Study N-200 October 23, 1997

Memorandum 97-73

Judicial Review of Agency Action: OAL Comments and Other Issues on SB 209

Attached to this memorandum is a letter from the Office of Administrative Law expressing concerns about the draft statute. This memorandum addresses OAL concerns and matters left over from the last meeting.

REPLACING TRADITIONAL MANDAMUS

OAL is concerned about replacing traditional mandamus with the draft statute. Robert Bezemek has expressed similar concerns for the California Federation of Teachers. The staff does not think this concern has a realistic basis. It is well-settled that, except as provided by statute, the same rules apply both to administrative and traditional mandamus. In Saleeby v. State Bar, 39 Cal. 3d 547, 561, 702 P.2d 525, 216 Cal. Rptr. 367 (1985), the court said:

> The two avenues to mandamus [administrative and traditional] in fact bear many similarities. . . . "Of course, mandamus pursuant to section 1094.5, commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of a 'separate and distinct legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' . . . The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except when modified by statute.

Accord, California Administrative Mandamus, § 1.3, at 4-5, § 1.8, at 8 (2d ed., Cal. Cont. Ed. Bar 1989); California Civil Writ Practice § 6.1, at 189 (3d ed., Cal. Cont. Ed. Bar, rev. May 1997).

Contrary to OAL's belief, the draft statute was not drawn initially from the administrative mandamus statute. Rather the 1981 Model State Administrative Procedure Act was used as the basis for early drafts. The Model Act does not distinguish between judicial review of adjudication, quasi-legislative action, or other agency action. See MSAPA §§ 5-101 (act provides for judicial review of "agency action"), 1-102 ("agency action" broadly defined). Professor Asimow recommended following the Model Act in California by replacing administrative

and traditional mandamus and other provisions for judicial review with a "single, straightforward statute" for review of all forms of state and local agency action.

Administrative Mandamus Provisions Generalized

Although the Model Act provided the basic framework for the draft statute, we have been careful to show the disposition of each provision of the administrative mandamus statutes, Code of Civil Procedure Sections 1094.5 and 1094.6. Some of these are appropriate for generalization to apply to all judicial review proceedings. Examples are:

(1) Only final agency action is reviewable. Section 1123.120. Traditional mandamus is not available at an intermediate stage of an agency proceeding unless an exception to the exhaustion doctrine applies. Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 293, 109 P.2d 942 (1941); California Civil Writ Practice, *supra*, § 6.4, at 195.

(2) No jury trial. Section 1123.740. Although advisory juries are permitted in traditional mandamus, they are in fact rarely used. There is no sound policy reason for different jury availability for judicial review of adjudication or quasi-legislative, ministerial, or informal action.

(3) Cost of preparing the record borne by petitioner and taxable as costs to losing party. Sections 1123.910, 1123.920. There is no sound policy reason for different cost provisions depending on the type of action being reviewed.

(4) Admissibility of extra-record evidence. Section 1123.850. Under Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995), the case law closed record rule for traditional mandamus is closely similar to the statutory rule for administrative mandamus. Although the draft statute preserves the special rule for review of state agency rulemaking under the APA (no evidence admissible that was not in existence at the time of the agency proceeding), there is no sound policy reason for different rules on admissibility of extra-record evidence on judicial review of adjudication or ministerial or informal action.

(5) Court discretion to stay agency action. Section 1123.720. In traditional mandamus as in administrative mandamus, the court has power to stay agency action. California Civil Writ Practice, *supra*, § 9.21, at 305. There is no sound policy reason why court discretion to issue a stay should differ depending on the type of action being reviewed.

(6) Disposal of the administrative record. Section 1123.840. General provisions in the Code of Civil Procedure govern disposal by the clerk of administrative records introduced in the trial of a "civil action or proceeding." Code Civ. Proc. § 1952. "Proceeding" includes traditional mandamus. 3 B. Witkin, California Procedure *Actions* § 14, at 67 (4th ed. 1996); 8 B. Witkin, California Procedure *Extraordinary Writs* § 6, at 786 (4th ed. 1997). There is no sound policy reason why disposal provisions should differ depending on the type of action being reviewed.

Other Provisions Generalized

Other provisions not in the administrative statutes apply to all judicial review proceedings, regardless of the type of agency action being reviewed. Examples are court discretion to deny review, most standing rules, exhaustion of administrative remedies, most standards of review, burden of proof, jurisdiction, venue, contents of the petition for review and the administrative record, and applicability of rules of practice for civil actions. There is no sound policy reason why these provisions should generally differ depending on the type of action being reviewed.

Adjudication Provisions Not Generalized

Provisions in the administrative mandamus statutes appropriate for review of adjudication but not appropriate for review of other kinds of agency action are limited in the draft statute to review of adjudication. For example, the time limits of Sections 1123.630 and 1123.640 apply only to review of adjudication, not to other kinds of agency action. A special standing rule applies to review of adjudication. Section 1123.240. A special rule applies to internal administrative review of adjudication. Section 1123.320. There is a special exception to the exact issue rule for adjudication. Section 1123.350(b)(4). Special weight is given to credibility determinations in a state agency adjudication, and there is a special provision for independent judgment review of a determination of fact made by an administrative law judge of the Office of Administrative Hearings that is changed by the agency head. Section 1123.430. The existing standard of review of factfinding in local agency proceedings is preserved. Section 1123.440. The administrative mandamus provision on type of relief is preserved. Section 1123.730(c). A special provision permits the court to take evidence in reviewing adjudication where the standard of review is independent judgment. Section

1123.850. Proceedings in forma pauperis to review adjudication are preserved. Section 1123.940.

Rulemaking Provisions Not Generalized

Provisions in the draft statute appropriate only for review of rulemaking are so limited. For example, a court may not enjoin or prohibit an agency from adopting a rule. Section 1123.130. And a person may obtain judicial review of rulemaking notwithstanding failure to participate in the rulemaking proceeding or to petition the agency for reconsideration. Section 1123.330.

