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Memorandum 88-73

Subject: Study N - Administrative Law (Scope of Study)

BACKGROUND

In 1987 the Commission was authorized by the Legislature to study "Whether there should be changes to administrative law." 1988 Res. Ch. 47. The Commission reviewed its priorities for study in January 1988 and concluded that during the year a consultant should be retained to prepare an analysis of the possible scope of a study of administrative law.

In March the Commission approved a contract with Professor Michael Asimow of UCLA Law School to prepare the analysis. The analysis was to give the Commission an overview of the field and the general problem areas that exist, designed to help the Commission decide what aspects of administrative law and procedure could profitably studied, and what sorts of priorities would be involved.

Professor Asimow completed the analysis and transmitted it to the Commission in August. A copy has previously been sent to each Commission member, and another copy is attached to this memorandum. The staff has also distributed copies of the analysis to interested persons for comment. The comments we have received appear as Exhibits 1 to 11 of this memorandum.

We are now in a position to review Professor Asimow's report, along with the comments we have received on it, and to make decisions concerning the scope and priorities in the administrative law study. The Commission, at its September meeting, decided to allocate all of its research budget for the 1988-89 fiscal year (approximately $11,000) to the administrative law study.

PROFESSOR ASIMOW'S REPORT

Professor Asimow's report classifies administrative law into four basic categories:

(1) Adjudication (administrative hearings)

(2) Rulemaking (adoption of regulations)

(3) Judicial Review (court review of agency action)

(4) Oversight (non-judicial controls by executive and legislative branches)

Within each of these categories the report identifies a number of issues that the Commission might consider addressing. Some of the issues are quite sweeping; others are fairly narrow.

Professor Asimow suggests that, rather than directly attacking individual problems that are in need of study, the Commission might want to consider adoption in California of the Model State Administrative Procedure Act, promulgated by the Uniform Law Commissioners in 1981. That act is a comprehensive treatment of all four components of administrative law, and reflects the latest thinking of experts in the area. The Commission could tailor the Model Act for the California situation.

Persons who reviewed Professor Asimow's report addressed both the concept of using the 1981 Model Act as a vehicle for administrative law reform and the specific issues suggested by Professor Asimow as possible study topics. A number of suggestions were also made for other specific study issues.

The report was generally well-received by the commentators. A number of them complimented the effort, finding it "thoughtful", "thorough and comprehensible", and a "solid foundation for a constructive examination into the state of administrative law in California." See Exhibits 1 (Western Land Bank), 8 (California Unemployment Insurance Appeals Board), and 9 (Administrative Law Committee of the Los Angeles County Bar Association).

On the other hand the Workers' Compensation Appeals Board (Exhibit 7) perceived some confusion in the report about the role and function of that agency, and believes that any study undertaken should, as a starting point, take into consideration the various types of administrative agencies and their respective functions.

The Administrative Law Committee of the Los Angeles County Bar Association took the opportunity to emphasize to the Law Revision Commission the significance of this study:

> Our Committee takes it for granted that the importance of a study of administrative law, as compared to other areas of law in which your Commission may be interested, will be considered in the light of the State Legislature's expressed interest, including authorization of a study, and of common knowledge in the legal profession as to the ever-increasing volume and complexity of cases being heard by administrative law judges and the bodies for whom they conduct hearings and of cases brought for review in appellate courts from administrative agency decisions.

Linda Stockdale Brewer, Director of the Office of Administrative Law (Exhibit 11), likewise commented that she shares Professor Asimow's observation that "the practical importance of administrative law has never been greater: administrative adjudication and rulemaking is enormously important to society and it touches the lives of us all."

The remainder of this memorandum summarizes the specific points made in the correspondence concerning Professor Asimow's report. Professor Asimow plans to attend the meeting to review the report with the Commission and to react to the comments we have received. Our objective at the meeting is to make decisions concerning the scope and priorities for the study so that we can get this project moving.

COMMENTS ON THE REPORT

Adoption of 1981 Model Act

The 1981 Model Act is the latest in a series of administrative procedure acts, earlier versions of which have enjoyed widespread enactment among the states. Professor Asimow describes the 1981 Act as comprehensive in scope, covering the entire field of administrative law. "It is an integrated approach to protecting the rights of the public while achieving economic and efficient government and making agencies politically responsive." The 1981 Act is fairly detailed and occupies about 90 printed pages of statute and commentary. Attached to this memorandum as Exhibit 12 is a five page description of the 1981 Model Act provided by the Uniform Law Commissioners.

The Administrative Law Committee of the Los Angeles County Bar Association (Exhibit 9) favors a basis or approach such as that provided by the Model Act and believes that a piecemeal approach would be wasteful of the Commission's resources. The Committee believes that the Commission's study should be a thoroughgoing review of the entire field of administrative law. "The objective of the study should be to create a body of law, comprehensive, coherent and designed to last, in what is generally regarded as the area of administrative law."

Several state agencies wrote that they are unfamiliar with the 1981 Model Act and therefore cannot comment intelligently on it. See, e.g., Department of Corporations (Exhibit 3)--"The Department is not familiar with the provisions of the 1981 Model Act. Consequently, we have no comments at this time." This point was also made by the Department of Social Services.

As Professor Asimow points out, the 1981 Model Act will be relevant whether we start with the concept of adopting the Act and make modifications to suit California or whether we start with existing California law and look to the Act for reform suggestions.

Adjudication

a. Coverage. The adjudication provisions of the California Administrative Procedure Act (APA) do not apply to all state agencies; such agencies as the Public Utilities Commission, University of California, and the Coastal Commission are not covered by the California act. Whether coverage of the APA should extend to all agencies is an issue that is given high priority for study by administrative law judge Paul Wyler (Exhibit 10) and by the Administrative Law Committee of the Los Angeles County Bar Association (Exhibit 9).

The Division of Industrial Accidents--Workers' Compensation Appeals Board (Exhibit 7) is exempt from the APA and believes it should remain exempt. The exemption "is very crucial to the DIA's/WCAB's ability to accomplish its constitutional purpose." The agency suggests that it might be more appropriate to either limit the study to administrative agencies of similar design and function (e.g., agencies subject to the California Administrative Procedure Act) or, at least,

differentiate between the various types of agencies. In this connection, the Commission should note that South Australia distinguishes between industrial matters and other types of administrative proceedings. See Exhibit 2 (Law Reform Committee of South Australia).

b. Local agencies. Should APA adjudication procedures apply to local agencies, which currently are not bound by any code of procedure? This topic seems to administrative law judge Paul Wyler (Exhibit 10) worthy of study.

c. Adjudications covered. APA adjudication provisions are limited to issues surrounding granting, revocation, etc. of a right, authority, license, or privilege. Should coverage be extended to other issues such as setting prices or assessing penalties? This topic also seems to administrative law judge Paul Wyler (Exhibit 10) worthy of study.

d. Formality of hearing. The APA provides a formal hearing procedure for all types of matters, major and minor. The 1981 Model Act, on the other hand, has a gradation of procedures depending on the issue and the seriousness of the sanction: there is provision for conference hearings, summary hearings, and emergency hearings. The Law Reform Committee of South Australia (Exhibit 2) comments, "We have power by rules of court to have informal hearings and by a 1929 statute to have informal hearings for conciliation purposes."

e. Separation of functions. Professor Asimow states that "Proper separation of adjudication from adversary functions is an essential element of fair administrative procedure." He points out that whereas both federal law and the 1981 Model Act require separation of functions within an agency, California law does not.

This item appears to be the most controversial of any in the report. The Administrative Law Committee of the Los Angeles County Bar Association (Exhibit 9) would give this matter a top priority for study, expressing the need for a "means of ensuring independence of administrative law judges (hearing officers), as to conduct of hearings and decision-making, from control or influence by the agency in any particular case." Administrative law judge Paul Wyler (Exhibit 10) also believes this is a matter that should be studied.

Western Land Bank (Exhibit 1) believes this problem is particularly important, advocating "a complete separation of functions and of all relations between ALJs and various agencies. The argument that agencies are 'more expert' than randomly selected ALJs contravenes our statutory and constitutional requirement of impartial jurors--not 'expert' jurors."

The Law Reform Committee of South Australia (Exhibit 2) disagrees that separation of functions is a universal principle. In a professional misconduct inquiry, for example, the members of the tribunal will all be members of the prosecuting body; they have to be in order to be licensed. There is no practical way of conducting such an inquiry otherwise.

Karen R. Wyant, Executive Officer of the Board of Governors of the California Auctioneer Commission (Exhibit 4) believes that the issue of separation of functions is fundamental to the basic integrity of the administrative disciplinary process. She questions the rule that gives the agency that initiated the action final authority to accept or reject an administrative law judge's decision, and points out the bias inherent in such a scheme. The Department of Corporations (Exhibit 3) takes the opposite position, however, stating that "we would strongly resist any attempt to remove an administrator's authority to set aside a hearing officer's decision in an administrative hearing. The law presently provides that an administrator's acts are subject to judicial review and we believe this is the appropriate forum for such a review."

f. Administrative law judges (ALJ's). The California scheme of a central panel of ALJs used by various agencies does not cover many important state agencies; should it? The Administrative Law Committee of the Los Angeles County Bar Association (Exhibit 9) would make this a primary matter for Commission study, as would administrative law judge Paul Wyler (Exhibit 10). The California Unemployment Insurance Appeals Board (Exhibit 8) observes that the vast majority of adjudications are conducted by ALJs who are employed by the agencies themselves and are not central panel ALJs. "Of the approximately 500 California administrative law judges, only 24 are employed by the Office of Administrative Hearings which serves as California's central panel."

g. Discovery. Existing rules provide limited pre-hearing discovery; should the general civil rules of discovery apply in administrative proceedings? They do in South Australia (Exhibit 2). Western Land Bank (Exhibit 1) believes they should here as well, stating that current law limiting discovery slants the scales in favor the agency. It suggests that the APA should expressly incorporate the disclosure requirements of the Public Records Act, requiring the agency to disclose all information in its files and be precluded from introducing evidence at a hearing unless the evidence and its sources have been made available at least 10 days before the hearing.

h. Hearsay evidence. Should California reject the "residuum rule" that hearsay evidence, while admissible, is not sufficient in itself to support a finding? Federal courts, the 1981 Model Act, and many states have rejected this rule. South Australia limits use of hearsay evidence--"We take a much stricter view if someone's career or reputation is at stake in the appeal." Exhibit 2.

i. Official notice. Should California broaden the matters that can be the subject of official notice (the equivalent of judicial notice), as has federal law and the 1981 Model Act? "I wouldn't widen official notice. In 18 years' experience as a judge, I have found that judges vary widely in what they will notice, and in any case some judges will use 'noticed' facts in areas where they are not really competent to notice and evaluate them." Hon. Dr. Zelling, Chairman, Law Reform Committee of South Australia (Exhibit 2).

j. Ex parte contact. The APA precludes off the record contacts between persons inside or outside the agency with a presiding officer. If this is a good rule, shouldn't it be applied to all persons in the decision-making chain, and shouldn't it be applied to all agencies? On the other hand, does the rule improperly deny needed technical assistance to presiding officers? Administrative law judge Paul Wyler (Exhibit 10) would give high priority to study of this matter.

k. Burden of proof. The ordinary preponderance of evidence burden of proof is replaced by "clear and convincing evidence to a reasonable certainty" in revoking or suspending a professional license. Professor Asimow asks whether this burden should be modified by statute. South

Australia uses the civil standard in all cases, with the qualification that the more serious the allegation, the clearer the proof within that standard ought to be. Exhibit 2.

l. Contempt. Should agencies have contempt power? "While we take no position with respect to whether or not other agencies should also be given contempt power, we firmly believe that the WCAB's contempt power is vital to its overall responsibilities." Workers' Compensation Appeals Board (Exhibit 7). Administrative law judge Paul Wyler (Exhibit 10) would give this matter a high priority for study.

m. Settlement. Should changes be made in the powers of ALJs to encourage settlements? South Australia has had conciliation powers for many years but they are not used much. "If you take the parties into chambers to discuss settlement, you almost invariably hear matters which are not evidence and so if the settlement doesn't come off, you have to disqualify yourself and the parties have to go away and come on later before another judge." Exhibit 2.

n. Other issues. A number of other issues in the adjudication area that are not expressly addressed by Professor Asimow were suggested by correspondents as matters in need of study. These are:

(1) Standardization of rules of evidence. Although Professor Asimow's report addresses a number of specific evidentiary matters, the Administrative Law Committee of the Los Angeles County Bar Association (Exhibit 9) would give high priority to the matter of standardization of rules of evidence generally.

(2) Collateral estoppel. The California Unemployment Insurance Appeals Board (Exhibit 8) notes a number of issues surrounding the effect to be given an administrative determination in subsequent civil proceedings and observes that this is currently a contentious matter that needs to be addressed.

(3) Notice. The California Unemployment Insurance Appeals Board (Exhibit 8) also believes that the adequacy of notice of the legal and factual issues to be heard and decided by ALJs needs to be addressed.

(4) Tax issues. A number of commentators observed that tax law is sui generis among administrative law matters. The California Unemployment Insurance Appeals Board (Exhibit 8) believes the special

status of tax determinations should be reexamined to see whether general administrative law rules (such as burden of going forward with the evidence and burden of proof) should apply.

(5) Other due process considerations. The California Unemployment Insurance Appeals Board (Exhibit 8) states that there are due process issues in administrative adjudication that are not generally encountered in the judicial branch. These include use of telephone hearings by administrative agencies, administrative continuance and subpoena powers, role of ALJs as a fact finders where parties to administrative proceedings are unrepresented by counsel, impact of federal regulations on state administrative processes, and the possibility of a uniform code of conduct for ALJs.

Rulemaking

The Department of Corporations believes that serious thought should be given to conforming the California APA to federal law with respect to rulemaking. "The federal administrative procedure act recognizes several levels of rulemaking and imposes different and less burdensome requirements on an agency for each level. This procedure seems to have worked well in the federal rulemaking context without creating a detriment to the notice, comment and hearing process." The staff does not know to what extent the 1981 Model Act conforms to federal law in this respect.

a. Interpretive rules. California has a notice and comment rulemaking procedure that applies even to rules that are strictly interpretive, whereas federal law excepts such rules from notice and comment requirements. Professor Asimow suggests that the California position is unrealistic and is probably ignored in practice. The State Personnel Board (Exhibit 5) concurs with this assessment, and the Department of Corporations notes that this problem is particularly troublesome. Both agencies feel the California rule is unduly burdensome and provides no real public benefit.

The Office of Administrative Law (OAL) (Exhibit 11) disagrees with this assessment. OAL points out that the Legislature in 1982 consciously required every state agency to follow proper procedures in promulgating any guideline, criterion, bulletin, manual, instruction,

order, standard, or other rule in response to the abuse of bureaucrats regulating by decree. The intent of the law is to limit red tape and make government more accessible to the public. "Our experience in the years following the Armistead decision and GC § 11347.5 has shown that the objective of eliminating illegal rules is both realistic, and worthy of attaining. The process of eliminating this 'extra' government intrusion is working."

The State Personnel Board also notes that there is an exception from the notice and comment provisions for "internal management" regulations, and suggests that the exemption should be extended to interagency memoranda, directives, and manuals, and other communications between state agencies.

b. Emergencies. California allows ordinary notice and comment procedures to be dispensed with in the event of emergencies, whereas federal law and other states provide a broader exemption where notice and comment procedures would be unnecessary, impracticable, or contrary to the public interest. The State Personnel Board (Exhibit 5) has not encountered any problems under existing law. The Department of Corporations (Exhibit 3) sees some utility in expanding California law to include business and financial emergencies; "Much deference to an administrator's determination of when an emergency exists should be given in this area."

The Office of Administrative Law (Exhibit 11) observes that an emergency regulation is not actually exempt from ordinary notice and comment procedures since such a regulation has a life of only 120 days, during which the agency must pursue standard procedures if it is to keep the regulation on the books thereafter. OAL states that the Legislature intentionally limited emergency authority in 1979 as a result of its unwarranted use by agencies. "The current limitation on the use of the emergency procedure continues to be appropriate, and has not proven to pose any unnecessary burdens on state government."

c. Office of Administrative Law. In recent years California has created an Office of Administrative Law to review administrative rules on the grounds of necessity, authority, clarity, and consistency with other law. Professor Asimow suggests that it may not be premature to ask whether the system serves the public interest. The State Personnel

Board (Exhibit 5) reports that its experience with OAL has been uneven and it feels that on balance the scope of OAL review should be narrowed, specifically "OAL should be proscribed from substituting its interpretation of any statute, except the APA, for the interpretation of the rulemaking agency."

The Department of Corporations (Exhibit 3) also feels that the review provisions should be restructured. "The review requirements of 'necessity', 'clarity', 'consistency', and 'nonduplication' make for an excessively wordy and burdensome statement of reasons, which under the APA must set forth the reasons an agency proposes for adopting a regulation, as well as a not very clear standard with which to measure the appropriateness of a proposed regulation."

OAL (Exhibit 11) would not agree with these assessments. "When OAL reviews a regulation for compliance with the APA, it does so not for the benefit of state agencies, but for the citizens of California in general and the persons directly affected by the regulation in particular." OAL notes that the Legislature's intent in creating OAL was to put brakes on the bureaucracy and the proliferation of red tape:

> The Legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations. It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted.

OAL states that it does not, and by law cannot, substitute its judgment for that of the rulemaking authority; instead, it encourages public participation in the rulemaking process, so that the agency "experts" do not make their regulations in a vacuum.

<u>d. Alternate dispute resolution.</u> Professor Asimow notes that federal agencies have had a positive experience with negotiated rulemaking, whereby affected parties negotiate the content of a regulation before it is proposed for public comment. The State Personnel Board (Exhibit 5) comments that it encourages participation by affected parties in an open, public meeting process that culminates in rule adoption; "this has been suitable from our perspective."

The Department of Corporations, on the other hand, apparently feels that negotiated rulemaking can help simplify the process. "In cases of agencies such as the Department of Corporations, proposed regulations typically affect industries regulated by that agency and not the public directly. In many cases, proposed regulations have been previously reviewed by the affected industries through industry advisory committees or ad hoc committees formed for the specific purposes of developing regulations in a certain area. When ready for public comment under the APA, wide distribution of the proposed regulations is made, thus preserving the opportunity for further review and comment."

OAL agrees that "negotiated rulemaking" is currently used by California state agencies prior to the formal adoption of regulations (usually through a "workshop" process). "It would appear that such negotiated rulemaking has been effective in dealing with a limited number of highly controversial subjects by allowing an extended period in which the public is allowed to review and comment on proposed regulations." Since such prior negotiations are currently available, it appears to OAL unnecessary to establish such a mechanism by statute.

