FEATURE ARTICLE

Updating California Administrative Law

*by Michael Asimow**

INTRODUCTION

The rules of administrative law are designed to achieve a balance between the goals of fairness to regulated parties and of effective, efficient, and economic government. Just as the rules of civil procedure apply to all lawsuits, the rules of administrative law apply to all agencies—regardless of the different sorts of regulation in which the agencies are engaged. The practical importance of administrative law has never been greater: administrative adjudication and rulemaking is enormously important to society and it touches the lives of us all.

The California Administrative Procedure Act (APA)[1] was first adopted in 1945, following a study by the Judicial Council.[2] Thus it preceded by one year the adoption of the federal APA.[3] The California APA was a pioneering act and, in many respects (such as in the creation of a central panel of hearing officers), was well ahead of its time. However, the Act had limited objectives. Because the Judicial Council lacked sufficient time, staff, and budget to make a comprehensive study of the problem, it recommended a statute that dealt with only a portion of administrative adjudication.[4] It contained provisions about judicial review, but these reflected the hopeless constitutional muddle relating to judicial review at that time.[5]

The APA provisions relating to rulemaking were completely revised in 1979. However, the adjudication and judicial review provisions remain, for the most part, the same as when they were adopted more than forty years ago. I would wager that all who practice in the field of California administrative law, whether from the government or the private side, would agree that the present Act is badly out of date, even if they would agree on little else.

Since the adoption of the federal and state APAs in 1945 and 1946, the subject has developed enormously. There is a tremendous body of commentary, case law, and experience. In particular, we can be more confident than was the Judicial Council in 1944 that a single, well-drafted code of administrative procedure can comfortably apply to the rulemaking and adjudication provisions of all agencies. The Commissioners on Uniform State Laws have adopted several model APAs, most recently a state-of-the-art version in 1981.[6] The time is clearly ripe for a new look at California administrative law.

PENDING STUDY OF ADMINISTRATIVE PROCEDURE

The California Law Revision Commission has engaged me to prepare a study of California administrative law and to make recommendations for legislation to modernize California administrative procedure.[7] The first phase of the study concerns adjudication. Rulemaking, judicial review, and political oversight will follow later. At present, I have begun work on this study and hope to present a report on at least some phases of administrative adjudication by the end of the summer of 1989. Ideally, the Law Revision Commission will ultimately adopt a set of recommendations based on my study and its own analysis and conclusions. With the support of as many interested groups as possible, the Commission will cause them to be introduced in the legislature.

This article is intended to alert the readers of the *California Regulatory Law Reporter* to my study and to the distinct possibility that quite substantial changes in California administrative law will come before the legislature in the next couple of years. With some luck, California could well have a new administrative procedure act.

If you have read this far, this is undoubtedly of interest to you. As a result, I hope that after reading this article you will communicate with me or with the Law Revision Commission.[8] In either case, you will be placed on the Commission's mailing list so you will be updated on the progress of the study. More important, I would like to receive whatever input you would care to provide on the issues discussed in this article. I would be happy to appear before your bar association administrative law committee or at a meeting of your agency's members and staff.

Nobody could be an expert on the procedures of all, or even of most, of the hundreds of California administrative agencies; I certainly do not claim to be. Therefore, to produce recommendations that deal fairly with the complexity and variety of California administrative justice without making it more cumbersome and costly, I will need the help of many people inside and outside of the agencies. I hope you will be one of those who takes an interest in this project.

The balance of this article surveys the issues I intend to cover in the course of my study. Each of these issues (and many others I will encounter as the study proceeds) are live, important issues, on which reasonable persons can differ. I have not reached a final decision on any of them, although I have strong views on many of them. But it will be necessary to come up with answers to all of them before the Law Revision Commission can come forward with proposed legislation and before any sort of coalition can be assembled that could support amendatory legislation.

This article first asks an overarching question: Should California consider adopting the 1981 Model Act? If the answer to that particular question is no, the balance of the article focuses on particular issues in need of current study.

