

# Your Top Ten List of California Administrative Law Reforms<sup>1</sup>

By Michael Asimow\*

## INTRODUCTION

As laborers in the vineyard of California administrative law, we often forget how unique it is. California administrative law is completely unlike federal administrative law or the law of any other state. You'd have to think hard to find a single principle on which California law is the same as the law anyplace else. So it's a good idea sometimes to ponder those differences and decide whether they make sense or whether we should rethink them—even if they've been with us for generations.

Before I start on my destruction derby, however, I'd like to point out some unique features of California law that should be preserved. These include:

- Public interest standing. In California, anyone can sue the government about anything as long as the case meets the "public interest" or "taxpayer suit" standards.<sup>2</sup> Standing law is pretty simple and clear. Federal standing law, in contrast, is incredibly tangled and basically bans public interest and taxpayer standing.
- Public interest attorney fees. California allows them.<sup>3</sup> The feds do not.<sup>4</sup>



*Professor Asimow engages participants with his keynote address on administrative law at the Administrative and Environmental Law Conference at U.C. Hastings on June 12, 2015.*

- Independent ALJs from the Office of Administrative Hearings (OAH) preside over hearings in many cases, especially those relating to licensing.<sup>5</sup> Independent ALJ panels exist in about 20 states but not at the federal level.
- State and local government is subject to equitable estoppel in California but the federal government is not.<sup>6</sup>
- Every regulation is checked for legality and clarity by the Office of Administrative Law (OAL).<sup>7</sup> Nothing comparable exists elsewhere.

- California uses a sliding scale to determine how much deference is owed to agency legal interpretations.<sup>8</sup> Under *Chevron*, the feds use an unsatisfactory result-oriented methodology that gives both too much and too little deference to agency legal interpretations.<sup>9</sup>

However, this article will focus on ten areas in which California is unique but, in my opinion, not in a good way. This article is going to be superficial. Space limitations prevent a detailed analysis; each of these topics merits an article of its own. Many (if not all) readers of this article will disagree with me about some (if not all) of my criticisms. I hope this begins a healthy conversation about some important administrative law issues and, in the future, possible legislative or judicial consideration of reforms. Unlike David Letterman's top-ten lists, these suggestions aren't in order from least to most important but instead are organized according to the administrative function involved—adjudication, rulemaking, judicial review, and open meetings.

## ADJUDICATION<sup>10</sup>

### 1. Residuum rule

The residuum rule states that hearsay evidence that is not admissible in a civil action is

admissible in administrative hearings to supplement or explain other evidence but is not sufficient in itself to support a finding.<sup>11</sup> In other words, California requires at least a “scintilla” or “residuum” of non-hearsay to support a finding in all adjudications, both state and local. Federal law, however, has rejected the residuum rule.<sup>12</sup>

The residuum rule should be abolished. It makes no sense—how is a decision more reliable if the record contains a smidgeon of non-hearsay than if the decision is supported entirely by reliable hearsay evidence? All of us rely on hearsay all the time in our daily life<sup>13</sup> and agencies are permitted to admit it into evidence. The residuum rule forces hearing officers in every state or local agency (many of them non-lawyers) to make difficult calls about whether one of the dozens of hearsay exceptions applies. The rule is a trap for self-represented persons who have no way to know that they should make an objection at the close of evidence that the government agency has failed to introduce the required scintilla. If they fail to make the objection, they waive the issue on judicial review. And for many agencies that rely heavily on written inter-agency or intra-agency reports the residuum rule creates serious practical difficulties.<sup>14</sup>

## **2. Burden of proof**

In cases involving suspension or revocation of a professional license, an agency must prove its case by “clear and convincing proof to a reasonable certainty” rather than the normal preponderance standard.<sup>15</sup> There is no logical reason for requiring this elevated standard of proof and the rule is not

followed elsewhere. While licenses are obviously valuable to the people who hold them, the rights of the licensee are protected by numerous provisions in the APA, especially including the fact that independent ALJs preside at the hearings. The California regulatory statutes are intended to protect the public from bad licensees and the clear and convincing standard stacks the deck against the public.

