Study N-301 September 11, 1998

Memorandum 98-58

Administrative Rulemaking: Advisory Interpretations: Comments on Tentative Recommendation

BACKGROUND

In March, 1998, the Commission circulated a tentative recommendation to create a procedure by which an agency may provide generally applicable written advice as to the agency's interpretation of law, without adopting a regulation. This memorandum reviews comments we have received regarding the tentative recommendation. Comment letters are attached in the Exhibit as follows:

GENERAL REACTION

The public response was generally favorable. The Committee on Administration of Justice of the State Bar of California supports the proposed law without reservation. See Exhibit p. 8. The Division of Labor Standards Enforcement of the Department of Industrial Relations (DLSE) generally approves of the proposed law, but identifies a number of specific concerns. See Exhibit pp. 3-7. These concerns, as well as those raised by Michael Ginsborg, are discussed in detail below. We received no letters of opposition.

SAFE HARBOR PROVISION

The Commission has concluded that an advisory interpretation should have no legal effect, with one important exception — an agency that adopts an advisory interpretation should be required to abide by that interpretation when enforcing the interpreted law. This would provide a limited "safe harbor" to those who conform

their conduct to an interpretation expressed in an agency's advisory interpretation. Thus, proposed Section 11360.030(b) provides, in relevant part:

> In an enforcement action, an agency may not assert an interpretation of law contradicting an advisory interpretation adopted by the agency to the extent that the conduct complained of occurred while the advisory interpretation was in effect….

DLSE supports this provision where applied to an agency that is acting to enforce the law on behalf of the public generally, but believes it would be problematic if applied in two other enforcement contexts: (1) Where the agency is acting in a purely adjudicatory capacity. (2) Where the agency is acting in a representative capacity to enforce the rights of private individuals. See Exhibit pp. 3-5. These issues are discussed below.

Adjudicatory Action

DLSE believes that an agency should not be bound by an advisory interpretation where the agency is involved in an enforcement action in a purely adjudicatory capacity. See Exhibit p. 5. The staff agrees. If an agency adjudicator is bound by the agency's advisory interpretation, then that interpretation effectively binds the parties to the proceeding. This violates the principle that an advisory interpretation should bind only the adopting agency.

The staff recommends creating an exception to the safe harbor provision where the agency is acting in a solely adjudicatory capacity. This could be achieved by revising proposed Section 11360.030, as follows:

> 11360.030. (a) Except as provided in subdivision (b), an advisory interpretation has no legal effect and is entitled to no judicial deference. An advisory interpretation cannot prescribe a penalty or course of conduct, confer a right, privilege, authority, exemption, or immunity, impose an obligation, or in any way bind or compel.
>
> (b) In an enforcement action~~,~~ brought by an agency, the agency may not assert an interpretation of law contradicting an advisory interpretation adopted by the agency to the extent that the conduct complained of occurred while the advisory interpretation was in effect under Section 11360.040.
>
> **Comment.** Section 11360.030 provides that an advisory interpretation has no legal effect other than to bind the agency that adopted the advisory interpretation. While an advisory interpretation should not be accorded any deference by a court in interpreting a provision of law that is the subject of the advisory interpretation, this does not preclude a court from independently reaching the same

> interpretive conclusion. Nor is the adopting agency precluded from advancing the same interpretation in an adjudication, on its own merits.
>
> Under subdivision (b), an agency is not bound by an advisory interpretation where the agency's participation in an enforcement proceeding is in a purely adjudicatory capacity.

Representative Action

In some cases an agency may participate in an enforcement action on behalf of a private individual. For example, DLSE may prosecute an action on behalf of an employee who has filed a wage claim against an employer, if DLSE believes that the claim is valid and enforceable and finds that the claimant is financially unable to employ counsel. See Labor Code § 98.3(a). If DLSE adopts an advisory interpretation concluding that certain claims are not valid, the safe harbor provision would prevent DLSE from prosecuting a wage action on behalf of a person making such a claim. Of course, this would have no effect on the validity of such claims if pursued by claimants in court on their own behalf.

DLSE believes an advisory interpretation that has been implicitly or expressly disapproved in an adjudication should not retroactively bind an agency in an enforcement action in which the agency acts in a representative capacity (see Exhibit p. 4):

> …in such a context, regardless of an agency's involvement in the enforcement process, a safe harbor should not apply, since the laws being administered and interpreted by the agency govern and define the respective rights and obligations of private parties, and not the relations between the state and a private party.

