Study N-301/302 June 11, 1999

Memorandum 99-37

1999 Legislative Program: AB 486 — Administrative Rulemaking

A number of amendments to AB 486 have been suggested by various state agencies. The proposed amendments are discussed below. If the Commission decides to recommend these amendments they will be made in the Senate Governmental Operations Committee. A number of letters relating to the proposed amendments are attached as an Exhibit:

Unless otherwise indicated, all references in this memorandum are to the Government Code.

JUDICIAL DEFERENCE TO ADVISORY INTERPRETATION

Proposed Amendment

At the April 1999 Commission meeting, DLSE urged the Commission to exempt DLSE from the rule that an advisory interpretation is entitled to no judicial deference — instead, its advisory interpretations would be entitled to whatever deference a court finds appropriate (under the principles expressed in *Yamaha Corp. of America v. State Bd. of Equalization,* 19 Cal. 4th 1, 78 Cal. Rptr. 2d 1 (1998)). DLSE justifies its request on three grounds:

(1) It is charged with enforcement of regulations adopted by another agency (wage orders of the Industrial Welfare Commission) and cannot itself adopt regulations to clarify the meaning of an ambiguous wage order.

(2) DLSE interpretations are often relevant in litigation to which DLSE is not itself a party. A court should be allowed to grant appropriate deference to a DLSE interpretation expressed in an advisory interpretation.

(3) Most labor attorneys would not object to courts giving appropriate deference to a DLSE advisory interpretation.

Public Comment

In response to DLSE's suggestion, the Commission decided to solicit comments from labor law attorneys on the proposed amendment. Of the twenty attorney's solicited, five responded to the request for comment. Of those, four support DLSE's position to varying degrees (Mr. Aubry, Mr. Borgen, Mr. Paller, and Mr. Tindall) and one is neutral on the issue (Mr. Thierman).

Importance of DLSE Guidance

Supporters note the value and importance of DLSE guidance. Mr. Borgen writes (at Exhibit p. 25):

> [S]uch guidance is not only important to clarify ambiguities, but invaluable because the DLSE's interpretation is often the only official view of particular wage-hour issues. By forbidding any court deference to the DLSE's advisory interpretations, the proposed legislation would undermine the DLSE's ability to offer such necessary guidance.

Mr. Tindall writes (at Exhibit p. 27):

> In my experience, the DLSE's advisory opinions tend to be well researched, well reasoned, and helpful — especially in areas of the law where there are few published opinions, such as the application of particular exemptions to the overtime wage laws. I would not object to courts giving some deference to the DLSE's advisory interpretations in such instances because of the agency's extensive experience in interpreting and enforcing such laws. The DLSE's advisory opinions have been helpful to me in attempting to wade through the sometimes murky waters of wage and hour law, and I suspect that the California courts think so as well.

Mr. Paller writes (at Exhibit p. 31):

> [W]e regularly are asked for advice regarding the meaning and application of California wage and hour law and regulations, including Industrial Welfare Commission wage orders. In rendering this advice, we rely heavily for guidance on advisory interpretations by the Division of Labor Standards Enforcement.
>
> Our reliance on DLSE interpretations is not unusual. Management counsel also regularly seek advisory letters to determine whether wage and hour practices conform with current law and regulations. California wage and hour law is complex, and mistakes are costly.

Importance of Reliability

Mr. Thierman suggests that AB 486 should be amended so that the safe harbor provision would protect a person who has complied with an advisory interpretation from an action brought by a private person, as well as protecting against actions brought by DLSE. See Exhibit p. 15. The Commission decided early on that providing a safe harbor against private causes of action would give an advisory interpretation too great a legal effect. However, allowing courts to defer to a DLSE advisory interpretation would extend some measure of protection to those who have relied on DLSE's interpretation of the law. If a private cause of action were brought against such a person, the person could argue that the court should defer to DLSE's view.

The likelihood that courts would defer to a DLSE advisory interpretation might also deter litigation between private parties. As Mr. Paller notes (at Exhibit pp. 31-32):

> Under present law, employers, by conforming their policies to DLSE advisory opinions, can have at least some assurance that their payroll practices will survive court challenge.
>
> In this, DLSE advisory opinions serve a function similar to U.S. Department of Labor advisory opinions and Internal Revenue Service letter rulings, to which the courts routinely defer (but are *not* bound). DLSE advisory opinions, like DOL opinions and IRS letter rulings, deter litigation by enabling individuals and institutions to receive advance approval of contemplated changes in payroll practices.

Recommendation

The comments in favor of allowing judicial deference to a DLSE advisory interpretation are persuasive. Unless new and compelling opposition to DLSE's

suggestion arises, **the staff recommends making the requested change.** This could be done by amending Section 1198.4 of the Labor Code, as follows:

> 1198.4 (a) Upon request, the Chief of the Division of Labor Standards Enforcement shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. Copies of such policy statements shall be furnished to the Industrial Welfare Commission.
>
> (b) Notwithstanding subdivision (a) of Section 11360.030 of the Government Code, a court is not precluded from giving judicial deference to an advisory interpretation adopted by the Division of Labor Standards Enforcement pursuant to Article 10 (commencing with Section 11360.010) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.
>
> **Comment.** Section 1198.4 is amended to provide that an advisory interpretation of the Division of Labor Standards Enforcement is not precluded from receiving judicial deference by Government Code Section 11360.030(a). Instead, a court may give the advisory interpretation whatever deference is deemed appropriate to the circumstances. See generally Yamaha Corp. v. State Board of Equalization, 19 Cal. 4th 1, 78 Cal. Rptr. 2d 1 (1998) (discussing standard of review for agency interpretation of law).

RULINGS OF COUNSEL OF FRANCHISE TAX BOARD AND STATE BOARD OF EQUALIZATION

Under existing law, rulings of counsel of the Franchise Tax Board and the State Board of Equalization are not regulations and need not be adopted under the rulemaking procedure. See Section 11342(g). Both the Franchise Tax Board and the State Board of Equalization have expressed concern that the advisory interpretation procedure might be interpreted as overriding their existing exceptions. In response, the staff pointed out to the Franchise Tax Board that use of advisory interpretations is expressly optional and nonexclusive. See Section 11360.010(e):

> Nothing in this article requires an agency to adopt an advisory interpretation. An advisory interpretation is not the exclusive means by which an agency may express the agency's interpretation of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers, or that governs the agency's procedures.

The staff offered to add Comment language further clarifying that the advisory interpretation process is optional and would not affect existing exceptions to the rulemaking procedure. Even with the offered language, the Franchise Tax Board believes that taxpayers, who often do their own legal research, will misunderstand the relationship between the advisory interpretation procedure and the existing exception.

Both the Franchise Tax Board and State Board of Equalization are happy with their existing exception and would probably never use the advisory interpretation procedure to provide interpretive advice on tax law questions. Thus, the simplest way to avoid their concerns is to exempt their legal rulings of counsel from the advisory interpretation exception. **The staff recommends adding subdivision (f) to proposed Section 11360.010, as follows:**

> 11360.010.…
> (f) This article does not apply to legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization.
>
> **Comment**.…
> …See also Gov't Code § 11342(g) (legal rulings of counsel of Franchise Tax Board and State Board of Equalization are not "regulations").

JUDICIAL REVIEW OF OAL DECISION

Proposed Amendment

OAL requests that a provision be added precluding judicial review of an OAL decision under Section 11360.090 (providing for OAL review of the validity of an advisory interpretation). OAL feels that being required to defend its decisions in court could significantly strain its resources.

OAL has a point. Its review of an advisory interpretation has very little effect. Disapproval simply means that the agency cannot express its interpretation in the form of an advisory interpretation. It does not preclude the agency from asserting the same interpretation by other lawful means (e.g., in an adjudication). Nor does not it preclude judicial review of the agency's interpretation. The requested change could be made by adding subdivision (g) to proposed Section 11360.090(g):

> 11360.090.…
> (g) A decision by the office under this section is not subject to judicial review.

Comment.…

~~A decision under this section is subject to judicial review. See Section 11360.100 & Comment.~~ Subdivision (g) provides that an OAL decision under this section is not subject to judicial review. However, this does not preclude judicial review of the validity of an advisory interpretation by other means. See, e.g., Code Civ. Proc. §§ 1085 (ordinary mandamus), 1094.5 (administrative mandamus), 3422 (injunction); Gov't Code § 11350 (review of validity of regulation).

Constitutionality

In drafting the amendment, the Legislative Counsel's office expressed concern that precluding judicial review of an OAL decision might unconstitutionally invade the jurisdiction of the courts as the ultimate authority in interpreting statutory law. After researching the matter, the staff concluded that this would probably not be a problem. OAL review is not intended as the ultimate decision on an interpretation of law. It is intended only as a form of executive oversight and does not preclude judicial interpretation of the provision of law that is the subject of the advisory interpretation. The issue can be addressed in part by adding language to the Comment to proposed Section 11360.090:

Comment.…

Review under this section is intended only to ensure that an advisory interpretation is authorized, properly adopted, and consistent with the law it interprets. Such review is not intended to limit the jurisdiction of the courts as the ultimate authority on the proper interpretation of a statute. See Bodinson Mfg. Co. v. Cal. Employment Comm'n, 17 Cal. 2d 321, 326, 109 P.2d 935 (1941) ("The ultimate interpretation of a statute is an exercise of the judicial power."); Cal. Const. art. VI, § 1 (judicial power vested in the courts).

Recommendation

The staff recommends making the requested amendment. It seems unlikely that the provision would ever be held unconstitutional. If it were, the general severability provision in the Government Code would operate and, in all probability, the other provisions in the section would not be affected. This would simply leave open the possibility of judicial review of an OAL disapproval of an advisory interpretation.

DECLARATORY REVIEW

Section 11360.100 provides for declaratory review of the validity of an advisory interpretation. The Judicial Council has indicated that it will oppose the bill unless that section is deleted. The Judicial Council feels that a provision expressly authorizing declaratory review of an advisory interpretation would invite litigation where there is not a real case or controversy.