## **3. Exceptions from the APA**

A number of state agencies are exempted from the APA, particularly from the vital Administrative Adjudication Bill of Rights.<sup>16</sup> These include the Public Utilities Commission, the State Board of Equalization, the University of California and the state college system.<sup>17</sup> These APA exceptions have no logical rationale but reflect the political muscle of the exempted agencies that did not want to be subject to the APA.

## **RULEMAKING<sup>18</sup>**

### **4. Complexity of rulemaking provisions**

California’s provisions for notice and comment rulemaking are of incredible length and mind-numbing complexity.<sup>19</sup> The Legislature constantly adds on new impact statements and other bells and whistles but never removes anything. These provisions create massive and mostly useless paperwork requirements, increase the cost of government, delay the issuance of regulations, and furnish handles for reviewing courts to throw out the rules when the agency makes a mistake and OAL does not catch it. However, very few of these provisions create better regulations

or enhance meaningful public participation. These provisions, which date from 1979, should be drastically pruned. The Legislature should return California to the relative simplicity of the pre-1979 provisions and those of federal law.<sup>20</sup>

## **5. Guidance documents**

The federal government issues massive amounts of guidance documents such as interpretive rules, bulletins, manuals, policy statements, or guidelines. They are extraordinarily valuable to lawyers and regulated parties who want to comply with the law. They assure uniform application of law by the agency’s staff. These rules are adopted without going through the time-consuming and costly notice and comment process.<sup>21</sup>

California, in contrast, prohibits issuance of guidance documents without pre-adoption notice and comment.<sup>22</sup> As a result, there are no guidance documents in California. This is an incredibly perverse requirement, harmful to regulated private parties and to agencies alike.<sup>23</sup> In 1999, the Legislature adopted a provision allowing issuance of guidance documents without full-fledged notice and comment but it was unaccountably vetoed by Governor Gray Davis.<sup>24</sup> The Legislature should try again, adopting a provision modeled on the balanced provisions for guidance documents in the 2010 Model State APA.<sup>25</sup>

## **JUDICIAL REVIEW<sup>26</sup>**

### **6. Mandamus**

Why is it that we use the ancient British common law writ of mandamus in California to secure

judicial review? This is incredibly outmoded. Under federal law, you get review through seeking an injunction or declaratory judgment.<sup>27</sup> Under the 2010 Model State APA, review is obtained under the regular rules of civil procedure.<sup>28</sup>

By contrast, in California, judicial review of adjudicatory decisions following a legally required hearing is by writ of administrative mandamus;<sup>29</sup> all other administrative action is reviewed by traditional mandamus.<sup>30</sup> Many statutes prescribe other formats. Countless cases struggle with the question of which writ is appropriate and there are many differences between the writs. For example, the standard of review of fact questions, the statute of limitations, the administrative record, the requirement of findings, all differ as between traditional and administrative mandamus. Traditional mandamus struggles with the wretched ministerial-discretionary distinction. Mandamus contains esoteric practices such as the alternative and peremptory writs, returns and replications, distinctive pleading and service rules, and other features that are mysterious to ordinary lawyers and to pro pers. Let's chuck it out now and move to a simple system under which you get judicial review of all forms of state and local action by filing a petition for it under the regular rules of civil procedure.<sup>31</sup>

## 7. The statute of limitations

The statute of limitations for seeking judicial review cries out for reform. For Tier 1 adjudications, the 30-day statute for filing for review is far too short.<sup>32</sup> The 30-day period runs from the last day on which reconsideration can be ordered, a measuring device

that is often confusing to attorneys and pro pers. The statute for review of local government adjudications is 90 days after the decision becomes final, which is much more reasonable.<sup>33</sup> If the petitioner in a Tier 1<sup>34</sup> case requests a copy of the record within ten days of the last day on which reconsideration can be ordered, the date for filing the petition for review is extended until 30 days after the record is prepared. This ten-day period is much too short, especially for self-represented persons. On the other hand, there is no statute of limitations on review of Tier 2 adjudication (except as specifically provided by statutes) or for traditional mandamus actions other than the three-year statute for liability created by statute.<sup>35</sup> A three-year statute is far too long.

## 8. The standard of judicial review of agency findings of fact

The standard of judicial review of agency fact findings is normally whether the findings are supported by substantial evidence on the whole record. This is the rule under federal law<sup>36</sup> and the 2010 Model Act.<sup>37</sup> It is the default rule in California as well.<sup>38</sup> However, if decision of a non-constitutional agency deprived the plaintiff of a "fundamental vested right," the standard for review is "independent judgment on the evidence."<sup>39</sup> I am on record as recommending that the independent judgment test be abandoned.<sup>40</sup> The test is no longer constitutionally required, so the Supreme Court could dispense with it. However, the Court declined to do so, stating that the decision is for the Legislature.<sup>41</sup>

What's wrong with independent judgment?

First, the standard for applying it is completely indeterminate. "In determining whether the right is fundamental, the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation."<sup>42</sup> Moreover, even if the right is not "vested," independent judgment is triggered if the right is "fundamental" enough.<sup>43</sup>

Courts endlessly struggle with the application of this parody of a legal standard and have come up with many bizarre results. For example, a local agency ordered the corporate owners of oil wells to plug them because they were a threat to public safety, had been abandoned for seven years, and were likely to be unproductive if opened. The court thought the right to operate the wells was vested (because they had been operated six years before being abandoned) and the right to operate them was "fundamental."<sup>44</sup>

Second, the independent judgment test places an undue burden on busy trial courts which must examine voluminous written records to decide which way the balance tips. In substantial evidence cases, in contrast, the burden on the court is much less. Moreover, independent judgment places responsibility for fact finding on a non-expert judge rather than on the expert and specialized administrative agency.

Third, the independent judgment test is unnecessary to protect the interests of professional licensees (the area in which it is most often employed).<sup>45</sup> Such licensees have the protection of a Tier 1 trial-type hearing before an OAH ALJ. Independent judgment gives

licensees a second bite at the apple (the Attorney General can't appeal a decision in favor of the licensee) and tips the balance too far against law enforcement and the interests of consumers. The substantial evidence test provides ample protection to persons harmed by irrational agency action and functions well everywhere except California. Even in California, the substantial evidence test is often deployed by reviewing courts to overturn decisions perceived to be unreasonable or unfair.<sup>46</sup>

Fourth, the independent judgment test produces huge anomalies. It applies to the discharge of employees of local government but not state government (because the State Personnel Board is a constitutional agency). Just to cite two examples, it applies to determinations of employee disability by local government but not state government (because the Workers' Comp Appeals Board is a constitutional agency).

Fifth, the independent judgment test conflict sharply with the Legislature's decision to require courts to give "great weight" to a state agency hearing officer's decision based on witness demeanor.<sup>47</sup> How can the court give great weight to an agency credibility determination while still exercising independent judgment on the evidence? Moreover, this provision creates a different rule for review of decisions by state and local agencies, since the "great weight" test applies only to decisions of state agencies.

## **9. Standard of review for fact findings in traditional mandate**

In suggestion 8, I argued that the independent judgment test gives courts too much power. However, I think courts need more power to review fact findings made by state and local agencies in adjudicatory decisions that are reviewed under traditional mandamus. These are adjudications in which there is no legally required evidentiary hearing. Although the law is confused on this point, many cases say that the agency's fact findings must be upheld unless they are entirely lacking" in evidentiary support.<sup>48</sup> This is another "scintilla" rule.

In other words, judicial review in traditional mandamus cases reviewing adjudicatory decisions is much less exacting than under the substantial evidence test. The "entirely lacking" test may be appropriate when reviewing quasi-legislative agency action—although even here the statute calls for substantial evidence review of factual determinations in state agency regulations.<sup>49</sup> But what is appropriate for quasi-legislative determinations is not appropriate for the review of adjudication which involves individualized determinations. The Supreme Court should squarely overrule cases that use the "entirely lacking" test when reviewing adjudicatory decisions.

## **OPEN MEETINGS**

### **10. Loosen up Bagley-Keene and the Brown Act**

Like the federal government and all states, California requires multi-member state and local agencies to make decisions only in public meetings. This principle

of transparency is widely accepted, although all the research on the subject indicates that it gravely inhibits collegial decision-making. Multi-members agencies just won't and don't conduct serious discussions and deliberations of the difficult issues the agencies must resolve when the public and the media are present. As a result, federal agencies have developed numerous work-arounds of the open meetings law that enables the members to discuss difficult issues and work out compromises.

