if the grounds for
26 misclassification appear on the face of the challenged pleading.

27 (d) An action or proceeding which is reclassified under the
28 provisions of this section shall be deemed to have been commenced
29 at the time the complaint or petition was initially filed, not at the
30 time of reclassification.

31 (e) Nothing in this section shall be construed to preclude or
32 affect the right to amend the pleadings as provided in this code.

33 (f) Nothing in this section shall be construed to require the
34 superior court to reclassify any action or proceeding because the
35 judgment to be rendered, as determined at the trial or hearing, is
36 one which might have been rendered in a limited civil case.

37 (g) In any case where the erroneous classification is due solely to
38 an excess in the amount of the demand, the excess may be remitted
39 and the action may continue as a limited civil case.

40 (h) Upon the making of an order for reclassification,
41 proceedings shall be had as provided in Section 399.5. Unless the
42 court ordering the reclassification otherwise directs, the costs and
43 fees of those proceedings, and other costs and fees of reclassifying
44 the case, including any additional amount due for filing the initial
45 pleading, are to be paid by the party filing the pleading that
46 erroneously classified the case.

1 In light of its request for further research and analysis, the Commission deferred
2 consideration of the issues relating to Code of Civil Procedure Section 1167.3
3 (time to respond in unlawful detainer case).

4 **Code Civ. Proc. § 580. Relief awardable**

5 The proposed amendment of Code of Civil Procedure Section 580 should be
6 revised along the following lines:

7 580. (a) The relief granted to the plaintiff, if there is no answer,
8 cannot exceed that which he or she shall have demanded in his or
9 her complaint or in the statement required by Section 425.11; but in
10 any other case the court may grant the plaintiff any relief consistent
11 with the case made by the complaint and embraced within the
12 issue. The court may impose liability, regardless of whether the
13 theory upon which liability is sought to be imposed involves legal
14 or equitable principles.

15 (b) Notwithstanding subdivision (a), the following types of
16 relief may not be granted in a limited civil case:

17 (1) Relief exceeding ~~twenty-five thousand dollars (\$25,000)~~ the
18 maximum amount in controversy for a limited civil case as
19 provided in Section 85, exclusive of attorney fees, interest, and
20 costs.

21 (2) A permanent injunction.

22 (3) A determination of title to real property.

23 (4) Enforcement of an order under the Family Code.

24 (5) Declaratory relief, except as authorized by Section 86.

25 The Comment should be revised accordingly.

26 **Code Civ. Proc. § 996.430. Enforcement of liability on bond**

27 The following amendment of Code of Civil Procedure Section 996.430 should
28 be added to the SCA 4 implementing legislation:

29 996.430. (a) The liability on a bond may be enforced by civil
30 action. Both the principal and the sureties shall be joined as parties
31 to the action.

32 (b) If the bond was given in an action or proceeding, the action
33 shall be commenced in the court in which the action or proceeding
34 was pending. If the bond was given other than in an action or
35 proceeding, the action shall be commenced in any court of
36 competent jurisdiction, and the amount of damage claimed in the
37 action, not the amount of the bond, determines the ~~jurisdiction of~~
38 the court classification of the case (limited civil case or otherwise).

1 (c) A cause of action on a bond may be transferred and assigned
2 as other causes of action.

3 **Comment.** Section 996.430 is amended to accommodate
4 unification of the municipal and superior courts in a county. Cal.
5 Const. art. VI, § 5(e). See Section 85 (limited civil cases) &
6 Comment.

7 **Welf. & Inst. Code §§ 656, 661. Petition to declare a minor a ward of the court**

8 The staff should research the concept of “juvenile court judge sitting as a
9 municipal court judge” and prepare appropriate amendments of Welfare and
10 Institutions Code Sections 656 and 661.