Fortunately, the Judicial Counsel has no objection to an advisory interpretation being judicially reviewable by other existing means. Because other forms of judicial review would be available (e.g., traditional mandamus or review of a "regulation" under Section 11350), deletion of Section 11360.010 would not preclude judicial review of an advisory interpretation. **The staff recommends making the requested change and adding language to the Comment to Section 11360.090(g) to point out the availability of other forms of judicial review (see Comment language above).**

REVIEW BY GOVERNOR

OAL believes that there should be a provision for review by the Governor of an OAL disapproval of an advisory interpretation. Analogous provisions exist in the current rulemaking scheme. See, e.g., Section 11349.5 (review by Governor of regulatory review decision). However, the Commission previously considered this issue and decided that the burden on the Governor from such review would be unwarranted given the minimal effect of an advisory interpretation. In light of that prior decision and the uncertainty as to what reaction of the Governor's office would be to such a last minute change, **the staff recommends against making the requested change.**

IMPLEMENTING REGULATIONS

The Department of Real Estate (DRE) would like clear authority to adopt regulations governing its implementation of the advisory interpretation procedures. Specifically, it anticipates adopting regulations governing the conditions under which it will grant a petition requesting an advisory interpretation. It proposes adding Business and Professions Code Section 10190, as follows:

> 10190. The commissioner in his or her discretion may honor requests from interested persons for advisory interpretations as

provided for by Government Code Sections 11340.6 and 11360.010. The commissioner may establish by regulation a procedure for accepting requests for advisory interpretations. The regulation may address, but is not limited to, each of the following subjects: a provision for the collection of a fee payable in advance sufficient to defray reasonable costs associated with the issuance of the interpretation; a minimum number of interested persons required to join in requesting the interpretation, and/or a requirement that the interpretation would benefit a minimum number of licensees or subdividers; and the maximum number of requests that will be considered for approval by the commissioner each year.

The basic suggestion of adding a provision that clearly authorizes an agency to adopt regulations governing its implementation of the advisory interpretation procedure is a good one. However, it seems unnecessary to specify the particulars of regulations that can be adopted, as is done in the language set out above. What's more, the staff is not sure that charging a fee to provide generally applicable advice would be good policy.

Rather than adding the language suggested by DRE, the staff recommends adding a general provision authorizing any agency to adopt regulations to implement the advisory interpretation procedure. DRE has indicated that this would be acceptable. OAL provisionally accepts this idea, so long as it is clear that OAL has primary rulemaking authority for implementation of the APA. **The staff recommends the following amendment to proposed Section 11360.010:**

11360.010.…

(f) An agency may adopt a regulation for the purpose of implementing this article. A regulation adopted pursuant to this subdivision shall not be inconsistent with a regulation adopted pursuant to Section 11342.4.

Comment. …

Subdivision (f) provides that an agency may adopt a regulation to implement this article, so long as that regulation is not inconsistent with a regulation adopted by the Office of Administrative Law (OAL) pursuant to Section 11342.4. For example, an agency could adopt a regulation governing the circumstances in which the agency will honor a request for an advisory interpretation, so long as the regulation is not inconsistent with an applicable OAL regulation.

NONCONTROVERSIAL REGULATIONS

Proposed Section 11347 provides that a noncontroversial regulation (one that is adopted under the regular rulemaking procedure and does not elicit any adverse public comment) is not subject to Section 11346.9. Section 11346.9 generally requires that an agency update determinations made earlier in the rulemaking process.

OAL suggests that a noncontroversial regulation should not be exempt from *all* of the requirements of Section 11346.9. In general, OAL's concern is that an agency may acquire new information (by means other than an adverse comment) that will lead it to reassess its earlier determinations and analyses. In such a case, an update would be useful. This is a good point. In light of this, **the staff recommends that proposed Section 11347 be deleted and Section 11346.9 amended as follows:**

> 11346.9. ~~Except as provided in Section 11347, every~~ Every agency subject to this chapter shall do the following:
>
> …
>
> (d) If an agency determines that a requirement of this section can be satisfied by reference to an agency statement made pursuant to Sections 11346.2 to 11346.54, inclusive, the agency may satisfy that requirement by incorporating the relevant statement by reference.
>
> **Comment**: ~~Section 11346.9 is amended to make an exception for regulations that do not elicit any adverse comment. See Section 11347 (noncontroversial regulatory action).~~ Section 11346.9(d) authorizes incorporation of prior statements by reference. This reflects the fact that no purpose is served by requiring an agency to reiterate a statement that was made earlier in the rulemaking process. For example, where an agency determines pursuant to Section 11346.5(a)(6) that a proposed rule would not impose a cost on a local agency or school district and, at the time of preparing the final statement of reasons, determines that its prior determination is correct and complete, the agency may incorporate the statement made pursuant to Section 11346.5(a)(6) in complying with Section 11346.9(a)(2).

This approach allows an agency to skip redundant reporting requirements by incorporating an earlier statement by reference, without regard to whether the proposed regulation is noncontroversial. This properly focuses on the goal of the reform — elimination of redundant requirements.

Review of Cost Estimates

OAL notes that the Department of Finance (DOF) has express authority to adopt instructions governing an agency's estimate of costs and savings to state and local agencies prepared pursuant to Section 11346.5 and to review those estimates. See Section 11357. DOF has adopted such instructions and published them in the State Administrative Manual (S.A.M.).

The consent regulation procedure requires that an agency determine the costs that a proposed consent regulation would impose on state and local agencies but does not require that the determination be performed under Section 11346.5. This suggests that the DOF would not have authority to establish instructions for these determinations or to review them.

In drafting the consent regulation procedure, the Commission decided to relax the required economic impact analyses, with the idea that anyone who felt that an agency's analysis was inadequate could object during public comment, thereby barring use of the consent regulation procedure. However, when that decision was made, the Commission staff was unaware that the DOF instructions in S.A.M. authorize DOF to *block* adoption of a regulation where it does not concur in the agency's findings. See S.A.M. § 6660. Considering the substantive role that DOF plays in reviewing the fiscal effect of regulations, it seems appropriate to preserve DOF's authority with respect to consent regulations. **The staff recommends making this change** by incorporating the existing analysis requirements (which are already subject to DOF oversight) into the consent regulation procedure:

> 11365.040.…
>
> (b) Notice of a proposed regulatory action shall include each of the following:
>
> …
>
> (6) A determination of the financial impact of the regulatory action on California businesses, individuals, and housing costs~~, a determination of any costs that the regulatory action will impose on state agencies, or on local agencies or school districts entitled to reimbursement under Part 7 (commencing with Section 17500) of Division 4, and a statement of the basis for these determinations~~.
>
> (7) The determination and estimate required by paragraphs (5) and (6) of subdivision (a) of Section 11346.5.
>
> (8) A statement of the basis for the determinations and estimates made pursuant to paragraphs (6) and (7).

A conforming change should be made to Section 11349.1, to allow OAL to return a proposed consent regulation if the adopting agency has not prepared the determination required by Section 11346.5:

> 11349.1.…
> (d) The office shall return any regulation ~~adopted pursuant to Article 5 (commencing with Section 11346)~~ to the adopting agency if any of the following occur:
> (1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.
> (2) ~~The~~ In adopting a regulation under Article 5 (commencing with Section 11346), the agency has not complied with Section 11346.3.

Funding for Required Reimbursement

On a related point, OAL points out that existing law authorizes it to return a proposed regulation (without approval) if the regulation will result in a reimbursable local agency mandate and the adopting agency has not provided evidence of funding to provide the required reimbursement. See Section 11349.1(d)(3). There is no reason why a consent regulation should be treated differently. **Proposed Section 11349.1(d) should be amended to make clear that the same rule applies to consent regulations:**

> 11349.1.…
> (d) The office shall return any regulation ~~adopted pursuant to Article 5 (commencing with Section 11346)~~ to the adopting agency if any of the following occur:
> …
> (3) The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the adopting agency fails to do any of the following:
> (A) Cite an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the Controller may pay the claims of local agencies or school districts.
> (B) Cite an accompanying bill appropriating funds as the source from which the Controller may pay the claims of local agencies or school districts.

(C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.

(D) Attach a letter or other documentation from the Department of Finance which that states that the Department of Finance has authorized the augmentation of the amount available for expenditure under the agency's appropriation in the Budget Act which that is for reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act and that this augmentation is sufficient to reimburse local agencies or school districts for their costs mandated by the regulation.

TECHNICAL CHANGES

This section of the memorandum discusses proposed technical changes. **The staff does not intend to discuss these changes unless issues are raised at the meeting.**

Petition for Adoption of Advisory Interpretation

OAL suggests that the existing procedures for petitioning an agency to adopt, amend, or repeal a regulation are confusing and that it would be better not to incorporate those procedures in the advisory interpretation bill. The Department of Consumer Affairs also found these provisions confusing. **Accordingly, Sections 11340.6 and 11340.7 should be deleted from the bill and a new section added to provide a more straightforward method to achieve the same purpose**:

11360.085. (a) Any interested person may request, in writing, that an agency adopt, amend, or repeal an advisory interpretation. The request shall clearly and concisely explain the need for the requested action and the agency's authority to take the requested action.

(b) Within 30 days of receipt of a request, the agency shall respond in writing to the person making the request, indicating whether the agency will take the requested action and explaining the agency's decision.

(c) A decision to deny a request made under this section shall be submitted to the office for publication in the California Regulatory Notice Register at the earliest practicable date.

Clarification of Relation Between Advisory Interpretation Provisions and Section 11340.5

OAL would like to move language that is currently in the Comment to Section 11360.010 ("Nothing in subdivision (e) affects the prohibition against the issuance or use of regulations that have not be properly adopted.") into Section 11360.010 itself. They believe that this would clarify the fact that the advisory interpretation statute is not intended to limit the statutory prohibition on use of underground regulations.

The staff is reluctant to paraphrase one statute in another and instead recommends amending the Comment to Section 11360.010 to strengthen it slightly:

> **Comment**.…
> Nothing in ~~subdivision (e)~~ this article affects the prohibition against the issuance or use of regulations that have not been properly adopted. See Section 11340.5 (prohibiting use of "underground regulations"). See, e.g., United Systems of Arkansas v. Stamison, 63 Cal. App. 4th 1001, 74 Cal. Rptr. 2d 407 (1998).