Preservation of Case Law

OAL is concerned that, because the draft statute replaces traditional mandamus (Section 1121.120), cases under Code of Civil Procedure Section 1085 (traditional mandamus) such as Johnston v. Department of Personnel Admin., 191 Cal. App. 3d 1218, 236 Cal. Rptr. 853 (1987), will no longer have any validity. At the earlier request of OAL, we specifically preserved the *Johnston* case by citing it in the Comment to Section 1123.420. We could add the following to the Comment to Section 1121.120 further to try to alleviate OAL's concern:

> Although the procedure provided in this title for judicial review of agency action replaces administrative and traditional mandamus and other forms of judicial review, prior case law is superseded only as required by inconsistent language in this title. To the extent consistent with this title, prior case law remains unaffected.

Conclusion

The draft statute has been carefully tailored for judicial review of particular kinds of proceedings when necessary, and has been generalized to apply to all proceedings when a general rule is preferable. Although we have retreated from our stated goal of having a unified judicial review statute by exempting certain local legislative acts, this does not mean we must therefore exempt traditional mandamus as well. The staff believes it is incumbent on those who wish to preserve traditional mandamus to show precisely how the draft statute would undesirably affect existing law, and not merely to raise vague general theoretical concerns. Specific issues identified in the OAL letter are addressed below.

APPLICATION OF DRAFT STATUTE TO SMALL CLAIMS ACTIONS

A provision in Section 1121 says the draft statute does not apply "[W]here a statute provides for trial de novo." Another provision in Section 1121 says the draft statute does not apply to "[l]itigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." These two provisions do not make clear the extent to which the draft statute supersedes small claims actions against government agencies. The second of these provisions and its accompanying Comment (set out on page 6, *infra*) were suggested by the State Department of Health Services, and were intended to require judicial review of DHS' administrative determination of Medi-Cal claims by health care providers to be by mandamus, and not by piecemeal actions in small claims court. See Memo 96-4 at 12.

It would be clearer to deal with DHS' small claims problem directly. **The staff recommends revising Sections 1121 and 1121.120 in the draft statute, and amending Section 14104.5 of the Welfare and Institutions Code, as follows:**

> 1121. (a) This title does not apply to any of the following:
> . . . .
> (2) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have <u>express</u> statutory authority to determine the claim.
>
> 1121.120. (a) The procedure provided in this title for judicial review of agency action is a proceeding for extraordinary relief in the nature of mandamus and shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief, and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action.
> (b) Nothing in this title limits use of the writ of habeas corpus.
> (c) <u>Except as otherwise provided by statute, nothing in this title prevents or limits a small claims action.</u>
> <u>(d)</u> Notwithstanding Section 427.10, no cause of action may be joined in a proceeding under this title unless it states independent grounds for relief.
>
> **Comment.** . . . Subdivision (c) makes clear that nothing in this title prevents or limits a small claims action. For a statute that provides otherwise, see Welf. & Inst. Code § 14104.5.

> [Welf. & Inst. Code §] 14104.5. Notwithstanding any other provision of law, the director shall by regulation adopt such procedures as are necessary for the review of a grievance or complaint concerning the processing or payment of money alleged by a provider of services to be payable by reason of any of the provisions of this chapter. After complying with these procedures, if the provider is not satisfied with the director's decision or his or her claim, he or she may , not later than one year after receiving notice of the decision, seek ~~appropriate~~ judicial ~~remedies~~ review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. This section shall be the exclusive remedy available to the provider of services for moneys alleged to be payable by reason of this chapter.
>
> This section shall not apply to those grievances or complaints arising from the findings of an audit or examination made by or on behalf of the director pursuant to Sections 10722 and 14170. Article 5.3 (commencing with Section 14170) shall govern the grievances or complaints.

These proposed revisions have been approved by the Department of Health Services. These revisions also require deleting language from the Comment to Section 1121 that reads:

> This title does apply to denial by the Department of Health Services of a claim by a health care provider where the department has statutory authority to determine such claims. See, e.g., Welf. & Inst. Code §§ 14103.6, 14103.7 [staff note: this latter section reference is incorrect]. Judicial review of denial of such a claim is under this title and not, for example, in small claims court. See Section 1121.120 (this title provides exclusive procedure for judicial review of agency action).

OTHER SECTIONS IN THE DRAFT STATUTE

The staff plans to discuss only the material below preceded by a bullet [•].

§ 1123.110. Requirements for judicial review

At the last meeting, the Commission asked the staff to consider whether the discretionary ripeness doctrine should be codified, and to get the views of Professor Robert Best of McGeorge Law School. The staff will supplement this memorandum when we have this information.

§ 1123.330. Judicial review of a rule

At the last meeting, the Commission asked the staff to make clear in the Comment that subdivision (b) (a "person may obtain judicial review of a rule whether or not a proceeding to enforce the rule has been commenced") is not intended to deprive the court of discretion to decline to grant judicial review on the ground that the controversy is not ripe for review. **The staff recommends adding the following to the second paragraph of the Comment:**

> Subdivision (b) continues existing law. See 1 G. Ogden, California Public Agency Practice § 22.01 (rev. June 1989) (judicial review of a rule may be had before commencement of enforcement proceedings). Subdivision (b) does not limit preconditions for judicial review, including exhaustion of administrative remedies and that the controversy be ripe for judicial review. See Section 1123.110 and Comment.

