#N-107

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02/26/92

Second Supplement to Memorandum 92-4

Subject: Study N-107 - The Process of Administrative Adjudication
(More Comments on Background Study)

Attached to this supplementary memorandum is a letter from Mark Levin of Los Angeles, one of the Commission's private practitioner consultants on administrative law. Mr. Levin makes a number of points relating to issues raised in Professor Asimow's background study.

Several of his points we deal with in connection with the draft statute to implement initial Commission decisions on the background study. See Memorandum 92-16. Two of his points relate to matters the Commission has not yet considered--electronic recording of proceedings and precedential decisions. We will take up these points in connection with our further policy discussions of the background study.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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January 28, 1992

FEDERAL EXPRESS

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California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Re: "THE ADJUDICATION PROCESS"
October 1991

Dear Nat:

I have reviewed Professor Michael Asimow's 120-page report entitled, "THE ADJUDICATION PROCESS." I offer the following comments and observations in connection with his proposals and recommendations.

1. LICENSE APPLICATIONS.

Professor Asimow is recommending directory provisions for time limits in responding to applications. (p. 4.) I strongly disagree with this recommendation which, if enacted, would perpetuate abuses which have existed for many years. Although the Business and Professions Code currently provides time limitations for agencies to act on applications and conduct a hearing following the denial of such applications (Bus. & Prof. Code §487), there is currently no remedy when an agency fails to act in a timely manner. While application proceedings are pending, the applicant is at the agency's mercy. Even those applicants who are eventually licensed often suffer irreparable economic injury because of delays which prevent a timely resolution of disputed applications.

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I believe strict time limitations should be placed on agencies for the resolution of application cases. If an agency wishes to delay an applicant while it conducts an investigation, it should be required to issue a temporary and conditional license, reserving the agency's right to revoke or limit the license after completion of the investigation.

2. INTERVENTION.

Professor Asimow recommends that the APA permit intervention in administrative hearings where the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired. Although intervention may be appropriate in some administrative cases, I believe it is inappropriate in the licensing disciplinary process.

Licensing agencies have virtually unlimited power to investigate allegations of unprofessional conduct which could subject regulated licensees to the disciplinary process. They have the power to subpoena witnesses and documents in order to prove allegations of unprofessional conduct. Agencies are invested with such power in order to permit them to carry out their primary function - - public protection. Potential intervenors have their own agendas which should be addressed in other forums, e.g., civil actions for damages. Such potential intervenors are in a position to communicate information directly to the prosecuting agency which can then determine the appropriateness of including such information in the prosecution of a disciplinary action. To permit the introduction of private agendas to the public disciplinary process would unduly lengthen disciplinary proceedings. Such lengthening could increase the cost of defending such actions to the point where licensees would be unable to afford a defense. I believe this would promote a distortion of the disciplinary process.

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3. ELECTRONIC RECORDING OF PROCEEDINGS.

Professor Asimow recommends electronic recordings (instead of certified shorthand reporting) of prehearing conferences and the hearings themselves. (pp. 4,6.) In the context of disciplinary proceedings (my primary frame of reference), tape recording of proceedings has often resulted in incomplete and inadequate records of proceedings which must sometimes be reviewed in mandamus proceedings and on appeal. Although court reporters are not infallible, generally speaking, they produce records superior to those produced from tape recordings. With tape recordings, there is frequently confusion concerning identification of the speaker. Also, the tape recording process does not permit interruption of the hearing in order to clarify testimony by soft-spoken or inarticulate witnesses. When two participants are speaking simultaneously, the record is unintelligible.

4. CONSOLIDATION AND SEVERANCE.

Professor Asimow recommends permitting agencies to consolidate or sever cases. Although I agree that agencies should have this power, such power should be limited to consolidation and severance in response to motions by the parties to the proceeding. In other words, the agency should not be permitted to unilaterally consolidate or sever multiple matters. The party moving for consolidation or severance must bear the burden of demonstrating the appropriateness of consolidation or severance, i.e., how would the consolidation or severance enhance the resolution of the matters before the agency?

5. BURDEN OF PROOF.

Professor Asimow recommends abandonment of the "clear and convincing evidence to a reasonable certainty" standard of proof in favor of the preponderance of the evidence standard. In Ettinger v. Board of Medical Quality Assurance (1982)

135 Cal.App.3d 853, the Court of Appeal explained in detail why there is no rational basis for application of different standards of proof in licensing disciplinary matters. The Court held that physicians, as well as other licensees, are entitled to be judged by the same standards as lawyers and real estate agents. The right to earn one's living at his or her chosen profession must continue to enjoy the protection provided by the "clear and convincing, etc." standard. To permit quasi-judicial agencies to revoke a professional license based on a standard as low as preponderance of the evidence would create an unwarranted injustice.

6. PRECEDENT DECISIONS.

Professor Asimow recommends that agencies be required to designate certain of their decisions which "contain new law or policy" as precedential. I disagree.

Particularly in disciplinary matters (as well as other types of proceedings), orders are theoretically tailored to deal with the specific shortcomings of the affected licensee. Such orders are a reflection of lengthy administrative records which are barely summarized in an agency's findings of fact contained in its decisions. Factors such as unique and extenuating circumstances, rehabilitation, etc., are taken into consideration before the ALJ and the agency arrive at an order. Such discretion should not be unduly restricted by elevating the decision of quasi-judicial administrative agencies to the same level as the Courts of Appeal and the Supreme Court. To do so would deny administrative agencies the very discretion entrusted to them by the Legislature.

I apologize for the brevity of my comments; however, they are designed to raise issues for discussion and not necessarily to resolve them. In the event such discussions take place, I would appreciate being invited to participate.

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Thank you for this opportunity to comment on Professor Asimow's report.

Very truly yours,

LEWIN & LEVIN

MARK A. LEVIN

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c: Michael Asimow, Professor of Law, UCLA School of Law
Robert J. Sillivan, Esq.