

California Administrative Mandamus*

1

Nature of Proceeding

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- I. INTRODUCTION
 - A. Method of Judicial Review **§1.1**
 - B. Governing Law **§1.2**
 - C. Historical Background **§1.3**
 - D. Constitutionality of CCP §1094.5 **[Deleted] §1.4**
- II. DESCRIPTION OF ADMINISTRATIVE MANDAMUS REVIEW
 - A. In General **§1.5**
 - B. Attributes **§1.6**
 - C. Applicability of CCP §1094.5 **§1.7**
 - 1. Governmental Agency Decisions **§1.8**
 - 2. Adjudicatory Decisions of Private Organizations **§1.9**
 - 3. Exceptions **§1.10**
 - D. Joinder With Other Causes of Action **§1.11**
 - E. Damages Unavailable **§1.12**
- III. COMPARISON WITH OTHER WRITS AND PROCEDURES
 - A. Traditional Mandamus
 - 1. To Compel Ministerial Duty **§1.13**
 - 2. When Agency Not Required to Hold Evidentiary Hearing **§1.14**
 - 3. Review of Quasi-Legislative Acts **§1.15**
 - B. Certiorari **§1.16**
 - C. Prohibition **§1.17**
 - D. Injunction **§1.18**
 - E. Declaratory Relief **§1.19**

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I. INTRODUCTION

§1.1 A. Method of Judicial Review

A petition for writ of mandate is the method used to obtain judicial review of most decisions issued by an agency. Mandate actions are special proceedings of a civil nature. CCP §§23, 363. The terms “mandate” and “mandamus” are used interchangeably, and are synonymous. CCP §1084. California statutes recognize two types of mandamus proceedings: “traditional” (also called “ordinary mandate”) and “administrative.” CCP §§1085, 1094.5; *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. The focus of this book is on administrative mandamus.

Administrative mandamus is the form of judicial review used to challenge an agency’s adjudicatory decision, *i.e.*, a decision by an agency regarding private rights or interests, when a hearing is required by law to be given before the agency issues that decision. Administrative mandate is applicable only when certain criteria are met:

- The agency’s decision is final;
- The decision results from a proceeding in which by law a hearing is required to be given;
- Evidence is required to be taken; and
- Discretion in the determination of facts is vested in the agency.

See *Environmental Protection & Info. Ctr. v California Dep’t of Forestry & Fire Protection* (2008) 44 C4th 459, 520, 80 CR3d 28; *Conlan v Bonta* (2002) 102 CA4th 745, 752, 125 CR2d 788; *DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 75 CR2d 102.

§1.2 B. Governing Law

The term “administrative mandate” does not specifically appear in any statute, but the procedure has been codified in CCP §1094.5. For a thorough discussion of the history of the codification of administrative mandate in §1094.5, see *Fukuda v City of Angels* (1999) 20 C4th 805, 811, 85 CR2d 696. As used in practice today, the phrase “administrative mandate” is merely a convenient description for the kind of judicial review covered by §1094.5, *i.e.*, review of an adjudicatory or quasi-judicial action by an agency when the agency is required by law to provide a hearing before issuing its decision.

In addition, CCP §1094.6 sets forth special procedural rules concerning review of local agency (*i.e.*, city or county) decisions. Code of Civil Procedure §1094.8 governs review of First Amendment permit or entitlement decisions, and other statutory schemes govern

administrative proceedings in specific areas of law. See, e.g., Pub Res C §21165.7 (actions under California Environmental Quality Act (CEQA) (Pub Res C §§21000–21177)); chap 6. Code of Civil Procedure §§1094.5–1094.6 are part of the chapter of the Code of Civil Procedure (§§1084–1097) governing mandamus generally. When not inconsistent with CCP §§1094.5–1094.6, the provisions governing traditional mandamus (CCP §§1084–1097, 1107–1110b) also apply to administrative mandamus. *Woods v Superior Court* (1981) 28 C3d 668, 673, 170 CR 484. Additionally, the general rules of pleading and practice in ordinary civil cases (CCP §§307–1062.20) apply to petitions for writs of mandate, except as otherwise provided in CCP §§1067–1110b. CCP §1109.

For the text of CCP §1094.5 and related statutes see the Appendix.

§1.3 C. Historical Background

Before the enactment of CCP §1094.5, a writ of mandate under CCP §1084 was used to review agency decisions. See *Fukuda v City of Angels* (1999) 20 C4th 805, 811, 85 CR2d 696 (citing *Drummey v State Bd. of Funeral Directors & Embalmers* (1939) 13 C2d 75, 87 P2d 848). The doctrine of separation of powers barred review of decisions of state-level agencies of legislative origin by certiorari or prohibition. *Fukuda v City of Angels* (1999) 20 C4th 805, 811, 85 CR2d 696 (citing *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 59 P2d 119, and *Whitten v California State Bd. of Optometry* (1937) 8 C2d 444, 65 P2d 1296).