Deadline Triggers

OAL believes that the 45 day public comment period for adoption of an advisory interpretation or consent regulation should begin on publication of the notice of adoption, rather than on mailing of the notice. This is an issue because publication of a notice typically does not occur until several days after the notice is submitted to OAL. **The staff sees no problem with OAL's suggestion and recommends the following changes:**

> 11360.050. An agency may adopt, amend, or repeal an advisory interpretation, by completing all of the following procedures:
> …
> (c) Accept written public comment for at least 45 calendar days after ~~providing the notice required in subdivision (b)~~ publication of the notice pursuant to subdivision (a) of Section 11360.080.
>
> 11365.020.…
> (d) Accept written public comments for at least 45 days after ~~giving~~ publication of the public notice.

On a related point, OAL would like it to be clear that the one year period for adoption of a regulation begins on publication of the public notice, and not on

mailing of that notice. **This should be implemented by amending Section 11349.3:**

> 11349.3.…
> (c) If an agency determines, on its own initiative, that a regulation submitted pursuant to subdivision (a) should be returned by the office prior to completion of the office's review, it may request the return of the regulation. All requests for the return of a regulation shall be memorialized in writing by the submitting agency no later than one week following the request. Any regulation returned pursuant to this subdivision shall be resubmitted to the office for review within one year of ~~distribution~~ publication of a notice pursuant to Section 11346.4 or Section 11365.040, or shall comply with Article 5 (commencing with Section 11346) or Article 11 (commencing with Section 11365.010) prior to resubmission.

Dissemination of OAL Decision Regarding Advisory Interpretation

The proposed law would require that OAL mail and publish a *notice* of an approval or disapproval of an advisory interpretation. OAL feels it would be more efficient to disseminate its *decision*, rather than a notice. **The staff sees no problem with OAL's suggestion and would make the following change:**

> 11360.090.…
> (c) On reaching a decision pursuant to subdivision (b), the office shall do all of the following:
> (1) Mail ~~notice explaining~~ its decision to the person who made the request and to the agency that adopted the advisory interpretation.
> (2) If the office approves or disapproves the advisory interpretation, it shall publish ~~a notice explaining~~ its decision in the California Regulatory Notice Register.

Applicability of Rulemaking Chapter to Advisory Interpretation Article

The proposed law currently exempts advisory interpretations from all other provisions of the rulemaking chapter, unless they expressly apply to an advisory interpretation. OAL points out that this is too broad an exclusion as it precludes application of definitions and other appropriate general provisions. **The staff recommends changing the proposed law as follows:**

> 11360.010.…
> (b) ~~Except as expressly provided in this chapter, an~~ An advisory interpretation adopted pursuant to this article is not subject to the

requirements of ~~the other provisions of this chapter~~ Article 5 (commencing with Section 11346).

The revised language exempts an advisory interpretation from the regular notice and comment procedures of Article 5 and from OAL review under Article 6 (which only applies to regulations adopted under Article 5).

Use of "Contradictory" in Advisory Interpretation Provisions

The proposed law uses variations on the term "contradictory" where variations on the term "inconsistency" would also work. OAL suggests using "inconsistency" because it is the term that is generally used in the APA and in the case law. **The staff sees no problem with the suggested terminology and recommends making the following changes:**

11360.030.…

(b) In an enforcement action or adjudicatory proceeding, an agency may not assert or rely on an interpretation of law ~~contradicting~~ that is inconsistent with an advisory interpretation adopted by the agency, where events material to the enforcement action or adjudicatory proceeding occurred while the advisory interpretation was in effect.

Comment.…

Subdivision (c) provides that the adopting agency is not bound, under subdivision (b), by an advisory interpretation that is inconsistent with an interpretation in a published opinion of the California Supreme Court or a California court of appeal. This does not affect any other possible limits on an agency's ability to ~~contradict~~ act on an interpretation that is inconsistent with an advisory interpretation (e.g., in some circumstances, an agency might be equitably estopped from ~~contradicting an~~ asserting an interpretation that is inconsistent with its advisory interpretation).

11360.040.…

(b) An advisory interpretation remains in effect until one of the following occurs:

(1) The advisory interpretation is repealed.

(2) The advisory interpretation is disapproved or superseded by a statute or regulation or is ~~contradicted by~~ inconsistent with a published opinion of the California Supreme Court or the California Court of Appeal.

Cross-Reference to Safe Harbor Provision

Proposed Section 11360.010 currently states that an advisory interpretation is nonbinding. OAL suggests that the Comment to that Section should be amended to point out the binding effect of the safe harbor provision (11360.030(b)). **The staff sees no problem with this and would revise the Comment as follows:**

> **Comment.** Section 11360.010 states the purpose of this article and governs its application. Subdivision (a) provides that this article is intended as an optional procedure by which an agency can offer generally applicable interpretive advice, without adopting a regulation under Article 5 (commencing with Section 11346). For example, an agency may wish to adopt an advisory interpretation to clarify the meaning of an ambiguous law or to provide examples illustrating the operation of a highly technical law. While an advisory interpretation is not binding on the public, it is binding on the adopting agency in some circumstances. See Section 11360.030.

OAL Review of Adverse Comments

OAL requests that it be made clearer that they would have authority to review whether a comment received in response to a proposed consent regulation is an "adverse comment." It was always the intention that OAL review include review of whether an adverse comment was received. **This should be clarified by amending Section 11349.3:**

> 11349.3.…
> (b) If the office disapproves a regulation, it shall return it to the adopting agency within the 30-day period specified in subdivision (a) accompanied by a notice specifying the reasons for disapproval. Within seven calendar days of the issuance of the notice, the office shall provide the adopting agency with a written decision detailing the reasons for disapproval. No regulation shall be disapproved except for failure to comply with the standards set forth in Section 11349.1 or for failure to comply with this chapter. The office shall disapprove a regulation adopted under Article 11 (commencing with Section 11365.010) if the rulemaking file contains an adverse comment.

A cross reference to this new provision should be added to the Comment to Section 11365.030:

> **Comment**.…
> An agency's determination that no adverse comment was received in response to a proposed consent regulation is subject to

review by the Office of Administrative Law. See Section 11349.3(b) (Office of Administrative Law shall disapprove consent regulation if rulemaking file contains adverse comment).

Definition of Adverse Comment

OAL suggests that the definition of "adverse comment" (in Section 11365.030) be amended to specifically include a comment suggesting that an alternative to the proposed regulation would be more effective or as effective and less burdensome.

The current definition of "adverse comment" includes a comment "that specifically objects to the substance of the proposed regulatory action." The staff believes that this language is sufficiently broad to encompass a comment proposing an alternative that would be more effective or less burdensome than the proposed regulation. **The staff recommends clarifying this in the Comment to Section 11365.030:**

> **Comment.** Section 11365.030 ~~is similar to Section 11347(c) (noncontroversial regulatory action)~~ provides that the consent regulation procedure cannot be used if an agency receives an adverse comment in response to a proposed consent regulation. An adverse comment includes a comment objecting to the substance of the proposed regulatory action. For example, a comment pointing out an alternative to the proposed regulation that would be more effective in achieving the purpose of the proposed regulation, or as effective and less burdensome than the proposed regulation, would be an adverse comment.

OAL Review of Notice

Section 11365.060 authorizes OAL to decline to publish a notice of a proposed consent regulation if the notice does not satisfy the requirements of the consent regulation procedure. OAL worries that the current language could be read to imply that OAL must review the *substantive merits* of the contents of the notice (e.g., the statement of necessity). This can be addressed by amending Section 11365.060 to use the same language that authorizes OAL to decline to publish a notice under the existing rulemaking procedure:

> 11365.060.…
> (b) The office may refuse to publish a notice of a proposed regulatory action submitted to it pursuant to this article if the agency that submitted the notice has ~~not satisfied the requirements of~~ failed to comply with this article.

OAL is satisfied with this solution. **The staff recommends making the change.**

Use of Underscore and Strikeout

Problem: OAL suggests that a provision be added requiring that the text of a proposed consent regulation use strikeout and underscore to indicate changes from existing regulations. The general rulemaking procedure contains such a provision. See Section 11346.2(a)(3). **The staff recommends amending Section 11365.020 as follows:**

> 11365.020.…
> (h) In preparing the preliminary and final text of a proposed regulatory action, the agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

Respectfully submitted,

Brian Hebert
Staff Counsel

STATE OF CALIFORNIA
GRAY DAVIS, Governor

OFFICE OF ADMINISTRATIVE LAW
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 323-6225
FAX: (916) 323-6826
e-mail: staff@oal.ca.gov

April 14, 1999

Arthur K. Marshall, Chairperson
California Law Revision Commission
Att'n: Brian Hebert, Staff Counsel
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **THIRD** PART OF OAL COMMENTS CONCERNING

Administrative Rulemaking: Advisory Interpretations & Consent Regulations--Final Recommendation dated September 1998

AB 486 (Wayne; 4-5-99)--Advisory Interpretations & Consent Regulations (approved April 6, 1999 by Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development; set for hearing before Assembly Appropriations Committee, April 21, 1999)

Dear Chairperson Marshall:

The Commission has requested input on the above-noted recommendation. We apologize for not having responded sooner.

The Commission's recommendation contains three separate elements:

(1) *advisory interpretations* (pp. 18-23 of AB 486);

(2) *elimination of "redundant" reporting requirements* (p. 9, line 31; p. 11, lines 16-40 of AB 486);

(3) *consent regulations* (pp. 23-26 of AB 486).

All three of these elements involve the enabling act of the Office of Administrative Law ("OAL"), the rulemaking part of the Administrative Procedure Act, Government Code section 11340--11359 ("APA"). All three of these elements directly impact the daily work of OAL.

OAL has written two letters to the Commission (dated April 2, 1999 and April 6, 1999) on the "advisory interpretation" element of the proposal. OAL's letter of April 6 (page 2) stated that it did not "address the topic of consent regulations or other substantive amendments first appearing in the April 5 version of the AB 486." Though OAL does not have an approved, official position on AB 486, we would like to submit for your consideration several technical suggestions concerning the second element of the proposal--elimination of "redundant" reporting requirements (p. 9, line 31; p. 11, lines 16-40 of AB 486). To assist your staff in meeting amendment deadlines, we are limiting this letter to this second element. We will address the "consent regulations" element in a fourth letter, to be sent shortly.