However, an advisory interpretation that considers the respective rights of wage claimants and their employers *would* define the relations between the state and private parties, because it would determine whether DLSE could commit its enforcement resources on behalf of certain claimants (and against their employers).

Agency representation of one side in a private dispute undoubtedly affects the outcome of the dispute. Therefore, potential disputants will have a keen interest in knowing whether an agency is likely to commit its resources in their dispute. An advisory interpretation indicating the circumstances in which an agency would commit its resources would be very helpful in this regard, but only if the advice is reliable. If an agency is free to issue advice and then ignore it, few people will trust that advice. Those who do run the risk that the agency will change its position.

It is true that the safe harbor provision could lead to a situation where an erroneous DLSE advisory interpretation would bar the agency from representing some legitimate claimants. This would seem to defeat the legislature's clear intent that DLSE should represent those claimants who cannot afford to represent themselves. On the other hand, this problem doesn't seem unique to representative actions — the legislature's intent would be equally frustrated where the safe harbor rule bars enforcement of the law on behalf of the general public. The only difference is the particularity of the interest that the agency is charged with protecting — in one case it acts to protect the general public, in another it acts to protect a specific class of the public. **The staff is not certain that this difference justifies exempting representative actions from the safe harbor rule.**

Effect of Contrary Judicial Interpretation

DLSE's proposal regarding a representative action exception to the safe harbor provision includes an interesting qualification — the exception would only apply where the advisory interpretation has been expressly or implicitly superseded in an adjudication. See Exhibit pp. 4-5. An agency would not be free to retroactively disregard an advisory interpretation on its own initiative. This seems to strike a reasonable balance between reliability and flexibility. While the staff is still not sure that the representative action exception makes sense, it is certainly more acceptable if qualified in the way proposed by DLSE.

What's more, it may make sense to create a general exception to the safe harbor provision where an advisory interpretation has been judicially superseded. This would address DLSE's specific concerns and would also generally allow agencies to perform their statutory duties despite having issued an erroneous advisory interpretation. Without such an exception, an agency's hands would be tied, even in cases where there is a strong public interest in enforcing a correct interpretation of the law.

The Commission should consider adding a general exception to the safe harbor provision along the following lines:

> Subdivision (b) does not apply if the advisory interpretation has been expressly or implicitly superseded by a conflicting interpretation adopted in a published appellate court decision or in a judgment or order issued by a court in an action in which the agency is a party. An agency must promptly amend or repeal an advisory interpretation that satisfies the conditions of this subdivision.

DLSE's proposed language would have extended the exception to situations where an advisory interpretation has been disapproved in an agency adjudication and designated as a precedent decision. See Exhibit p. 6. The staff believes that this would give the agency too much control over whether the agency is bound by an advisory interpretation.

Clarifying revision

DLSE also suggests a minor clarifying revision to the notice provided in proposed Section 11360.050, as follows:

> 11360.050. An agency may adopt, amend, or repeal an advisory interpretation, by completing all of the following procedures:
>
> (a) Prepare a preliminary text of the proposed action. The preliminary text shall clearly identify the provision of law that the advisory interpretation interprets and shall include the following notice, prominently displayed on its first page:
>
> "This is an advisory interpretation adopted pursuant to Government Code Sections 11360.010-11360.100. It has no legal effect, other than to bind the adopting agency <u>in an enforcement action</u>. Review by the Office of Administrative Law is available on request under Government Code Section 11360.090."
>
> (b) Provide public notice of the proposed action, as provided in Section 11360.060.
>
> (c) Accept written public comment for at least 45 calendar days after providing the notice required in subdivision (b).
>
> (d) Certify in writing to the office that all written public comments received in the period provided in subdivision (c) were read and considered by the agency.
>
> (e) Prepare the final text of the proposed action, subject to the limitations of Section 11360.070. The final text shall clearly identify the provision of law that the advisory interpretation interprets and shall include the following notice, prominently displayed on its first page:
>
> "This is an advisory interpretation adopted pursuant to Government Code Sections 11360.010-11360.100. It has no legal effect, other than to bind the adopting agency <u>in an enforcement action</u>. Review by the Office of Administrative Law is available on request under Government Code Section 11360.090."
>
> (f) Submit the final text of the proposed action and the certification required by subdivision (d) to the office.

