#N-103

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First Supplement to Memorandum 90-36

Subject: Study N-103 - Administrative Adjudication (Central Panel--more information)

We have received the following information relevant to the issue of the central panel of administrative law judges:

(1) Letter from Paul Wyler, Los Angeles Administrative Law Judge (Exhibit 1). Mr. Wyler encloses material relating to the issue, some of which we have either reproduced or referred to in the main memorandum. Mr. Wyler also summarizes some of the concerns at pages 2-3 of his letter, and at page 4 makes a "pilot project" recommendation, analyzed below.

(2) Letter from Malcolm C. Rich of Chicago Council of Lawyers (Exhibit 2), author of the book of comparative data on central panel systems, excerpted in the main memorandum. Mr. Rich analyzes the portion of Professor Asimow's study dealing with the central panel.

(3) Testimony in 101st Congress on S. 594 (Administrative Law Judge Corps Act). This consists of statements of witnesses before the Senate Judiciary Committee's Subcommittee on Courts and Administrative Hearing Practice (Senator Heflin presiding, June 13, 1989). We have not reproduced the various statements, which generally are not helpful for our present purposes. Predictably, agency representatives from the Department of Justice and the Social Security Administration opposed adoption of a federal central panel. Administrative law judge representatives from the National Conference of Administrative Law Judges, the Federal Administrative Law Judges Conference, and the Association of Administrative Law Judges supported adoption of a federal central panel; a representative of the Forum of United States Administrative Law Judges opposed it. An administrative law practitioner (John T. Miller, Jr., of Washington, D.C.) supported its adoption.

The concept of a pilot or experimental project is new. The object of the pilot project would be to test the potential cost savings of an expanded central panel, and whether the benefits of the expanded panel would outweigh the disadvantages. Mr. Wyler does not offer any details of how such a project would be set up.

The staff wonders whether this sort of procedure is needed. We already have something better than a pilot project in the existing California central panel and in central panels in other states. The general conclusion here and elsewhere is that the central panel works fairly well. We don't have detailed cost data, but that could probably be obtained with some added time and money. It seems like a more efficient expenditure of resources to gather more data on existing central panel systems than to set up a new pilot project, if more information is thought to be desirable. However, the staff believes we already have plenty of data on which to make decisions; it appears to us to be more a policy than a factual issue.

The staff has one added thought on this matter. Although Professor Asimow's study recommends against a wholesale removal of agency administrative law judges to the central panel, the study also suggests a few areas where removal would be appropriate:

> One example may involve prosecutorial disputes in the horse racing industry that are not presently heard by central panelists. These involve exclusion from racetracks and suspension of licenses. See Aroney v. HRB, 145 CA3d 928, 193 CR 708 (1983); Morrison v. HRB, 205 CA3d 211, 252 CR 293 (1988); Jones v. Superior Court, 114 CA3d 725, 170 CR 837 (1981). Another candidate might be the Insurance Commissioner's power to issue a cease and desist order. Ins. C. § 1065.1-1065.7. I hope that responses to this study will identify additional functions appropriate for transfer to the panel.
>
> Asimow, Administrative Adjudication: Structural Issues 48 n. 96 (October 1989)

If we do make some of these suggested removals to the central panel, we can treat them like pilot projects. That is, we can determine what sort of information and data would be useful, and then collect the information and data before and after removal to the central panel.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

PLEASE REPLY TO:
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April 3, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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RE: ADMINISTRATIVE LAW STUDY, ADMINISTRATIVE ADJUDICATION - THE CENTRAL PANEL CONCEPT

Dear Sirs:

This letter is being written by myself as an individual and not on behalf of any government agency or bar association.

I enclose herewith the following materials which may be of interest:

1. A copy of a pamphlet prepared by the National Conference of Administrative Law Judges regarding the issue of the central panel in the federal government;

2. From a book which I have previously referred to, namely a book by Malcolm Rich and Wayne Brucar, published by the American Adjudicature Society, entitled The Central Panel System for Administrative Law Judges: A Survey of Seven States, which book I recommend the Commission and its members should study and analyze, a photostatic copy of the last chapter thereof, called "Summary and Conclusion", pages 83-86;

3. A letter from the said Malcolm Rich to me, which I requested he prepare after sending him a copy of Professor Asimow's report, particularly the central panel remarks of Professor Asimow. I did not tell Mr. Rich what to write but I asked him to comment on those portions of Professor Asimow's report regarding whether an expanded central panel system should be adopted in California. As you know, Mr. Rich is one of the co-authors of the book referred to in the previous paragraph.

4. I previously sent to you the front pages of two bills that have been introduced in the Congress, S-594 and HR-1179 in the 101st Congress, First Session. I could supply the entire copy of the bills to the Commission, if it desires, but it should be pointed out that with respect to the question of expertise, the bill provides for separate divisions of the administrative law judge corps for various substantive topics. Judges would be assigned to these areas of specialization after the administrative law judge corps was established so that the question of expertise would be handled in that fashion and there would be no loss of expertise.

In addition to the materials above set forth, the commission may consider, if it desires, other studies that have been made. I understand that the State of New Jersey has prepared a study regarding the central panel system in its state and that study may be available, or should be available, to the Commission. Professor Asimow's footnote number 39 refers to a number of states that have adopted the central panel system. The Commission may wish to write to some or each of these states to obtain information from those states as to the operation of their central panels, their success, their benefits, the costs and other problems that may have arisen with respect to the functioning of the central panel in their states and what developments have occurred therein.

It should be pointed out that Professor Asimow conducted surveys of administrative law judges in several agencies as to whether or not they favor a central panel system. He did not conduct any survey of the litigants before these judges as to whether or not these litigants felt they were receiving a fair trial, felt that the judges are independent of their agencies and have other concerns regarding the appearance or actual independence of those judges. The Commission may wish to conduct a survey of these litigants.

In connection with the central panel concept, the following considerations should be kept in mind. The arguments for the central panel are as follows:

1. The public will perceive that they will be getting greater due process in their hearings. The separation of the judges from their agencies will provide greater appearance of independence of the judge. The appearance of independence is just as important as the actual independence;

2. It is believed that there will be a substantial tax saving or saving of public funds in the administrative process by the adoption of the central panel system in that there will be less duplication of efforts, less duplication of systems and facilities and of personnel;

3. A lesser consideration, but one that might be considered, is that this will avoid "burn out" among administrative law judges. Furthermore, an administrative law judge who is hearing the same cases day in and day out develops a certain institutional bias which may be prevented by rotation in the hearing process, namely giving that administrative law judge opportunity, on occasion, even if there is a specialization in the central panel, to hear cases involving other agencies;

4. A lesser consideration, although it has been mentioned, is that the administrative process will be demythesized. At present, when the administrative law judge, who is an expert in conducting a hearing involving an agency representative who is also an expert, the litigant on the other side who is unsophisticated or a generalist feels that he is involved in some sort of mystical or esoteric process. If the judge is a generalist or the agency representative is required to explain the process at the hearing, there will be greater understanding and greater awareness by the public that the public is receiving a fair hearing.

The arguments against the central panel system are:

1. The present system seems to work so don't change it.

2. The central panel system will erode the expertise of the administrative law judges, forcing administrative law judges to hear cases which they are not familiar with;

3. The tax savings or savings of costs are illusory because an experienced or expert administrative law judge will be able to conduct the hearing process with greater rapidity and efficiency than a generalist judge who is required to learn each subject as it comes along.

As a matter of theory or principle, I believe that the arguments in favor of the central panel outweigh those against the central panel, especially if it is understood that the central panel system will still allow for specialization or expertise arrangements in that the judges who are assigned to the central panel may still be assigned generally to their areas of expertise or certain areas of specialization.

For the foregoing reasons I urge the commission to reject the views of Professor Asimow and to recommend an expended central panel system for all administrative adjudications in California.

However, because of uncertainties as indicated above, in the alternative I request that the Commission consider the adoption of a "pilot project" or "experimental project" in this area to test the benefits and costs, and the advantages or disadvantages of an expanded central panel system in California. Exactly how this "pilot project" or experimental system would work I will leave to the Commission. Pilot projects have generally been established for a limited period of time, in a limited geographical area, or in a limited subject matter or jurisdiction. A pilot project would test the potential cost savings of an expanded central panel project, and whether the benefits of that expanded central panel project would outweigh the disadvantages that may be argued against it.

I therefore recommend that the Commission recommend the establishment of an expanded central panel project among the administrative agencies and adjudications in California, or, in the alternative, that it recommend a "pilot project" in this area with certain limitations and parameters as considered advisable by the Commission.

Sincerely,

PAUL WYLER
Administrative Law Judge

PW:kc
Enclosures

Please reply to:

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March 14, 1990

Paul Wyler
Administrative Law Judge
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Dear Judge Wyler:

You asked me to respond to a report prepared by Professor Michael Asimow regarding the central panel concept. As you know, the concept of the central panel evokes an often vigorous debate about not only the merits of this concept but the role of the administrative law judge in general. I am not prepared to discuss the details of how a central panel system can or should be implemented in California. I will, however, discuss the points made by Professor Asimow and suggest some additional items that you and other persons interested in the California central panel model should consider.

At the outset, let me point out that I do not disagree particularly with the points made by Professor Asimow. The central panel system is more compatible with some agencies than with others. But there are benefits to a central panel approach that were not mentioned in the report that I reviewed. These more general benefits cut across the type of agency involved and serve to promote a better administrative law system in general. It will be the work of interested persons in California to contrast these more general benefits with the negatives discussed by Professor Asimow. I will, in this letter, discuss both the points that he makes and these additional benefits.

## The Positives and Negatives of the Central Panel Approach

In 1983, Wayne Brucar and I stated in our publication on the central panel:

> The place of the central panel within the administrative process can be defined only after there is a thorough understanding of the duties and responsibilities of state ALJs and agency officials alike. Without such an understanding, the advantages and

disadvantages of the central panel will remain speculative.[1]

In 1990, state administrative adjudication is still not as thoroughly studied as it should be, and the advantages and disadvantages of the central panel are still speculative. But the following factors are considerations discussed by Professor Asinow as well as by other researchers, practitioners and judges.

Budgetary Considerations

Proponents of the central panel concept claim that because the central panel more efficiently allocates ALJs, the system is less expensive than assigning ALJs permanently to one agency. Larger agencies will not have to keep all the ALJs they need during peak periods and smaller agencies will have ALJs available to them. Professor Asimow dismisses this budgetary saving in California because of the workloads of non-OAH agencies. However, even if the bigger non-OAH agencies will not have ALJ time to spare, proponents of the central panel discuss additional sources of budgetary savings.

For example, a central panel will allow the elimination of costly duplication of administrative functions such as the bookkeeping related to the employment and evaluation of ALJs. Also, locating ALJs in one office will allow administrative cost-cutting innovations to be implemented.[2] A central panel may also have a greater incentive to seek cost-cutting measures in the administrative hearing process since this is its sole endeavor.

The Need For Specialized Expertise

The need to have ALJs with specialized expertise is a formidable issue to those debating the merits of the central panel approach. Some proponents of the central panel claim that allowing ALJs to be "generalist" judges allows these ALJs to always approach a problem with a fresh perspective. Opponents of the central panel see this approach as diluting the effectiveness of the administrative hearing process. But it is my understanding that existing central panels often assign ALJs on the

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[1]M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES (1983), at 14.

[2]For a futher discussion of advantages and disadvantages of the central panel, see Lubbers, "A unified corps of ALJs: a proposal to test the idea at the federal level," 65 Judicature 266 (1981), citing Digest of Report of Committee on Independent Corps of ALJ (Appendix to Report of the Committee on the Study of the Utilization of Administrative Law Judges - "La Macchia Commission Report," U.S. Civil Service Comm'n, 1974).

basis of expertise. It has been the goal of some central panel directors to provide enough training so that an individual ALJ may hear more than one type of case. But this is quite different from establishing the ALJ as a generalist judge who is ready to hear any type of case. In addition, a specialized corps of ALJs may be located within the central panel. For example, there may be central panel ALJs who hear nothing but worker's compensation cases. The hearing process thereby recognizes the need for specialized expertise in some areas without giving up the advantages of the central panel. Furthermore, state legislatures in some central panel states require the central panels to consider specialized expertise when ALJ assignments are made.

The Appearance of Bias and the Evaluation of ALJs

Administrative adjudication must both provide a fair proceeding for litigants and provide justice expediently. In attempting to do both, ALJs and agency officials are part of an ongoing tension between these sometimes competing goals. Sometimes this tension is expressed in the public domain (such as in the area of Social Security hearings where the agency attempted to place production quotas and other restrictions on its ALJs) but more often the tension is underlying. It is my understanding that when pressure is applied by agencies to their ALJs, it is accomplished through subtle means rather than expressed production or other quotas. As long as the agency has the power to evaluate the ALJ and make salary adjustments, the potential for subtle or not so subtle pressure is always present. A central panel provides a more objective environment for the evaluation of ALJ performance.

I agree with Professor Asimow that there is a more compelling case for a central panel for agencies that exercise conflicting functions such as prosecution and adjudication. But I must add that the appearance of bias issue goes beyond just what occurs in the hearing room. The central panel approach, in providing for evaluation and salary recommendation decisions to emanate from the central panel rather than from the agencies for which the ALJ hears cases, recognizes and attempts to eliminate the potential for both the appearance of as well as actual bias.

Additional Considerations

In addition to the considerations raised above, there are other potential advantages associated with the central panel system. For example, because the central panel is concerned exclusively with administrative hearings, it has an added incentive to collect objective and thorough statistics on the hearing process. And if the central panel itself does not perform this function voluntarily, the state legislature may make this endeavor a mandatory function which would thereby give the legislators a better abilty to make realistic appropriations for administrative hearings. In addition, a central

panel provides an opportunity for those involved with the administrative hearing process to help design and implement alternative dispute resolution procedures through the central panel.

There are other potential advantages to the central panel approach, as well. For example, a central panel, because ALJs are housed in one location, may be in a better position to provide more objective and thorough training to ALJs. Furthermore, an objective of many existing panels is to seek a uniform set of hearing procedures so that administrative hearings will be more consistent, and some central panel directors have been active in seeking legislative reforms of the administrative hearing process.

Conclusions

Professor Asimow has discussed some of the critical plusses and minuses of the central panel approach. The central panel concept does raise a tension between the role of the ALJ as a quasi-judicial figure who must have specialized expertise versus the ALJ as a generalist administrative judge. He is correct that there are no indisputable data showing actual cost savings associated with the central panel approach. Data on state administrative hearings are often either non-existent or incomplete.

But there are additional advantages associated with the central panel approach which need to be factored into the analysis. There are potential budget savings because the central panel can streamline the administrative aspects of conducting administrative hearings. In addition, a central panel provides a more objective environment for the evaluation of ALJs and decisionmaking regarding proposed salary modifications. There can be a stronger emphasis on training of ALJs within the central panel and a centralized housing of ALJs allows the development of a more uniform set of hearing procedures. And the central panel approach also provides a centralized location from which to seek legislative changes seeking reforms of the administrative hearing process and from which to seek alternative dispute resolution procedures.

The minuses associated with the central panel approach in California must be balanced against the actual and potential benefits. I have not attempted to do this. But I think it important to add that the notion of a central panel system is not an all or nothing proposition. Each state that has enacted a central panel has created a unique system. California should seek to pick and choose those aspects that are beneficial to its administrative process. In this regard, you should note that central panels have been enacted on a voluntary basis with each agency having the power to join or reject the panel approach. Some states require their central panels to consider specialized expertise when ALJs are assigned to hear cases. Other panels include ALJs that have specialized expertise in

one subject matter, such as in worker's compensation cases. Thus, California could have a central panel system that recognizes the need for specialized expertise in at least some areas but also benefits from the advantages of a central panel approach.

I hope this letter is of some use to you. Please contact me if you wish a more detailed analysis or if you have questions.

Sincerely,

Malcolm C. Rich

Malcolm C. Rich