Study N-100 January 25, 1995

Third Supplement to Memorandum 95-8

Administrative Adjudication: Comments of State Bar Committee on Administration of Justice and Others

STATE BAR COMMITTEE ON ADMINISTRATION OF JUSTICE

We have received comments on the proposed recommendation from the State Bar Committee on Administration of Justice. See Exhibit pp. 1-8. We will take up their comments at the meeting.

DEPARTMENT OF CONSUMER AFFAIRS

We have received comments from the following boards in the Department of Consumer Affairs opposed to the proposed intervention statute:

These comments are the same in character as those we have received from other boards in the Department of Consumer Affairs. See the Second Supplement to Memorandum 95-8.

Also attached is a similar letter from the Legal Affairs office of the Department of Consumer Affairs. See Exhibit pp. 16-18.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA
[illegible] FRANKLIN STREET
SAN FRANCISCO, CALIFORNIA [illegible]

TO: California Law Revision Commission

RE: Committee on Administration of Justice's Comments on Latest Proposed Revision to California Administrative Procedure Act

DATE: January 23, 1995

The State Bar's Committee on Administration of Justice has reviewed the advance copy of the administrative adjudication draft which incorporated the Commission's decisions made at its November meeting.

The Commission has already elected to recommend only a limited revision of the Administrative Procedure Act, and to not recommend that Administrative Law Judges be drawn from a central panel or other source outside of an agency. In light of these decisions, it appears to us that the "Bill of Rights" which begin on page 16 of the proposed new statute are of particular importance, and are the primary remaining protections for the public.

CAJ is concerned with the following issues:

1. Neutrality of Presiding Officer. This issue is dealt with in Section 11425.30 on page 18 of the proposed statute. Subparagraph (b)(2) of the statute would allow a person to serve as a presiding officer even though he or she:

> ". . .has participated as a decision maker in the determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its pre-adjudicative stage. . ."

CAJ is concerned that this injects too much of a prosecutorial flavor, which is likely to result in bias (perhaps unconscious) on the part of the presiding officer. The determination of whether there is probable cause to proceed with an administrative action is an essentially prosecutorial function. It is analogous to the determination by a deputy district attorney to file a criminal action. A person who has proceeded that far in the prosecution of a case simply should not serve as the administrative decision-maker. Allowing such a person to act as a decision-maker also undermines the concept of keeping the presiding officer free from "command influence."

2. Basis for Decision. Subsection (c) of Section 11425.50 at lines 41-43 on the bottom of page 19 of the proposed statute allows supplementing the record after the hearing is over. It is CAJ's belief that the record should not be supplemented after a hearing is over unless it is by mutual agreement, because having an opportunity to "comment" on the supplement may not be very meaningful. Such a post-hearing procedure would allow an agency to "load the record," while leaving the citizen no real opportunity to rebut. The right to "comment" does not, for example, include any right to produce opposing witnesses or evidence. CAJ therefore strongly recommends that this second sentence of subsection (c) be amended to include the following underlined language, so that the revised sentence would read:

> "Evidence of record may include supplements to the record that are made after the hearing, provided that all parties consent to the inclusion of the supplementary material and are given an opportunity to comment on it."

3. Determining What Decisions Are To Constitute Precedent. This is covered in Section 11425.60 which begins on page 21 of the proposed statute at line 17. CAJ recommends the following two revisions to this section:

a. First, that the determination as to whether a decision should be published or not should be made independently by the hearing officer (ALJ) rather than by the agency itself. Having the hearing officer make the determination would not only provide an element of independence, but would also reduce the possibility that an agency might choose to publish only those decisions which upheld a particular prosecutorial staff policy not included in regulations; and

b. If the determination to not designate a decision or part of a decision as precedent is not to be subject to judicial review, then there needs to be a prohibition against allowing administrative decisions to usurp the function of formal rule-making. The rule-making process, typically utilized in issuing regulations, generally requires a more formalized advance exposure of the proposed rule, so that affected persons have an opportunity to comment on it. An agency should not be permitted to do an "end run" around that process by an accretion of administrative decisions. CAJ recommends that the following additional clause be added at the end of the last sentence in subdivision (b) of Section 11425.60 on line 25, page 21, of the proposed statute:

> "; provided that designation of a decision for publication shall not be used to exempt from the rulemaking process any decision that is otherwise subject to invalidation as (i)

> revising or amending an existing rule or (ii) adopting a rule without which there would be no adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties."

This proposed addition is based on the decision in American Mining Congress v. Mine Safety & Health Administration (D.C. Cir. 1993) 995 F.2d 1106, 1112.

4. Ex Parte Communications. Proposed Sections 11430.20 and 11430.30 on page 23 of the proposed statute would allow ex parte communications to the hearing officer in some circumstances.

As we have previously stated, CAJ is strongly opposed to permitting ex parte communications of any kind. We would strongly recommend that:

a. No ex parte communications of any kind be allowed; and

b. Section 11430.30, which begins on page 23 at line 27 of the proposed statute, should be deleted in its entirety in all events. CAJ feels that allowing ex parte communications from agency personnel to the decision-maker carries a substantial risk of abuse.

If technical advice or other policy matters need to be tendered to an ALJ, that information should be tendered openly, so that all parties have an opportunity to comment upon it. Agency personnel do not have a corner on technical advice. The California Coastal Commission and the other conservation and water control agencies enumerated in the proposed statute should not be exempted from the prohibition. If policy or technical recommendations need

to be made to an ALJ, they can be made in a report which is made available to the affected citizenry openly, before or at the hearing. Otherwise, an agency's behind-the-scenes recommendations can materially influence an ALJ's decision, without the affected members of the public even knowing that the advice was given or that the recommendation was made. These are, after all, public agencies, and they should not be permitted to influence a decision-maker by secret communications.

5. Informal Hearing Procedure. An informal hearing procedure is undoubtedly justified in small matters or when there is no material issue of fact. There is, however, some danger in giving an agency power to issue a regulation which requires only an informal hearing procedure on all matters in a particular category. In an informal hearing, the hearing officer can limit witnesses' testimony, evidence and argument; and may also limit or entirely preclude pleadings, intervention, discovery, prehearing, conferences and rebuttal. Subparagraph (c) of Section 1145.20, at line 5 on page 34, would authorize an agency to use the informal hearing process in any circumstances in which it has so provided by its own regulation.

CAJ strongly feels that an agency should not be given the right to simply opt out of a regular hearing and to shift into the much more limited informal hearing procedure, by regulation. The provisions of subparagraphs (a) and (b) of that proposed section should suffice. If, as indicated in an earlier draft, there is a problem with one specific agency, such as the Department of Motor Vehicles, that should be dealt with by a narrow exception, instead

of simply giving all agencies the power to opt out of ordinary hearings. Otherwise, the citizens' due process rights can be seriously impaired. Even in DMV proceedings for suspension or revocation of a driver's license, there should be some modicum of due process, instead of a hearing procedure which would allow the presiding officer to make a determination on very limited evidence.

6. Intervention. Section 11507.2 on pages 57 and 58 of the proposed statute deals with intervention. The proposed procedure seems generally reasonable, but CAJ recommends two changes:

a. First, that subparagraph (e), appearing at lines 13-18 on page 58, which provides that the ALJ's decision shall "not be subject to administrative or judicial review" should be modified by adding the following at the end thereof:

> ", unless the proposed intervenor in the application for intervention claims to be a real party in interest."

If a proposed intervenor's status would really be directly impacted by a decision of the ALJ, it would seem sensible to allow such a person to intervene. If, for example, a lessee of real property were involved in a proceeding before an agency and the decision would affect the real property, the lessor should be permitted to intervene. The reciprocal would also be true.

b. CAJ is also concerned that subparagraph (a) of the proposed statute would allow an agency to opt out of the intervention process by regulation. CAJ recommends that agencies, specifically including the Coastal Commission and other land use agencies, not be permitted to be exclude intervention by regulation.

