

CALIFORNIA LAW REVISION COMMISSION

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January 12, 1998

<i>Date:</i> January 23, 1998	<i>Place:</i> Los Angeles
Jan. 23 (Friday) 9:00 am – 5:00 pm	Wyndham Hotel at LAX 6225 West Century Blvd. 310-670-9000
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call 650-494-1335 and you will be notified of any late changes.	
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FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. **MINUTES OF DECEMBER 12, 1997, MEETING (sent 12/23/97)**
2. **RATIFICATION OF ACTIONS AT DECEMBER 12, 1997, MEETING**
3. **ADMINISTRATIVE MATTERS**
 - Election of Officers**
Memorandum 98-1 (NS) (sent 1/12/98)
 - Report of Executive Secretary**
4. **1998 LEGISLATIVE PROGRAM**
 - Status of Bills**
Memorandum 98-2 (NS) (to be sent)
 - SB 209 (Study N-200 — Judicial Review of Agency Action)**
Memorandum 98-6 (RM) (to be sent)
5. **TRIAL COURT UNIFICATION (STUDY J-1300)**
 - Miscellaneous Issues**
Memorandum 98-3 (BG) (to be sent)

6. ENVIRONMENTAL LAW CONSOLIDATION (STUDY E-100)
General Principles
Memorandum 98-4 (BH) (sent 1/9/98)
7. EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE TRANSFERS
(STUDY FHL-910)
Draft of Tentative Recommendation
Memorandum 98-5 (BH) (sent 1/12/98)
8. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)
Comments on Tentative Recommendation
Memorandum 97-74 (BG) (sent 11/6/97)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JANUARY 23, 1998
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on January 23, 1998.

Commission:

Present: Edwin K. Marzec, Chairperson
Arthur K. Marshall, Vice Chairperson
Robert E. Cooper
Sanford Skaggs
Colin Wied

Absent: Bion M. Gregory, Legislative Counsel
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: Michael Asimow, Administrative Law
Brian E. Gray, Environmental Law

Other Persons:

Frank Coats, Department of Motor Vehicles, Sacramento
Bill Heath, California School Employees Association, San Jose
Barbara Wheeler, Association for California Tort Reform, Sacramento

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MINUTES OF DECEMBER 12, 1997, MEETING

The Minutes of the December 12, 1997, Commission meeting were approved as submitted by the staff.

RATIFICATION OF ACTIONS AT DECEMBER 12, 1997, MEETING

A quorum being present, the Commission ratified actions taken by the Commission acting as a subcommittee at the December 12, 1997, Commission meeting, as reported in the Minutes of that meeting.

ADMINISTRATIVE MATTERS

Election of Officers

The Commission considered Memorandum 98-1, relating to election of officers of the Commission. The Commission elected Edwin K. Marzec as Chairperson and Arthur K. Marshall as Vice Chairperson, for the remainder of the term expiring August 31, 1998.

Meeting Schedule

In an effort to minimize quorum problems, the Commission decided to cancel the meeting scheduled for February 23, 1998. Instead, the meeting scheduled for March 19, 1998, will be expanded to a two-day meeting, March 19-20, 1998. The meeting will be scheduled from 9 am to 5 pm each day, but when the meeting

date approaches the staff will assess the prospects for an earlier termination on March 20.

Report of Executive Secretary

Priorities for topics. The Executive Secretary reported that the Commission has received State Bar and legislative requests that it study two uniform acts — the Uniform TOD Security Registration Act and the Uniform Principal and Income Act. The Commission had previously agreed to work these matters into its agenda for 1998 if requested to do so. The staff plans to commence work on the two acts for consideration at the next Commission meeting. These matters should involve mainly staff work and relatively little Commission time.

Location of Commission office. The Executive Secretary reported that the staff is investigating the possibility of relocating the Commission's office to Santa Clara University Law School. There would be a number of mutual benefits from such a location, but it would require a commute for Commission employees who have moved to the Palo Alto area because of the Commission's current location there. The staff will make a decision by the end of January on whether to pursue the possibilities with Santa Clara Law School.

1998 LEGISLATIVE PROGRAM

The Commission considered Memorandum 98-2 and its First Supplement, relating to the status of bills in the Commission's 1998 legislative program. The Executive Secretary supplemented the memoranda with the information that SB 177 (best evidence rule) has been passed by the Senate, and that the tentative proposal on response to demand for production of documents in discovery is also included in a pending omnibus civil procedure bill (AB 1094).