THE 1981 MODEL ACT

There are obvious reasons why California should consider the 1981 Model Act as a starting point for administrative law reform. Although the Act has not yet had widespread adoption (Washington, Arizona, and Utah have adopted it

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in whole or in part), it represents years of study and consideration by skilled consultants and by the Commissioners on Uniform State Laws. There are obvious reasons to start with a Model Act when drafting a California statute: it allows California to take advantage of the enormous research and drafting investment made by others and, to the extent uniformity is achieved, it makes available precedents from other states when provisions of the law are drawn into question.

The Model Act contains many innovations in its provisions relating to adjudication, rulemaking, judicial review, and oversight. For example, it provides for a set of differing adjudication procedures, of varying degrees of formality, depending on the matter to be resolved. The same degree of formality should not be required in cases considering whether a physician's license should be revoked or a student should be suspended from a California state college for five days.

Most important, the Model Act covers the entire field: public information, adjudication, rulemaking, judicial review, and legislative and executive oversight of agencies. It is an integrated approach to protecting the rights of the public while achieving economic and efficient government and making agencies politically responsive. It would be a whole fresh start for California. This might be a better approach than to perform countless bits of minor surgery on the existing statutory and decisional law which is often outdated and confusing. Needless to say, however, the Model Act would serve only as a starting point. As always, California would go its own way and strike its own compromises. But the Act would be a good place to begin.

In the final analysis, it may not make much difference where one starts: whether one takes the Model Act approach or the piecemeal approach, one must study existing California law and compare it with Model Act provisions in order to decide what is best for California. But perhaps there is a difference in emphasis depending on whether the Model Act or the existing law is the starting point. If the Model Act is the starting point, one might need a stronger justification to depart from it than if one takes existing law as the starting point.

PIECEMEAL CHANGES

In this section I shall briefly address a list of problem areas that I have identified at this stage of my study. These will be broken down into the following categories of adjudication, rulemaking, judicial review, and oversight.

Adjudication

A. Should Agencies Adjudicate? One fundamental issue of administrative law is whether the same agency members who prosecute cases should also adjudicate them. Many people feel that it is unfair, for example, that a licensing agency adopts the rules of practice, employs staff that investigates violations by licensees, prosecutes their cases before an administrative law judge (ALJ), then makes the final adjudicatory decision. Those people advocate various reforms, such as making ALJ decisions final; having a separate, independent group of judges within an agency make the final adjudicatory decisions; or having a separate administrative court to hear appeals from ALJ decisions of many agencies. Models of this sort can be found in various states and the federal government.

Others feel that it is essential that a regulatory agency retain adjudicatory power in order to make policy through adjudication as well as through rulemaking. They contend that many situations cannot be anticipated through the adoption of rules; the public interest requires that agency members be able to make new law and policy in particular adjudications. They point out that the separation of adjudication from policymaking will inevitably lead to differences of opinion and confusion between the two different bodies making agency policy. And they urge that the legislature has placed the political responsibility for agency policymaking exclusively upon the agency heads.

Thus, an important issue that must be confronted in this study is whether there are agencies in which the benefits of separating adjudication from other agency functions would outweigh the costs of doing so.

B. Coverage. The adjudication provisions of the APA impose a set of standardized fair hearing procedures in cases of adjudication (such as license revocation). Under present law, the adjudication provisions apply only to the agencies named in Government Code (hereinafter GC) section 11501. Denials or revocations of professional licenses (or reprovals to licensees) trigger APA procedures.[9] In other cases an agency's authorizing statute requires it to follow the APA.[10] A long list of critically important California agencies are not required to comply with the APA's adjudication provisions. To name a few, the APA does not apply to the Public Utilities Commission, the Workers' Compensation Appeals Board, the University of California, and the Coastal Commission. In some cases, such as the Department of Motor Vehicles, certain adjudicatory functions of an agency are covered by the APA but additional functions are not. By comparison, the rulemaking provisions of the APA apply to almost all agencies.

Each of the agencies not listed in GC section 11501 has its own procedural code spelled out in its own statute, regulations, and customs. As a result, practitioners who have a matter before a new agency have to learn a new body of procedure. Cases relating to a particular problem of administrative procedure before one agency may not be precedents when the very same issue arises before another agency. Procedural due process under the California constitution imposes notice and hearing requirements in *far* more situations than does due process under the federal constitution.[11] This maze of adjudicatory requirements seems reminiscent of the writ system that once guided civil litigation—a different set of procedures for tort, contract, and property litigation. Most people think that progress was made when a single code of procedure came to cover all civil litigation.

