Study N-300 February 26, 1997

First Supplement to Memorandum 97-12

Administrative Rulemaking: Interpretive Guidelines (Academic Perspectives)

Memorandum 97-12 raises the issue of the proper treatment to be given interpretive guidelines by the rulemaking statute. This supplement presents three different academic perspectives on the issue:

- Profs. Asimow & Ogden — interpretive statement exception to rulemaking.
- Prof. Weber — expedited rulemaking procedure for interpretive guidelines.
- Public Law Research Institute (Hastings) — direct final rulemaking.

These perspectives are summarized below.

Profs. Asimow & Ogden — Interpretive Statement Exception to Rulemaking

Profs. Asimow & Ogden, academic consultants retained by the Commission for the rulemaking study, offer a joint proposal for dealing with interpretive statements. Their proposal is elaborated in some detail in Exhibit pp. 1-5. Briefly, they recommend an interpretive statement exception to the rulemaking statute with the following features:

(1) The interpretive statement must be labeled as such.

(2) The statement lacks the force of law. (This concept is developed at Exhibit pp. 2-3.)

(3) The statement must be published.

(4) The statement can be challenged before OAL.

(5) If the procedural requirements are not followed, a reviewing court can give no deference to the statement.

They believe this proposal will work smoothly, without giving rise to the confusion and litigation that has characterized the federal provision for interpretive rules and policy statements.

Prof. Weber — Expedited Rulemaking Procedure for Interpretive Guidelines

Prof. Gregory Weber, an academic consultant retained by the Commission for a more private-sector-oriented perspective, has given the staff his oral comments on the matter (he is unable to attend the February Commission meeting). Prof. Weber agrees there is a problem here. However, he does not think interpretive

guidelines should be excepted from the rulemaking procedure in a way that would preclude public participation in their formulation.

Instead, he suggests an expedited form of rulemaking procedure for interpretive guidelines. As he conceives it, there would be a notice and comment period for interpretive guidelines. The adoption process would be complete on agency certification that it has read the public comments. No OAL review would be required for the interpretive guidelines to become effective.

Public Law Research Institute (Hastings) — Direct Final Rulemaking

The Hastings College of Law's Public Law Research Institute provides law students an opportunity to engage in public law research in a structured faculty-directed setting. The Institute is providing analysis for Assemblyman Ackerman on some of the issues being considered by the Commission, including administrative rulemaking issues.

Their analysis of the issues presented in Memorandum 97-12 finds particular merit in "direct final" rulemaking — after public notice, rules that elicit no public response would ride a "fast track" through the APA. The merits of this option are that it avoids the illusive distinction between interpretation and rulemaking by relying on public reaction as the trigger for increased review. "In short, this option serves the twin goals of increased efficiency and public involvement while staying true to California's tradition of closely monitoring the promulgation of agency rules."

Profs. Asimow and Ogden agree that direct final rulemaking should be made an exception to California's normal rulemaking procedures. However, they do not see this as a complete solution, since direct final rulemaking is only useful for rules that will have trivial impact, whereas many interpretive guidelines have major substantive significance, and people will object to them.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Proposal for an interpretive statement exception to the rulemaking provisions of the California APA

Michael Asimow
Greg Ogden

1. Problems with existing law: There should be an exception to the APA's notice and comment procedure for interpretive statements. The problems with existing law were highlighted in the Supreme Court's recent opinion in Tidewater Marine Western, Inc. v. Bradshaw, 59 Cal.Rptr.2d 186, 197-98 (1996), which challenged the Legislature to solve those problems:

> Professor Asimow asserts that full APA compliance [for adoption of interpretive rules] entails impractical costs and delays. The agency must devote significant resources to building an agency file that will satisfy the Office of Administrative Law...Among other things, the agency must establish the necessity of the proposed rule...In addition, opponents of a proposed rule may file long and complex comments, which the agency must address point by point...Professor Asimow argues that, because of the burden of full APA compliance, agencies do not adopt regulations. Instead, they resort to case-by-case adjudication, and they use informal oral communications to direct agency staff. Sometimes, agencies seek statutory amendments, in lieu of adopting regulations, or they simply ignore the APA, issuing and enforcing regulations without regard to its provisions.
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> Professor Asimow identifies serious concerns. Though too many regulations may lead to confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative, this effect is less pronounced in the case of interpretive regulations. The public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarity ambiguities in the law and ensure agency-wide uniformity. In addition, agencies cannot always respond to changing circumstances promptly if they must ask the Legislature for a statutory amendment or resort to a regulatory process fraught with delays. Finally, if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts.
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> Of course, the ability of agencies to issue restatements or summaries of their prior decisions and prior advice letters [exceptions to the APA which the Supreme Court articulated in the Tidewater case] mitigates these concerns to some extent...If in some circumstances agencies should also be free to adopt

regulations informally and without following the APA's elaborate procedures, then the Legislature should state what those circumstances are and what lesser procedural protections are appropriate. Until it does, we decline to carve out an exception for interpretive regulations that we do not believe the language of the APA adequately supports.

2. Definition of interpretive statements: An interpretive statement would be defined as "a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or regulation or other provision of law, or a court decision, or an agency order." See Wash. Rev. Code §34.05.010(8). Thus this definition requires that the interpretive statement be properly labelled as such. It allows statements interpreting any of the legal texts the agency is responsible for implementing--statutes, regulations, court decisions, or agency adjudicatory decisions.

This approach avoids the difficult definitional problem of identifying interpretive rules under federal law, an issue that has been litigated hundreds of times. Interpretive statements under this proposal are self-identifying; they are labelled and, as explained in paragraph 4, by definition they lack the force of law.

3. Publication: Interpretive statements must be filed with OAL within ten days of adoption and would be published each week in a separate section of the California Regulatory Notice Register. We leave to OAL the details of working out the most appropriate form of publication.

4. Interpretive statements do not have the force of law: The statute should provide that a document labelled as an interpretive statement does not have the force of law. This means that nobody has to follow it if they disagree with it, even though most people will probably decide to follow it to avoid hassles.

What do we mean by "force of law?" A rule or order has the force of law if people are bound by it (unless, of course, a court later sets it aside). A rule or order has the force of law if the agency that adopts it is acting pursuant to a power delegated to it by the legislature to bind parties. Thus a rule or order has the force of law if i) a statute has delegated power to the agency to make rules or orders and ii) the agency intends to use that power. The APA provides various safeguards, including elaborate notice and comment procedure and mandatory OAL scrutiny, when agencies adopt regulations that have the force of law. Similarly, due process and the APA provide elaborate safeguards when agencies adopt adjudicatory orders that have the force of law.

Most but not all agencies have delegated power to make law and bind private parties through regulations. Most but not all agencies also have power to make law and bind private parties through adjudication. Regulations that have the force of law should only be adopted by agencies after proper notice and comment procedure and OAL scrutiny. A regulation that is labelled as an interpretive statement, by definition, does not have the force of law. The adopting agency has declined to use its delegated power to make law (assuming it has such delegated power), because it has adopted its statement in a form which the APA explicitly will provide lacks the force of law.

Of course, an agency might apply a previously-adopted interpretive statement to a private party in the course of an adjudicatory decision against the party. In that situation, the adjudicatory decision has the force of law and parties must abide by it (unless it is set aside by a court). However, the interpretive statement, and the agency precedent applying it, would not be binding on any other party until the agency applied the precedent to them. In short, the fact that an interpretive statement might achieve the force of law through being applied by an agency in a subsequent adjudicative decision does not, in itself, give the interpretive statement the force of law.

5. Interpretive statements and judicial review: Normally the ripeness requirement would preclude judicial review of an interpretive statement before it is applied by the agency to a party. In unusual circumstances, however, the statement could be challenged under the exception to the ripeness requirement. Proposed judicial review statute CCP §1123.140; National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C.Cir. 1971). This exception calls for a showing that "postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement."