Judicial Review

a. Scope of review. Should California abandon the "independent judgment" standard for judicial review of agency decisions in favor of a "substantial evidence" standard? Administrative law judge Paul Wyler (Exhibit 10) believes this matter should receive some priority for study. Western Land Bank (Exhibit 1) would keep the current independent judgment standard, and would strengthen it by allowing review by appeal rather than by discretionary writ. "This would also ensure a more impartial decision by ALJs." This position is echoed by William E. Fox of Paso Robles (Exhibit 6). "When these safeguards are not within the law, some commissioners assume a very dictatorial attitude, and in my opinion, don't necessarily decide the case in accordance with the law. In my years of experience, this right makes all the difference in the world to the attitude of a hearing commissioner."

b. Exhaustion of remedies. The California exhaustion of remedies doctrine is nonstatutory and confusing, whereas the 1981 Model Act spells out the principles. South Australia does not require exhaustion of remedies before appeal or review. Exhibit 2.

c. Court in which review occurs. Most judicial review occurs in the superior court, but decisions of a few agencies (Workers' Compensation Appeals Board, State Bar, Public Utilities Commission) occurs initially at the court of appeal or supreme court level. Should direct review by appellate courts be eliminated, and should there be a special court with jurisdiction to review agency action? Administrative law judge Paul Wyler (Exhibit 10) would give this matter priority for study. The Workers' Compensation Appeals Board (Exhibit 7) would resist removal of initial appellate court jurisdiction:

> The WCAB is a multi-level adjudicatory body. Cases are initially tried before Workers' Compensation Judges (Judges who are required to adhere to the Code of judicial conduct). Any appeal from a decision of a Workers' Compensation Judge is then heard by the seven member WCAB. Judicial Review thereafter is directly to the Court of Appeal or Supreme Court. Consistency is particularly important in this complex, highly specialized field. Review by the Court of Appeal (following review by the WCAB) is the best way of ensuring the integrity of the system.

Nonjudicial Controls

a. Oversight. California has OAL review of agency rules, but the 1981 Model Act provides for both gubernatorial and legislative review and also requires a cost/benefit analysis of rules in certain situations. Should California redesign its oversight system to include any or all of these checks and balances? OAL (Exhibit 11) states that at the time the Legislature created OAL it examined other possible oversight mechanisms, but rejected them in favor of the OAL approach. "The Legislature chose to establish an office that would work independently of both the Governor's Office and the Legislature in order to provide an unbiased and comprehensive review of regulations. There are different systems in other states; however, none work to protect the public's right of access to the regulatory process as effectively as a totally independent oversight review body such as OAL."

b. Ombudsman. Many agencies and some states have an ombudsman to look into complaints arising out of agency action. Should California have an ombudsman? This concept is strongly supported by Western Land Bank (Exhibit 1). The ombudsman "has been very successful in Australia in negotiating settlements. On our experience I would recommend the appointment of one in your State." Exhibit 2 (Hon Dr. Zelling, Chairman, Law Reform Committee of South Australia). This matter also seems worthy of study to administrative law judge Paul Wyler (Exhibit 10).

c. Administrative Conference. The Administrative Conference of the United States has worked well at small expense to study administrative law problems and recommend improvements. Professor Asimow asks whether California should have one, and administrative law judge Paul Wyler (Exhibit 10) believes this topic is worthy of study.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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CA LAW REV. COMM'N
SEP 12 1988
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September 8, 1988

CAlif. Law Revision Commission
4000 Middlefield Rd Suite D2
Palo Alto CA 94303-4739

Re: Administrative Law Study.

Gentlemen:

We wish to commend Professor Michael Asimow on his thoughtful outline of the scope of the Administrative Law Study. It truly needs top-to-bottom review. Especially noteworthy is item "e" (Separation of Functions). Our administrative agencies, with very few but notable exceptions, feel that their function is not merely investigatory and prosecuroty, but primarily punitive. The 2 unwritten laws of administrative agencies are (1) hit the regulated and "earn your salary" through fines; and (2) we ask the questions.

In my opinion, regulatory agencies should act to prevent untoward conduct, rather then seek to punish. Regulatory personnel engage in untold nitpicking, and seek to "earn their salaries" by fines which are frequently paid as a compromise to avoid high legal costs of attempting to seek a just determination. And, as even ALJs are aware that they are being "supported" by fines, the licensees are virtually uniform in commenting that ALJs are usually on the side of the regulators, rather than truly impartial. This, of course, leads to disrespect of the law and those who are charged with enforcing it.

Item "e" - Separation of functions: we strongly advocate a complete separation of functions and of all relations between ALJs and various agencies. The argument that agencies are "more expert" than randomly selected ALJs contravenes our statutory and constitutional requirement of impartial jurors - not "expert" jurors.

Item "g" (Discovery). Current law limits discovery and thus slants the scales in favor of the agency/prosecutor/investigator. However, it is often overlooked that both California and federal law requires disclosure of information in the hands of government agencies by the Public records Act and the federal Freedom of Information Act. Though shot full of holes and exemptions, this valuable tool is often overlooked by counsel steeped in the tradition of court-type discovery.
It is suggested that the APA expressly incorporate the disclosure requirements of the Public Records Act in all instances, requiring the administrative agency to disclose all information in its files to the subject and be precluded from introducing any evidence at any hearing, unless such evidence, and its sources, have previously been made available to the subject. A 10-day term prior to any hearing for such disclosure would be fair.

As an illustration, we have found on numerous occasion that a demand under the Official Records Act has succeeded in abating further action by overeager agency personnel, who have gone on a fishing expedition on nothing more than some disgruntled persons complaint letter, even though the complaint by itself shows complete lack of merit. All at great savings to the agency and the subject. Professional and business people know thatit is

not possible to make all customers happy. However, agency personnel often take the view that "where there's smoke (a complaint) there must be fire". In fact, we have seen agency personnel going to public records on their own, and sending out 5-page questionnaires to people randomly selected from public records with loaded questions as to whether or not they were satisfied, and what caused their dissatisfaction etc. (The Real Estate Commissioner engaged in such tactics when there were no complaints against the subject).

Item "3" - judicial review. We advocate the current system of independent judicial review, and suggest that it be strenghtened by allowing review by appeal, rather than by discretionary writ. Certainly if there is available judicial review in all civil matters - even small claims actions, it should be available as of right from ALJs' decisions. This would also ensure a more imprtial decision by ALJs.

We do not share your concern that "non-specialist judges would second-guess findings of expert agency members". We require impartial jurors and judges, not "expert" jurors or judges.

Item 4b - Ombudsman. In view of the tendency of administrative personnel to justify their salaries - whether justified or not - and great nitpicking, it appears vital that licensees have some protection from administrative agencies and their often overeager personnel. We strongly support a fully-staffed Ombudsman's office with powers to question administrative agencies and their personnel as to their action. Experience reveals that the presumption of correct official action places an undue burden on licensees or subjects.

Sincerely yours,

P. BOGART

CA LAW REV. COMM'N
SEP 12 1988
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LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

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THE HON. Dr. A.O. ZELLING C.B.E. (Chairman)
THE HON. JUSTICE WHITE (Deputy Chairman)
THE HON. JUSTICE LEGOE (Deputy Chairman)
The Hon. Justice Perry
J.J. Doyle, Q.C.
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FROM THE CHAMBERS OF THE CHAIRMAN
THE HON. Dr. A.O. ZELLING, C.B.E.
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9th September, 1988

John H. DeMoully Esq.,
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UNITED STATES.

Dear Mr. DeMoully,

Thank you for your letter of August 22 which reached me yesterday. I have read Professor Asimow's memorandum on administrative law. As you need a reply by the 30th instant, I have not been able to do any research in support of a reply, and what follows is a record of my thoughts as I read the memorandum.

Taking the memorandum in the same order as Professor Asimow, my comments are as follows:-

Introduction

Whether you have a Model Act or not partly depends on how quickly you want changes, shown to be necesary by the practical working-out of the projected law reform, to become effective. We faced the same problem three years ago and opted to keep as much as possible within rules of court and not within a statute. The Judges can alter rules of court as quickly as the shoe is shown to pinch. If you have to wait on Parliament to pass amending legislation you will in our experience wait a considerable time for any amendment to be brought in and passed. In deciding what went where we asked ourselves four questions:-

1. Does the appeal or other review procedure arise in relation to an industrial argument? If so the appeal or review should go to industrial commissioners for conciliation and arbitration, not to a court or administrative appeals tribunal.

2. If the matter is not an industrial argument, what is the type of relief sought?

   (1) if the relief sought arises from an argument that the administrative body appealed from has not proceeded according to law (in which I include procedural and substantive ultra vires and denial of natural justice), then the matter should be dealt with in the Supreme Court under our rule 98 covering orders for judicial review (which is cast in wider terms than the cognate English judicial review procedure). That covers about two-thirds of all applications.

(2) if the relief sought is a review of a discretion exercised by an administrative body which does not depend on a paragraph (1) argument i.e. if you want the reviewing body to substitute its discretion for that of the body appealed from, the appeal or review application should go to an administrative appeal tribunal.

(3) if the relief sought is a review on the merits with a view to getting a substituted decision on the merits from the appeal body, the matter should to go a court if a question of law is involved, but to an administrative appeal tribunal if the question is solely one of fact.

Rules of court are already in place covering (1) and court cases under (3).

The legislation covering (2) and the rest of (3) has not yet been drafted by Parliamentary Counsel.

The above means that you would only need your Model Act for matters of class (2) and some of class(3); the rest would be governed by rules of court.

Coverage

We envisaged that the coverage should be State-wide whether the matter was destined for the courts or the administrative appeals tribunal and it should cover all adjudications.

Formality of hearings

We have power by rules of court to have informal hearings and by a 1929 statute to have informal hearings for conciliation purposes. Whether you divide up informality beyond that is a matter of drafting.

Separation of functions

Professor Asimow says: "Proper separation of adjudication from adversary functions is an essential element of fair administrative procedure". But is it? Sometimes it is but the proposition cannot be expressed as a universal. Take for example a stewards' inquiry under the Racing Act or the Trotting Control Act as to whether a horse has been raced on its merits. There is no practical way you can conduct such an inquiry other than the one used in practice where the stewards are prosecutors, judges and jury. Or take a professional misconduct inquiry. The members of the tribunal will all be members of the prosecuting body (Law Society, Medical Board or whoever); they have to be to get their practising certificates. And there are many other such cases.

Administrative law judges

We don't have these at State level, but Federal law does. It hasn't been very satisfactory since its introduction in 1977 and there are plans mooted to change the system of appeals in most cases of administrative appeal to a division of the Federal Court of Australia, the members of which division will handle nearly all administrative appeals. There is less likelihood of conflicting appeal decisions that way. Your present central panel system sounds better than any projected reform.

Discovery

Here the civil rules do apply.

Hearsay

We only allow hearsay by consent or where the hearsay rules prevent proof of obvious things like the date of a postmark, the number stamped on a motor part, or the use of computer evidence. We take a much stricter view if someone's career or reputation is at stake in the appeal.

Official notice

I wouldn't widen official notice. In 18 years' experience as a judge, I have found that judges vary widely in what they will notice, and in any case some judges will use "noticed" facts in areas where they are not really competent to notice and evaluate them.

Burden of proof

We use the civil standard in all cases, with the qualification in Queen Caroline's case, that the more serious the allegation, the clearer the proof within that standard ought to be.

Settlement

As I said earlier we have powers of conciliation under a 1929 statute to bring about settlements. The powers are not used very much. If you take the parties into chambers to discuss settlement, you almost invariably hear matters which are not evidence and so if the settlement doesn't come off, you have to disqualify yourself and the parties have to go away and come on later before another judge.

Issues relating to rule making

These appear to be issues relating to Californian practice on which I am not competent to comment.

Judicial review

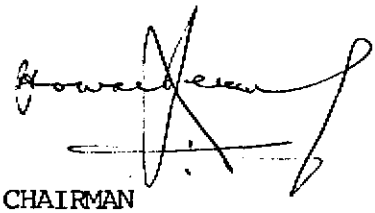
I don't know the "independent judgment" standard, and so cannot comment. We don't require exhaustion of remedies before appeal or review. This is based on the Privy Council decision in Annamunthodo's case given about 30 years ago when we still had appeals to the Privy Council.

Non judicial controls

The Ombudsman has been very successful in Australia in negotiating settlements. On our experience I would recommend the appointment of one in your State. You have to give him power to report the facts to Parliament if the Department or agency won't co-operate, otherwise strong and sometimes insolent departments like defence and police would tell him to get lost. But when they know that non-cooperation means unpleasant publicity in Parliament, they get down to proper discussions with the Ombudsman.

If there is any point on which our comment now or later would help, please do not hesitate to let me know.

Yours faithfully,



CHAIRMAN

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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

IN REPLY REFER TO:

FILE NO. _____ _____

September 16, 1988

CA LAW REV. COMM'N
SEP 19 1988
RECEIVED

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

Re: Consultant's Report on Possible Scope of Administrative Law Study.

Dear Mr. DeMoully:

Thank you for offering the opportunity to the California Department of Corporations to comment on the possible scope of the California Law Revision Commission Study of the California Administrative Procedure Act. While the Commissioner of Corporations' primary responsibility is as the securities law administrator for the State of California, the Commissioner also administers and enforces a wide variety of business and financially related laws. To help you understand the scope of the Commissioner's responsibility, I have attached to this letter a list of the laws administered by the Commissioner of Corporations. As you can imagine from this list, a substantial amount of rulemaking and administrative adjudication occurs under these laws and any effort to improve the administrative process will have our intense interest.

We have reviewed the consultant's report and our comments are of necessity general in nature. However, the Department would appreciate the opportunity to review and comment on specific proposals to amend the Administrative Procedure Act ("APA") before they are introduced as a bill in the Legislature.

In general, the Department believes that serious thought should be given to substantially conforming the California rulemaking process under the APA to federal law. The federal administrative procedure act recognizes several levels of rulemaking and imposes different and less burdensome requirements on an agency for each level. This procedure seems to have worked well in the federal rulemaking context without creating a detriment to the notice, comment and hearing process.

The Department is not familiar with the provisions of the 1981 Model Act. Consequently, we have no comments at this time. As stated above, our preference is for conformance by the APA to federal law in the area of rulemaking.

The Department believes that the rulemaking and review process under the APA could be restructured so that it is less burdensome to an agency in terms of the type and amount of documentation necessary to comply with the requirements of the APA consistent with the notice, comment and hearing procedures necessary in any administrative rulemaking process. For example, Article 5 of Chapter 3.5 of the Government Code (commencing with Section 11346) could be paired down substantially. Many of the concerns sought to be addressed by provisions of Article 5 are naturally addressed through the notice, comment and hearing process when a regulation is proposed. In cases of agencies such as the Department of Corporations, proposed regulations typically affect industries regulated by that agency and not the public directly. In many cases, proposed regulations have been previously reviewed by the affected industries through industry advisory committees or ad hoc committees formed for the specific purposes of developing regulations in a certain area. When ready for public comment under the APA, wide distribution of the proposed regulations is made, thus preserving the opportunity for further review and comment

Another area of the APA that could be restructured is Article 6 dealing with the review of regulations. Typically, the Legislature gives authority to an administrative agency to implement, interpret and make specific provisions of a law enacted by it. The scope of review as well as the criteria established for review in Government Code Section 11349.1 may at times work against the legislative mandate in a law an agency is charged with administering. Moreover, the ability to adopt a regulation to comply with a legislative mandate in a timely fashion under the APA is sometimes impaired by the application of these not very precise criteria. The review requirements of "necessity", "clarity", "consistency", and "nonduplication" make for an excessively wordy and burdensome statement of reasons, which under the APA must set forth the reasons an agency proposes for adopting a regulation, as well as a not very clear standard with which to measure the appropriateness of a proposed regulation.

One of the areas that is particularly troublesome in the context of rulemaking is in the use of formal or informal interpretive opinions, releases or specific rulings by an agency under the APA. The use of these interpretive and explanatory devices may be considered a "regulation" under the APA, even though specific

statutory authority has been granted to an administrator to issue opinions, releases and specific rulings; authority separate from the administrator's authority to adopt, amend or repeal rules and regulations. The use of opinions, releases and specific rulings are typically limited to specific facts presented by an issue raised by a member of the public, the bar, or a licensee who requires guidance relating to a jurisdictional question. For example, under the Corporate Securities Law of 1968, the Commissioner has been granted authority by the Legislature to respond to requests for interpretive opinions (Corporations Code Section 25618), which is separate and apart from the Commissioner's authority under Corporations Code Section 25610 to make, amend or repeal rules as are necessary to carry out the provisions of that law. The Commissioner's opinions under this law relate to issues of whether a certain transaction involves an "offer" or "sale" of a "security", whether under specified circumstances a person is a "broker-dealer" or an "investment adviser", or other issues typically addressed by the staff of the Securities and Exchange Commission under "no-action" letters or by the Securities and Exchange Commission, itself, through the issuance of releases. There are other applications. For example, under the Federal Credit Union Law the National Credit Union Administration ("NCUA") is authorized to issue interpretive rulings and policy statements relating to its interpretation of that law. The Commissioner of Corporations is the administrator of the California Credit Union Law which applies to California-chartered credit unions. In some areas, these laws are similar and it is useful to be able to act as quickly as the NCUA in addressing general policy issues or providing explanation on a short-term basis without having to go through the lengthy and complex rulemaking process; a process which inhibits an agency from taking immediate, short-term action where necessary, or providing necessary explanation.

Finally with respect to rulemaking, the category of "emergencies" could be expanded under the APA to include business and financial emergencies, which in many cases have as much of an effect on the general public welfare as natural disasters. Much deference to an administrator's determination of when an emergency exists should be given in this area.

There is one general comment in the area of adjudication, judicial review and oversight that the Department wishes to make at this time: we would strongly resist any attempt to remove an administrator's authority to set aside a hearing officer's decision in an administrative hearing. The law presently provides that an administrator's acts are subject to judicial review and we believe this is the appropriate forum for such a review.

Again, thank you for the opportunity to make general comments regarding the study project. Please feel free to contact me at the telephone number below if you wish to discuss these matters further, or for other assistance.

Very truly yours,

WILLIAM KENEFICK
Assistant Commissioner
(916) 322-3633

WK:kw

Attachment

The Commisioner is responsible for administering and enforcing the following statutes:

Corporate Securities Law of 1968 ("CSL"):
Corporations Code Secs. 25000-25804.

