Study N-200 June 22, 1995

First Supplement to Memorandum 95-30

Judicial Review of Agency Action: Narrative Portion of Tentative Recommendation

Attached is a staff draft of the narrative portion (preliminary part) of the Tentative Recommendation on Judicial Review of Agency Action. The Commission has not completed its review of the draft statute, so the narrative will have to be revised to reflect Commission decisions made at the June meeting. In writing the narrative, we tried to guess what decisions the Commission might make, so it does not reflect the Commission's final decisions.

Also attached are three additional sections that should be included in conforming revisions in the draft statute.

As suggested by Herb Bolz of the Office of Administrative Law, the following cases should be added to the fifth paragraph of the Comment to Section 1123.420 in the draft statute concerning appropriate deference in reviewing agency interpretations of law:

> Jones v. Tracy School Dist., 27 Cal. 3d 99, 108, 611 P.2d 441, 165 Cal. Rptr. 100 (1980) (no deference for statutory interpretation in internal memo not subject to notice and hearing process for regulation and written after agency became amicus curiae in case at bench); City of Los Angeles v. Los Olivos Mobile Home Park, 213 Cal. App. 3d 1427, 262 Cal. Rptr. 446 (1989) (no deference for interpretation of city ordinance in internal memo not adopted as regulation); Johnston v. Department of Personnel Administration, 191 Cal. App. 3d 1218, 1226, 236 Cal. Rptr. 853 (1987) (no deference for interpretation in inter-departmental communication rather than in formal regulation); California State Employees Ass'n v. State Personnel Board, 178 Cal. App. 3d 372, 380, 223 Cal. Rptr. 826 (1986) (formal regulation entitled to deference, informal memo prepared for litigation not entitled to deference).

Respectfully submitted,

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CONTENTS

JUDICIAL REVIEW OF AGENCY ACTION

BACKGROUND

This recommendation is submitted as part of the Commission's continuing study of administrative law. The Commission's recommendation on administrative adjudication by state agencies[1] has been introduced in bill form[2] and is pending in the Legislature.

This recommendation on judicial review is the second phase of the Commission's study of administrative law. This recommendation proposes that California's antiquated provisions for judicial review of agency action by administrative mandamus be replaced by a single, straightforward statute for judicial review of all forms of state and local agency action.

The Commission retained Professor Michael Asimow of the UCLA Law School to serve as consultant and prepare background studies.[3]

The proposed law provides some procedural rules for judicial review and, where specific rules do not apply, provides that the normal rules of civil procedure apply to judicial review. The goal is to allow litigants and courts to resolve swiftly the substantive issues in dispute, rather than wasting resources disputing tangential procedural issues.

REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provisions of Code of Civil Procedure Section 1094.5.[4] Regulations adopted by state agencies are reviewed by superior courts through actions for declaratory judgment.[5] Various other agency actions are reviewed by traditional mandamus under Code of Civil Procedure Section 1085[6] or by declaratory judgment.[7]

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1. *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

2. Senate Bill 523 (1995-96 regular session).

3. Professor Asimow prepared three studies on judicial review of agency action for the Commission. These are: *Judicial Review: Standing and Timing* (Sept. 1992), [hereinafter Asimow I], *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) [to be published in the UCLA Law Review, hereinafter Asimow II], and *A Modern Judicial Review Statute to Replace Administrative Mandamus* (Nov. 1993) [hereinafter Asimow III].

4. The discussion under this heading is drawn from Asimow III, *supra* note 3, at 3-12.

5. Gov't Code § 11350(a); Code Civ. Proc. § 1060.

6. See, e.g., Vernon Fire Fighters v. City of Vernon, 107 Cal. App. 3d 802, 165 Cal. Rptr. 908 (1980); Shuffer v. Board of Trustees, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977).

7. See, e.g., Californians for Native Salmon Ass'n v. Department of Forestry, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990).

