Study N-300 June 12, 1996

First Supplement to Memorandum 96-38

Administrative Rulemaking: More on Scope of Project

Attached are the following materials relating to the scope of the administrative rulemaking project.

Commenter	Exhibit Page
Office of Administrative Law	1-3
California Medical Association	4
Dugald Gillies (Sacramento Nexus)	5-9
David Rosenberg (Article and Letter)	10-11

The thrust of these materials is indicated below.

Role of OAL

The California Medical Association opposes the proposals to eliminate or curtail the independent review functions of the Office of Administrative Law. OAL "performs important oversight functions and ensures that inappropriate or unauthorized regulations are not promulgated by state agencies", and that "there is appropriate public input into the regulatory review process." Exhibit p. 4.

Doug Gillies also disagrees with the proposals to reassess the role of OAL, which "can, and should, continue to play a viable role in review of regulations" and "should be given even more resources and tools to even further progress." Exhibit p. 6.

Dave Rosenberg, a former Commission member, notes that members of the Sacramento County Bar Association have argued that OAL should not be eliminated; "it performs a very useful public function". Exhibit, p. 10. He states that, "Without OAL, there would be absolutely no entity in state government which would ensure that regulations are published (and not secret), are understandable, are consistent with other regulations, and are authorized by the statutes. As state government grows ever more complex and intrusive, OAL becomes ever more important." Exhibit p. 11.

Necessity Review

The concept of refining the statutes governing OAL review of regulations for necessity is addressed in Memorandum 96-38 at pages 16-17. OAL has written to us concerning this issue, suggesting a revision of the necessity standard to provide that a regulation satisfies the necessity requirement if "the rulemaking record contains rationale facts, studies, expert opinion, or other material sufficient to support a conclusion that the regulation is reasonably necessary to effectuate the purpose of the statute." Exhibit p. 2.

Doug Gillies opposes this change in the necessity standard, stating that the OAL proposal would "water it down" and is a "cop out". Exhibit p. 6. He believes that "necessity review, in its broadest context should be retained, subject at least to the substantial evidence rule and in consideration of the entire record", giving examples in support of his position. Exhibit p. 8.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA
PETE WILSON, Governor

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
SACRAMENTO, CA 95814
(916) 323-6225

June 6, 1996

California Law Revision Commission
Attention: Nat Sterling
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Improvements to rulemaking part of Administrative Procedure Act
***Second* OAL Submission: Refining the "necessity" standard.**

Dear Commissioners:

The rulemaking part of the Administrative Procedure Act (APA) requires the Office of Administrative Law (OAL) to review all regulations submitted to it and make determinations using all of the following standards: necessity; authority; clarity; consistency; reference; and nonduplication. The "necessity" standard is probably the least understood of the standards. The regulated public sometimes complains that OAL approves regulations that are "unnecessary," meaning that the regulations are unnecessary in terms of *policy*. Some state agencies and legal scholars criticize the standard as too burdensome and assert that OAL has too much flexibility in determining whether or not the rulemaking record meets the standard.

In spite of the criticism, OAL believes that there is value to retaining a "necessity" standard in the APA. In a case where the validity of a regulation is challenged, a court may declare the regulation invalid if the record does not demonstrate that the regulation is reasonably necessary to effectuate the purpose of the statute. OAL review for compliance with the "necessity" standard makes it likely that an approved regulation will not be struck down based on a failure to make the required showing.

The definition of "necessity" in subdivision (a) of Government Code section 11349 has been revised several times since its enactment in 1979. The current definition follows.

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

The standard relates to two other provisions of the APA, Government Code sections 11342.2 and 11350.

Government Code section 11342.2 provides:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and *reasonably necessary to effectuate the purpose of the statute.* (Italics added.)

Subsection (1) of subdivision (b) of Government Code section 11350 states that, in addition to any other ground that may exist, a regulation may be declared invalid if:

> The agency's determination that the regulation is *reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law* that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence. (Italics added.)

OAL suggests that amendments to the APA, similar in substance to those set forth below, would have the following effects: 1) promote consistency among code sections relating to the "necessity" standard--Government Code sections 11342.2, 11349, and 11350; 2) make the "necessity" standard less burdensome; and 3) clarify the scope of OAL's review for "necessity." At the same time, we believe, the amendments preserve one of the values of OAL legal review, i.e., providing the rulemaking agency and the regulated public with a measure of certainty that a regulation will survive a court challenge to its validity. Under the revised standard, OAL will review for "necessity" by applying the "rationality" test recommended in the commission's study of the scope of judicial review. (Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 U.C.L.A. Law Review 1157, 1231.)

1) Revise subdivision (a) of Government Code section 11349, as follows.

