

First Supplement to Memorandum 99-78

Mandamus to Review Agency Action (Staff Draft Recommendation)

A letter from Paul H. Dobson of the Attorney General's office, commenting on the staff draft recommendation on *Mandamus to Review Agency Action: Selected Issues*, is attached. The Attorney General's office does not support either proposed change and would "probably oppose such legislation...." The basis for their opposition is summarized below:

Venue to Review State Agency Action

Mr. Dobson disputes that judges in Sacramento County have more experience with mandamus proceedings to review state agency action than judges in other counties. In large counties, such as Los Angeles, the courts have considerable experience reviewing state agency action. In smaller counties, the courts have analogous experience reviewing local agency actions. Thus, he feels the proposal to add venue in Sacramento County for mandamus proceedings to review state agency action is unwarranted and would "unnecessarily burden the Sacramento Superior Court and state agency respondents...."

Notice of Last Day to Review State Agency Adjudication

Mr. Dobson expresses two principal objections to the proposal that an agency be required to provide a party to an adjudicative proceeding with notice of the last day for judicial review or of the statutes governing the limitation period for judicial review:

(1) A party who proceeds with counsel should know the applicable limitations period. A party who proceeds without counsel may not, but that is a natural consequence of the decision to proceed without counsel. State agencies should not be required to provide such parties with legal advice.

(2) The consequences of failing to provide the required notice or providing defective notice are not sufficiently clear. If the proposal does proceed, the effect of failure to provide notice as required should be clarified.

Respectfully submitted,

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VIA FACSIMILE AND U.S. MAIL

Fax No. (650) 494-1827

Nathaniel Sterling
Executive Secretary
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Re: Law Revision Commission Recommendation on Mandamus Review

Dear Mr. Sterling:

This is in response to your October 26, 1999, letter to Special Assistant Attorney General Patricia Wynne seeking the views of this office on the California Law Revision Commission recommendation on mandamus review of agency action. We have reviewed the recommendation and have the following comments.

Venue Proposal

Currently, the general rule of venue for mandamus actions is that they are to be filed where the cause of action arose. (Code. Civ. Proc., § 393.) In administrative mandamus actions venue would be where the administrative hearing was held. There are exceptions to the general rule. Business and Professions Code section 2019 provides that venue for actions against the Medical Board is proper in Sacramento, San Francisco, San Diego and Los Angeles. Business and Professions Code section 2714 provides that venue for actions against the Board of Registered Nursing lies in Los Angeles, San Francisco, and Sacramento. Business and Professions Code section 3600-1 provides that venue for actions against the Board of Osteopathic Examiners lies in the same three cities.

The Commission's proposal is to add Sacramento County as an *additional* county in which a mandamus action can be brought against a state agency. The given reason for adding Sacramento County is that Sacramento judges have more experience in handling mandamus actions. The Commission proposal also notes: "In addition there may be a significant home town advantage for petitioner in these types of cases." (Draft Recommendation p. 1.)

In our view the proposed change is unwarranted. We are not convinced that the Sacramento Superior Court would have substantially more experience in handling writs than

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courts in other major cities. Our experience is that the Los Angeles Superior Court does an excellent job on such cases. As to administrative mandamus matters, it is not apparent that a local court even in a less populated county would not have sufficient expertise to review an administrative record for substantial evidence or exercise independent judgment on a record. These courts handle local mandamus actions against city agencies, county agencies, school districts, and other districts.

Venue for a traditional mandamus (Code Civ. Proc., § 1085) against a state agency often is in Sacramento because that is where the action giving rise to the case often takes place. Where all the events surrounding a traditional mandamus case occur in another county, it probably is preferable to have the case heard near the place where the cause of action arose.

Finally, the *option* of Sacramento County as a proper venue does nothing to address the issue of home-town advantage. If the petitioner wishes a home-town advantage, he or she will chose the home-town court rather than Sacramento. Thus, the proposal only benefits the petitioner who may wish to take the case out of town because of some concern with the local courts.

Accordingly, this office does not comprehend the need for this proposed change and believes that it could unnecessarily burden both the Sacramento Superior Court and state agency respondents in mandamus proceedings.

Notice Proposal

The Commission proposes a general notice requirement for the time to seek review of an agency decision by administrative mandamus. The Commission presents neither anecdotally nor statistically a basis to conclude that such notice is necessary. The proposal appears to be premised on the supposition that a licensee without counsel is disadvantaged unless he or she receives some form of notice as to the time to seek judicial review. A litigant proceeding without counsel will always be at a disadvantage. At the administrative level, an agency provides notice to the licensee with respect to his or her rights to a hearing before the agency. In our view, it does not follow that the agency should provide legal assistance to a licensee with respect to judicial litigation against the agency as a result of its decision.

Providing the licensee with cites to the relevant statutes and other rules related to the computation of the final filing date is inappropriate in the case of a licensee represented by counsel and probably would only lead to more questions from pro per licensees. Having the state agency compute the actual due date of a petition for writ of mandate puts an unwarranted burden on the agency. The due date would be dependent upon a number of factors and would require the agency to provide legal advice to the potential petitioner. (See Gov. Code, §§ 11521, 11523.) On the other hand, citing code sections to a non-lawyer is not a plausible method of explaining legal rights.

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Moreover, the notice might be inadequate or wrong, or alleged to be so. The proposal does not address adequately the failure to give notice at all or erroneous notice. Proposed Government Code section 11518.3 *mandates* that notice be given. The section arguably creates a statutory nondiscretionary duty on the part of the agency to the licensee. Proposed Government Code section 11523 clearly deals with delayed notice and arguably deals with lack of notice, but does not expressly and unambiguously address a failure to comply with the notice requirement because of lack of any notice or an erroneous notice. It is arguable that violation of this mandatory duty provides a licensee who fails to meet the statute of limitations with some form of legal or equitable relief. If this proposal is pursued, the notice requirement should be clarified in this regard.

For the above reasons, this office is not in support of this notice proposal.

Conclusion

As may be seen from the above comments, this office does not support either proposal in the recommendation and probably would oppose such legislation proposing such amendments. Of course, we will be happy to discuss our concerns and welcome feedback.

Sincerely,



PAUL H. DOBSON
Deputy Attorney General

For BILL LOCKYER
Attorney General

PHD/glm