05/24/90

DATE & TIME:	*PLACE:*
• May 31 (Thursday) 1:30 pm - 6:00 pm • June 1 (Friday) 9:00 am - 2:00 pm	• Sacramento • State Capitol Room 2040

NOTE: Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

THURSDAY, MAY 31, 1990

1. MINUTES OF APRIL 26-27, 1990, COMMISSION MEETING (sent 5/8/90)

2. ADMINISTRATIVE MATTERS

1990 Legislative Program
Oral report at meeting

Communications from Interested Persons

More Administrative Matters at Agenda Item #14

3. STUDY N-103 - ADMINISTRATIVE LAW: ALJ CENTRAL PANEL

Memorandum 90-72 (NS) (sent 5/21/90)
First Supplement to Memorandum 90-72 (enclosed)
Second Supplement to Memorandum 90-72 (pending)

4. STUDY H - COMMERCIAL LEASE LAW

STUDY H-113 - RECONSIDERATION OF KENDALL LEGISLATION

Memorandum 90-68 (NS) (sent 5/9/90)
First Supplement to Memorandum 90-68 (sent 5/17/90)
Second Supplement to Memorandum 90-68 (pending)

STUDY H-111 - REMEDIES FOR BREACH OF ASSIGNMENT OR SUBLEASE COVENANT

Comments on Tentative Recommendation
Memorandum 90-49 (NS) (sent 5/9/90)
First Supplement to Memorandum 90-49 (sent 5/17/90)

STUDY H-112 - USE RESTRICTIONS

Comments on Tentative Recommendation
Memorandum 90-50 (NS) (sent 5/9/90)
First Supplement to Memorandum 90-50 (sent 5/17/90)

FRIDAY, JUNE 1, 1990

5. STUDY L-1040 - APPOINTMENT OF PUBLIC ADMINISTRATOR

Memorandum 90-46 (RJM) When Public Administrator Must Petition for Appointment (sent 4/12/90; another copy sent 5/8/90)
First Supplement to Memorandum 90-46 (RJM) (enclosed)

6. STUDY L-3034 - GIFTS IN VIEW OF DEATH

Memorandum 90-54 (RJM) (sent 3/23/90; another copy sent 5/8/90)

7. STUDY L-3036 - USE OF VIDEOTAPE IN CONNECTION WITH WILL

Memorandum 90-35 (RJM) (sent 3/19/90; another copy sent 5/8/90)

8. STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Comments on Tentative Recommendation
Memorandum 90-48 (RJM) (sent 5/15/90)

9. STUDY L-646 - EXERCISE OF STOCK VOTING RIGHTS BY TRUSTEES

Memorandum 90-77 (SU) (sent 5/14/90)

10. STUDY L-3009 - NONPROBATE TRANSFERS

Draft of Tentative Recommendation
Memorandum 90-78 (RJM) Repeal of Civil Code § 704 (United States Savings Bonds) (sent 5/18/90)

11. STUDY J-501 - DISCOVERY AFTER JUDICIAL ARBITRATION

Draft of Tentative Recommendation
Memorandum 90-75 (RJM) (enclosed)

12. STUDY D-327 - BONDS AND UNDERTAKINGS

Memorandum 90-74 (NS) Limitations on Personal Sureties (sent 5/15/90)

13. STUDY J-900 - SHIFTING ATTORNEY'S FEES BETWEEN LITIGANTS

Memorandum 90-55 (SU) (sent 4/17/90; another copy sent 5/8/90)

14. MORE ADMINISTRATIVE MATTERS

Handbook of Practices and Procedures
Memorandum 90-73 (SU) (sent 5/17/90)

New Topics--Defendant's Request for Plaintiff's Statement of Damages
Memorandum 90-79 (NS) (sent 5/14/90)

§§§

ad54
05/24/90

1990 LEGISLATIVE PROGRAM
Measures Introduced at Request of Law Revision Commission

Enacted

1990 Stats. Ch. 79 - Assembly Bill 759 (Friedman) New Probate Code
Prior to passing the Assembly, this bill was amended to delete the chapter that provided that the attorney fees would be reasonable rather than be determined by a statutory schedule of fees. This leaves the issue of attorney fees to be dealt with in Assembly Bill 831. The bill was further amended in the Senate to make technical amendments and to provide that the bill will not become operative unless a fee bill is enacted. State Bar Section supports.

