

Memorandum 89-15

Subject: Study N - Administrative Law (Schedule for Study)

At the December 1988 meeting the Commission discussed the priority for study of the various aspects of California administrative law, and also discussed the advantages and disadvantages of using the 1981 Model State Administrative Procedure Act as a basis for the study. The Commission requested the staff, in consultation with Professor Asimow and in light of the discussion at the meeting, to bring back to the Commission as soon as possible a specific recommendation and schedule for proceeding on this study.

The staff has reviewed the tapes of the discussion at the meeting and the letters received on this matter, and has consulted with Professor Asimow. The staff proposes the following procedure for the administrative law study.

The sequence for study would be: (1) adjudication, (2) judicial review, (3) rulemaking, and (4) nonjudicial review. It is conceivable that after the first three phases are complete, the Commission may conclude that the last phase is not necessary. No final recommendation would be made to the Legislature until the entire study, or at least large self-sufficient portions that represent a balanced package, are complete. This would not apply to individual problems that appear to require immediate attention on an urgency basis.

Within each area of administrative law that is being studied, the Commission would develop a series of smaller tentative recommendations focusing on individual problems or concepts. From the smaller recommendations the Commission would assemble a larger package that deals with the entire area comprehensively. The Evidence Code was prepared in this fashion by the Commission with great success.

Professor Michael Asimow would be retained as a consultant to prepare a background study on the first phase--adjudication. He would cover the entire field of administrative adjudication in a series of

reports dealing with individual or related matters delivered to the Commission from time to time as they are completed. The first reports would be delivered to the Commission not later than September 30, 1989, and the last reports would be delivered not later than September 30, 1990.

Professor Asimow would use the 1981 Model Act as a vehicle to present issues and to make sure that the field is covered comprehensively. However, the focus of each report would be a comparison of the Model Act with existing California law and a discussion of the relevant policy and practice. Views of agencies, judges, practitioners, and other interested persons would be considered by the consultant, but the Commission would expect to receive from the consultant not a compromise proposal but the consultant's suggestion as to the best resolution of the problem.

Professor Asimow's first reports would deal with the broadest issues in the adjudication area--(1) coverage of the adjudicative portions of the administrative procedure act (corresponding to some of the general provisions of the 1981 Model Act); (2) role of the central panel of administrative law judges (corresponding to Section 4-202 of the 1981 Model Act); (3) levels of formality in administrative adjudication (corresponding to Sections 4-401, 4-501, and 4-502 of the 1981 Model Act). The remaining reports would deal with the more detailed issues involved in adjudication, corresponding generally to Article IV (adjudicative proceedings) of the 1981 Model Act.

The \$11,000 available for research in this year's budget would cover the entire adjudication phase of the study even though that phase would extend over several years. Of this amount, \$1,000 would be allocated to cover Professor Asimow's expenses in attending Commission meetings and legislative hearings when requested by the Commission through the Executive Secretary. The remaining \$10,000 would go to cover the cost of any empirical research needed for the project, as well to compensate the consultant for all reports produced.

Compensation would be made in up to four partial payments. Each payment would be made when the reports delivered by the consultant clearly exceed the portion of the total study to which the payment relates.

The Commission should recognize that the amount allowed for the consultant would not begin to compensate the consultant for the work devoted to a project of this magnitude. As is the Commission's practice, the consultant's participation is in the nature of a public service and the compensation allowed is in the nature of an honorarium.

We have not suggested a schedule for completion of the Commission's work on adjudication. This will depend on the priority the Commission decides to give this matter. The staff assumes the Commission will not want to devote its time exclusively to administrative law, as it has done with probate law.

We would not schedule or allocate funds for the judicial review or rulemaking portions of the study until we have experience with progress under the adjudication phase and until we know what research funds will be available and what other priorities outside the administrative law area are competing for Commission attention.

Among the factors we considered in the development of this proposal, the following are particularly significant:

(1) Problems in the adjudication area (uniformity of procedure, central hearing officer panel) were the genesis of this study by the Commission. In this connection, we call the Commission's attention to a letter from the State Bar Public Law Section, attached as Exhibit 1. While the Section does not make any suggestions as to priority, the Section notes that "The cases being heard by Administrative Law Judges and Hearing Officers in the State of California are increasing in quantity and complexity. Litigants and practitioners who appear before administrative bodies have complained about the lack of uniformity in those proceedings. While the Public Law Section believes that uniformity in state administrative law proceedings is a topic that should be addressed, it also wants to point out the need for diversity with respect to local and regional administrative law adjudications."

(2) The adjudication area is the largest for study, and this year we have the funds to do it.

(3) Many of the problems in the adjudication area are nonpolitical and susceptible of rational solution. It will be useful to begin in this area to help establish the method of study and to develop a sound working relationship with the interested parties before we hit the

other volatile political issues involved in judicial review, rulemaking, and nonjudicial oversight. Also, working through adjudication will enable the Commission to become more familiar with some of the forces at work in administrative law before facing the other tough policy decisions.

(4) The more protracted schedule required for adjudication fits well with the Commission's current schedule and priorities, since it will be awhile yet before the Commission is sufficiently free from probate matters that it can devote substantial attention to administrative law.

(5) The proposed sequence of study will enable us to build balanced packages for presentation to the Legislature.

