COMMENTARY

IS THIS REALLY NECESSARY?

The Agencies of California Speak Out About the Office of Administrative Law: A Startling Survey

The Office of Administrative Law was created by AB 1111 in 1979 as a bold experiment. It was intended to sweep out the gratuitous red-tape of administrative rules adopted repetitiously, improperly, or without authority by almost 200 boards, commissions, agencies, and departments in California state government. It was written into the Administrative Procedure Act (APA), which guides almost all of state government in its adoption of rules.

This rulemaking function of state government is extremely important; the agencies essentially adopt laws which govern how our economy functions, from the entry requirements to the practice of medicine to the pesticides allowed to be sprayed on apples. Our state is increasingly governed by these administrative decisions. The legislature, as a generalist body inundated with its own workload, has enacted very general enabling statutes for a multitude of executive bodies and given them quasi-legislative powers to fill in the details through adopted regulations. The breadth of the enabling statutes conferring this authority on agencies allows almost boundless discretionary power in filling the vacuum. To use our two examples above, the law directs one agency to "assure physician competence" and the other to "protect the public from hazardous agricultural chemicals." The "what" and the "how" are substantially left to the agencies. And the "what" and the "how" are important—they determine the critical details of our lives.

To assure some order to the process for adopting these rules, the legislature enacted the APA as a procedural statute. The political science theory here is well-developed: a fourth branch of government in the executive vein, but with quasi-judicial and quasi-legislative powers, which has expertise, staff, and time to focus on developing, adopting, and implementing rules. The APA requires notice of proposed rules to interested parties and the public in advance, and a public hearing or opportunity for public comment.

There were and are problems with agency rulemaking. One of them was the perception that too many rules were being adopted; they were stultifying, incomprehensible, and—given the large number of agencies in related areas adopting them without coordination—often repetitive or contradictory.

The California AB 1111 experiment created a "super" body to review *all* rules, called the "Office of Administrative Law." For every package of rules adopted, the agencies are required to assemble a "rulemaking file", including a statement of purpose, the required notices, public comments, hearing transcripts, agency responses to those comments, and studies or written evidence relied upon. Staffed by attorneys, OAL has thirty days to review the rule along six criteria: authority, reference, clarity, nonduplication, consistency and necessity. If OAL disapproves of the rule, it is sent back to the agency for reconsideration in light of the reasons for disapproval—perhaps amounting to permanent rejection. An appeal to the Governor of a disapproval is possible.

We were immediately critical of the structure of the OAL review. (See CRLR Vol. 1, No. 1 (Spring 1981) at 2 (*The Office of Administrative Law: Regulatory Reform or an Ayatollah for California?*); see also CRLR Vol. 1, No. 3 (Fall 1981) at 2 (*The Fallacy of Neutral Regulatory Reform*); and CRLR Vol. 5, No. 1 (Winter 1985) at 3 (*The Office of Administrative Law: Office of Red Tape?*).)

We had a conceptual problem. We had no problem with OAL's review of these rules for authority, reference, clarity, nonduplication, or consistency. These were judgments that the young generalist attorneys making up the OAL staff could make competently. They were trained to examine statutory language and intent for adequate authority to adopt a rule, and to survey other rules for consistency and duplication. And the reform in arranging for such a review was a momentous one—for in the normal course only one in every one thousand rules is ever examined by a court. An extraordinary writ or ancillary challenge very occasionally causes an examination, but almost all are simply adopted and followed. Here we have a guaranteed review of *all* rules to make sure the agency has proper authority to adopt it (by itself a significant reform). And in addition, all rules are examined for clarity, nonduplication, consistency, etc. But we felt there was a serious conceptual error in giving OAL the right to reject a rule because it is not, in its view, "necessary". "I don't think the rule is necessary" allows rejection for a multitude of subjective reasons. Most important, it is a decision made by a generalist attorney who was not the "trier of fact," who did not observe the witnesses who testified, and who designedly has no expertise in the subject matter at hand.