In connection with its consideration of the 1998 legislative program, the Commission made decisions relating to judicial review of agency action (Study N-200) and the business judgment rule (Study B-601), which are reported elsewhere in these Minutes.

STUDY B-601 – BUSINESS JUDGMENT RULE

In connection with the 1998 legislative program, the Commission considered the First Supplement to Memorandum 98-2, relating to the business judgment rule.

The Commission decided to delete the phrase “that fall between traditional duty of care cases and traditional duty of loyalty cases” from the Comment to proposed Section 321. No other change should be made in the Comment. A similar but more general formulation should be included in the Comment to Section 320, with a cross-reference to Section 321 and its Comment.

The portion of the Comment to proposed Section 320 relating to nonprofit corporations should be in the form set out on page 3 of the memorandum.

With respect to introduction of the proposed legislation in bill form, the Executive Secretary discussed the considerations involved in selecting an appropriate legislative author. It was the sense of the Commission that even if an ideal author cannot be located, the staff should seek to have the bill introduced this session in any event.

STUDY E-100 – ENVIRONMENTAL LAW CONSOLIDATION

The Commission considered Memorandum 98-4, discussing the principles to be applied in determining which statutes should be included in a consolidated Environmental Code. The Commission adopted the statement of principles set out in the memorandum.

The Commission instructed the staff to prepare the first three divisions of the proposed Environmental Code:

- Division 1. Preliminary Provisions
- Division 2. General Provisions
- Division 3. Solid and Hazardous Waste

The staff will also investigate whether there are any other divisions that can be included in this first block of material without too much additional effort.

The Commission identified certain matters that should be excluded from the proposed outline of the Environmental Code:

- (1) Workplace exposure to hazardous materials.
- (2) Exposure to tobacco smoke.
- (3) Exposure to lead-based paint.
- (4) Risks associated with the presence of asbestos in buildings.

STUDY F-910 – EFFECT OF DISSOLUTION OF MARRIAGE
ON NONPROBATE TRANSFERS

See entry in these Minutes under Study L-910.

STUDY H-910 – EFFECT OF DISSOLUTION OF MARRIAGE
ON NONPROBATE TRANSFERS

See entry in these Minutes under Study L-910.

STUDY J-1300 – TRIAL COURT UNIFICATION

The Commission considered Memorandum 98-3 and the First Supplement to Memorandum 98-3, concerning implementing legislation for SCA 4. Except as set forth below, the Commission adopted the staff recommendations on the issues discussed in those memoranda, which were primarily technical in nature:

Code Civ. Proc. § 575.6. Telephone Appearances at Trial Setting Conferences

The Commission decided to leave this provision unchanged. The staff reported that Professor Kelso is checking whether the Judicial Council has any concerns about that approach.

Code Civ. Proc. § 1283.05. Depositions in Arbitration Proceedings

Code of Civil Procedure Section 1283.05 should be amended along the following lines:

1283.05. To the extent provided in Section 1283.1 depositions may be taken and discovery obtained in arbitration proceedings as follows:

(a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of, and Article 3 (commencing with Section 2016) of Chapter 3 of, Title 3 of Part 4 of this code, as if the subject matter of the arbitration were pending ~~in a civil action~~ before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section.

(b) The arbitrator or arbitrators themselves shall have power, in addition to the power of determining the merits of the arbitration, to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court of this state under the provisions of this code, except the power to order the arrest or imprisonment of a person.

(c) The arbitrator or arbitrators may consider, determine, and make such orders imposing such terms, conditions, consequences, liabilities, sanctions, and penalties, whenever necessary or appropriate at any time or stage in the course of the arbitration, and such orders shall be as conclusive, final, and enforceable as an arbitration award on the merits, if the making of any such order that is equivalent to an award or correction of an award is subject to the same conditions, if any, as are applicable to the making of an award or correction of an award.