Security Owners Protection Law:
Corporations Code Secs. 27000-27203.

Bucket Shop Law:
Corporations Code Secs. 29000-29201.

Franchise Investment Law ("FIL"):
Corporations Code Secs. 31000-31516

Community Land Chest Law:
Health & Safety Code Secs. 35100-35237.

Check Sellers, Bill Payers and Proraters Law:
Financial Code Secs. 12000-12403.

California Credit Union Law ("CUL"):
Financial Code Secs. 14000-15451.

Escrow Law ("EL"):
Financial Code Secs. 17000-17654.

Industrial Loan Law ("ILL"):
Financial Code Secs. 18000-18705.

Personal Property Brokers Law ("PPBL"):
Financial Code Secs. 22000-22653.

Consumer Finance Lenders Law ("CnFLL"):
Financial Code Secs. 24000-24654.

Commercial Finance Lenders Law ("CmFLL"):
Financial Code Secs. 26000-26653.

Securities Depository Law:
Financial Code Secs. 30000-30704:

Trading Stamp Law:
Business and Professions Code Secs. 17750-17780.

The Knox-Keene Health Care Service Plan Act of 1975 ("K-K Act"):
Health & Safety Code Secs. 1340-1399

California Auctioneer Commission
A Public Corporation
Board of Governors

George Deukmejian
Governor

September 20, 1988

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

CA LAW REV. COMM'N
SEP 21 1988
RECEIVED

Re: Possible Scope of CLRC's Study of Administrative Law

Dear Mr. DeMoully:

One issue which immediately came to mind when I reviewed your consultant's report on the above subject was that of separation of functions.

I have been involved with regulatory licensing for the last 16 years with both this agency and the Department of Consumer Affairs (DCA). The last ten have been at a level dealing with regulatory enforcement and resultant disciplinary matters.

In this agency as well as those in DCA (and probably many others as well) final authority to accept or reject an Administrative Law Judge's (ALJ's) decision rests with the agency that initiated the action.

Even though the individuals making those final decisions (either Board members or the Director of DCA) are different from the actual staff persons who developed and initiated the case, the final decision-makers can be influenced to some extent by the general regulatory atmosphere in which they are involved. They may have access to information that was not, or would not, be allowed into evidence in the administrative proceeding. They may be influenced politically to take a certain general enforcement posture. They may balk at the thought of a great expenditure of resources with an end result not to their liking.

While there are certain further procedural events that must follow the rejection of an ALJ's decision, the end result can still be biased because of these factors. And while there is the option of judicial appeal to the respondent, the basis for such appeal is very limited. Both processes are expensive to the respondent, who may drop his or her case in frustration. On the other hand, some may appeal judicially simply because of an assumption of impartiality on the part of the decision-makers, which is expensive to the agency.

I believe the issue of impartially is a fundamental one to the basic integrity of the administrative disciplinary law process.

Sincerely,

Karen R. Wyant

KAREN R. WYANT
Executive Officer

1130 "K" Street, Suite LL20 • Sacramento, California 95814 • 916-324-5894

EXHIBIT 5

State of California

Memorandum

Date: September 16, 1988

To: John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMM'N
SEP 21 1988
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From: State Personnel Board - Policy Division

Subject: Scope of CLRC Administrative Law Study

In your August 22, 1988, letter, you solicited comments from interested persons regarding the questions posed by Professor Asimow in his report entitled "Possible Scope of California Law Revision Commission Study of Administrative Law". As the constitutional entity charged with administering the State's merit employment system, the State Personnel Board (SPB) has a keen interest in the issues addressed in Professor Asimow's report and the subsequent study to be undertaken by the Commission. We appreciate the opportunity to comment.

The focus of our comments is on the second of the four categories identified by Professor Asimow - Rulemaking. As the source of regulation of the State's merit employment system, the Personnel Board adopts rules subject to the provisions of the Administrative Procedures Act (APA). As a rulemaking entity, we are conversant with the issues raised in the report. The first issue - interpretive rules - is of genuine concern to us. The State has a highly decentralized merit selection program which requires the SPB to establish and communicate a considerable number of guidelines and policies to departments. These interdepartmental communications are interpretive and intended to facilitate the internal management of State government. The APA specifies that "regulation" means every rule, regulation, order, or standard of general application adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure.

One of the few exceptions to this expansive definition is a directive which relates only to the internal management of the state agency. The Legislature has recognized that the internal operation of an organization requires the organization to be able to develop or modify management procedures as the need arises and has exempted the internal operations of an agency from the definition of a regulation. However, the SPB issues memoranda and manuals on an interagency basis relating to the internal management of State government. Thus, these communications are not solely applicable to the internal operations of the SPB.

We are seemingly obligated to use the lengthy APA rulemaking process even though we are, in effect, merely performing an internal management function for State government. Currently it takes from 6-9 months after the need for a new rule is identified before the rule can be adopted or amended. In addition, a considerable expenditure of staff resources is necessary simply to manage the internal administrative functions of State government. In most cases, these operational directives do not affect the rights of the public impacted by the SPB's regulatory activities. If they do, then adoption of a rule is appropriate. If not, then the agency with oversight for a particular administrative function for State government should be able to operate in an expeditious manner. This, it seems to us, is entirely congruent with the legislative intent expressed in the APA to "reduce the number of administrative regulations".

We concur with Professor Asimow's statement that "California law may be unrealistic and is probably often ignored in practice". Therefore, as a minimum, we believe that Government Code Section 11342(b) should be revised to expand the "internal management" exemption to include "any interagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or that portion of the public affected by the issuing agency's activities". This approach will enable State administrative agencies to perform their internal oversight role without the significant time delays and resource expenditures generated by compliance with the APA. Yet, at the same time, it does not unnecessarily abridge the public's right to participate in the rule making process involving substantive issues.

With respect to the second issue - emergencies - we have not encountered any nonemergency situation which would have been resolved more efficaciously if we had the discretion to adopt rules without public notice and comment. Our one emergency rule adoption experience was adequately handled within the current APA provisions.

In terms of the third issue, much could be written about our experience with and assessment of the Office of Administrative Law's (OAL) review of our proposed rules. In short, our experience has been uneven. At times, their review has gone beyond the bounds of reasonableness in their application of the "clarity" standard. This, in our judgment, unnecessarily frustrated the timely accomplishment of a legitimate objective which is contrary to the public interest of an efficient and effective public service.

On the other hand, more recently we have found their review resulted in more clearly worded, and hence more beneficial, rules. On balance, we believe that the scope of OAL review authority should be narrowed. Specifically, OAL should be proscribed from substituting its interepretation of any statute, except the APA, for the interpretation of the rulemaking agency. This will preclude the tendency to second-guess from a sometimes ill-informed perspective.

Finally, as to the fourth issue - alternate dispute resolution - we do not have an informed opinion on the suitability of the negotiated rulemaking method. We have a five-Member Board which encourages participation by affected parties in an open, public meeting process which culminates in rule adoption. This has been suitable from our perspective.

Again, we appreciate the opportunity to provide our views on these key issues in the rulemaking process. We trust that the Commission's study will address these issues and submit recommendations to the Legislature which are designed to improve the State's administrative law system.

DUANE D. MORFORD, Chief
Policy Division
(916) 445-8241

EXHIBIT 6

WILLIAM E. FOX
ATTORNEY AT LAW
819-12TH STREET
P. O. BOX 1756
PASO ROBLES, CALIFORNIA 93447
TELEPHONE (805) 238-9571

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SEP 23 1988
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September 19, 1988

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

Re: Consultant's Report on Possible Scope of Study

Gentlemen:

You are advised that I have had limited experience in the administrative law field. However, I feel that a litigant should have a right to file a motion for a new trial, or to appeal any decision.

When these safeguards are not within the law, some commissioners assume a very dictatorial attitute, and in my opinion, don't necessarily decide the case in accordance with the law.

In my years of experience, this right makes all the difference in the world to the attitude of a hearing commissioner.

Yours very truly,

William E. Fox
WILLIAM E. FOX

WEF/kat

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS—WORKERS' COMPENSATION APPEALS BOARD
525 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

September 28,1988

OCT 04 1988
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ADDRESS REPLY TO:
P.O. BOX 603
SAN FRANCISCO, CA 94101

John De Moully
Executive Secretary
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Consultant's Report as Possible Scope of Study

Dear Mr. De Moully:

Thank you for sharing Professor Asimov's report with us and for giving us an opportunity to comment on the matters addressed in the the report.

We firmly believe that any study undertaken should, as a starting point, take into consideration the various types of administrative agencies and their respective functions. Perhaps it would be more appropriate to either limit the study to administrative agencies of similar design and function (eg, agencies subject to the California Administrative Procedures Act) or, at least differentiate between the various types of agencies.

Some of Professor Asimov's comments suggest confusion about the role and function of our agency. We hope this response will help to clarify any misunderstanding.