Approved by Committee in Second House

Senate Bill 1774 (Lockyer) Urgency Probate Bill
This bill would effectuate the Commission's *Recommendation Relating to Disposition of Small Estate by Public Administrator* and would make a technical correction relating to the operative date of a 1989 enactment. State Bar Section supports. **APPROVED BY ASSEMBLY JUDICIARY COMMITTEE ON MAY 23.**

Senate Bill 1855 (Beverly) Creditors of Decedent
State Bar Section supports. **APPROVED BY ASSEMBLY JUDICIARY COMMITTEE ON MAY 23.**

Senate Concurrent Resolution 76 (Lockyer) Resolution to Continue Authority to Study Previously Authorized Topics **APPROVED BY ASSEMBLY JUDICIARY COMMITTEE ON MAY 23.**

Passed One House

Assembly Bill 831 (Harris) Trustees Fees and Attorney Fees
This bill would effectuate the Commission recommendations concerning trustee fees and attorney fees. State Bar Section supports. **Amended April 18. SET FOR HEARING BY SENATE JUDICIARY COMMITTEE ON JUNE 19.**

Assembly Bill 2589 (Sher) In-law Inheritance
State Bar no position. Amended on March 13 (technical amendment). **SET FOR HEARING BY SENATE JUDICIARY COMMITTEE ON JUNE 19.**

Senate Bill 1775 (Lockyer) Comprehensive Probate Bill

This bill would effectuate six Commission recommendations:

(1) *Survival Requirement for Beneficiary of Statutory Will.*

(2) *Execution or Modification of Lease Without Court Order.*

(3) *Access to Decedent's Safe Deposit Box.*

(4) *Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding.*

(5) *Court-Authorized Medical Treatment.*

(6) *Priority of Conservator or Guardian for Appointment as Administrator.*

State Bar Section opposes (statutory will provision). This bill will be amended to include any additional revisions the Commission decides at its May meeting to make in the Probate Code this session. **SET FOR HEARING ON JUNE 27.**

Senate Bill 1777 (Beverly) Uniform Statutory Powers of Attorney Bill

This bill effectuates two recommendations, one proposing the Uniform Statutory Powers of Attorney Act and the other relating to springing powers of attorney. State Bar Section supports. Bill was amended to delete provision providing for attorney fees in action against person who unreasonably refuses to honor power of attorney. This amendment was necessary to eliminate opposition of California Bankers Association and California Land Title Association. **APPROVED BY SENATE ON MAY 17.**

Senate Bill 2649 (Morgan) Uniform Management of Institutional Funds Act

Introduced March 1, 1990. **APPROVED BY SENATE ON MAY 10.**

MEETING SCHEDULE

May-June 1990		
May 31 (Thurs.)	1:30 p.m. - 6:00 p.m.	Sacramento
June 1 (Fri.)	9:00 a.m. - 2:00 p.m.	
July 1990		
July 26 (Thurs.)	10:00 a.m. - 6:00 p.m.	San Diego
July 27 (Fri.)	9:00 a.m. - 2:00 p.m.	
August 1990	No Meeting	
September 1990		
Sep. 13 (Thurs.)	10:00 a.m. - 6:00 p.m.	Stanford or
Sep. 14 (Fri.)	9:00 a.m. - 2:00 p.m.	San Jose
October 1990		
Oct. 11 (Thurs.)	10:00 a.m. - 6:00 p.m.	Los Angeles
Oct. 12 (Fri.)	9:00 a.m. - 2:00 p.m.	
November 1990		
Nov. 29 (Thurs.)	10:00 a.m. - 6:00 p.m.	Orange County
Nov. 30 (Fri.)	9:00 a.m. - 2:00 p.m.	
December 1990	No Meeting	

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 31-JUNE 1, 1990

SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 31-June 1, 1990.