The staff sees no problem with the proposed revision and recommends its implementation. If the Commission decides that the safe harbor provision should

not apply where an advisory interpretation has been judicially superseded (as discussed above), the foregoing section should be further revised to reflect that decision.

SCOPE OF PROPOSED LAW

Background

Earlier public comments suggested that California Environmental Quality Act guidelines (CEQA guidelines), which may be nonbinding in certain cases, should not be subject to adoption under the advisory interpretation procedure. Considering that the statutes governing the adoption of CEQA guidelines expressly require compliance with specific parts of the notice and comment procedures of the APA, the Commission agreed. Rather than add an exemption specifically for CEQA guidelines, the Commission decided to include a more general limitation that would bar use of the advisory interpretation procedure to adopt any agency statement that is expressly subject to rulemaking procedures. Proposed Section 11360.010(d) provides as follows:

> Where a statute or other provision of law requires an agency to act pursuant to this chapter or pursuant to other specified procedures, the agency shall not act pursuant to this article unless the statute or other provision of law expressly requires or authorizes the agency to act pursuant to this article.

It turns out that there are problems with the approach taken in Section 11360.010(d).

Problems in Drafting General Scope Limitation

Latent ambiguity. DLSE believes that proposed Section 11360.010(d) contains a latent ambiguity. Because the APA is itself a statute that requires compliance with the APA and authorizes use of the advisory interpretation procedure, "virtually every agency subject to the APA will be authorized to issue advisory interpretations; this could defeat the intent … to exclude certain agencies from the procedures based on separate statutory requirements imposed on such agencies to comply with rulemaking procedures." See Exhibit p. 6.

DLSE is correct that the APA would authorize every agency subject to the APA to adopt advisory interpretations. However, this is not a problem. The intent of Section 11360.010(d) is not to exclude certain *agencies* from use of the advisory interpretation procedure, but to exclude particular agency *activities* (such as adoption of CEQA guidelines). The fact that the APA generally authorizes state

agencies to adopt advisory interpretations simply means that the APA is not *itself* a bar to adoption of advisory interpretations. If some other statute (for example, the statute governing adoption of CEQA guidelines) specifies procedures to be followed and does not authorize use of the advisory interpretation procedure, then *that* statute is a bar to use of the advisory interpretation procedure.

Still, DLSE's comment demonstrates that the interaction between the APA and the scope limitation provision is confusing. This confusion could be reduced by revising proposed Section 11360.010(d) along the lines proposed by DLSE — use of the advisory interpretation procedure would be barred where a statute or other provision of law, *other than a provision of the APA*, expressly requires use of rulemaking procedures and does not authorize or require use of the advisory interpretation procedure. See Exhibit p. 6. **The staff sees no problem with this approach. However, the change will be unnecessary if the Commission approves the staff's recommendation, discussed below.**

Superfluous requirements. In examining Section 11360.010(d), the staff has discovered a more difficult problem. A great many code sections that establish an agency's rulemaking authority also expressly provide that the authority established is governed by APA procedures. Most of these statements of the APA's applicability are superfluous because, by its own terms, the APA applies to all agency rulemaking activity (except where expressly exempted). Unfortunately, superfluity does not vitiate (see Civ. Code § 3537) — a section containing a superfluous statement of the APA's application is still a section that requires an agency to act pursuant to the APA. Thus, under proposed Section 11360.010(d) a section that reiterates the applicability of the APA would be sufficient to bar an agency's use of the advisory interpretation procedure. This would result in a much broader limitation on use of the advisory interpretation procedure than was intended.

One solution would be to refine the limitation condition so that the section somehow distinguishes between a superfluous reference to the application of the APA and an intentional incorporation of APA procedures. Unfortunately, the staff could find no satisfactory way to draft such a distinction.

A more practical solution would be to abandon the attempt to craft a general limitation altogether and simply exclude CEQA guidelines from adoption under the advisory interpretation procedure. This would solve the specific problem that was originally presented to the Commission and would avoid the overbreadth that seems inherent in the approach currently taken in proposed Section 11360.010(d). Of course there may be other cases that raise the same problem as CEQA guidelines —

where the advisory interpretation procedure might be used to circumvent procedures that are expressly required. However, it seems unlikely that many such situations exist. In most cases, an agency statement that is subject to express adoption procedures would not be eligible for adoption as an advisory interpretation, either because it has binding effect or because it does more than state an interpretation of law. Even if such cases do exist, a specific procedural requirement should be read as superseding or supplementing the general advisory interpretation procedures.