7. No Waiver of Privilege. Section 11513(c) on page 68 of the proposed statute exempts administrative hearings from the rules of evidence except as specifically provided. Subparagraph (e), beginning at line 7 on page 69, covers two completely unrelated issues:

(i) it first provides that:

> "the rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing. . ."

CAJ is concerned that this opens the door so far that if a member of the public files a complaint or otherwise appears as a witness in an administrative hearing, that the citizen may be deemed to have thereby waived all of his or her privileges (such as, but not limited to, the right of privacy) for all subsequent administrative and court proceedings. That seems unjust, and contrary to the public policy of encouraging members of the public to file complaints against licensees who violate the terms of their license. If, for example, a health care provider made sexual advances to a patient, that patient's privacy rights should not be waived for all purposes if the patient complains to the regulatory agency. The problem is not, however, limited to health care providers. If a person discloses a financial statement in an agency proceeding, the privacy right relating to that financial information should not be deemed waived for all other or future proceedings.

CAJ therefore recommends that the first clause of subparagraph (e) appearing at lines 7 and 8 be deleted and that the following be inserted in its place:

> "A person by filing a complaint with an administrative agency or testifying in an administrative proceeding

does not thereby waive any privilege or privacy rights in any other proceeding."

If a witness filed a complaint with an agency which put in issue the witness' own physical or mental health, privacy rights, etc., and then filed a civil action which involved the same issues, the filing of the civil action would put that information in issue, and would therefore properly constitute a waiver of any otherwise applicable privilege as to the items so put in issue in the lawsuit. If, however, the witness filed a complaint with an agency, but thereafter instituted no proceeding, that witness should not be deemed to have waived his or her privileges or privacy rights by the mere fact of filing a complaint or giving testimony to an agency. If he or she is called as a witness in a civil action instituted by some other person, the witness' own privileges and privacy rights should still subsist, unwaived.

(ii) The second clause of subparagraph (e), appearing at lines 9-11, which allows the presiding officer to weigh the probative value of evidence against undue consumption of time, should be put in a separate subsection, since that subject is unrelated. This clause, which is entirely appropriate, would simply import to administrative agency practice most of the policy which already underlies Evidence Code §352 in the judicial context.

Committee on Administration of Justice

By: Charles W. Willey
Chair

Consumer Affairs

BOARD OF ACCOUNTANCY
2000 EVERGREEN STREET, SUITE 250
SACRAMENTO, CA 95815-3832
(916) 263-3680

January 23, 1995

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

Re: Commission's December 1994 Staff Draft:
Administrative Adjudication by State Agencies
Intervention - Section 11507.2

Dear Commission Members:

We understand the Commission is now considering a proposal which would create a right to intervene in hearings now covered by the California Administrative Procedure Act.

The State Board of Accountancy (the Board) has reviewed proposed Section 11507.2 and opposes it. We oppose intervention because:

- We believe it would disrupt the administrative hearing by introducing additional issues and parties.

- We believe it will increase costs of enforcement actions by requiring the Board to respond to motions, attend prehearing conferences, etc.

- We believe it will cause delays in completing administrative actions.

- The potential exists for an intervening party to significantly impact the focus of the hearing. The agency thus loses control of its enforcement action which could be turned into a proceeding that lacks appropriate focus on enforcement issues relating to a particular licensee.

The provision of Section 11507.2(a) appears to fall short of allowing an agency to "opt out" because each agency would be required to go through the entire regulatory process. This is a substantial and unnecessary agency expenditure.

The current intervention proposal is not in the public interest. Current agency disciplinary actions are directed at specific unprofessional conduct. To expand the issues by allowing intervention disrupts the intended purpose of the agency disciplinary action. It would increase the costs of the hearing and delay decisions as Administrative Law Judges resolve issues presented by intervenors.