(d) For the purpose of enforcing the duty to make discovery, to produce evidence or information, including books and records, and to produce persons to testify at a deposition or at a hearing, and to impose terms, conditions, consequences, liabilities, sanctions, and penalties upon a party for violation of any such duty, such party shall be deemed to include every affiliate of such party as defined in this section. For such purpose:

(1) The personnel of every such affiliate shall be deemed to be the officers, directors, managing agents, agents, and employees of such party to the same degree as each of them, respectively, bears such status to such affiliate; and

(2) The files, books, and records of every such affiliate shall be deemed to be in the possession and control of, and capable of production by, such party. As used in this section, "affiliate" of the party to the arbitration means and includes any party or person for whose immediate benefit the action or proceeding is prosecuted or defended, or an officer, director, superintendent, member, agent, employee, or managing agent of such party or person.

(e) Depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators.

Comment. Section 1283.05 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Section 85 (limited civil cases) & Comment.

Penal Code § 859. Counsel for Defendant

As recommended by Judge Charles L. Patrick, the Commission decided to delete the portion of Penal Code Section 859 stating: "The magistrate must, upon

the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated.” The Comment should refer to Section 14 of Article 1 of the California Constitution (magistrate shall require peace officer to transmit message to counsel within county), which makes the statutory language unnecessary.

Penal Code § 949. First Pleading by People

The staff reported that, unlike Judge Patrick, Professor Kelso believes that the reference to Penal Code Section 859a in Penal Code Section 949 is correct. In light of that difference of opinion, the Commission decided to leave the reference to Penal Code Section 859a unchanged.

STUDY K-410 – PROTECTING SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 97-74, concerning comments on the Commission’s tentative recommendation on protecting settlement negotiations. The Commission directed the staff to prepare a revised draft tentative recommendation, incorporating the following changes:

(1) Proposed Section 1131 (admissibility and discoverability in noncriminal proceeding) should be revised along the following lines:

1131. Except as otherwise provided by statute, in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding, the following rules apply:

(a) Evidence of settlement negotiations is not admissible against the person attempting to compromise.

(b) Evidence of settlement negotiations is not subject to discovery, and disclosure of the evidence may not be compelled, unless all of the following conditions are satisfied:

(1) The party requesting disclosure makes a specific showing of a substantial likelihood that the disclosure will lead to the discovery of admissible evidence.

(2) The request for disclosure is not unreasonably cumulative or duplicative.

(3) The requested information is not obtainable from another source that is more convenient, less burdensome, less expensive, or less intrusive on settlement negotiations.

(4) The likely benefit of the proposed discovery outweighs its burden and expense, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

~~(5) Discovery is otherwise authorized by law.~~

A similar revision should be made in proposed Section 1132 (admissibility and discoverability in criminal action).

(2) The staff should research and analyze what exceptions to include in the revised draft, particularly with regard to the ban on discovery of settlement negotiations. As before, the draft should make clear that the law on discovery of settlement agreements remains unchanged.

(3) The new draft should address the issue of confidentiality, as well as admissibility and discoverability. The staff is to explore whether the protection against discovery should be triggered only if the parties agree in advance that their negotiations are confidential.

STUDY L-910 – EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE TRANSFERS

The Commission considered Memorandum 98-5, discussing a staff draft of a tentative recommendation relating to the effect of dissolution of marriage on a nonprobate transfer to a former spouse. The Commission approved the staff draft generally, but instructed the staff to strengthen the statutory warning provided in Family Code Section 2024. The staff will prepare a tentative recommendation and distribute it for public comment.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 98-6. The Commission decided to abandon the effort to replace traditional mandamus with a single judicial review statute. William Heath of the California School Employees Association thought the provision in SB 209 requiring the agency to give notice to the parties of the last calendar date for judicial review of administrative adjudication was very useful. He also thought the law should be clarified on limitations periods and contents of the administrative record for local agency adjudication.

The Commission asked the staff to contact the organizations that opposed SB 209 to see whether there would be objection to replacing Code of Civil Procedure Sections 1094.5 (state agency adjudication) and 1094.6 (local agency adjudication) with a unified statute limited to judicial review of state and local agency adjudication. Professor Asimow thought the statute might be limited to state and

local agency hearings required by statute or the constitution. Except for its narrower application, such a statute would look much like SB 209. It would codify rules for standing, exhaustion of administrative remedies, limitations periods, standards of review (preserving existing law on standard of review of state and local agency factfinding), record for review, proper court, venue, stays, and costs. All these provisions would be limited to review of adjudication. They would not apply to quasi-legislative, ministerial, or informal action. The staff should report the results of this inquiry to the Commission.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary