Study N-200 February 15, 1996

First Supplement to Memorandum 96-14

Judicial Review of Agency Action: Further Unresolved Issues

This supplemental memorandum presents additional material involving issues from the judicial review tentative recommendation. We have received new letters on these matters from the following persons:

Office of Administrative Law
Office of the Attorney General
California School Employees Association
Professor Michael Asimow
California Medical Association

The letters are attached to this memorandum as Exhibit pages 1-15, and are referred to at appropriate places in the memorandum.

§ 1123.140. Exceptions to finality and ripeness requirements

Memorandum 96-14 includes a draft provision to make clear that the rulemaking process may not be enjoined; only an agency's attempted application of a rule is subject to injunction. The Office of Administrative Law proposes some Comment language that elaborates the constraints on judicial review of regulations — the regulatory process must be pursued to completion before all administrative remedies are deemed exhausted, the regulation adoption is final, and the matter is ripe for review. See Exhibit pp. 1-2. **The staff believes this explanatory material is useful and will incorporate it in the draft of the revised judicial review proposal.**

§ 1123.230. Public interest standing

At the January 1996 meeting the Attorney General requested the Commission to consider the possibility of abolishing public interest standing to challenge agency action. The Commission requested the Attorney General's Office to prepare a specific proposal on this matter so the Commission could properly evaluate it.

The specifics of the Attorney General's proposal are set out at Exhibit pp. 3-4. The proposal would abolish both statutory taxpayer actions and case law public

interest standing principles. A person would have standing only if (1) the person "has suffered a particularized injury" from the agency action or (2) standing is "contemplated by the statute or other provision of law" pursuant to which the agency has taken the action.

In support of the proposal, the Attorney General's Office notes the California Supreme Court's expression of concern at the trend of the courts to exercise an increasingly activist role — "We believe, however, that the California judiciary is ill-equipped to add to its already heavy burden the duty of serving as an ombudsman for the plethora of state administrative agencies and local agencies that exist in every one of our 58 counties." Carsten v. Psychology Examining Com., 27 Cal. 3d 793, 801 (1980).

Professor Asimow has written to strongly oppose the suggestion to eliminate public interest standing. See Exhibit pp. 14-15. He notes that public interest standing is a well-accepted feature of California law, and there are numerous situations where there is no other means of challenging illegal administrative action. Allowing a member of the public to challenge illegal action serves the interests of lawful and accountable government. Professor Asimow observes that both before and after the *Carsten* case cited by the Attorney General's office the Supreme Court has repeatedly approved public interest standing, noting that it "promotes the policy of guaranteeing citizens the opportunity to ensure that no government body impairs or defeats the purpose of legislation establishing a public right." Green v. Obledo, 29 Cal. 3d 126, 144 (1981).

Professor Asimow also criticizes the specifics of the Attorney General's Office proposal. Why introduce the new concept of "particularized injury" when "interested person" is well-developed in existing law and the federal courts have found it extremely difficult to distinguish particularized from generalized injuries? "California does not need to adopt this confusing test." Exhibit at p. 15.

The staff strongly advises the Commission not to pursue the Attorney General's proposal. We have spent a great deal of time and effort trying to overhaul and simplify the state's complex judicial review system in a way that is both workable and enactable. To add such an extraordinarily controversial item as abolition of public interest standing to the mix would, in the staff's opinion, divert the focus of the project and overshadow all the careful work we have done so far.

If the Commission is really interested in pursuing this concept, it should not do so in the context of this project but should make it a separate study. We would

need to do a substantial amount of empirical research to find out what types of cases public interest standing is being used for, how frequently public interest standing cases arise, whether in fact public rights are being vindicated or whether the cases are really nuisance lawsuits, whether the Attorney General's proposal in fact codifies the federal system, how well the federal system is working, etc.

The staff believes the draft statute that we have developed codifies existing California public interest standing principles, and imposes modest limitations, in an appropriate way. The unarticulated concern of the Attorney General's Office may be that public interest standing is a court-developed doctrine that is in flux, and our draft would freeze development at a point that is not acceptable. If the Attorney General's Office believes other limitations on public interest standing may be appropriate, we should consider them; but outright abolition falls outside this realm.

Ultimately, if necessary, the matter could be left to continued case law development instead of being fixed by statute. While not ideal for a project aimed at providing a clear statement of the law, this would offer a way to sidestep the issue and get on with the project. Of course we should note here the Attorney General's questioning of the need for the project itself. Exhibit p. 5.