The staff recommends that the Commission revise proposed Section 11360.010 to remove the scope limitation provision, amend Public Resources Code Sections 21083 and 21087 (which govern the adoption of CEQA guidelines) to provide that CEQA guidelines may not be adopted as advisory interpretations, and add a cross reference to these Public Resources Code Sections to the Comment to proposed Section 11360.010.

Advisory Interpretations as Regulations

Early drafts of the proposed law expressly provided that an advisory interpretation is not a regulation. This made clear that an advisory interpretation is not subject to the regular rulemaking procedures.

We later received a comment suggesting that the provision excepting advisory interpretations from the definition of "regulation" was unnecessary and inappropriate — unnecessary because a nonbinding statement of opinion is not a regulation, and inappropriate because agencies might somehow abuse the advisory interpretation process to adopt regulations. The staff disagreed with the commentator's points, but suggested an alternative — eliminating the definition exception and adding language providing that an advisory interpretation is not subject to rulemaking procedures. This would achieve the desired result (exempting advisory interpretations from rulemaking procedures) while avoiding any problems perceived by the commentator. The Commission approved this alternative.

That decision raises one issue that has not yet been considered — if an advisory interpretation is a regulation under the APA's definition (as it would appear to be), could an agency satisfy a legislative mandate to adopt regulations for a specific purpose simply by adopting an advisory interpretation? Apparently so. However, it is not clear that this would be inappropriate. Agencies have discretion to decide the number and kind of regulations that are necessary to achieve a statutory purpose. If the agency decides that nonbinding interpretive advice is sufficient for a statutory

purpose, then it could adopt advisory interpretations. If something more substantial is required, binding regulations could be adopted under the regular rulemaking procedure. On the other hand, an agency might shirk its duty to fully implement a law because it concludes that adoption of binding regulations would be too burdensome. In that case, adoption of advisory interpretations would satisfy the letter of a legislative mandate to adopt regulations, but not its spirit.

If the Commission decides that adoption of advisory interpretations should not satisfy a legislative mandate to adopt regulations, there are at least two ways to implement that policy:

> (1) Add language providing that: "Adoption of an advisory interpretation does not satisfy a statutory requirement that an agency adopt regulations."
>
> (2) Restore the language providing that an advisory interpretation is not a regulation.

The staff favors the first of these alternatives. It is direct and would not revive the controversy that originally led the Commission to remove the definition exception from the proposed law.

JUDICIAL DEFERENCE

DLSE would like the Commission to reconsider its decision that an advisory interpretation is "entitled to no judicial deference." See proposed Section 11360.030(a). That decision is discussed below.

Background

A central tenet of the proposed law is that an advisory interpretation should have no legal effect (other than to bind the adopting agency). This raises the question of whether an advisory interpretation has a "legal effect" if a court gives it any weight in interpreting the law. Some commentators are concerned that allowing "judicial deference" to an advisory interpretation would bind the courts in some circumstances. This concern seemed well-founded at the time it was raised. One line of case law holds that:

> Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight, and should not be disturbed unless clearly erroneous.

See *Rizzo v. Bd. of Trustees of State Univ.*, 27 Cal. App. 4th 853, 862 (1994). Under this rule, if an agency adopts an advisory interpretation and abides by it for many years, the advisory interpretation might well acquire some binding force in judicial interpretation of the law that is the subject of the advisory interpretation. This would seem to violate the principle that an advisory interpretation should have no legal effect other than to bind the adopting agency in an enforcement action. In light of this concern, the Commission agreed to add language providing that an advisory interpretation is entitled to no judicial deference.

Clarification of Standard of Review

A recent decision of the California Supreme Court clarifies the standard to be applied by courts in reviewing an administrative interpretation of a statute. See *Yamaha Corp. of America v. State Bd. of Equalization*, 98 Daily Journal D.A.R. 9211 (Aug. 28, 1998). The court draws a distinction between "quasi-legislative regulations" (i.e., regulations adopted by an agency to which the Legislature has delegated the power to "make law"), and agency interpretations of law. *Id.* at 9213. "Quasi-legislative rules" have the dignity of statutes. When a court reviews such rules its review is limited to determining whether the rule is consistent with the authority delegated by the Legislature and is reasonably necessary to effectuate the purpose of the statute. *Id.* at 9213-9214. Agency interpretations of law (except those expressed in underground regulations, see discussion below) are reviewed under the independent judgment standard:

> The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

Id. at 9212 (quoting *Judicial Review of Agency Action*, 27 Cal. L. Revision Comm'n Reports 1, 81 (1997).

