Study N-100 March 24, 1995

Memorandum 95-18

Administrative Adjudication: Issues on SB 523 (Kopp)

We have received communications relating to the following issues on SB 523 (Kopp) — the administrative adjudication bill. As a general rule, we believe it would be inadvisable to add new provisions to the bill that will generate opposition; the bill has a tough road ahead as it is.

Code of Ethics for Administrative Law Judges

The Office of Administrative Hearings has suggested that it would be desirable to promulgate a code of ethics for administrative law judges. Presumably such a code for administrative law judges would be analogous to canons of judicial ethics.

It would be a simple matter to add a provision to the law allowing OAH to promulgate a code of ethics for its administrative law judges:

> **§ 11502. Administrative law judges**
>
> 11502. ...
>
> (b) The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 *and by regulation to promulgate a code of ethics for the administrative law judges.* Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.
>
> **Comment.** Section 11502 is amended to add authority of the Director of the Office of Administrative Hearings to promulgate a code of ethics for administrative law judges.

However, it may also be desirable to make clear that other agencies have this authority as well, particularly since a provision added to the OAH statute but not to other statutes may raise a negative inference. If that is done, it is not clear whether codes of ethics should be adopted on an agency-by-agency basis, recognizing the varying circumstances of hearing officers within each agency, or whether there should be a single code of ethics adopted statewide, and if so,

whether the State Personnel Board or some other agency is proper for this purpose. These issues require further exploration, and it might not be possible to develop a satisfactory recommendation on this during the legislative process.

The staff would not proceed with either a limited or broad approach in the context of SB 523 unless representatives of administrative law judges indicate their agreement with the concept of promulgation of a code of ethics for administrative law judges.

Peremptory Challenges

Early versions of the administrative adjudication proposal allowed agencies to provide for peremptory challenge of administrative law judges, except where Office of Administrative Hearings administrative law judges are involved:

> By regulation an agency may provide for peremptory challenge of the presiding officer in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.
>
> **Comment.** This provision codifies existing practice. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

The reason for the OAH exception was the concern of OAH about its ability to reschedule administrative law judges on short notice and the potential for judge-shopping.

This provision was dropped from the Commission's final recommendation in the end because it did not fit the scheme of the final recommendation either as a general procedural provision applicable to all agencies or as a special provision applicable to the formal hearing procedure run by the Office of Administrative Hearings.

The Office of Administrative Hearings has now concluded in light of further experience that this provision would be desirable for its hearings. OAH believes that in situations where there is antagonism or distrust between a party and an administrative law judge, it is better simply to avoid the problem by allowing a peremptory challenge. While scheduling problems exist, OAH thinks it can work around them, perhaps by disclosing the scheduled judge and requiring exercise of the peremptory challenge sufficiently in advance of the hearing to allow the necessary rescheduling to be done.

In light of this change of position, **the staff thinks it would be beneficial to restore a peremptory challenge provision to the bill, provided this is not opposed by any organization**:

> **§ 11425.40. Disqualification of presiding officer for bias, prejudice, or interest**
>
> 11425.40. ...
>
> *(d) An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer.*
>
> **Comment.** Subdivision (d) adds authority for an agency to allow peremptory challenge of the presiding officer. This is consistent with existing practice in some agencies. See, e.g., 8 Cal. Code Reg. § 10453 (Workers' Compensation Appeals Board). In the case of a proceeding conducted under Chapter 5 (formal hearing procedure) by an administrative law judge employed by the Office of Administrative Hearings, this provision authorizes the Office of Administrative Hearings, and not the agency for which the Office of Administrative Hearings is conducting the proceeding, to provide for peremptory challenge of the administrative law judge.

Electronic Reporting of Proceedings

The Commission's recommendation is to amend Government Code Section 11512(d), dealing with reporting of hearings under the formal hearing procedure as follows:

> The proceedings at the hearing shall be reported by a ~~phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.~~ *stenographic reporter or electronically, as determined by the administrative law judge. If the administrative law judge selects electronic reporting of proceedings, a party may at the party's own expense require stenographic reporting.*

The Commission's reasoning, based on information provided by the Office of Administrative Hearings, is that electronic reporting is far less expensive than stenographic reporting and that the quality of electronic reporting now yields clear and error-free transcripts:

> The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improved quality of electronic recording, and with the use of multi-track recorders, monitors, and trained hearing officers, the problems of electronic recording are minimized, and the cost saving may be substantial. For these reasons, the proposed law permits the

> administrative law judge to require electronic reporting; a party may require stenographic reporting at the party's own expense.

We have received opposition to this change from a representative of the California Court Reporters Association, the California Association of State Hearing Reporters, and the Consumer Attorneys of California. See Exhibit p. 1. They note that the existing provision for electronic reporting on consent of the parties is a recent addition to the law (1983), that the Commission's comments on the quality of electronic reporting are conclusionary, and that "the quantum leap in technological advancement in computer assisted transcription available only through the use of the stenographic reporter" must be taken into consideration.

The Court Reporters Association has provided us copies of Justice Research Institute, *Court Reporting Technologies: A Cost-Benefit Analysis and Qualitative Assessment* (1992). This study was commissioned by the court reporters' national association and compares audiotape, videotape, computer-aided transcription, and computer-integrated courtroom methods of recording trial proceedings. The executive summary and the analysis and conclusions are reproduced here as Exhibit pp. 2-3. The full text of the study includes descriptions of methodology of the study, record-making technology, cost factors, and qualitative considerations. Copies of the full text of the 100+ page study are available to Commission members and will also be available for inspection at the Commission meeting. The study concludes that the computer-based technologies are more cost-effective than the audio and video-based technologies. An important factor, among others, is amenability of computer-based technologies to rapid production of a usable transcript.

The staff has a few observations about this. First, the staff agrees that computer-based reporting technologies offer great promise. We have seen them demonstrated and they are quite remarkable. (However, cost-benefit studies of reporting in judicial proceedings have limited application to reporting in administrative proceedings. In administrative proceedings conducted under the California Administrative Procedure Act by the Office of Administrative Hearings, a transcript is called for and prepared only in a small fraction of cases.)

Second, it is clear from the study provided by the court reporters that it is short-sighted to base statutory language on current technologies, since technologies are undergoing such rapid change. For example, at present it may well be cost-effective in some circumstances to use a live court-reporter

transcribing into a computer, but in the future automated voice-recognition hardware and software may be preferable.

Third, the decision as to the means of reporting should be vested in the agency responsible for preserving and preparing a record. The agency is in the best position to determine the most cost-effective means of accurately reporting the proceedings, and can take into account studies such as the one provided by the court reporters. In the case of hearings under the Administrative Procedure Act the Office of Administrative Hearings is responsible for accurate preservation and preparation of the record.

The staff believes the statute should not favor one particular reporting technique over another. The statute should make clear that computer-based technologies such as those employed by court reporters are permissible. The statute should authorize the agency responsible for preparation of the record to select the appropriate means of reporting based on cost, quality, speed, and other relevant factors. The staff would revise the existing provision along the following lines:

> **§ 11512. Presiding officer**
>
> 11512. ...
>
> (d) The proceedings at the hearing shall be reported by a ~~phonographic~~ stenographic reporter ~~. However, upon the consent of all the parties, the proceedings may be reported~~ , electronically , *by computer-based technology, or by other appropriate means, as determined by the Office of Administrative Hearings taking into account availability, cost, quality, speed, and other relevant considerations.*
>
> ...
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> **Comment.** Subdivision (d) is amended to expand the reporting options available in an adjudicative proceeding and to vest the choice of reporting options in the Office of Administrative Hearings.

Administrative Review of Proposed Penalty

Under the formal hearing procedure, an administrative law judge employed by the Office of Administrative Hearings makes a proposed decision, which includes a proposed penalty. If the agency wishes to decrease the penalty, it may do so summarily. Gov't Code § 11517(b). If the agency wishes to increase the penalty, it must order a transcript and decide the case on the record. Gov't Code § 11517(c).

We understand that an agency unhappy with a proposed penalty may be reluctant to increase the penalty because of the time and expense involved in ordering and reviewing the transcript. The Office of Administrative Hearings has suggested that the law be revised to allow an agency to increase the penalty based on the statement of the factual and legal basis of the proposed the decision, without reviewing the transcript. If this were done, the proposed decision ought also to include a statement of factors in the record in mitigation of the proposed penalty.

The staff does not believe this proposal would be acceptable to the private sector. They would feel it is important that the agency head review the record before increasing a penalty proposed by an administrative law judge who had heard all the evidence. Consequently, **the staff thinks it would be inappropriate to add such a provision to the bill** at this stage of the proceedings.

Respectfully submitted,

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Executive Secretary

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Facsimile Transmittal Sheet

To: Nathaniel Sterling

From: Frank Murphy, Jr.

Date: March 13, 1995

Fax #: 415/494-1827

Message: Mr. Sterling:

The Administrative Procedures Act was amended in pertinent part (Government Code Section 11512(d)) in 1983 to allow the use of electronic means for making of the record upon the agreement of the parties. The various conclusionary statements of the Commission's report speaking to the improvement of electronic recording overlooks the quantum leap in technological advancement in computer assisted transcription available only through the use of the stenographic reporter. The California Court Reporters Association, California Association of State Hearing Reporters, and the Consumer Attorneys of California (amongst others) will vigorously oppose this change proposed by the Commission.

Total number of pages, including this sheet: 1

If you have a problem receiving this fax, please call Joyce at (916) 441-5280.

Executive Summary

This report is based on a study of the four methodologies for making a trial court record: audio, video, computer-aided transcription (CAT) and computer-integrated courtrooms (CIC). The specific focus is on the development of a cost-benefit analysis model which examines direct costs for start-up, year one costs and a net present value calculation for a five-year time span.

After describing the salient features of each method, the report evaluates the quantitative and qualitative arguments and facts.

Principal among the report's findings and conclusions are the following:

- The introduction of limited vision technologies for making a trial court record which are not computer based is not cost efficient and delays the ultimate computerization of court record making. It also stunts opportunities for court system technology compatibility with other branches of government and the private sector.

- Shifting and hidden costs associated with audio and video technologies are substantial and should be identified and quantified in assessing these methodologies for making a trial court record. Illustrative of a shifting cost is the governmental cost of video equipment for a nine judge intermediate court which is $31,950. A significant hidden cost of any equipment is the replacement cost of major components in four to five years.

- System participants (judges and lawyers) utilizing either audiotapes or videotapes on appeal report the time required to review a record increases by a factor of three to four over the use of a hard copy transcript.

- The success of any method chosen for making a record is dependent upon the competence of the individual monitor or reporter and the effective administration of the process employed. In evaluating the system for making a trial court record, attention must be given to due process safeguards based on accuracy and accountability.

- In one respect the future is known. The microcomputer is now and will be the cornerstone of all foreseeable technologies.

VII. Analysis and Conclusions

As the cost-benefit analysis model reveals, the start-up, year one direct costs and the five year direct costs for CAT are lower than start-up or year one costs for audio. When the net present value calculations, again for direct costs only, are examined for a five year period, audio's costs exceed the cost of CAT by $8,432.00 per year for one courtroom. Once administrative overhead, the shifting and hidden costs of the equipment purchases required by intermediate and supreme court judges and staff, as well as public defenders, attorneys general and penal institutions is added, and the additional professional person hours consumed in reviewing a given audio case on appeal by the earlier referenced individuals is accommodated, then the true total cost of audio expansively exceeds the cost of CAT.

Similarly, in juxtaposing the relative cost for video and a computer-integrated courtroom, we find that the start-up cost, total direct year one cost and the cost over five years are substantially less for CIC than for a video system. When we analyzed the net present value of costs over a five year period for those two technologies, we found that the per year cost by which video exceeds CIC is $11,364.00 per year for one courtroom. Again, that figure does not reflect the additional administrative overhead expense attendant to the operation of a video court system. In one court in Kentucky where a court administrator was consumed with finding and consolidating excerpts from multiple tapes in order to prepare a record on appeal, this figure would be increased significantly. Also, recall the expense incurred by the remainder of the system for the purchase of video playback equipment and the frequently cited estimate that the record review time by all appellate participants is expanded by a factor of three to four, then the cost of video becomes substantially higher than any other method of making a trial court record.

It should also be borne in mind that, consistently, both critics and proponents identify a professionally prepared transcript on appeal as the standard for a record on appeal which is emulated and contrasted with all of the methodologies.