§ 1123.340. Exceptions to exhaustion of administrative remedies

Under Section 1123.340(d), a person need not exhaust administrative remedies if the person lacked notice of the availability of the remedies. The Attorney General's Office (Exhibit p. 4) proposes to replace this provision with:

> The person was entitled to notice of a proceeding in which relief could be provided but lacked notice of the proceeding. Under this subdivision, the court's authority is limited to remanding the case to the agency to conduct a hearing in which the person has an opportunity to participate.

The staff **invites comment on this proposal** from other interested persons.

§ 1123.420. Review of agency interpretation or application of law

The staff alternative raised in Memorandum 96-14 would narrow abuse of discretion review to statutory interpretation made *in a regulation*, and would leave the standard of review for labor agency statutory interpretations made *in adjudication* to case law development. Professor Asimow points out that the staff

draft fails to state this precisely; **the staff will correct the draft and Comment**, if the Commission adopts that approach.

Professor Asimow continues to oppose special treatment for the labor agencies. "It won't be long till all the other agencies of the state demand to be included in (d) and it will be impossible to find a principled basis to stop them. All are experts in the meaning of their own statute." Exhibit p. 9.

Professor Asimow also questions the labor agencies' claim that there is a legislative delegation to them of interpretive authority. He cites the new case of United Farm Workers v. Agricultural Labor Relations Board, 48 Cal. Rptr. 2d 696 (Dec. 21, 1995), which does not use a "clearly erroneous" standard of review. Instead it uses the same review standard as for any other state agency interpreting its own statute — the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the case. Exhibit pp. 9-10.

§ 1123.430. Review of agency fact finding

The tentative recommendation provides substantial evidence review of an agency determination of fact. This is a major change from existing law which provides for independent judgment rule where a fundamental vested right is involved. Until now, we have heard concerns expressed about this change primarily from employee representatives in local agency hearings. See discussion in connection with Section 1123.435 (review of fact finding in certain local agency adjudications), immediately below. However, the change substantially affects occupational license proceedings at the state level as well. Because the Commission needs to consider all relevant perspectives on this matter, the staff solicited the comments of the California Medical Association, which has been active in this area.

CMA's letter appears at Exhibit pp. 11-13. CMA is extremely concerned about the change for a number of reasons:

(1) It limits the civil discovery rights of physicians; administrative discovery is limited, and substantial evidence review would foreclose the opportunity to ascertain potentially exculpating information.

(2) It diminishes the assurance of impartiality by the trier of fact, and allows for a license revocation even if there is only minimal evidence in the record to support the administrative determination.

(3) It hurts judicial economy, since improper exclusion of evidence cannot be corrected under the proposal; the case would have to be remanded for further administrative proceedings, followed by further judicial review.

(4) Full court review is critical for physicians, since recently enacted legislation precludes appeal from the superior court decision; only writ review is allowed.

(5) Professional licensure is a fundamental vested right, entitled to the protection of independent judgment review by a neutral court. The *Tex-Cal* case, holding that the Legislature could constitutionally provide for substantial evidence review of unfair labor practice determinations of ALRB, did not involve deprivation of the magnitude that occurs with a license revocation.

The staff believes, and Professor Asimow has anticipated from the outset, that this issue will be the battleground of judicial review reform in the Legislature. The staff believes also that substantial evidence review by the court is sufficient and appropriate where a full and fair administrative hearing and decision is provided. But why would anyone who now is entitled to independent judgment review be willing to give it up — it effectively gives them two bites of the apple.

The Commission has before it information that in many types of cases the administrative determination is biased and full court review is an important corrective. Public employee representatives have made an effective presentation of this in the case of some local agency employment determinations. Also, the State Bar Committee on Administration of Justice asserts institutional bias in administrative agency adjudication that requires effective court correction.

The staff believes these considerations cannot be ignored. In Memorandum 96-14 we have suggested some alternatives that we believe merit serious Commission consideration. It is noteworthy that even in 1945, when the Judicial Council drafted the administrative mandamus statute, it sidestepped any attempt to define the cases in which independent judgment review would be required, leaving us with the present system — substantial evidence except "in cases where the court is authorized by law to exercise its independent judgment on the evidence". Code Civ. Proc. § 1094.5.