In other words, an advisory interpretation would not be binding on the courts. A court would exercise its independent judgment and give whatever weight to an advisory interpretation is appropriate considering:

> the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 9215. Now that the court has clarified the standard of review of administrative interpretations of law, there does not seem to be any reason to bar judicial consideration of advisory interpretations.

Procedural Streamlining as Rationale for Limiting Judicial Consideration of Advisory Interpretation

One possible rationale for limiting judicial consideration of an advisory interpretation is that an advisory interpretation is subject to less rigorous adoption procedures than an interpretation expressed in a duly-adopted regulation. While that is true, it is clear that courts are permitted to consider evidence of an agency's interpretation of law expressed in forms that are subject to little or no public review and deliberation. For example, the interpretations at issue in *Yamaha* were brief summaries of the opinion of agency counsel. In other cases, courts have considered administrative interpretations expressed in executive orders, internal memoranda, and correspondence between an agency and members of the legislature. See, e.g., *Rizzo v. Bd. of Trustees of State Univ.*, 27 Cal. App. 4th 853 (1994).

The procedural gravity with which an agency expresses an interpretation is relevant to the persuasiveness of that expression, but should not bar the court from considering it. Besides, if an advisory interpretation (which is adopted with public notice and comment) is entitled to no deference, it would have less persuasive force than an interpretation expressed by completely informal methods (such as a letter to a legislator or an internal memorandum). This makes no sense.

The only form of agency interpretation that is categorically denied any judicial deference is an interpretation expressed in an "underground regulation" (i.e., a statement that should have been adopted as a regulation but was not). See *Tidewater Western Marine, Inc. v. Bradshaw*, 14 Cal. 4th 557, 576-77 (1996). This "no deference" rule encourages compliance with the APA by denying an agency any benefit of an underground regulation. For this reason "and quite apart from any expertise the agency may possess in interpreting and administering the statute, courts in effect ignore the agency's illegal regulation." *Yamaha* at 9217 (concurring opinion). This rationale for denying judicial consideration is not relevant to an interpretation expressed in a *lawful* agency communication, which an advisory interpretation would be.

Recommendation

The question of judicial deference has been a contentious one. When the Commission decided to adopt a no deference rule, much of the opposition to the

proposed law ended. However, that opposition was expressed before *Yamaha* clarified the standard courts apply in reviewing agency interpretations. Now that it is clear that agency interpretations are not binding on the courts, the commentator's concerns seem unfounded. Because of this clarification of governing law, and because advisory interpretations would provide valuable guidance to courts in exercising their independent judgment, **the Commission should reconsider its decision to bar judicial consideration of advisory interpretations in interpreting law. The staff recommends that proposed Section 11360.030 be revised as follows:**

> 11360.030. (a) Except as provided in subdivision (b), an advisory interpretation has no legal effect ~~and is entitled to no judicial deference~~. An advisory interpretation cannot prescribe a penalty or course of conduct, confer a right, privilege, authority, exemption, or immunity, impose an obligation, or in any way bind or compel.
>
> (b) In an enforcement action, an agency may not assert an interpretation of law contradicting an advisory interpretation adopted by the agency to the extent that the conduct complained of occurred while the advisory interpretation was in effect under Section 11360.040.
>
> (c) The standard for judicial review of an agency's interpretation of law expressed in an advisory interpretation is the independent judgment of the court.
>
> **Comment.** Section 11360.030 provides that an advisory interpretation has no legal effect other than to bind the agency that adopted the advisory interpretation. ~~While an advisory interpretation should not be accorded any deference by a court in interpreting a provision of law that is the subject of the advisory interpretation, this does not preclude a court from independently reaching the same interpretive conclusion. Nor is the adopting agency precluded from advancing the same interpretation in an adjudication, on its own merits.~~
>
> Subdivision (c) codifies the standard of judicial review of an agency interpretation of a statute. See, generally, *Yamaha Corp. of America v. State Bd. of Equalization*, 98 Daily Journal D.A.R. 9211 (Aug. 28, 1998). A court applying the independent judgment standard may give an advisory interpretation whatever weight the court deems appropriate to the circumstances. *Id.*