Keep in mind two things. First, the APA well recognizes the authority of the agency to adopt rules free from interference as to its preferred policy. That is why the agency exists. It has always been unclear how this directive coexists with an undefined directive to OAL to reject rules that are not, in its judgment, "necessary". Second, whenever OAL rejects a rule, whether it be a substantive, procedural, or technical objection, it is likely to lead the agency back to square one. It must then begin from scratch the drafting, notice, hearing, and adoption process, with statements of intent, statements of small business impact, statements of housing impact, etc., etc., if it is to rerun the OAL gauntlet. If the entire process need be repeated, a rejection means a four-month to one-year delay, depending upon the meeting schedules involved.

Supporters of broad OAL jurisdiction countered that they were able as legal counsel to review the "rulemaking file" required in every rulemaking process. If a persuasive objection were noted and the file indicated no persuasive rebuttal, the file itself could be used to make a judgment. We very much disagree with this conclusion. Upon what basis of knowledge of the underlying subject area can a generalist attorney decide what comments of the public warrant detailed evidentiary response, or determine that the agency's explanation is "persuasive"? The defenders of the system could counter that this

same argument could be used to object to judicial review of agency decision-making; after all, is not a judge a non-expert generalist? We give him or her broad authority! But this analogy well demonstrates the OAL jurisdictional flaw—because courts in fact give great weight to the findings of fact of the agency, and respect its subject matter expertise. Further, the court's hesitation to substitute its judgment for an agency's is most pronounced in the quasi-legislative arena represented by rulemaking. Finally, the court is subject to an adversarial process directly before it.

The direct result of the "necessity" standard is a great deal of extra work to no constructive end. That is, the agency knows that its rule will be reviewed by generalists unschooled in the subject matter. OAL does not have before it contending parties—where one will often concede obvious points. Hence, every element to a rule, and every comment or objection, no matter how facially spurious, must have a response in the record. A "failure to respond" to a crank letter may be the source of an OAL rejection as much as an informed critique by the leading expert in the field. Therefore, the agency studs its file with material—responses, comments, and report-dressing, jargon-filled material. The OAL is not expert, has no back-and-forth adversarial system to rely upon as does a court, has heard *none* of the evidence directly, and is unable to differentiate a reasoned and persuasive response from a *pro forma* spate of self-serving contentions.

What is the end result of the review for "necessity"? We predicted that it would mean a great deal of ... red tape and waste—the reduction of which is the *raison d'etre* of OAL. Agencies with recognized expertise tend not to respond at length to spurious objections or comments which were rejected years ago or which anyone with a minimal substantive knowledge of the field would discount—but these are grounds for rejection by OAL and rules are sent back for time-consuming documentation of that which is obvious to those responsible for regulating the field. On the other hand, a legitimate objection can easily be facially rejected and that rejection documented by an agency in a manner which will pass muster before any generalist reviewer. This aspect of OAL review did indeed become known as the "BS" stimulator now clogging rulemaking files submitted to OAL.

The framers of AB 1111 did not understand who can best do what in a regulatory system. An attorney generalist is at the mercy of whoever has the last word in a non-adversarial setting where substantive complexity is involved. The result is inevitably going to be irrational decisions of little public interest use—with OAL tending to send back that which is least appropriate for rejection and the agencies well able to gloss over that which may well warrant rejection.

There are a number of possible solutions to this structural defect. One counter-tactic chosen by OAL is irresponsible. OAL invites *ex parte* contacts with private parties interested in rulemaking. That is, OAL allows private contact and advocacy by those interested in rulemaking in its private chambers. Let us say that an agency follows all of the proper steps enumerated in the APA. It proposes rulemaking, notices it, holds hearings, and considers evidence from a variety of sources. It consults its staff. It draws upon its knowledge of the history of regulation and of impacts of prior rules and its relatively expert knowledge of the subject matter. One of the interested parties to the proceeding objects—and although he has had his say in public, he now has a private "last word" audience with the OAL generalist attorney deciding whether to accept or reject this rule. There is no notice of the contact to other parties who participated in the prescribed open process, or to the agency. A self-interested party, with his or her own expert and jargon-filled explanations, can now have the last word in private. When attempted before a court with a guaranteed adversarial process, such a tactic is unethical and may lead to disbarment. But it is allowed here.