In 1944, after a study by the Judicial Council, the legislature adopted three major pieces of legislation: (1) a statewide Department of Administrative Procedure; (2) the Administrative Procedure Act (APA) (Govt C §§11340–11529); and (3) CCP §1094.5, the codification of the procedures related to administrative mandamus. *Fukuda v City of Angels* (1999) 20 C4th 805, 815, 85 CR2d 696.

It is noteworthy that the APA was enacted at the same time as §1094.5. The California APA established certain procedures in Govt C §§11400–11529 that specified state-level agencies must follow when engaged in certain kinds of administrative adjudication. The APA provides that decisions rendered under it are subject to judicial review “by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure.” Govt C §11523. This provides the link between the APA and CCP §1094.5.

The Judicial Council’s comments (10 Cal Judicial Council Biennial Report 26, 45 (1944)) reflect a clear intent to have CCP §1094.5 apply to all agencies, regardless of whether the agencies are subject to the APA, regardless of their legislative or constitutional origin, and

regardless of their state-level or local character. See *Temescal Water Co. v Department of Pub. Works* (1955) 44 C2d 90, 100, 280 P2d 1.

NOTE □ A federal Administrative Procedure Act, analogous in many respects, was enacted in 1946. See 5 USC §§551–559, 701–706.

In 1974, after enactment of CCP §1094.5, the California Supreme Court held that the 1950 amendment to Cal Const art VI, §1 removed the legislature’s powers to vest judicial functions in local agencies. *Strumsky v San Diego County Employees Retirement Ass’n* (1974) 11 C3d 28, 42, 112 CR 805. Thus, certiorari and prohibition are no longer available to review such decisions. For a more comprehensive discussion of *Strumsky*, see §6.132.

§1.4 D. Constitutionality of CCP §1094.5 [Deleted]

This section has been deleted.

II. DESCRIPTION OF ADMINISTRATIVE MANDAMUS REVIEW

§1.5 A. In General

A petitioner files a petition for writ of administrative mandamus to obtain a writ, *i.e.*, an order issued by a court to a lower tribunal (*i.e.*, the administrative agency), directing the agency to set aside its decision, to reconsider its decision, or take other action as the court directs. CCP §1094.5(f).

§1.6 B. Attributes

There are certain attributes of administrative mandamus review, some of which are unique to administrative mandate and some that are shared with other special proceedings. Understanding these attributes can aid counsel in analyzing the availability of administrative mandamus review in particular cases.

- Administrative mandamus is considered a special proceeding of a civil nature. CCP §§23, 363; *Jones v Board of Police Comm’rs* (1903) 141 C 96, 74 P 696.
- Administrative mandate is a judicial review procedure maintained at the superior court level. It is not a reconsideration of the agency decision. There are some agency decisions that, by statute or other provision, are judicially reviewed at the appellate court level. See §1.10 for discussion and examples.

- Courts may apply principles of equity and fairness when deciding mandamus petitions. See *Curtin v DMV* (1981) 123 CA3d 481, 484, 176 CR 690 (although trial court found no error in DMV's suspension of petitioner's license, court ordered DMV to credit petitioner with time served on prior suspension later found to be erroneous); *Windigo Mills v Unemployment Ins. Appeals Bd.* (1979) 92 CA3d 586, 596, 155 CR 63 (mandamus "is an equitable proceeding designed to achieve justice").
- The "mandate hearing" or "trial" on the petition for writ of administrative mandate occurs promptly, usually within weeks or months after the petition for writ of administrative mandate has been filed, depending on the local rules of that court. For example, see Bus & P C §2337, which provides that judicial review of discipline imposed on a physician's medical license is given priority and shall be heard within 180 days, absent good cause. See chap 14 on trial.

NOTE □ Most superior courts have websites with links to their local rules and mandate procedures. See, *e.g.*, Los Angeles Superior Court (<http://www.lasuperiorcourt.org/courtrules/Chapter9-1.htm>) and Alameda Superior Court (<http://www.alameda.courts.ca.gov/courts/rules/chapter5.pdf>). Sacramento Superior Court produces a comprehensive guide to its writ procedures. See Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, available at <http://www.saccourt.ca.gov/civil/docs/writ-procedural-guide.pdf>.

- Damages are not available in administrative mandamus proceedings. A petitioner's remedies are limited to a judgment either setting aside the agency's decision or remanding the matter for the agency's reconsideration in "light of the court's opinion and judgment." CCP §1094.5(f). See §1.12 for a discussion of the limited exceptions to this general prohibition on damages.
- An administrative mandamus case is heard by the court sitting without a jury. CCP §1094.5(a). See §14.1 for discussion.
- A party must exhaust its administrative remedies before he or she may seek judicial review via administrative mandamus. *Bollengier v Doctors Med. Ctr.* (1990) 222 CA3d 1115, 1125, 272 CR 273. See §§3.9-3.48 on exhaustion of remedies.
- The court conducts a limited trial de novo, reviewing the administrative proceedings and the evidence admitted during the administrative hearing. *Elizabeth D. v Zolin* (1993) 21 CA4th 347, 355, 25 CR2d 852 (court may only consider evidence admitted

during administrative hearing, except as permitted by CCP §1094.5(e)); *Schoenen v Board of Med. Exam'rs* (1966) 245 CA2d 909, 913, 54 CR 364 (hearing in administrative mandamus case is “more of the nature of a review than of an unlimited new trial”). The court may inquire into whether the agency acted in excess of its jurisdiction, committed a serious error of law, or abused its discretion in determining the facts. In the typical case, a petitioner alleges an abuse of discretion, usually contending that the decision is not supported by the findings or the agency findings are not supported by the evidence. See chap 6.