Many statutes set forth special review procedures for different agencies. Decisions of the Public Utilities Commission and of the Review Department of the State Bar Court are reviewed on a discretionary basis by the California Supreme Court.[8] Decisions of Workers' Compensation Appeals Board, Agricultural Labor Relations Board, and Public Employment Relations Board are reviewed initially by the courts of appeal, in some cases as a matter of right and in other cases by discretion only.[9] Decisions of the State Energy Resources Conservation and Development Commission are reviewed in the same manner as decisions of the Public Utilities Commission.[10] Decisions of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board are reviewed on a discretionary basis either by the Supreme Court or the Court of Appeal.[11] Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules.

There are many problems with this patchwork scheme. First, it is often unclear whether judicial review should be sought by administrative mandamus, traditional mandamus, or declaratory relief. If an action for administrative mandamus can be brought, it must be brought under those provisions. Parties regularly file under the wrong provisions. Some cases hold that if the trial court uses the wrong writ, the case must be reversed on appeal so it can be retried under the proper procedure, even if no one objects.

Trial courts must distinguish between administrative and traditional mandamus because there are many differences between them, including use of juries, statutes of limitations, exhaustion of remedies, stays, open or closed record, whether the agency must make findings, and scope of review of factual issues. Administrative mandamus is proper to review quasi-judicial action, while traditional mandamus or declaratory relief is proper to review quasi-legislative action. It is often difficult to determine whether the action to be reviewed is quasi-judicial or quasi-legislative.

Moreover, if administrative mandamus is unavailable because statutory requirements are not met, and traditional mandamus is unavailable because there has been no deprivation of a clear legal right or an abuse of discretion, the case will be unreviewable by the courts.

Both administrative and traditional mandamus involve complex rules of pleading and procedure. The proceeding may be commenced by a petition for issuance of an alternative writ of mandamus or by a notice of motion for a peremptory writ. The procedures for each are different.

The proposed law provides that final state or local agency action is reviewable by a notice of review filed with the appropriate court. Normal rules of pleading

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8. Pub. Util. Code § 1756; Cal. R. Ct. 58 (Public Utilities Commission), 952 (State Bar Court).
9. Cal. R. Ct. 57, 59.
10. Pub. Res. Code § 25531.
11. Bus. & Prof. Code §§ 23090, 23090.5.

and practice for the court would apply. For the purpose of judicial review of agency action, common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced by the unified scheme of the proposed law.[12]

Existing statutes draw little or no distinction between judicial review of state and local agency action. The proposed statute on judicial review of agency action applies to local as well as to state government. It applies to review of any type of government action, including review of agency regulations, and not merely to review of adjudicative decisions.[13]

STANDING TO SEEK JUDICIAL REVIEW

Under existing law, a petitioner in a mandamus proceeding must be beneficially interested in the subject of the proceeding. For declaratory relief, the person must be interested under a written instrument or contract or desire a declaration of his or her rights or duties. Standing may be conferred by private or public interest.[14]

Private Interest Standing

By case law, a person has sufficient private interest to confer standing if the agency action is directed to that person, or if the person's interest is over and above that of members of the general public. Non-pecuniary interests such as environmental or esthetic claims are sufficient to meet the private interest test. Associations such as unions, trade associations, or political associations have standing to sue on behalf of their members. But if the person has not suffered some kind of harm from the agency action, the person lacks standing to seek judicial review of it. The proposed law codifies these rules.

The proposed law provides that, if the challenged action is a regulation, a person subject to that regulation has standing to seek review of it. This would change the rule that a person challenging a regulation must have been a party to the rulemaking proceeding.[15]

The proposed law does not continue the rule that the person seeking review must have objected to the agency action. This rule has the undesirable effect of

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12. The proposed law preserves the action to prevent an illegal expenditure by a local governmental entity under Section 526a of the Code of Civil Procedure, but applies its standing provisions to such actions. See generally Asimow I, *supra* note 3, at 5; Asimow III, *supra* note 3, at 22-23.

13. See proposed Sections 1120, 1121.240.

14. The discussion under this heading is drawn from Asimow I, *supra* note 3.

15. Under the proposed law, judicial review of state agency adjudication, unlike judicial review of local agency adjudications and other agency actions, is limited to persons who were parties in the adjudicative proceeding before the agency. With respect to other agency actions, a person who was not present or did not participate could seek judicial review if general standards of private interest standing or public interest standing are satisfied. This will simplify the law by eliminating the need to classify various types of agency action to determine who has standing to seek judicial review. This is consistent with existing law with respect to state agency rulemaking, but would expand existing law with respect to other agency actions, which require prior participation, subject to a number of exceptions. See Asimow I, *supra* note 3, at 10-11.

requiring a person seeking review to seek out and include in the review process a person who was active in making a protest to the agency but is not otherwise interested in the judicial review proceeding.[16]

The proposed law denies a person who complained to an agency about a professional licensee standing to challenge an agency decision in favor of the licensee, unless the person was either a party to the administrative proceeding, or had a right to become a party under a statute specific to that agency.

The proposed law makes clear that a local agency may have private interest standing to seek judicial review of state action, and relaxes the limiting rule that local government has standing for constitutional challenges under the commerce or supremacy clause but not under the due process, equal protection, or contract clause.[17]

Public Interest Standing

The proposed law codifies case law applicable to mandamus proceedings that a person who lacks private interest standing may nonetheless sue to vindicate the public interest. This promotes the policy of allowing a citizen to ensure that a government body does not impair or defeat the purpose of legislation establishing a public right. The existing rule does not apply to actions for declaratory relief, but the proposed law generalizes the rule to apply regardless of the relief sought in judicial review of agency action.

Participation Requirement

The proposed law does not require that the person seeking judicial review have participated in the administrative proceeding, whether adjudication or rulemaking, in order to have standing on either a public interest or a private interest basis.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under existing law, a litigant must fully complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement unless an exception to the exhaustion of remedies rule applies.[18] The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather than discretionary with the court. The proposed law provides exceptions to the exhaustion of remedies

16. The proposed law preserves the exhaustion of remedies aspect of this rule, which requires the ground on which agency action is claimed to be invalid must have been raised before the agency. See Asimow I, *supra* note 3 at 10.

17. The proposed law does not adopt the federal or Model Act zone of interest test. See generally Asimow I, *supra* note 3, at 14-15.

18. The discussion under this heading is drawn from Asimow I, *supra* note 3.

rule to the extent administrative remedies are inadequate[19] or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.[20] The proposed law continues the rule of existing statutes that a litigant is not required to request reconsideration from the agency before seeking judicial review.[21]

The proposed law codifies the rule that, in order to be considered by the reviewing court, the exact issue must have first been presented to the agency. The proposed law does not continue the rule that exhaustion of remedies is not required for a local tax assessment alleged to be a nullity. Judicial review of such matters should not occur until after conclusion of administrative proceedings.[22]

The proposed law eliminates the rule that allows immediate judicial review of agency denial of a request for a continuance[23].

PRIMARY JURISDICTION

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case.[24] Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

The proposed law makes clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies. It provides that the court should send an entire case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.[25]

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19. The inadequacy requirement includes and accommodates existing California exceptions to the exhaustion of remedies rule for futility, certain constitutional issues, and lack of notice. Asimow III, *supra* note 3, at 62, 105-37.

20. This provision was taken from the 1981 Model State Administrative Procedure Act, 15 U.L.A. 1 (1990). The proposed law expands the factors to be considered to include private as well as public benefit.

21. Gov't Code §§ 11523 (Administrative Procedure Act), 19588 (State Personnel Board). However, the common law rule in California may be otherwise. See Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P.2d 433 (1943). This rule would not apply to the Public Utilities Commission or other agencies for which reconsideration is required by statute. E.g., Pub. Util. Code § 1756. Nor would it preclude a litigant from requesting reconsideration or an agency on its own motion from reconsidering.

22. *Cf.* Stenocord Corp. v. City and County of San Francisco, 2 Cal. 3d 984, 88 Cal. Rptr. 165 (1970).

23. Gov't Code § 11524(c). Such a denial will be subject to general rules requiring exhaustion of remedies, and thus will be subject to a possible exception because administrative remedies are inadequate or because to require exhaustion would result in irreparable harm. Similarly, judicial review of discovery orders will be postponed until after conclusion of the administrative proceeding.

24. The discussion under this heading is drawn from Asimow I, *supra* note 3.

25. The court in its discretion may ask the agency to file an amicus brief with its views on the matter as an alternative to sending the case to the agency.

RIPENESS

The ripeness doctrine in administrative law counsels a court to refuse to hear an attack on the validity of an agency rule or policy until the agency takes further action to apply it in a specific fact situation, and is well accepted in California law.[26] The proposed law codifies the ripeness doctrine.

STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATORY ACTION

Existing statutes of limitations for judicial review of agency adjudications are scattered and inconsistent.[27] The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,[28] and for judicial review of a local agency decision other than by a school district is 90 days.[29] Other sections applicable to particular agencies provide different limitations periods for commencing judicial review. Adjudicatory action not covered by any of these provisions is subject to the three-year or four-year limitations periods for civil actions generally.[30]

The proposed law provides a single, uniform 30-day limitations period for judicial review of all adjudicatory action, whether state or local and whether under the APA or not,[31] except that some special limitations periods for particular agencies are preserved.[32] Non-adjudicatory action will remain subject to the general limitations periods for civil actions.

The proposed law requires the agency to give written notice to the parties of the date by which review must be sought. Failure to do so would toll the running of

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26. The discussion under this heading is drawn from Asimow I, *supra* note 3.

27. The discussion under this heading is drawn from Asimow I, *supra* note 3.

28. Gov't Code § 11523.

29. Code Civ. Proc. § 1094.6(b). This provision applies only if the local agency has adopted an ordinance making it applicable. Some other statutes of limitations applicable to judicial review of administrative proceedings are: Veh. Code § 14401(a) (90-days after notice of driver's license order); Lab. Code §§ 1160.8 (30 days after ALRB decision), 5950 (45 days for decision of Workers' Compensation Appeals Board); Gov't Code §§ 3542 (30 days for PERB decisions), 19630 (one year for various state personnel decisions), 65907 (90 days for decisions of zoning appeals board); Unemp. Ins. Code § 410 (six months for appeal of decision of Unemployment Insurance Appeals Board); Welf. & Inst. Code §10962 (one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See Asimow III, *supra* note 3, at 91.

30. These actions are also subject to the defense of laches.

31. The period starts to run from the date the agency decision becomes effective, generally 30 days after issuance of the decision. Gov't Code § 11519. The decision will inform the parties of the limitations period for judicial review. Failure to do so extends the period to six months. If a transcript is requested within 30 days after the decision becomes effective, the limitations period is tolled until delivery of the transcript. The new statute will also cover judicial review of an agency decision refusing to hold an adjudicatory hearing required by the Administrative Procedure Act or other law.

32. For example, the 30-day PERB and ALRB judicial review periods are preserved, as are the limitation periods under the California Environmental Quality Act. See Gov't Code § 3520 (PERB); Lab. Code § 1160.8 (ALRB); Pub. Res. Code § 21167 (CEQA). [Staff note: This footnote will have to be revised in light of Commission decisions on the general limitations period.]

the limitations period up to a maximum period of 180 days after the decision is effective.[33]

Under the existing APA and the existing statute for judicial review of a local agency decision, when a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered.[34] Both statutes require that the record be requested within ten days after the decision becomes final in order to trigger the extension provision. The proposed law provides that a party's opening brief shall be filed within 60 days after filing the notice of review, or within 60 days after receipt of a record requested within 15 days after filing the notice.