§ 1123.420. Review of agency interpretation of law

OAL is concerned that, by citing Professor Asimow's law review article in the Comment to Section 1123.420, we have approved the federal distinction between legislative and interpretive rulemaking. The pertinent part of Professor Asimow's article discusses the deference courts should give to agency interpretation of law when the power to interpret has or has not been delegated to the agency by statute. However, we long ago deleted from Section 1123.420 the language referring to delegated authority to interpret. The staff is willing further to address OAL's concern by adding the following to the Comment to Section 1123.420:

> Nothing in Section 1123.420 or this Comment is intended to incorporate or approve the distinction made in federal law between interpretive and legislative regulations.

§ 1123.460. Review of agency procedure

• Section 1123.460 provides for independent judgment review with appropriate deference to the agency's determination on:

> (a) Whether the agency has engaged in an unlawful or unfair procedure or decisionmaking process, or has failed to follow prescribed procedure.

> **Comment.** . . .
>
> As used in subdivision (a), "unfair" procedures are not limited to those that offend due process or violate a statute. This rejects the rule of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (courts may not require agencies engaged in rulemaking to take procedural steps not required by constitution or statute).

• OAL would preserve *Vermont Yankee,* as the Commission's original recommendation did. By not including the "or unfair" language, the Commission's original recommendation was consistent with the Model State APA. See MSAPA § 5-116(c).

• The "or unfair" language was added at the May meeting at the suggestion of Steven Pingel and David Casey of the Consumer Attorneys of California. Mr. Pingel noted that the existing administrative mandamus statute, Code Civ. Proc. § 1094.5(b), requires the court's inquiry to include "whether there was a fair trial":

> Present law permits judicial review of whether there was a "fair trial" in the administrative hearing. . . . I have consistently opposed efforts to water down the remedies presently provided by administrative mandate, especially where fundamental vested rights are involved, such as in adjudication of employee disciplinary or disability retirement rights.

• Mr. Casey's letter said:

> Under SB 209, too much deference is given to administrative agencies. The bill eliminates the right to have an "unfair" administrative hearing reviewed. Since the petitioner already has the burden of proving that the agency action was invalid, it is unfair to require the judge (the purportedly independent decisionmaker) to give unfettered deference to the agency.

• Professor Asimow noted that California does not follow *Vermont Yankee*, and that California courts have occasionally mandated administrative procedures not required by statute, either in the interest of fair procedure or to facilitate judicial review. Professor Asimow concluded that *Vermont Yankee* should be rejected in California:

> . . . *Vermont Yankee* unduly inhibits the ability of the judiciary to respond creatively to real problems of unfairness and injustice in

> the administrative process or to unforeseen problems arising out of the judicial review function. At the same time, the decision creates a good deal of unnecessary confusion about which common law doctrines it displaces. Therefore, California should not follow Vermont Yankee. Our courts should retain the power to require super-statutory administrative procedures.

Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1246-47 (1995). Thus Professor Asimow's view is consistent with that of Mr. Pingel and Mr. Casey, and with Section 1123.460 in its present form.

• Should there be a special rule preserving *Vermont Yankee* for judicial review of a state agency regulation adopted under the Administrative Procedure Act? Professor Asimow cites three cases for the proposition that California courts occasionally mandate procedures not required by statute: Saleeby v. State Bar, *supra*; Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974); Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982).

• *Saleeby* was an administrative adjudication, but also involved State Bar (non-APA) rules. The court held that "to comport with due process requirements, applicants [for reimbursement from the Client Security Fund] must be afforded an opportunity to be heard and respond to the bar's determinations and the bar must issue sufficient findings to afford review." Although the State Bar rules did not require findings, the court added a requirement that the bar include findings in the record to facilitate judicial review. Authority to require the agency to add to the record an explanation of its action is already codified in the draft statute in Section 1123.820(d).

• *Topanga* was an administrative adjudication involving a zoning variance granted by a county agency. The court held the agency must make findings sufficient to facilitate judicial review, finding this requirement to be "implicit" in the administrative mandamus statute.

• *Ettinger* was an administrative adjudication to revoke or suspend a physician's license to practice medicine. The court imposed a new requirement, not found in a statute, that in such proceedings the agency must prove its case by clear and convincing proof to a reasonable certainty.

• None of these California cases would be affected by providing that the "or unfair" language does not apply to judicial review of a state agency regulation

adopted under the APA. Such a limitation could be justified on the ground that the APA already has detailed procedural protections, including public notice of and opportunity to comment on proposed regulations, and OAL review. See Gov't Code §§ 11346.4, 11346.5, 11349.1. We could do this by revising Section 1123.460 as follows:

> 1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving appropriate deference to the agency's determination of its procedures:
>
> (a) Whether the agency has engaged in an unlawful ~~or unfair~~ procedure or decisionmaking process, or has failed to follow prescribed procedure.
>
> (b) Whether the agency has engaged in an unfair procedure or decisionmaking process. This subdivision does not apply to judicial review of a state agency regulation adopted, amended, or repealed under the rulemaking portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> (c) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

• OAL is concerned that the Comment to Section 1123.460 says the section codifies existing law, but cites only federal law and the Model Act. The staff thinks this point is well-taken. **The staff recommends revising the first paragraph of the Comment to read:**

> **Comment.** Section 1123.460 ~~codifies~~ is consistent with existing law concerning the independent judgment of the court ~~and the deference due agency determination of procedures.~~ on questions of a legal character, including whether the administrative proceedings have been fair. Bekiaris v. Board of Educ., 6 Cal. 3d 575, 587, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). *Cf.* 5 U.S.C. § 706(2)(d) (federal APA); Mathews v. Eldridge, 424 U.S. 319 (1976). Section 1123.460 is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law).

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

At the last meeting, the Commission asked for background on the meaning of "announced" in Section 1123.640, shown below in boldface:

> 1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section 1123.630, shall be filed not later than 90 days after the decision is **announced** or after the notice required by Section 1123.650 is delivered, served, or mailed, whichever is later.
>
> (b) Subject to subdivision (c), the time for filing the petition for review is extended as to a party:
>
> (1) During any period when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.
>
> (2) Until 30 days after the record is delivered to the party if, within 15 days after the decision is **announced**, the party makes a written request to the agency to prepare all or any part of the record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.
>
> (c) In no case shall a petition for review of a decision described in subdivision (a) be filed later than 180 days after the decision is **announced** or reconsideration is rejected, whichever is later.

