Memorandum 91-17

Subject: Study N-100 - Administrative Adjudication Generally (Procedure on Study)

The purpose of this memorandum is to review for the Commission and interested persons where we are on the administrative procedure study, how we are proceeding, and the anticipated future course of the study. We believe such a review is useful at this time because of the number of persons and agencies intensely interested in the study, many of whom have become aware of the study or have become involved only recently.

HISTORY OF STUDY

The Legislature directed the Commission to study administrative law by concurrent resolution adopted in 1987. The legislative action was in response to a request from the administrative law committee of the Los Angeles County Bar Association.

The Commission decided to engage a consultant to prepare a survey of California administrative law and its problems, for the purpose of helping the Commission decide on the scope and focus of the study. In 1988 the Commission retained Professor Michael Asimow of UCLA Law School to prepare the survey. Professor Asimow's eight page report, "Possible Scope of California Law Revision Commission Study of Administrative Law", was delivered in August 1988.

The Commission circulated copies of the survey to interested persons for comment. The survey and comments were considered at the Commission's December 1988 and January 1989 meetings. At that time the Commission decided to do a comprehensive study of the entire field of administrative law, dividing the study into four phases, with the following priority: (1) administrative adjudication, (2) judicial review, (3) administrative rulemaking, and (4) nonjudicial review.

The Commission retained Professor Asimow to prepare for it a background study of the first phase, administrative adjudication. The study was to take the form of a series of reports delivered to the

Commission from time to time as they were completed. Pursuant to this contract Professor Asimow has delivered three reports to the Commission to date:

(1) "Administrative Adjudication: Structural Issues" (October 1989)

(2) "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs" (August 1990)

(3) "Impartial Adjudicators: Bias, Ex Parte Contacts and Separation of Functions" (January 1991)

The Commission began its consideration of structural issues at the January 1990 meeting. Consideration of appeals within the agency began at the September 1990 Commission meeting. And consideration of impartial adjudicators is scheduled to begin at the April 1991 meeting.

With respect to structural issues, the Commission has initially decided to propose a new comprehensive administrative adjudication statute, including a range of formal and informal hearing procedures, using the 1981 Model State Administrative Procedure Act to raise issues in California law. The act would be so structured as to cover administrative adjudications of all state agencies other than the Governor and Governor's Office, the Legislature, the Judicial Branch, and the University of California. Local agencies would not be covered by the new act. As a general rule there would not be a separation of adjudication from other agency functions, except where such a separation now exists. Administrative law judges and hearing officers would not as a general rule be removed from the agencies that now employ them to be placed in a central panel such as the Office of Administrative Hearings.

With respect to appeals within the agency, the Commission has considered issues at several meetings and has asked the staff to prepare a draft of the consultant's recommended changes in order to focus discussion at meetings, but has not made any initial decisions.

COMMISSION PROCEDURE

The Commission seeks the broadest possible input on its background studies, initial decisions, and tentative recommendations, before it submits final recommendations to the Legislature. Often initial or tentative decisions are modified or reversed based on new information and arguments the Commission receives.

The Commission maintains an extensive mailing list of persons interested in the various topics on its agenda. There are three basic mailing list categories:

(1) Meeting materials. Persons who receive staff memoranda, drafts, redrafts, etc., on an ongoing basis are generally limited to those who will either be regularly attending meetings or sending written comments in advance of meetings. Because of the volume of material produced and the cost of sending it out, and the time commitment required for persons on this list, we try to keep it severely limited. However, anyone who makes a serious commitment to attend meetings or send comments or both will be sent meeting materials.

(2) Tentative recommendations. The meeting memoranda and drafts and redrafts eventually lead to Commission adoption of a tentative recommendation that the Commission believes represents a sound approach to the problems in the field. The tentative recommendations are widely distributed for review and comment to most persons on the Commission's mailing list free of charge.