It is possible that the agency is controlled by special interests and such a private contact may help the OAL prevent an abusive rule. But it is wrong to develop a system which assumes that an agency is always wrong or always right, or that a party pressing an *ex parte* contact is an effective check. One should follow some very clear rules in setting up a sensible regulatory system—and they are not all that mysterious. Ensure that the decisionmakers for the public represent the public interest. Give them expert staffs so their decisions are informed. Have a review, if you want one, by people who are in a position to know what they are doing. Do not extend their powers beyond their competence. Do not try to compensate for their lack of expertise by introducing arbitrary lobbying (usually by those with an immediate financial stake in the matter) in a closed and secret process.

Government has a maddening tendency of trying to solve a bad system by simply overlaying another level of review on top of it. This syndrome is illustrated on the adjudicatory side of the Administrative Procedure Act (where the agencies impose discipline). The law provides for a hearing and decision by a professional administrative law judge. But we're not always happy with the quality, so we'll allow the board or commission to review and change the result. But how can we trust the board or commission? We'll allow a writ of mandate to be filed in superior court to reexamine the whole process under what is called the "independent judgment test." But, superior court judges are not perfect either, so we'll allow an appeal to a court of appeal. Well, there should be consistency here, so let's have a petition for review to the state Supreme Court. Hmm... Is there a federal issue here? On over to that system....

It is a common phenomenon: you take a reasonable step to allow a review; you take another reasonable step to allow another review; you take another step which of itself is quite reasonable—at some point you look back and realize you have just taken five very unreasonable steps. Because you have not created a decisionmaker you trust—with perhaps one review for consistency—you review the reviewer. The end result on the adjudicative side is a seven-year odyssey to discipline a holder of a state license who resists. The end result on the rulemaking side is worse, because here the reviewer is not only incompetent to apply the "necessity" standard he is required to use, but he also abandons the rules of fairness which at least provide some balance in the advocacy before that review and throughout adjudications.

The problems which have resulted from this structure appear to be threatening what could be a largely beneficial experiment as to the *five* criteria OAL can evaluate. The result has been accusations of OAL errors, creation of gratuitous red tape, and inconsistency.

For its part, OAL has had its own problems. It has not really been able to complete the comprehensive review of all rules intended by AB 1111. It has had great difficulty in keeping up with the current flow of new regulations as they are adopted. Because the APA requires it to reject within thirty days, it turned to a process of informally asking agencies to take back rules and resubmit them when it has resources, or agree to

a coerced extension of time or to a long list of demanded changes in the rule. Failure to comply may mean *pro forma* rejection.

The agencies, for their part, got angry. They were created specifically to make these judgments. They are responsible for rulemaking and the APA provides that substantive decisions about rules are reserved for the agencies. But the "necessity" standard appears to be an exception capable of swallowing the rule and removing their assigned task for which they have specialized knowledge, historical perspective, and direct confrontation with the evidence at issue, in lieu of a young attorney staffer. They have increasingly tried to avoid OAL entirely. They are trying to get themselves exempt from the APA or at least OAL review in new legislation. In fact, exemption language from OAL is becoming almost as faddish in Sacramento as the ubiquitous attempt to avoid malpractice exposure through "immunity" grants. Other agencies prefer to seek direct legislation to accomplish rule changes rather than deal with OAL. Still others go the other extreme and implement their rules by what is called an "underground" procedure—they call them "guidelines" or "interpretations" or "policies," or in the recent case of the Insurance Commissioner, a "bulletin." These may look and talk like rules, but the agencies believe if they are not *called* rules, they can do it the old-fashioned way—by themselves. The result of this is the loss of the enormous benefits of assured review for authority, clarity, consistency, and duplication.

We heard complaints that our fears had been realized starting in the early 1980s, but we did not know whether they were asymptomatic. We decided to test it with a survey. We formulated questions and sent them to the agency officials who deal with OAL in the 166 relevant agencies of California.

We received a completed survey from 74 agencies, an extraordinary sample. We offered confidentiality to our respondents because of the continuing oversight of OAL over their operations. The ability of OAL to reject a needed rule inhibits visible complaints by the agencies. That inhibition is palpable to anyone who talks with these officials and precludes legislative scrutiny where disclosure risks public confrontation. Further, it is unclear to each single agency, standing alone, whether its problems are unique to its relationship with OAL or or whether there is a more basic institutional and universal problem.