Under the existing administrative mandamus statute for local agencies (Code Civ. Proc. § 1094.6), the

> petition shall be filed not later than the 90th day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, or for a written decision or written findings supporting the decision, in any applicable provision of any statute, charter, or rule, for the purposes of this section, the decision is final on the date it is **announced**. . . . If there is a provision for reconsideration, the decision is final for purposes of this section upon the expiration of the period during which such reconsideration can be sought; provided, that if reconsideration is sought pursuant to any such provision the decision is final for the purposes of this section on the date that reconsideration is rejected. If there is a provision for a written decision or written findings, the decision is final for purposes of this section upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ.

The existing scheme seems unnecessarily complex. The draft statute simplifies it by commencing the running of the limitations period from the date the decision is announced, but extending the period if reconsideration is sought pursuant to express statute, rule, charter, or ordinance. Cases in the annotations to Code of Civil Procedure Section 1094.6 do not further define the term "announced." Both Ogden and the CEB treatise refer to the requirement that the

decision be "announced," but do not further define it. See 2 G. Ogden, California Public Agency Practice § 51.10[3] (rev. Apr. 1996); California Administrative Mandamus, Update April 1997, § 7.12, at 97 (2d ed., Cal. Cont. Ed. Bar). Webster's New Collegiate Dictionary defines "announce" as meaning to "give public notice . . . ; to publish; proclaim; herald." This seems adequate.

Gov't Code § 11350 (amended). Judicial declaration on validity of regulation

• SB 209 was amended to exempt judicial review of underground regulations (those not adopted under the APA) from the draft statute, leaving such regulations to be reviewed, as at present, by declaratory relief. OAL is concerned that we have limited the remedies available for review of underground regulations, so that the court will no longer be able to grant specific relief available in a mandamus proceeding, for example, by ordering an agency not to rely on the regulation. See, e.g., Grier v. Kizer, 219 Cal. App. 3d 422, 430, 268 Cal. Rptr. 244 (1990). Code of Civil Procedure Section 1061 permits the plaintiff in an action for declaratory relief to ask for a declaration "either alone or with other relief." **The staff recommends making clear in Section 11350 that injunctive relief is available in judicial review of an underground regulation:**

> (b) Judicial review of a rule alleged to be in violation of Section 11340.5 is not subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. In a proceeding for judicial review of a rule alleged to be in violation of Section 11340.5, the court may grant injunctive or other relief in addition to the relief authorized by subdivision (a).

The remaining subdivisions of Section 11350 must be relettered accordingly.

Respectfully submitted,

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October 8, l997

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Re: Commission Memorandum 97-56 (August 27, l997); SB 209 (as amended Sept. 11, l997), the Commission's proposal to fundamentally revise statutory procedures for "judicial review of agency action"

Dear Mr. Sterling:

The Commission has requested comments on Memorandum 97-56, dated August 26, l997. The Office of Administrative Law ("OAL") submits the following thoughts. We appreciate the opportunity to comment on this proposal.

OAL continues to have serious concerns about SB 209, for the reasons expressed orally at various Commission meetings, in discussions with Commission staff, and in letters and memos. See, e.g., our letters dated December 7, l995; February 27, l997 [Attached to Minutes of Meeting of February 27, l997]; March 28, l997 [First Supplement to Commission Memo 97-16, exhibit p. 6]; April 7, 1997 [First Supplement to Commission Memo 97-16, exhibit p. 16]; and April 17, l997 [Commission Memo 97-26, Exhibit p. 11]. We have been unable to locate a Commission memo which includes the December l995 OAL letter. We are accordingly attaching a copy of the above-noted 1995 letter to today's letter as Appendix "A."

The recent amendments to the Commission's proposal (SB 209) contain both good news and bad news. The good news is that a definite effort has been made to fix the single most glaring flaw in the proposal: the clear intent is that state agency "underground regulations" will no longer be covered by the unified judicial review scheme. The bad news is that other problems have not been fixed, and some revisions have created new problems.

Rather than focus solely on particular words and phrases in the amended proposal,

we must reiterate at the outset that we continue to have fundamental differences with the ambitious, all-encompassing approach to judicial review taken in SB 209. Taking the existing administrative mandamus statute (Code of Civil Procedure section 1094.5, judicial review of state agency quasi-judicial decisions) as its basis, the proposal was designed to encompass judicial review of both quasi-judicial and quasi-legislative actions of not only state but also local agencies.

CHANGES TO ACCOMMODATE *LOCAL* GOVERNMENT CONSTITUENCIES; LATE-EMERGING BUT UNDERSTANDABLE CONCERNS

In his 1986 treatise *State Administrative Rulemaking*, Professor Bonfield notes at page 47 that the Model State Administrative Procedure Act provision exempting local government bodies from its coverage "reflects a judgment that the problems of dealing with both state and local agencies in one statutory scheme are insurmountable." The statutory scheme he was thinking of would encompass administrative rulemaking, administrative adjudication, and judicial review of agency action. Professor Bonfield stated at page 48 that a "separate APA should, therefore, be drafted to deal specifically with the special needs and circumstances of local government administrative units." Indeed, in California in 1996, objections were raised concerning the Commission's proposal to cover both state and local entities in one unified statute.

When they belatedly became aware of the Commission's judicial review proposal in late l996, lawyers representing California counties persuaded the Commission to make a large number of significant changes. If we recall correctly, the county representatives felt that the proposal would make too many needless changes; that virtually all concerned parties felt that existing California law was in general functioning satisfactorily; that sweeping changes would only confuse and unsettle things.