Commission:

Present:	Edwin K. Marzec Chairperson	Bradley R. Hill
	Roger Arnebergh Vice Chairperson	Arthur K. Marshall
	Bion M. Gregory Legislative Counsel (May 31)	Forrest A. Plant
		Sanford M. Skaggs
Absent:	Elihu M. Harris Assembly Member	Bill Lockyer Senate Member
		Ann E. Stodden

Staff:

Present:	Nathaniel Sterling	Robert J. Murphy III
	Stan Ulrich	
Absent:	John H. DeMoully	

Consultants:

Michael Asimow, Administrative Law (May 31)
William G. Coskran, Landlord and Tenant Law (May 31)

Other Persons:

Ben Allamano, Executive Secretary, Agricultural Labor Relations Board, Sacramento (May 31)
Seymour R. Appleby, California Probate Referees Association, Hayward (June 1)
Richard Bower, Assistant Chief Counsel, Department of Transportation, Sacramento (May 31)
Camille Cadoo, Probate Trust and Estate Planning Section, Beverly Hills Bar Association, Beverly Hills (June 1)
Michael B. Day, Deputy General Counsel, Public Utilities Commission, San Francisco (May 31)

Ronald P. Denitz, Tishman West Companies, Los Angeles (May 31)
Elaine W. Donaldson, Chairman, Occupational Safety and Health Appeals Board, Sacramento (May 31)
Dan C. Doyle, Chief Counsel, Youth Authority, Youthful Offender Parole Board, Sacramento (May 31)
Janet M. Eagan, Executive Officer, Occupational Safety and Health Appeals Board, Sacramento (May 31)
Gary Gallery, Chief Administrative Law Judge, Public Employment Relations Board, Sacramento (May 31)
Beth Herse, Staff Counsel, Office of Statewide Health Planning, Sacramento (May 31)
Steve Jablonsky, Executive Officer, Occupational Safety and Health Standards Board, Sacramento (May 31)
Donald B. Jarvis, National Conference of Administrative Law Judges and Association of California State Attorneys, San Francisco (May 31)
Gary Jugum, Assistant Chief Counsel, State Board of Equalization, Sacramento (May 31)
Howard W. Lind, State Bar Real Property Section, Industrial and Commercial Development Subsection, Oakland (May 31)
Tim McArdle, Chief Counsel, California Unemployment Insurance Appeals Board, (May 31)
Benton Oliver, State Board of Equalization, Sacramento (May 31)
Pete Pierson, Franchise Tax Board, Sacramento (May 31)
Stephen Rhoads, Executive Director, California Energy Commission, Sacramento (May 31)
Terry Ross, State Bar Estate Planning, Trust and Probate Law Section, Mill Valley (June 1)
Willard Shank, Member, Public Employment Relations Board, Sacramento (May 31)
Stan Valkosky, Hearing Officer, California Energy Commission, Sacramento (May 31)
Brian Walkup, Legislative Counsel, State Banking Department, Sacramento (May 31)
Tom Wilcock, Chief Administrative Law Judge, Department of Social Services, Sacramento (May 31)
Jim Wolpman, Administrative Law Judge, Agricultural Labor Relations Board, Sacramento (May 31)
Shirley Yawitz, California Probate Referees Association, San Francisco
Rich Younkin, Secretary and Deputy Commissioner, Workers' Compensation Appeals Board, San Francisco (May 31)

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF APRIL 26-27, 1990, MEETING

The Commission approved the Minutes of the April 26-27, 1990, Commission Meeting submitted by the staff, subject to the following clarification:

The third paragraph on page 7 was revised to read, "The staff is to commence work on ~~the new code, giving priority to~~ the provisions relating to formalities of marriage and judicial determination of void or voidable marriage as the first matter in the Family Code project."

MEETING SCHEDULE

The Commission changed the location of the September 13-14 meeting from Stanford to Concord, the October 11-13 meeting from Los Angeles to Fresno, and the November 29-30 meeting from Orange County to Los Angeles.

BUDGET AUGMENTATION

The Assistant Executive Secretary reported that the budget augmentation requested by the Commission for the 1990-91 fiscal year for the Family Code project has been approved by the Assembly budget subcommittee but not by the Senate budget subcommittee. As a result, the Commission's budget will be resolved by a conference committee. The Senate subcommittee expressed concern that a one-time $74,000 (12%) augmentation of the Commission's budget might not be appropriate at a time when the state is facing a large deficit and there may not be sufficient funds for other important state programs.