However, in California, our governing principle is that if it's worth doing, it's worth overdoing. Both the Bagley-Keene Act (which applies to state agencies) and the Ralph M. Brown Act (which applies to local government) cut off the work-arounds conventionally used by federal agencies.

Under Bagley-Keene, a meeting is "any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains." In addition, "A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body."<sup>50</sup>

Federal agency heads frequently use seriatim e-mails to their colleagues, or conduct one-on-one meetings with colleagues, to discuss and try

out ideas and strike bargains. Can't be done in California. They arrange to have their staff members meet and work out deals. Not in California. They can engage in notational voting outside of meetings. No way in California. Under federal law, they can conduct information-gathering sessions that won't result in decision-making or voting.<sup>51</sup> California board members can't.

Why do we have multi-member commissions often split between political parties? Because we want them to share wisdom, deliberate, bargain, strike compromises, critique the views of other members. But they won't do it in public. How come law school faculty meetings or conferences of the justices of the Supreme Court aren't held in public? Because, as we all know, the presence of the public inhibits discussion. Let's rethink our approach to California sunshine.

## CONCLUSION

On many critical issues, California administrative law is fundamentally different from federal law and that of most states. In some cases, California law is much better. But in the ten issues discussed in this article, I believe that is not the case. Just because it's always been that way doesn't make it better. Let's critically examine California law, keep what's good, and reform what isn't.



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## Endnotes

- 1 This is a longer version of the keynote talk delivered at the Administrative & Public Environmental Law Conference, June 15, 2015, at Hastings College of the Law. A different version of this article appears in the Administrative Law & Regulatory Practice News published by the Administrative Law Section of the American Bar Assoc.
- 2 *Green v. Obledo* (1981) 29 Cal.3d 126.
- 3 Cal. Code of Civ. Proc. § 1021.5.
- 4 *Alyeska Pipeline Serv. Co. v. Wilderness Soc.* (1975) 421 US 240.
- 5 Michael Asimow, Michael Strumwasser, Herbert Bolz, and Timothy Aspinwall, CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW, Vol. 1, ¶¶8:30 – 8.43 (2014). This book is hereinafter referred to as CPG. Volume 1 of CPG relating to adjudication and separation of powers was published in 2014. Volume 2 relating to judicial review and volume 3 relating to rulemaking are forthcoming in 2015 and 2016. The views expressed in this article are those of the author and not necessarily of the co-authors of CPG.
- 6 CPG ¶10:140 et seq.
- 7 Cal. Gov. Code § 11349 et. seq..
- 8 *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4<sup>th</sup> 1.
- 9 *Chevron USA, Inc. v. Natural Res. Def. Council*. (1984) 467 U.S. 837. Space limitations prevent a detailed analysis of *Chevron* here.
- 10 This discussion of administrative adjudication makes reference to Tier 1 and Tier 2 adjudication. These terms are not used in the statute but are necessary to understand the rather complex APA structure. See CPG § 4.10 et seq. Tier 1 adjudication is described in Government Code §§ 11500 et seq. and describes the universe of adjudication to which the original 1945 APA was subject. In Tier 1 cases (primarily but not exclusively professional licensing disputes), ALJs from OAH preside and the code describes detailed procedural rules. Tier 2 adjudication consists of all other state-level adjudication in which an evidentiary hearing is required by statute. The 1995 amendments to the APA added the Tier 2 provisions which are found in Government Code §§ 11400 et seq. These sections provide for an Administrative Adjudication Bill of Rights (AABOR). The AABOR is applicable to both Tier 1 and Tier 2 agencies. Govt. Code §§ 11425.10 et seq. Thus adjudication by many state agencies such as the Workers' Comp Appeals Bd., the State Personnel Bd., the Coastal Commission any many others is covered by the APA but not by the Tier 1 provisions of the APA.