According to page 630 of the Final Recommendation, the intent of the element involving elimination of "redundant" reporting requirements is to exempt state agencies from the requirements of Government Code section 11346.9 ("final statement of reasons" for a regulatory action) if the rulemaking proposal has elicited no adverse public comment (as defined). The premise of the proposal is that the requirements of section 11346.9 should not apply to a state agency rulemaking if there are no adverse public comments. We suggest that this premise may be incorrect, that several parts of section 11346.9 contain important requirements that should continue to apply whether or not there are "adverse" public comments. (Section 11346.9 is reproduced in Appendix "A" of this letter, using AB 486 text downloaded from the legislative website.)

First, section 11346.9(a)(1) *requires agencies to provide public notice* if studies, etc., relied upon by the agency are suddenly added to the rulemaking record, without notice to the public. The statutory requirement is implemented by an OAL regulation, Title 1, California Code of Regulations, section 45, which requires agencies adding such material to the rulemaking record to provide notice and an opportunity to comment to all persons who have in some concrete way participated in the rulemaking proceeding.

The matter of "studies relied upon" is sometimes an important issue to members of the regulated public. The public should continue to be afforded the protection of section 11346.9(a)(1), whether or not adverse comments have been submitted.

Second, section 11346.9(a)(2) requires a determination concerning whether the regulatory action imposes a mandate on local agencies or school districts. Sometimes during a rulemaking, the adopting agency develops additional information on this topic. If the adopting agency changes its views on this local mandate issue during the rulemaking (for instance, deciding that, contrary to its initial finding in the rulemaking notice, that the regulatory action *does impose* such a mandate), the agency should be required to disclose this fact. Local governments (and the state budget) should continue to be afforded the protection of section 11346.9(a)(2), whether or not adverse comments have been submitted.

Third, section 11346.9(a)(4) in part requires a determination that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed. This requirement follows up on the requirement found in Government Code section 11346.5(a)(12), which mandates a statement *in the rulemaking notice* that the agency "must determine" whether such alternatives exist.

The adopting agency may have received an *oral* comment at an APA public hearing (or in an informal contact with a member of the public) that proposed a more effective alternative. Under proposed section 11347(c)(1) the *oral* comment would not constitute an "adverse" comment because that term is restricted to *written* comments. Also, staff of the adopting agency may have independently developed a more effective way to address the problem. It seems best to leave the determination requirement of section 11346.9(a)(4) in place, as a way of encouraging agencies to briefly consider the "more effective alternative" issue before submitting the final regulations to OAL for review and approval.

Fourth, section 11346.9(a)(5) requires an explanation for rejecting any proposed alternative that would lessen the adverse economic impact on small business. As noted above under the third issue, under the proposed amendment, an adopting agency would not be required to respond to an oral comment at an APA public hearing, even though the oral comment outlined such a proposed alternative.

Fifth, section 11346.9(b) requires agencies to update the "informative digest," a required portion of the rulemaking notice, which in part requires agencies to prepare "a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation." This requirement serves an important purpose, even if no adverse comments have been received. Statutes governing agencies are frequently amended, sometimes midyear. An agency submitting a regulation to OAL should be required to review recent amendments to its governing statute to ensure that the regulation--which may have been initially proposed as much as a year earlier--is still consistent with statute.

In light of the above-noted issues, the Commission may well elect to simply remove the element of its proposal dealing with elimination of "redundant" reporting requirements. It looks as though this could easily be done without affecting other parts of the proposal.

Comments made during Commission meetings at which this element of the proposal was discussed suggest that the underlying policy concern was to relieve agencies of the need to turn out verbatim copies of (1) the initial statement of reasons and (2) the informative digest which have merely been retitled as (1) the *final* statement of reasons and (2) the *updated* informative digest.

In an effort to assist the Commission, we have drafted language narrowly tailored to accomplish these purposes, which appears below as bolded additions to sections 11346.9(a)(1) and (b). This language basically states that the adopting agency may incorporate previously drafted material by reference, under specified conditions.

Current practice is to permit such incorporation. For instance, if the rationale for the proposed regulation which appeared in the *initial* statement of reasons is still accurate and is satisfactory to the adopting agency, the agency may simply state in the *final* statement of reasons that the earlier material is "incorporated by reference" into the *final* statement of reasons. Since this practice is currently permitted, it is not clear that there is a need to amend the APA, however.

If you have questions or thoughts about these suggestions, please contact me at **(916) 323-6814 (voice)**; (916) 323-6826 (FAX); e-mail... hbolz@oal.ca.gov.

Sincerely,

Herbert F. Bolz

Appendix "A"---AB 486 text of Government Code section 11346.9

SEC. 6. Section 11346.9 of the Government Code is amended to read: +}

11346.9. Every agency subject to this chapter shall do the following:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical {+ , +} or empirical study, report, or similar document on which the agency is relying in proposing the adoption or amendment of a regulation that was not identified in the initial statement of reasons, or {- which -} {+ that +} was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with subdivision (d) of Section 11346.8. **If the final text of the proposed regulatory action is not different in substance from the text that was made available to the public pursuant to Section 11346.4, and if the adopting agency elects to make no change to the information provided in the initial statement of reasons pursuant to Section 11346.2(b)(1-2), the agency may incorporate by reference the applicable information in the initial statement of reasons into the final statement of reasons.**

(2) A determination as to whether the regulation imposes a mandate on local agencies or school districts. If the determination is that the regulation does contain a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses.

(b) Prepare and submit to the office with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills. **If the final text of the proposed regulatory action is not different in substance from the text that was made available to the public pursuant to Section 11346.4, if there have been no pertinent changes to immediately preceding laws and regulations since the issuance of the notice of proposed adoption issued pursuant to Section 11346.5(a)(3), and if the adopting agency elects to make no change to the original informative digest, a**

statement to that effect may be included in the rulemaking file in lieu of an updated informative digest.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with this section if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation {- which -} {+ that +} the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

STATE OF CALIFORNIA GRAY DAVIS, Governor

OFFICE OF ADMINISTRATIVE LAW
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 323-6225
FAX: (916) 323-6826
e-mail: staff@oal.ca.gov

April 16, 1999

Arthur K. Marshall, Chairperson
California Law Revision Commission
Att'n: Brian Hebert, Staff Counsel
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **FOURTH** PART OF OAL COMMENTS CONCERNING

Administrative Rulemaking: Advisory Interpretations & Consent Regulations--Final Recommendation dated September 1998

AB 486 (Wayne; 4-5-99)--Advisory Interpretations & Consent Regulations (approved April 6, 1999 by Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development; set for hearing before Assembly Appropriations Committee, April 21, 1999)

Dear Chairperson Marshall:

The Commission has requested input on the above-noted recommendation. We apologize for not having responded sooner.

The Commission's recommendation contains three separate elements:

(1) *advisory interpretations* (pp. 18-23 of AB 486);

(2) *elimination of "redundant" reporting requirements* (p. 9, line 31; p. 11, lines 16-40 of AB 486);

(3) *consent regulations* (pp. 4-18; 23-26 of AB 486).

All three of these elements involve the enabling act of the Office of Administrative Law ("OAL"), the rulemaking part of the Administrative Procedure Act, Government Code section 11340--11359 ("APA"). All three of these elements directly impact the daily work of OAL.

OAL has written two letters to the Commission (dated April 2 and April 6, 1999) on the "advisory interpretation" element of the proposal. OAL's letter of April 6 (page 2) stated that it did not "address the topic of consent regulations or other substantive amendments first appearing in the April 5 version of the AB 486." In a third letter dated April 14, 1999, OAL submitted suggestions concerning the *second* element of the proposal--elimination of "redundant" reporting requirements.

Though OAL does not have an approved, official position on AB 486, we would like to submit for your consideration, several suggestions concerning the *third* element of the proposal, *consent regulations* (pp. 4-18; 23-26 of AB 486). We appreciate the careful consideration given to earlier suggestions by the Commission and by the staff. We look forward to seeing the formally amended version of the bill and the officially revised comments; we reserve the right to make additional comments.

In our view, it has not yet been made clear that the consent regulation element of the proposal is necessary.

Minor *nonsubstantive* changes to the California Code of Regulations ("CCR") can under existing law be made quickly and easily. See Title 1, California Code of Regulations, section 100. Substantive changes (major or minor) can be made through the regular rulemaking process. If the substantive proposal is truly non-controversial, there will be either very few or no public comments. If public comments are very light or non-existent, the agency staff work required to complete the rulemaking process is sharply reduced because time need not be spent analyzing public comments. Thus, the system as it currently exists, adapts automatically to non-controversial proposals by sharply reducing the amount of agency staff work required. On the other hand, enacting the consent regulation procedure is going to raise many new procedural questions, which will take

substantial OAL staff time. In particular, OAL attorney time will be needed to adopt new regulations which will be needed to answer these procedural questions.

Assuming that it is determined that a consent regulation system is in fact needed, there are seven issues we wish to call to your attention at this time: (1) review of cost or savings and of local mandates by Department of Finance, (2) OAL review of agency certification that no adverse comments were received, (3) including less burdensome alternatives in definition of "adverse comments," (4) mailing notice to OAL\ beginning of 45 day comment period, (5) not reviewing notice for necessity or authority, (6) underline \strikeout, and (7) "publication" not "distribution."

Issue 1---review of cost or savings and of local mandates by Department of Finance

No less than regulations proposed for adoption under existing APA requirements, *proposed consent regulations should be subject to the approval of the Department of Finance ("DOF")*, if they have budget implications. See Government Code sections 11346.5(a)(6) (notice must contain fiscal impact statement prepared per DOF instructions); 11357 (DOF instructions, which are exempt from the APA, shall appear in State Administrative Manual); 11347.3(b)(5)(fiscal impact statement must be included in rulemaking file); 11349.1(d-e) (OAL shall (1) disapprove proposed regulatory actions lacking proper fiscal impact statement or revealing unfunded local mandate and (2) notify DOF of disapproval); SAM section 6660 (new 5/98) (if regulatory action involves (1) local mandate or (2) cost or savings to state government, adopting agency cannot submit fiscal impact statement/standard form 399 to OAL without prior DOF approval).