If an interpretive statement is challenged in court (either before or after it is applied to a private party), the court would exercise independent judgment about whether the agency had erroneously interpreted the law. However the court could give the interpretation deference under appropriate circumstances, such as whether the interpretation is of long standing, whether the agency has held it consistenty, whether it was adopted contemporaneously with adoption of the text being interpreted, whether the material being interpreted is technical or complex, whether the interpretation received careful consideration, etc. See proposed CCP §1123.420 and the comment to that section.

If an agency failed to follow the procedural requirements set forth in the new statute (i.e. failed to properly label the rule as an interpretive statement or failed to file it with OAL), the reviewing court should review the agency's interpretation

without giving it any deference. See Tidewater at 198 (no deference given to improperly adopted interpretation but the agency's action is not automatically invalidated).

6. Challenges before OAL: The statute would provide that any person could challenge an interpretive statement before OAL. The person could challenge the statement on the ground of consistency with the legal text being interpreted or on the grounds that the agency had failed to follow appropriate procedure (i.e. proper labelling or publication). If OAL failed to dispose of the challenge within 30 days after it is filed [perhaps this should be 60 days] the challenge would be deemed rejected.

7. An example. This example came up in discussions with OAL. Suppose that by statute an agency has delegated power to prevent "misbranding" of milk. The agency might exercise that delegated power by adopting a regulation requiring that "raw milk" contain a specific health warning. In such case, the regulation would have the force of law. It could only be adopted by fully complying with the rulemaking provisions of the APA. Anyone who sold raw milk without the label would be punished for violating the regulation. A court would review the regulation by deciding whether the decision to require the particular warning was "reasonably necessary" in light of the facts in the record. See Prop. CCP §1123.450.

Alternatively, suppose the agency adopted an interpretive statement that the word "misbranding" would be interpreted to mean that raw milk must bear a specific health warning. Of course, the agency could also do this through a specific advice letter to milk producers, action which Tidewater made clear was not subject to rulemaking procedure.

If the agency adopted this interpretation (either through a specific advice letter or a properly publicized interpretive statement), its interpretation would not have the force of law. If it prosecutes milk producers for misbranding, it would have to do so under the statute, not the interpretive statement. A court would probably find that the agency's interpretation, evidenced in the interpretive statement, was an incorrect interpretation of the word "misbranding," because it is simply not a likely definition of the word by any guide that the court might consult. It would act exactly the same as if the interpretive statement had been in an advice letter or had never before been articulated by the agency until the particular case. The important points are

- that the interpretive statement has no legal force and
- the court has power to independently decide questions of law, such as interpretation of words in a statute. It does not decide the issue as an abuse of discretion as it would if the

agency had required a particular label through exercising delegated power in a regulation.

8. Direct final rules. Commission Memorandum 97-12 refers to "direct final rules" at p. 9. A direct final rule is one that has a trivial impact; the agency thinks that nobody will complain about it. However, in many cases, the rule will have the force of law.

Under an exception for direct-final rules, the agency first publishes the direct final rule and informs the public that if nobody objects within a set period (say 60 days) the rule will be adopted without further formalities. If someone objects, the rule is then subjected to normal notice and comment procedure. Direct-final rulemaking is a definite time-saver. The Commission should recommend that direct-final rules be permitted under a new rulemaking exception.

The rationale for the two exceptions is entirely different. Direct-final rules, by definition, have trivial impact (and if the agency is wrong about the impact, any person can compel the agency to go through the normal rulemaking process). The triviality of the impact suggests that it is inefficient and a waste of resources to go through any rulemaking procedure at all (other than publication).

Interpretive statements, in contrast, may well have a substantial practical impact and people may object to them. Nevertheless, as Tidewater recognized, imposing the APA process on the adoption of interpretative statements produces results that are bad for the public and the agencies. The interpretive statement exception suggested in this memo has several provisions that are designed to protect the public: i) the statement must be labelled, ii) the statement necessarily lacks the force of law, iii) the statement must be published, iv) the statement can be challenged before OAL, and v) if the procedural requirements are not followed, a reviewing court can give no deference to the statement.

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