11 **STUDY L-4000 – HEALTH CARE DECISIONMAKING**

12 The Commission considered Memorandum 98-28, including the staff draft of
13 the tentative recommendation on *Health Care Decisions for Incapacitated Adults*,
14 and its First Supplement. The Commission approved circulation of the tentative
15 recommendation, subject to the following decisions:

16 **Prob. Code § 4653. Mercy killing, assisted suicide, euthanasia not approved**

17 This section should be revised to split it into two sentences for clarity, and the
18 Comment should provide additional guidance:

19 4653. Nothing in this division does not shall be construed to
20 condone, authorize, or approve mercy killing, assisted suicide, or
21 euthanasia, nor does it. This division is not intended to permit any
22 affirmative or deliberate act or omission to end life other than the
23 withholding or withdrawal of health care pursuant to an advance
24 health care directive or, by a surrogate, or as otherwise provided, so
25 as to permit the natural process of dying.

26 **Comment.** Section 4653 continues the first sentence of former
27 Section 4723 without substantive change, and is consistent with
28 Section 13(c) of the Uniform Health-Care Decisions Act (1993). This
29 section also continues the substance of former Health and Safety
30 Code Section 7191.5(g) (Natural Death Act). The language of this
31 section has been revised to conform to the broader scope of this
32 division. This section provides a rule governing the interpretation
33 of this division. It is not intended as a general statement beyond the
34 scope of this division nor is it intended to affect any other authority
35 that may exist.

36 See Sections 4670 et seq. (advance health care directives), 4710 et
37 seq. (health care surrogates), 4725 (surrogate rules applicable to
38 surrogate committee). See also Sections 4605 (“advance health care

1 directive” defined), 4615 (“health care” defined), 4639 (“surrogate”
2 defined).

3 **§ 4665. Application to existing advance directives**

4 The Commission decided to continue the draft statute rule applying the new
5 law to instruments executed before the operative date. The question of how to
6 treat durable powers of attorney for health care that will have expired or been
7 revoked by operation of law under the rules in the existing law was discussed.
8 The Commission decided that the new rule permitting advance directives to be
9 read together, with the later directive prevailing in the case of a conflict, should
10 be applied (see draft Section 4698). As a practical matter, the issue rarely, if ever,
11 arises; if it does, the directives are likely to be interpreted in the clinical setting
12 without considering that a former statutory rule may have acted to revoke the
13 first of two powers executed before the new law took effect.

14 **§ 4697. Effect of dissolution or annulment**

15 The rule revoking designation of a spouse as agent upon dissolution or
16 annulment and reviving the designation on remarriage was affirmed for the sake
17 of consistency with the California rules governing powers of attorney generally
18 and wills.

19 **§ 4701. Optional form of advance directive**

20 The separate instruction concerning artificial nutrition and hydration in the
21 optional form (Item 7 of Part 2) should be deleted. A patient would be able to
22 include whatever instructions are desired in the “other wishes” part of the form,
23 but it is not desirable to encourage potentially conflicting instructions, which
24 could occur where the patient selects “(a) Choice Not To Prolong Life” and then
25 overrides it with the instruction to continue artificial nutrition and hydration
26 “regardless of my condition and regardless of the choice I have made in
27 paragraph (6).” There could also be a conflict if the patient has checked “(b)
28 Choice To Prolong Life” consistent with “generally accepted health care
29 standards.” This change will make the optional form consistent with the
30 approach of the statute as a whole, which includes rules mandating health care in
31 accordance with generally accepted standards (draft Section 4654) and does not
32 require application of futile care (draft Section 4735).

1 **§ 4722. Composition of surrogate committee**

2 The description of the nurse member of the surrogate committee in
3 subdivision (a)(2) should include the requirement that the nurse be
4 knowledgeable about the patient whose care is under consideration.

5 The person or entity that is responsible for establishing the surrogate
6 committee should be indicated in this section, or elsewhere in this chapter. It is
7 assumed that the health care institution will establish the surrogate committee in
8 a case where the patient is under the care of an institution, but in other cases,
9 although they will be rare, the statute should provide for establishment of a
10 surrogate committee by the county health officer or other appropriate authority.