Historically, the reason that the Act covers only certain agencies is that the Judicial Council's report was not comprehensive. That report covered only licensing agencies and, for the most part, the adjudication provisions of the APA today cover only licensing functions.

Under the existing Act, all adjudicatory hearings are conducted by ALJs from the central panel known as the Office of Administrative Hearings (OAH).[12] Thus, the process of APA adjudicatory hearings inevitably involves a central panel judge. When people discuss the extension of the APA to additional agencies, they often assume that this means that all of the agency's hearings would be conducted by OAH ALJs. However, it should be possible to decouple the ALJ-central panel problem[13] from the question of whether the APA adjudication procedures should apply to an agency's proceedings. The APA could cover an agency's adjudication even though the agency employs its own hearing officers or does not use hearing officers at all.

The issue to be studied is whether the APA should supply adjudication procedures for all state agencies that engage in adjudication (unless the legislature

specifically decides to exclude them).

C. Adjudications Covered. The adjudication provisions of the APA apply in cases where a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned; or should be granted, issued, or renewed; or where a licensee is publicly reproved.[14] But there are many administrative adjudications that might not be covered by this listing (such as assessment of a civil money penalty or fixing rates for a regulated industry).[15] Should the adjudication provisions of the APA apply to every adjudication?

D. Formality of Hearing. The APA provides for only a single, relatively formal trial-type procedure regardless of the nature of the issue and the seriousness of the matters to be resolved. The same elaborate procedure would apply to hearings at which there is a dispute of material fact (such as the negligence of a licensee) and a hearing at which the only issue concerns the exercise of discretion or the interpretation of regulations. The same formalities attend the revocation of a pharmacist's license and the imposition of an extremely minor sanction. There is no specific provision for emergencies—when an agency must act before providing procedures. Under the 1981 Model Act, there is a gradation of procedures depending on the issue to be resolved and the seriousness of the sanction; there is provision for conference hearings, summary hearings, and emergency hearings.[16] For example, a conference hearing is used if there is no issue of material fact to be resolved. Should California law also provide for less formal procedures when that is appropriate?

E. Separation of Functions. The issue of "separation of functions" assumes that a single agency combines several functions—rulemaking, prosecution, and adjudication.[17] It addresses the question of whether the same staff member may engage both in adversary functions (such as prosecution, investigation, or advocacy) and adjudicatory functions (such as deciding cases or advising adjudicatory decisionmakers). For example, may the person who prosecutes the agency's case (whether from the agency staff or the Attorney General's staff) also give off-the-record advice to the members of the agency who make the ultimate decision in the case? If not, which staff members may the adjudicators consult?

California law contains no provision on separation of functions[18] and the practice seems to vary considerably. The Model Act and federal APA do contain provisions on separation of functions.[19] Given that agencies have responsibility for both prosecution and adjudication of cases, proper separation of functions is an essential element of fair administrative procedure. Should California law include a provision on separation of functions?

F. Ex Parte Contacts. California law prohibits ex parte (*i.e.*, off the record) contacts by any person (either inside or outside the agency) with a presiding officer.[20]

This provision seems too narrow since it does not prohibit ex parte contacts by or from agency decisionmakers above the ALJ level (for example, by the agency heads when they decide appeals). Moreover, it applies only to those agencies listed in GC section 11501. Should not all persons in the decision-making chain, including adjudicatory advisers, be forbidden to receive ex parte contacts from persons outside the agency? And should not the ex parte rules apply to all agency adjudication, whether or not it is otherwise subject to APA adjudicatory rules?[21]

On the other hand, the provision may be too restrictive in the sense that it may deny needed technical assistance to decisionmakers (either ALJs or agency heads) from agency staff members who have not been involved in the case.[22]

G. Administrative Law Judges. At present, California, like about a dozen other states, has a partial central panel system.[23] Many adjudications are conducted by the twenty or so central panel ALJs who are assigned to an agency on a case-by-case basis by the Office of Administrative Hearings. However, a vast amount of adjudication is not covered by the central panel system because many agencies employ their own ALJs. Federal agencies and the majority of agencies in other states employ their own ALJs; there is no central panel.

The question of whether the central panel approach should be extended to more agencies, or to all agencies, is difficult. On the one hand, it is clear that perceptions of fairness are enhanced when an ALJ does not work for the agency that is prosecuting the case. ALJs themselves might like the variety of hearing different cases rather than similar ones day after day. On the other hand, there are significant advantages in having ALJs specialize and become experts in the work of a single agency. It would be costly, for example, to educate an ALJ from scratch in the economics of public utility regulation each time the PUC undertakes a new ratemaking case.

Should California move to a system in which central-panel ALJs are used for all adjudications unless the legislature specifically provides that they shall not be used? Should the present system whereby agencies are billed for their use of central-panel judges be continued? Is there a compromise approach under which ALJs could work for a central panel but continue to hear the cases from only a single agency?

H. Proposed Decisions. At present, when an ALJ conducts a hearing, the ALJ prepares a "proposed decision." If an agency does not adopt the ALJ's decision (or decides to reduce the penalty and adopt the balance of the decision), the agency must provide an opportunity for all parties to present oral or written argument before the agency itself.[24] Some people believe that in writing their final decisions, agencies too frequently overturn the decisions of ALJs on credibility issues. Should the law make the ALJ's credibility determinations final? Or provide that credibility findings may be overturned only in cases in which the ALJ's decision is a clear error of judgment? Are there other ways in which the process of decision in appeals from ALJ decisions should be improved?

I. Discovery. At present, California provides for only limited forms of prehearing discovery.[25] These provisions allow a party to obtain the names and addresses of witnesses, make a copy of various statements and reports in the agency's files, and take depositions of persons who will not be available at the hearing. Some agencies provide for more extensive discovery practice.

Some practitioners complain that they need better discovery in order properly to prepare their cases. However, there is a real concern that extensive discovery could bog down agency adjudication, much as it has done in civil litigation. Thus, the issue is whether some or all of the rules of civil discovery should apply in administrative cases.

J. Hearsay Evidence. Although any evidence is admissible in administrative proceedings (if it is of the sort that responsible persons rely on in serious affairs), hearsay evidence is not sufficient in itself to support a finding.[26] In administrative law this is called the "residuum rule." It has been rejected by the 1981 Model Act, the federal courts, and many states. Some people feel the residuum rule is an essential protection against sloppy agency practice. Others feel that technical rules of evidence have no place in administrative practice. Should California dispense with the residuum rule?

K. Official Notice. Official notice may be taken by agency decisionmakers only of generally accepted technical or scientific matters within the agency's special field or of facts which may be judicially noticed by courts.[27] Parties must be informed of any matters to be officially noticed and given a change to rebut. Federal law and the 1981 Model Act permit much broader official notice. Should California broaden the matters which may be the subject of official notice?

L. Burden of Proof. Ordinarily the burden of proof in administrative proceedings is the same as in civil litigation—preponderance of the evidence. However, an agency must prove its case "by clear and convincing evidence to a reasonable certainty" in revoking or suspending a professional license.[28] Should the preponderance of the evidence rule be restored in all cases of administrative adjudication?

M. Contempt. Traditionally, it was thought that an agency lacked the power to hold persons in contempt; only a court could do so. However, constitutional agencies in California have the contempt power.[29] Should any agencies have the contempt power? Should all agencies have that power?

N. Settlement. Some ALJs have indicated that administrative adjudication might be improved if they had enhanced power to encourage settlements. Should any changes be made to encourage settlements?

Rulemaking

A. Required Rulemaking. Agencies generally have discretion to make policy either through case-by-case adjudication or through rulemaking. Most people would agree that it is clearly preferable that law and policy be made through rulemaking rather than adjudication, although it is not always possible to do so. The Model Act contains some important provisions that require an agency to set forth appropriate standards, principles, and procedural safeguards in the form of rules "as soon as feasible and to the extent practicable." Similarly, an agency must adopt rules to supersede the principles of law or policy previously adopted in adjudications "as soon as feasible and to the extent practicable."[30] These provisions would tilt the balance sharply toward rulemaking and away from adjudication. Should California adopt some kind of required rulemaking provision?