One of most important county-requested changes totally exempted two types of local enactments from the unified scheme and made clear that existing California law continued to apply to these enactments. Proposed section 1121 was revised to expressly state that the new unified scheme did *not* apply to

> "(a)(4) judicial review of either of the following enacted by a county board of supervisors or city council:
>
> (1) An ordinance or regulation.
>
> (2) A resolution that is legislative in nature."
> (SB 209, p. 6, lines 6-8.)

The official comment to section 1121 states:

> "Matters exempted from this title by subdivision (a)(4) *remain subject to judicial review by traditional mandamus or by an action for injunctive or declaratory relief.*" (Emphasis added.)

The Commission was persuaded that current law represented the better public policy with regard to judicial review of local agency enactments. This retention of current law marked a dramatic retreat from the grand design approach.

CHANGES TO ACCOMMODATE CONSTITUENCIES OF *STATE* AGENCIES

The county-proposed changes were apparently frustrating to the Commission because they were requested at the last minute, and many of them had the effect of punching noteworthy holes in the painstakingly developed grand design for a unified judicial review scheme. This year, the Commission has been confronted with a series of concerns expressed by various parties vitally interested in judicial review of **state** agency actions. These concerns, many of them late-emerging, have been expressed by OAL, Consumers Union, former Commission consultant Gene Livingston, and others.

These state-agency issues as we see them are (1) whether or not there are facts demonstrating that current law should be changed, and (2) if the need for a change is shown, what would be the best public policy. We don't want to see the tail wagging the dog. The recurring question should be what is the best public policy, not whether or not the grand design can be slightly modified in some way to accommodate the public concern.

The main focus during the years of drafting the Commission proposal was judicial review of *quasi-judicial state agency* actions. For instance, the proposal to drop "independent judgment" review of adjudicatory decisions in favor of "substantial evidence" review led to many heated discussions. Relatively little time, however, was spent discussing review of *quasi-legislative state agency* actions. One reason for this was Professor Asimow's strong conviction that the same standards and procedures should apply to both quasi-judicial and quasi-legislative actions. If one accepts this premise, it is of course undesirable to have any separate statutory provisions governing review of quasi-legislative actions.

This leads us to consideration of two persistent realities.

First, the Commission has been assisted in its administrative law study since l988 by UCLA Law Professor Michael Asimow, the Commission's academic consultant. Professor Asimow is a very intelligent, articulate, energetic and influential person, who has definite policy priorities. According to Consumers Union, Professor Asimow "has written several articles advocating that [state] agencies need more freedom from judicial review." (Letter of March 31, l997, p.2; attached to Commission Memorandum 97-16, exhibit p. 7.) Also, in 1996, Professor Asimow submitted a friend of the court brief on behalf of himself to the California Supreme Court in the *Tidewater* case in which he urged the court to read the Administrative Procedure Act in such a way that "interpretive guidelines" would be totally exempt from notice and comment requirements.

In addition to having definite policy preferences, Professor Asimow has urged that changes in California law be sweeping in nature. The l988 Scope of Study document prepared for the Commission by Professor Asimow advocated using the Model State Administrative Procedure Act as the starting point for reviewing administrative law in California. (Proposed section 1123.460, discussed below, is based on a Model Act provision.) The Scope of Study stated at p. 3:

> "*It would be a whole fresh start for California.* This might be a better approach than to perform countless bits of minor surgery on the existing statutory and decisional law which is often outdated and confusing." (Emphasis added.)

In the area of judicial review, this is a very ambitious approach to take. Professor Asimow has, in many ways, persevered in his determination to make "a whole fresh start for California."

The **second** persistent reality concerns the level of participation by private sector representatives in the development of the judicial review proposal. Despite good faith Commission efforts, there has been very limited input from **private** sector organizations and attorneys during the entire administrative law study. As OAL's letter to the Commission of June 15, l994, p. 2, noted:

> "Except for one meeting in l993, persons attending Commission meetings on the adjudication statute [SB 523] have, with surprisingly few exceptions, been representatives of state agencies. As the years passed, individual Commissioners periodically expressed concern about the problem during meetings, and discussed ways to increase such input, but none proved very effective."

One of the reasons private sector input was limited stemmed from a sharp reduction in the Commission's budget several years ago. At that point in time, the Commission was compelled to begin charging substantial annual subscription fees for copies of studies, memoranda, drafts, etc. Many private sector organizations felt that subscribing was too costly, that it would be cheaper and easier to wait to comment until a bill was introduced. Though the funds were eventually restored, and the subscription policies relaxed, our view is that people still remember the high fee period.

This state of affairs (low level of private sector input) changed dramatically, of course, when SB 209 was introduced. Many private sector entities submitted comments on the bill.

Consider the factors noted above: a persuasive academic consultant with a personal policy agenda; a high rate of participation by state agency staff; and a low rate of participation by private sector representatives. It should not be surprising if the final recommendation fails to come to grips with the "deep-seated problems of agency accountability and responsiveness" which Justice Friedman of the California Court of Appeal referred to in a l976 appellate

opinion. *(California Optometric Association v. Lackner* (l976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.)

The remainder of this letter will focus on the following selected areas of concern, (1) inappropriate injection of federal battles and distinctions, (2) concerns about what will be lost if Code of Civil Procedure section 1085 (ordinary mandate) is swept aside, and (3) disagreements over what constitutes "existing law."

I. INAPPROPRIATE INJECTION OF FEDERAL BATTLES AND DISTINCTIONS

A. AUTHORIZING JUDGES TO IMPOSE ADDITIONAL NON-STATUTORY RULEMAKING REQUIREMENTS ON STATE AGENCIES IS A BAD IDEA (OR, "VERMONT YANKEE GO HOME")

Proposed section 1123.460 ("Review of Agency Procedure"; p. 16, lines 10-19)

Section 1123.460 provides in part:

> "The standard for judicial review of the following issues is the independent judgment of the court, giving appropriate deference to the agency's determination of its procedures:
>
> > (a) whether the agency has engaged in an unlawful or unfair procedure or decisionmaking process, or has failed to follow prescribed procedure. . . ."