State agency regulations can have serious consequences in terms of (1) creation of local mandates, for which the state may be found financially responsible and (2) creation of substantial costs or savings in state agency budgets. The Commission's proposal exempts agencies from DOF review of proposed consent regulations. AB 498, pp. 25, lines 37-40. The proposal eliminates OAL's authority to require completion of the fiscal impact statement, which includes approval of DOF. AB 498, pp. 12:38--13:2.

We recommend amending the proposal to continue the existing statutory provisions requiring (1) DOF review of fiscal impact statements and (2) OAL review of regulatory actions to ensure (a) that a fiscal impact statement has been prepared and (b) that DOF has approved the statement, where the adopting agency states that there are budget implications.

Issue 2---OAL review of agency certification that no adverse comments were received

We recommend making clear in statutory text that OAL has the power to review the agency "certification" that no adverse comments were received. AB 498, pp. 23: 38--24:2. True, the comment to proposed section 11347 states "an agency's assertion that no adverse comment was received is subject to review by [OAL]." However, it would be preferable if this point were made in statutory text. It is not certain that section 11347 will be contained in the final version of AB 486. It is not certain that the comment to section 11347 will continue to be worded in exactly the same way it is worded in the Final Recommendation.

An additional concern is that the word "certify" in proposed section 11365.020 (e) could be read to suggest that OAL's only role is to review the rulemaking file to ensure that a "certification" is present. Proposed section 11365.020(e) provides that the agency adopting a consent regulation "*certify* in writing *that all written public comments* received in the public comment period *were read and considered by the agency* and that no adverse comments were received." (Emphasis added.) Clearly, in reviewing the certification that comments were "read and considered," OAL's role would be properly limited to ensuring that the certification was present in the file. It would be inappropriate and impractical for OAL to look behind the certification and to review whether agency staff had in fact read and considered the comments.

However, OAL should required to determine whether comments characterized by the adopting agency as not adverse, were in fact "adverse" as defined in proposed section 11356.030(b). See AB 498, p. 24: 12-22. Whether or not "adverse" comments were received is the pivotal fact around which the entire abbreviated adoption process is constructed!

Issue 3--include less burdensome alternatives in definition of "adverse comments"

The definition of "adverse comment" in section 11365.030(b), AB 486 p.24;12-21, does not include comments which have identified alternatives to the proposed regulations which are either (1) more effective in carrying out the purpose for which the regulation is proposed or (2) equally effective but less burdensome to affected private persons than the proposed regulation. Under existing law, adopting agencies are required to take these factors (possibly mentioned in comments) into account before submit a proposed regulation to OAL. Government Code sections 11346.9(a)(4) & 11346.5(a)(12).

We recommend expanding the definition of "adverse comment" to include comments outlining alternatives to the proposed regulations which are either (1) more effective in carrying out the purpose for which the regulation is proposed or (2) equally effective but less burdensome to affected private persons than the proposed regulation.

Issue 4--mailing notice to OAL\ beginning of 45 day comment period?

We suggest deletion of the words "to the office and" from proposed section 11365.040(a), AB 486, p. 24:24-25. OAL does not need a mailed copy of the notice, and such a requirement would serve no purpose.

However, OAL does need a copy of the notice so that the notice may be published in the California Regulatory Notice Register, thus beginning the 45 day public comment period. Cf. Issue 6 in our letter of April 6. Section 11365.020 states that the agency must accept comments "for at least 45 days after giving public notice." We are not sure when "public notice"is given--(1) when the notice is mailed or (2) when the notice is published in the Notice Register. We think it should be made clear that the 45 day comment period begins with the publication of notice in the Notice Register.

Issue 5--not review notice for necessity or authority

Section 11365.040 requires that a consent regulation *notice* contain, among other things, (1) a statement of the agency's rationale for determining that the regulation is necessary and (2) citations of the provisions of law (a) giving the agency authority to adopt the regulation and (b) which are being implemented in the regulation.

We recommend that AB 486 be amended to make clear that while OAL will review the notice to ensure that the required elements are present, that OAL will not, the case of *the three above noted elements*, undertake to determine whether or not the content of each of the three is legally sufficient. In other words, if the agency cites a statute as authority for its action, that is sufficient for purposes of approving the notice for publication. If and when the regulatory action is submitted for review by OAL, we will perform an in depth review of the legal sufficiency of the three above-noted elements. During the notice phase, it seems best to defer to the adopting agency on these issues.

Issue 6--underline \strikeout

It is essential that the preliminary and final texts of the proposed regulation be prepared in strikeout\underline or italics. AB 486, pp. 23: 28 & 24:3.

Issue 7---"publication" not "distribution"

It is clear under existing law that in regular APA rulemaking, agencies have one year from the date of *publication* of the notice in the Notice Register in which to submit the regulatory action to OAL. Page 15: 11 of AB 486 would muddy the waters by stating that the benchmark date for both regular APA and consent actions would be the "distribution" of the notice. It is not clear whether the word "distribution" refers to mailing of notices or to publication or to both.

We suggest substituting "publication" for "distribution."

If you have questions or thoughts about these suggestions, please contact me at **(916) 323-6814 (voice)**; (916) 323-6826 (FAX); e-mail... hbolz@oal.ca.gov.

Sincerely,

Herbert F. Bolz

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THIERMAN LAW FIRM
LABOR RELATIONS AND EMPLOYMENT LAW
120 GREEN STREET
SAN FRANCISCO, CA 94111

MARK R. THIERMAN
ROBERT FRIED
CARRIE L. FREESTONE
DONALD G. OUSTERHOUT
ALICE K. CONWAY

TELEPHONE (415) 391-9200
FACSIMILE (415) 434-2867

email: thierman1@tvfl.com
www.thierman.com

April 29, 1999

Brian Hebert
Staff Counsel
California Law Review Commission
4000 Middle Road, D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

APR 3 0 1999

File:

Re: Your April 26, 1999 letter

Dear Mr. Hebert:

After our telephone conversation, and half way through a draft of a letter in response to your inquiry, I read the opinion in ***Wehrli v. County of Orange***, 99 C.D.O.S. 2990 (copy attached hereto) on the internet which seems to preclude offensive use of DLSE Determination Letters in any other proceeding because there is no review process. As a practical matter, in order to encourage the general public to rely on the published determinations of the DLSE, the safe harbor provisions must be extended to private litigants as well as an administrative estoppel to the DLSE itself. Most of the provisions of the Labor Code and the Orders of the Industrial Welfare Commission either explicitly provide a private cause of action for enforcement by private parties or form the predicate for actions under *Qui Tam* or Business and Professions Code Section 17,200. Thus, I agree that reliance upon a DLSE opinion letter should be a bar to private litigation as well as public litigation, a defensive use of the determinations only.

As for the language of the proposed legislation, there is a glaring omission of federal court orders from the list of courts whose opinion can reverse the basis of a determination. We further discussed the need to clarify that an employer is not at risk to anticipate which opinion letters are based upon doctrines overruled by the appropriate courts, but that the DLSE will promptly issue notice of reversal or suspension of any determination letter which was based upon law no longer considered valid.

Finally, I am confirming that the DLSE does not propose to exempt itself from the new legislation, but merely seeks to eliminate the provision that determinations issued under the proposed procedures are not legislatively precluded from consideration by the judiciary.

Very truly yours,

Mark R. Thierman

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Cite as 99 C.D.O.S. 2990

MARK J. WEHRLI, Plaintiff-Appellant,

v.

COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal, Defendants-Appellees.

No. 97-55040

United States Court of Appeals for the Ninth Circuit

D.C. No. CV-95-00042-GLT

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding Argued and Submitted May 4, 1998--Pasadena, California Before: William C. Canby, Jr. and Andrew J. Kleinfeld, Circuit Judges, and William W Schwarzer,[FOOTNOTE 1] District Judge.

COUNSEL

Michael P. Stone, Muna Busailah, Marc Berger, Michael P. Stone, Pasadena, California, for the plaintiff-appellant.

William F. Bernard, Lynbert & Watkins, Santa Ana, California, for the defendants-appellees.

Filed April 27, 1999

OPINION

CANBY, Circuit Judge:

Plaintiff-appellant Mark Wehrli brought this action pursuant to 42 U.S.C. § 1983, claiming that certain actions of his employer, Orange County, California, violated his federal constitutional rights. The issue for decision on this appeal is whether an earlier state administrative adjudication of Wehrli' s claim, which he voluntarily precipitated, is to be given preclusive effect in the present proceedings. We conclude that the administrative ruling is not preclusive, and we accordingly reverse the district court' s summary judgment in favor of the County.

BACKGROUND

16

Wehrli, a Deputy Marshal at the Orange County courthouse, suffered an off-duty epileptic seizure, and so advised his employer. A county physician restricted Wehrli to light duty for the next five years, the period following an initial seizure during which there remains a significant risk of recurrence. The County informed Wehrli that it had no light duty positions for a Deputy Marshal and instead offered him a clerical position. The County conditioned this offer on Wehrli' s waiver of his right to challenge his removal from the Deputy Marshal position, and the waiver of any right to eventual reemployment as a Deputy Marshall. Wehrli refused to waive these rights and was discharged.

Wehrli then filed this 42 U.S.C. § 1983 action in district court, challenging his discharge as a violation of due process. Shortly thereafter, all proceedings were stayed because of the County' s bankruptcy. During the stay, Wehrli opted for an administrative hearing on his claims, as provided by the Marshal' s Court Personnel Rules and Regulations. A municipal court judge presided over the hearing. Wehrli was represented by an attorney and was allowed to present evidence and cross-examine opposing witnesses. The hearing was not recorded, however, and the hearing rules provided that "the decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review." [FOOTNOTE 2]

The hearing officer found that, in light of the updated medical record, particularly new information about the effect of medication on Wehrli' s condition, Wehrli was fit to serve as a Deputy Marshal. He therefore reinstated him to that position. The hearing officer also found, however, that Wehrli had failed to present key information from his own physician to the County. He determined that "Deputy Wehrli' s inaction in providing information to [the County] was a substantial factor leading to his termination." He concluded that the County acted reasonably in discharging Wehrli and that Wehrli was not entitled to backpay. The hearing officer also found that the County did not violate any of Wehrli' s rights by conditioning its offer of a clerical position on Wehrli' s waiver of his appeal rights.