TABLE 1

EXCERPT FROM CPIL SURVEY

6. California's current APA-mandated procedural requirements for rulemaking are (select one answer for each subcategory):

a. (1) 4.0% very satisfactory
   (2) 36.5% satisfactory
   (3) 35.1% unsatisfactory
   (4) 16.2% very satisfactory
   (5) 8.1% NO OPINION

b. (1) 63.5% too complicated
   (2) 18.9% not too complicated
   (3) 17.6% NO OPINION

c. (1) 33.8% not too costly for my agency
   (2) 33.8% too costly for my agency
   (3) 32.4% NO OPINION

7. In considering the scope of OAL's review of rulemaking files, as currently defined in the APA, indicate below whether each of the following IS or IS NOT an appropriate standard of review:

a.	"authority"	86.5%	IS	5.4%	IS NOT	8.1%	NO OPINION
b.	"reference"	79.7%	IS	10.8%	IS NOT	9.5%	NO OPINION
c.	"clarity"	79.7%	IS	12.2%	IS NOT	8.1%	NO OPINION
d.	"necessity"	52.7%	IS	39.2%	IS NOT	8.1%	NO OPINION
e.	"nonduplication"	70.3%	IS	21.6%	IS NOT	8.1%	NO OPINION
f.	"consistency"	74.3%	IS	16.2%	IS NOT	9.5%	NO OPINION

8. In reviewing my agency's rulemaking files during the period from 1/1/87 through 3/31/88, OAL's application of the

		CONSISTENT	INCONSISTENT	NO OPINION
a.	AUTHORITY standard was	47.3%	9.5%	43.2%
b.	REFERENCE standard was	44.6%	9.5%	45.9%
c.	CLARITY standard was	27.0%	35.1%	37.8%
d.	NECESSITY standard was	23.0%	37.8%	39.2%
e.	NONDUPLICATION standard was	37.8%	12.2%	50.0%
f.	CONSISTENCY standard was	40.5%	13.5%	45.9%

9. A comprehensive evaluation of California's rulemaking and regulatory review process

(1) 73.0% is needed. (2) 12.2% is not needed (3) 14.9% NO OPINION

10. A performance evaluation of OAL

(1) 68.9% is needed. (2) 12.2% is not needed. (3) 18.9% NO OPINION

13. a. Since the creation of OAL, my agency (select one):

(1) 56.7% HAS (2) 36.5% HAS NOT (3) 6.8% DON'T KNOW

sometimes pursued statutory amendments in lieu of regulatory changes because of a desire to avoid the rulemaking process.

b. (answer only if you checked answer #1 in question #13)

Reasons for avoiding the rulemaking process: (check one or more)

(1) 28.5% COST (2) 47.6% CONVENIENCE (3) 90.4% FRUSTRATION

The survey was directed to the agency official responsible for OAL rulemaking coordination. The first five questions of the survey were statistical questions about the number of rules adopted, the experience of the person responding, etc. In Table 1, we present the substantive questions exactly as they appeared on the survey, with the tabulation of responses:

These results are startling indeed. Forgetting the matter of percentages, the fact that more than one-half of 74 agencies responding—or 38 different agencies—view the APA rulemaking requirements as "unsatisfactory or very unsatisfactory" should alarm any observer. Any temptation to dismiss complaints as "sour grapes" from agencies who have attempted to adopt unnecessary or gratuitous rules and been thwarted by an agency operating according to legislative intent is belied by the detailed responses. The agencies do not begrudge the OAL a review, and specifically support by margins of 3-to-1 to 9-to-1 its evaluation of five of the six criteria. The "necessity" standard wins approval as "an appropriate standard of review" by only a 5-to-4 margin. Further, a majority of agencies who have confronted OAL "necessity" rejection are hostile to its use. That hostility is not manifested for the other standards, notwithstanding common rule rejection on those other bases. Further, the necessity and clarity standards were applied "inconsistently" 38% to 23% and 35% to 27%, respectively. The other standards were adjudged consistently applied.

By a vote of 63.5% to 18.9%, the respondents view the rulemaking process as too complicated. Perhaps most important, these officials candidly admit, by 56.7% to 36.5%, that they have "pursued statutes" rather than rulemaking to avoid OAL. It is indeed a sad commentary if an agency views the legislative process as easier and less cumbersome than the administrative process—especially when the agencies themselves are supposed to be the repository of rulemaking power. They may already have the votes for a rule by those empowered to so decide—but the act of going through OAL has become so frustrating that burdening further the legislative process is preferred! The fact that 90.4% of those who have pursued statutory change rather than rulemaking identified "frustration" with OAL (Question 13b) as a reason is indicative of a very serious breakdown.