NOTE □ Code of Civil Procedure §1094.5(b)–(c) outlines the nature of the court’s inquiry into issues such as whether the agency proceeded without or in excess of jurisdiction, whether there was a fair trial, whether a prejudicial abuse of discretion occurred, and whether the findings are supported by the evidence. For discussion of the interpretation of the code’s provisions and their application in specific cases, see chap 6. For the text of §1094.5(b)–(c), see Appendix.

PRACTICE TIP □ Section 1094.5 does not specify on its face which cases are subject to independent judgment review. It is important to determine the appropriate standard of review, whether substantial evidence or independent judgment. See discussion of the standards of review and how to apply them in chap 6.

- The petitioner has the burden of proof. “[R]arely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.” *Fukuda v City of Angels* (1999) 20 C4th 805, 814, 85 CR2d 696, quoting *Sipper v Urban* (1943) 22 C2d 138, 144, 137 P2d 425.
- New evidence is not admissible, except under the narrowest of circumstances. CCP §1094.5(e); *Fort Mojave Indian Tribe v California Dep’t of Health Servs.* (1995) 38 CA4th 1574, 45 CR2d 822; *Elizabeth D. v Zolin* (1993) 21 CA4th 347, 25 CR2d 852. Because administrative mandate review involves a review of the evidence introduced at the administrative hearing, new evidence is admitted only when the evidence is relevant and, in the exercise of reasonable diligence, could not have been produced or was improperly excluded during the hearing. See chaps 4, 13; §14.18. Similarly, “discovery,” as used in CCP §§2016.010–2036.050, is not available in typical administrative mandate proceedings. See §§13.7–13.15; chap 10.

- There is a presumption that the administrative decision is correct. *Fukuda v City of Angels* (1999) 20 C4th 805, 808, 85 CR2d 696.
- The prevailing party is entitled to costs. CCP §1094.5(a); Govt C §11523. This includes the costs of preparing a copy of the administrative record (transcripts and exhibits) lodged with the court for its review as well as costs of suit. See §§10.14–10.16, 15.31–15.35.
- The prevailing party is not entitled to attorney fees unless the agency’s action is deemed arbitrary and capricious within the meaning of Govt C §800(a). A bona fide dispute is insufficient to justify the imposition of the statutory sanction. *Stirling v ALRB* (1987) 189 CA3d 1305, 1312, 235 CR 56 (attorney fees may not be awarded simply because agency’s action was erroneous or even clearly erroneous); *Von Durjais v Board of Trustees* (1978) 83 CA3d 681, 689, 148 CR 192. If the court finds the agency’s conduct to be “lacking any reasonable basis whatsoever” (*Gunn v Employment Dev. Dep’t* (1979) 94 CA3d 658, 665, 156 CR 584), or “discriminatory and illegal” (*Olson v Hickman* (1972) 25 CA3d 920, 923, 102 CR 248), however, such fees would be appropriate. See §§2.17–2.24, 10.43.

NOTE □ Attorney fees may also be available as sanctions under CCP §128.7, which provides for an award of fees when any attorney or party presents papers to the court with an improper purpose, without support in existing law, based on a frivolous argument for extension or change of existing law, or without evidentiary support. For discussion of an award of fees under CCP §128.7, see California Attorney Fee Awards §§8.24–8.33 (2d ed Cal CEB 1994).

§1.7 C. Applicability of CCP §1094.5

A proceeding under CCP §1094.5 is the exclusive remedy for judicial review of adjudicatory administrative actions of state-level agencies of constitutional and legislative origin (see, e.g., *People v County of Tulare* (1955) 45 C2d 317, 319, 289 P2d 11; *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788), local-level agencies (see, e.g., *Saad v City of Berkeley* (1994) 24 CA4th 1206, 1211, 30 CR2d 95), and private organizations (see, e.g., *Pomona College v Superior Court* (1996) 45 CA4th 1716, 1722, 53 CR2d 662) when the adjudicatory decision is the result of a proceeding in which (CCP §1094.5(a)):

- By law a hearing is required to be given (but does not necessarily have to take place);

- Evidence is required to be taken; and
- Discretion in the determination of facts is vested in the administrative tribunal, corporation, board, or officer.

See §§1.8–1.9 for discussion. There are exceptions to this general rule (e.g., when an enactment expressly provides otherwise). See §1.10.

Writs of certiorari and prohibition may be used if a constitutional agency is the respondent, but administrative mandamus is established as the preferred method. See §§1.14–1.15. On joinder of other causes of action and requesting damages, see §1.11.