- 11 The residuum rule applies by statute to Tier 1 adjudication. Govt. Code § 11513(d). See note 9 for explanation of Tier 1 and 2 adjudication. However, the residuum rule applies to judicial review of all adjudication by state and local agencies. See CPG ¶9.35 et. seq. Although the residuum rule was once considered to be constitutional, the Supreme Court has made clear that it can be rendered inapplicable by statute. CPG ¶9.50.
- 12 *Richardson v. Perales* (1971) 402 US 389.
- 13 The standard for admissibility of evidence is whether it is “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” GC ¶11513(c). Thus, in theory, only reliable hearsay should be admissible.
- 14 See *Utility Reform Network v. PUC* (2014) 223 Cal. App. 4<sup>th</sup> 945.
- 15 *Ettinger v. Bd. of Med. Qual. Assur.* (1982) 135 Cal. App.3d 853; CPG 9.145 et seq..
- 16 See note 9.
- 17 See CPG ¶4.270 et seq.
- 18 Volume 3 of CPG will cover rulemaking. Hopefully, it will be published in 2016.
- 19 See Govt. Code §§ 11340 et seq..
- 20 The recently adopted Model State APA of 2010 contains well thought-out provisions for notice and comment rulemaking. California should use the 2010 MSAPA as the starting point for simplification of the rulemaking process. The act can be found at [http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf)
- 21 Federal APA, 5 USC § 553(b)(A). The federal APA is cited herein as FAPA.
- 22 Govt. Code § 11340.5(a); *Tidewater Marine Western Inc. v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557; *Morning Star Co. v. State Bd. of Eq.* (2006) 38 Cal.4<sup>th</sup> 324.
- 23 See Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992).
- 24 See Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. OF PUB. L. 229, 291-93 (1999).
- 25 § 311. For reference to the 2010 MSAPA, see note 19 above.
- 26 Volume 2 of CPG will discuss judicial review. Hopefully it will be published in fall, 2015.
- 27 FAPA § 703.
- 28 § 502(a). See note 19 for reference to the 2010 MSAPA.
- 29 Cal. Code of Civ. Proc. § 1094.5. If the decision was by a local government entity, the review is under § 1094.6. Administrative mandamus is often referred to as “certiorarified mandamus” and it is unique in the world.
- 30 Cal. Code of Civ. Proc. § 1085.
- 31 Tragically, legislation recommended by the California Law Revision Commission to adopt a simplified and modernized form of judicial review (SB 209) died in the Senate Judiciary Committee in 1998. See *Speed Bumps*, note 23 at 272-79.
- 32 Govt. Code § 11523.
- 33 *Id.* § 1094.6(a), (b).
- 34 Tiers 1 and 2 are explained in note 9 above.
- 35 Cal. Code of Civ. Proc. § 338(a).
- 36 FAPA § 706(2)(E).
- 37 § 508(a)(3)(D).
- 38 Cal. Code of Civ. Proc. § 1094.5(c).
- 39 The leading case is *Bixby v. Pierno* (1971) 4 Cal.3d 130 (1971).
- 40 Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1176-92 (1995).
- 41 *Fukuda v. City of Angels* (1999) 20 Cal.4<sup>th</sup> 805
- 42 *Bixby*, 4 Cal.3d at 144.
- 43 See, e.g., *Frink v. Prod* (1982) 31 Cal. 3d 166.
- 44 *Termo Co. v. Luther* (2008) 169 CA4th 394.
- 45 *Bixby* defended the rule in these rather over-wrought terms: “Before his license is revoked, such an individual, who walks in the shadow of the governmental monoliths, deserves the protection of a full and independent judicial hearing.”
- 46 See, e.g., *Berger Foundation v. City of Escondido* (2005) 127 Cal. App. 4th 1, 9-13.
- 47 Govt. Code § 11425.50(b).
- 48 *Golden Drugs Co. v. Maxwell-Jolly* (2009) 179 Cal. App. 4<sup>th</sup> 1455, 1465-67.
- 49 Govt. Code § 11350(b)(2).
- 50 Govt. Code § 11122.5(a), (b). The Brown Act contains similar language. Govt. Code § 54952.2.
- 51 *FCC v. ITT World Communications, Inc.* (1984) 466 U.S. 463. “Informal background discussions that clarify issues and expose varying views” are not “meetings” under the federal Sunshine Act.