Section 1123.460 presents three problems. **First**, the section permits judges to impose new and additional rulemaking requirements in the process of deciding cases--requirements above and beyond the detailed procedures already present in the rulemaking part of the APA. **Second**, the comment to section 1123.460 cites mostly federal statutory and case law authorities in support of the proposition that the section codifies existing [California] law. **Three**, it illustrates the risks of taking familiar, non-problematic language from an existing statute governing review of quasi-judicial actions and making that familiar language applicable to quasi-legislative actions as well.

The official comment as revised August 26, l997, in Commission Memorandum 97-56, second attachment, p. 8, states in part:

> "As used in subdivision (a), 'unfair' procedures are not limited to those that offend due process or violate a statute. This rejects the rule of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (l978) (courts may *not* require agencies engaged in rulemaking to take procedural steps not required by constitution or statute)." (Emphasis added.)

We appreciate the addition of this above-quoted paragraph to the official comment, as originally set out on p. 87 of the February l997 *Recommendation* . The addition makes it much easier to see what is going on. Previously, it was necessary to refer to one of the background studies published in the *Recommendation* volume in order to ascertain the legislative intent underlying section 1123.460. In the "Scope of Review" background study in the Commission's published *Recommendation* (p. 397), Professor Asimow states in effect that the purpose of section 1123.460 is to make clear that, in the rulemaking arena, the court "can *impose* appropriate procedures" (emphasis added) on state agencies, procedures that are required by neither statute nor the constitution. Prior to the landmark l978 U.S. Supreme Court *Vermont Yankee* case (cited in immediately preceding paragraph) federal courts "imposed extra-statutory rulemaking procedures on agencies, such as *cross-examination in rulemaking*." (Recommendation, p. 398, note 336; emphasis added.) The l978 case, Professor Asimow reports, "doused the enthusiasm of the federal courts for extra-statutory procedural innovation." (Recommendation, p. 398.)

We question the wisdom of enacting an open-ended new provision which may lead to the imposition of new procedural requirements. Statutory rulemaking procedures applying to state agencies *subject to the APA* are already complex and demanding. OAL has been working with the Commission to make the rulemaking part of the APA less burdensome to state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations. Some progress has already been made in this area: for instance, the precedent decision exemption from the APA that was created in the Commission's l995 administrative adjudication bill, SB 523. More work is needed toward this end.

Similarly, we question the wisdom of giving *judges* carte blanche to create and impose new, additional rulemaking requirements. Judges play a crucial role in interpreting statutory and constitutional law. But it is not a good idea to give them a roving commission to throw new procedural hurdles in the path of state regulatory agencies. We certainly would not want to see a judge ordering a state agency to allow cross-examination in oral rulemaking hearings. Cross examination is cited in the Commission's background study as example of an "extra-statutory procedural *innovation.*" (Quoted material from Recommendation, p. 398, emphasis added.) California does not need this procedural innovation. True, such a requirement would be "new," but it would not be good. If cross-examination were required in oral rulemaking hearings, the hearings could go on for days or weeks!

Second, the first sentence of the official comment states that section 1123.460

> "codifies existing law concerning the independent judgment of the court and the deference due agency determinations of procedures. Cf. 5 U.S.C. sec. 706(2)(D)(federal APA); Mathews v. Eldridge, 424 U.S. 319 (l976). Section 1123.460 is drawn from l981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former [CCP] section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law)."

Clearly, only one of the authorities cited is from California law. And, that citation is to the CCP section currently governing judicial review of **quasi-judicial** proceedings. Again, we note that it is not necessarily appropriate to take policies developed to review quasi-judicial actions and extend them so that they apply as well to **quasi-legislative** actions. Cross-examination, for instance, may well be essential to a "fair trial" in a quasi-judicial proceeding aimed at stripping a citizen of his or her license to practice medicine. It gives us pause, however, to contemplate a judge ordering the California Medical Board to allow cross-examination before it could move forward with a proposal to update a regulation governing continuing education requirements.

As stated in OAL's letter to the Commission of March 28, l997, p. 5:

> "Section 1123.460 is appropriate insofar as it applies to determinations by particular adjudicatory agencies of appropriate *quasi-judicial* procedures. It is appropriate for the courts to give deference to determinations of particular agencies when the agency is dealing with rules contained in duly adopted law which applies solely to that agency. Here, the agency would be interpreting the laws it is charged with enforcing."

We agree with the Consumers Union observation:

> " . . . many of the new procedures . . . apply more appropriately to agency adjudication, rather than agency rulemaking. We are concerned that in the rush to create a single, 'unified' framework for judicial review, the important distinctions between adjudication and rulemaking may not be adequately addressed. What works for one type of agency action may not work well for the other and thus a single rule may be unwise." (Letter of March 31, l997, p.2; attached to Commission Memorandum 97-16, exhibit p. 7.)

B. INDIRECTLY ENSHRINING THE FEDERAL "LEGISLATIVE" V. "INTERPRETIVE" RULEMAKING DISTINCTION IN CALIFORNIA LAW BY MEANS OF INCLUDING IT IN SB 209 LEGISLATIVE HISTORY DOCUMENTS IS A BAD IDEA

Material in the background studies found in the official Commission *Recommendation* indicates that existing California law recognizes a distinction between "interpretive"and "legislative" regulations. *Recommendation*, pages. 350-51; note 146 on page 350; note 129 on page 345; note 132 on page 346; note 149 on page 351. This is not a correct statement of existing California law. Twice, the California Supreme Court has unanimously rejected this theory. *Tidewater Marine Western, Inc. v. Bradshaw* (l996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186; *Armistead v. State Personnel Board* (l976) 22 Cal.3d 200, 149 Cal.Rptr. 1. However, the distinction has been the primary academic research interest of Professor Asimow for over 20 years.

