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Memorandum 90-6

Subject: Study N-101 - Administrative Adjudication (Structural Issues--synopsis of comments received on background study)

BACKGROUND

The first phase of the Commission's administrative law project concerns administrative adjudication. The Commission's consultant, Professor Asimow, has prepared a background study for the Commission concerning basic structural issues in administrative adjudication. Copies of the study have previously been distributed to the Commission. Professor Asimow is currently preparing for the Commission background information concerning specific issues in administrative adjudication.

The consultant's study was circulated to more than 200 persons, agencies, and organizations on our administrative law mailing list in early November, with a request for comments by December 8. We have received the comments attached as Exhibits to the supplements to this memorandum.

We anticipate the following procedure for the Commission meeting. Our consultant will review the background study with the Commission. On each of the issues presented the staff will summarize the comments received, and interested persons present at the meeting will have a further opportunity to comment. Our consultant may wish to respond to some of the comments. Our objective at the meeting is to make initial decisions on the structural issues so that we can begin the task of shaping a tentative recommendation on administrative adjudication. Initial decisions can be made at the meeting or, if the Commission believes additional information would be useful before making a decision, at a future meeting.

The purpose of this memorandum is to analyze the comments received on the background study in order to facilitate discussion at the Commission meeting. The memorandum states each issue and analyzes the

comments on it, but does not summarize the consultant's recommendation on the point or take a staff position on it. Professor Asimow will be presenting the background study to the Commission directly, and the staff does not believe it is in a position to advise the Commission at this stage in the study.

GENERAL REMARKS

The first phase of the consultant's study, dealing with structural issues, gets us immediately into the thicket of the most fundamental disputes over the function of administrative adjudication and the most intense political divisions in the area. But resolution of these issues--whether there should be one body of administrative law applicable to all agencies, whether adjudication of administrative law issues should be done by judges independent of the agencies, whether the agencies should have the ability to override decisions of administrative law judges--are the very reason the Commission is now involved in this study.

The general perception of persons who have reviewed the consultant's study is that, apart from whether or not the person agrees or disagrees with the consultant's ultimate conclusions, the study gives the Commission an even-handed treatment of the issues. See, e.g., letters of Karl Engeman of the Office of Administrative Hearings (Exhibit 5--"thorough, accurate and insightful"); Sanford Svetcov and Charlotte Uram of San Francisco (Exhibit 7--"fully and fairly addresses the debate in the field on the issues presented"); John M. Huntington and Ron Russo of the Attorney General's Office (Exhibit 15--"extremely thorough, scholarly, and well balanced ... the pros and cons of each issue are fairly and clearly set forth").

This perception is not universally shared by the commentators, and a few who disagree with the consultant's conclusions also find his presentation of the issues flawed. See, e.g., Robert A. Neher of the Office of Administrative Hearings (Exhibit 16--"assertions display a lack or knowledge [and] understanding"); Stephen J. Smith of the Office of Administrative Hearings (Exhibit 18--"fatally flawed ... without a scintilla of support ... report should be rejected").

The meat of the many good comments we received, however, is in the specific points made concerning individual issues. The remainder of this memorandum addresses the individual issues in the order in which they are presented in the consultant's report.

ADMINISTRATIVE PROCEDURE ACT APPLICABLE TO ALL FORMAL HEARINGS

The consultant recommends that, "California needs a modernized, broadened APA. At a minimum the APA should establish procedural rules for all adjudications conducted by state agencies where, by statute, the agency is required to hold an on-the-record hearing (the "minimum" approach). In designing a new APA, the 1981 Model State APA is an excellent starting point." The consultant states that the recommendation for a single administrative procedure governing all statutorily required administrative hearings is the single most important conclusion of the report.

The comments received on this proposal fall into two general categories--(1) the question whether one size fits all and (2) the wisdom of using the 1981 Model Act as a model.

Single Administrative Procedure Act

The fundamental concept of a single administrative procedure act to govern all statutorily required administrative hearings was generally approved by private practitioners who commented on the report and who represent clients before a number of different agencies. See, e.g., Sanford Svetcov and Charlotte Uram of San Francisco (Exhibit 7--"From our vantage point as practicing litigation and counseling attorneys representing clients in agency proceedings, a modernized, uniform Administrative Procedures Act would enhance lawyer and client knowledge of and hence accessibility to agency practices, particularly those that are informal and unwritten.") Ken Cameron of Santa Monica concurs (Exhibit 25--"There is no good reason for the various procedures now existing, all of which have come into existence with differences attributable to minor historical factors.")