The Assistant Executive Secretary has conferred with staff of the Senate subcommittee, who indicate that the subcommittee has completed its work and will not reconsider this matter. Membership of the conference committee has not yet been announced. The best way for the Commission to indicate to the conference committee members the need for the budget augmentation is through interested legislators. The Assistant Executive Secretary noted that Assemblywoman Speier has been instrumental in initiating the Family Code project and has committed to working for the budget augmentation in the conference committee.

After the conference committee members are announced, the Chairperson will seek to meet with Senators Keene and Lockyer, as well as with members of the conference committee (e.g. Senators Alquist and Robbins, should they be announced as members) to indicate the need of the Commission for the budget augmentation. The Chairperson also suggested conferring with Assemblywoman Speier to see whether

alternative sources or creative means of funding the project might be available should the Commission lose the budget augmentation, for example through contingency funds or a tie-in to funds that have been approved for a related program.

CONSULTANT CONTRACTS

Family Code. The Chairperson reported that he has contacted Judge Markey and Commissioner Kalinsky, both of whom have extensive experience in the family law area and both of whom have expressed a willingness to participate in the Family Code project. A formal letter should be sent to them expressing the Commission's appreciation for their involvement. The Commission may wish to contract with them as consultants to attend meetings if that appears useful as they become active on this project.

Revocability of Donative Transfer of Community Property. The Assistant Executive Secretary reported that due to the current budget shortfall, the state has imposed a freeze on outside consultant contracts. The freeze affects the contract approved by the Commission with Professor Jerry Kasner of University of Santa Clara Law School to prepare a study of issues involving the revocability of donative transfers of community property. The staff has sought an exception to the freeze, which has been denied. The staff is currently investigating three possibilities: (1) obtain "special consultant" status for Professor Kasner; (2) see if the freeze will end on June 30 with the end of the fiscal year; (3) obtain outside funding for the study (e.g., from the State Bar probate section).

1990 LEGISLATIVE PROGRAM

The Assistant Executive Secretary made the following report on the 1990 Legislative Program.

1990 LEGISLATIVE PROGRAM
Measures Introduced at Request of Law Revision Commission

Enacted

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Senate Bill 2649 (Morgan) Uniform Management of Institutional Funds Act

Introduced March 1, 1990. **APPROVED BY SENATE ON MAY 10.**

NEW TOPICS

The Commission considered Memorandum 90-79, relating to the suggestion of Judge Robert C. Todd of Orange County that the Commission study Code of Civil Procedure Section 425.11 (defendant's request for plaintiff's statement of damages). The Commission also reviewed the State Bar Litigation Section's response to the Commission's request for its reaction to this suggestion. The Commission decided it would not undertake a study of this matter.

The Commission also discussed the extent to which the Commission may or should spend time considering matters suggested by individuals. The staff noted that the Commission's authorizing legislation requires it receive and consider suggestions from judges, public officials, lawyers, learned bodies (including the Commission on Uniform State Laws), and "the public generally". The staff indicated that it uses some discretion as to what matters to bring before the Commission and what matters it refers elsewhere or returns to the sender. If the Commission is already authorized by the Legislature to study the general area to which the suggestion relates, there is no problem in the Commission working on it; also, the Commission has taken the position that it will maintain a continuing review of matters enacted on its recommendation. If the Commission is not already authorized to study the matter, the Commission's practice is, approximately annually, to consider all suggestions for new topics received during the preceding period and decide whether it will request legislative authority to study any of them.

HANDBOOK OF PRACTICES AND PROCEDURES

The Commission considered Memorandum 90-73 and the revised Handbook of Practices and Procedures attached thereto. The Commission approved the following policy on transcripts for inclusion in the Handbook:

> **Transcripts of Commission meetings.** As a general rule, transcripts will not be made of Commission meetings unless the Commission directs the staff to prepare a transcript on a particular matter and announces that decision before the discussion to be transcribed. There are two exceptions to this general policy: (1) In the case of a question as to the accuracy of the Minutes for the previous meeting, at the request of a Commissioner, the staff may prepare a transcript, for Commissioners only, of the part of the discussion as needed to resolve the issue. (2) The Commission may decide to transcribe a discussion without prior notice if all Commissioners present consent and no persons who participated in the discussion object to the transcript.