The proposed law preserves the case law rule that an agency may be estopped to plead the statute of limitations if a party's failure to seek review within the prescribed period was due to misconduct of agency employees.

STANDARD OF REVIEW

Review of Agency Fact-Finding

Existing law requires California courts to use independent judgment in reviewing an agency's factual determinations that substantially deprive a litigant of a fundamental vested right.[35] California is the only jurisdiction in the United States that uses the independent judgment standard for judicial review of agency action.

The independent judgment test was imposed by a 1936 California Supreme Court decision on the theory that constitutional doctrines of separation of powers or due process required it. The test applied to review of fact-finding by agencies not established by the California Constitution, because it was thought that those agencies could not constitutionally exercise judicial power. But the courts have subsequently rejected any constitutional basis for the independent judgment test, so the Legislature or the courts are now free to abolish it. Nonetheless, the courts have continued to apply the independent judgment test to decisions of nonconstitutional agencies where fundamental vested rights are involved. Thus the substantial evidence test is applied to review of constitutional agencies, and to review of nonconstitutional agencies where fundamental vested rights are not involved. Independent judgment review is applied to nonconstitutional agencies where substantial vested rights are involved. There is no rational policy basis for this distinction.

The proposed law preserves independent judgment review of agency fact-finding in a limited class of cases — where the agency has changed a finding of fact of, or has increased the penalty imposed by, the administrative law judge in an

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33. Concerning the effective date of the decision, see note 30 *supra*.

34. Gov't Code § 11523; Code Civ. Proc. § 1094.6(d).

35. The discussion under this heading is drawn from Asimow II, *supra* note 3.

APA proceeding. These are the cases in which prosecutorial overreaching is most likely to have occurred. In all other cases, the proposed law eliminates independent judgment review of agency fact-finding, and instead requires the court to uphold agency findings if supported by substantial evidence in the record as a whole.[36]

The proposed law codifies the existing rule[37] that a person challenging agency action has the burden of persuasion on the propriety of the agency action.

Review of Agency Interpretation of Law

Under existing law, courts exercise independent judgment when reviewing an agency interpretation of law. This is qualified by the rule that, depending on the context, courts should give great weight to a consistent construction of a statute by the agency responsible for its implementation. Deference is given to the agency's interpretation if the court finds it appropriate to do so based on a number of factors. These factors are generally of two kinds — factors indicating that the agency has a comparative interpretive advantage over the courts, and factors indicating that the interpretation in question is probably correct.

In the comparative advantage category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. A court is more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or judicial precedent.

Factors indicating that the interpretation in question is probably correct include the degree to which the agency's interpretation appears to have been carefully considered by responsible agency officials. For example, an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than an interpretation contained in an advice letter prepared by a single staff member. Deference is called for if the agency has consistently maintained the interpretation in question, especially if the interpretation is long-standing. A vacillating position, however, is entitled to no deference. An interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted. Deference may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.

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36. An important benefit of the substantial evidence test is that it greatly broadens the power of the appellate court in appeals from trial court decisions reviewing administrative action. Asimow II, *supra* note 3, at 15-16.

37. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar 2d ed. 1989).

If the Legislature has demonstrably delegated authority to an agency to interpret the law, the court must accept a reasonable agency interpretation using the abuse of discretion standard. A delegation typically occurs where a statute empowers an agency to adopt a rule defining language in the statute.[38] Courts may also find that the Legislature intended to delegate interpretive power when it deliberately wrote unusually vague and open-ended statutory language that an agency must apply, or when an issue of interpretation involves policy choices which the agency is empowered to make.[39]

When a court reviews a regulation, it normally separates the issues, exercising independent judgment with appropriate deference on interpretive issues, such as whether the regulation conflicts with the governing statute, but applying the abuse of discretion standard on whether the regulation is reasonably necessary to effectuate the purpose of the statute.