The concept was also endorsed by one of the agency respondents. Steven C. Owyang of the Fair Employment & Housing Commission states that they heartily endorse our consultant's call for a single,

comprehensive APA for statutorily required state agency adjudication. "Our own experience under the existing APA confirms his arguments that occasional practitioners before the FEHC would be far more likely to be familiar and comfortable with its procedures if there were a uniform statewide procedural scheme, and that the body of precedent available to resolve difficult procedural issues would be very usefully expanded." Exhibit 21.

Other agency respondents took a more circumspect approach, however. The Legal Division of the Public Utilities Commission is unable to agree at this time. "Until we have had an opportunity to review the details of the proposed APA, we cannot evaluate the desirability of subjecting the CPUC to an APA designed primarily to cover the adjudications conducted by other state agencies. Much of the CPUC's work involves setting rates for utilities and other policy-making functions. This contrasts with the benefit determinations and disciplinary proceedings that are the main work of many other agencies." Exhibit 13. Christine A. Bologna and Gary M. Gallery of the Public Employment Relations Board likewise reserve judgment on this matter until the specifics of the proposed administrative procedure act are available.

The State Bar Taxation Section, on the other hand, is quite confident that a general administrative procedure act will not do for taxation matters. See Exhibit 20. Although they believe the state tax administration procedures are badly in need of improvement and should be included in the study, "We think the functions of tax agencies are enough different from the functions of regulatory agencies that one comprehensive APA cannot suitably cover them both." They point out that the American Bar Association's taxation committee has studied the 1981 Model Act and found it to be in some respects ill-suited for application to state tax agencies. They offer the Commission an alternative model act for state tax matters that has been promulgated by the American Bar Association. They urge the Commission to attempt this reform.

Use of the 1981 Model Act

A number of respondents, all administrative law judges with the Office of Administrative Hearings, oppose the concept of using the 1981 Model Act as a starting point for reform. Their point is that the existing California administrative procedure act is basically sound, is well-tested with a substantial gloss, and is familiar to parties concerned--the agencies, the practitioners, and the administrative law judges. They note that the 1981 Model Act is not widely adopted and is basically untried. Typical comments are "in the past nine years, only 3 states have adopted same, and none of those states has anywhere near the complex licensing issues we are facing in California" (Exhibit 11--Ralph B. Dash); "the consultant possesses a fundamental bias that history and facts have not swayed. He has become an apologist for the Federal System with which he is the most familiar, and the Model State Act to which he obviously contributed ... [It] solves few problems relating to administrative adjudication in California" (Exhibit 16--Robert A. Neher); "Why hasn't the Model Act received more acceptance in the last eight years? ... Why shouldn't California improve the present APA and adapt it for broader coverage? It works well! The report takes a very uncritical look at the Model Act. Regardless of the amount of work that went into its drafting, its not necessarily better for California. To the extent it incorporates procedures based upon the federal APA, it contains several steps backward and is costly." (Exhibit 19--John D. Wagner).

Although the staff will refrain from remarking on these comments at this point, we do feel it is appropriate to observe that the Commission has previously made a decision to use the 1981 Model Act as a vehicle for a systematic raising of issues in California administrative law, and has asked its consultant to prepare a background study that reviews the 1981 Model Act in light of California law. This does not mean that the 1981 Model Act will be preferred to existing California law--only that it will be a catalyst for discussion and drafting.

SEPARATION OF ADJUDICATIVE FROM OTHER ADMINISTRATIVE FUNCTIONS

The second major structural issue raised by the consultant's report is whether there should generally be a separation of adjudicative from rulemaking and prosecutorial functions within in agency. That is, can an agency that is both rulemaker and prosecutor also be an impartial judge? Separation of functions could be achieved either by providing an independent appeals board to review administrative law judge decisions or by providing for direct judicial review of administrative law judge decisions without intervening agency review. Our consultant concludes that, "There should be no presumption in favor of separating the adjudicatory function from other agency functions."

Of the issues raised in the study, the staff believes this goes most to the heart of the administrative process. It is also the issue that received the bulk of all the comment on the study. Predictably, the agency commentators feel it is important for the agency to retain control of the adjudicatory process; the practitioners and independent administrative law judges feel a separation is critical to fairness. The commentators focus primarily on three practical ramifications of this issue, although others are mentioned as well:

> Whether the decision of the administrative law judge should be final or whether it should be subject to departmental review before judicial review is available.
>
> Whether the administrative law judge should be making policy by individual decisions or whether this should be done exclusively through the rulemaking process.
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> Whether the administrative law judge should be exercising discretion or whether discretion should reside in the agency head.

Finality of Administrative Law Judge's Decision

At the root of the separation of functions issue is the question of who interprets and applies the administrative regulations--the agency that issued them or the judge called upon to apply them to a particular person or situation. Put another way, may a party aggrieved by the administrative law judge's decision seek judicial review immediately, or is there an intervening level of agency review before judicial review is available? Under existing California law, the

general rule is that the ultimate administrative decision rests with the agency head or board. Gov't Code § 11517(c). This general rule is subject to specific statutory exceptions where the Legislature has vested administrative adjudication in an agency separate from the rulemaking entity:

Alcoholic Beverage Control Appeals Board for Department of Alcoholic Beverage Control
Fair Employment and Housing Commission for Department of Fair Employment and Housing
State Board of Equalization for Franchise Tax Board
Unemployment Insurance Appeals Board for Employment Development Department
Worker's Compensation Appeals Board for Division of Industrial Accidents

The general rule that the agency may "nonadopt" the administrative law judge's decision is criticized by the practitioners and the administrative law judges who commented on the consultant's report. Typical comments are: "The most critical major flaw in the current APA is that it does not provide a fair opportunity for a Respondent to secure an impartial determination of his dispute. ... [Government Code § 1157(c)] has often led lay and professional persons to believe, with just cause, that the OAH provides them with a 'Kangaroo Court', in that the agency acts as both prosecutor and the ultimate judge." (Exhibit 10--Milford A. Maron of the Office of Administrative Hearings); "The ability of a prosecutor/adjudicator to change a decision after a full and fair trial results only in excessive delay, extra cost, inefficiency, and most significantly an unfair advantage to the regulatory power and its panoply of 'experts'." (Exhibit 16--Robert A. Neher of the Office of Administrative Hearings); "The power of an agency to 'non-adopt' a proposed ALJ decision can effectively impair a licensee's economic ability to secure judicial review. Often respondents are without funds to proceed further after an agency's §11517(c) proceedings. Section 11517(c) proceedings work to prolong administrative actions which are supposed to be resolved expeditiously. ... In sum, if the agency head or board does not actually hear and see the evidence as it is presented, it should not find the facts in a separate proceeding based on a cold record. Insofar as the Administrative Procedure Act now allows this to occur, it should be

amended to permit all parties immediate access to judicial review without intermediate 'non-adoption' proceedings." (Exhibit 17--Paul M. Hogan of the Office of Administrative Hearings); "administrative law judges [should] be given authority to make binding determinations of fact in administrative adjudication under the APA. This authority would free appointed boards to concentrate on policy matters. Fact determination would be more accurate. And disciplinary decisions would be more likely to focus on protection of the public rather than punishment." (Exhibit 23--Charles J. Post of Santa Monica); "those who prosecute cannot be expected to judge impartially. Any attempt to have judging and prosecution carried on within the same government entity will lead to long and futile controversy about degrees of independence of the judges. Eliminate such waste of time and energy by a complete divorce between the functions, either by a separate administrative appeals tribunal or by making the administrative law judge's findings and conclusive final unless appealed to a court. Where agency participation is needed, as to obtain consistency and uniformity, formal participation, oral or written, by an agency representative as a party should be allowed at whatever stage of the procedure the agency desires." (Exhibit 25--Ken Cameron of Santa Monica).