PUBLICATION REQUIREMENT

On receipt of the final text of a proposed action affecting an advisory interpretation and certification that all public comments regarding the proposal were read and considered, the Office of Administrative Law must "publish the completed action in the California Code of Regulations." See proposed Section

11360.080(b). Mr. Ginsborg suggests that this requirement should be revised to clarify that it is the *final text* of the completed action that must be published in the CCR rather than notice of the completed action. **The staff believes that this would be a useful clarification and recommends revising proposed Section 11360.080 as follows:**

> 11360.080. (a) On receiving a notice pursuant to Section 11360.060, the office shall publish the contents of the notice in the California Regulatory Notice Register.
>
> (b) On receiving the final text of a proposed action and certification that all timely public comment was read and considered, pursuant to subdivision (f) of Section 11360.050, the office shall do all of the following:
>
> (1) File the final text of the proposed action with the Secretary of State.
>
> (2) Publish a notice of the completed action in the California Regulatory Notice Register.
>
> (3) Publish the final text of the completed action in the California Code of Regulations.

OTHER METHODS OF AGENCY COMMUNICATION

Mr. Ginsborg is concerned that the proposed law would authorize agencies to express legal interpretations in a form other than a regulation or an advisory interpretation (e.g., in an individual advice letter or in case-specific adjudication). See Exhibit pp. 1-2. It would not. The proposed law simply provides that adoption of an advisory interpretation is not the exclusive means by which an agency can communicate interpretive advice. See proposed Section 11360.010(e). It neither expands nor limits other available means of agency communication (including individual advice letters and precedent decisions).

Respectfully submitted,

Brian Hebert
Staff Counsel

April 27, 1998

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Objections to the Tentative Recommendation on Advisory Interpretations

Dear Commissioners:

I have omitted my mailing address to ensure that it does not become part of the public record. But my work phone number is not confidential, and you are welcome to call me if necessary at 415-396-9438. Please note that I act in my private capacity only; my views do not in any way represent the views of my employer.

For almost five years I have been a law librarian in California, and I frequently help researchers find agency regulations. I am concerned that your recommendation, if adopted and enacted, would inadvertently limit public access to advisory interpretations.

The Commission is considering a change in how agencies may promulgate their interpretations of laws that they enforce. Right now agencies cannot disseminate such interpretations except as regulations. The Commission claims that the cost involved deters some agencies from issuing advice, or causes them to violate the present rulemaking statute. The Commission proposes allowing the agenices to communicate nonbinding, "advisory interpretations" by means of the Register and California Code of Regulations (CCR), without issuing a regulation. This change is intended to increase public awareness of how agencies interpret the laws they enforce.

But the proposal may have the opposite effect, because agencies would be free to pursue other means for expressing interpretive opinions:

> "Adoption of an advisory interpretation is optional and does not preclude expression of an agency's interpretive opinion by other means. For example, an agency may express its interpretation of law in a duly-adopted regulation, individual advice letter, or in case-specific adjudication."

Thus agencies would be free to express their interpretive opinions in sources other than the Register or the CCR, including unpublished sources. The public might

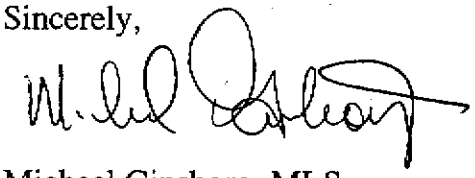
then be unable to find such opinions, and it's not even clear that the agencies would have any legal duty to make them available upon request.

The Commission has at least two options for opening up access to those advisory interpretations that agencies haven't published in the Register or CCR. Such agencies could be required to publish notices in the Register about the subjects of their advisory opinions and how the public may obtain them. (Subjects would, at a minimum, reference relevant CCR or California Code sections.) Alternatively, they could be required to announce in the Register what method they will follow in expressing advisory opinions, and how the public may find and request the opinions.

Another problem with the proposed legislation occurs at recommended Government Code section 11360.80(b). The language here is ambiguous. Once an agency has complied with other requirements for adopting its advisory interpretation, the OAL is supposed to "[f]ile the final text of the proposed action with the Secretary of State" (b)(1), but would "[p]ublish the completed action in the California Code of Regulations." Publishing the "completed action" could mean publishing a summary of the opinion, or perhaps a notice, with or without instructions about how to get the final full text.

I hope that the Commission will remove the ambiguity by stating that the completed action includes the full text of the advisory interpretation.