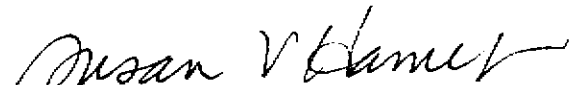
The Division of Industrial Accidents, Workers' Compensation Appeals Board, is a constitutionally mandated administrative agency (Cal. Constitution Article XIV (4). The Constitution has vested the legislative with full power to create and enforce a complete system of workers' compensation by establishing an administrative body to adjudicate disputes arising under the system to the end that the administration of the system shall accomplish substantial justice in all cases inexpensively and expeditionly. Pursuant to this authority, the Division of Industrial Accidents/Workers' Compensation Appeals Board was created. (Labor Code (110 et seq). The Legislature has specifically given both the Division of Industrial Accidents ("DIA") and the Workers' Compensation Appeals Board ("WCAB") the authority to adopt, amend, and/or repeal such regulations as are reasonably necessary to carry out and enforce its laws. (Labor Code ((5307, 5307.3). Consistent with its constitutional mandate, the DIA/WCAB is exempt from all of the requirements of the Administrative Procedures Act with the exception of the notice requirement. This exemption, which was questioned by Professor Asimov, is very crucial to the DIA's/WCAB's ability to accomplish its constitution purpose. The DIA/WCAB is quite different from other administrative agencies and any study must bear this fact in mind.

The consultant also question whether or not administrative agencies should have contempt power. The legislature has specifically given the WCAB contempt powers, and this empowerment has been upheld by the Appellate Court. (Labor Code (134; Morton v. WCAB (1987) 193 Cal App 3cl 924; 238 Cal Rptr. 651). While we take no position with respect to whether or not other agencies should also be given contempt power, we firmly believe that the WCAB's contempt power is vital to its overall responsibilities.

Finally, Professor Asimov questions whether or not judicial review of administrative agency decisions should be conducted in the same manner and/or by the same body. Professor Asimov points out that decisions of the WCAB are initially reviewed by the Court of Appeal. We respectfully disagree with Professor Asimov's characterization that such review is an aberration. The WCAB is a multi-level adjudicatory body. Cases are initially tried before Workers' Compensation Judges (Judges who are required to adhere to the Code of judicial conduct). Any appeal from a decision of a Workers' Compensation Judge is then heard by the seven member WCAB. Judicial Review thereafter is directly to the Court of Appeal or Supreme Court. Consistency is particularly important in this complex, highly specialized field. Review by the Court of Appeal (following review by the WCAB) is the best way of ensuring the integrity of the system.

We hope that these comments are helpful to you. Please don't hesitate to contact me should you need any further information.

Very truly yours,



Susan V. Hamilton
Workers' Compensation Judge

SVH:jp

CA LAW REV. COMM'N
Study N
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State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
714 P Street, Room 1750
P. O. Box 944275
Sacramento 94244-2750 (916) 445-5678

September 30, 1988

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

Subject: Administrative Law Study

Gentlemen:

Thank you for the opportunity to comment on Professor Asimow's report on the possible scope of the Administrative Law Study. The report, in this Board's view, establishes a solid foundation for a constructive examination into the state of administrative law in California.

The Board would like to comment initially on the observation made on page 5 that most adjudications are conducted by administrative law judges assigned to an agency from a central panel of administrative law judges. In fact, the vast majority of adjudications are conducted by administrative law judges who are employed by the agencies themselves. Of the approximately 500 California administrative law judges, only 24 are employed by the Office of Administrative Hearings which serves as California's central panel.

The Appeals Board is particularly interested in the area of adjudication. While the discussion of the adjudication process is very thorough, the Board suggests that the following additional issues be included in that portion of the study.

1. Collateral Estoppel: Whether or to what extent decisions of administrative agencies should be given collateral estoppel effect in other proceedings. This is a contentious issue in the unemployment insurance field in many states, and was for the Appeals Board until recently.

In People v. Sims (1982), 32 C3d 468, the Court held that collateral estoppel may be applied to decisions made by administrative agencies when certain elements of due process had been satisfied. This holding had the effect distorting the conduct and scope of unemployment insurance benefit hearings where a civil suit for wrongful discharge was contemplated.

In 1986, section 1960 was added to the Unemployment Insurance Code to provide generally that any decision of the Appeals Board shall not be binding and shall not be used as evidence in any subsequent action or proceeding between an individual and his or her prior employer.

The questions remaining are whether section 1960 is too broad or whether it should be broadened. Should a similar provision be applied to other administrative agencies. An effort is currently being made at the federal level to enact a considerably broader version of section 1960 which would apply to all states' unemployment insurance appellate boards.

2. Notice: Adequacy of notice of the legal and factual issues to be heard and decided by administrative law judges is an area that raises due process implications. How specific should a notice be? When is a notice too general? In Shaw v. Valdez (1987, CCH 21,860) the U.S. 10th Circuit Court of Appeal held that what amounted to a generic notice was, in substance, no notice at all; a party is entitled as a matter of right to know in advance all of the factual and legal issues that would be presented at the hearing.

3. Tax: Administrative adjudication of tax petitions presents situations that are unique to this area of the law. Generally, a tax petitioner must exhaust its administrative remedies and pay the amounts alleged to be due before it can obtain judicial review (Cal.Un.Ins.Code 1241). In virtually all forums, the petitioner has the burden of proving the allegations in the petition. Certain taxpayers are subject to so-called jeopardy assessment procedures (Cal.Un.Ins.Code 1137). Should due process standards differ in tax cases? Should the gradiation of procedures under the 1981 Model Act apply? The burden

of proof notwithstanding, should the agency be required to set forth a prime facie case? Do these questions touch on substantive matters that ought to be left to the taxing authorities?

4. Other due process considerations: Administrative adjudication presents other due process considerations not generally encountered in the judicial branch. For example.

Telephone Hearings: Many agencies permit parties to appear by telephone given certain conditions. Do telephone hearings reduce due process protections? What limitations, if any, should be placed on telephone hearings?

Continuances and subpoenas: Should there be uniform standards for granting continuances and subpoenas? Should the agency have the power to enforce its subpoenas?

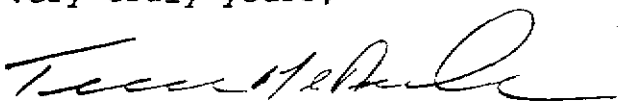
Role of administrative law judge as fact finder: It is common for both parties in administrative hearings to be unrepresented by counsel. How active a role should the administrative law judge take in calling and examining witnesses? Should the administrative law judge cross-examine? What is the danger of the administrative law judge departing from the fact-finding role and becoming an advocate for one of the parties?

External contraints: Some agencies are subject to external, procedural constraints over which they have little, if any, control. For example, this Appeals Board is subject to regulations of the Employment and Training Administration of the U. S. Department of Labor. Among other things, these regulations require that the Board's administrative law judges issue a certain, substantial percentage of its decisions within 30 days of the appeal date. The Social Security Act and the Federal Unemployment Tax Act contain conformity provisions to which the Board must adhere. The question presented is how may an agency maximize due process protection consistent with external constraints?

5. Code of Conduct for ALJS: Judicial branch judges are subject to a code of conduct as are certain administrative law judges, i.e., Workers' Compensation Judges. Administrative law judges and other executive branch employees are currently subject to civil service laws and rules as well as conflict of interest and incompatible activities rules. Should there be a judicial-type code of conduct for administrative law judges? If so, who should prescribe it and what should be its scope?

The Appeals Board is an agency which renders over 130,000 dispositions each year. As such, it is keenly interested in the Commission's study of administrative law. The Board is constantly reviewing its procedures in order to increase its responsiveness to the parties appearing before it and to improve the quality of its product. The Board welcomes the Commission's study and appreciates the opportunity to participate.

Very truly yours,



TIM McARDLE, CHIEF COUNSEL

TM:pcp

cc: Robert L. Harvey, Chairman, CUIAB
Michael A. DiSanto, Chief Administrative Law Judge, CUIAB
Marilyn H. Grace, Senior Appellate Law Judge, CUIAB

KEN CAMERON
ATTORNEY AT LAW
1211 FOURTH STREET, SUITE 200
SANTA MONICA, CALIFORNIA 90401
(213) 458-9766
(213) 451-8678

CA LAW REV. COMM'N
OCT 24 1988
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October 21, 1988

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

Re: Memorandum of Professor Michael Asimow, re Scope of Study of Administrative Law, August 15, 1988

Dear Mr. DeMoully:

There follows a summary of views regarding the Asimow Memorandum of August 15, 1988, expressed to me by certain members of the Administrative Law Committee of the Los Angeles County Bar Association. The Committee met on October 6, 1988, and discussed the Memorandum. Some members of the Committee also mailed in their comments.

Dr. Asimow's report offers two basic approaches for the study: The Model Act and a piecemeal approach.

Our Committee favors a basis or approach such as that provided by the Model Act and believes that a piecemeal approach would be wasteful of the Commission's resources. We believe that the subject of administrative law is of such importance to the legal community and to the public in California that a thoroughgoing study of that body of law, in all its aspects, is now warranted. We have in mind that the major piece of legislation in the area, the Administrative Procedure Act, first enacted in 1945, has undergone very little revision since its birth over 40 years ago.

We therefore recommend that the study include all four topics listed by Dr. Asimow, that is, adjudication, rule-making, judicial review and oversight.

The objective of the study should be to create a body of law, comprehensive, coherent and designed to last, in what is generally regarded as the area of administrative law. We recognize that certain areas, such as tax law, are generally not thought of as part of the field of administrative law, even though their application depends largely on administrative bodies. We do not envisage any substantial problem in defining the boundaries of the area of administrative law.