Other commentators, however, believe that the need for agency control overrides the virtues of finality. "We agree with Professor Asimow that legislation should not require the separation of the adjudicatory function from other CPUC functions. We concur that such a separation of functions could impede CPUC policymaking." (Exhibit 13--Legal Division of the California Public Utilities Commission); "it makes obvious sense to combine the rulemaking with the adjudicative function. As the report notes, rules and policy are often made through case-by-case adjudication, so there are very good reasons to combine that process with formal rulemaking and substantial disadvantages to separating the two functions." (Exhibit 21--Steven C. Owyang of the Fair Employment & Housing Commission); "Administrative Law Judges should not have the final say in the decision making process. We feel that such a change in final authority would impinge on the policy making authority of the executive branch of government. Under due process there is no need to transfer decision making to an independent

third party as long as there are means for the courts to review the procedural context within which the decision was made and to review the record to determine if the findings are supported by the evidence." (Exhibit 22--Robin T. Wilson of the Department of Real Estate); "the agency's regulatory function is an important part of its operations, and requires intimate familiarity with the substantive issues involved ... Thus, we concur that there should be no presumption in favor of separation of adjudication from other agency functions, such as rulemaking." (Exhibit 26--Christine A. Bologna and Gary M. Gallery of the Public Employment Relations Board).

A few of our commentators address the existing situation where there is in fact a separation of functions by legislative creation of an appeals board separate from the regulatory entity. The agencies involved appear to believe the separation works well, while practitioners may have a different view:

Earl E. Sullaway of the Department of Fair Employment & Housing (Exhibit 1)--"On balance, separation of adjudicatory functions from investigative is desirable. It is true that this can lead to policy and interpretive differences (as it has between the Fair Employment and Housing Commission and the Department of Fair Employment and Housing) but the even-handedness (both perceived and actual) of such a process substantially enhances the enforcement agency's position." Tim McArdle of the Unemployment Insurance Appeals Board (Exhibit 8)--"I wish to point out that it is precisely because the UIAB is independent of the agency, which in this case is the Employment Development Department, that there is no built-in conflict of interest. ... Providing due process of law, including an impartial and independent decision maker, is the essence of administrative adjudication transcending matters of a purely practical nature. In my view, giving the agency the final decision violates this fundamental consideration and undermines the entire process."

Compare the agency views with those of practitioners. Joshua Kaplan of Beverly Hills (Exhibit 4) concludes from his experience before the Alcoholic Beverage Control Appeals Board that vesting review in a separate administrative agency allows unchecked discretion. "If the Department is dissatisfied with the decision of the A.L.J., it

merely ignores it. The ABC Appeals Board then generally rubber stamps the Department's decision since it is not staffed by attorneys and is thus highly politicized. Any review thereafter is solely by discretionary writ and the courts have proven most reluctant to intervene in disputes between what is perceived to be a solitary, independent businessman and a vast government bureaucracy." (The Alcoholic Beverage Control Appeals Board responds that this perception is not universal, and the Office of Administrative Hearing's practice outline states that, "The ABC Board will review ABC's decision based on the record of the hearing (transcript and exhibits), upholding it if there is substantial evidence to support it. In practice, however, the ABC Board often applies its own independent judgment in reviewing ABC decisions." In any event, the Board is bound by the substantial evidence test in reviewing decisions of the Department of Alcoholic Beverage Control; the Board is not an ultimate factfinder like ALRB, CUIAB, or WCAB. See Exhibit 27).

The Executive Committee of the State Bar Taxation Section (Exhibit 20) believes there is urgent need of reform of the system whereby the State Board of Equalization hears appeals from administrative hearings of income and franchise tax matters adjudicated by the Franchise Tax Board. The Bar Committee notes that the process is slow, the case backlog is growing, settlement with the agency is thwarted, the appeal process accomplishes little, doctrinal conflicts develop, and there are other problems as well.

Turner & Sullivan (Exhibit 14) remarks, "There should not be an 'administrative law court' for all the reasons stated in your report."

Administrative Law Judge as Policy Maker

A key argument against finality of the administrative law judge's decision and in favor of agency review of decisions is that the decision may involve a policy determination, and policy determinations have been vested by the Legislature in the agency, not in the administrative law judge who should be strictly a finder of fact. The debate in the comments we have received centers around whether administrative policy can or should be developed on a case-by-case basis (similar to the development of the common law) or whether development of policy must be limited to the rulemaking process.

The comments we have received on this matter come mainly from administrative law judges, who suggest that the case-by-case development of policy argument should not be used to frustrate the need for separation of functions through finality of the administrative law judge's decision. "Most administrative agencies (a notable exception is the Fair Employment and Housing Commission) do not issue precedential decisions and such cases, therefore, do not provide a basis for communication of the agency's interpretation of a statute or rule except in the particular case decided. More important, by virtue of general case law in California, administrative adjudicators, like courts of record, must defer to agency interpretation of statutes or rules implemented by the agency unless such interpretation is clearly erroneous. Agency interpretation is rarely articulated for the first time during the course of an administrative hearing." (Exhibit 5--Karl S. Engeman of the Office of Administrative Hearings); "Case by case adjudication does not provide a licensee with sufficient advance information so that he can select a proper course of action. It prevents licensees from knowing in advance that their activity is lawful or unlawful, so that they will not be unwittingly drawn into violative conduct. A licensee would have a much better idea of what an agency requires of him by examining rules the agency promulgates which circumscribes his conduct." (Exhibit 10--Milford A. Maron of the Office of Administrative Hearings); "They have not made and do not 'make law' in 'case by case adjudication'. The decisions are not published, are rarely reported, are not precedential (except FEHC) and are never presented at trial in a fashion which indicates that the agency is desirous of 'making new law' in this trial." (Exhibit 16--Robert A. Neher of the Office of Administrative Law).

The California Medical Association (Exhibit 6), has a somewhat different perspective on this matter:

> [Professor Asimow] observes that it is not always "feasible or practical to solve every problem through rulemaking." While perhaps this statement is true in the abstract, California's APA is unique in that it requires that all "regulations" which are broadly defined, to be promulgated through the rulemaking procedures of the APA, thereby guaranteeing public participation in the adoption of rules. Case by case rulemaking of general application through adjudication at an agency level should not be

tolerated under this scheme. Indeed, varying interpretations of a rule (which constitute regulations in and of themselves) as applied to different individuals, violate not only the existing APA, but also the equal protection clause of the Constitution.

Moreover, the California Medical Association strongly believes that ALJ decisions should be made available to the public and indexed and digested appropriately. The availability of such decisions is critical to properly informing the public of the agency's interpretation of rules and to ensure consistency in the application of the rules. For the same reasons we support the adoption of uniform guidelines for disciplinary penalties. With sufficient guidelines form the Legislature, the dangers of combining adjudicatory and regulatory functions within an agency are reduced.

Exercise of Discretion by Administrative Law Judge

An issue related to the formulation of policy in administrative law judge decisions, and implied in the remarks just quoted of the California Medical Association, is the degree to which the exercise of discretion by the administrative agency should be permitted and would be impaired by finality of the administrative law judge decision.

Comment on this issue in favor of administrative law judge finality takes two general lines: (1) Discretion should not enter into the matter; clear rules consistently adhered to are necessary. (2) Discretion is necessary to ameliorate rules that would be unduly harsh in a particular case, but the administrative law judge is in a fine position to exercise discretion. Sample remarks are excerpted below.

> It has been my experience that agency members have no monopoly on the ability to recognize the interest underlying the regulatory scheme and balance that interest against the rights of those regulated to develop an effective and equitable penalty. In fact, the administrative adjudicator is generally the only person who has had an opportunity to observe the demeanor of the violator, an important advantage in the determination of who is fit to continue as licensee and whether restrictive conditions are likely to be observed. At present, the Office of Administrative Hearings employs "guidelines" issued by various regulatory agencies which set out the agency's view of the range of penalties which ought to be imposed for specified violations. The latitude within such guidelines reflects the recognition that the circumstances under which violations occur vary significantly, and that generally the best person to determine which penalty among those within the range suggested by the agency is appropriate is the administrative adjudicator. Further, with the frequency with which

administrative adjudicators sit on particular types of cases, they, like judges who hear criminal cases day in and day out, become the real "experts" in penalty assessment.
Karl S. Engeman of the Office of Administrative Hearings (Exhibit 5)

With respect to sanctions, it is our experience that the experience of the administrative law judges combined with guidelines set out in regulations by the agencies allow for fairly good consistency in assessing the penalty if cause for discipline is established. Our view is that only in cases where the respondent claims the penalty assessed by the administrative law judge is harsh or excessive, should there be an appeal to the agency. This will result in very few requests for reconsideration under the APA.
Turner & Sullivan (Exhibit 14)

INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES

California has an independent administrative law judge corps in the Office of Administrative Hearings. However, the jurisdiction of the Office of Administrative Hearings is limited in scope and most hearing officers work for the agency whose cases they hear. Should the agency hearing officers be made part of the independent corps? Our consultant concludes that "There should be no large-scale removal of ALJs from the agencies for which they decide cases."

As with other issues discussed in this study, the commentary reveals a divergence of opinion between the agencies on the one hand and administrative law judges and practitioners on the other.

Typical comments of agencies that employ their own hearing officers are: "Legislation should <u>not</u> require the CPUC to use ALJs from an independent panel. As Professor Asimow points out, the CPUC requires highly specialized ALJs and often relies on its ALJs to work out the changes that the Commission will make to the ALJ's proposed decision." (Exhibit 13--Legal Division of Public Utilities Commission); "While the work done for the FEHC by OAH ALJ's has improved steadily and has in some cases been excellent, our experience has taught us that accurate, knowledgeable and--above all--consistent application of a body of law as complex and esoteric as the discrimination laws we enforce is best accomplished with judges who specialize in that area. ... There is no loss in fairness, and an enormous gain in both

efficiency and accuracy, if ALJ's apply consistently the substantive rules laid down by the agency, and that outcome, as we suggested above, is far more likely to occur where ALJ's are attached and in some broad way answerable to the policy-making agency." (Exhibit 21--Steven C. Owyang of Fair Employment & Housing Commission); "We agree with the conclusion that ALJs do not have to be separated from their agencies and combined in a central pool. The ability to obtain court review of decisions and procedures will ensure due process." (Exhibit 22--Robin T. Wilson of Department of Real Estate); "PERB ALJs are separate from other units within the agency. This arrangement, coupled with the finality of the ALJ's proposed decision in the absence of exceptions, provides sufficient independence to allay the appearance of bias. Thus, there is no need to remove PERB ALJs to a central statewide agency." (Exhibit 26--Christine A. Bologna and Gary M. Gallery of Public Employment Relations Board).

Where there is a statutory separation of the agency from the appeals board, the affected agencies feel particularly strongly that a central panel is irrelevant. See comments of Steven C. Owyang of the Fair Employment & Housing Commission (Exhibit 21) and Carol Agate (Exhibit 12).

The administrative law judges of the Office of Administrative Hearings who commented on the study have a different view. They point out that the concepts of having a central panel and having specialization within the central panel are not inconsistent. Karl S. Engeman of the Office of Administrative Hearings (Exhibit 5) remarks:

> Among those states employing a central panel, the inclusion of workers' compensation hearings is the rule rather than the exception. The State of Washington and the State of Colorado are examples. The State of New Jersey's central panel also hears rate setting cases. By all accounts, the incorporation of such functions with groups of ALJs assigned primary responsibility in the areas of specialization provides both specialization and independence, the hallmark of a central panel.

See also Robert S. Neher (Exhibit 16):

> To assert that a "central panel" concept is not workable or efficient because of some perceived lack of skill or special knowledge is a bug bear of those sold on the status quo. The skills and knowledge required are those of an <u>adjudicator</u> - not those of an <u>attorney specialist</u>. ... The

> qualifications of an adjudicator and the requirements of justice are well known to this Commission. In a formal trial type adjudication, the idea of "special expertise" being necessary, desirable or even useful in deciding controverted facts, ruling on evidence, or determining well addressed legal issues is a cliche universally indulged in to justify condoning the absence of the appearance of fairness, and allows a fertile field for actual unfairness to take root.

Practitioners who commented also suggest an independent administrative law judge corps with specialization within the corps. See Exhibits 7 (Sanford Svetcov and Charlotte Uram of San Francisco) and 25 (Ken Cameron of Santa Monica). This matter was also the subject of comment from Professor Harold Levinson of Vanderbilt University School of Law (Exhibit 9), who remarks:

> In my opinion, the jurisdiction of OAH should be expanded radically, so that ALJs from the Office will conduct virtually all hearings for virtually all state agencies. I respectfully urge you to solicit testimony from people in some of the states that have broad-jurisdiction central panels of ALJs. Those states have found solutions to the types of problems mentioned in Professor Asimow's report. I am particularly impressed by the fact that no state, having adopted a broad-jurisdiction central panel, has repealed the system or significantly reduced the jurisdiction of the central panel.

DEFINITION OF ADJUDICATION

The existing California law governing administrative procedure applies the administrative procedure act only to specific agencies for specific decisions; other agency actions are unregulated. Our consultant recommends expanded coverage of agency actions. "Adjudication should be defined broadly to cover most agency action of particular applicability that determines the legal rights or other legal interests of one or more specific persons. The APA should prescribe an appropriate agency procedure in all cases of adjudication, whether hearings are required by a statute, a rule, or the state or federal constitution, or by none of them (the 'maximum approach')."

Under this recommendation, a full on-the-record hearing would not be required for the ordinary agency decision that affects a person's rights. The typical procedure would be that, upon request of the

person adversely affected, the agency would give notice of what it is doing, give the person an opportunity to explain the person's point of view, briefly explain the adverse decision, and provide a way for the decision to be summarily reviewed.

There were relatively few comments directed to this specific proposal. The comments show the expected agency/practitioner split. In favor of the recommendation were Turner & Sullivan (Exhibit 14) and Ken Cameron of Santa Monica (Exhibit 25). Opposed to the recommendation was Robin T. Wilson of the Department of Real Estate (Exhibit 22):

> Our objection is largely based on the definition of the term order to include anything which affects a "legal interest". We believe that this term is so imprecise that it becomes all-inclusive and would thus hamper most day to day government decision making. ... The maximum approach would result in many government operations being stymied with an unworkable and impractical system which would greatly increase the costs of doing government business solely to handle the adjudication of new found remedies.
>
> Along this line there is never any practical showing of abuses in the present system; rather there is an academic suggestion that government operates in an arbitrary manner and therefore needs further checks. The Department finds the study severely lacking in its failure to identify those "decisions" which currently provide a remedy for administrative adjudication. ... At a minimum the study should identify the area of governmental decision making where policy considerations of time, cost and public protection necessitate some form of adjudication. The provision of examples where adjudication may be needed toes not begin to recognize the ingenuity of the human mind and the potential for articulation of a "legal interest". ... The maximum approach will even hamper nondiscretionary decision making which affect legal interest and by slowing government decision making with considerations of legal implications and costs considerations. The Department submits that the fix to the problem should not go any further than the problem as demonstrated. ... The Department is concerned about changes that are not required by due process but are advanced because of an academic notion of fairness.

One agency was willing to suspend judgment on this proposal, pending more information. The Legal Division of the Public Utilities Commission (Exhibit 13) remarks that "it is not clear to us which proceedings of the CPUC would or should be considered adjudications, and therefore within the scope of the proposed new APA. ... It appears

that Professor Asimow would consider ratemaking for a class of utilities to be rulemaking, subject to a different set of procedures that have not yet been spelled out. ... We hope that further phases of Professor Asimow's study will explain in greater detail what kinds of proceedings are 'adjudications', so that we can better analyze their potential impact on the work of the CPUC."

PRESCRIBING APPROPRIATE LEVEL OF FORMALITY

Existing California law provides only one type of adjudicatory proceeding under the administrative procedure act--a formal on-the-record hearing. Professor Asimow recommends that, whether or not the "maximum approach" described above is adopted, the California administrative procedure act "should provide for an array of procedural models having varying degrees of formality."

The study explains that under the 1981 Model Act, in addition to the standard formal procedure, there also are provided variations called "conference hearings", "summary proceedings", and an "emergency adjudicative procedure" designed to provide an appropriate level of procedure for the type of situation involved. If an agency desires to use a particular type of procedure less than the formal hearing, the agency would adopt a regulation describing what type of situation would be governed by the informal procedure. Absent such a regulation, the formal procedure would apply.

The commentary on this proposal was mixed. Ken Cameron of Santa Monica (Exhibit 25) agrees with the suggestion--"Where a corps of administrative law judges exists to define and make uniform, by rule, the appropriate level of hearing procedure in any class of dispute, the aims of simplicity, brevity and fairness can be accomplished." Anthony M. Summers of the Office of the Attorney General (Exhibit 2) notes that the Coastal Commission applies a variety of procedures--"I point this out to show that there is some practical precedent in California, even within a single agency, for a system similar to that proposed by Professor Asimow."

Sanford Svetcov and Charlotte Uram of San Francisco (Exhibit 7) find this the most interesting aspect of the study, and see advantages and disadvantages:

> Formal adjudications have had their own body of governing law and standards. By contrast, informal agency actions affecting private rights, which constitute the vast majority of governmental actions affecting private individuals, have been handled in the different agencies at various levels and through various methods at varying degrees of formality.
>
> The advantage of standardizing agency procedures affecting individuals is that it would produce a clearer course of action for pursuit and resolution of informal agency action. The potential disadvantage, however, may be that it would result in less of the give and take needed for sound agency decisions on these individual matters.

They think the Commission would be wise to have an experimental or pilot program comparing the two systems in selected contexts before making across-the-board changes.

Professor Harold Levinson of Vanderbilt Law School (Exhibit 9) likes the concept of informal procedures, but doesn't like Professor Asimow's suggestion that particular agencies could, by rule, modify the procedures as appears appropriate for the types of regulations they are enforcing. "If agencies could create hybrids without limit, many of the benefits of a single comprehensive code of procedure would be lost."

The California Medical Association (Exhibit 6) is apprehensive about informal procedures, and would like to see some details. "The California Medical Association is extremely concerned that the administrative process in California be conducted fairly, appropriately, and in a manner which ensures that a risk a physician, or indeed, any member of the public, is erroneously deprived of a right is not unduly high. Therefore, the Association fully supports a full predeprivation hearing consistent with the requisite safeguards of due process. The Association would oppose any amendment to the APA which would deprive the people of this state that right."

The Legal Division of the Public Utilities Commission (Exhibit 13) agrees there is a need for an array of adjudicatory hearing procedures with varying degrees of formality. But they are uncertain how this would affect existing statutes that require, for example, "an

opportunity to be heard as provided in the case of complaints", and whether the less formal procedures would be available in such situations.

The method of deciding whether informal procedures could be made applicable to particular types of adjudications also caused concern among other agency commentators. Robin T. Wilson of the Department of Real Estate (Exhibit 22) wonders about the practicality of specifying by legislation or rule which procedures apply to which types of decision. "This suggestion does not recognize the costly and time consuming nature of current requirements to enact laws and regulations. Nor does it reflect a true understanding of the role of the Office of Administrative Law in the rulemaking process." They are concerned that if the administrative procedure act is applied to every agency determination, as suggested above under the "maximum" approach, that the Office of Administrative Law will be flooded with state agency proposed regulations for informal adjudication. "We believe that this will be a continuous never ending requirement for most agencies as new legal interests are created to challenge decisions as orders."

The Department of Real Estate also questions the practicality of providing different adjudicatory levels:

> While on paper it can be suggested that less formal proceedings will save money, there is no factual support to back up this suggestion. The time and effort of preparing a "conference hearing" may very well equal that spent in preparing for and presenting a formal adversary hearing. ... In fact, by broadening the term "order", it is suggested that it is more likely that the cost of government will substantially rise, regardless of the type of forum used to adjudicate, while at the same time decision making will be hampered and delayed to avoid the necessity of the costs of a hearing.

OTHER SUGGESTIONS

The commentators on this first portion of our consultant's background study on administrative adjudication also addressed other matters not included in the study and made suggestions for reform. These include:

(1) Agency investigative discovery powers should be addressed. Earl E. Sullaway of Department of Fair Housing and Employment (Exhibit 1)

(2) Alternative dispute resolution mechanism as part of the administrative adjudication structure. Sanford Svetcov and Charlotte Uram of San Francisco (Exhibit 7)

(3) Whether, within an adjudication, different procedures might be available for the determination of "legislative" and "adjudicative" facts. Legal Division of Public Utilities Commission (Exhibit 13)

(4) Allocation of burden of proof in administrative adjudications. Gregory A. Thomas of Natural Heritage Institute (Exhibit 24)

The staff would reserve these matters for consideration at appropriate points during the study.

Respectfully submitted,

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