Sincerely,



Michael Ginsborg, MLS
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STATE OF CALIFORNIA PETE WILSON, Governor

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June 12, 1998

Brian Hebert, Staff Counsel
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4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

RE: California Law Revision Commission's Tentative Recommendation For The Adoption Of Legislation Governing "Advisory Interpretations"

Dear Mr. Hebert:

We would like to take this opportunity to comment on the Tentative Recommendation of the Commission which proposes new legislation to govern the adoption of advisory interpretations by state agencies. We have reviewed the legislation both from a general perspective and from the standpoint of its impact on the specific duties and responsibilities vested in this agency, the Division of Labor Standards Enforcement of the Department of Industrial Relations ("DLSE"). While in general we approve of the statutory solution crafted by the Commission to address the issue of non-regulatory interpretations, we have identified some significant concerns which we believe warrant revisions in the proposed statute as well as, in one case, further reflection and discussion among all parties interested in this legislation. Our concerns are detailed below.

(1) Binding Effect Of Interpretation In Enforcement Actions

We consider the "safe harbor" provision, as presently proposed in Section 11360.030(b), to be extremely problematic for DLSE and similarly situated agencies.

As explained by the Commission, the goal of the "safe harbor" provision is to protect "those who . . . conform their conduct to an interpretation expressed in an advisory interpretation." The provision accomplishes this goal by binding the agency to "its own advisory interpretation in enforcing the interpreted law."

The term "enforcement action", as used in the safe harbor provision, is not defined. Since the Commission early on rejected a suggestion that the safe harbor should be extended to actions brought by other agencies or by private individuals, the statute makes it clear that the agency issuing the advisory interpretation must be a participant in the action or proceeding. Beyond this piece of information, however, the provision provides no guidance as to the meaning of "enforcement action" under the statute.

Broadly read, the "enforcement action" language can be said to encompass actions or proceedings in which (1) the agency acts to enforce the laws it administers on behalf of the general public, (2) the agency acts in a representative capacity to enforce specific rights on behalf of private individuals, and (3) the agency acts in an adjudicatory capacity. There is no question that the safe harbor provision is aimed specifically and sensibly at the first type of activity. However, it is the potential application of the provision to activities of the second and third type that raises the problems which concern DLSE.

Pursuant to its delegated authority, DLSE administers and therefore interprets an array of labor laws which govern the relations between employers and employees. As part of its mandate, DLSE is charged under a number of statutes with the duty of enforcing the rights of employees under the labor laws. (Labor Code §§ 79 - 106). In the area of wage claims, for example, DLSE is vested with jurisdiction to process claims filed by workers against their employers; under the governing statute, Labor Code section 98, DLSE must review the claim and either refer the claim for adjudication by a DLSE hearing officer, bring a court action on behalf of the aggrieved worker, or decline to process the claim, relegating the worker to an independent court action. In the context of this administrative scheme, the safe harbor provision poses a number of difficulties.

Hypothetically, let us assume that, as a result of a court action brought by an employee whose claim was declined by DLSE, an appellate court issues an opinion in direct conflict with a DLSE advisory interpretation which excluded workers such as the employee from any entitlement to overtime wages. Should the prior interpretation preclude DLSE from now accepting pre-existing claims from similarly situated employees based on the court decision, and then either referring the claims for adjudication or bringing an action on behalf of the employees?

We think not. Since the employees are not bound by the prior interpretation, DLSE should not be precluded from discharging its statutory duty with respect to unexpired claims if there has been a determination that the prior interpretation was incorrect. We think this should be so whenever a revision in the interpretation arises out of a superseding adjudicatory determination. In other words, it is our view that in such a context, regardless of an agency's involvement in the enforcement process, a safe harbor should not apply, since the laws being administered and interpreted by the agency govern and define the respective rights and obligations of private parties, and not the relations between the state and a private party. It should be noted that the suggested approach does not favor one regulated party over another but rather cuts both ways: thus, in the wage claim context, for example, DLSE would also be required to decline enforcement of a wage claim once it had been determined that an advisory interpretation allowing such claims was in error.

In a similar vein, we believe that an agency should not be precluded from reconsidering the correctness of an advisory interpretation if the issue comes before it in an adjudication proceeding and the agency is acting solely in an adjudicatory capacity. Since the dispute is between private parties who are not legally bound by the interpretation, in the context of an adjudication the agency should be free to reconsider its position based on the arguments of the parties.