Some statutes may specifically authorize judicial review of final administrative decisions under CCP §1094.5. See, e.g., *Welf & I C* §14171(j). See also *RCJ Med. Servs. v Bonta* (2001) 91 CA4th 986, 1003, 111 CR2d 223; *County of Sonoma v Commission on State Mandates* (2000) 84 CA4th 1264, 1278, 101 CR2d 784 (under Govt C §17559, decisions of Commission on State Mandates reviewed under CCP §1094.5).

§1.8 1. Governmental Agency Decisions

Although there are some statutory exceptions (see §1.10), a proceeding under CCP §1094.5 is the exclusive remedy for challenging the final adjudicatory decision of a state or local governmental agency when the decision is the result of a required evidentiary hearing. Examples of governmental agency decisions subject to judicial review by administrative mandamus under §1094.5 are:

- Denial of an application for a professional license. See, e.g., *Savelli v Board of Med. Exam'rs* (1964) 229 CA2d 124, 40 CR 171.
- Discipline imposed on a professional vocational license. See, e.g., *Green v Board of Dental Exam'rs* (1996) 47 CA4th 786, 55 CR2d 140; *Williamson v Board of Med. Quality Assur.* (1990) 217 CA3d 1343, 266 CR 520; *Cooley v State Bd. of Funeral Directors & Embalmers* (1956) 141 CA2d 293, 296 P2d 588.
- Denial of application for reinstatement of professional vocational license. See, e.g., *Flanzer v Board of Dental Exam'rs* (1990) 220 CA3d 1392, 1396, 271 CR 583 (dental license); *Crandell v Fox* (1978) 86 CA3d 760, 763, 150 CR 426 (real estate license).
- Employee discipline imposed by a state or local governmental employer. See, e.g., *Fukuda v City of Angels* (1999) 20 C4th 805, 85 CR2d 696; *Norris v State Personnel Bd.* (1985) 174 CA3d 393,

219 CR 895; *Almond v County of Sacramento* (1969) 276 CA2d 32, 80 CR 518.

- Termination of a tenured teacher. See, e.g., *Bledsoe v Biggs Unified Sch. Dist.* (2008) 170 CA4th 127, 88 CR3d 13; *Alexander v Board of Trustees* (1983) 139 CA3d 567, 188 CR 705.
- Discipline imposed on a driver's license. See, e.g., *Santos v DMV* (1992) 5 CA4th 537, 7 CR2d 10.
- Denial of disability retirement benefits. See, e.g., *Usher v County of Monterey* (1998) 65 CA4th 210, 76 CR2d 274; *Hosford v Board of Admin. of Public Employees Retirement Sys.* (1978) 77 CA3d 854, 143 CR 760.
- Denial of application for Medi-Cal disability benefits. See, e.g., *Anthony v Kizer* (1991) 230 CA3d 990, 281 CR 516.
- Zoning and land use decisions. See, e.g., *Fort Mojave Indian Tribe v California Dep't of Health Servs.* (1995) 38 CA4th 1574, 45 CR2d 822 (challenge to agency decision certifying environmental impact report); *PMI Mort. Ins. Co. v City of Pacific Grove* (1981) 128 CA3d 724, 179 CR 185 (challenge to zoning decision by city to deny variance); *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 113 CR 836 (zoning).

§1.9 2. Adjudicatory Decisions of Private Organizations

Although administrative mandate is typically used to review a *governmental* agency's decision, it can, under certain circumstances, be used to challenge the decision of certain *private* organizations. Administrative mandate review under CCP §1094.5 is available to challenge the adjudicatory decisions of a private organization when its decision is final and arises after a required evidentiary hearing, and discretion was vested in the private entity. *Pomona College v Superior Court* (1996) 45 CA4th 1716, 1722, 53 CR2d 662. See §§5.31–5.34. As the supreme court explained in *Anton v San Antonio Community Hosp.* (1977) 19 C3d 802, 815, 140 CR 442:

It has been widely assumed that mandate review via section 1094.5 is available only with respect to administrative decisions by *governmental* agencies. However, we find nothing in the statutory language or supporting legislative materials which would lead us to accept that assumption as warranted. Section 1094.5, ...is by its terms made applicable to "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the

determination of facts is vested in the inferior tribunal, corporation, board or officer....” Clearly this language is not limited, ...to governmental as opposed to nongovernmental agencies. [Emphasis in original.]

Examples of actions against private entities properly filed as administrative mandate under §1094.5 are:

- Decisions involving hospital staff privileges, including decisions by private hospital boards or boards of directors of hospital districts organized under the Local Health Care District Law (Health & S C §§32000–32492). See, e.g., *Anton v San Antonio Community Hosp.* (1977) 19 C3d 802, 140 CR 442; *Oskooi v Fountain Valley Regional Hosp. & Med. Ctr.* (1996) 42 CA4th 233, 49 CR2d 769; *Bollengier v Doctors Med. Ctr.* (1990) 222 CA3d 1115, 272 CR 273.
- Review of a private dental plan’s decision regarding fees that could be charged by a participating dentist. See, e.g., *Delta Dental Plan v Banasky* (1994) 27 CA4th 1598, 1608, 33 CR2d 381.
- Review of a private manufacturer’s decision to terminate an employee under a grievance procedure that required evidence be taken and a hearing held. See, e.g., *Wallin v Vienna Sausage Mfg. Co.* (1984) 156 CA3d 1051, 1056, 203 CR 375.
- Review of a trade union decision to remove an officer following a formal hearing. See, e.g., *Bray v International Molders & Allied Workers Union* (1984) 155 CA3d 608, 616, 202 CR 269.