"Underground rulemaking" by declaring rules "policies" and avoiding the useful OAL review for authority, duplication, etc., the imposition of yet another layer of red tape, and the burdening of the legislature with specific statutory changes which could otherwise be accomplished by rulemaking is not what the Legislature envisioned for the Office of Administrative Law experiment.

Some of the *sua sponte* comments penned in by the agency officials dealing with OAL further amplify the problem. Following are comments, each from a different agency:

"Evidently, the OAL attorneys are evaluated on how many disapprovals they write. This is like evaluating a cop on how many tickets he writes."

"The staff at OAL is inexperienced, has a poor understanding of the law, chronically substitutes its own judgment for that of the agency."

"OAL uses the standards to substitute its judgment for the policy decisions of the agency."

"OAL's goal is good. Their process is terrible."

"It's often faster to get changes through the legislature than from OAL."

"'Necessity' is the most inappropriate standard since OAL can substitute its judgment for the agencies."

"Perhaps it would be wiser for OAL to review the regulations before an agency spends so much time and money on public hearings, mass mailings, etc."

"OAL is too big of a bureaucracy."

"Time required to implement a regulation takes longer than the legislative process."

"Review of proposed regulations is often petty and superficial, which is all we could expect of reviewers who know little or nothing about the subject matter of the regulations. Some reviewers tend to look upon proposed regulations as 'issue hunts' more appropriate to answering law school exam questions."

"Racking up disapprovals of regulations for slight technical problems does not make OAL's stats credible in the eyes of departments. OAL formalities for rule language change *after notice of proposed action* is out and public comment received is onerous (and results in repetitive notice and comment proceedings) ... not what the Legislature intended."

"My biggest complaint is the inevitable phone call I receive on the 29th day of OAL review [after which a rule must be approved]...'we have a few problems with your file.' They then proceed with a long list of problems, many or most of which are none of their business. And every time they threaten you, that if you don't accept *all* of their changes, they will disapprove the file. You have very little power in this situation. So in my opinion, the published disapprovals are just part of the problem...I worry what changes OAL will require that are purely subjective and infringe upon the program implementing authority of my agency."

"...if a witness objects to a provision of a regulation, there is no way the agency can 'sell' OAL on the validity of the regulation. In one instance, a reg was rejected because one witness objected to a standard even though the agency repeatedly told him the standard did not apply in the circumstances he described. OAL stated that we had failed to respond to his objection! ... To preserve our sanity, I would rather negotiate with lobbyists and swim with other sharks than have ANY dealing with OAL!"

"The process of addressing the necessity for each and every provision of a rule or form is especially tedious."

"It does try to second guess agencies which are more aware of technical problems before them."

"My agency is [partially] exempt...I feel *very* fortunate to have this exemption."

"The Governor's Office provides little, if any, oversight over OAL. This is unfortunate and allows OAL to be arbitrary and heavy handed."

The answers to questions 9 and 10 indicate a very strong desire by the agencies for legislative review of the momentous changes wrought by AB 1111 in 1979 (although one of the few respondents opposing such a review noted: "why hassle OAL with a review, just limit their power").

The agencies might be somewhat more angry if they paid attention to their accounting. OAL is a "general services" agency which bills special-funded agencies (most of them heavily involved in writing regulations) for its services. The Auditor General, Office of Attorney General, Office of Administrative Hearings, and other agencies do likewise. The AG will cost you about $75 per hour. Not cheap, but he or she is there to help you and attorneys do not come cheap. How much do you think the most recent calculation for special-fund billing for OAL services came to? $240 per hour. That is how much the special-fund agencies writing most of these rules and having the above-described problems have to pay from their budget for the privilege.

Almost ten years have passed since the momentous changes of AB 1111 were

effectuated. The time has come for a review. California led in proposing the concept, as it leads in many innovative regulatory areas. It should now lead in refining it so its abuses and excesses are controlled and its advantages are allowed to flourish.