Seeing this material in the *Recommendation* makes us uneasy. These background studies are frequently cited in the Commission's official comments. We are not sure what a court would do with this material if it were cited in support of the proposition that the intent of the Legislature in enacting SB 209 was in part to signal its recognition of the interpretive/legislative distinction.

A fuller description of our concerns on this issue is found in Appendix "A" of this letter, a copy of OAL's December l995 letter addressing an earlier version of proposed CCP section 1123.240.

In our view, something clear and definitive needs to done in statutory text to negate the background study material. The proper way in which to approach the issue of whether or not to create the interpretive/legislative distinction (or some variation thereof) in *California* law is to meet the issue head on, as the Commission is doing in the interpretive guideline part of the rulemaking study. Indirect efforts to build support for the distinction may well cause confusion and lead to increased litigation.

II. "NEW BROOM SWEEPS CLEAN"; NOT CLEAR WHAT WILL BE LOST IF, FOR INSTANCE, CCP SEC. 1085 IS SWEPT ASIDE

Code of Civil Procedure sec. 1085, Writ of Mandate (SB 209, p. 4, line 18)

OAL expressed concerns about the effect of SB 209 on CCP sec. 1085 in our letter of March 28, l997, p.4. Other commenters have also raised serious concerns on this issue. For instance, Robert J. Bezemek, in a letter dated July 17, l997, urged the Commission to "recommend *no* changes in the writ of ordinary mandate [CCP sec. 1085]."(Emphasis added.)

The problem is as follows. The existing mandate statute would be dramatically amended to subject such actions to all of the preconditions and requirements of SB 209 (proposed new CCP, title 2). This will likely made it harder for citizens to seek redress in court. Also, much of existing law in this area is in the form of appellate opinions interpreting the current section 1085, which was codified in l872, based on an 1851 enactment. If the intent is to preserve the law contained in these opinions (such as *Johnston v. Department of Personnel Administration*

(1987) 191 Cal.App.3d 1218)(action to enforce statutory right to hearing, striking down underground regulation in the process), language should be added to SB 209 to specifically restate the principle of law underlying the holding in each opinion. If this is not done, it appears that this law will be swept out by the comprehensive provisions of SB 209. Proposed sec.1121.120(a) makes clear that ordinary mandamus is replaced by the new unified form of judicial review.

Our initial reading of SB 209, as amended Sept. 11, suggests that the proposal would (1) allow litigants to continue to be heard in court on state agency underground regulation claims if they seek declaratory relief under a much-revised version of Government Code section 11350 (p. 33, lines 30-31), but at the same time (2) continue to require a series of preconditions in the event these same litigants desire any remedy other than declaratory relief (p. 33, line 24). Ordinarily, a desired remedy in an underground regulations case is for the court, should it find that the agency has failed to follow the law, to enjoin the agency from utilizing the invalidated rule until and unless it has been adopted pursuant to the APA. See OAL letter of February 26, l997, p. 4. It would be helpful to hear the views of private practitioners experienced in this type of litigation.

III. DISAGREEMENTS OVER WHAT IS "EXISTING LAW"

Finally, we have been struck by the sharp disagreements that have emerged over what is existing California law. Stating that the Commission proposal merely continues "existing law" does not answer many questions. In some areas, there appear to be widely varying interpretations concerning exactly what the "existing law" is.

Similarly, as noted above, one official comment cites federal law and the Model APA after stating that proposed section 1123.460 "codifies existing law." In our view, the phrase "existing law" should nearly always be reserved for California statutes and California appellate opinions.

Also, we note that the comment to proposed section 1123.460 (quoted above on page 8) should reflect that CCP section 1094.5 constitutes existing California law for judicial review of quasi-judicial actions, not quasi-legislative actions.

Further, as noted above, the fact that a particular provision of California law exists and works adequately in dealing with review of quasi-judicial actions does not mean that this provision should automatically be made applicable to quasi-legislative actions.

Thank you for considering these comments. If you would like to discuss any of these matters further, please feel free to contact me at (916) 323-6814. My e-mail address is hbolz@oal.ca.gov.

Sincerely,

Herbert F. Bolz

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December 7, l995

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

Re: Tentative Recommendation
"Judicial Review of Agency Action"
(August l995)
Proposed section 1123.420(c)

Dear Commissioners:

The Office of Administrative Law ("OAL") is charged with administering the rulemaking part of the California Administrative Procedure Act ("APA"). See *Grier v. Kizer* (l990) 219 Cal.App.3d 422, 431 (good summary of OAL duties); *State Water Resources Control Board v. Office of Administrative Law* (l993) 12 Cal.App.4th 697, 702 (same).

OAL appreciates the opportunity to take part in the judicial review phase of the administrative law project. We looks forward to the phase of the project addressing agency rulemaking. Our long term objective is to make the rulemaking part of the APA less burdensome for state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations.

We write today to express strong concern that one part of the above noted Tentative Recommendation may in effect substantially diminish opportunities for meaningful public participation in agency rulemaking. The particular words chosen and material cited in the text and comment of one proposed section could lend powerful support to the effort to insulate a large number of significant agency rules from public notice and comment, review by OAL, and publication in the California Code of Regulations. This one part of the Recommendation prematurely and needlessly gets into the issue previously listed as the Commission's primary interest in the upcoming rulemaking phase of

the study.

The Commission's l988 "Scope of Study" document spells out the issues that will be explored in the administrative law study. Several key rulemaking issues are identified. One paragraph suggests that it might be a good idea to adopt into California law some version of two provisions from the *federal* Administrative Procedure Act. The two provisions are extremely significant; they exempt two large categories of agency pronouncements from public notice and comment requirements.