§1.10 3. Exceptions

Certain agencies have statutory provisions specifying an exclusive method for obtaining judicial review of their adjudicatory decisions by means other than administrative mandamus under CCP §1094.5. Some of these agencies include:

- **Public Utilities Commission (PUC).** PUC decisions issued in certain ratemaking and licensing proceedings are now reviewed by writ of review to the court of appeal. All other matters are reviewable by writ of review to either the court of appeal or the California Supreme Court depending on the extent of review sought. See Pub Util C §§1756–1768 (PUC rulings); Cal Rules of Ct 8.496(a). See also California Civil Writ Practice §§16.33–16.45 (4th ed Cal CEB 2008).
- **Department of Alcoholic Beverage Control and Alcoholic Beverage Control Appeals Board.** The appropriate procedure to obtain judicial review of a decision issued by the department is to

petition for a writ of review to the supreme court or court of appeal. Bus & P C §§23090–23090.7. The court’s scope of review is substantially similar to that under CCP §1094.5. Bus & P C §23090.2. But see *Stroh v Midway Restaurant Sys., Inc.* (1986) 180 CA3d 1040, 1048, 226 CR 153 (holding that Bus & P C §23053.1 permits Department of Alcoholic Beverage Control to petition superior court for injunction barring violations of Department’s rules occurring after revocation of liquor license and pending appeal to Alcoholic Beverage Control Appeals Board). See Civ Writ Prac §§16.22–16.25.

- **State Bar of California.** Judicial review of attorney discipline cases is by petition for review to the California Supreme Court or to the court of appeal. Bus & P C §§6082–6083; Cal Rules of Ct 9.13.
- **Workers’ Compensation Appeals Board (WCAB).** Judicial review of WCAB decisions is by petition for writ of review in the California Supreme Court or the court of appeal. Lab C §§5950–5955. See Civ Writ Prac §§16.46–16.48.
- **Agricultural Labor Relations Board (ALRB).** Judicial review of decisions of the ALRB is by petition to the court of appeal. Lab C §1160.8. See Civ Writ Prac §§16.18–16.21.
- **Public Employee Relations Board.** Review of unit determinations and unfair practice cases can be obtained only by petition for extraordinary writ to the court of appeal. Govt C §§3520, 3542, and 3564. See Civ Writ Prac §§16.29–16.32.
- **Energy Resources Conservation and Development Commission.** Judicial review of decisions of the Energy Resources Conservation and Development Commission on applications for the certification of sites and related facilities can be reviewed only through a petition for a writ of review in the California Supreme Court. Pub Res C §25531(a). See Civ Writ Prac §§16.26–16.28.

PRACTICE TIP □ When review of an adjudicatory decision of an agency is desired, counsel must determine whether there is a particular requirement to proceed in a manner other than by administrative mandamus under CCP §1094.5. When a method of review under a federal statute provides the aggrieved party with *more* protection than is available by review under §1094.5, federal procedure should be followed. See *San Francisco Unified Sch. Dist. v State* (1982) 131 CA3d 54, 65, 182 CR 525.

§1.11 D. Joinder With Other Causes of Action

When CCP §1094.5 applies and it is the exclusive vehicle for judicial review, it may not be joined with other types of action, such as declaratory relief (see §1.19), in an attempt to circumvent this rule. *State v Superior Court* (1974) 12 C3d 237, 249, 115 CR 497. However, joinder of causes of action stating independent grounds for relief is permissible, *e.g.*, joining a cause of action to declare a statute facially unconstitutional (see 12 C3d at 251), as is joinder of a cause for traditional mandamus (CCP §1085) to compel a ministerial act. It is established practice to join a petition for administrative mandamus under CCP §1094.5 with a petition for traditional mandamus when the petitioner is uncertain as to which is applicable. See *Conlan v Bonta* (2002) 102 CA4th 745, 748, 125 CR2d 788; *Prentiss v City of South Pasadena* (1993) 15 CA4th 85, 87, 18 CR2d 641.

PRACTICE TIP □ One problem with a petitioner’s joining other causes of action with a petition for writ of administrative mandamus under CCP §1094.5 is the pretrial delay in bringing the other causes of action to trial and the effect of the one-judgment rule. For discussion and procedure to resolve problems created by the one-judgment rule, see §14.38.

For further discussion of joining causes of action, see §§14.38–14.41. On seeking damages in a CCP §1094.5 proceeding, see §§1.12, 3.77–3.83.