When Orange County emerged from its bankruptcy, Wehrli moved to reactivate his federal action. The district court noted that the administrative hearing officer had "addressed the same issues in his decision that are now before the Court." It found that the administrative hearing had adequate judicial safeguards, and that, by opting for such a hearing under its applicable rules, Wehrli had waived his right to judicial review of that decision. The district court concluded that Wehrli was collaterally estopped from relitigating the issues underlying his § 1983 claims. Wehrli appeals.

DISCUSSION

Is the State Administrative Proceeding Entitled to Preclusive Effect?

Wehrli' s principal challenge to the district court' s decision is a relatively narrow one. He argues that the district court erred in giving collateral estoppel effect to the state administrative decision because that decision was not subject to judicial review. We conclude that WEHRLI is correct.

There is no doubt that, as a general matter, a state administrative decision can have preclusive effect upon a federal § 1983 claim. The Supreme Court so held in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). That case, too, dealt with a state administrative decision that had not been subjected to judicial review, but such review had been available under state law; the plaintiff had simply failed to avail himself of it. In finding the administrative decision to be preclusive, the Supreme Court pointed out that the full faith and credit statute, 28 U.S.C. § 1738, does not require federal courts to

give force to unreviewed state administrative proceedings. *Id.* at 794. The Court added, however, that "we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." *Id.* The Court then held, with regard to preclusion of the plaintiff' s § 1983 claim:

> [W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," [*United States v.]* Utah Construction & Mining Co., [384 U.S. 394,] 422 [1966], federal courts must give the agency' s factfinding the same preclusive effect to which it would be entitled in the State courts.

Id. at 799 (footnote omitted). We have held that this same principle applies to legal as well as factual rulings of an administrative body. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032-33 (9th Cir. 1994).

Wehrli argues that the unavailability of judicial review means that he did not have "an adequate opportunity to litigate." There is sound support for his view. Although the Supreme Court in *Elliott* did not elaborate on the essentials of an "adequate opportunity," it quoted *Utah Construction for the requirement. Utah Construction* gave preclusive effect to an administrative decision with the observation that "both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." *Utah Construction*, 384 U.S. at 422. Our cases, too, suggest that the availability of judicial review is a crucial factor in determining preclusive effect. In *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), we accorded preclusive effect where judicial review of the administrative adjudication was available but unused, stating:

> If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by foregoing her right to appeal.

Id. at 719, n.12 (emphasis added); *see also Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988). Similarly, we held in *Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), that a plaintiff had had an "adequate opportunity to litigate" because "[h]e had an opportunity, which he chose not to take, for judicial review, and even for the presentation of evidence in the reviewing court to demonstrate procedural irregularities by the board." *Id. at 630.*

In Miller, 39 F.3d at 1038, we rejected a claim that preclusive effect must be denied because the administrative decisionmakers were not necessarily lawyers, stating that "the availability of judicial review, even if not always determinative, is of critical importance here." *Id.* We do not draw from this statement an implication that, when the decisionmaker is a lawyer or judge, judicial review is unnecessary for preclusive effect. That issue was not before us in *Miller*, and the rationale of both *Plaine and Eilrich* militate in favor of the availability of judicial review as a requisite for preclusive effect. Certainly the fact that Wehrli' s hearing officer was a judge adds to the judicial character of the proceedings and the likelihood of a fair hearing, but individual hearing officers are capable of occasional arbitrary action even if they are judges.[FOOTNOTE 3] Indeed, the Restatement, which California generally follows in these matters, *see Anderson-Cottonwood Disposal v.* W.C.A.B., 185 Cal. Rptr. 336, 340 (App. 1982), flatly denies preclusive effect to a *judicial judgment* when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement, Second, Judgments § 28(1). The reasons for this proscription apply to Wehrli; with no administrative record and no judicial review, Wehrli would have no way of correcting arbitrary administrative action if any occurred. We agree, therefore, with

the Third Circuit that "the issue of a ' full and fair' opportunity to litigate includes the possibility of a chain of appellate review." *Crossroads Cogeneration v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 137 (3d Cir. 1998) (construing similar New York law); *see also Convalescent Ctr. v. Dept. of Income Maintenance*, 208 Conn. 187, 195-202, 544 A.2d 604, 608-11 (Conn. 1988) (holding that access to judicial review is a necessary precondition to administrative collateral estoppel).

We do not accept the County' s view that Werhli is in the position of one who chose to forego available review. It is true that Werhli was not *required* to invoke the administrative process, but that will often be the case. The rules of the administrative process themselves foreclosed judicial review; Wehrli had no choice between review or no review. He did not waive judicial review in any sense meaningful for the purposes of res judicata or collateral estoppel. We conclude, therefore, that Wehrli did not have an "adequate opportunity to litigate" his claim in the administrative proceedings, within the meaning of *Elliott and Utah Construction*. The state administrative decision is therefore not entitled to preclusive effect as a matter of federal common law.

We also point out that *Elliott* requires federal courts to accord only that preclusive effect that the state would give to its own proceeding. California does give preclusive effect to state administrative decisions, but it does so under the guidance of *Utah Construction. See People v. Sims*, 32 Cal.3d 468, 479, 651 P.2d 321, 328 (1982); *see also Plaine*, 797 F.2d at 720. Thus, in giving an agency decision preclusive effect against a county, the California Supreme Court pointed out that one of the factors indicating that the administrative agency had acted in the "judicial capacity" required by *Utah Construction* was that "the County had both the right to seek a rehearing before the agency and the right to petition for review in superior court." *Sims*, 32 Cal.3d at 480, 651 P.2d at 328. We have found no California case according res judicata or collateral estoppel effect to an administrative decision for which judicial review was not available.

We conclude, therefore, that neither federal nor California law would give preclusive effect, under the doctrines of res judicata or collateral estoppel, to a state administrative proceeding not subject to judicial review.

CONCLUSION

The judgment of the district court is reversed, and the matter is remanded to the district court for further proceedings.

REVERSED *and REMANDED.*

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Wehrli claimed that he was wrongfully fired as a deputy marshal because of his handicap, epilepsy. He wanted to avoid the delay of judicial proceedings, so he elected to pursue a state administrative procedure to obtain a remedy. The procedure is voluntary. Wehrli was free to pursue all his remedies under the law. But by electing to use the administrative procedure, he subjected himself to rules waiving alternative procedures and judicial review. Rule D(8) of the Court Personnel Rules and Regulations said "[t]he decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review." In cases where the grievance was decided by a judge pursuant to the procedure (a municipal court judge decided this case), Rule D(1) provided that both the person

bringing the grievance and the Association of Deputy Marshals of Orange County "relinquish any current or future claim to seek or obtain a remedy through any other court appeal procedures."

The hearing officer rendered a split decision. He held that "based on the medical information available to Marshal Carona . . . Carona acted reasonably in discharging Plaintiff." But based on newly available medical information, the hearing officer held that Wehrli was entitled to reinstatement. Because the discharge had not been wrongful, Wehrli was not entitled to back pay. Thus Wehrli obtained part of what he sought, reinstatement but no money award.

Despite the express provision that by using the administrative provision he would "relinquish any current or future claim to seek or obtain remedy through any other court appeal procedures," Wehrli is here seeking the remedy he relinquished. He argues that were he not permitted to do so, a person in his position "would be caught between Scylla and Charybdis, where they would have to choose between going directly to federal court to seek vindication of their federal rights . . . , or exercise their due process right to a grievance procedure . . . ." Well, yes. Wehrli was free to choose, and he made a choice. He could choose between the advantages of the judicial process, appealability, discovery, and perhaps greater accuracy, and the advantages of the special administrative process he elected, speed, economy, and finality.

Speed, economy and finality have a lot to recommend them in a case involving a person' s job. To some aggrieved employees, it will be worth risking an unappealable mistake to get them. Wehrli, after all, got back to work almost immediately by means of the administrative process of which he now complains. He got fired December 23, 1994, and got his administrative determination reinstating him January 5, 1995, immediately after the holidays. It is hard to imagine that any judicial proceeding could have gotten him working again that fast. If he had lost, he probably could have found another job long before obtaining any relief in judicial proceedings, and gone forward with his career. An aggrieved employee might reasonably elect a remedy that gets his dispute resolved quickly, inexpensively and finally, instead of a slow, expensive remedy with perhaps higher accuracy. It is impossible to have both, because judicial review necessarily entails delay, lack of finality, and expense.

Wehrli has now somehow converted his claim, which would ordinarily be under the Americans With Disabilities Act, into a section 1983 claim. His theory seems to be that the County' s offer, which Wehrli rejected, of a light duty job if Wehrli would waive his rights to appeal administratively and to a deputy marshal' s job, took away a property right he had in his job without due process of law. It is not clear to me that he can avoid the restrictions on ADA remedies by restating his claim under 42 U.S.C. § 1983, but that issue has not been the focus of the arguments raised. The case has been argued in terms of whether the state administrative proceeding is entitled to preclusive effect, which the district judge gave it. I believe that it is, and would affirm.

Not a single case that the majority cites holds or even says in dictum what today' s majority holds, that state administrative determinations cannot be given preclusive effect if they are not subject to judicial review. All the cases the majority cites for the proposition that "the availability of judicial review is a crucial factor in determining preclusive effect" are cases in which preclusive effect was in fact given. None denied preclusive effect. None said that availability of judicial review was "a crucial factor," as the majority holds. The holding in every one of those cases -- *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), *Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988), *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986) -- was that preclusive effect should be given to an administrative determination. In every case, judicial review was available, so there was no occasion

for deciding whether, were it not available, preclusive effect would still be given. There could therefore be no holding to that effect. And none of the language in the cases amounted even to dictum that availability of judicial review is a prerequisite to preclusive effect.

