COMMENTARY

LAW REVISION COMMISSION NEARS COMPLETION OF NEW APA

By Michael Asimow[1]

Since 1989, the California Law Revision Commission has been engaged in a mammoth project to draft new Administrative Procedure Act (APA) adjudication provisions for legislative consideration.[2] This project should be completed late in 1994 for submission to the legislature in 1995.[3] However, the Attorney General opposes enactment of the statute as presently drafted.[4] The Attorney General's opposition will require the Commission to rethink a number of central provisions of the draft.

Readers of this journal with a professional interest in administrative law need to know about the proposed new APA. It will affect the practice of every government and private administrative lawyer. Make your voice heard. Get a copy of the proposed Act[5] and write to the Commission if you have suggestions or if you disagree with particular provisions or with the Attorney General's position. The Commission is extremely open to public comment, but time for making changes in the Act is running short.

The new APA is designed to cover adjudication by *all* California state agencies.[6] At this point, a few agencies whose adjudication is *sui generis* have been excepted,[7] but all the others are covered. California's existing APA probably covers less than 5% of the total number of adjudications by state agencies.[8] Thus, the new APA will have massively greater coverage than existing law.[9] But this is hardly a radical suggestion: The federal government and virtually every other state have an APA that covers adjudication in all agencies. California lags far behind everyone else in this respect.

Once adopted, the new Act will make administrative law a real legal specialty. No longer will we think of ourselves only as tax lawyers, workers' compensation lawyers, energy lawyers, labor lawyers, or professional licensing lawyers. We will *all* be administrative lawyers, and all of us will try our administrative cases under the same statute. The precedents applicable to one agency will apply to all. You won't have to learn new ropes to practice before a new agency because it will function under a familiar statute; in addition, as discussed below, the new Act will require the adoption of a convenient code of procedural regulations and will also create precedent decisions. There can be continuing legal education courses about administrative law and better books about California administrative law. The Act will usher in a new era of more informal proceedings, hearings over the telephone, and much greater utilization of alternative dispute resolution (ADR) techniques. Thus, the new Act will signal a revolutionary change in the professional culture of many California lawyers.

The Act does not radically change the existing system of adjudication. Thus, it preserves but does not expand the Office of Administrative Hearings (OAH), California's central panel of administrative law judges (ALJs). Nor does it strip agency heads of the power to make the final decision in adjudicatory cases.[10]

What then would the new Act do?

- It would make available all types of ADR techniques, including mediation and arbitration. Under present law, the legality of ADR in administrative adjudication is questionable.
- It would introduce an informal hearing in which the presiding officer could dispense with cross-examination and other courtroom theatrics. Informal hearings would be used when there is no disputed issue of material fact, in cases involving relatively small stakes, or as provided by regulations. The existing APA provides only for formal hearings.
- It would make certain basic protections applicable to all agencies. For example, *ex parte* contacts with agency heads, which are now tolerated in some agencies, would be prohibited. There is presently no provision for the separation of prosecutory and advocacy functions from adjudicatory functions. The Act would make separation of functions mandatory in all adjudication.[11]
- The Act would encourage all agencies to maintain a system of precedent decisions so that agency law could be known to all, not just to insiders.
- The Act would require that reviewing courts give great weight to ALJ findings that are based on the demeanor of witnesses.[12] Under present law, agency heads may cast aside such findings and substitute their own without having seen or heard the witnesses.
- The Act would adopt a system of emergency hearings under which all agencies could act promptly in situations threatening public health or welfare.[13] It would also provide for declaratory orders, the administrative equivalent of declaratory judgments. Declaratory orders provide a way for an agency to furnish reliable, binding guidance on problematic transactions without having to first charge someone with a violation of law.
- The Act would give agencies substantial power to make ALJ decisions final or to limit review by the agency heads of ALJ decisions.

One difficult problem in drafting a new Act was to preserve the protections provided by the existing APA while allowing other agencies sufficient flexibility. Administrative adjudication spans a vast range of matters, from the twenty-minute hearings provided by the Unemployment Insurance Appeals Board to lengthy and complex cases involving water rights, energy facility siting, or unfair labor practices. It is not realistic and would be very inefficient to require that every agency follow exactly the same procedures. Instead, it is clear that agencies need flexibility to design their own procedures. Yet the Commission did not wish to reduce the existing level of protection provided by the APA with respect to practice before the agencies that it covers.

Take, for example, the question of discovery. The existing APA provides for a system of discovery that consists largely of inspection of files and exchange of witness lists.[14] Some agencies provide much greater discovery (such as the deposition practice of the Workers' Compensation Appeals Board), while others provide for no discovery at all. It seems inappropriate to mandate a single, inflexible system of discovery for all the disparate types of adjudication. On the other hand, the discovery system in OAH agencies is working well and should not be disturbed.[15]

This drafting problem was solved by providing for a system of "template" procedure applicable to all adjudicating agencies not covered by the existing APA. Under the template approach, certain provisions of the Act (such as restrictions on *ex parte* contacts and separation of functions) will apply to all agencies. As to all the other provisions in the Act, however, non-APA agencies may either follow the provisions applicable to OAH agencies or adopt regulations that design their own procedures. If they fail to adopt regulations, the provisions relating to OAH agencies will function as the default rules.