§1.12 E. Damages Unavailable

Damages are not available in administrative mandamus proceedings. A petitioner’s remedies are limited to a judgment setting aside the agency’s decision or remanding the matter for the agency’s reconsideration “in light of the court’s opinion and judgment.” CCP §1094.5(f).

NOTE □ When a petitioner is seeking reinstatement to a civil service position after suspension or discharge and seeks back pay, such relief is generally *not* considered damages within the meaning of CCP §1095 or the Tort Claims Act, but is considered relief incidental to the petition. Hence, compliance with the Tort Claims Act is not required. *Harris v State Personnel Bd.* (1985) 170 CA3d 639, 643, 216 CR 274, disapproved on other grounds in *Coleman v Department of Personnel Admin.* (1991) 52 C3d 1102, 1123 n8, 278 CR 346. See also *Warner v North Orange County Community College Dist.* (1979) 99 CA3d 617, 628, 161 CR 1. For further discussion, see §3.79.

In some limited circumstances, a separate action for damages can be instituted *after* an aggrieved party has pursued a CCP §1094.5 proceeding and obtained a final judgment invalidating the administrative action. This is usually considered a jurisdictional prerequisite, and a demurrer or summary judgment will lie. *City of Fresno v Superior Court* (1987) 188 CA3d 1484, 1490, 234 CR 136; *Logan v Southern Cal. Rapid Transit Dist.* (1982) 136 CA3d 116, 123, 185 CR 878.

EXAMPLE 1 □ In *Westlake Community Hosp. v Superior Court* (1976) 17 C3d 465, 482, 131 CR 90, the court held that an action for damages arising out of a doctor's staff privileges dispute with a private hospital is barred until after the doctor has sought and obtained a judicial decision setting aside the hospital's adverse disciplinary action. See also *Joel v Valley Surgical Ctr.* (1998) 68 CA4th 360, 365, 80 CR2d 247 (*Westlake* doctrine did not bar physician's action for damages against private facility after underlying administrative proceeding had settled).

EXAMPLE 2 □ In *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 56 CR3d 111, the court concluded that Ohton could not bring a damages action against California State University (CSU) for alleged retaliation without first exhausting his judicial remedies by filing a petition for writ of administrative mandamus. This was the first case arising under Govt C §8547.12(c), the CSU whistleblower protection statute. The court interpreted the phrase "satisfactorily addressed" as requiring Ohton to challenge the CSU administrative decision by filing a writ petition as a condition precedent to suing for damages.

EXAMPLE 3 □ In *O'Hagan v Board of Zoning Adjustment* (1974) 38 CA3d 722, 729, 113 CR 501, the court held that petitioner could seek damages after prevailing in an administrative mandamus proceeding that challenged the taking of his property.

III. COMPARISON WITH OTHER WRITS AND PROCEDURES

A. Traditional Mandamus

§1.13 1. To Compel Ministerial Duty

A traditional writ of mandate under CCP §1085 is available when the petitioner has no plain, speedy, and adequate remedy; the respondent has a clear, present, and usually ministerial duty to perform; and the petitioner has a clear, present and beneficial right to

performance. *Conlan v Bonta* (2002) 102 CA4th 745, 748, 125 CR2d 788; *Unnamed Physician v Board of Trustees* (2001) 93 CA4th 607, 618, 113 CR2d 309. When a petition challenges an agency's failure to perform an act required by law, rather than the conduct or result of an administrative hearing required by law to be held, the remedy is by ordinary mandate, not by administrative mandate under CCP §1094.5. *Conlan v Bonta, supra*; *Wellbaum v Oakdale Joint Union High Sch. Dist.* (1977) 70 CA3d 93, 96, 138 CR 553.

For discussion of the distinction between ministerial and discretionary acts, see *Morris v Harper* (2001) 94 CA4th 52, 114 CR2d 62.

§1.14 2. When Agency Not Required to Hold Evidentiary Hearing

Traditional mandamus may also be used to review an adjudicatory action or decision when the agency is not required to hold an evidentiary hearing. *DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102. If the agency held a hearing but the hearing was not *required by law*, then traditional mandate must be used to review the agency action or decision. *Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 257 CR 557.

By comparison, administrative mandamus is appropriate to inquire into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal. *Conlan v Bonta* (2002) 102 CA4th 745, 752, 125 CR2d 788. When review is sought by traditional mandamus, generally the court's inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. *DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102.

§1.15 3. Review of Quasi-Legislative Acts

California has consistently differentiated "legislative" and "adjudicatory" actions and the manner in which they may be reviewed. *Saleeby v State Bar* (1985) 39 C3d 547, 560, 216 CR 367; *Bollengier v Doctors Med. Ctr.* (1990) 222 CA3d 1115, 1123, 272 CR 273. Adjudicatory matters are those in which the government's action affecting an individual is determined by facts peculiar to the individual case, whereas legislative decisions involve the adoption of a "broad, generally applicable rule of conduct on the basis of general public policy." *Saleeby v State Bar, supra*.