I must concede that there is also no case that I have found holding the contrary, that preclusive effect will be given to an administrative proceeding such as the one in the case at bar despite the lack of availability of judicial review. But I think a fair reading of the precedents suggests that that is the correct result, at least where submission to the administrative proceeding is voluntary. We need not reach the question whether preclusive effect would be given to a mandatory state administrative procedure with no provision for judicial review.

The critical cases are United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). *Utah Construction* strongly suggests that judicial review of the administrative determination is not a prerequisite for preclusive effect. Though not on all fours, those two cases appear to me to mean that the district court was correct in this case to give preclusive effect to the state administrative determination.

In *Utah Construction*, the Board of Contract Appeals had authority to resolve one kind of dispute, but not another. The Court held that its findings of fact in the kind of dispute within its jurisdiction were binding in a Court of Claims proceeding on disputes outside the Board' s jurisdiction. The findings were "final and conclusive" and subject only to very limited judicial review, under the Wunderlich Act. The Court repudiated the notion that *res judicata* principles did not apply to administrative proceedings, and stated what have come to be known as the "*Utah Construction* factors" :

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Id. at 422. These factors are met in the case at bar. Judicial review is not among the factors the Court specified. The Court did not say that appealability is a critical part of "acting in a judicial capacity" or "adequate opportunity to litigate." Because the fact findings of the Board of Contract Appeals were, as a practical matter, not subject to judicial review, *Utah Construction* is more consistent with the proposition that judicial reviewability is *not* essential to "acting in a judicial capacity" or "adequate opportunity to litigate."

The Court held that state administrative proceedings have preclusive effect in a federal section 1983 case, in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), The case at bar, whether it ought to be or not, is a section 1983 case, so *Elliott* controls unless properly distinguished. The Court held that the state administrative determination could not be given preclusive effect in a Title VII claim, because the federal statute expressly provided that state proceedings were to receive "substantial weight" and Congress did not intend for them to have preclusive as opposed to "substantial" weight. Because of the congressional intent to allow pursuit both of state and federal remedies, the fact that the state proceeding was requested rather than compelled did not matter. *Id.* at 796, n. 5.

But for section 1983 claims (which is all we have in the case at bar), the Court held that the state proceeding *did have preclusive effect. Elliott* says that application of *Utah Construction* to state administrative proceedings "serves the value underlying general principles of collateral estoppel: enforcing repose." *Elliott*, 478 U.S. at 798. The Court quoted Davis on Administrative Law with

http://www.callaw.com/opinions/apr/9755040.htm

approval, that "a controversy should be resolved once, but not more than once," *id.* at 798 n. 6, serving the value of "avoiding the cost and vexation of repetitive litigation and the public' s interest in conserving judicial resources." *Id.* The Court did not mention availability of judicial review, just the *Utah Construction* factors quoted above, as the prerequisites for preclusive effect of state administrative determinations.

Our cases are consistent with the analysis above. *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988), holds that a state administrative determination had to be given preclusive effect under *Utah Construction and Elliott* even though it had not been judicially reviewed (the appellant had not taken advantage of his opportunity for state judicial review). We listed numerous factors in *Eilrich* that showed that the state agency was "acting in a judicial capacity" and granted "adequate opportunity to litigate" without mentioning appealability. Likewise in *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), we upheld application of collateral estoppel in a section 1983 case to state administrative determinations, because we had to under *Utah Construction, Elliott, and Eilrich.* See also *Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), and *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986).

The case might be different were the state proceeding an arbitration under a collective bargaining agreement. *McDonald v. City of West Branch*, 466 U.S. 284 (1984), holds that "in a § 1983 action, a federal court should not afford res judicata or collateral estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement," *Id.* at 292, because the arbitrator might not have authority to enforce section 1983, and the arbitrator' s expertise pertained to "the law of the shop, notthe law of the land." *Id.* at 290. But those factors donot apply here. Though the proceeding resembled arbitration in its elective character, speed, and finality, it was not arbitration pursuant to a collective bargaining agreement. It was an administrative proceeding pursuant to court rules. The hearing officer was a state judge, with expertise in "the law of the land" as opposed to the "law of the shop," and was not restricted from enforcing the "law of the land."

The case might also be different if the state proceeding was mandatory rather than voluntary. We can leave for another day the question whether a state administrative agency to which a person had to submit his claim, and from which there could be no judicial review, satisfies the "acting in a judicial capacity" and "adequate opportunity to litigate" requirements of *Utah Construction. Compare Crossroads Cogeneration v. Orange & Rockland Utilities, Inc.*, 1509 F.3d 129, 137 (3d Cir. 1998) (dictum that full and fair opportunity to litigate "includes the possibility of a chain of appellate review") with *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) ("due process does not require a State to provide an appellate system"). Whether a right to judicial review might be a prerequisite to "acting in a judicial capacity" and granting an "adequate opportunity to litigate" in some circumstances, it cannot be where a party voluntarily gives up his right to a proceeding subject to judicial review in order to take advantage of a proceeding that necessarily dispenses with judicial review as part of a scheme that affords a quick, cheap, and final remedy. There is no reason to deprive people of the option of quick, cheap final remedies by limiting finality to procedures where judges can review the determinations.

:::::::::::::::::::::::::::: FOOTNOTE(S)::::::::::::::::::::::::::::

FN1. The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

FN2. The rules also state that "[i]f the grievance/appeal is decided by a judge, the grievant/appellant

and ADMOC relinquish any current or future claim to seek or obtain remedy through any other Court appeal procedures."

FN3. Our statement is not to be taken as implying error by the hearing officer in Wehrli' s case; the merits of his decision are not before us.

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Saperstein, Goldstein, Demchak & Baller
A Professional Corporation
1300 Clay Street, 11th Floor
Oakland, California 94612
510/763-9800
510/835-1417 FAX

Law Revision Commission
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MAY - 7 1999

File:

May 6, 1999

VIA TELECOPIER

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

Re: Law Revision Commission Study of Administrative Rulemaking

Dear Mr. Hebert:

This is in response to your letter of April 26, 1999. For the reasons stated below, it is imperative to retain judicial deference for advisory interpretations (opinion letters) from the Division of Labor Standards Enforcement (DLSE).

Statement of Interest

The Saperstein, Goldstein, Demchak & Baller firm represents employees in discrimination and wage-hour class actions. In the last year we have litigated several statewide class actions and a nationwide collective action, prosecuting employees' wage-hour rights under the state's Industrial Welfare Commission Wage Orders and the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. We have also represented non-profit organizations serving low-income and minority workers in amicus briefs in two wage-hour cases presently pending before the California Supreme Court – Cortez v. Purolator and Morillion v. Royal Packing Company.

Analysis

The DLSE is empowered to enforce the Labor Code, and, more particularly, is responsible for administering and enforcing the provisions and Wage Orders regulating wages, hours and working conditions. Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 564, 561-62; cert. den. (1997) 520 U.S. 1428; Labor Code § 1193.5. To carry out this mandate, the legislature recognizes that the DLSE must formulate enforcement policy statements and interpretations of the Labor Code and Wage Orders. See Labor Code § 1198.4.

The California Supreme Court has determined that administrative agency interpretations offered in advice or opinion letters, such as those of the DLSE, may be given deference. Tidewater, 14 Cal.4th at 571, 576; Yamaha Corp. v. State Bd. of Equalization, __ Cal.4th __, 78 Cal.Rptr.2d 1, 6-7 (1998). Such deference stems from the recognition that an administrative agency, such as the DLSE, develops expertise and technical knowledge of the law and factual applications through its experience in enforcing the law. See Yamaha, 78 Cal.Rptr. at 7-8.

In discussing the deference due agency interpretations, the California Supreme Court has recognized that an agency's case-by-case opinion letters and administrative adjudications offer important guidance to the public. See Tidewater, 14 Cal.4th at 576; Yamaha, 78 Cal.Rptr.2d at 7-8. In the case of the DLSE, such guidance is not only important to clarify ambiguities, but invaluable because the DLSE's interpretation is often the only official view of particular wage-hour issues.[1] Cf. Leader, Wages & Hours Law & Practice (Matthew Bender 1995), p. 9-7 (making same observation about the Department of Labor, Wage & Hour Division's interpretations of the FLSA). By forbidding any court deference to the DLSE's advisory interpretations, the proposed legislation would undermine the DLSE's ability to offer such necessary guidance.

The authoritative effect of the DLSE's advisory interpretations depends on the public's anticipation that courts will afford weight to such agency interpretations. In our practice, the DLSE opinion letters are often essential for discerning wage-hour rights and obligations – especially when a matter is not answered by case law or the language of the Labor Code and/or Wage Orders. In conferring with both fellow plaintiffs' attorneys and opposing counsel representing management, we find that our fellow practitioners recognize that the DLSE's opinion letters provide valuable, persuasive interpretations of the status of the state's wage-hour laws. If courts are disallowed from giving any deference to the DLSE's advisory interpretations such letters will obviously lose their persuasiveness with practitioners. Where the DLSE opinion letter is the only official word on a subject, employees and employers will be left with little or no reliable guidance as to their rights and obligations. Neither plaintiffs nor employers will have any incentive to seek DLSE opinion letters if no deference can be afforded to them in the event of litigation. The result would be disastrous and would replace the current orderly administration of California wage-hour law with an untenable anarchic system.

[1] There is little published California case law in the wage and hour area. This is no doubt because most wage and hour matters typically involve small sums and are therefore resolved informally or at the administrative level.

For the reasons stated above, we urge the Commission to abandon the proposed legislation in its current form. Thank you for your consideration.