B. Interpretive Rules. California notice and comment rulemaking procedures apply even to rules that are strictly interpretive (such as explanatory bulletins) if they are of general applicability.[31] Federal law does not require notice and comment for interpretive rules or policy statements. The 1981 Model Act strikes a compromise position. It requires notice and comment procedures when a state legislature has delegated power to the agency to make the interpretation in the form of a legislative rule. Where an agency validly adopts an interpretive rule without notice and comment (because it has no legislative rulemaking power), a reviewing court is not permitted to pay it deference.[32] California law may be unrealistic and is probably often ignored in practice (because most agencies issue masses of interpretive communications). Should California adopt some exception for interpretive rules and policy statements?

C. Good Cause Exception. The ordinary notice and comment procedures may be dispensed with in the event of emergencies.[33] However, federal and state acts usually contain a somewhat broader exemption, allowing an agency to dispense with notice and comment procedures upon a finding of good cause because the procedures are unnecessary, impracticable, or contrary to the public interest. This is considerably broader than the "emergency" standard. Should California broaden the exemptions from notice and comment rulemaking to take account of situations other than emergencies?

D. Office of Administrative Law (OAL). California provides for review of most agency rules by the OAL on the grounds of necessity, authority, clarity, reference, nonduplication, and consistency with other law or regulation.[34] Although OAL review is relatively new, it may not be premature to ask whether the system serves the public interest.[35] Does OAL review improperly encourage non-experts to second-guess judgments of agency experts? Should OAL review be narrowed or dispensed with in favor of other oversight mechanisms?

E. Alternative Dispute Resolution. Federal agencies have experimented successfully with negotiated rulemaking. In these proceedings, all affected parties get together and negotiate a satisfactory rule; then it is proposed for public comment. Should California statutes permit or encourage alternate methods to formulate rules?

Judicial Review

A. Scope of Review. For unique historical reasons, the factual findings of California agencies are frequently subject to judicial review under an "independent judgment" standard (rather than the more conventional "substantial evidence" standard).[36] Independent judgment review applies to the findings of non-constitutional agencies that affect "vested, fundamental rights."

There are some definite problems with independent judgment. A great deal of ink has been spilled trying to decide whether a particular private interest is "vested" or "fundamental." Another disadvantage is that independent judgment review significantly increases a person's chances of success in the courts; it is probably not good public policy to encourage people to appeal cases in which substantial evidence supports the agency's fact findings. In addition to the confusion that attends the distinction between independent judgment and substantial evidence review, there is a deeper concern: independent judgment review might cause non-specialist judges to second-guess the findings of expert agency members in ways that do not promote good government.[37]

On the other hand, many people in California are devoted to the independent judgment test. They feel it provides essential protection for the ordinary citizen who is up against a clumsy and unfeeling administrative bureaucracy. It provides a bulwark against sloppy administrative procedure or agencies that are biased or captured by the industries they regulate. Should California dispense with independent judgment review?

B. Exhaustion of Remedies. A party must exhaust administrative remedies before going to court. The exhaustion rule is presently non-statutory and subject to considerable confusion.[38] The Model Act spells out the principles that help courts decide when the exhaustion requirement applies.[39] Should California have a similar statute?

C. Court in which Review Occurs. Most judicial review occurs in the superior court under the writ of mandate procedure.[40] However, decisions of the Workers' Compensation Appeals Board are initially reviewed in the court of appeals, and decisions of the Sate Bar and the Public Utilities Commission are initially reviewed in the Supreme Court. Should these aberrations be abolished? At what level should judicial review occur? Should there be a special court entrusted with judicial review of agency action?

Non-Judicial Controls

A. Oversight. Aside from the executive branch Office of Administrative Law that reviews agency rules, discussed above, California has no institutionalized

means of conducting oversight. The 1981 Model Act provides for both gubernatorial and legislative review of rules.[41] It also requires a regulatory analysis (cost benefit analysis) of rules in certain situations.[42] Should California redesign its system of oversight of administrative rules to include any or all of these institutional checks and balances?

B. Ombudsperson. In many agencies and in some states there are ombudspeople empowered to look into complaints about poor administration and try to correct them; generally, an ombudsperson has no formal powers. Should California have an ombudsperson who can look into complaints arising out of agency action?