Traditional mandamus under CCP §1085 (see *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 567, 38 CR2d 139; *Bollengier v Doctors Med. Ctr.* (1990) 222 CA3d 1115, 1123, 272 CR 273), declaratory relief (see §1.19), and injunction (see §1.18), or a combination of these remedies, is the appropriate form of judicial review for legislative or quasi-legislative action. Adjudicatory determinations only, not quasi-legislative actions, are reviewable by administrative mandamus under CCP §1094.5. *Saleeby v State Bar, supra*; *Bollengier v Doctors Med. Ctr., supra*.

NOTE □ If the petitioner makes a mistake concerning which form of mandamus is proper to review agency action and files a petition under CCP §1085 (traditional mandate), as opposed to CCP §1094.5 (administrative mandate), the court may treat it as a petition under §1094.5 if the petition states a cause of action under that statute. *Anton v San Antonio Community Hosp.* (1977) 19 C3d 802, 813, 140 CR 442; *Bollengier v Doctors Med. Ctr.* (1990) 222 CA3d 1115, 1125, 272 CR 273. See also §5.35.

PRACTICE TIP □ A distinction must be drawn between the act of adopting a regulation (a quasi-legislative act) and the later act of issuing a decision declaring that the regulation has been violated (an adjudicatory act).

For further discussion of quasi-legislative action, see §§5.19–5.22.

§1.16 B. Certiorari

In some states, the normal method of reviewing an adjudicatory administrative action is by certiorari. See 4 Davis, *Administrative Law Treatise* §23.16 (3d ed 1994). In California, however, administrative mandamus under CCP §1094.5 is the appropriate method to review adjudicatory action of state-level agencies of legislative origin, local agencies, and certain private entities. See, e.g., *Fukuda v City of Angels* (1999) 20 C4th 805, 808, 810, 85 CR2d 696; §1.1.

The writ of certiorari is codified in CCP §§1068–1069. It is also known as a “writ of review.” Certiorari is used to review completed judicial action taken without or in excess of jurisdiction when there is no appeal and no other adequate remedy. CCP §§1068, 1074. Because state-level agencies of legislative origin and local agencies cannot exercise judicial powers, certiorari is not available to review adjudicatory action taken by such agencies. See *Fukuda v City of Angels* (1999) 20 C4th 805, 811, 85 CR2d 696 (citing *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 59 P2d 119, and *Whitten v California State Bd. of Optometry* (1937) 8 C2d 444, 65 P2d

1296); *Drummev v State Bd. of Funeral Directors & Embalmers* (1939) 13 C2d 75, 87 P2d 848.

Certiorari cannot be used to review acts of legislatively created statewide administrative agencies, because the legislature lacks power to confer judicial functions on a state administrative agency. *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. Likewise, adjudicatory decisions of local agencies are not reviewable on certiorari. *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 44, 112 CR 805 (local agencies may no longer exercise judicial powers).

Certiorari as well as administrative mandamus is available to review adjudicatory actions of state-level agencies of constitutional origin. *Boren v State Personnel Bd.* (1951) 37 C2d 634, 637, 234 P2d 981. Because constitutional agencies derive their adjudicatory power from the California Constitution, they are not subject to the rule of *Standard Oil Co. v State Bd. of Equalization, supra*.

PRACTICE TIP □ As a matter of practice, however, administrative mandamus is generally favored because of its broader scope of review. The scope of review in certiorari is limited to a determination of whether the lower tribunal, board, or officer exceeded its prescribed jurisdiction or authority. See CCP §§1068, 1074. In an administrative mandamus proceeding, the court can inquire into the various matters specified in CCP §1094.5(b)–(c) (e.g., whether the agency proceeded without or in excess of its jurisdiction or whether the agency held a fair hearing or was guilty of a prejudicial abuse of discretion). See CCP §1094.5(b). See chap 6 on scope of review under CCP §1094.5.

On certiorari, see California Civil Writ Practice §§4.10–4.16, 15.27–15.38 (4th ed Cal CEB 2008).

§1.17 C. Prohibition

The purpose of a writ of prohibition is to prevent or restrain a court or other judicial tribunal from erroneously assuming jurisdiction or acting in excess of that jurisdiction. Prohibition may also prevent a nonjudicial body or officer from exercising a judicial function that exceeds its jurisdiction. CCP §§1102–1103; *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 432, 124 CR 339. The writ is a preventive remedy used to restrain the commission of a future judicial act (*Aronoff v Franchise Tax Bd.* (1963) 60 C2d 177, 181, 32 CR 1), rather than a review of a judicial act already done, which is the function of certiorari. See §1.16. This remedy is most often used to

restrain judicial acts by courts; prohibition will not lie to restrain “ministerial acts” of the courts. *Modern Barber Colleges, Inc. v California Employment Stabilization Comm’n* (1948) 31 C2d 720, 729, 192 P2d 916.