(3) Final recommendations. The comments received on the tentative recommendations are considered by the Commission and many changes may be made before it finalizes its recommendations to the Legislature. The printed final recommendations are distributed even more widely than tentative recommendations, so that all interested persons of whom the Commission is aware will know what is in the proposals being presented to the Legislature.

The course of development of a Commission recommendation, from the initial consultant's background study or staff report, through meetings where policy decisions are made and drafts and redrafts are considered, revised, and refined, to development of a tentative recommendation, consideration of comments, further revision, and development of a final recommendation to the Legislature, is typically a time-consuming one. Persons interested in the administrative law study should be aware that this is a long-term project that will take many years to complete. Initial and fundamental decisions may be reconsidered along the way, details of procedure may be worked and reworked endlessly, and all interested and affected persons, organizations, and agencies will have ample opportunity to have their perspective fully considered and balanced against other competing viewpoints.

The Commission meetings are more in the nature of working sessions than formal hearings. Our experience in the past has been that if persons on all sides of an issue can be brought together and each made to see the needs of the others, a solution can be worked out that is generally satisfactory. This is one reason the Commission recommendations enjoy an enactment rate in excess of 90%.

ROLE OF CONSULTANT

Some misunderstanding seems to have developed among persons interested in the administrative law project about the role of the Commission's consultant. The Commission looks to its consultants for initial research and advice on what problems exist in a particular area of law and what possible solutions the consultant might recommend. This is only a starting point, however, and the Commission also receives input from interested persons and from its own staff before making any decisions. The Commission has a record of exercising an independent judgment. In this case, as in other cases, Professor Asimow is neither making policy decisions nor drafting a statute on administrative law. He is acting as a key Commission resource, but one of many in the project.

A question has arisen about Professor Asimow's procedure in developing his background studies for the Commission on this project. See Exhibit 1 (letter from John W. Spittler, General Counsel, Public Employment Relations Board). The staff has asked Professor Asimow to outline his research procedure for the benefit of the Commission and interested persons. Professor Asimow's response is attached. See Exhibit 2.

Typically, a Commission consultant prepares background reports for the Commission based primarily on the consultant's experience in the area and knowledge of the law, supplemented by some input from practitioners. Professor Asimow has gone far beyond this norm in obtaining empirical information about practices in a variety of state agencies. In fact, the staff cannot remember the Commission ever having received a background study based on such extensive interviewing of persons active in the field.

Another point the staff believes deserves emphasis is one made in Professor Asimow's letter. The task the Commission has set for itself--drawing a single administrative procedure act that can be applied to all state agencies--is so massive that we cannot possibly hope to study in detail every affected activity in every agency. We must rely on the agencies to identify possible adverse impacts on their activities that may result from general rules the Commission develops that on the surface appear fair and sound.

Occasionally the Commission will hire consultants not to prepare background material, but simply to attend Commission meetings to give the Commission the benefit of their experience when issues are being considered. In the administrative law project, the Commission has decided to hire consultants representing the perspective of persons who appear before administrative agencies. This is necessary because the Commission has found that agencies and administrative law judges are well-represented and vocal at Commission meetings, but no one appears to represent the public. The Commission has engaged Turner & Sullivan of Sacramento, Livingston & Mattesich of Sacramento, and Mark Levin of Los Angeles for this purpose. The Commission has also engaged Professor Preble Stolz of Boalt Hall for the benefit of his experience and perspective at Commission meetings.

COMMISSION'S "HIDDEN AGENDA"

The staff has heard concerns expressed that the objective of the Commission's administrative law study is to remove decision making authority from agency heads and vest it in administrative law judges. We hope this memorandum illustrates that nothing could be further from the truth. The Commission has no hidden agenda; it is simply responding to legislative direction to study the area. The Commission's only objective is to see whether the Administrative Procedure Act can be revised so it will provide a fair and expeditious adjudication procedure that can be applied with some degree of uniformity to all state administrative adjudications.

The staff believes the Legislature has vested in executive branch agencies responsibility for overseeing particular laws. It makes no sense to us to remove that responsibility from agency heads and vest it

in administrative law judges. In the staff's view, the administrative law judge's function should be to assist the agency head in ascertaining the facts so that the law will be administered fairly.