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory, although some clarification is needed. The proposed law continues independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation. The proposed law makes clear that mere authority for an agency to make regulations generally or to implement a statute is not in itself a delegation of authority to construe the meaning of words in a statute.

Review of Agency Application of Law to Fact

In nearly every adjudicatory decision, the agency must apply a legal standard to basic facts, sometimes called mixed questions of law and fact . Under existing law, an application question is reviewed as a question of fact if the basic facts of the case are disputed, whether the dispute concerns matters of direct testimony or matters of inference from circumstantial evidence. If there is no dispute of basic facts (whether established by direct or circumstantial evidence) but the application question is disputed, the agency's determination is reviewed as a question of law.[40]

The Commission believes the standard of review of application questions should not turn on whether the basic facts are disputed. It invites manipulation, since a party can control the standard of review by either disputing or stipulating to basic facts. Application decisions are often treated as precedents for future cases, thus resembling issues of law more than fact.

The proposed law treats application questions as questions of law. Reviewing courts would thus exercise independent judgment with appropriate deference for

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38. Delegation does not occur merely because the Legislature gives legislative rulemaking authority to an agency, or because the statute is somewhat ambiguous. This principle applies only when a statute demonstrably delegates to the agency the power to interpret particular statutory language. Asimow II, *supra* note 3, at 60.

39. There is a possibly inconsistent line of cases. Asimow II, *supra* note 3, at 62.

40. Some cases are inconsistent. Asimow II, *supra* note 3, at 85-86.

application decisions by administrative agencies.[41] Treating application questions as questions of law avoids having to distinguish between pure questions of law and questions of application, because it is often difficult to know which is which.[42]

Review of Agency Exercise of Discretion

An agency has discretion when the law allows it to choose between several alternative policies or other courses of action. Examples include an agency's power to choose a severe or lenient penalty, whether there is good cause to deny a license, whether to grant permission for various sorts of land uses, or to approve a corporate reorganization as fair. An agency might have power to prescribe the permitted level of a toxin in drinking water, to decide whether to favor the environment at the expense of economic development or vice versa, or to decide whom to investigate or charge when resources are limited. Existing law is replete with conflicting doctrines on these important issues.

California courts may review agency discretionary decisions on grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations of discretionary authority. Existing law is unclear whether the court reviews the discretionary action on an open or closed record, but most California decisions preclude introduction of new evidence in such cases. The agency must give reasons for the discretionary action in the case of review of adjudicatory action, but not in the case of quasi-legislative action unless required by statute.

In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible and whether the agency followed legally required procedures, using independent judgment with appropriate deference. Within these legal limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature delegated discretionary power to the agency, not the court. But the court should reverse if the agency's choice was an abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision, and the rationality of the choice.

In reviewing the adequacy of the factual underpinning, it is not clear whether the abuse of discretion test is merely another way to state the substantial evidence test, or whether the substantial evidence test gives the court greater leeway in reviewing the agency decision, but the prevailing view is that they are synonymous. Legislative history of a recent enactment also suggests that

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41. If the Legislature demonstrably delegated primary responsibility to the agency to apply law to facts, the agency's application would be reviewed only for reasonableness, not independently.

42. This approach might create the opposite problem of distinguishing application questions from questions of fact, but this distinction should not usually be problematic. Fact questions can be answered without knowing anything of the applicable law. Application questions should not be treated as questions of fact, because it would strip courts of the responsibility for applying the law in every case, and would require the courts to ignore important public policy reasons for judicial rather than agency responsibility for applying law to fact, a formula of rigidity. Treating them as questions of law with appropriate deference to the agency decision is a formula for flexibility. Asimow II, *supra* note 3, at 100-101.

substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.[43]

The proposed law requires the factual underpinnings of a discretionary decision to be supported by substantial evidence on the whole record, whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.[44] The proposed law provides for review of agency exercise of discretion on a closed record.