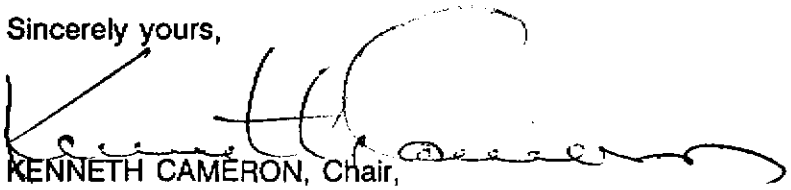
If priorities in selecting specific subjects for study are needed because of financial constraints or for other reasons, we recommend that Dr. Asimow be consulted as the primary source of opinion as to what priorities should be established. Our Committee's preferred primary subjects for study all relating to adjudication would be: 1) standardization of hearing procedure, 2) standardization of rules of evidence, 3) extension of the central panel mode of organization of administrative hearing procedures, 4) means of ensuring independence of administrative law judges (hearing officers), as to conduct of hearings and decision-making, from control or influence by the agency in any particular case.

In closing, I wish to express the opinion of our Committee that the Memorandum of August 15, 1988 from Dr. Asimow to your Commission presents the subject in a thorough and comprehensible manner and should serve as an excellent starting point for your determinations as to the scope of the proposed study.

Our Committee takes it for granted that the importance of a study of administrative law, as compared to other areas of law in which your Commission may be interested, will be considered in the light of the State Legislature's expressed interest, including authorization of a study, and of common knowledge in the legal profession as to the ever-increasing volume and complexity of cases being heard by administrative law judges and the bodies for whom they conduct hearings and of cases brought for review in appellate courts from administrative agency decisions.

The views expressed in this letter are those of participating members of the Administrative Law Committee, not those of the Los Angeles County Bar Association.

Sincerely yours,



KENNETH CAMERON, Chair,
Administrative Law Committee

cc: Dr. Michael Asimow
Richard Walch, Executive Director, LACBA
Margaret M. Morrow, President, LACBA

PLEASE REPLY TO:
PAUL WYLER
1300 W. Olympic Bl., 5th Fl.
Los Angeles, CA 90015
(213) 744-2250

October 26, 1988

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California Law Revision Commission
4000 Middlefield Rd. #D-2
Palo Alto, CA 94303-4739

RE: STUDY OF ADMINISTRATIVE LAW

Gentlemen,

Kenneth Cameron, Chair of the Administrative Law Committee of the Los Angeles County Bar Association will send to your Commission the views of that committee on the above study.

However, I am enclosing a copy, to you and to Professor Asimow, of my letter to Mr. Cameron in which my own individual views were contained.

Sincerely yours,

PAUL WYLER,
Administrative Law Judge

PW:kc
Enclosure

cc: Professor Asimow

Los Angeles County Bar Association

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October 7, 1988

Kenneth Cameron, Esq.
1211 4th St., Suite 200
Santa Monica, CA 90401

RE: ADMINISTRATIVE LAW COMMITTEE

Dear Ken,

I enclose herewith an article from the L.A. Daily Journal regarding administrative Law.

With respect to Professor Asimow's report, the following comments are made.

There are a number of interesting topics presented and from an academic point of view, the choice is difficult as to determining priority. Almost all the subjects warrant some study. From a purely selfish point of view, I have selected the following priorities and list the following subjects in the order I think is important to the Committee: (1) Asimow Topic 1F - Central panel of Administrative Law Judges; (2) Asimow Topic 1A - coverage of APA to administrative agencies; (3) Asimow Topic 1J - Ex-parte contact; (4) Asimow Topic 1L - contempt powers of agencies and of Administrative Law Judges; (5) Asimow Topic 3A - scope of judicial review; and (6) Asimow Topic 3C - reviewing courts.

Although I am not sure about priorities, the following Asimow topics seem worthy of study: 4B and C, 1B, C and E.

Whatever the Committee consensus arrives at it is my suggestion that you contact Professor Asimow to see whether he would be willing to meet with the Committee or representatives thereof in relation to the comments of the Committee.

Sincerely,

PAUL WYLER,
Administrative Law Judge

PW:kc
Enclosures

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
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(916) 323-6225

October 27, 1988

CA LAW REV. COMM'N
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Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

Thank you for the opportunity to comment on the Law Revision Commission's consultant's report entitled Possible Scope of California Law Revision Commission Study of Administrative Law.

I share Dr. Asimow's observation that "the practical importance of administrative law has never been greater: administrative adjudication and rulemaking is enormously important to society and it touches the lives of us all."

It is in this spirit that the Office of Administrative Law welcomes comments from both the public and private sectors on how the rulemaking process can be improved to benefit the people of California.

If I can be of any further assistance to you on this project, please don't hesitate to contact me or John D. Smith, Chief Deputy Director/General Counsel, at (916) 3236221.

Sincerely,

Linda Stockdale Brewer
Director

Comments on issues relating to rulemaking as they appear in the study.

2. Issues Relating to Rulemaking:

a. Interpretive rules: The question presented is whether California should adopt some exception (from the APA) for interpretive rules and policy statements.

In 1956, the First Report of the Senate Interim Committee on Administrative Regulations stated in part:

> The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act ..."
>
> "The committee has found that some agencies did not follow the act's requirements because they were not aware of them; some agencies do not follow the act's requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy..."
>
> "The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as "house rules" of the agency."
>
> They consist of the rules of the agency, denominated variedly as "policies," "interpretations," "guides," "standards" or the like, and are contained in internal organs of the agency such as manual, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins."

In 1978, the California Supreme Court in Armistead v. State Personnel Board, 22 Cal.3d 198, held that state agencies "rules" have no effect unless such rules have been promulgated in compliance with the Administrative Procedure Act.

The Legislature codified the Armistead holding by enacting Government Code section 11347.5 in 1982. The words of this new code section bore a striking resemblance to the final paragraph of the legislative report quoted above. After weighing the other policy alternatives, the Legislature decreed that:

> "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [the APA], unless the guideline [etc.] has been adopted [pursuant to the APA]."

The Armistead case, the numerous cases which follow Armistead, and this statute are designed to eliminate decades of this type of regulatory abuse by state agencies.

Section 11347.5 of the Government Code as well as the definition of "regulation," [GC § 11342(b)] is intentionally broad to permit a "new way" of governing in California. No longer can state bureaucrats regulate the people of California "by decree."

This statute accurately reflects the current policy in California of limiting red tape, and making government more accessible.

Our experience in the years following the Armistead decision and GC § 11347.5 has shown that the objective of eliminating illegal rules is both realistic, and worthy of attaining. The process of eliminating this "extra" government intrusion is working.

b. Should California broaden the exemptions from notice and comment rulemaking to take account of situations other than emergencies?

Emergency regulations are not currently exempt from notice and comment procedures. An emergency regulation which is approved by OAL is effective for 120 days during which time the adopting agency must formally adopt the regulation by providing for public notice and comment, and meeting all the legal requirements as set forth in the APA. Public notice and comment are not dispensed with, but rather delayed to allow an agency to get regulations "on the books" expeditiously.

Therefore, the question to be considered is whether the standard of emergency should be broadened to take into account situations other than "for the immediate preservation of the public peace, health and safety, or general welfare." [GC § 11349.6]

When in 1979, the Legislature limited the scope of emergency regulations they did so as a result of unwarranted exapansion of the use of this abbreviated procedure for adopting regulations. The current limitation on the use of the emergency procedure continues to be appropriate, and has not proven to pose any unnecessary burdens on state government.

c. Office of Administrative Law (OAL): This section poses three questions which will be addressed in the order presented.

1. Does OAL's review serve the public interest?

This question can be answered in part by referring to the Legislature's findings and intent as set forth in the Government Code. Section 11340 entitled Legislative finding and declaration states:

> "The Legislature finds and declares as follows:
>
> (a) There has been an unprecedented growth in the number of administrative regulations in recent years.
>
> (b) The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account. The language is often confusing to the persons who must comply with the regulations.
>
> (c) Substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established.
>
> (d) There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law."

Section 11340.1 entitled Legislative intent states in relevant part:

> "The Legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations. It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted..." [emphasis added]

When OAL reviews a regulation for compliance with the APA, it does so not for the benefit of state agencies, but for the citizens of California in general and the persons directly affected by the regulation in particular. OAL's review is accomplished in order to assure:

1. That the public has received adequate notice, and has had an opportunity to comment on new or amended regulations.

2. That the adopting agency has the legal authority to adopt the regulation.

3. That the regulation actually implements an existing statute (reference).

4. That the agency has demonstrated why the regulation, and the attending burden on the public is necessary.

5. That the regulation is consistent with existing law.

6. That the regulatory language is clear and can be easily understood by the regulated public.

7. That the regulation does not unnecessarily duplicate existing law.

Clearly, the Legislature's intent, as implemented by OAL, benefits the regulated public in California. Without such review, California would return to the days of "like it or litigate" which was contrary to the interests of business and the private citizens of California.

2. Does OAL review improperly encourage non-experts to second-guess judgments of agency experts?

The simple answer to this question is no. Section 11340.1 of the Government Code states in relevant part:

> "It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

Therefore, beyond compliance with the requirements of the APA, OAL cannot and does not second-guess the judgment of rulemaking agencies in the manner in which they adopt regulations.

As far as the public is concerned, OAL does encourage public participation in the rulemaking process. California law, whether statute or regulation should not be adopted in a vacuum. It is appropriate that the regulated public, the "experts" in the private sector continue to be permitted to make constructive suggestions on how they should be regulated.

3. Should OAL review be narrowed or dispensed with in favor of other oversight mechanisms?

Before OAL was created, the Legislature looked at other examples of regulatory oversight mechanisms. Should the Legislature provide the oversight? Should the Governor's Office, or some combination thereof? The Legislature chose to establish an office that would work independently of both the Governor's Office and the Legislature in order to provide an unbiased and comprehensive review of regulations. There are different systems in other states, however, none work to protect the public's right of access to the regulatory process as effectively as a totally independent oversight review body such as OAL.

d. Should California statutes permit or encourage negotiated rulemaking?

"Negotiated rulemaking" is currently used by California state agencies prior to the formal adoption of regulations. Such "negotiated rulemaking" is usually characterized as "workshops" where all interested parties are brought together to discuss what will become the proposed regulations as submitted to the public for comment during the formal rulemaking process.

It would appear that such negotiated rulemaking has been effective in dealing with a limited number of highly controversial subjects by allowing an extended period in which the public is allowed to review and comment on proposed regulations. Since such prior negotiations are currently available it is unnecessary to establish such a mechanism in statute.

MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981)

The concern for state administrative procedures dates at least from a 1938 report and a proposed model statute dealing with judicial review of state administrative action from the American Bar Association. That ABA report became (in spite of the wait precipitated by World War II) the basis for the first Model State Administrative Procedure Act promulgated by the ULC in 1946. By 1961, the 1946 Act needed revision to keep up with the growth of state administrative activity. In 1981, exactly twenty years later, the Act has received another needed revision.

The Model State Administrative Procedure Act, beginning with the 1946 original, has been a beacon for state legislation. Its utilization by the states places it on a par with ULC products such as the Uniform Commercial Code and the Uniform Partnership Act. But state administrative practices have extended far beyond those envisioned even as late as 1961. The growth of state agencies has been phenomenal, and the states have experimented with procedural concepts well beyond those in the 1961 Act. The 1981 Act signifies the development.

Still, administrative procedures remain the same in gross. Two fundamental activities require proper procedures - the making of rules and regulations and the deciding or adjudicating of individual cases and controversies. The 1981 Act has five Articles: Article I, General Provisions; Article II, Public Access to Agency Law and Policy; Article III, Rule Making; Article IV, Adjudicative Proceedings; and Article V, Judicial Review and Civil Enforcement. But the basic topical division remains the same - rule making and adjudication.

Article I contains definitions and some provisions applying to all other Articles, and requires no summary. Article II is indicative of the changes that have occurred in state agency activities, and is, clearly, part of rule making. The 1961 Act had a limited and general requirement for publication of rules. Article II establishes an office of administrative rules director. This office publishes an administrative bulletin for notice of proposed rules and an administrative code as a central source for all final rules. It reflects a growing need for a central reference for rule making in state government.

The fundamental principles of rule making remain the same for all incarnations of the Model Act, and govern Article III of the 1981 Model Act, as well. There must be adequate notice. A procedure which allows citizens to comment and to present information is required. A time period passes after which the rule is effective, unless withdrawn or challenged in a further proceeding. These are the basics.

The 1981 Act deals with these basic parameters more specifically than did the earlier versions of the Act. Each agency must keep a public rule-making docket, with specific information about proposed rules. Notice must be published in the administrative bulletin at least 30 days prior to final adoption. The agency must receive public submissions of information and comment during the 30-day period. An oral hearing is required, upon a written request by the administrative rules committee, the administrative rules counsel, a political subdivision, an agency, or 25 persons, within 20 days after the publication of notice. If an oral hearing is to be held, notice must precede it by at least 20 days. Of course, any person is entitled to be heard. A rule becomes final within 180 days of the first notice.

Rule making can be exempt from these basic requirements if it "would be unnecessary, impracticable, or contrary to the public interest" to subject a rule to these procedures. However, an agency, if it does exempt specific rules from these procedures, may be requested to initiate the procedure by the administrative rules review committee or the governor within 2 years of the effective date of a rule. A request tolls the rule within 180 days from the time the request is filed. The agency must, then, institute the ordinary proceedings to keep the rule. In addition, procedures are not required for the adoption of any rule "that only defines the meaning of a statute or other provision of law or precedent, if an agency does not possess delegated authority to bind the courts to any extent with its definition." These exemptions limit the procedural requirements to minimize cost and delays.

There are a number of rule-making provisions that have never appeared, to any degree, in the prior Model Act. For example, the administrative rules review committee, the governor, a political subdivision, an agency, or 300 signators may require an agency to publish a regulatory analysis. The analysis must cover certain matters, such as the classes of persons affected, the probable quantitative and qualitative impact, and probable costs. This requirement places substantial demands for justifying new rules upon any agency.

In past paragraphs, the administrative rules committee has been mentioned. The committee is part of a rule review chapter of the 1981 Model Act that includes a series of review requirements. Each agency is required to review its rules at least annually. The review determines what new rules need to be adopted, but also establishes an internal mechanism for criticism and re-evaluation of rules. Every rule must be very critically reviewed at least every 7 years, a review that tests the quality of rules and the rule-making process.

The 1981 Model Act also grants the governor direct authority to rescind or suspend rules, or severable parts of rules, by executive order. The chief executive may also terminate a rule-making proceeding, and has an administrative rules counsel to advise his office on the exercise of these powers.

The third review entity is the administrative rules review committee. It is a committee of the legislature, and has 3 members from each house. The committee has the power to review rules, selectively. It can receive complaints from the public and hold public proceedings to consider them. The review committee has two options. It can recommend enactment of statutes to correct or improve agency operations, or to supersede particular rules.

It also may file objections in the office of the Secretary of State. The agency must respond to the filed objections. If the review committee does not then withdraw the objections, the burden is placed on the agency, in any action for judicial review or enforcement, to establish that the contested rule is within the procedural and substantive authority delegated to the agency.

The review provisions serve in lieu of some other "legislative veto" as tried in a few jurisdictions. The legislative veto has been rejected in the 1981 Model Act because "a one house or two-house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, may raise serious state constitutional questions." The legislative veto may impinge upon the governor's veto power, and empower the legislative branch to perform an executive function.

The separation of powers questions have serious policy implications, notwithstanding their constitutional status. A proper balance of the branches of government seems essential to good government. The legislative veto promises to disbalance power, weakening the executive in favor of the legislative branch. Further, the veto short-cuts the legislative process, and allows the legislature to narrow the scope of existing legislation without the usual full scrutiny given to introduced

bills. These policy problems led the ULC to limit the 1981 Model Act within tried and true principles of separation of powers. If rules are made badly, the series of reviews provided in the 1981 Model Act offers adequate remedy. At the same time, no injury is done to the constitutional balance.

The adjudication of individual cases and controversies received limited and summary treatment in the prior Model Acts. They provided a hearing for every contested case and for appropriate judicial review. The 1981 Model Act provides for a formal hearing process in Article IV, with substantial due process requirements, and for less formal proceedings when full hearings are not warranted. Not only does the 1981 Model Act provide for separate kinds of proceedings, it also provides for an Office of Administrative Hearings, which centralizes adjudicative proceedings to a great degree, and for a more clearly defined process of judicial review and enforcement in Article V.

Adjudication of cases and controversies requires adequate due process. This means, of course, proper notice, hearing, and evidentiary requirements. The 1981 Model Act provides for these basic requirements, as did the prior Model Acts, but also adds much that promotes efficiency in adjudication. For example, a pre-hearing conference is available in the 1981 Model Act, a conference very like pre-trial conferences provided in most modern civil procedures in the courts. The pre-hearing conference may be used to narrow issues, iron out procedural difficulties, and determine the evidence to be presented at the hearing.

The 1981 Model Act provides subpoena powers to the presiding officer for any proceeding. The presiding officer can compel discovery of evidence, and issue protective orders, again as is commonly provided in modern civil procedures in the courts.

The Office of Administrative Hearings, also, is a response to the need for more efficiency in the hearing process. This Office provides administrative law judges, professionals in the conduct of adjudicative proceedings for all state agencies. The proceedings of all agencies can be similarly conducted by experienced, trained people.

Of even more importance to efficiency are the provisions for more informal proceedings. If the matter to be considered does not merit the full range of hearing requirements, why require them? A conference adjudicatory hearing takes place without pre-hearing conferences, discovery, or subpoenas. It

requires only that the parties be allowed to testify, present exhibits, and offer comments. A conference hearing can be used only in specific instances. For example, such a hearing may occur if there is no disputed issue of material fact, if a disputed issue has a modest monetary value, or involves discipline of prisoners or students (only for minor infractions), and like kinds of proceedings. Due process requirements may be relaxed in these instances.

Summary and emergency hearings are even more relaxed. Emergency conditions justify rapid action and less rigorous procedures. Summary proceedings may be used in minor disputes so long as the public interest does not require notice and opportunity to participate. A summary proceeding also gives a right to review in a full-blown proceeding.

Judicial review may occur once all administrative remedies are complete. This means agency appeal processes, when available, must be exhausted. The 1981 Model Act, unlike its predecessors, provides an exclusive method for judicial review. The provisions of the 1981 Model Act govern standing to sue, filing of review petitions, and the review powers of the court, including what new evidence may be taken. The review of a court is mostly of an appellate nature, with limited capacity to hear new evidence and to re-try issues. The 1981 Model Act makes provision for judicial enforcement of agency orders, as well.

The Model State Administrative Procedure Act (1981) is a complete and comprehensive draft, covering all areas of current concern in administrative law. It is hoped it will be as useful to the states as its predecessors.