> "Necessity" means that the rulemaking record ~~of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation—taking into account the totality of the record,~~ contains rationale, facts, studies, expert opinion, or other material sufficient to support a conclusion that the regulation is reasonably necessary to effectuate the purpose of the statute. ~~For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.~~

2) Revise subsection (1) of subdivision (b) of Government Code section 11350 to promote consistency among section 11350 and Government Code sections 11342.2 and 11349 and to remove the reference to the judicial standard of review. That

standard will be included in the bill that represents the culmination of the commission's current study of judicial review of actions taken under the APA.

The ~~agency's determination~~ rationale, facts, studies, expert opinion, or other material contained in the rulemaking record do not support a conclusion that the regulation is reasonably necessary to effectuate the purpose of the statute~~, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence~~.

Sincerely,

John D. Smith
Director

California Medical Association
221 Main Street, P.O. Box 7690, San Francisco, CA 94120-7690 • (415) 541-0900
Physicians dedicated to the health of Californians

Reply to: 1201 K Street, Suite 1050, Sacramento, CA 95814-3906
(916) 444-5532 • FAX: (916) 444-5689

MEMORANDUM

June 10, 1996

TO: The California Law Revision Commission

FROM: Elizabeth McNeil
Associate Director
Government Relations

RE: Administrative Procedures Act
Plans A and Plan B

CMA Position: **OPPOSE**

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The CMA opposes the proposals to eliminate or curtail the independent legal review functions of the Office of Administrative Law. These proposals create difficult barriers for the public to receive information and provide comment. Moreover, they relieve state agencies from their obligation to respond to public comments.

The Office of Administrative Law performs important oversight functions and ensures that inappropriate or unauthorized regulations are not promulgated by state agencies. The Office also ensures that there is appropriate public input into the regulatory review process.

We respectfully urge you to oppose these proposals.

bp061196.b

SACRAMENTO NEXUS

Dugald Gillies
Yolanda D. Gillies

8536 Willings Way
Fair Oaks, CA 95628-6235
(916) 967-0937
Fax Available

11 June 1996

By Overnight Express

California Law Revision Commission
400 Middlefield Road, Suite D-1
Palo Alto, CA 94303-4739

Attn: Nathaniel Sterling, Esq
Executive Secretary

Re: Administrative Rulemaking (Study N-300) and Memorandum 96-38(NS)

Dear Members of the Commission and Staff:

In contemplation of your meeting agenda for June 13, please accept my comments on the above cited documents. Unfortunately I will be unable to attend this meeting because of a conflict, but hope to attend several of your future meetings at which this topic may be discussed, and to submit further comments, with your permission, as your examination evolves and your file of exhibits grows.

My perspective emerges from service as a California Senate consultant from 1953 to 1967 and as a lobbyist since that time. My activity has included presentations on administrative regulations on behalf of clients for a period of 30 years before such agencies as the Departments of Real Estate, Insurance, Corporations, the Resources and Business, Transportation and Housing Agencies, the Contractors State License Board, and undoubtedly others.

Role of OAL

With respect to the issue titled "Role of OAL" discussed at page 13, et seq of Memo 96-38, I disagree with what appear to be the proposals of Professors Asimow and Ogden for a full blown reassessment of the effectiveness of the current system and the existence and role of OAL as premature and disruptive of the orderly and progressive evolution of procedures and the organization which involves not just the Office of Administrative Law but of the scores of state executive agencies with which its work inter-relates to produce an understandable, equitable functioning body of administrative law.

The memo repeats the question: has the OAL review process

achieved the goals set forth in the legislation [which created it]? My answer, as one who was a peripheral participant in the enactment of AB 1111 (McCarthy) of 1979, which my client and I actively supported, is: it has achieved a significant part of them and is achieving more all the time, and should be given more resources and tools to even further progress.

Responding to another query: Yes, the OAL can, and should, continue to play a viable role in review of regulations.

And then the challenge is posed: are there alternatives including returning to individual department self discipline; and my response is, there may be, but it would not be department self-discipline. There really was no system before OAL, frequent and flagrant rejection of the rules, and repeated instances of sheer ineptitude and disorientation. It is better today not only because of OAL actions, but because the very existence of OAL tempers abuse. And there are repeated evidences even today of failures to abide by authority, to be consistent with referenced statutes or other law, to establish any basis of necessity, or to consider alternatives which impose lesser burdens on the regulated. Should the commission desire (and allow time) I could supply examples of both pre-1980's and current cases from my own limited experience.

The role of the OAL should be retained. Certainly there is value in reviewing details of the OAL process, as proposed by your staff (page 15, Memo 96-38) and at some date in the next two months, I will attempt to comment on some such details.

Necessity Review

In Memo 96-38 at pages 16-17 some attributions by academic resource persons for the Commission are set forth contending that the necessity review of proposed regulations, mandated by Gov't Code §11349.1, intrudes into the policy function of an executive agency proposing the regulation, and perhaps inferring that it should be eliminated or at least emasculated.