In order to design their own procedures, non-OAH agencies must adopt regulations in compliance with the rulemaking provisions of California's APA.[16] This is one of the reasons the Attorney General and many agencies object to the current draft. Agencies are understaffed and confronted with severe budgetary austerity. They are opposed to bearing the considerable costs of rulemaking, particularly including the need to pass the regulations through the Office of Administrative Law (OAL).

The Commission took heed of this objection by allowing agencies ample time to complete the rulemaking process; the Act would not go into effect until July 1, 1997. Moreover, the Act specifically provides for the adoption of interim regulations that would not expire until March 31, 1999. It also provides that OAL will not have power to disapprove procedural regulations adopted during this period because they do not meet the "necessity" standard.[17] To the extent that an agency procedural regulation has already been properly adopted, it would not be necessary to go through rulemaking proceedings to readopt it. And agencies could, if they wish, simply adopt the default rules provided in the Act for OAH agencies without going through any rulemaking proceeding.[18]

Nevertheless, it seems clear that at least some agencies will have to bear some costs of going through rulemaking. But consider the upside: The public concerned with the particular agency will, for perhaps the first time, have an opportunity to furnish input about what the agency's procedures should look like. Many of the procedural regulations followed by California agencies are incomplete, outmoded, or inaccurate descriptions of existing practice. The revised APA will require agencies to adopt a proper code of procedural regulations. Agencies will have to solicit public comment and consider and respond to the comments they receive. It seems to the Commission that a one-time public proceeding to determine the procedural rules that govern an agency's adjudication is well worth its cost.

The Attorney General expressed support for many of the proposals in the current draft, such as those relating to ADR and *ex parte* contacts, and endorsed the idea of making them applicable across the board. However, the AG opposed the idea of making the rest of the statute applicable to all agencies. He is very concerned about the cost of rulemaking and the likelihood of other transitional costs, such as litigation arising out of the new law. He does not believe that the benefits of the new law outweigh those costs.[19] The Commission has not yet decided whether to push forward with a comprehensive approach or to accept the AG's more modest proposal.

In the author's opinion, the benefits of a comprehensive new APA clearly outweigh the transitional costs of putting it into place. I believe that the proposed act is a once-in-a-lifetime opportunity to build a new system of administrative law for the generations that will come after us. We can be pioneers, just like the Judicial Council whose 1945 report gave birth to our existing APA.

Once more, I say: Readers of the *California Regulatory Law Reporter*, take heed! This is important. If you like what the Commission is doing, say so—now and during legislative consideration of the bill. If you agree or disagree with the Attorney General, let him and the Commission know about it. If you think the draft can be improved, tell us about it now, so that the Commission can consider appropriate modifications. Speak now or forever hold your peace.

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ENDNOTES

1. Professor of Law, UCLA School of Law. The author welcomes inquiries about the Law Revision project. His phone number is (310) 825-1086. The opinions expressed in this article are the author's alone and should not be attributed to the Commission or its staff.

2. I have been the consultant for this project and have written seven studies about administrative procedure reform and judicial review. These, along with the current draft of the legislative proposal, are available from the California Law Revision Commission, 4000 Middlefield Rd., Ste. D-2, Palo Alto, CA 94303. The Commission's phone number is (415) 494-1335. I have published an article summarizing the first three of these studies. Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067 (1992). Another article about the scope of judicial review is forthcoming.

Additionally, readers of the *California Regulatory Law Reporter* may recall my summary article introducing them to this massive project. 9:3 CAL. REG. L. REP. 1 (Summer 1989).

3. The statute to be submitted to the legislature will cover adjudication procedure but not judicial review. The Commission hopes to submit a judicial review statute to the legislature in the future.

4. Letter from Attorney General Daniel E. Lungren to the California Law Revision Commission (May 11, 1994).

5. *See supra* note 2.

6. More precisely, the Act would govern a decision by an agency "if, under the federal or state constitution or a statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." Proposed CAL. GOV'T CODE § 631.010, currently embodied in the Commission's Memorandum 94-26 (June 1, 1994). By the time this article is published, the Commission will have replaced Memorandum 94-26 with a revised draft. Nevertheless, citations herein to provisions in the proposed Act will be to Memorandum 94-26.

7. For example, the Commission exempted Public Utilities Commission (PUC) adjudications from the statute because of the unique nature of the PUC's ratemaking adjudications; trying to accommodate PUC practice created serious drafting problems and greatly complicated the draft statute. Early on, the Commission exempted the University of California because of the University's constitutional autonomy. It has exempted the various proceedings conducted by the Department of Corrections (such as parole revocation). It also exempted proceedings by the Agricultural Labor Relations Board and Public Employees Relations Board for worker certification but not unfair labor practices. Several other possible exemptions remain under consideration at this writing.

8. The adjudication portion of the existing APA covers mostly occupational licensing agencies plus a few others. *See* CAL. GOV'T CODE § 11501.

9. For example, the Act will cover the Unemployment Insurance Appeals Board, the Workers' Compensation Appeals Board, the State Personnel Board, the State Board of Equalization's tax hear-