The staff cannot conceive of the Commission making a recommendation to the Legislature that would impair the ability of an agency to do its legislatively assigned tasks, or of the Legislature accepting such a recommendation were the Commission to make it. In fact, one of the few decisions made by the Commission so far in this study is to recommend that administrative law judges and hearing officers not be removed from their employing agencies to a central panel, in part because the existing agency administrative law judge system appears to be working efficiently with no perceivable detriment to the public.

This does not mean we will not examine all issues raised before the Commission to see whether they are meritorious. This is the nature of a Commission inquiry. It does mean that the Commission is likely to find unmeritorious any solution to a problem that could have a detrimental effect on an agency's ability to perform its statutory functions.

FUTURE SCHEDULE

The Legislature has asked the Commission to give the administrative law study and the Family Code project equal priority. The Commission has attempted to move the administrative law study along as rapidly as possible. However, the work has proceeded more slowly than expected for several reasons:

(1) Because most of the state agencies involved in this study are headquartered in Sacramento, for their convenience and to save the state money, the Commission has decided generally to hold administrative law material for consideration at Sacramento meetings. The consequence of this decision is that progress cannot be made on the administrative law project monthly, since the Commission is required to meet in various locations around the state.

(2) The number of intensely interested persons and agencies is larger than usual for this project. Because the Commission believes it

is important to give full and mature consideration to all views and perspectives, the time required to review all material submitted or raised at meetings is above average.

(3) The consultant has first identified for Commission review fundamental structural issues in administrative adjudication that require greater input and deliberation than many of the lesser technical and procedural issues that will be taken up later. These issues are simply consuming large amounts of Commission meeting time at the outset of the project. For example, the Commission devoted much of three or four meetings and read voluminous communications on the issue of the central panel scheme for administrative hearing officers, before concluding that a change in the existing structure would be undesirable.

The net result of all this is that the administrative law project, inherently a lengthy major project, must necessarily proceed on a more deliberate and longer-term basis than originally conceived. The staff has no way to estimate specific or even general completion dates at this time. Suffice it to say that it appears to us that the Commission will not be in a position for several years even to issue any tentative recommendations on administrative adjudication.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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December 26, 1990

Mr. John Demoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Demoully:

In view of the extensive discussion which took place at the Los Angeles meeting on November 30, 1990, and the various concerns expressed therein, I believe that some clarification might help create wider support for the undertaking of the Commission. It seems that while extremely well meaning, Professor Asimow has not been able to galvanize support for the Commission by early and clear contact with the various professionals whom will be directly and daily affected by his recommendations. If this can be accomplished, I believe that support would be forthcoming from sources which are now voicing opposition. It would be of great assistance to my Board (and perhaps others) if Professor Asimow could articulate the problem which he has been retained to solve; i.e., was he to conduct a review of the Administrative Procedure Act for the purposes of modernization or did he conduct some research which lead him to believe that a problem existed which required the proposed changes? If any empirical research was done, it would be useful to learn of:

1. Any data, in any form, from any type of survey instrument which was used to develop the premises upon which the Commission's recommendations are based; i.e., what evidence statistical or otherwise was gathered that lead to the conclusions upon which the recommendations are based? Did the survey instrument undergo any sort of validation procedure?

2. If the recommendations are based upon oral interviews, in what manner were the interviews conducted? How were the interview subjects selected? What questions were asked? Were

all questions asked of all subjects? Were additional questions asked some subjects; and if so, what and why? Were responses memorialized? If so, how? Did the questions undergo any sort of validation procedure?

3. Was there any sort of follow up procedure either by survey or interview? If so, what and how?

Responses to these inquiries would greatly aid my Board Members in understanding and considering the Commissions's recommendations. Thank you for your anticipated cooperation.