Very truly yours,

David Borgen

Aaron Kaufmann

DB/ld

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

ATTORNEYS AT LAW

EMBARCADERO CENTER WEST
275 BATTERY STREET, 30TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3339
TELEPHONE: (415) 956-1000
FACSIMILE: (415) 956-1008
mail@lchb.com
www.lchb.com

ROBERT L. LIEFF
ELIZABETH J. CABRASER
RICHARD M. HEIMANN
WILLIAM BERNSTEIN
WILLIAM B. HIRSCH
JAMES M. FINBERG
KAREN E. KARPEN
JOSEPH R. SAVERI
DONALD C. ARBITBLIT
STEVEN E. FINEMAN
ROBERT J. NELSON
JACQUELINE E. MOTTEK
MORRIS A. RATNER
MELANIE M. PIECH
KELLY M. DERMODY
JONATHAN D. SELBIN
RICHARD M. FRANCO
BARRY R. HIMMELSTEIN

CARYN BECKER
STEPHEN H. CASSIDY
JOSHUA P. DAVIS
PAULINA DO AMARAL
ERIC B. FASTIFF
HECTOR D. GERIBON
PIERCE GORE
REBECCA M. KATZ*
LISA J. LEEBOVE
KAREN J. MANDEL
SCOTT P. NEALEY
RINA PEDROZA
ERIK L. SHAWN*
MICHAEL W. SOBOL
DAVID S. STELLINGS*
STEVEN M. TINDALL
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JONATHAN M. WATKINS
HEATHER A. WOODARD

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May 21, 1999

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MAY 24 1999

File:

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

Dear Brian:

Thank you for your letter regarding the DLSE's position on the state legislation that would create a simplified notice and comment procedure that a state agency could use to issue an advisory interpretation. From my experience, I tend to agree with the DLSE's position that its advisory interpretations should be entitled to some judicial deference. In Yamaha Corp. of American v. State Board of Equalization, 19 Cal. 4th 1 (1998), the California Supreme Court indicated that courts may accord some degree of deference to agency opinion letters interpreting statutes or regulations that the agency has the duty to enforce.

In my experience, the DLSE's advisory opinions tend to be well researched, well reasoned, and helpful — especially in areas of the law where there are few published opinions, such as the application of particular exemptions to the overtime wage laws. I would not object to courts giving some deference to the DLSE's advisory interpretations in such instances because of the agency's extensive experience in interpreting and enforcing such laws. The DLSE's advisory opinions have been helpful to me in attempting to wade through the sometimes murky waters of wage and hour law, and I suspect that the California courts think so as well.

I hope you find these comments helpful.

Very truly yours,

Steven M. Tindall

SMT:wp
cc: Kelly M. Dermody

HERBERT.ADM

10 ROCKEFELLER PLAZA, 12TH FLOOR NEW YORK, NEW YORK 10020-1903
TELEPHONE: (212) 218-6600 FACSIMILE: (212) 218-6608

MORRISON & FOERSTER LLP

SAN FRANCISCO
LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
DENVER

ATTORNEYS AT LAW

425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2482
TELEPHONE (415) 268-7000
TELEFACSIMILE (415) 268-7522

NEW YORK
WASHINGTON, D.C.
LONDON
BRUSSELS
HONG KONG
SINGAPORE
TOKYO

May 24, 1999

Writer's Direct Dial Number
(415) 268-6558

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MAY 25 1999

File:

Brian Hebert, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: **Law Revision Commission Study of Administrative Rule Making**

Dear Mr. Hebert:

Thank you for the opportunity to comment on the California Law Revision Commission's proposed legislation creating a simplified notice and comment procedure that a state agency could use to issue an "advisory interpretation." I particularly appreciate the opportunity to comment because of my own long-standing views on this issue which date back to the mid-1980's and are based on my own experiences with the "underground regulation" procedures of the Office of Administrative Law.

While I agree with the Division of Labor Standards Enforcement's (DLSE) viewpoint on the proposed legislation with regard to the amount of judicial deference due an administrative determination by the DLSE, I do not believe either their comments or your recommendation address the fundamental problem with the Administrative Procedures Act and underground regulations. Rather, I believe an approach closer to the Federal Administrative Procedures Act which contains a much looser definition of administrative guidance and advisory opinions should be adopted in California.

The problem with the Law Revision Commission's proposal, at least as far as the DLSE is concerned, is that in the context of current law (*Tidewater Marine, Inc. v. Bradshaw*, 14 Cal.4th 557 (1996)), there is simply no reason to use an advisory interpretation procedure that results in a non-binding statement of the DLSE's interpretation of the law and a statement that is afforded no deference by a court of law. Under *Tidewater*, the DLSE is entitled to issue interpretive letters and opinions which are based on the specific facts of a particular case. These letters can be used as precedent by the DLSE and outside parties and will be accorded at least some weight by a court of law. The *Tidewater* opinion seems to recognize that these letters are written

without any notice and comment; even so, they will be accorded deference based on their persuasiveness and consistency with the statute. On the other hand, the Law Revision Commission's suggestion would require the DLSE to go through a notice and comment period in order to issue a statement of policy which will be accorded no judicial deference. Under this construct, it is hard to see why the DLSE would ever want to use the notice and comment procedure.

In your letter you list DLSE's three reasons why it believes its interpretations should be afforded some deference under the principles expressed in *Yamaha Corp. of America v. State Board of Equalization*, 19 Cal.4th 1 (1998). I agree with the DLSE that it has no power to regulate under the Industrial Welfare Commission (IWC) regulations because that regulatory authority is exclusive to the IWC. It is unfortunate that the entity with the regulatory authority is a part-time agency usually made up of five persons who are not expert in the wage and hour field and who operate with a very small staff. Regulations interpreting the Fair Labor Standards Act (FLSA) at the federal level are issued by a well-staffed enforcement agency and, accordingly, under the Code of Federal Regulations there are hundreds of pages of regulations interpreting the FLSA. Much of the necessity for DLSE to issue interpretive letters and opinions would be obviated if it had the regulatory authority to develop extensive regulations similar to those under the FLSA. Indeed, under *Tidewater*, the Labor Commissioner's new *Policies and Interpretations Manual* relies heavily on the federal regulations for authority.

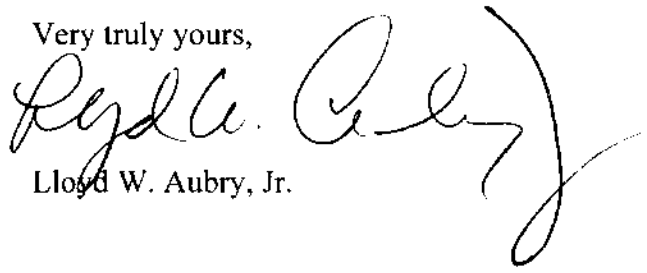
It is true that DLSE interpretations and opinion letters are introduced into private as well as DLSE litigation. It is also true that in this type of litigation expert witnesses are called to provide an expert opinion usually based on DLSE's legal analysis or on their own interpretation of the statute. If expert witnesses are going to be permitted to testify about what a particular statute or set of facts mean, DLSE's opinions and interpretations should also be admitted.

I am going to recuse myself from the third point raised by the DLSE, that most labor attorneys would not object to giving appropriate deference to DLSE advisory interpretations. First, I can't presume to speak for other labor attorneys and have certainly seen other labor attorneys attempt to overturn DLSE advisory opinions; and second, many of the interpretations and letters were written by me.

While the Law Revision Commission's proposal sounds reasonable when considered solely in light of the APA's current strict definition of a regulation and an underground regulation, I do not believe it is the best approach to resolving these recurring problems under the APA, particularly after the *Tidewater* decision. Rather, as noted above, I believe the APA should be amended to conform to the Federal APA so that agencies could more easily provide interpretive guidance and opinions without going through the formal rule-making process. Certainly, in light of the ability of the DLSE under *Tidewater* to issue interpretive letters and opinions which will be accorded deference by a court, the procedure that you have proposed will not be of much use to the DLSE and probably to any other agency.

Again, thank you for the opportunity to comment, and if you have any further questions, please do not hesitate to contact me.

Very truly yours,



Lloyd W. Aubry, Jr.

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A LAW CORPORATION

ROBERT W. GILBERT
KENNETH J. SACKMAN
JOSEPH L. PELLER JR.*
ROBERT A. CANTORE *
STEVEN M. REHAUT
HERBERT M. ANSELL

LAURIE A. TRAKIMAN
JAY SMITH **
CHRISTOPHER E. KRAFCHAR **
CINDY T. GUNADI
GARRETT J. HINES

6100 WILSHIRE BOULEVARD, SUITE 700
LOS ANGELES, CALIFORNIA 90048-5114

TELEPHONE (323) 938-3000
FAX (323) 937-0150

May 27, 1999

Arthur K. Marshall, Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Assembly Bill 486

Dear Chairperson Marshall:

Thank you for your invitation to comment on Assembly Bill 486. We agree with the Division of Labor Standards Enforcement that proposed Section 11360.030 of the Government Code should be revised to permit courts to give appropriate deference to the DLSE's advisory interpretations.

My law firm has represented private sector labor unions and labor-management trust funds in Southern California for more than 50 years. In the course of our representation, we regularly are asked for advice regarding the meaning and application of California wage and hour law and regulations, including Industrial Welfare Commission wage orders. In rendering this advice, we rely heavily for guidance on advisory interpretations by the Division of Labor Standards Enforcement.

Our reliance on DLSE interpretations is not unusual. Management counsel also regularly seek advisory letters to determine whether wage and hour practices conform with current law and regulations. California wage and hour law is complex, and mistakes are costly. Employers also rely on the DLSE's special expertise. Under present law, employers, by conforming their policies to DLSE advisory opinions, can have at least some assurance that their payroll practices will survive court challenge.

In this, DLSE advisory opinions serve a function similar to U.S. Department of Labor advisory opinions and Internal Revenue Service letter rulings, to which the courts routinely

defer (but are not bound). DLSE advisory opinions, like DOL opinions and IRS letter rulings, deter litigation by enabling individuals and institutions to receive advance approval of contemplated changes in payroll practices.

In summary, AB 486 would deprive business and labor of any level of certainty that the courts will give deference to wage and hour practices that conform to those sanctioned by the DLSE in its advisory opinions. Indeed, the courts would be entirely precluded from considering DLSE's interpretations on which the parties have based their conduct. We therefore join the DLSE in urging the Committee to modify the proposed legislation to provide that the courts are not foreclosed from giving appropriate deference to the DLSE's advisory interpretations.

Again, thank you for the opportunity to comment on the proposed legislation. If you have any questions, please call.

Very truly yours,

GILBERT & SACKMAN
A Law Corporation

By _____
Joseph L. Paller Jr.

JLP:hs

cc: Miles E. Locker, Chief Counsel, DLSE