The writ of prohibition is limited to judicial acts. See CCP §1102. It is not available to prohibit legislative or administrative acts. *Spring Valley Water Works v City & County of San Francisco* (1877) 52 C 111, 117 (legislative); *Fleischer v Adult Auth.* (1962) 202 CA2d 44, 47, 20 CR 603 (administrative). Thus, prohibition does not lie to control adjudicatory actions of state-level agencies of legislative origin or of local agencies, because these agencies cannot exercise judicial powers. See *Whitten v California State Bd. of Optometry* (1937) 8 C2d 444, 445, 65 P2d 1296 (state-level agencies); *Strumsky v San Diego County Employees Retirement Ass’n* (1974) 11 C3d 28, 43, 112 CR 805 (local agencies). However, similar to certiorari (see §1.16), prohibition may lie to restrain the acts of a statewide constitutional agency. See *O’Brien v Olson* (1941) 42 CA2d 449, 109 P2d 8.

Nevertheless, administrative mandamus is generally favored because of its broader scope of review. The scope of review in prohibition, like certiorari, is limited to so-called jurisdictional questions. See generally *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 287, 109 P2d 942. Administrative mandamus is not subject to this limitation, and the court can inquire into the various matters specified in CCP §1094.5(b)–(c) (e.g., whether the agency proceeded without or in excess of its jurisdiction or whether the agency held a fair hearing or was guilty of a prejudicial abuse of discretion). See CCP §1094.5(b). See chap 6 on scope of review under CCP §1094.5.

On prohibition, see California Civil Writ Practice §§4.2–4.9, 15.14–15.26 (4th ed Cal CEB 2008).

§1.18 D. Injunction

Injunction may not be used as a method of reviewing an adjudicatory agency decision in place of administrative mandamus. See *Tushner v Griesinger* (1959) 171 CA2d 599, 605, 341 P2d 416. Injunctive relief, however, is permitted when administrative remedies are inadequate or unavailable. *Associated Cal. Loggers, Inc. v Kinder* (1978) 79 CA3d 34, 43, 144 CR 786. It is often used to stay the effect of an agency’s decision pending review of the decision. See §§11.3–11.27. Moreover, CCP §526(b)(4) and CC §3423(d) prohibit the issuance of an injunction “to prevent the execution of public statute, by officers of the law, for the public benefit.” 79 CA3d at 45. Case

law has recognized exceptions for injunctions against official action when the statute being enforced is alleged to be unconstitutional (*Brock v Superior Court* (1939) 12 C2d 605, 609, 86 P2d 805), when the court found that the public official's action was not within the scope of the statute (*Pierce Ins. Co. v Maloney* (1954) 124 CA2d 501, 269 P2d 57), or when the public official's action exceeds his or her power (*Financial Indem. Co. v Superior Court* (1955) 45 C2d 395, 402, 289 P2d 233).

On obtaining injunctive relief (stay) pending decision on party's request for issuance of a writ, see chap 11. On injunctive relief generally, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

§1.19 E. Declaratory Relief

Declaratory relief is the remedy generally used to test the validity of a statute or a regulation. See, e.g., *Western States Petroleum Ass'n v State Dep't of Health Servs.* (2002) 99 CA4th 999, 122 CR2d 117 (petition for writ of traditional mandate and complaint for declaratory relief challenging drinking water regulation adopted by State Department of Health Services); *J.L. Thomas, Inc. v County of Los Angeles* (1991) 232 CA3d 916, 924, 283 CR 815 (person has standing to challenge facial validity of statute in declaratory relief without exhausting administrative remedies); *Subriar v City of Bakersfield* (1976) 59 CA3d 175, 195, 130 CR 853 (constitutional questions could be reached by action for declaratory relief independent of administrative mandamus). Declaratory relief cannot be used to attack an adjudicatory or "quasi-judicial" decision by an agency. *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 123, 109 CR 799. The appropriate procedure in such a case is to petition for a writ of administrative mandamus under CCP §1094.5. See *State v Superior Court* (1974) 12 C3d 237, 249, 115 CR 497. However, the court may treat an action seeking declaratory relief as a petition for a writ of administrative mandamus. See *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court of appeal reversed trial court's sustaining of demurrer without leave to amend, concluding that declaratory relief action should be treated as petition for writ of mandamus).

PRACTICE TIP □ It may be appropriate to join an action for administrative mandamus with one for declaratory relief when the statutory scheme underlying the administrative agency's decision is challenged as unconstitutional. If, however, a statute or regulation was allegedly already applied to a party in an unconstitutional manner (*i.e.*, a factual question), the exclusive

remedy appears to be an action for administrative mandamus after administrative remedies have been exhausted. See *Taylor v Swanson* (1982) 137 CA3d 416, 187 CR 111. On exhaustion of administrative remedies, see §§3.9–3.48.

Joinder of a cause of action for declaratory relief with administrative mandamus may not be used to avoid the limitation on judicial review provided in CCP §1094.5, *i.e.*, as a means to obtain a trial de novo or to introduce new evidence (*e.g.*, evidence not considered by the agency). See *Guilbert v Regents of Univ. of Cal.* (1979) 93 CA3d 233, 244, 155 CR 583; *Gong v City of Fremont* (1967) 250 CA2d 568, 574, 58 CR 664.