Although the staff feels quite confident that this is the best way to proceed, and the proposed consultant agrees this is a sound way to proceed, we do note that we have received a letter from Joy Fisher of the Department of Corporations (Exhibit 2), reiterating the concerns she expressed at the December meeting that rulemaking should be addressed first and that the existing California statute should be the primary vehicle for addressing administrative law issues.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

**PUBLIC LAW SECTION
THE STATE BAR OF CALIFORNIA**

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December 12, 1988

CA LAW REV. COMM'N
DEC 13 1988
RECEIVED

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: LAW REVISION COMMISSION PROPOSED STUDY OF ADMINISTRATIVE LAW

Dear Sirs:

The Public Law Section consists of attorneys employed by public agencies, administrative law judges and hearing officers, and by practitioners in the field of public law in the State of California.

The Public Law Section believes that the study of administrative law deserves attention by the Law Revision Commission. This area of law requires re-examination, particularly in light of the fact that the Administrative Procedure Act in the State of California was first enacted in 1945, over 40 years ago, and has not been revised substantially in that period. Administrative law proceedings are expanding in the State of California, both in administrative bodies, as well as in judicial review thereof. The cases being heard by Administrative Law Judges and Hearing Officers in the State of California are increasing in quantity and in complexity. Litigants and practitioners who appear before administrative bodies have complained about the lack of uniformity in those proceedings.

While the Public Law Section believes that uniformity in state administrative law proceedings is a topic that should be addressed, it also wants to point out that the need for diversity with respect to local and regional administrative law adjudications.

The Public Law Section has reviewed Professor Michael Asimow's preliminary study and finds it an excellent approach to the matter. It defers, at this time, any suggestions as to priority of subjects to be considered but is willing to offer recommendations thereon, if called upon by the Law Revision Commission.

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The Public Law Section respectfully offers its support and assistance to the Law Revision Commission in its study of administrative law and hopes to participate in the study to the greatest extent possible consistent with the Commission's procedures.

It is requested that the Public Law Section be placed upon the list of entities that are interested in the Law Revision's study of administrative law and be notified of all further proceedings in this study.

Very truly yours,

A handwritten signature in cursive script that reads "Paul Wyler / dt".

Paul Wyler
Member, Executive Committee

PW:dc

DEPARTMENT OF CORPORATIONS

1107 9TH STREET, 8TH FLOOR
SACRAMENTO, CA 95814-3610

IN REPLY REFER TO:

FILE NO. _____

December 6, 1988

CA LAW REV. COMM'N

DEC 08 1988

RECEIVED

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Administrative Law Project

Dear Mr. Sterling:

This letter is for the purpose of requesting that the Department of Corporations be placed on the mailing list to receive meeting agendas and copies of any studies, reports, communications or other public documents generated or received by the California Law Revision Commission in connection with the review of California's Administrative Law.

It is evident that this project will be lengthy, and I don't believe the Department will have a representative at every Commission meeting; however, we are very interested in being kept abreast of new developments so that we may send a representative or written comments at appropriate times.

I would like to reiterate my strong feeling that structuring the project around a study of the 1981 Model Act is putting the cart before the horse. I believe the proper place to begin is with a review of California's current law and the legislative history of that law as expressed in the Tenth Biennial Report of the Judicial Council of California. The Law Revision Commission needs to be firmly grounded in what is and why it is the way it is before it considers what changes need to be made to the law that exists. The unnecessary loss of decades of judicial interpretation would be regrettable. I appreciate the desire of

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the Commission to do a thorough study rather than taking a piecemeal approach, but a thorough study can be structured just as effectively around the existing law as it could be around the Model Act.

Any decision to change the existing law should be grounded in evidence that the existing law is not working or is not working well. This evidence needs to be solicited directly from the "users" of the law, both the private bar and government agencies. This evidence, in my opinion, is best sought by inviting the public to present testimony at a series of hearings to be held by the Commission. Testimony could be taken in an orderly fashion by structuring comments around topics or chapters covered in the current law. Any attempt to ask the public to comment instead on the provisions of the Model Act will, I think, lead to confusion and frustration. Users will want to talk about the problems they are having with existing law; they will be less competent to discuss theoretical provisions in the Model Act and such a discussion will divert them from their main concerns. Furthermore, I believe users will resent having to react to a "solution" before they have been given an opportunity to air their complaints.

Once the public has had an opportunity to give direct testimony with regard to problems experienced in using current law, Commission staff could summarize the testimony and pinpoint problem areas for the Commission. Then and only then, in my opinion, is it appropriate to consider solutions. In considering solutions, the Model Act should be just one of many resources considered. Federal Law and other state laws should also be reviewed, and any potential solution should be judged in light of the overall purposes and objectives of an administrative law system--i.e., a simplified system designed to speed up resolution of issues, relieving the burden on the court system, etc.

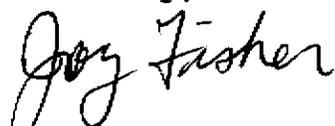
As I indicated at the December 2 meeting, the Department of Corporations, like many other state agencies, experiences the most frustration with the current rulemaking system. I would once again urge the Commission to give a top priority to reviewing this aspect of the administrative law system. It is, in my opinion, much more dysfunctional than the adjudicatory provisions of the Administrative Procedure Act.

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Thank you for the opportunity to express my view on behalf of the Department. I will look forward to working with you on this project in the future. Agendas and other publications can be sent to me at the following address:

Joy Fisher
Department of Corporations
Office of Policy
1107 9th Street, 8th Floor
Sacramento, California 95814

Sincerely,



JOY FISHER
Senior Corporations Counsel
(916) 445-8042

JF:gt