Study N-100 July 13, 1994

First Supplement to Memorandum 94-34

Administrative Adjudication: Comments on Tentative recommendation

Attached as an Exhibit are a letter from attorney Ed Kuwatch for the California Deuce Defenders and a letter from our consultant, Robert Sullivan.

§ 643.320. When separation required

The Department of Motor Vehicles points out that the estimated $31,000 annual cost of administrative per se hearings is only for those hearings for commercial drivers. The annual cost of all administrative per se hearings is substantially higher than that. If so, the suggested tradeoff between administrative per se hearings and seizure and sale hearings is inappropriate.

Mr. Kuwatch notes the separation of functions provision does not require two DMV employees to attend license revocation or suspension hearings, but merely requires that the duties of prosecutor and presiding officer not be performed by the same person.

§ 648.450. Hearsay evidence and the residuum rule

Bob Sullivan opposes the staff recommendation to require an objection to a finding supported only by hearsay to be raised on administrative review if there is such review, or be barred from being raised on judicial review. He has the same concern as Professor Asimow that an unrepresented person might fail to make the objection on administrative review, and thus lose the right to do so on judicial review.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

CALIFORNIA DEUCE DEFENDERS

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July 8, 1994

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Rd., Ste D-2
Palo Alto CA 94303

Re: Comment on Administrative Procedure Amendments

Dear Mr. Sterling:

I am writing both individually and on behalf of the California Deuce Defenders association with comments on your agency's proposed revisions to the Administrative Procedure Act. This is a follow-up to my previous comments sent to the Commission by letter dated January 28, 1994 (see your memo #94-19, pp. 220-227).

I - What is *Separation of Functions*?

I note in your recent memos that there is an ongoing exchange about whether or not the D.M.V.'s Admin Per Se hearings will be exempt from the separation-of-functions provisions of §643.320. The most recent mention of this issue is in memo 94-34, at page 3. This discussion has puzzled me because I have been repeatedly informed since early March by D.M.V. personnel in the Driver Safety Division that the D.M.V. intends to separate the functions of prosecutor and presiding officer in all driving privilege suspension hearings.

So I called you week before last to discuss the matter and found that the Commission was unaware of the D.M.V.'s plans. A call to the D.M.V.'s Driver Safety Division revealed the reason for the confusion. The D.M.V. reads your *separation of functions* statute as requiring two department employees **at the hearing**. This is odd, because the statute makes no reference to the number present; it only requires that prosecutor and presiding officer duties not be shared by the same person.

When I discussed this with you on Friday last week you suggested that perhaps the statue ought to include a statement that the persons performing the separate functions need not both be present at the hearing. I assume that you mean that with such statutory language, the Admin Per Se exception from the separation of functions requirement would not be necessary, since the two-person requirement that the D.M.V. apparently reads into the statute would be removed.

II - Cost Estimates Should Include Other Savings.

Another point I wanted to comment on is the statement on page 3 of memo 94-34 that, *The Department of Motor Vehicles estimates the cost of applying the separation of functions requirement to administrative per se hearings at about $31,000 annually.* Considering the millions spent on these hearings presently, this is either an insignificant sum, or a few zeros have been dropped. But in any event, D.M.V. Driver Safety Division personnel inform me that the figures provided by the D.M.V. represent no economic effects other than average hearing costs and employee wages, assuming two employees per hearing. But, though separation of functions will result in fairer hearings by more specialized personnel, no consideration was given to the reduced litigation costs that will undoubtedly come about from these reforms.

However, a comparison of past and present circumstances makes it clear that such savings will result. Prior to the operative date of the Admin Per Se laws in July, 1990, only chemical test refusal suspension actions were taken against pre-conviction drunk driving arrestees. My best memory of those now distant times is that I did a 100 to a 150 of these hearings over a 12 year period and filed administrative writs only once or twice. Most other attorneys had similar records (though there always were, and always will be, those who fully litigate every case). I believe that the comparatively low level of litigation was the result of a common perception that the hearings were fairly conducted by competent hearing officers.

Contrast this with the current situation in which a much larger percentage of suspension actions result in hearings and a much larger number of those hearings result in writs. I believe the difference in the proportion of actions that go to hearing and in the proportion of hearings that go to writs is due the unpredictability of hearing outcomes, and the wide perception of unfairness that leads to mistrust of the hearing decision.

Conceivably, increased fairness and competence at the hearings could bring about a return to previous levels of litigation, at least as a percentage of suspension actions taken, and could save millions per year in both D.M.V. costs and in state court funds. These potential savings need to be incorporated into the figures

before any realistic appraisal is made of the costs of implementing a separation-of-functions requirement on D.M.V. Admin Per Se hearings. Though exact figures would not be possible, you might reasonably conclude that implementation could be predicted to not cost a dime, and perhaps could result in substantial savings.

III - Central Panel Administrative Law Judges Are Required.

Finally, I want to once again emphatically point out that the D.M.V. is not acting in the proper role in supervising their hearing officers and the reasonable solution to the problem is a transfer of the presiding officer duties to a Central Panel of Administrative Law Judges outside the control of the D.M.V. A quick review of the previous letters to the Commission from myself and Richard Hutton (see your memo #94-19, pp.213-227), makes it clear that the D.M.V. considers these hearing officers nothing more than employees carrying out department policy, rather than as judicial officers applying law to the facts. Though there have been some improvements, the department continues to put out memos like the included #94-20 (dated May 9, 1994), related to *Wheeler v. D.M.V.* *Wheeler* had held that blood alcohol analysis reports to the D.M.V. must be signed and sworn or they are inadmissible in evidence at Admin Per Se hearings.

This California Court of Appeal opinion was filed and ordered published on March 24, 1994. Though it was thereafter immediately citeable as binding precedent with the full force of law in this state (Cal. Rules of Court, Rule 977; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 C2d 450, 20 CR 321), the D.M.V. instead, on May 9, 1994, informed "ALL DRIVER SAFETY HEARING OFFICERS", by this memo as follows: *Since Wheeler is on appeal, continue to decide each Wheeler-type case on its own merits.* What this means is that the D.M.V. had requested review in the Supreme Court and wanted hearing officers to ignore the decision while the request for review was being considered. So they illegally ordered their employees to ignore binding authority that those hearing officers were obligated by law to follow. And they did it because the hearing officers are their employees and they just don't get the idea that they can't tell them to break the law or ignore it in ruling on cases before them. **Independent hearing officers would be loyal to the constitution and laws of this state, not their prosecutorial employers.**

Citizens deserve to have their welfare and happiness and their lives and livelihoods decided fairly and impartially by unbiased presiding officers who are not directed in their rulings by the prosecutor who employs them. **It is apparent that the only way to accomplish this is to transfer hearing duties from the department to an independent agency (though a separate Hearings Division**

within the department, but not under the authority of the Driver Safety Division, may be an acceptable solution).

Conclusion

I hope you find my comments of interest and import. Unfortunately, I'm moving my offices on the days of your next meeting and cannot attend. But please let me know if I can be of further assistance.

Sincerely,

ED KUWATCH

cc: Richard Hutton, C.A.C.J. Legislative Committee
Gail Dekreon, President, California Deuce Defenders
Marilyn Schaff, Chief Legal Counsel, D.M.V.
John Quijada, Driver Safety Division, D.M.V.

DIVISION OF DRIVER SAFETY

DS 94-20
5/9/94

TO: ALL DRIVER SAFETY HEARING OFFICERS

WHEELER V DMV: UNSWORN BLOOD TEST REPORT

In this APS 0.08% BAC case, the court held that the blood test report must be sworn. The department has requested the state Supreme Court to either overturn or depublish the case. One copy for each office is enclosed for your review.

BACKGROUND

In *Wheeler*, the Orange County crime lab used its own form to report blood/urine results to the department. The form contained the analysts names and initials. There was also a certification at the bottom, which contained minor variations from the DS 367A. A copy of the lab form is attached.

The court noted the analysts "scribbled" initials next to the results. However, since the certification did not have a signature line and no full signature was anywhere on the form, the court held the form was unsworn.

PROCEDURE

Since *Wheeler* is on appeal, continue to decide each *Wheeler*-type case on its own merits.

No special stay provisions attach to cases similar to *Wheeler*. Carefully weigh each stay request on a case-by-case basis.

QUESTIONS OR COMMENTS

Call Tom McKay at (916) 657-6264, or CALNET 437-6264, with your questions or comments.

CHARLEY KENNER, Chief
Division of Driver Safety

Attachment
Enclosure

cc: Driver Safety District Managers

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Re: Study N-100

Dear Nat:

I received this memorandum. I plan to attend the July 14, 1994, meeting.

I want to offer my comment on the proposed change to section 648.450 — hearsay evidence. I think the section should be left alone. The addition of subdivision (c) is a mistake. A finding based on hearsay does not become anymore palatable simply because it was reviewed. What if the litigant is unrepresented. Is there any reason to believe he/she would make the objection at the review level having failed to make it at the hearing? The policy behind limited use of hearsay is sound. The present practice and confusion in the cases regarding the necessity of objection to hearsay needs to be clarified. The proposed statute, without subdivision (c), takes care of it. I recommend the Commission not change it.

Very truly yours,

Robert J. Sullivan
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT

RJS/jg/9418900J.SAC