Letters To The Editor

August 23, 1988

Regulatory Law Reporter:

In response to the "Open Letter to Our Colleagues in the Media" in your summer issue, here's a closed letter: Kindly take my name off your mailing list.

If your premises are correct, I'm too stupid and corrupt to be reading your publication—or anything else.

Claire Cooper
The Sacramento Bee

Editor's Response:

Well, isn't that special?

For those of you who missed our critique (see CRLR Vol. 8, No. 3 (Summer 1988) p. 10), we did not accuse journalists of being personally stupid or corrupt. We argued that the media is biased in carrying out the most important part of its job—the selection of *what* to cover. This bias is not politically partisan but is guided by journalistic "subculture rules." These rules do not emanate from consumer demand in any marketplace; instead, the media has created its own demand and its own reality and is governed by a series of complex mores. These rules can be pervasive and general: *e.g.*, dog biting man is not a story, but man biting dog is; so look for the unusual and the exceptional, and select stories which depict what is generally *not* reality. This then leads to a overwhelming bias toward the "petty irony" in coverage.

And these rules can also be very specific: *e.g.*, the rule that "a Presidential candidate cannot cry; if he or she does, he or she is disqualified for the office." (Although applied to Schroeder and Muskie, this rule was never applied to Hubert Humphrey because he emoted a great deal, and its lack of "petty irony" content ameliorated the specific "Candidates Cannot Cry" rule.)

We also argued that journalists, like most of us, have become horizontally acculturated and identify strongly with their peers. This is manifested in the rule that any story covered by another journalist is automatically worthy of coverage (even if unsubstantiated or wrong). And we argued that journalists and the media in general have ignored *real* issues which people *do* care about: health care, ozone depletion, population control, government corruption—important issues which are not dramatically focused into one of the several easily-identifiable "acceptable" categories: those dealing with crime or conflict, deviant or smarmy sex, or affecting the life of a celebrity.

We noted that journalists should admit that their values and group reinforcements affect the subjects they choose to report. Out of the millions of facts and events occurring every day, they choose an infinitesimal number to cover and they all follow similar criteria, which are *not* market-determined. What determines that the conduct of Cher's boyfriend should consume precious airtime and printspace, while the daily deaths of 20,000 children from easily preventable dehydration are ignored? Journalists and the media, increasingly preoccupied with "lifestyles of the rich and famous" and the sniggering sexual innuendo of Geraldo- and Oprah-type talk and "magazine" shows, pretend that they are "neutral" reflectors of public demand. We contend that is nonsense.

Since our long commentary was written, some interesting things have happened. The FBI has apparently been documenting the everyday corruption which the journalists of Sacramento have felt does not warrant attention. The media has interacted with the Presidential candidates to produce issueless silliness: Quayle's flirtation with a woman years ago, the pledge of allegiance, countless photo opportunities, and one-liner "sound bite" putdowns. Barry Goldwater has been moved to tell his own party's nominee to "cut it out." Barry always suffered that fatal political flaw: personal candor.

Ms. Cooper's response is interesting, because it comes from a rather good journalist (and we are *not* cancelling the *Bee*'s subscription in retaliation) and from a publication which may be one of the exceptions proving the rule. For that reason it underlines our thesis: those in the media are horizontally acculturated and feel personally offended when their peer group is criticized. This is the source of the bias problem which we address; that unquestioning acculturation; that tribal loyalty.

What is most amusing about it is that is makes a good story under the distorted criteria of the media subculture: it is a classic petty irony. Here is a journalist who gets the critique wrong, and then gets defensive because *she*, who spends much of her career writing criticisms of others (whether from her or from those she interviews), cannot stand criticism coming back at her—and not even criticism of *her*, but of her profession. And what is her response? She did what she and her peers laugh at when it comes from those they cover: "I did not like your editorial, you are a commie, cancel my subscription." In this case, the final petty irony is that she takes offense at allegedly being called ignorant and then retaliates by refusing to read the major source of information about agency actions in the state. Well, she showed us!

For those who want to read what got Ms. Cooper so upset, we will make reprints available at no cost for all who request them. And we challenge our colleagues in the media to reprint it, discuss it, respond to it.

As to Ms. Cooper's and similar responses from the media pooh-bahs of California: we rest our case.