In light of the foregoing views we would like to request that Section 11360.30 be revised to include a limiting definition of "enforcement action" which would provide in substance as follows:

> **(c) For purposes of this article "enforcement action" does not include the following:**
>
> **(1) An adjudication proceeding in which the agency acts solely in an adjudicatory capacity.**
>
> **(2) An action or proceeding in which the agency, either as a party or in a representative capacity, acts on behalf of private persons pursuant to a statute or other law which authorizes the agency to so act for the purpose of enforcing the rights of such persons, provided one of the following conditions is met:**
>
> **(a) The advisory interpretation is expressly or implicitly superseded by a conflicting interpretation adopted in a published appellate court decision.**
>
> **(b) The advisory interpretation is expressly or implicitly superseded by a conflicting interpretation adopted in a judgment or order issued by a court in an action brought directly against the agency.**

> **(c) The advisory interpretation is expressly or implicitly superseded by a conflicting interpretation adopted in a designated precedent decision issued by the agency in an adjudication proceeding in which the agency acted solely in an adjudicatory capacity.**

In conjunction with the foregoing suggestion, we would like to request a minor revision in the language of subsections (a) and (e) of Section 11360.050. In particular, we believe the language which specifies the notices which must be provided should be revised to make it clear that the binding effect on agencies is limited to an enforcement action. This could be accomplished by simply adding the words "in an enforcement action" at the end of the second sentence in the notice language required by each subsection, so that the second sentence would now read:

> "It has no legal effect, other than to bind the adopting agency <u>in an enforcement action</u>."

2. <u>Ambiguity In Subsection (d) of Section 11360.010</u>.

There appears to be a latent ambiguity in subsection (d) of Section 11360.010.

The subsection provides that where a "statute or other provision of law" requires an agency to act pursuant to the Administrative Procedure Act ("APA"), the advisory interpretations procedure may not be utilized unless the statute or other law "expressly requires or authorizes" use of such procedure. The problem here is that the APA itself is a "statute" which requires an agency to act pursuant to the APA (Government Code §11340.5), and it is also one which would expressly authorize use of the advisory interpretations procedure (§11360.50). If the language of the subsection encompasses the APA, then virtually every agency subject to the APA will be authorized to issue advisory interpretations; this could defeat the intent of the subsection to exclude certain agencies from the procedure based on separate statutory requirements imposed on such agencies to comply with rule making procedures. It would appear that the language of the subsection should be revised so that the reference to "statute or other provision of law" will exclude the APA.

3. Revisit Judicial Deference

We would like to urge the Commission to reconsider its decision to insert a provision which declares that advisory interpretations are "entitled to no judicial difference." (§11360.030(a).)

Initially, the Commission embraced a proposal which provided that if the adoption of advisory interpretations was accompanied by public participation a weakened standard of deference was appropriate. In our view, this was a desirable and proper approach since it preserved the utility and usefulness of agency expertise, while at the same time recognizing that the courts should be rigorous in determining what weight to give an agency interpretation. The current approach, however, completely discards agency expertise, the value of which has long been recognized, and replaces it with nothing. The courts will now be faced with regulatory interpretations which, if validly promulgated, must be followed because they have the force of law, or with statutes and regulations which must be interpreted from scratch without benefit of the illumination which could be offered, in appropriate cases, by the vast experience and expertise of the agency.

We would ask the Commission to revisit this issue, invite further comment and discussion, and reconsider the possibility of reinstating a standard of weakened deference into the legislative proposal to be submitted to the legislature.

Thank you for affording us the opportunity to submit our comments for your consideration.

Sincerely,

William A. Reich

Miles E. Locker, Acting Chief Counsel
William A. Reich, Staff Counsel
State Labor Commissioner

WAR/bcs

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California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

FROM: Kim Zeldin
Committee on Administration of Justice

DATE: June 15, 1998

RE: Advisory Interpretations March 1998 (CAJ 98-11)

COMMITTEE POSITION: Support

ANALYSIS:

(1) Summary of existing law:

Under existing law, there are limited ways in which a state agency can express its interpretation of a law that it enforces or administers (e.g., formal binding regulations, individual advice letters, or case-specific adjudication).

(2) Changes to existing law:

The proposal would allow agencies to issue advisory interpretations which, while binding on the agency, are not binding on the public.

(3) Analysis of proposed changes and recommended amendments.

This is a well-written, well considered proposal. It enables agencies to communicate with the public and allows the public to, if they simply follow the agency's advisory interpretation, be immune from suit on that basis.