§ 1123.435. Review of fact finding in certain local agency adjudications

Memorandum 96-14 includes a draft to provide independent judgment review of a local agency decision affecting a fundamental vested right of an

employee, unless the local agency decision is made pursuant to fair hearing procedures.

The California School Employees Association suggests that the independent judgment test not be limited to employment-related rights, since it is difficult to distinguish those rights from other rights such as education, free speech, license revocation, welfare, freedom from lawful discrimination, etc., that are now recognized as fundamental. However, if the Commission intends to narrowly limit independent judgment review to employment-related rights, CSEA suggests the staff draft be revised to refer to "a fundamental, vested right ~~of an employee~~ arising out of employment", since an employer may claim that a worker is not an employee while challenging a termination or layoff. Exhibit p. 7. **The staff would make this change.**

CSEA also believes a complete Administrative Procedure Act should be developed for local agency adjudication, which could be used by local agencies on a voluntary basis to give them protection from independent judgment review. However, if the Commission intends to impose only selected procedural requirements on local agencies in order to qualify for substantial evidence review, CSEA believes that in addition to the administrative adjudication bill of rights the following aspects of the formal hearing procedure in the Administrative Procedure Act should be required:

> Notice
> Service of Accusation and Request for Hearing
> Discovery
> Notice of Hearing
> Subpoena Power
> Oaths, Examination of Witnesses, and Rules of Evidence
> Consideration, Preparation, and Adoption of a Decision
> Reconsideration

See Exhibit p. 8.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

1st Supp. Memo 96-14 EXHIBIT Study N-200

Law Revision Commission
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To: Bob Murphy Date: 7 February 1996

File:

Fm: Herb Bolz, OAL

Re: *County of Alameda v. Aubry* problem (court enjoining agency from continuing with rulemaking process on grounds notice was defective)

Your memo of Jan. 26 contains revised language addressing the above problem. We would prefer broader language, but what you proposed could work if we add some comment language to the pertinent sections. We seek to include language which expressly precludes a court from interfering in an ongoing rulemaking. Your Jan. 26 language makes clear that section 1123.140 doesn't itself authorize such a court action, but the question remains whether *other* sections in the TR or in existing law authorize such an action. There is nothing in the current rulemaking APA which expressly forbids such judicial intervention.

Comment to 1123.120 Finality

new second paragraph; current 2d becomes 3d paragraph

For example, state agency action concerning a proposed rule subject to the rulemaking part of the APA is not final until (1) the agency submits the proposed rule to the OAL for review as provided by the APA and (2) the OAL approves the rule pursuant to Government Code section 11349.3.

Comment to 1123.130 Ripeness

new second paragraph

An allegation that procedures followed in adopting a state agency rule were legally deficient would not be ripe for judicial review until (1) the regulatory agency had completed the rulemaking process and formally adopted the rule, typically by submitting it to the OAL pursuant to Government Code section 11343(a), (2) the OAL had approved the rule and filed it with the Secretary of State pursuant to Government Code section 11349.3, thus allowing it to become final, and (3) the adopting agency had applied the rule.

Comment to 1123.140 Exception to finality and ripeness

new second paragraph

Subdivision (b) prohibits, for instance, a court from enjoining a state agency from holding a public hearing (or otherwise proceeding to adopt a proposed regulation) on the ground that the notice was legally defective. Similarly, subdivision (b) prohibits a court from enjoining the OAL from reviewing or approving a proposed rule that has been submitted by a regulatory agency pursuant to Government Code section 11343(a).

Comment to 1123.310 Exhaustion

new 3d paragraph

This chapter does not permit a court to enjoin a state agency from holding a public hearing or otherwise proceeding to adopt a proposed regulation. Persons of the opinion that steps taken by a state agency in compliance with the rulemaking requirements of the APA are legally deficient may submit written or oral procedural objections to the adopting agency pursuant to Government Code section 11346.9(a)(3). The adopting agency must summarize and respond to these objections. If the comment correctly identifies a procedural error, it is the adopting agency's duty to take steps needed to cure the problem. After the proposed regulation is submitted for review to the OAL, it is OAL's duty to review the adopting agency's disposition of procedural objections and to disapprove the proposal if the adopting agency has still failed to comply with applicable procedural requirements.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

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February 8, 1996

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VIA FACSIMILE AND U.S. MAIL

Bob Murphy
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

RE: Judicial Review of Agency Actions

Dear Bob:

This is in response to the California Law Revision Commission's request for suggested language limiting standing, and your request for language which would address our office's concern about a proposed exception to the exhaustion of administrative remedies requirement.

The following changes to the Commission's August 1995 Tentative Recommendation would limit standing in a way that our office believes is appropriate:

1. Delete the "Public interest standing" section (1123.230);

2. Propose the repeal of Code of Civil Procedure section 526a (taxpayer standing); and

3. Replace the "Private interest standing" section (1123.220) with the following:

"§ 1123.220 **Standing to review non-adjudicative agency actions**

1123.220. (a) A person has standing to obtain judicial review of an agency action if:

(1) the person has suffered a particularized injury from the agency action of which review is sought; or

> (2) standing of the person seeking judicial review is contemplated by the statute or other provision of law pursuant to which the agency has taken the action.
>
> (b) An organization that does not otherwise have standing under subdivision (a) has standing if a person who has standing under that subdivision is a member of the organization, or a nonmember the organization is required to represent, and the agency action is germane to the purposes of the organization.

Further, section 1123.210 can be amended to delete the phrase "or is otherwise expressly provided by statute," since that concept would be covered by our suggested subdivision 1123.220(a)(2).

In reviewing our suggestion that standing needs to be limited, the Commission may wish to consider the California Supreme Court's similar expression of concern:

> "The trend [in administrative law], not altogether salutary, is for the courts to exercise 'an increasingly activist role ... the courts have come to assume a virtual ombudsman function.' (Citation.) We believe, however, that the California judiciary is ill-equipped to add to its already heavy burden the duty of serving as an ombudsman for the plethora of state administrative agencies and local agencies that exist in every one of our 58 counties." *Carsten* v. *Psychology Examining Com.*, 27 Cal.3d 793, 801 (1980).

As to exhaustion of administrative remedies, our office believes that the exception allowing judicial review of cases where "The person lacked notice of the availability of a remedy" (see subdivision 1123.340(d)) needs to be modified so that the court's authority is limited to remanding the case to the agency for an agency hearing. In addition, Commissioner Skaggs correctly pointed out that the exception should be triggered by lack of notice of the hearing, rather than lack of notice of the availability of a remedy.

I believe that both concerns can be addressed by replacing the language quoted above with the following:

> "The person was entitled to notice of a proceeding in which relief could be provided but lacked notice of the proceeding. Under this subdivision, the court's authority is limited to remanding the case to the agency to conduct a hearing in which the person has an opportunity to participate."

As indicated in previous letters from this office, the above changes would not necessarily eliminate our office's overall concern that this may be an area in which existing law does not need to be overhauled. Please do not hesitate to give me a call if you would like to discuss any of this further.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Dan Siegel

DANIEL L. SIEGEL
Deputy Attorney General

California School Employees Association

February 9, 1996

Law Revision Commission
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Colin Wied, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: **Comment on Tentative Recommendation**
Judicial Review of Agency Action

Dear Chairperson Wied and Members of the Commission:

California School Employees Association (CSEA) appreciates the Commission's January 19 revisions to proposed sections 1123.635, 1123.660, and 1123.760. CSEA is also grateful for the opportunity to submit additional comments relevant to further revision of proposed section 1123.435.

First, at the risk of repetition, CSEA's position concerning the elimination of the independent judgment test from judicial review of agency factfinding is summarized by listing points already presented to the Commission:

1. It is not true that no other state utilizes the independent judgment test for factfinding. Even if it were true, this is nothing more than a misery loves company argument.

2 If it is true that no other state utilizes this test "across the board," as stated at the last Commission meeting, neither does California. California limits that test to actions that substantially affect a fundamental, vested right.

3. The distinction for fundamental, vested rights is not "utterly incoherent." In most areas, <u>of which employment is only one</u>, there is no "incessant litigants' parade" to the courts on this issue. (Contra, Asimow <u>The Scope of Judicial Review of Decisions of California Administrative Agencies</u> (1995) 42 UCLA L.Rev. 1157, 1176.) In any case, some flexibility of "fundamentalness" is essential to a changing society.

4. The teeth that some see in the substantial evidence test may seem real from the academic perspective, but they are chimerical in practice.

5. In the case of local agency adjudications, the decisionmakers are usually elected or appointed

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officials, vulnerable to political pressures, who preside over adjudications infrequently, without expertise or adequate procedural or substantive guidelines. With few exceptions, they try to do a good job but, without the constraints of the APA, their decisions are not deserving of lowered judicial scrutiny.

6. The Commission should develop a "little APA" for local agencies. The political realities dictate that it be voluntary but, at the very least, its adoption by a local agency should be a condition of the substantial evidence test.

CSEA has an interest in improving the rights of the many classified workers it represents in school and community college district administrative adjudications, even if those improvements must come at the expense of the relatively few such cases where judicial review is sought. Unlike teachers, classified workers are subject to disciplinary proceedings that are uncontrolled by the APA. The Commission has partially accommodated CSEA's interest in the proposed section 1123.435. More is needed.

The staff proposal for revising the proposed section 1123.435 recognizes fundamental, vested rights "of an employee." This phrase could lead to mischief in that employer's sometimes claim that a worker is not an employee while challenging termination or while laid off on a reemployment list but with a statutory right to reemployment. If the Commission intends to limit this section to employment rights, the phrase should be changed to "arising out of employment."

The problem with either phrase is that it is hard to imagine a rational basis for distinguishing employment rights from other rights (education, free speech, license revocation, welfare, freedom from unlawful discrimination, etc.) which are now recognized as fundamental. Accordingly, CSEA recommends the elimination of the words "of an employee" in the draft set forth on page 6 of Memorandum 96-14.

Turning to additional procedural protections upon which to condition lowered judicial scrutiny, CSEA again urges the Commission to recommend the enactment of a comprehensive, voluntary little APA for local agencies. If the Commission wants a more limited proposal, however, it should at least satisfy the following requirements of Chapter 5 of the APA:

1. Notice, to the extent provided in section 11503.

2. Service of Accusation and Request for Hearing, to the extent provided in section 11505.

3. Discovery, to the extent provided in section 11507.6. (This is already included in the proposed section 1123.435.)

4. Notice of Hearing, to the extent provided in section 11509.

5. Subpoena power, to the extent provided in section 11510. (This is already included in the proposed section 1123.435 to the extent provided in Article 11 of Chapter 4.5, but this seems like a simpler substitute.)

6. Oaths, Examination of Witnesses, and Rules of Evidence, to the extent provided in section 11513, subdivisions (a) through (c), (j) and (k).

7. Consideration, Preparation, and Adoption of a Decision, to the extent provided in section 11517, subdivisions (a) through (c).

8. Reconsideration, to the extent provided in section 11521.

Some of these protections may be provided by statutes governing a particular local agency. (See, e.g., Ed. Code § 45116.) In a school or community college district adjudication, CSEA's main interest, given that the Commission has addressed items #3 and #5, above, is in the additional protections of items #6 and #7.

I look forward to further discussion of these matters at the Commission's February 22 meeting in Sacramento.

Sincerely,

William C. Heath
Deputy Chief Counsel

cc: Margie Valdez, CC
Barbara Howard, DGO

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February 7, 1996 File:

Robert Murphy
CA Law Revision Commission
4000 Middlefield Rd.
Palo Alto, CA 94303

Dear Bob,

I think the language proposed for §1123.420(a) at p. 5 of Memorandum 96-14 is OK. I am tired of fighting about this issue. Of course, the legislature might decide to delegate interpretive power in adjudicative decisions also, as the labor agencies claim the legislature did for them. So the comment should provide for that eventuality also. But the legislature will have to do it explicitly.

Incidentally, should the reference be to a "regulation as defined in 11342 of the Government Code" rather than to a "rule?" "Rule" means any statement of general applicability in the APA so that this statute as drafted would cover a mere bulletin or manual interpretation.

I continue to oppose special tretment of the labor agencies (such as 1123.420(d). The present statute plus the comment is an improvement over prior formulations because it limits the area in which the delegation occurs. The comment should also mention that it is confined only to adjudicatory decisions by the labor agencies, not to their rulemaking. It won't be long till all the other agencies of the state demand to be included in (d) and it will be impossible to find a principled basis to stop them. All are experts in the meaning of their own statute.

The language in judicial opinions that the labor agencies keep relying on is, in my opinion, a happenstance; the legislature intended no special delegation of interpretive power to them. Take a look at UFW v ALRB, 48 Cal.Rptr.2d 696 at 703 (1995). Guess

what? ALRB is treated just like any other agency. "Further, although the ALRB's interpretation of the ALRA is entitled to 'great weight'...the 'final meaning of a statute...rests with the courts.' Dyna-Med..." And ALRB's statutory interpretation is soundly rejected. This is clearly not a case in which the court finds any delegation to the ALRB to interpret a statute and does not involve any "clearly erroneous" or "arbitrary-capricious" test.

Arguably the above-quoted language concerned another statute rather than the ALRA which the ALRB did not have delegated power to interpret. Later in the same opinion, however, at pp. 707-10, the court uses precisely the same analysis with respect to ALRB's interpretation of the remedy provisions of its own statute. The question is what remedies ALRB is entitled to award. The court followed the Supreme Court's decision in Peralta that ALRB does not have power to award compensatory damage. But Peralta involved the FEHC; it relied on the earlier Dyna-Med case which also involves FEHC. Dyna-Med clearly used weak-deference methodology in interpreting the statute.

If the ALRB is special, why doesn't the court distinguish Peralta and Dyna-Med as involving an agency to which interpretive power was not delegated? But they don't. I guess ALRB will argue that this case is just wrong in its analysis so we should ignore it. It would be interesting to know whether ALRB plans to seek a hearing in the Supreme Court to argue that the Court of Appeal used an incorrect scope of review rule. And PERB will say that the UFW case applies only to the ALRB, not itself. But I think the UFW analysis is correct and applies to both agencies.

Sincerely,

Michael Asimow
Professor of Law

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Physicians dedicated to the health of Californians

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February 12, 1996

Nathaniel Sterling
Executive Secretary
California Law Review Commission
4000 Middlefield Rd., Ste. D-2
Palo Alto, CA 94303-4739

Re: Recommendations Concerning Judicial Review of Agency Action

Dear Mr. Sterling:

As you may recall, in mid-December, you graciously contacted me to inform me of the fact that the California Law Review Commission had issued a tentative recommendation in August of 1995 concerning judicial review of agency action. At that time, you suspected that CMA would be concerned over the recommendation that the independent judgment standard of judicial review set forth in Code of Civil Procedure §1094.5 be replaced with a "substantial evidence" test. Your suspicions were 100% accurate. The California Medical Association is extremely concerned about this proposal for a number of reasons.

The substitution of the "substantial evidence" test for the independent judgment review by the courts dramatically reduces procedural protections presently afforded to physicians in licensure revocation proceedings in two ways. First, the "substantial evidence" standard envisioned by the recommendation limits the civil discovery rights of physicians. Under the current independent judgment review standard, courts are empowered to admit and consider new evidence. *See* Code of Civil Procedure §1094.5. Such new additional evidence, however, is generally not admissible where the "substantial evidence" standard governs. Because discovery in a civil action is much broader than that which is afforded to physicians under the Administrative Procedure Act, if physicians are restricted to a "substantial evidence" standard when having their actions reviewed by the court, the opportunity to ascertain potentially exculpating information can be entirely foreclosed.

Second, such a limited review diminishes the assurance of impartiality by the trier of fact. Indeed, the procedural check created by having an impartial Superior Court judge review an administrative decision is essentially eliminated by reducing the ability of a judge to independently review the determination. In this regard, it should be stressed that a "substantial evidence"

review is extremely limited; courts have interpreted such review as requiring only that there be minimal evidence in the record to support the administrative determination.

For similar reasons, the "independent judgment" review promotes judicial economy. For example, if the court determines that there was relevant evidence that was improperly excluded or that could not have been produced despite the exercise of reasonable diligence, the court is authorized to admit and consider the evidence without remanding the case. Code of Civil Procedure §1094.5(e). Consequently, even if procedural deficiencies occur at the administrative level, a court can correct those deficiencies and the entire administrative process need not be repeated. Under a substantial evidence standard, the court would have no option but to remand the case to the agency for a rehearing with possible subsequent judicial review.

Finally, particularly for physicians, the independent judgment standard is critical. As you may know, pursuant to recently amended Business & Professions Code §2337, physicians no longer have a guaranteed right to appeal a Superior Court decision. Under these circumstances, full and complete review by the trial court is essential.

There is no justification for the elimination of the protections and latitude afforded by the independent judgment standard. The right to an independent judgment review is critical given the importance of licensure to physicians (and to all other professionals for that matter). The California Supreme Court has unequivocally concluded that the revocation of a physician's license to practice medicine involves the deprivation of a vested right, and hence, is entitled to independent judgment review. *See* Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124; 181 Cal.Rptr. 732; Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28; 112 Cal.Rptr. 805 (stating "...if the order or decision of the agency substantially affects a fundamental vested right, the court, in determining under Section 1094.5 of the Code of Civil Procedure whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence...")

It is true that the Supreme Court in Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd (1979) 24 Cal.3d 335, 156 Cal.Rptr. 1 upheld a determination by the Legislature to restrict review of a vested right to a substantial evidence standard. However, that case did not involve deprivation of the magnitude which occurs with a license revocation. Moreover, to our knowledge, no case has ever upheld a "substantial evidence" review for licensure revocation proceedings.

Thus, we urge that the Commission reconsider its tentative recommendation on this issue. Again, I would like to express my gratitude for your bringing this matter to our attention. If you would like to discuss this issue further, please do not hesitate to contact me at any time at (415) 882-5137.

Sincerely,

Astrid G. Meghrigian
CMA Legal Counsel

AGM/kb

cc: Scott Syphax
Sandra Bressler

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February 15, 1996

Nat Sterling
California Law Revision Commission
FAX (415) 494-1827

Dear Nat,

I may not be able to attend the February 22 Commission meeting so I thought I would respond in writing to the Attorney General's letter dated February 8, 1996.

I strongly oppose the AG's suggestion that §1123.230 be repealed. Public interest standing has long been a well-accepted feature of California law. In numerous situations, no person would have private interest standing to challenge illegal administrative actions. Allowing a member of the public to challenge such action serves the interests of lawful and accountable government. The AG offers no evidence that existing law has caused any problem of judicial overload or any other problems.

Note that the AG has not proposed a statute that abolishes the existing case law providing for public interest standing. Instead, the AG's suggestion for deletion of §1123.230 would leave intact the existing case law. Proposed §1123.230 contains significant protections for government defendants that are not adequately spelled out in existing law or in the statutory taxpayer action (which the proposed statute would repeal as redundant). Under §1123.230, the plaintiff must actually reside or conduct business in the agency's jurisdiction; the plaintiff must be a proper representative of the public and adequately protect the public interest; and the plaintiff must have first requested the agency to correct the practice. The AG should be applauding these improvements of existing law.

The AG cites the Carsten case which does indicate concern about the Court serving as an ombudsman. But §1123.210 does not suggest overruling the Carsten decision which barred an agency member from seeking judicial review of a decision of her own agency. That decision is correct--the courts should not try to resolve intra-agency policy disputes. Nor does public interest standing provide that the courts should serve as an ombudsman; instead it allows courts only to correct illegal action. (The existing taxpayer action in some case does permit courts to act as ombudsman--see my study at p. 28--and I agree that it should be repealed). Carsten was a 4-3 decision and Justice Richardson's dissent contends that the existing law allowing public interest standing has created no problems for government or the courts.

Both before and after Carsten, the Supreme Court has repeatedly allowed plaintiffs public interest standing. It noted that public interest standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no government body impairs or defeats the purpose of legislation establishing a public right." Green v. Obledo, 29 Cal.3d 126, 144 (1981). More recently, the Court approved standing of a public interest group that challenged a county's failure to deputize county employees as voting registrars as required by state law. Common Cause v. Bd. of Supervisors, 49 Cal.3d 432 (1989).

In Louisiana-Pacific v. Dep't of Forestry, 21 Cal.Rptr.2d 468, 472 (1993), the Court emphatically approved standing for Friends of the Earth in an environmental case. It quoted the Common Cause case and remarked that "the state's citizens have a fundamental interest in the protection of its timberland and natural resources from logging operations which violate the Act...'Effects of environmental abuse are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved.'"

I also oppose the AG's suggestions for revising §1123.210 on private interest standing. Why introduce the new concept of "particularized injury" when the "interested person" concept is well developed in existing law? The "interested person" approach is well described in the comment to §1123.210. The concept of "particularized injury" is drawn from U. S. Supreme Court cases; the federal courts have found it extremely difficult to distinguish particularized from generalized injuries. California does not need to adopt this confusing test.

I hope my written comments can substitute for my attendance at the meeting.

Sincerely,

Michael Asimow
Professor of Law