The OAL in a communication to you of June 6 on this specific topic argues to retain "a" necessity standard but then proposes to water it down by eliminating the requirement for substantial evidence of the need for a regulation [as weak and vascillating as that requirement is], and for consideration of the totality of the record [such as protestations of necessity] and to require only that there be "material sufficient to support a conclusion that the regulation is reasonably necessary to effectuate the purpose of the statute."

I believe that to be a cop out. The language of the statute is clear and unequivocal: the rulemaking record must show a need for the regulation and that includes a need for establishing the policy.

In a case this year relating to administrative regulations [although not the necessity review] a court struck down a regulation promulgated in 1947 and reiterated that despite a precedent declaring that "a court should give the administrative agency's construction great weight; [and] a court will not substitute its judgment for that of the administrative agency"...."a court looks first to the words of the statute and gives them their usual and ordinary meaning..." [and] "...the courts may not add provisions to a statute...", ad infinitum. (Home Depot v Contractors State License Board, 49 Cal Rptr2d 302 [4th Dist 1996]).

If the administrative agency or others, disagree with a holding of OAL they have recourse to the Governor or the courts (Gov't Code §§11349.4. 11350) or to the Legislature. [In the matter of the Home Depot case, supra, for example, AB 1455 was amended on June 10, proposing to abrogate a portion of that holding.]

The legislative intent respecting the chapter on Rulemaking in the Administrative Procedure Act repeatedly iterates concern about the numbers of "unnecessary" regulations (Gov't Code §§11340, 11340.1, and uncodified §2, Chap. 794, Stats of 1991). Among your functions, of course, is whether to recommend changing that statute and the political viability of such a proposal. The 1979 statute creating OAL and the basis of current standards, was adopted, of course, at a time of much expressed legislative concern and a plethora of proposals for specific legislative oversight mechanisms. In my judgment, legislative concern about overregulation still exists, and should.

In 1978, before OAL, the Department of Real Estate proposed a very lengthy regulation (10 CCR 2785) titled "Ethics and Professional Conduct Code" in what the new commissioner proclaimed in a speech making tour of the state as necessary to provide ethical standards to brokers and salespersons who did not belong to organizations with their own Codes of Ethics.

The proposals included such caveats as "complying with its Code of Ethics, if a member of an organized industry group", and "measuring success as an agent by how much money is saved or made for principals, not by the amount of money that accrues to the licensee from agency activities." Some 18 months later when this regulation was adopted some of the most far out items had been dropped from the list of 36, and a section had been added (after negotiation with a trade group involved) to read:

> "Nothing in this regulation is intended to limit, add to or supercede any provision of law relating to the duties and obligations of real estate licensees or the consequences of violations of law....The conduct guidelines set forth in subsections (c) and (d) are not intended as statements of duties imposed by law nor as grounds for disciplinary action...but as guidelines for elevating the

professionaliasm of real estate licensees."

In 1989 the Department proposed substantially rewriting this §2785 and sometime between publication of the proposal on Aug 14, 1989, and filing with the Secretary of State, the language above and all of the former subsections (c) and (d) disappeared (whether upon response to OAL or not, is not known to this writer) and the Real Estate Commissioner instead issued "Suggestions for Professional Conduct....", which incorporate much of the language quoted above. This underground regulation is widely publicized and circulated by the Department.

In a matter still pending in the regulatory process, the Department of Insurance in a Notice of Proposed Action (#RH-344, Nov 16, 1995) to rewrite Subchapter 7.5 (commencing with 10 CCR 2695.1) declared generally that they were "necessary in order to make effectively (sic) administer and interpret the statute."

In specifics, there has existed in §2695.1(c), a partial exemption from the entire subchapter "for the handling or settlement of claims brought under surety bonds" and a rationalization for that provision based on "the unique relationship which exists under a surety bond between the insurer, the obligee or beneficiary, and the principal..."

The Department proposed to repeal the entire subsection (c), and in the Initial Statement of Reasons simply said "This change was necessary to clarify that surety claims are no longer exempt from certain provisions of the regulations". At hearings there was extensive testimony including factual and legal data, in opposition to the proposal and I am encouraged to think that it is being resolved. It is possible that the policy chiefs in the department were not fully informed of the effect of the change or the purposes of those who proposed them, and that if a realistic statement of necessity had been prepared that a prolonged and expensive effort could have been avoided. In my judgment the statments in the department material were woefully inadequate [and no supporting material or testimony was provided at the three hearings on the matter].

Yes, necessity review, in its broadest context should be retained, subject at least to the substantial evidence rule and in consideration of the entire record. The statute precludes OAL from substituting its judgment for that of the agency proposing the regulation and there are remedies available to the agency in questions of dispute.