Sincerely,

John W. Spittler
General Counsel

cc: See attached distribution list

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February 20, 1991

Nathaniel Sterling
Executive Secretary
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Dear Nat,

This letter responds to a letter sent to the Commission by John D. Spittler, General Counsel of the Public Employee Relations Board, on December 26, 1990. Mr. Spittler's letter inquires about the methodology that I employed to do research on California administrative law and to support the studies I have written.

The Law Revision Commission initially contacted me to see whether I was interested in serving as a consultant for a study on administrative law. A legislative resolution had authorized the Commission to study "whether there should be changes in administrative law." SCR 12 (Lockyer) (1987 Res. Ch. 47). I was interested in undertaking this study because it tied in well with work I had already done on federal administrative law and because I was engaged in preparing a law school casebook comparing state and federal administrative law. The research on that casebook had at least suggested to me that California's administrative law was badly outdated.

At the time California adopted its Administrative Procedure Act (APA) in 1945, no other state had taken this step and, under the influence of the famous Benjamin report, New York had rejected the idea. The federal APA was not enacted until the following year. Thus it is not surprising that California's APA, while in many respects a pioneering, even inspired product, has fallen far behind the times. Since California adopted its Act, the nature and quality of state regulation has changed in ways that could not have been imagined in 1945. The federal APA was enacted and has stood the test of 45 years of

application. Virtually every other state has adopted an APA, mostly based on the Model State Administrative Procedure Act of 1961. In 1981, the Commissioners on Uniform State Laws proposed a state-of-the-art statute that drew on experience under all of the other statutes and on academic writing and case law generated over more than four decades. That Act was adopted after a lengthy and intensive process of research, criticism, drafting and redrafting.

Although the rulemaking provisions of the California APA were revised in 1979, the adjudication and judicial review provisions remain almost as they were in 1945. Essentially, the Act applies only to a relatively small (although very important) piece of administrative adjudication; all the rest is conducted under statutes peculiar to particular administrative schemes. This is a model that has been rejected by the federal Act, by the 1961 Model Act, and by the 1981 Model Act.

Indeed, existing California law reminds me of the old writ system in which every cause of action had its own procedure, or of the pre-federal rules era in which every federal court followed the procedures of the state in which it was located. So I began my work convinced that it would be possible for California to modernize its administrative procedure, adopting a single statute for all agencies, flexible enough to account for their differences, but uniform enough so that a lawyer would have a fair chance to master an agency's procedure when coming to it for the first time. In addition, I believe, the judicial review function can be improved when judicial precedents will apply across the range of administrative law, rather than agency-by-agency.

In conducting this study, I encountered a fundamental difficulty. While I was familiar with some California agencies, there were a vast number with which I was unfamiliar. I doubt if too many people are intimately familiar with the vast range of California agencies or even with the adjudication function within those agencies. Yet a study of this magnitude required me to familiarize myself with enough of the agencies so that I could generalize intelligently. Of course, I could never become intimately familiar with all agencies, but I felt this was not necessary. If I could produce studies of value, the Commission staff could draft statutes that would have general utility; agencies would then come forward and show how those procedures did not fit their work. In that case, either the statute could be altered to account for these differences or, if necessary, an agency could seek exemption from the statute for a particular function.

I have now completed three studies: a) structural issues in adjudication, b) appeals within the agency, and c) administrative impartiality. These studies explain my findings, the areas in which I saw serious problems, and my proposed solutions.

These studies are based on the research methodology which I shall now describe. I was assisted by several research assistants whose work I closely supervised and followed up on. My assistants and I spent many hours (probably in excess of one hundred) interviewing present and former agency staff and agency heads, administrative law judges, and private sector professionals who deal with particular agencies. In addition, I also read all the secondary literature I could find about these agencies as well as the case law dealing with their procedures.