C. Administrative Conference. The Administrative Conference of the United States is an independent federal agency that studies administrative law problems and makes recommendations to the agencies or the legislature about improvements. It has worked well at small expense. Should California have an Administrative Conference?

CONCLUSION

As is evident from the foregoing, many burning issues of California administrative law deserve careful study. Some of these issues are of major public importance. Other issues are of lesser magnitude, but every one bears directly on the fundamental question of whether it is possible to improve the quality of administrative justice in California. Toward that end, I hope that everyone who makes his or her living from administrative practice in California will take an interest in this pending study and in the legislative activity that hopefully will follow it.

FOOTNOTES

1. Now codified in Government Code §§ 11340-11528.

2. *See generally* Clarkson, *The History of the California Administrative Procedure Act*, 15 **Hast. L.J.** 237 (1964).

3. Now codified at 5 U.S.C. § 551 *et seq.*

4. California Judicial Council, Tenth Biennial Report 9-10 (1944).

5. *Id.* at 26-28.

6. *See* 14 Uniform Laws Annotated (1989 Supp.) (hereinafter cited as "1981 Model Act").

7. The Commission was authorized by the legislature to study "whether there should be changes in administrative law." SCR 12 (Lockyer) (1987 Res. Ch. 47).

8. The address of the California Law Revision Commission is 4000 Middlefield Road, Suite D-2, Palo Alto, CA 94303. Its telephone number is (415) 494-1335.

9. Business and Professions Code §§ 485, 495.

10. *See* California Continuing Education of the Bar, **California Administrative Hearing Practice** 41-122 (1989 Supp.) (list of all agency functions with guide to whether APA applies).

11. *People v. Ramirez*, 25 Cal. 3d 260 (1979).

12. Government Code § 11502.

13. *See infra* discussion in subpart G.

14. Government Code §§ 11503, 11504; Business and Professions Code § 495.

15. *See* Government Code § 11500(f) (defining adjudication broadly to include any "resolution of an issue pertaining to an individual").

16. 1981 Model Act, *supra* note 6, §§ 4-401 to -403, 4-501 to -506.

17. *See supra* subpart A concerning whether agencies should adjudicate.

18. The provision on ex parte contacts, discussed *infra* in subpart F, deals with some separation of function issues.

19. *See* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 **Colum. L. Rev.** 759 (1981).

20. Government Code § 11513.5.

21. In some non-APA agencies, such as the Public Utilities Commission, ex parte comments by outsiders with agency decisionmakers are commonplace.

22. *See* Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 **Admin. L.J.** 107 (1987).

23. *See generally* Abrams, *Administrative Law Judge Systems: The California View*, 29 **Admin. L. Rev.** 487 (1977).

24. Government Code § 11517.

25. *Id.* at §§ 11507.6-.7, 11511.

26. *Id.* at § 11513(c).

27. *Id.* at § 11515.

28. *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853 (1982).

29. *See Morton v. Workers' Compensation Appeals Board*, 193 Cal. App. 3d 924 (1987).

30. 1981 Model Act, *supra* note 6, § 2-104(3) and -104(4).

31. *Armistead v. State Personnel Board*, 22 Cal. 3d 198 (1978); Government Code §§ 11342(b), 11347.5(a).

32. 1981 Model Act, *supra* note 6, § 3-109.

33. Government Code § 11346.1.

34. *Id.* at § 11349.1.

35. *See, e.g., California Regulatory Law Reporter*, Vol. 8, No. 4 (Fall 1988) at 8 ("The Agencies of California Speak Out About the Office of Administrative Law: A Startling Survey").

36. Code of Civil Procedure § 1094.5.

37. *See* Comment, *A Proposal for a Single Uniform Substantial Evidence Rule in Review of Administrative Decisions*, 12 **Pac. L.J.** 41 (1980).

38. *See* Fellmeth and Folsom, **California Regulatory Law and Practice** 95, 124 (1981).

39. 1981 Model Act, *supra* note 6, § 5-107.

40. Code of Civil Procedure § 1094.5.

41. 1981 Model Act, *supra* note 6, §§ 3-202 to -204.

42. *Id.* at § 3-105.