On other issues including consistency review, an exception for interpretative regulations, the final statement of reasons, public access to the rulemaking file, and some others, I will submit comments at a later time.

Thank you for this opportunity to submit these views and I promise to show up at a later meeting to give you a chance to

question or challenge me should you choose to do so.

Sincerely,

Dugald Gillies

PHOTO BY JOHN WINO WO

"The state is increasingly involved in regulating people, professions and industries. Administrative practice is really a very broad one," said David Rosenberg, chair of the Sacramento County Bar's Administrative Law Section.

Administrative Law Section Encompasses Range of Practice

By Karen Kingsbury
Daily Recorder Correspondent

Editor's Note: This is another in The Daily Recorder's series on Northern California legal organizations.

The chair of the Administrative Law Section of the Sacramento County Bar Association said the field of administrative law is an area of practice that will expand in the future.

"The state is increasingly involved in regulating people, professions and industries. Administrative practice is really a very broad one," said David Rosenberg, chair of the section.

Rosenberg is a partner at the Sacramento law firm of Diepenbrock, Wulff, Plant & Hannegan. He is also the mayor of Davis and is running for the Yolo County Board of Supervisors. As of the first of March, Rosenberg will be opening up his own law offices in Davis. His practice is in civil litigation, primarily against the government, and

See **SECTION**, page 5

To: Nat
Fm: Herb, OAL
Please include in next news.

SECTION

Continued from page 1

administrative law practice, which is dealing with administrative agencies in various disputes.

Administrative law judges, attorneys who are state employees working for various agencies and private practitioners who practice in administrative law make up the 142 membership of the section.

The section provides an opportunity for lawyers and judges who are interested in administrative law to meet in a social setting and also to obtain information and Continuing Legal Education credits at the section's bi-monthly luncheon meetings.

As chair of the section, Rosenberg hopes to continue to provide informational and informative meetings and increase the section's membership.

There are several benefits of joining the section, said Rosenberg.

"Our lunches are typically attended by about 40 people. You have the opportunity to meet other practitioners, administrative law judges and chief counsel. You can meet them in a social setting and get to know them as people."

Another benefit is earning the CLE credit.

"If you were to attend all of our meetings in a year, you would earn about five credits.

"And you get information on the cutting edge of administrative law. We, for example, recently had the executive secretary of the California Law Revision Commission speak to us which is in the process of finalizing a complete revision of the California Administrative Procedure Act, so anyone who practices administrative law has an enormous leg up in knowing what the changes in law are."

Administrative law covers an wide spectrum of activities that relate to government regulation.

"Anytime there is an issue regarding government regulation and a lawyer is involved, I think, it's fair to say that the person practices administrative law," said Rosenberg.

Last year there was discussion about eliminating the Office of Administrative Law, an office that the State of California has had for a number of years which reviews regulations and hears challenges to "underground regulations."

"In other words, if you think a department is using a document that should be a regulation but isn't, you can challenge it at the Office of Administrative Law," said Rosenberg. "There was some effort underway to eliminate that office. Many of us in the section argued that the Office of Administrative Law should not be eliminated and performs a very useful public function. It wasn't eliminated."

The challenges facing administrative law attorneys are to keep up with the changes in the law.

"The biggest single challenge is the diversity of the practice in the sense that one of our efforts is to make the practice more uniform so that if you have a challenge with the Department of Motor Vehicles it would be handled similarly to a challenge at the Department of Rehabilitation. In the old days, everyone was different, there were a 100 different ways to do things, so our effort has been to create more uniformity."

Sacramento Daily Recorder Jan. 24, 1996

June 23, 1995

The Honorable Alfred E. Alquist
California State Senate
State Capitol
Sacramento, CA 95814

RE: Budget conference Committee: Budget Item 8910 Office of Administrative Law

Dear Senator Alquist:

I am advised that the budget for the Office of Administrative Law (OAL) is proposed to be eliminated from the state budget. This would be, in my opinion, a grave mistake.

In the course and scope of my law practice, I often represent organizations which are regulated by state government agencies. It is extremely important to the public to have regulations which are known, understandable, consistent, and authorized. Regulations, like statutes, directly impact people. Without OAL, there would be absolutely no entity in state government which would ensure that regulations are published (and not secret), are understandable, are consistent with other regulations, and are authorized by the statutes. As state government grows ever more complex and intrusive, OAL becomes ever more important.

OAL was created to address long standing problems. As a result of OAL's involvement, the regulatory system in California has been improved. OAL was a reform of the regulatory process in California. Please do not undo this reform.

Very truly yours,

DIEPENBROCK, WULFF, PLANT & HANNEGAN

BY
DAVID ROSENBERG

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