Memorandum 91-6

Subject: Study N-106 - Fact Finder Impartiality (Consultant's Background Study)

CONSULTANT'S BACKGROUND STUDY

The latest installment of Professor Michael Asimow's background study prepared for the Commission on administrative adjudication relates to "Impartial Adjudicators: Bias, Ex Parte Contacts and Separation of Functions". The study is organized as follows:

APPENDIX

Model State Administrative Procedure Act of 1981
§§ 4-202, 4-213, 4-214, 4-215
California Government Code
§§ 11512, 11513.5
California Code of Civil Procedure
§ 170.1
Federal Administrative Procedure Act
§§ 554, 556, 557

Professor Asimow will be present at the Commission meeting to summarize his study and recommendations.

COMMENTS ON BACKGROUND STUDY

Copies of the study were distributed to Commission members in January. The study was also circulated to interested persons for comment at that time, with an indication that comments would be considered by the Commission at its meeting. To date we have received comments from the following persons:

William B. Eley, Senior Staff Counsel, Alcoholic Beverage Control Appeals Board (Exhibit 1)
John M. Huntington, Assistant Attorney General, and Ron Russo, Deputy Attorney General, Department of Justice (Exhibit 2)
The Hon. Mr. Justice Zelling, C.B.E., Law Reform Committee of South Australia (Exhibit 3)
Ken Cameron, Attorney at Law, Santa Monica (Exhibit 4)
Michael B. Day, Acting General Counsel, Public Utilities Commission (Exhibit 5)
William R. Attwater, Chief Counsel, State Water Resources Control Board (Exhibit 6)
Cindy Rambo, Executive Director, State Board of Equalization (Exhibit 7)
Daniel Louis, Senior Staff Counsel, Supervisor, Department of Social Services (Exhibit 8)

The full text of the comments appears in the Exhibits. The substance of the comments is summarized below.

General Remarks

The State Water Resources Control Board (Exhibit 7) feels that generally speaking, the study is well done; "it has given us valuable insights regarding issues we have faced for years." Justice Zelling of

the Law Reform Committee of South Australia (Exhibit 3) in general agrees with Professor Asimow's conclusions.

The California Public Utilities Commission (Exhibit 5) takes issue with the assumption that rules appropriate for disciplinary and certain licensing proceedings should also apply to "individualized ratemaking". Individualized ratemaking cases ordinarily involve policy more than disputed facts; they are neither clearly adjudicatory nor completely legislative. "CPUC submits that it is inappropriate to ban CPUC decisionmakers on an across-the-board basis from having the kinds of contacts that legislators would be permitted if they were deciding similar questions."

The State Board of Equalization (Exhibit 6) notes that Professor Asimow's recommendations are based on the concept of separation of adversarial from adjudicative functions within an agency. "The fundamental flaw is that the executive function cannot be fractured into an executive and judicial function, under a single executive authority. The analysis ignores the basic concepts (1) that the executive administers, (2) that the executive has an inherent power to correct its own errors, and (3) that administration is not prosecution." Moreover, SBE believes it inappropriate to delegate to its employees powers greater than it could reserve to itself; SBE would oppose any change in administrative procedure that would limits its authority vis-a-vis its own employees. "The Board disagrees with the principle that 'professional factfinders' are in some way able to reach conclusions which are superior to those reached be persons directly responsible to the electorate." The letter from SBE does not specify which of the recommendations in Professor Asimow's study are objectionable from this perspective.

Exclusive Record

Professor Asimow recommends that, consistent with existing California case law, findings of fact should be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in the proceeding.

The CPUC (Exhibit 5) agrees that findings of fact must be based exclusively on the record.

The State Water Resources Control Board (Exhibit 7) is concerned that the exclusive record requirement should not be construed to preclude consideration of specialized knowledge of the adjudicator, and prior knowledge of the adjudicator, about the matter before it, noting that State and Regional Board members are appointed in part for their expertise in water resource matters. The statute should recognize that the adjudicator may use factual information known to the adjudicator, which should be disclosed on the record. The statute should also recognize the right of the State Board, when reviewing a decision of a Regional Board, to look at any relevant evidence. The following language is offered on these matters:

> Evidence of record may include factual knowledge of the presiding officer and supplements to the record which are made subsequent to a proceeding provided that such evidence is made a part of the record and that all interested persons are given an opportunity to comment on it.

Ken Cameron of Santa Monica (Exhibit 4) urges that exclusivity of record be an inflexible rule, using Evidence Code definitions of official notice and judicial notice.

Ex Parte Communications

Professor Asimow recommends that California adopt a provision based on 1981 Model State APA § 4-213, which prohibits adjudicators from communicating ex parte with persons outside the agency having an interest in the proceeding, subject to some qualifications.

Proceedings covered. The State Water Resources Control Board (Exhibit 7) notes that as a practical matter staff of administrative agencies must be allowed to communicate with outsiders regarding matters of process. The Comment to the 1981 Model State APA would make clear that prohibitions on ex parte communications are "not intended to apply go communications made to or by a presiding officer or staff assistant, regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service; such topics are not regarded as 'issues,' provided they appear to be noncontroversial in context of the specific case." SWRCB recommends that this language be elevated to the statute.

The CPUC (Exhibit 5) believes that a ban on ex parte communications is not appropriate for it since policymaking plays a central role in much of its adjudicatory decisionmaking. "A statute prohibiting ex parte contacts in all proceedings that fit within the definition of 'adjudication' would interfere with the Commission's ability to make policy effectively. Given the complexity and multifaceted nature of the CPUC's proceedings, we submit that the CPUC should have the flexibility to craft its own rules to deal with ex parte communications." CPUC has currently released for comment a proposed ex parte rule tailored to its needs, that would permit ex parte contacts but require disclosure and an opportunity for rebuttal. A copy of the proposed rule is attached to the CPUC letter. CPUC hopes that the sort of "sunshine" approach developed in the proposed rule will permit the kinds of communication that the Commission needs to engage in effective policymaking.

Communications by ALJs with agency heads. CPUC agrees with Professor Asimow that administrative law judges should be allowed to communicate with agency heads and their advisors even after preparation of a proposed decision. "Because of the ALJs' familiarity with the record in often long and complex PUC proceedings, ALJ participation in the crafting of the final decision can be most helpful."

Subject of communications. Professor Asimow notes the problem of "status inquiries" concerning pending cases by legislators on behalf of constituents. He suggests that legislative status inquiries to adjudicators be prohibited ex parte communications. CPUC disagrees: "The CPUC, as a policymaking agency, ought to be responsive to legislative inquiries."

Ex parte communications between agency head and outside prosecuting attorney. John M. Huntington and Ron Russo of the Attorney General's office (Exhibit 2) are concerned about a rule prohibiting an agency head from receiving communications from persons outside the agency where the outside person is the Attorney General prosecuting a case for the agency. They note that on many occasions the prosecutor needs to be able to confer with the agency head in confidence to discuss details of the adjudication in proposing a settlement agreement to the agency head. This is handled under existing practice by the

implication that the other party has consented to this type of ex parte communication. This should be excepted from the ban on ex parte communications.

Ex parte communications between party and adjudicator. Mr. Huntington and Mr. Russo also note that if a party does communicate with an adjudicator on a topic such as settlement of a pending adjudicatory matter, it is inappropriate for the party to bypass the adjudicator's counsel. They suggest that this matter be clarified by statute.

Disclosure of ex parte communications received before involvement in proceeding. Professor Asimow suggests that a person who receives an ex parte communication on a matter before becoming an adjudicator on the matter should, after becoming an adjudicator, disclose the communication. See 1981 Model State APA § 4-213(d). CPUC thinks this will be unworkable. Agency personnel may communicate orally and in writing concerning a matter before it ever reaches the stage of a formal administrative adjudication. A disclosure requirement would be very difficult to comply with in such a situation. It also would discourage agency personnel "from having entirely proper communications (so as not to have to report them later) and thus tend to isolate the Commissioners from desirable policymaking input."

Absolute prohibition. Ken Cameron of Santa Monica (Exhibit 2) urges that ex parte communications be forbidden in all cases except between or among administrative law judges or their functionally equivalent officers. His objective would be to come "so close to the judicial process as to make judicial review in the usual case a superfluity".

Bias

Professor Asimow recommends codification of the rule that an adjudicator is subject to disqualification for bias, prejudice, or interest, or if a reasonable person would entertain a doubt that the adjudicator would be impartial.

Grounds for disqualification. While CPUC (Exhibit 5) agrees with Professor Asimow that the grounds for administrative disqualification should not be the same as the grounds for judicial disqualification, it

disagrees with disqualification "where a reasonable person would entertain a doubt that the judge would be able to be impartial." This standard is vague, and could disqualify adjudicators who worked in different roles in earlier cases.

Effect of existing statutes. The State Water Resources Control Board (Exhibit 7) notes the existence of several statutory provisions that attempt to avoid problems of bias. SWRCB suggests that the general statute dealing with bias should recognize the special statutes.

The rule of necessity. Existing law allows a biased adjudicator to preside if there is no other unbiased person available to preside. Professor Asimow would eliminate this rule, and provide instead that the "appointing authority" (e.g., the Governor, in the case of an agency head) must appoint a person to act in the case.

While Ken Cameron of Santa Monica (Exhibit 4) generally believes that bias is adequately covered by existing state law and regulation, he agrees with Professor Asimow that the rule of necessity should be superseded by provision for appointment of a replacement where necessary.

The California Public Utilities Commission believes it would be improper for the Governor to appoint another person to act in place of a CPUC Commissioner. Standards for appointment, terms, and removal of Commissioners are specified in the California Constitution, and the proposed statute would be inconsistent.

Who decides disqualification motions. Professor Asimow suggests that the administrative law judge should rule on disqualification motions against him or herself, but that the agency could adopt rules whereby disqualification decisions could be assigned to a different judge than the one sought to be disqualified. He also notes that seven agencies provide that the agency head or supervising administrative law judge decides disqualification motions against the presiding officer.

The Department of Social Services (Exhibit 8) wonders whether the flexibility to have a person other than the presiding officer determine the disqualification motion would extend to cases where the presiding officer is supplied by the Office of Administrative Hearings. If so, what are the pros and cons of having an agency such as DSS rule in licensing cases on disqualification motions against OAH judges?

Justice Zelling of the Law Reform Committee of South Australia offers the following alternative:

> Adjudicators in my experience frequently know or can guess in advance that a situation of apprehended bias (real or apparent) will eventuate. But if left to themselves they are quite frequently overborne by heads of departments who do not want decisions delayed, or timetables interrupted, and the adjudicator has no card to play in reply.
>
> An adjudicator who reasonably fears he will be operating in a bias situation should be allowed to take out a summons for advice and directions returnable before a judge, as to whether or not he should in the circumstances proceed or refuse to do so, and be protected if he follows the judge's advice and directions.
>
> This is a procedure well known here and in most common law countries in relation to trustees exercising quasi judicial or administrative powers.
>
> It has worked well for years in relation to trustees and I see no reason why it should not work equally well mutatis mutandis in the case of adjudicators.

Peremptory challenges. Professor Asimow recommends against peremptory challenges to administrative adjudicators for prejudice. CPUC agrees. "Given the complex nature of most CPUC cases and the time constraints involved, we believe that allowing parties to peremptorily challenge an assigned ALJ would interfere with the CPUC's ability to control its own workload."

Separation of Functions

Professor Asimow remarks that California has no statutory provisions requiring separation of prosecutory from adjudicatory functions within an agency and the case law does not provide adequate guidance. He therefore recommends that California adopt a version of 1981 Model State APA § 4-214, which prohibits persons involved in the investigation or prosecution of a case from being involved in adjudication of the case.

Existing practice. The Department of Social Services (Exhibit 8) agrees with Professor Asimow's recommendation, noting that DSS has practice separation of functions for a number of years in cases where the department has chosen not to adopt the decision of the administrative law judge. "Both the adjudicator and the adjudicator's

advisor within the department do not communicate with individuals who are appropriately classified as adversarial, unless the communication is disclosed to the respondent, or respondent's counsel."

William B. Eley, Senior Staff Counsel with the Alcoholic Beverage Control Appeals Board (Exhibit 1), sent copies of two decisions referred to in his letter. In each of these cases the Chief Counsel for the Department of Alcoholic Beverage Control wore two hats, acting as prosecutor to revoke a liquor license, and when the ALJ's proposed decision imposed a lesser penalty, signing the Department's final decision overturning the ALJ decision and revoking the license. On review by the ABC Appeals Board, the Board found an improper combination of functions, remarking that the adjudicative and prosecutorial functions of a regulatory agency may be required to be kept more separate than they were in former years. "In our view, an attorney who appears to be at the apex of an administrative agency's legal staff, and who wore the 'prosecutorial hat' at an evidentiary hearing before an ALJ, and who argued in vain for outright revocation at the conclusion of the hearing conducted by the ALJ, should not be involved in the agency's subsequent rejection of the ALJ's proposed decision and/or the agency's ultimate order of outright revocation under Government Code §11517(c)."

It is not clear whether Professor Asimow or the 1981 Model State APA would go this far, where the Chief Counsel merely signed the Department's final decision without actively participating in the making of the decision. The Comment to the 1981 Model State APA notes that the requirement of separation of functions is intended to apply to "a person who has personally carried out the function, and not one who has merely supervised or been organizationally connected with a person who has personally carried out the function." Mr. Eley's letter raises the issue whether the appearance of lack of separation should be prohibited, as well as the fact of lack of separation.

Staff members with organizational links to adversaries. The State Water Resources Control Board (Exhibit 7) points out the situation they are faced with, where the State Board provides staff attorneys to assist in prosecutions by the Regional Boards; by virtue of their participation in an adversarial role, the attorneys could be precluded

from advising the Regional Board during its deliberations. "Thus the result of following the separation of power principals is that the Board members themselves will not have a legal advisor since it is impractical and too expensive to assign two attorneys to each Regional Board--one to advise staff and one to advise the Regional Board." SWRCB believes it is important that statutory language adopted to institutionalize separation of functions principals be flexible enough not to impact the ability of agencies to function in situations such as this. The language of 1981 Model State APA § 4-214 proposed by Professor Asimow appears to have sufficient flexibility to accommodate these concerns.

CPUC, on the other hand, would find such a limitation unworkable. Cases before the CPUC may involve highly technical matters in which only a few persons have the necessary expertise. Cases can extend over many years, and staff may serve in different capacities within CPUC or may move from one division to another of the CPUC during that time. "While we recognize that separation of functions is an admirable goal, the statutory provision recommended to achieve that goal seems more appropriate for disciplinary and similar proceedings than for individualized ratemaking cases at the CPUC, which often involve highly technical issues and continue for long periods of time. Given the work that the CPUC does, the proposed statute would interfere with the CPUC's effective use of technical staff and deprive the Commissioners of needed advice."

Restrict review of administrative law judge decisions. Ken Cameron of Santa Monica urges the following approach:

> Separation of functions can be accomplished by providing that all cases must first be heard by an administrative law judge whose decision on matters of fact is final, unless appealed. Members of Board type agencies would be restricted, as to sua sponte review, to matters of law.

Command Influence

Professor Asimow recommends that the presiding officer may not be the subordinate of an investigator, prosecutor, or advocate in the case. But an advisor to the presiding officer could be a subordinate.

If the entire staff would be precluded from acting as presiding officer under these rules, the agency would go outside (possibly to the Office of Administrative Hearings) for a hearing officer.

DSS (Exhibit 8) agrees with the concept of allowing a subordinate of an adversary to act as advisor to the adjudicator. "In light of constraints such as the size of staff and the needs of efficiency, we agree this issue should be left to each individual agency to determine whether such a narrow constraint would be beneficial for the particular agency."

CPUC (Exhibit 5) addresses this problem by having a separate ALJ Division. The Chief ALJ reports to the Executive Director and Commissioners and is not subject to supervision by adversarial personnel. But they are concerned that the command influence rules not be drafted in such a way that a person who had acted in an adversary role in a particular case would later be precluded from serving as Chief ALJ if the case were still ongoing. Likewise, the Governor should not be precluded from elevating the Commission's General Counsel to the post of Commissioner, as has occurred in the past.

Ken Cameron of Santa Monica (Exhibit 4) does not believe command influence rules will solve the problem of impartiality. He urges a central panel instead--"Command influence can be prevented only by putting all hearing officers (ALJ's) into a general agency whose head is completely separate from other Departments of State government."

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA PETE WILSON, Governor

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
1001 Sixth Street, Suite 401
Sacramento, CA 95814

February 1, 1991

Professor Michael Asimow
School of Law
University of California, Los Angeles
Los Angeles, CA 90024

Subject: Impartial Adjudicators

Dear Professor Asimow:

Enclosed for your perusal are two accusation-type cases recently decided by the Alcoholic Beverage Control Appeals Board that may be of interest in conjunction with the subject of Impartial Adjudicators. In each case, the Chief Counsel of the Department of Alcoholic Beverage Control wore the "prosecutorial hat" at the evidentiary hearing conducted by an administrative law judge from the Office of Administrative Hearings; the ALJ proposed a penalty short of outright revocation; pursuant to Government Code §11517(c), the ALJ's proposed decision was rejected by the Department of ABC; the latter then issued its own decision--signed by the Chief Counsel--and ordered outright revocation. In Montejano (1990) AB-5990, see pp. 7-10. In Quintana (1990) AB-5977, see pp. 10-13.

Sincerely yours,

William B. Eley

WILLIAM B. ELEY
Senior Staff Counsel
(916) 445-4005
ATSS: 485-4005

cc: John Demoully, Executive Secretary,
California Law Revision Commission

John W. Spittler, General Counsel, PERB

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February 4, 1991

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Sterling:

Re: STUDY ON IMPARTIAL ADJUDICATION BY MICHAEL ASIMOW
FILE NO. N-106

In reviewing Professor Asimow's study on ex parte communications, we felt one area had not been adequately addressed. In essence, the proposal prohibits all ex parte communication with the adjudicator of a pending proceeding. We have no quarrel with this general principle. As a practical matter when we, as attorneys for an agency, have agreed to a settlement with the party representing a licensee, part of our job is to sell that agreement to the adjudicator whether a board or an agency head. To do that frequently requires us to disclose perceived weaknesses that may exist in our case. If the settlement is rejected, we, of course, do not want those perceived weaknesses known to our opponent. We have taken the position that whether specifically set forth in the settlement proposal, it is at least implied that the other party has consented to this type of ex parte communication. Under the study proposal, it is not clear if that consent would make an exception to the rule.

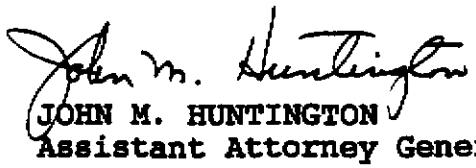
Addressing another common problem, we also believe that ex parte communications by a party to an adjudicator on topics such as settlement of a pending adjudicatory matter and bypassing that adjudicator's counsel is also inappropriate. At one time, the State Bar refused to apply the exception allowing contact with a public officer or

board to the rule prohibiting contact with a party represented by counsel when the public entity was performing an adjudicatory function. (See Opinion No. 1984-82 of State Bar Committee on Professional Responsibilities.) Whether this opinion survived the Revised Rules of Professional Conduct of the State Bar is unknown, but the reasoning would appear to apply.

We respectfully request that these two areas be clarified.

Sincerely,

DANIEL E. LUNGREN
Attorney General



JOHN M. HUNTINGTON
Assistant Attorney General

RON RUSSO, Supervising
Deputy Attorney General

JMH:RR:mac

Memo 91-6

LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

EXHIBIT 3

Study N-106

FROM THE CHAMBERS OF THE CHAIRMAN:
THE HON. MR. JUSTICE ZELLING, C.B.E.,
JUDGES' CHAMBERS,
SUPREME COURT,
ADELAIDE S.A. 5000
~~PHONE: 217 0451 EXT. 724~~

28. ii. 91

Nathaniel Sterling Esq.
Assistant Executive Secretary,
California Revision Commission.
Palo Alto.

Dear Sir,

Thankyou for your letter of January 17 regarding Professor Aronson's study on impartial adjudicators.

In general I agree with his conclusions.

May I make one suggestion where he discusses the problems inherent in challenges for bias (pp. 49ff.)

Adjudicators in my experience frequently know or can guess in advance that a situation of apprehended bias (real or apparent) will eventuate. But if left to themselves they are quite frequently overborne by heads of departments, who do not want decisions delayed, or timetables interrupted, and the adjudicator has no court to play in reply.

An adjudicator who reasonably fears he will be operating in a bias situation should be allowed to take out a summons for advice and directions returnable before a judge, as to whether or not he should in the circumstances proceed or refuse to do so, and be protected if he follows the judge's advice and directions.

This is a procedure well known here and in most common law countries in relation to trustees exercising quasi judicial or administrative powers.

It has worked well for years in relation to trustees and I see no reason why it should not work equally well mutatis mutandis in the case of adjudicators.

Yours sincerely,

Howard Zelling

Memo 91-6

EXHIBIT 4

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

March 8, 1991

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

Re: Professor Asimow's Study of 1/7/91

Dear Mr. Sterling:

My comment on the latest portion of Professor Asimow's Study may be summarized by my saying that the objective of administrative adjudication should be to come so close to the judicial process as to make judicial review in the usual case a superfluity. Of course, judicial review will always be needed to correct errors of law or to prevent miscarriages of justice.

I do not therefore concur in the opening statement (page 1) that "...administrative adjudication is only one facet of the regulatory process by which an agency carries out a legislative mandate..." That statement is historically true but insufficient and incomplete.

To point up my general position, as stated above, I urge the following:

1. Record exclusivity must be an inflexible rule, using Evidence Code definitions of official notice and judicial notice.

2. Ex parte communications must be forbidden in all cases except between or among administrative law judges or their functionally equivalent officers.

3. Bias is adequately covered by existing state law and regulation except that the "rule of necessity" should be supplanted by providing for appointment of a replacement or replacements where necessary.

4. Separation of functions can be accomplished by providing that all cases must first be heard by an administrative law judge whose decision on matters of fact is final, unless appealed. Members of Board type agencies would be restricted, as to *sua sponte* review, to matters of law.

5. Command influence can be prevented only by putting all hearing officers (ALJ's) into a general agency whose head is completely separate from other Departments of State government.

I wish the Commission success in the difficult task of accomplishing these objectives.

Sincerely yours,

KEN CAMERON

KC:lk

cc: Michael Asimow, Professor,
UCLA School of Law

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

CA LAW REV. COMM'N

MAR 25 1991

RECEIVED

March 22, 1991

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

Dear Chairman Arnebergh:

Re: Comments on Background Study on Administrative Adjudication: Adjudicatory Impartiality

The following are the comments of the Legal Division of the California Public Utilities Commission (CPUC) on Professor Asimow's background study on adjudicatory impartiality. They are presented for the consideration of you and your fellow Commissioners at your meeting on April 11-12. Although the CPUC is currently exempt from the Administrative Procedure Act (APA), and believes that that exemption ought to continue, we submit these comments because your Commission is currently studying proposals that would amend the APA and make the CPUC subject to it.

General Comments

The CPUC takes issue with the study's assumption that rules that may be appropriate for disciplinary and certain licensing proceedings should also apply to "individualized ratemaking" (the setting of rates for a single utility). While individualized ratemaking bears a certain superficial resemblance to these other proceedings, the study generally ignores the significant differences.

Both individualized ratemaking and these other proceedings fit within the Law Revision Commission's current definition of "adjudication" because they are both agency actions of particular applicability that determine legal interests of specific persons where a trial-type hearing is required. (See Asimow Study at 29; §§ 610.310, 640.010 of 3/1/91 draft Act.) However, individualized ratemaking cases are really quite different from disciplinary proceedings like the PATCO case (which the study discusses at pages 6, 30-40) or the hypothetical case concerning whether an applicant has the qualifications necessary to receive a license (which the study discusses at pages 52-58).

As the study recognizes, "[m]any issues in ratemaking cases involve policy rather than disputed facts". (Study at 12, n.25.) Indeed, much of the testimony in individualized ratemaking cases is expert testimony on policy issues or questions of legislative fact. Testimony concerning disputed issues of adjudicative fact

is much less important in ratemaking proceedings than in the other kinds of proceedings that the study discusses. Nor do ratemaking cases generally involve the imposition of punitive penalties, as disciplinary cases do. Nevertheless, the study seems to argue that because trial-type hearings are required to resolve any disputed issues of fact that may arise in individualized ratemaking, decisionmakers must isolate themselves from all contact with outsiders and agency staff who act as adversaries, just as if these were disciplinary proceedings or other kinds of cases in which policymaking does not play such a central role. (Study at 12-13, see also 65.) The CPUC submits that the same kinds of rules are not appropriate.

The study also argues that individualized ratemaking cases are "adjudicatory" and not "legislative", because they involve the "making of a rate for a single utility, based on specific facts about that utility and applying general rules adopted by the Commission to the particular case." (Asimow Study at 12, n.24, citing Strumsky v. San Diego City Employees Ret. Ass'n., 11 Cal. 3d 28 (1974).)[1] This description does not accurately reflect much of what goes on in individualized ratemaking. Individualized ratemaking does not just involve the application of pre-existing general rules to specific facts about a particular utility. In individualized ratemaking cases the CPUC also has to resolve many important issues, not on the basis of pre-existing rules, but based on its consideration of important policy questions.[2]

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1 Compare Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3d 891, 909 (1979). "The fixing of a rate and the reducing of that rate are prospective in application and quasi-legislative in character. . . . In contrast, reparation looks to the past with a view toward remedying primarily private injury, and is quasi-judicial in nature." This "prospective" versus "backward looking" distinction may be more useful in dividing CPUC proceedings into quasi-legislative and quasi-judicial proceedings than the Strumsky test. As will be explained in text above, CPUC proceedings are not so easily divided into those that set general rules and those that apply them.

2 Even initial licensing cases at the CPUC may turn more on policy issues concerning whether and to what extent competition should be allowed in a given field, as opposed to the qualifications of the person or company seeking the license.

The CPUC's Decision 86-01-026 (20 Cal. P.U.C. 2d 237), in Pacific Bell's 1986 general rate case, illustrates how individualized ratemaking cases must resolve many issues based on policy considerations, not pre-existing rules. For example, that decision determined: when ratepayers should not pay for Pacific Bell's costs of defending anti-trust suits (20 Cal. P.U.C. 2d at 292-93); the extent to which ratepayers should pay the salaries of highly-paid executives at Pacific Bell's holding company (20 Cal. P.U.C. 2d at 330-31); the extent to which ratepayers should pay for other costs associated with Pacific Bell's new holding company structure (20 Cal. P.U.C. 2d at 264); and whether Pacific Bell should charge a markup when it provides services to its affiliates, and how much that markup should be (20 Cal. P.U.C. 2d at 267-67).[3] In an earlier decision in that same Pacific Bell general rate case, D.85-08-047, the CPUC had to decide important policy issues relating to depreciation, including whether it was a good idea to allow Pacific Bell to amortize its $1.5 billion theoretical depreciation reserve deficiency and whether Pacific Bell should be allowed to switch to the equal life group depreciation method. (See 18 Cal. P.U.C. 2d at 608-09.)

As the above examples illustrate, individualized ratemaking cases involve numerous policy determinations and are not simply "adjudicatory", even under the Strumsky test. Accordingly, the CPUC submits that it is inappropriate to ban CPUC decisionmakers on an across-the-board basis from having the kinds of contacts that legislators would be permitted if they were deciding similar questions.[4]

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3 It often would not be practical to decide such policy issues in a separate "rulemaking" proceeding applicable to a whole class of utilities. Many of the policy issues may only apply to the one utility. Even if the issues are of more general interest, the CPUC's proceedings would grind to a halt if such policy issues, having arisen in the course of an individualized ratemaking proceeding, could not be resolved until completion of a separate rulemaking proceeding.

4 Even in individualized ratemaking cases, the CPUC is not just a "neutral arbiter" between contesting adversaries, but has an affirmative duty to set sound policies that will ensure that adequate utility service is available at reasonable prices. (Compare the study's description of adjudication as involving a "neutral arbiter" of "adversarial presentations" (Study at 19).)

Exclusive Record

We agree with the study's recommendation that findings of fact must be based exclusively on the record.

Ex Parte Communications

We believe that the study's recommendations concerning ex parte communications are not appropriate for the CPUC. As explained above, much of the CPUC's workload that would be considered "adjudication" under the Law Revision Commission's current definition actually consists of individualized ratemaking and other kinds of cases in which policymaking plays a central role. Accordingly, we submit that CPUC Commissioners and their advisers should not be subject to a total statutory prohibition on ex parte communications, that apparently was drafted primarily with other kinds of proceedings in mind. Rather, we believe that the CPUC should be able to craft its own rules governing ex parte communications, rules that are designed specifically for the kinds of cases that the CPUC handles.

When a Commissioner has a policy concern about an issue in an individualized ratemaking case, ex parte communications may provide the most efficient way for the Commissioner to have his or her concerns answered. An en banc oral argument before the Commissioners may provide a forum in which such policy concerns can be addressed. However, due to time and scheduling constraints, such en banc arguments can only be held in a small number of the most important cases.

Moreover, the same policy issue will often arise in several different formal CPUC proceedings, as well as in informal long-range planning.[5] If one of these formal proceedings were subject to the proposed statute totally prohibiting ex parte contacts, then Commissioners and their advisers would be unable to have any informal oral discussions about that issue with any party to that case or with anyone with an interest in the outcome of that proceeding. Thus, a statute prohibiting ex parte contacts in all proceedings that fit within the definition of "adjudication" would interfere with the Commission's ability to make policy effectively.

Given the complexity and multifaceted nature of the CPUC's proceedings, we submit that the CPUC should have the flexibility to craft its own rules to deal with ex parte communications. In

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5 The Study acknowledges this problem at pp. 35-36, & n.81.

fact, the Assigned Commissioner in R.84-12-028 (Rulemaking considering changes in the CPUC's Rules of Practice and Procedure) has just released a Proposed Ex Parte Rule for comment. (The Assigned Commissioner's Ruling is attached at the end of this letter.) The proposed rule requires disclosure of ex parte contacts made during the decisionmaking phase of contested CPUC proceedings. (Rulemaking proceedings and investigations other than enforcement proceedings are excluded from the proposed rule.) The disclosure must include "a full description of the communication and its content" and written materials must be attached. Parties will then have "the right to effective written or oral rebuttal of any of the matters raised in such communication". It is hoped that this "sunshine" approach will permit the kinds of communication that the Commission needs to engage in effective policymaking, while giving parties notice of ex parte communications and an opportunity to respond.

In the past, the CPUC has issued a number of different ex parte rulings to govern specific proceedings. The proposed generic rule similarly permits the CPUC to tailor ex parte rules to meet the particular needs of specific proceedings. Because the CPUC's approach does not rely on an inflexible statute, it permits the CPUC to modify its rules about ex parte contacts if experience shows that changes are needed.

For all the reasons explained above, we believe the CPUC should not be subject to the proposed ex parte statute. Nevertheless, because the study recommends applying such a statute to the CPUC, we wish to make a few more detailed comments about the proposal.

In his preliminary discussion Prof. Asimow defines an ex parte communication as an off-the-record communication between a person outside the agency and an agency decisionmaker. (Study at 5-6.) Nevertheless, the proposed statute covers all "parties", which would certainly include the CPUC's Division of Ratepayer Advocates when it appears as a party in a case. (See Study at 29-30.)

We agree with Prof. Asimow that Administrative Law Judges (ALJs) should be allowed to communicate with Commissioners and their advisers even after preparation of a proposed decision. (Study at 33-34.) Because of the ALJs' familiarity with the record in often long and complex PUC proceedings, ALJ participation in the crafting of the final decision can be most helpful.

We believe that status inquiries by legislators should not be prohibited. The CPUC, as a policymaking agency, ought to be responsive to legislative inquiries. (Compare Study at 36-37.)

The proposal that adjudicators place into the record communications received before serving that could not have been

properly received while serving seems unworkable. As pointed out above, the same or similar issues repeatedly arise in both informal CPUC activities and in formal proceedings, and some of these formal proceedings fall within the Law Revision Commission's current definition of "adjudication" while others do not. As a result, even under the proposed statute, Commissioners and their advisers might properly receive numerous communications both oral and written about an issue arising in informal proceedings and in formal proceedings not subject to the ex parte statute. These communications might occur over a period of years. However, as soon as that issue also arose in a formal proceeding subject to the statute, Commissioners and their advisers apparently would be obligated to try to remember all of these communications, both oral and written, and to reduce the oral communications to writing. (See Study at 27-28, & n. 62.) Such a requirement would therefore either unduly distract Commissioners and their advisers from their other duties or would discourage Commissioners and their advisers from having entirely proper communications (so as not to have to report them later) and thus tend to isolate the Commissioners from desirable policymaking input.

Bias

We agree with Prof. Asimow that incorporation of the standards for judicial disqualification would cause problems. As he notes, CPUC proceedings often involve the same parties and similar issues year after year; adjudicators who worked in different roles in earlier cases should not be disqualified. (See Study at 44.)

We disagree with Prof. Asimow's suggestion that adjudicators be disqualified "where a reasonable person would entertain a doubt that the judge would be able to be impartial." (Study at 45.) We believe this standard is too vague. It runs the risk of disqualifying, or at least calling into question, adjudicators who worked in different roles in earlier cases.

We also believe that it would not be proper for the Governor to appoint other persons to act in place of CPUC Commissioners if a majority of the Commissioners were disqualified. (See Study at 47.) Section 1 of Article XII of the California Constitution requires that the Governor appoint the Commissioners with the approval of the Senate, for staggered 6-year terms. It further provides that a vacancy is filled for the remainder of the term and that the Legislature may remove a member for corruption. The study's suggestion seems inconsistent with these constitutional provisions.

We agree with Prof. Asimow that any statute should not provide for peremptory challenges to ALJs. (Study at 50-51.) Given the

complex nature of most CPUC cases and the time constraints involved, we believe that allowing parties to peremptorily challenge an assigned ALJ would interfere with the CPUC's ability to control its own workload.

Separation of Functions

As the study notes (Study at 64), the CPUC has created separate divisions to engage in advocacy (Division of Ratepayer Advocates) and advise the Commissioners (Commission Advisory and Compliance Division). However, this institutional separation of functions does not apply to all the kinds of entities that the CPUC regulates. There is only a partial separation of functions in the regulation of transportation companies and no such institutional separation of functions for the regulation of water utilities. One reason why the CPUC does not have separate advocacy and advisory staffs for water utility regulation is because a relatively small number of staff are involved in the regulation of water utilities (as compared with energy and telephone utilities). The necessary staff expertise would be stretched too thin if there had to be separate advocacy and advisory staffs in this area.

The study's recommendation on separation of functions does not require separate staffs, but does disable individuals who have once served as adversaries from later serving as decisional advisers in the same proceeding. This presents serious problems for the CPUC, because, in some of the highly technical areas involved in CPUC cases, only one or a few individuals may have the necessary expertise.[6]

CPUC ALJs had to address this problem when they issued a ruling governing the earlier phases of the 1986 Pacific Bell general rate case. This ruling required disclosure of contacts between adjudicators and parties (both inside and outside the agency). This ruling exempted from the disclosure provisions certain kinds of contacts with advocacy staff initiated by CPUC decisionmakers.[7] The ALJs explained that they ordinarily

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6 The Study notes this problem at page 56.

7 Among the contacts exempted from disclosure were contacts to "check proposed decision language and calculations for accuracy" and to "quantify the impacts on particular rates and revenue requirement premised on given inputs" and to "obtain an objective technical understanding of the interrelationship of the various results of operations elements".

used advisory staff to provide technical support to the extent feasible, but that without this exemption for certain contacts with advocacy staff, "given the limited overall level of staff resources, we could be virtually hamstrung in trying to prepare decisions expeditiously." (ALJ Ruling of July 1, 1985.)

The study's recommendation ignores the fact that many CPUC proceedings continue for years. For example, the 1986 Pacific Bell general rate case, discussed above, commenced in January of 1985 and is still ongoing now, over six years later. Seventy-two different decisions have been issued in that case in the interim. Under the study's recommendation, any staff member who had served as an adversary in an earlier stage of the proceeding would be unable to provide advice to the Commissioners in a later stage of the proceeding. This would likely deprive the Commissioners of necessary advice.

Moreover, the CPUC frequently transfers staff between the Division of Ratepayer Advocates and the Commission Advisory and Compliance Division to optimize staff development and respond to changing workloads. If an individual who had acted as an adversary in an earlier phase of a long-ongoing proceeding could never provide decisional advice later on, rotating staff in this manner would be difficult, if not impossible.

In short, while we recognize that separation of functions is an admirable goal, the statutory provision recommended to achieve that goal seems more appropriate for disciplinary and similar proceedings than for individualized ratemaking cases at the CPUC, which often involve highly technical issues and continue for long periods of time. Given the work that the CPUC does, the proposed statute would interfere with the CPUC's effective use of technical staff and deprive the Commissioners of needed advice. Accordingly, the proposed statute should not apply to the CPUC.

Command Influence

The CPUC has a separate ALJ Division. The Chief ALJ reports to the Executive Director and the Commissioners, and is not subject to supervision by the Division of Ratepayer Advocates or the General Counsel. However, we are concerned that the proposed statutory language might prohibit certain experienced persons from assuming the post of Chief ALJ. As pointed out above, some proceedings that fall within the Law Revision Commission's current definition of "adjudication" continue for many years. It appears that, under the proposed statutory language, a person who had once been an adversary in such a proceeding could not not supervise the ALJ Division until that proceeding had concluded. (Otherwise no ALJ could act in the case.) For similar reasons, the proposed statutory language might call into question the governor's authority to elevate the Commission's General Counsel

to the post of Commissioner (something that has been done in the past).

We thank you for this opportunity to comment on Professor Asimow's background study on adjudicatory impartiality.

Sincerely yours,

Michael B. Day
Acting General Counsel

Enclosure

MBD/JTP:cip

cc: President Eckert
Commissioners

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own Motion for purposes of compiling the Commission's rules of procedure in accordance with Public Utilities Code Section 322 and considering changes in the Commission's Rules of Practice and Procedure.	R.84-12-028 (Filed December 19, 1984)

ASSIGNED COMMISSIONER'S RULING

After careful consideration, I believe the time has come to revisit the question of adoption of a generic rule governing ex parte contacts in Commission proceedings. This is not a new issue in this rulemaking docket. In 1986 the Commission held workshops, drafted a generic rule, and solicited comments, but deferred final action in order to gain experience with its newly adopted rules governing "Decisions and Proposed Reports" (Rules 77 through 77.5). Since that time, the Commission has adopted ex parte rules in specific proceedings on a case-by-case basis on its own motion or in response to requests by parties.

For a variety of reasons, we now wish to consider a change to the Commission's previous case-by-case approach. We now have extensive experience with the proposed decision/comments process, and it is difficult to see how an ex parte rule would not complement that process. Indeed, parties should address how the Public Utilities Code § 311 comments process might be improved if a generic ex parte rule, along the lines of that proposed in this ruling, is adopted. In addition, as we consider the introduction of competition to many of the industries we regulate, our proceedings are becoming increasingly complex and controversial. Given the high stakes, the participation of many parties representing diverse interests is not unusual. It is important that the Commission maintain both the full appearance and reality of due process and fair access for all parties appearing before it.

Attached to this ruling is a proposed generic rule governing ex parte communications in defined Commission proceedings. Parties should review the proposed rule and file comments in this docket on or before April 22, 1991. I have requested the Administrative Law Judge Division to review the comments and to make a recommendation for the consideration of the full Commission.

In preparing their written comments, the parties should focus on the following issues, as well as any others they believe the Commission should consider:

1. Scope of the Ex Parte Rule

The proposed rule's primary mechanism is public disclosure of substantive (not procedural) communications BETWEEN Commissioners, Commissioners' advisors, the Chief Administrative Law Judge, Assistant Chief Administrative Law Judges, or any assigned Administrative Law Judge AND any employee, counsel, or agent of any party to any contested proceeding, except rulemaking proceedings and investigations on the Commission's own motion, excluding enforcement proceedings, following submission of a proceeding.

Parties should comment on the proposal's disclosure mechanism, as well as its differentiation between substantive and procedural communications. Parties may wish to comment on the issue of whether ex parte communications should be subject to disclosure from the commencement of a proceeding. To that end, a definition of "commencement of a proceeding" is included in the proposed rule.

In addition, parties should address the proposal's coverage of "contested proceedings" and enforcement proceedings, and its exclusion of rulemaking and other investigations initiated on the Commission's own motion.

Finally, parties should address the adequacy of the decisionmaker and party definitions. The proposed rule covers the

Division of Ratepayer Advocates, but does not cover Commission Advisory and Compliance Division (CACD) staff members who may advise decisionmakers; parties should indicate whether they believe CACD staff members should be subject to the ex parte rule in certain circumstances, and if so, under what conditions. CACD should comment on this issue as well.

2. **Reporting Mechanism**

The proposed rule places the reporting obligation on the party, whether the communication is initiated by the party or the decisionmaker. The proposal also outlines a reporting mechanism which requires a docket office filing and service of the filing on all parties, within 5 working days of the communication. Since it is desirable to make the reporting obligation as simple, effective, and nonburdensome as possible given the strict time limits involved, parties should comment on the proposed reporting mechanism, including its allowance of the right to effective written or oral rebuttal, with these goals in mind.

Although the proposed reporting mechanism is patterned after rules the Commission has previously imposed on a case-by-case basis, it is worthwhile to consider alternative reporting mechanisms. For example, "Notices of Ex Parte Communication" might be filed with the Docket Office but not served on parties. Under this procedure, the Notice would appear in the Daily Calendar, and would be available to parties for review in the Commission's Docket Offices in San Francisco, Los Angeles, and San Diego.

Parties should also comment on the adequacy of the information to be included in the Notice of Ex Parte Communication, and should suggest alternatives, if they believe the proposed rule can be improved in this area.

3. Definitions

Parties may also file comments on the adequacy of the definitions included in the proposed rule.

IT IS RULED that parties shall file an original and twelve copies of their comments on the proposed generic ex parte rule attached to this ruling, with certificate of service, on or before April 22, 1991. The Commission Advisory and Compliance Division shall also follow this procedure in filing its comments. A copy of the current service list is attached to this ruling to assist the parties in fulfilling their service obligations.

Dated March 22, 1991, at San Francisco, California.

/s/ PATRICIA M. ECKERT
Patricia M. Eckert
Assigned Commissioner

Proposed Ex Parte Rule

a. No Decisionmaker shall have any oral or written communication with any Party to any contested proceeding, except rulemaking proceedings conducted pursuant to Article 3.5 of the Commission's Rules of Practice and Procedure, and investigations on the Commission's own motion, excluding enforcement proceedings, concerning any substantive issue involved in the proceeding, unless the communication is reported within 5 days. Communications limited to scheduling and procedural inquiries need not be reported. This Rule shall apply from the submission of a proceeding to the Commission to the date of issuance of a final order in that proceeding. It does not apply to communications made prior to submission.

b. Reportable communications shall be reported by the party, whether the communication was initiated by the party or decisionmaker. They shall be reported within 5 working days of the communication by filing a "Notice of Ex Parte Communication" (Notice) with the Commission's Docket Office (pursuant to the applicable Rules for filing pleadings), complete with a certificate of service on all parties. The Notice shall include the following information:

(1) the date, time and location of the communication, and whether it was oral, written or a combination;

(2) the identity of the recipient(s) and the person(s) initiating the communication;

(3) a full description of the communication and its content, to which shall be attached a copy of any written material or text used during the communication.

c. Any party shall have the right to effective written or oral rebuttal of any of the matters raised in such communication, as prescribed by the Administrative Law Judge.

d. For purposes of this Rule, the following definitions apply:

(1) "Ex parte communication" means a written or oral communication on any substantive issue in a contested proceeding, between a party and a

decisionmaker as described in paragraph a. above, outside the hearing room and outside the presence of other parties;

(2) "Decisionmaker" means any Commissioner, Commissioner's Advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, or any Administrative Law Judge assigned to the proceeding;

(3) "Party" means any interested party, applicant, respondent, complainant, defendant, intervenor, protestant, or Commission staff of record in a proceeding (but not other members of the Commission staff), and their agent(s) or employee(s).

(4) "Commencement of a proceeding" is the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint, or the adoption by the Commission of an order instituting investigation.

(5) "Submission of a proceeding" is as described in Rule 77 of the Commission's Rules of Practice and Procedure.

e. The Commission may also impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

f. In addition to the above policy, the Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue a ruling governing ex parte contacts tailored to the needs of any specific proceeding.

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
P.O. BOX 942879 SACRAMENTO, CALIFORNIA 94279-0001
(916) 445-3965

March 22, 1991

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

Dear Mr. Sterling:

We are in receipt of your letter of January 17, 1991, by which you distributed Professor Michael Asimow's study of January 1991, titled "Impartial Adjudicators: Bias, Ex Parte Contacts and Separation of Functions".

The State Board of Equalization is a constitutional agency, all of whose members are elected by direct vote of the people. The Board administers almost 20 excise tax laws, generating more than $20 billion in revenues annually.

It remains the position of this agency, as expressed to the Commission on earlier occasions, that it would be inappropriate to extend to all state agencies a general set of rules concerning administrative adjudication, without regard to specific functions performed, standards of judicial review applicable to individual agencies, and source of authority of the "agency head".

The State Board of Equalization is a revenue agency. A tax is not a penalty. Procedures appropriate to licensing or to civil penalty proceedings, which as a general rule affect only the individual party to the proceeding, have historically not been applicable to tax assessment proceedings, where the question at issue is ordinarily a question of statutory interpretation applicable to all taxpayers.

With respect to taxes, oral hearings are provided by statute only with respect to assessments, not with respect to claims for refunds. Judicial review is not "on the record." Contested matters are heard in the Superior Court on a de novo basis. The special status of tax proceedings is reflected in the California Constitution, which provides in article XIII, section 32, as follows:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

The Board certainly supports the concepts that the taxpayer ought to be given the right to be heard when the taxpayer has received an assessment with which the taxpayer disagrees, and that the Board's review procedures should be "fair". However, the Board is charged with the duty to "enforce and administer" the tax law. The Board does not have the latitude to excuse payment of the tax, without regard to the "record," if the tax is properly due.

Your report notes that "...it is deeply offensive in an adversary system that any litigant should have a opportunity to influence the decisionmaker outside the presence of opposing parties." (Emphasis added.) The Board's tax assessment procedures are not adversarial, insofar as tax programs administered by the Board are concerned. The Board's procedures are adversarial with respect to appeals filed from decisions of the Franchise Tax Board.

The report discusses "separation of functions," which refers to procedures whereby an agency separates "adversarial functions" from "adjudicative functions". The administrative process is examined with the idea in mind that the separation of powers concept (executive versus judicial) can be embedded in the administrative process. The fundamental flaw is that the executive function cannot be fractured into an executive and judicial function, under a single executive authority. The analysis ignores the basic concepts (1) that the executive administers, (2) that the executive has an inherent power to correct its own errors, and (3) that administration is not prosecution.

The Board believes it inappropriate to delegate to its employees powers greater than it would be able to reserve to itself. The Board is directly elected by the people. The Board would oppose any change in administrative procedure which would limit its authority vis-a-vis its own employees. The Board disagrees with the principle that "professional factfinders" are in some way able to reach conclusions which are superior to those reached by persons directly responsible to the electorate.

Our representatives will attend your meeting in Sacramento on April 11, 1991 and would be available to answer any questions which you may have about our agency, its mission and our procedures.

Sincerely,

Cindy Rambo
Executive Director

CR:sr

Memo 91-6

EXHIBIT 7

Study N-106
MAR 25 1991
RECEIVED

State of California

Memorandum

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

Date: March 22, 1991

William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL
From : **STATE WATER RESOURCES CONTROL BOARD**

Subject: PROFESSOR ASIMOW'S BACKGROUND STUDY ON ADMINISTRATIVE LAW

The purpose of this memo is to comment on Professor Asimow's report on adjudicatory impartiality. This report was reviewed by several attorneys on our staff. Generally speaking, we all felt that the study was well done and that it has given us valuable insights regarding issues we have faced for years.

The State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards (Regional Boards) exercise the regulatory powers of the State in the field of water resources. The State and Regional Boards exercise adjudicatory powers in a wide variety of circumstances, including the issuance of permits and licenses and in various enforcement actions. The State Board also exercises an appellate review function where persons petition for review of Regional Board actions. The State and Regional Boards are "non-APA" agencies. Decisions of the State and Regional Boards are made by the Board members following noticing, hearing, and meeting requirements.

Our comments are keyed to Professor Asimow's organizational headings:

1. Exclusive Record

The exclusive record requirement should not be construed to preclude consideration of the following: specialized knowledge of the adjudicator and prior knowledge of the adjudicator about the matter before it. The State and Regional Board members are appointed in part upon their expertise in water resource matters. Water Code Sections 175 and 13201. These experts often rely on their

technical expertise in making decisions. While the Model State Administrative Procedure Act (MSAPA) 4-215(d) recognizes that this expertise may be utilized in evaluating evidence, it is practical reality that this expertise includes factual knowledge itself. In a similar vein, Board members may possess knowledge of facts pertaining to a case before them. For example, they may have visited a waste discharge facility at a time prior to a specific proceeding about the facility. While both of these issues can be reconciled with the exclusive record requirement by "disclosure on the record", it is recommended that the MSAPA mention them specifically.

Water Code Section 13320(b) entitles the State Board to look at any relevant evidence when reviewing a Regional Board action. Though this evidence becomes part of the record, the MSAPA should be clarified to specifically allow such consideration.

Based on these comments, MSAPA 4-215(d) should be rewritten to add at the end: Evidence of record may include factual knowledge of the presiding officer and supplements to the record which are made subsequent to a proceeding provided that such evidence is made a part of the record and that all interested persons are given an opportunity to comment on it.

2. Ex Parte Communications

On page 10 of the report, Professor Asimow seems to imply that ex parte contacts are tolerated, sometimes encouraged, at the State Board. Both State and Regional Board members are routinely advised not to engage in ex parte contacts involving adjudicatory matters.

Practically speaking, staff of administrative agencies must be allowed to communicate with outsiders regarding matters of process. While the comment to 4-213 recognizes this reality, it is recommended that the comment be included in the text.

3. Bias

There are several statutory provisions which attempt to avoid problems of bias. For example, Water Code Sections 175.5 and 13207 prohibit Board members from participating in matters where they have a specified interest. The Political Reform Act of 1974, Government Code Section 81000 et seq. has a similar provision. Id. Section 87100. MSAPA 4-202(b) should be amended to recognize these statutory provisions.

4. Separation of Functions

This section contains some of the most difficult issues for the State Board and Regional Boards. These issues stem in large part from the fact that the State and Regional Boards have relatively small staffs. Staff members often have several duties and may serve as advocates in some matters and advisors in others. This dual function concern is particularly evident with the staff attorneys. We are also concerned with some of the practical considerations presented by the recommendations. In this vein, we agree wholeheartedly with Professor Asimow's observation that any requirements in this area should be tempered by practical considerations. Examples of such observations are:

(1) It is essential that adjudicators at all levels have the maximum access to staff advisors. (Report, page 54)

(2) Some agencies are simply too small to be so rigidly compartmentalized. Supervisors and colleagues of adversaries must be available as advisors or there would be nobody who could serve as an advisor. (Report, page 55)

(3) Staff who are neutral between the parties can be considered advisors even if they make recommendations to the adjudicators. (Report, page 58)

(4) Agencies, unlike courts, perform many functions besides adjudication. An individual should not be viewed as becoming an adversary in a particular case simply because that person engaged in non-adjudicatory activity involving the same issues or the same persons. (Report, page 60)

(5) An attorney may play an adversary role in one case but not an adversary role in a second. (Report, page 64)

MSAPA 4-214 appears to have sufficient flexibility to accommodate these concerns. While we agree with the general principal of separation of powers, such separation can cause serious problems in the functions of smaller agencies unless construed in a flexible manner. Often staff will have to make a choice between "prosecuting" the case or advising the agency in its deliberations. This choice can present problems with smaller agencies. I would like to point out one example unique to the State and Regional Boards. The State Board provides the staff attorneys for the Regional

Boards. These attorneys are headquartered in Sacramento where they have other duties. The attorneys travel to the meetings and hearings of the nine Regional Water Quality Control Boards. In enforcement cases before the Regional Boards, the attorney often performs an adversarial role by assisting the staff in preparing and presenting the cases. Therefore, the attorney seems to be precluded from advising the Regional Board during its deliberations on such cases as to any issues other than process. Thus the result of following the separation of power principals is that the Board members themselves will not have a legal advisor since it is impractical and too expensive to assign two attorneys to each Regional Board--one to advise staff and one to advise the Regional Board. Finally, some of the Regional Boards desire to meet in closed session to deliberate on matters where a hearing has been held. These closed sessions are usually held at the end of the Regional Board's regular meeting and are only one of many agenda items. If the Regional Board attorney has acted as an advocate, he or she would seem to be precluded from going into closed session with their Board members. It is difficult to explain to the Board members the reasoning behind this result since their attorney may have acted as an advisor for every other item on the meeting agenda.

Thank you in advance for considering our views. If you have any questions, feel free to call me or Craig M. Wilson at (916) 323-5344 or ATSS 473-5344.

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

DEPARTMENT OF SOCIAL SERVICES
744 P Street, M.S. 4-161
Sacramento, CA 95814
(916) 323-4701

March 22, 1991

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

I want to express the appreciation of the State Department of Social Services and myself to you and the commission members for providing the opportunity to comment on the revisions being considered for the Administrative Procedure Act. Please note that our department has two areas that concern administrative adjudication. We have a unit of administrative law judges that presides over a number of types of hearings relating to issues such as entitlements to governmental grants or assistance. In addition, the department files yearly hundreds of accusations and statements of issues related to licensure of residential and nonresidential facilities for children and adults. These licensing cases involve licensure of residential facilities for the elderly, foster care homes for children and daycare for children, as examples. These licensing hearings are heard by administrative law judges from the Office of Administrative Hearings. The enclosed comments are only related to the licensing hearings.

Firstly, the department agrees with Professor Asimow's conclusions and recommendation regarding separation of functions. The department has practiced this separation for a number of years relative to those cases for which the department has chosen not to adopt the decision of the administrative law judge. Both the adjudicator and the adjudicator's advisor within the department do not communicate with individuals who are appropriately classified as adversarial, unless the communication is disclosed to the respondent, or respondent's counsel. These disclosures are communications by which the advisor or adjudicator indicates, for example, the period in which to file arguments or rebuttal to arguments.

We agree with Professor Asimow's position that the Model State Administrative Procedure Act goes too far in prohibiting the advisor from being a subordinate to a person who is classified as adversarial. In light of constraints such as the size of staff and the needs of efficiency, we agree this issue should be left to each individual agency to determine whether such a narrow constraint would be beneficial for the particular agency.

The second comment relates to who should hear the motion to disqualify a judge for bias. Professor Asimow seems to suggest that at least for agencies that have large staffs of administrative law judges or ones that currently have the practice, the agency head or the supervising law judge should be allowed to hear such motions. Professor Asimow would provide for such flexibility by maintaining the present rule i.e., the judge who is challenged hears the motion, with provision for individual agencies to adopt a different rule.

We do not disagree with Professor Asimow's suggestion; however, the department would like to have clarified whether he is suggesting the same flexibility for agencies who do not have their own staff of administrative law judges, such as our licensing cases which are heard by the Office of Administrative Hearings. Further, our agency would like a discussion of the pros and cons of having an agency such as the Department of Social Services, in the licensing area, being able to adopt an alternative rule to have another person to determine the bias of the assigned judge.

Thank you once again for the opportunity to comment . Please let me know if there is any other way that I or the department may be of assistance to the commission.

Sincerely,

DANIEL LOUIS
Senior Staff Counsel, Supervisor

cc: Tom Wilcock
Robert C. Campbell
Lawrence B. Bolton
John Baine
Paula Mazuski
Linda Shepard