Review of Agency Procedure

Under existing law, California courts use independent judgment on the question of whether agency action complied with the procedural requirements of statutes or the constitution. California courts have occasionally mandated administrative procedures not required by any statute, either in the interest of fair procedures or to facilitate judicial review.

The Commission believes that California courts should retain the power to impose administrative procedures not found in a statute. This power is necessary to prevent procedural unfairness to parties. However, while courts should continue to use independent judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in statutes. Agency expertise is just as relevant in establishing procedure as in fact-finding and determining or applying law and policy.

The proposed law permits the court to exercise independent judgment in reviewing agency procedures, with deference to the agency's determination of what procedures are appropriate.[45]

Closed Record

Under existing law,[46] whether judicial review is of a closed record with no additional evidence on review, or whether additional evidence may be received on review, depends on whether the court is using the substantial evidence test or is exercising independent judgment. In substantial evidence cases, the superior court receives no additional evidence. Where independent judgment applies, the court can either remand to the agency for reconsideration of the evidence, or may admit the evidence itself.[47]

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43. There are cases to the contrary. Asimow II, *supra* note 3, at 113.

44. The proposed law rejects case law indicating that an exercise of agency discretion can be disturbed only if evidentiary support is "entirely lacking" or that review is less intensive in abuse of discretion cases than in other cases. See generally Asimow II, *supra* note 3, at 127.

45. An agency's procedural choices under a general statute applicable to a variety of agencies, such as the APA, should be entitled to less deference than a choice made under a statute unique to that agency. Asimow II, *supra* note 3, at 138.

46. Code Civ. Proc. § 1094.5.

47. Code Civ. Proc. § 1094.5(e).

The proposed law requires that, if the evidence is insufficient for review, the matter is remanded to the agency for additional fact-finding.[48] The proposed law requires the agency to provide a brief explanation of the reasons for its action where necessary for proper judicial review.[49]

PROPER COURT FOR REVIEW

Under existing law, most judicial review of agency action is in superior court. However, the Supreme Court reviews decisions of the Public Utilities Commission, California Energy Conservation and Development Commission, and State Bar Court. The court of appeal reviews decisions of the Workers' Compensation Appeals Board, the Agricultural Labor Relations Board, and the Alcoholic Beverage Control Appeals Board. The trend in newer judicial review statutes is to place a significant portion of judicial review cases in appellate rather than trial courts.[50]

The proposed law preserves existing law by keeping most judicial review of agency action in superior court. The proposed law eliminates the option of Supreme Court review for the Public Utilities Commission, Energy Commission, and State Bar Court, and provides for review in the first instance in the court of appeal for those agencies.[51] The Supreme Court is too busy to take seriously review of the complex decisions of the PUC and Energy Commission, and appellants from the State Bar Court are more likely to receive review at the court of appeal level than at the Supreme Court level. Moreover, review of individual attorney discipline cases is not a wise use of the Supreme Court's limited resources.

VENUE

Under existing law, mandamus proceedings in superior court seeking judicial review of state or local agency action are filed in the county in which the cause of action arose.[52] In licensing and personnel cases, this means the petitioner's principal place of business. In non-licensing cases, it means the place where the injury occurred. Review of a driver's license suspension is in the county of the licensee's residence, Review of a decision of the Medical Board of California occurs only in Sacramento, Los Angeles, San Diego, or San Francisco. Depending on particular statutes, cases reviewable by the court of appeal are filed in the

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48. The proposed law also permits the court to require the agency to prepare a table of contents of the record in an appropriate case.

49. This would limit the scope of the *Topanga* case for agencies other than state agencies. State agencies will be governed by the requirement that the decision include "a statement of the factual and legal basis and reasons for the decision as to each of the principal controverted issues."