The Scope of Study states:

> **"2. Issues relating to rulemaking":**
>
> > **"a. Interpretive rules:** California notice and comment rulemaking procedures apply even to rules that are strictly interpretive (such as explanatory bulletins) if they are of general applicability. *Armistead v. State Personnel Board*, 22 Cal.3d l98 (l978); GC secs 11,342(b) [now 11342(g)], 11347.5(a) [now 11340.5]. Federal law does not require notice and comment for interpretive rules or policy statements. The l981 Model Act strikes a compromise position. California law may be unrealistic and is probably often ignored in practice (because every agency puts out masses of interpretive communications). Should California adopt some exception for interpretive rules and policy statements?" (pp. 6-7.)

Specifically, OAL is troubled by significant language--borrowed from the area of federal administrative law--that has cropped up in proposed section 1123.420, subdivision (c) ("Review of agency interpretation or application of law"). The intended meaning of this language is spelled out in (1) the comment following section 1123.420 and (2) the authorities cited in the comment.

Section 1123.420, subdivision (c) states:

> "(c) The standard for judicial review under this section of the following agency action is abuse of discretion:

(1) An agency's *interpretation* of a statute, where a statute expressly *delegates* that function to the agency.

(2) An agency's application of law to facts, where a statute expressly delegates that function to the agency .

(3) A local legislative body's construction or interpretation of its own legislative enactment." (Emphasis added.)

The comment to section 1123.420 states:

> "Subdivision (c)(1) codifies the rule that, where the legislature has expressly **delegated** authority to the agency to **interpret** the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. See, e.g., Henning v. Division of Occupational Safety & Health, 219 Cal.App.3d 747, 268 Cal.Rptr. 476 (l990). But 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 the statute. And a delegation of authority to construe a statute is not to be implied merely because the statute is ambiguous. Subdivision (c)(1) applies only when a statute expressly **delegates** to the agency the power to **interpret** particular statutory language. See Asimow, supra at 1198 [*The Scope of Judicial Review of Decisions of California Administrative Agencies*, 43 UCLA L. Rev. 1157]." (Bolded emphasis added.)

The comment cites p. 1198 of the UCLA Law Review article, which contains the following: "This is *not* the same as saying that the legislature delegated to an agency the power to interpret all the words in a statute just because it delegated legislative rulemaking authority to the agency, . . ." Footnote 146 of the article appears at this point, and states in part:

> "As used in this Article, the term '**legislative**' rule or regulation means one adopted by an agency pursuant to **delegated** lawmaking power; an '**interpretive**' rule or regulation is not adopted pursuant to delegated rulemaking power." (Bolded emphasis added.)

This distinction between "legislative" and "interpretive" rules is critical--in federal administrative law. According to the California Supreme Court, however, the distinction does not exist in California law. *Armistead*, 22 Cal.3d at 202. In other words, while the federal APA permits federal agencies to issue "interpretive" rules without public notice and comment, the California APA requires notice and comment for both "interpretive" and "legislative" rules. The distinction is a difficult one, described by a federal appellate court as "fuzzy," and by a leading scholar as "difficult to apply in practice . . . the subject of constant litigation."

The problem we face today is that the words of section 1123.420, the comment, and the law review citation seem to have the effect of incorporating this troublesome federal distinction into California law. This is most premature. It creates a host of problems, including:

(1) there are hundreds of statutes which expressly "delegate" to agencies the power to interpret those statutes. How will courts know which statutory language involves (a) more deferential "abuse of discretion" review delegations and which language involves (b) less deferential "independent judgment" delegations? We have conflicting signals. The comment says that subdivision (c)(1) applies only where a statute "expressly delegates to the agency the power to interpret **particular statutory language**." (Emphasis added.) Memorandum 95-67 (pp. 13-14), by contrast, would add to the Labor Code language giving an agency "delegated authority" to interpret **an entire statutory division**. The phrase "particular statutory language" seems to indicate a brief part of a statute, such as word, phrase, or sentence. Is it reasonable to characterize an entire statutory division--possibly hundreds of sections--as "particular" statutory language?

(2) will California courts confronting *standard of review* questions rely on federal cases which have applied the "fuzzy" federal legislative/interpretive distinction in the *rulemaking* context?

(3) will California courts facing the question of whether a particular California agency rule is subject to the California APA find support in section 1123.420, its comment, or its citations for the proposition that agency rules are not subject to the APA unless adopted pursuant to a "delegated lawmaking power"?

(4) will California courts face the argument that regulations contained in the California Code of Regulations are not in fact binding on the regulated public if they can be characterized as merely "interpretive" rules ("not adopted pursuant to delegated rulemaking power")? We note that the law review article cited several times in the comment carefully distinguishes between "legislative" regulations and "interpretive" regulations. See, e.g., footnotes 129, 132, and 149.

This does not exhaust the list of likely complications. When time permits, we hope to explore the matter more deeply.

It may or may not be a good idea to exempt so-called interpretive rules from public notice and comment. It is important that the matter be clearly noticed and that interested parties in both the public and private sector have an opportunity to discuss their concerns with the Commission. In any event, this matter should be taken up in an orderly manner as part of the rulemaking phase of the administrative law study--not now.

Many of the concerns expressed by strong supporters of the interpretive rule exception (such as Prof. Asimow) have some validity. When the proper time comes, it may well be possible to hammer out a compromise solution. Whatever the solution is, it should reflect *California's* particular circumstances and needs. The *federal* model should not be uncritically copied.

Also, it is probably possible to re-draft section 1123.420 so that it recognizes a more deferential "abuse of discretion" review standard--without dragging in terminology which seems to be inextricably intertwined with the federal legislative/intrepretive distinction.

Sincerely,

Herbert F. Bolz

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