11 **§ 4736. Duty of declining health care provider or institution**

12 The Commission discussed the tension between this section requiring
13 provision of “continuing care” until a transfer of the patient can be made in a
14 situation where a health care provider declines to comply with a health care
15 decision, and Section 4735 permitting a health care provider to decline to provide
16 ineffective care or care contrary to generally accepted health care standards. A
17 number of alternatives were discussed, including restricting Section 4736 to the
18 cases described in Section 4734 (declining due to conscience or institutional
19 policy), and limiting the duty to continue care until a time when it becomes
20 apparent that a transfer is impossible. Representatives of the medical community
21 noted that this issue is currently under debate in medical ethics circles, and the
22 general consensus appeared to be that the statute could not at this stage resolve
23 this complicated issue. Perhaps the best solution for now is to note in the
24 Comment to this section that it does not attempt to resolve the issue that may
25 arise if transfer cannot be accomplished.

26 **§ 4742. Statutory damages**

27 The amounts of damages should be set at \$2500 (for violation of the act) and
28 \$10,000 (for interference with a person’s advance directive or the right to execute
29 a directive).

30 **Other Issues**

31 Several other issues raised in the staff notes in the draft were not considered
32 or resolved. The Commission decided it was best to circulate the tentative
33 recommendation for comment rather than holding it for further refinement.
34 Several of the major issues that have been discussed but not resolved will benefit

1 from wider review and comment. The unconsidered issues will be presented to
2 the Commission when the comments on the tentative recommendation are
3 considered in the fall, probably at the September meeting.

4 **Review of Scope of Court-Authorized Medical Treatment Statute**

5 The question of expansion of the scope of the statute governing court-
6 authorized medical treatment (Prob. Code §§ 3200-3211) to cover withholding or
7 withdrawal of life-sustaining treatment should be reviewed by the staff and
8 presented for Commission consideration at a future meeting.

9 STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

10 The Commission considered Memorandum 98-29 and its First Supplement.
11 The Commission approved the staff recommendation not to proceed further with
12 the judicial review project.

13 STUDY N-302 – CONSENT REGULATIONS AND OTHER
14 NONCONTROVERSIAL REGULATIONS

15 The Commission considered Memorandum 98-30 and its First Supplement,
16 presenting and discussing a draft tentative recommendation relating to the
17 procedures to be followed when an agency takes a noncontroversial regulatory
18 action. The Commission approved distribution of a tentative recommendation,
19 subject to the following decisions:

20 **Consistency in Required Findings**

21 In order to provide greater consistency between the findings that an agency
22 must make before public comment and the updated findings that an agency must
23 make after public comment, the following amendment to Section 11346.5(a)(5)
24 will be incorporated as a conforming amendment in the tentative
25 recommendation:

26 11346.5. (a)(5). A determination as to whether the regulation
27 imposes a mandate on local agencies or school districts and, if so,
28 whether the mandate requires state reimbursement pursuant to
29 Part 7 (commencing with Section 17500) of Division 4. If the agency
30 determines that the regulation imposes a mandate on local agencies
31 or school districts, but finds that the mandate is not reimbursable,
32 the agency shall state the reasons for that finding.

33 **Comment.** Section 11346.5(a)(5) is amended to conform its
34 requirements to those of Section 11346.9(a)(2).

1 **Consistency in Terminology**

2 In order to provide greater consistency between the terminology used in the
3 existing rulemaking procedures and in the proposed consent regulation
4 procedure, the word “assess” will be replaced with the word “determine” in
5 proposed Section 11365.020(b), and the word “assessment” will be replaced with
6 the word “determination” in proposed Section 11365.040(b)(5). Comments to
7 these sections will discuss their relation to similar provisions in the existing
8 rulemaking scheme.

9 **Typographical Error**

10 The reference to paragraph (5) in proposed Section 11365.020(g) is erroneous
11 and will be replaced with a reference to subdivision (e).

☐ APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary