#N-107

rm223
02/26/92

Memorandum 92-22

Subject: Study N-107 - The Process of Administrative Adjudication -- Sanctions in Proceedings

Exhibit 1 is a letter from James Wolpman, Chief Administrative Law Judge of the Agricultural Labor Relations Board, urging new provisions to make clear that courts may punish contempts in administrative hearings, and to impose monetary sanctions when agency procedures are disregarded or abused.

Punishment for Contempt

Mr. Wolpman would allow courts (but not administrative agencies) to punish for contempt in administrative proceedings. There is existing authority for this in the Administrative Procedure Act, although at present administrative hearings by the Agricultural Labor Relations Board and most large agencies in California are not conducted under the APA. Section 11525 of the Government Code provides that if "any person . . . is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court . . . ." The superior court then issues an order requiring the person to appear before the court and show cause why he or she should not be punished for contempt. Our consultant, Professor Asimow, would continue Section 11525 with revisions drawn from Government Code Section 11188 to make clear that, if the court is enforcing a subpoena, the court may order compliance rather than punishing for contempt. Asimow, *The Adjudication Process,* at 35 (Oct. 1991).

We could perhaps make the court's contempt power clearer by defining "misconduct" as used in the APA in terms of the contempt statute, Code of Civil Procedure Section 1209. Such a provision might look as follows:

> Contempt
>
> (a) The agency may certify the facts to the superior court in and for the county where the proceedings are held if a person does any of the following in proceedings before the agency:
>
> (1) Disobeys or resists any lawful order.

(2) Refuses to respond to a subpoena.

(3) Refuses to take the oath or affirmation as a witness or thereafter refuses to be examined.

(4) Is guilty of misconduct during a hearing or so near the place of the hearing as to obstruct the proceeding.

(b) As used in subdivision (a), "misconduct" includes the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceedings that tends to interrupt the due course of the proceedings.

(2) A breach of the peace, boisterous conduct, or violent disturbance, that tends to interrupt the due course of the proceedings.

(3) Any other unlawful interference with the process or proceedings of an administrative agency.

(c) The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.

(d) If a person is charged with refusing to respond to a subpoena and it appears to the court that the subpoena was regularly issued, the court shall order the person to appear before the officer named in the subpoena at the time and place fixed in the order and to testify or produce the required papers. On failure to obey the order, the person shall be dealt with as for contempt of court.

(e) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt, in the same way as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Subdivisions (a), (c), and (e) continue the substance of former Section 11525 of the Government Code. Subdivision (b) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is drawn from the third and fourth sentences of Government Code Section 11188.

Attorney Discipline by Administrative Agencies

Mr. Wolpman is concerned that an administrative agency cannot suspend an attorney from practicing before it because of Hustedt v. Workers' Compensation Appeals Board, 30 Cal. 3d 329, 636 P.2d 1139, 178 Cal. Rptr. 801 (1981). In *Hustedt*, the California Supreme Court held Labor Code Section 4907 unconstitutional. Section 4907 purports to authorize the Workers' Compensation Appeals Board to suspend an attorney from practicing before the board. The court held the

California Constitution gives this power exclusively to the California Supreme Court.

Thus to permit an administrative agency to suspend an attorney from practicing before it would require an amendment to the California Constitution. The staff does not recommend this.

Many federal administrative agencies have authority to discipline attorneys, including suspension or disbarment from practice before the agency, and imposition of the contempt sanction. 4 J. Stein, G. Mitchell & B. Mezines, Administrative Law §§ 42.01, 42.02 (1991). The federal Securities and Exchange Commission may discipline attorneys, but this authority has been denounced by the Board of Governors of the American Bar Association, and the academic commentary has been generally negative. Emerson, *Rule 2(e) Revisited: SEC Disciplining of Attorneys Since* In re *Carter,* 29 Am. Bus. L.J. 155, 235-36 (1991). Apparently federal agencies other than the SEC "have had little or no occasion to invoke attorney disciplinary rules." *Id.* at 246.

Among the states, Indiana and Pennsylvania permit administrative agencies to discipline lawyers that practice before them, especially in the field of securities regulation. *Id.* at 222. The California Department of Corporations typically refers attorney disciplinary matters to the State Bar, but the State Bar has been criticized for not acting aggressively on these cases. *Id.* at 233.

On the other hand, the court in *Hustedt* cited a report of a committee of the ABA that "fragmentation of disciplinary authority within some states was a major defect in their systems, one which significantly impaired the effectiveness of disciplinary enforcement." 30 Cal. 3d at 341. The ABA committee concluded that the best disciplinary structure gives exclusive disciplinary jurisdiction to the state's highest court, with a single, specialized disciplinary agency responsible for preliminary investigation, hearing, and determination of complaints. These committee recommendations were ultimately approved by the ABA as a whole. *Id.*

The attorney in *Hustedt* was charged with using bad faith tactics for delay. In civil courts, these tactics are deterred by monetary sanctions, discussed next.

Monetary Sanctions for Bad Faith Tactics

Mr. Wolpman (Exhibit 1) wants to allow monetary sanctions for bad faith tactics in administrative proceedings, the same as in civil actions. Code of Civil Procedure Section 128.5 permits a trial court to order a party, the party's attorney, or both, to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely to cause unnecessary delay. The section also expressly applies to court-ordered arbitration (not conducted by a judge).

There is already an analogous but narrower provision in the Administrative Procedure Act (although, as noted above, most administrative hearings in California are not under the APA). Under the APA, discovery in administrative proceedings may only be enforced in superior court. Gov't Code § 11507.7. The agency cannot enforce its own discovery orders. Under Section 11507.7, the court may award court costs and reasonable attorneys' fees to a party if the opposing party or attorney, without substantial justification, refuses to comply with a proper request for discovery, files a petition to compel discovery, or fails to comply with a discovery order of the court. Our consultant recommends continuing Section 11507.7. Asimow, *The Adjudication Process,* at 33 (Oct. 1991).

The staff recommends broadening the sanction provision of Section 11507.7 to apply to all kinds of bad faith tactics, not limited to discovery. The statute could incorporate Section 128.5 of the Code of Civil Procedure, and provide for administrative proceedings the same monetary sanctions for bad faith tactics that are frivolous or dilatory as in civil actions. Although the provision would apply to "parties," the sanction would no doubt be most often applied against individual litigants, not the agency.

The staff recommends we circulate the following provision for comment:

> Bad faith tactics
>
> (a) Section 128.5 of the Code of Civil Procedure applies to proceedings under this part, subject to the limitations and procedures provided in this section.
>
> (b) A party may petition the superior court in the county in which the administrative hearing is being or will be held for an order under Section 128.5 of the Code of Civil Procedure. The petition shall be supported by an affidavit

stating facts necessary to make the showing required by that section.

(c) At least 15 days before the hearing, the petition and affidavit shall be filed, and served on the attorney for each party who is represented by an attorney and on each party not represented by an attorney. Service shall be made in the manner provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure.

(d) The party sought to be sanctioned may serve and file a written response to the petition.

Comment. This section is drawn from Section 11507.7 of the Government Code (petition to compel discovery), and is expanded to apply to all kinds of bad faith actions or tactics as defined in Section 128.5 of the Code of Civil Procedure.

Agency Self-Enforcement of Discovery Orders

As noted above, administrative agencies must go to court to get their requests for discovery enforced. Gov't Code § 11507.7. If a party continues to refuse to comply, a two-step process is necessary: The agency must first petition the court to compel discovery, then petition for contempt for noncompliance with the court order.

The federal system is essentially the same: Discovery must be enforced by a two-step process. A commentator has argued that this may cause intolerable delays -- seven years in one extreme case. Note, *The Argument for Agency Self-Enforcement of Discovery Orders*, 23 Colum. L. Rev. 215, 218 (1983). He argued that administrative agencies should be able to enforce their own discovery orders. He would give agencies power to impose discovery sanctions, including contempt. Judicial review of sanctions would await final resolution of agency action. *Id.* at 221.

The commentator noted objections, based on due process and separation of powers, to allowing agencies to impose sanctions traditionally judicial in nature. He concluded these objections were not well taken. *Id.* at 222-34. He discounted concerns on policy grounds of potential abuse of discretion by agencies and overzealous ALJ's. *Id.* at 234-37.

The staff does not recommend going so far as to give administrative agencies the power directly to impose discovery sanctions, including contempt. Neither our consultant, Professor

Asimow, nor Mr. Wolpman (Exhibit 1) have urged us to do this. Neither court commissioners, referees, nor grand juries have the power to punish for contempt. See Code Civ. Proc. §§ 259 (court commissioners), 638-645.1 (referees); *In re* Gannon, 69 Cal. 541, 543, 11 P. 240 (1886) (grand juries). See also Code Civ. Proc. § 708.140(a) (only court that ordered reference in examination proceedings may punish for contempt for disobeying order of referee); Pen. Code § 166 (contempt in presence of referee is misdemeanor).

The staff thinks Mr. Wolpman's concerns will be adequately addressed by the two proposed sections above on contempt and bad faith tactics.

Respectfully submitted,

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January 23, 1992

Edwin K. Marzec, Chairperson
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4000 Middlefield Road, Suite D-2
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Dear Mr. Marzec:

Please excuse my delay in responding to your invitation to comment on the final section of Professor Asimow's study of California Administrative Law, dealing with the Adjudication Process.

My purpose in writing is to raise two interrelated issues which are not dealt with in Professor Asimow's Study, but which I believe deserve careful consideration by the Commission in formulating its recommendations for the procedures to be applied in administrative adjudication.

Both concern the difficult and unfortunate problems which arise when the adjudicatory process is abused: the first is the issue of contumacious behavior; the second is the right to impose financial sanctions when established agency procedures are disregarded or abused.

Unlike many of the issues considered by Professor Asimow, contempt and sanctions are susceptible to uniform procedures, extending across the full range of California administrative adjudication.

While abusive behavior by attorneys, lay representatives, and litigants is not an everyday occurrence, it happens frequently enough to be of concern because it inevitably disrupts the normal adjudicatory process and creates a stressful and frustrating situation for the administrative law judge and the other hearing participants. What is needed--and what is presently lacking--is an effective mechanism for punishing the offender and deterring future misconduct. The same considerations apply to financial sanctions. Rather than go into detail, I would simply invite you to consider the attention which they have received in recent years and which, in the Federal system, has led to the adoption of Rule 11 of the Federal Rules of Civil Procedure and, in California, to a number of specific statutory changes; a good example being the modifications to

§128.5 of the Code of Civil Procedure. Believe me, we in administrative adjudication experience similar problems.

The present state of California law leaves much to be desired. Absent express statutory authority, administrative agencies have no contempt power. While I do not believe that it would be a particularly good idea for agencies themselves to wield that power, they should have the right to initiate contempt proceedings in the Superior Court. Right now, such authority--where it exists at all--is confined to the enforcement of subpoenas and final orders, and does not extend to contumacious behavior. [The one exception I am aware of is the Workers' Compensation Appeals Board; see Lab. Code §5309(c).] Nor does an agency have the power punish misconduct by suspending an attorney from practice before it; in Hustedt v. WCAB (1981) 30 Cal.3d 329, the California Supreme Court held the exclusive remedy to be a complaint to the State Bar. But the State Bar disciplinary system is not really designed to deal with that kind of problem; and, besides, it is already overburdened.

Much the same is true of financial sanctions. Without express statutory language, the imposition of financial sanctions for attorney fees is beyond the power of an administrative agency. See Bauguess v. Paine (1978) 22 Cal.3d 626; Sam Andrews' Sons v. ALRB (1988) 47 Cal.3d 157, 172-73, fn. 10. And the same is true of other financial sanctions. Yarnell & Associates v. Superior Court (1980) 106 Cal.App.3d 918. [The change in Code Civ. Proc. §128.5 which reversed Bauguess and Yarnell does not apply to administrative proceedings.]

Something obviously needs to be done in this area; and I believe that any thorough re-examination of the administrative hearing process must address these two issues.

Thank you for allowing me to submit these comments. I again apologize for my delay in getting them to you.

Very truly yours,

James Wolpman
Chief Administrative Law Judge