I kept conducting interviews until I felt that I understood how an agency functioned and what sorts of unique problems the agency presented that should be accommodated by a new statute. All of these interviews are summarized in my notes. I have promised, however, to preserve the anonymity of all those who spoke to me; thus I would resist producing any of these notes--at least without careful redaction. Mr. Spittler's letter asks whether I asked everyone the same questions. I did not. I tried to gather information to help me understand the problems and how agencies dealt with them and what their special needs were. This does not lend itself to an interview methodology in which everyone is asked the same questions.

In addition, I gave numerous speeches on the subject before Bar Associations and appeared at the meetings of several agencies, always seeking additional information and suggestions. I wrote an article in the California Regulatory Law Reporter, letting administrative law professionals know about my work and soliciting input. I testified at a legislative hearing concerning the PUC.

This process of data collection persuaded me that my initial hunch was right: there is a need for a single uniform statute and it is feasible to draft one. In addition, these interviews convinced me that there are numerous shortcomings of California administrative law. A few of these, already covered by the three reports I have written, include: inadequate protection against ex parte contacts, absence of a statute on separation of functions, inadequate deference to the demeanor determinations of administrative law judges, a lack of relatively informal models for conducting adjudication, differences between agencies in their approaches to the same problems, and undue rigidity of procedures under the existing APA.

After careful study and consideration, I rejected calls for more extreme changes in administrative adjudication. I felt that the case for stripping agencies of their administrative law judges had not been made. I also decided that agencies with law enforcement functions should not necessarily be deprived of their adjudicatory functions.

In studying adjudication, the agencies to which we gave particularly intensive treatment are:

Attorney General
Office of Administrative Hearings
Public Utilities Commission
Workers Compensation Appeal Board
Unemployment Insurance Appeals Board
Superintendent of Banks
Fair Employment and Housing Commission
Department of Alcoholic Beverage Control and
Alcoholic Beverage Control Appeals Board
California Coastal Commission
Insurance Commissioner
State Personnel Board
State Board of Equalization
Department of Social Services
Missouri Office of Administrative Law

We engaged in several interviews but gave less intensive coverage to these agencies:

Department of Corporations
Department of Motor Vehicles
Energy Resources Conversation and Development Commission
University of California
Water Resources Control Board
Board of Prison Terms

I have also started working on certain issues relating to rulemaking, and that work involved interviews with different agencies than those noted above.

As you may note from this list, I did not perform interviews at Public Employees Relations Board--or at many, many others. Even with the aid of my research assistants, I could not cover every agency, or anything close to it. I had to be selective and hope that my choices of exclusion and inclusion were appropriate. Similarly, there is always the possibility that we made a poor choice of persons within an agency to interview, thus receiving biased or incomplete information. At some point, however, I had to stop interviewing and start writing my reports, or I would never have finished. Perhaps I could have alleviated the skepticism of the PERB toward my work if I had interviewed at that agency.

Mr. Spittler asks whether I used a formal survey instrument. I would have welcomed the opportunity to do this, but the nature of the study did not seem to lend itself to this methodology. I took such a survey on only one point: I surveyed all of the ALJs working for the PUC and the Workers' Compensation Appeals Board to try to ascertain their attitudes

toward independence. The results are summarized at pp. 46-49 of my first report.

The three reports which I have written so far, and a statute drafted by the staff of the Commission, have now been widely circulated and subjected to meticulous examination and criticism. Numerous Commission meetings have considered these matters; the meetings have been attended by large numbers of professionals inside and outside of government. I remain committed to modifying my conclusions, and the draft statute, to accommodate information and suggestions as they are received. The Commission is independent and highly responsive to input; it feels quite free to reject my suggestions and to go its own way.

Thus I hope the limitations on my research methodology--errors arising from the choice of persons interviewed and the inability to become intimately familiar with every agency--can be compensated by the ability of every agency to contribute its input to the Commission's work. Working together, I am certain that we can produce a new statute that will improve the quality of administrative justice in our state, will be attentive to concerns of efficiency and economy, and will avoid counter-productive interference with agency functions.

I hope the readers of this letter will feel free to contact me at the UCLA Law School or to telephone me at 213-825-1086.

Sincerely,

Michael Asimow