50. The discussion under this heading is drawn from Asimow III, *supra* note 3, at 23-35.

51. Under the proposed law, the Supreme Court would retain authority to review by writ of certiorari a judicial review decision of the court of appeal.

52. The discussion under this heading is drawn from Asimow II, *supra* note 3, at 35-39.

appellate district where the cause of action arose or where the petitioner resides. The proposed law generally continues these venue rules.

STAYS PENDING REVIEW

Under the existing APA, an agency has power to stay its own decision.[53] Whether or not the agency does so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if to do so would be against the public interest.[54]

A stricter standard applies in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA. The stricter standard also applies to non-health care APA cases in which the agency head adopts the proposed decision of the administrative law judge in its entirety or adopts the decision and reduces the penalty. Under the stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits. The court may condition a stay order on the posting of a bond.

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.[55] If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.[56]

The proposed law simplifies this scheme by providing one standard regardless of the type of agency action being reviewed. Under the proposed law, the factors to be considered by the court in determining whether to grant a stay include, in addition to the public interest and the likelihood of success on the merits, the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.[57]

COSTS

The proposed law consolidates into one general provision various provisions on the fee for preparing a transcript and other portions of the record, recovering costs of suit by the prevailing party, and proceeding in forma pauperis.[58]

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53. Gov't Code § 11519(b). The discussion under this heading is drawn from Asimow III, *supra* note 3, at 39-42.

54. Code Civ. Proc. § 1094.5(g).

55. If a stay is in effect when a notice of appeal is filed, the stay is continued in effect by operation of law for 20 days from the filing of the notice. Code Civ. Proc. § 1094.5(g).

56. In cases not arising under the administrative mandamus statute, the trial and appellate courts presumably have their usual power to grant a stay by using a preliminary injunction. Asimow III, *supra* note 3, at 40.

57. These revisions will make the standard for granting a stay similar to the standard for granting a preliminary injunction. Asimow III, *supra* note 3, at 41.

58. See Code Civ. Proc. §§ 1094.5(a), 1094.6(c); Gov't Code § 11523.

CONFORMING REVISIONS

MEDICAL BOARD OF CALIFORNIA

Bus. & Prof. Code § 2337 (amended). (Second of two, operative 1/1/96, repealed 1/1/99) Judicial review

2337. Notwithstanding any other provision of law, review of final decisions of an administrative law judge of the Medical Quality Hearing Panel, or the Division of Medical Quality or the Board of Podiatric Medicine in the event a review is ordered pursuant to Section 2335, shall be ~~by writ of mandamus~~ pursuant to ~~Section 1094.5~~ Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure before a district court of appeal. ~~The court of appeal shall exercise its independent judgment in review of the proceedings below, and, where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced, or that was improperly excluded at the hearing, it may admit the evidence without remanding the case.~~

The Judicial Council may adopt rules to allocate these cases to a particular panel or panels within each district for consistent and efficient consideration. Review shall be entitled to calendar priority, and the hearing shall be set no later than 180 days from the filing of the action.

This section shall become operative on January 1, 1996, and shall be repealed as of January 1, 1999, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

Comment. Section 2337 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 2337 is superseded by the standards of review in Sections 1123.410-1123.460 of the Code of Civil Procedure.

COMMISSION ON PROFESSIONAL COMPETENCE

Educ. Code § 44945 (amended). Judicial review

44945. The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence.~~ in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 44945 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence

of Section 44945 is superseded by the standards of review in Sections 1123.410-1123.460 of the Code of Civil Procedure.

BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY COLLEGES

Educ. Code § 87682 (amended). Judicial review

87682. The decision of the arbitrator or administrative law judge, as the case may be, may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by an administrative law judge under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence.~~ in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 87682 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 87682 is superseded by the standards of review in Sections 1123.410-1123.460 of the Code of Civil Procedure.