For the reasons noted above, the Board urges the California Law Revision Commission to remove Section 11507.2 (Intervention) from its legislative proposal for revision of the Administrative Procedure Act.

Thank you for your consideration.

Sincerely,

Avedick B. Poladian
President
State Board of Accountancy

LS

State of California Department of Consumer Affairs

CONTRACTORS STATE LICENSE BOARD
9835 GOETHE ROAD, SACRAMENTO, CALIFORNIA
MAILING ADDRESS: P.O. BOX 26000
SACRAMENTO, CALIFORNIA 95826

January 23, 1995

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

Dear Commission Members:

RE: Commission's December 1994 Staff Draft:
Administrative Adjudication by State Agencies
INTERVENTION - Section 11507.2

This letter is to alert you that as Registrar of the Contractors State License Board (CSLB) I am strongly opposed to the Commission's proposed amendment Section 11507.2 to the Government Code. Of major concern is the additional time and cost to handle enforcement cases and the shift in the role of enforcement from discipline of licensees to financial recovery for concerned parties.

Specifically this proposal may create:

1. difficulty in settling complaints due to a lack of understanding of the difference between administrative actions and civil actions.
2. reluctance by complaining parties to agree to stipulation, arbitration and/or mediation.
3. a rise in enforcement costs due to an increase in the number of hearings and potential for a longer time to complete legal actions.

Furthermore, I believe this proposal would not be in the interest of consumers because of the likely lengthening of the adjudication process.

Again, I oppose this proposal and am concerned that the opt out provision through the regulatory process would be lengthy and costly.

Sincerely,

Gail W. Jesswein
Registrar

cc: Derry Knight, Deputy Director, Legal Affairs
Department of Consumer Affairs
Joel Primes, Deputy Attorney General, Licensing
Office of the Attorney General

Consumer Affairs

PHYSICAL THERAPY EXAMINING COMMITTEE
1434 HOWE AVENUE, SUITE 92, SACRAMENTO, CA 95825-3291
TELEPHONE: (916) 263-2550

January 23, 1995

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

RE: COMMISSION'S DECEMBER 1994 STAFF DRAFT:
ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES INTERVENTION - SECTION 11507.2

Dear Commission Members:

The commission is now considering a proposal which would create a right to intervene in hearings now covered by the California Administrative Procedure Act. This would be very costly, disruptive and is not in the public interest.

The Physical Therapy Examining Committee (PTEC) is opposed to the proposed section 11507.2. The opposition is based on the following objections:

1) It would disrupt the administrative hearing by adding additional issues and parties.

2) PTEC would be responsible for additional hearing costs that result from the issues brought into the hearing by the intervening party.

3) Would cause delays in completing administrative actions.

4) An intervening party could commandeer the hearing. The agency thus loses control of its enforcement action which could be turned into an unmanageable ill-focused proceeding.

The opt out provision (Section 11507.2(a)) is inadequate as it would require every agency to go through the entire regulatory process. This is a substantial and unnecessary agency expenditure.

Based on the above objections, it is not felt that the current intervention proposal is in the public interest. Current agency disciplinary actions are directed at specific unprofessional conduct. To expand the issues by allowing intervention disrupts the intended purpose of the agency disciplinary action. It would increase the costs of hearing and delay decisions as administrative law judges resolve issues presented by intervenors.

Sincerely,

Steven K. Hartzell
Executive Officer

Consumer Affairs

BOARD OF VOCATIONAL NURSE AND PSYCHIATRIC TECHNICIAN EXAMINERS

2535 CAPITOL OAKS DRIVE, SUITE 205
SACRAMENTO, CALIFORNIA 95833
TELEPHONE (916) 263-7800

January 23, 1995

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

RE: Administrative Adjudication by State Agencies
Intervention -- Section 11507.2

Dear Commission Members:

The Board of Vocational Nurse and Psychiatric Technician Examiners has reviewed your proposal which would allow intervention in hearings. The Board is opposed to this proposal based upon the following facts:

1. Disrupts the administrative hearing by adding additional issues and parties.

2. Increases cost of enforcement actions.

3. Increases time to complete administrative actions.

4. Intervening party could dominate the hearing. The agency would then lose control of its enforcement action.

5. The opt out provision (Section 11507.2(a)) is inadequate as it would require every agency to go through the entire regulatory process. This is a substantial and unnecessary agency expenditure.

The current intervention proposal is not in the public's interest. Current Board disciplinary actions are directed at specific unprofessional conduct. To expand the issues by allowing intervention disrupts the intended purpose of the Board's disciplinary action. It would increase the costs of the hearing and delay decisions as the Administrative Law Judges' resolve issues presented by the intervenors.

Thank you for the opportunity to present the Board's position in this matter.

Sincerely,

Charles L. Bennett

CHARLES L. BENNETT
President

State of California Department of Consumer Affairs
SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY EXAMINING COMMITTEE
1434 HOWE AVENUE, SUITE 86, SACRAMENTO, CA 95825-3240
TELEPHONE: (916) 263-2666

January 25, 1995

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

Re: Administrative Adjudication by State Agencies - Intervention (Section 11507.2)

Dear Commission Members:

The Speech-Language Pathology and Audiology Examining Committee is in opposition to the proposed addition of Government Code section 11507.2 as outlined in the Commission's Alternate Draft dated December 5, 1994. The Committee is in full agreement with the opposition spelled out in the Department of Consumer Affairs letter written by Derry Knight, Deputy Director of Legal Affairs dated January 23, 1995.

As Derry Knight indicates in that letter, individuals involved or interested in the disciplinary actions taken by the various agencies against licensees have a number of other options open to them. To allow them an additional opportunity above and beyond the available remedies would serve no discernable value and would ultimately result in an increase in the overall cost of the licensure program. Frequently, increased costs in the operation of licensure programs result in increased costs to licensees who then pass them on to consumers.

We do not believe this is in the best interest of the consumer public and respectfully request the Commission eliminate this proposal from further consideration.

Yours truly,

Carol Richards

Carol Richards
Executive Officer

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY PETE WILSON, Governor

Department of Consumer Affairs

MEDICAL BOARD OF CALIFORNIA
1426 HOWE AVENUE
SACRAMENTO, CA 95825-3236

January 25, 1995

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

Dear Commissioners:

This letter is to express strong opposition to the proposal to allow third party intervention (Section 11507.2) in hearings covered by the Administrative Procedure Act contained in your December 5, 1994 Staff Draft (Memo 95-4).

You have already received a letter in opposition to this proposal from the Office of Legal Affairs of the Department of Consumer Affairs, and I would like to incorporate by this reference the arguments in that letter as part of this letter.

From my perspective it is hard for me to understand why such a proposal has merit. Perhaps the proposers are suggesting that third party intervenors will be able to select at random cases upon which they would like to make what they think are wide-sweeping academic arguments or that watchdogs will be able to roam the landscape of cases to call attention to procedural mistakes.

What is far more likely, however, is that the defense bar will use this potential avenue as a way of making mischief. The possibilities seem endless to recruit intervenors to add myriads of issues and challenges that can extend and aggravate cases even more than the already unacceptable time it takes to adjudicate accusations.

Surely, this proposal serves neither respondent nor consumer, for even more delay in our adjudicatory process is "justice denied."

Sincerely,

DIXON ARNETT
Executive Director

cc: Members of the Board
attachment: DCA Legal Affairs Letter

STATE OF CALIFORNIA — STATE AND CONSUMER SERVICES AGENCY PETE WILSON, Governor

Department of Consumer Affairs

LEGAL AFFAIRS
400 R STREET, SUITE 3090
SACRAMENTO, CA 95814-6200
(916) 445-4465

January 23, 1995

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

RE: Administrative Adjudication by State Agencies -- Intervention (Section 11507.2) as contained in Commission's December 5, 1994 Staff Draft (Memo 95-4)

Dear Commission Members:

This is to communicate to the Commission the opposition of the California Department of Consumer Affairs to the Commission proposal which would create a right to intervene by third parties in hearings which are now covered by the California Administrative Procedure Act. The suggestion which we object to is set forth in proposed Government Code section 11507.2 as contained in the Commission's Alternate Draft dated December 5, 1994.

We are writing on behalf of only the Department and its bureaus at this time, but you should be hearing by separate communication from a number of the licensing boards, commissions and committees which are affiliated with the Department.

Department of Consumer Affairs Interest

As you may be aware, the Department of Consumer Affairs is the umbrella agency for thirty two boards, commissions, and committees plus five bureaus. The Department and affiliated entities regulate over 180 professions and vocations, and license over 1.2 million people or entities in the State. The aggregate commitment to enforcement activities by the Department and related entities is very significant, nearly sixty percent of budgets approximating $225 million.

Given the timing, it was not possible for the various Department boards to obtain a formal position in time for your January 26 meeting. We have requested that the individual boards communicate directly with the Commission, once they have definitive direction from their policy boards. The Department itself, however, wants to be on record as strongly opposing the subject proposal.

Reasons for Opposition

The Department opposes the intervention proposal for a variety of reasons. We are concerned that the Commission is even considering such a proposal which, we believe, could unnecessarily disrupt and unduly complicate enforcement actions. The principal reasons for our opposition follow:

1. License enforcement actions are not, and should not become, a primary forum for resolution of disputes between individual parties. Other forums such as mediation, arbitration, small claims and other courts instead are primarily equipped to resolve disputes between individuals.

   Agency enforcement actions are primarily focused on unprofessional conduct and preventing harm to the citizens of California in general. Intervention will have the effect of greatly modifying this focus, by allowing interested third parties to participate, and advocate their individual interests.

2. Allowing intervention would disrupt the administrative hearing and related process by adding additional issues and parties. Requests to intervene, even if not granted, will be costly, time consuming and disruptive.

   Intervention has the potential for turning even the simplest enforcement action into an unmanageable ill-focused proceeding.

3. Third party intervention, by potentially adding new issues and interests, could be manifestly unfair to the respondent since there will be a likely need to defend against ill-defined claims which were never part of the pleadings in the action.

4. Added cost of enforcement to the already fiscally strapped government regulatory bodies is a certain outcome if intervention is allowed.

   Given agencies' finite enforcement budgets, the increased costs associated with intervention will, necessarily, have the effect of precluding some otherwise appropriate actions. Intervenors will thus effectively impact enforcement priorities.

5. Intervention motions and intervenor involvement in actions will cause even further delays in completing administrative actions. We already find ourselves frequently criticized because of the time it takes to move actions through the process.

6. The "opt out" provision (subparagraph (a) of §11507.2) would require every board, commission, committee and bureau wishing to have its actions exempt from intervention to incur the expense and time commitment required to go through the entire formal regulatory process.

Alternatives

First, we strongly urge the Commission to delete the intervention proposal. It is not in the public interest.

If the Commission decides to go ahead with an intervention proposal, changing it to an "opt in" instead of the present proposed "opt out" would be an improvement.

Conclusion

For the foregoing reasons, the Department of Consumer Affairs urges the Commission to eliminate from the staff draft the proposed addition of Government Code section 11507.2, which proposal would allow third party intervention in administrative proceedings. We believe the proposal not to be in the public interest, and would have the potential for allowing even the simplest enforcement action to be turned into an unmanageable ill-focused proceeding.

Thank you for considering our comments.

Very truly yours,

Derry L. Knight
Deputy Director, Legal Affairs