As revised, the Commission approved the Handbook attached to the memorandum.

STUDY D-327 - BONDS AND UNDERTAKINGS

The Commission considered Memorandum 90-74, relating to the possibility of requiring security of a personal surety on a bond or undertaking. The Commission decided to inquire of the State Bar committees on probate, appeals, debtor-creditor relations, and public contracts whether personal sureties are used much and the extent of problems collecting from personal sureties.

STUDY H-111 - REMEDIES FOR BREACH OF ASSIGNMENT OR SUBLEASE COVENANT

The Commission considered Memorandum 90-49 and the First Supplement to Memorandum 90-49, reviewing comments received on the tentative recommendation on remedies for breach of a commercial lease

covenant on assignment or sublease. The Commission approved the recommendation for printing and submission to the Legislature after making the following changes.

§ 1995.300. Remedies subject to express provision in lease

The following section was added to the proposed statute:

> 1995.300. A remedy provided by law for violation of the rights of the tenant or of the landlord concerning transfer of a tenant's interest in a lease, including a remedy provided in this article, is subject to an express provision in the lease that affects the remedy.
>
> Comment. This section codifies the general rule that the parties to a contract may negotiate the remedies to be applied in case of a breach of the contract. This rule is of course subject to general principles limiting freedom of contract. See, e.g., 1 B. Witkin, Summary of California Law Contracts §§ 23-36 (9th ed. 1987) (adhesion and unconscionable contract doctrines).

§ 1995.310. Tenant's remedies for landlord's breach

The last sentence of the Comment to Section 1995.310 was revised to read:

> The landlord's wrongful conduct, such as wrongful withholding of consent, may, in addition to a breach of contract, involve a tort (e.g., interference with contract or prospective economic advantage, or trespass). Other remedies for breach of a lease may include statutory remedies. The tenant may also transfer without the landlord's wrongfully withheld consent.

§ 1995.330. Application of remedies to assignee or subtenant

Subdivision (a) was deleted from Section 1995.330 and the subdivisions (b) and (c) were renumbered as (a) and (b).

STUDY H-113 - RECONSIDERATION OF KENDALL LEGISLATION

The Commission considered Memorandum 90-68 and the First Supplement to Memorandum 90-68, together with a letter from Ernest E. Johnson of Los Angeles (copy attached to these Minutes as Exhibit 1), relating to Mr. Johnson's suggestion that the Commission reconsider the Kendall legislation enacted last session on the Commission's

recommendation. The comments of persons present at the meeting were to the effect that the process followed by the Commission to arrive at the recommendation was fair and involved tenant representatives as well as landlord representatives, and that the substantive findings and recommendations of the Commission were accurate and fair. The Commission decided not to reconsider this matter.

STUDY J-501 - DISCOVERY AFTER JUDICIAL ARBITRATION

The Commission considered Memorandum 90-75 and attached staff draft of a *Tentative Recommendation Relating to Discovery After Judicial Arbitration*. The Commission asked the staff to consider whether the present requirement that the arbitration hearing must be held not later than 60 days after the case is assigned to the arbitrator (Cal. R. Ct. 1611) should be increased to 120 days or some other period. There was some sentiment on the Commission that 60 days is too short.

The staff should write to the California Judges Association and the State Bar Section on Litigation. The staff should send a copy of the Tentative Recommendation for comment, and ask whether the 60-day period should be extended to some longer period such as 120 days.

The staff should research the question of when the five-year dismissal statute commences to run in arbitration: Does it commence to run when the civil complaint is filed or when the case is assigned to arbitration? *Compare* Preston v. Kaiser Foundation Hospitals, 126 Cal. App. 3d 402, 408-409, 178 Cal. Rptr. 882 (1981) (time commences to run from order for arbitration), *with* Lockhart-Mummery v. Kaiser Foundation Hospitals, 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325 (1980) (time commences to run from filing of complaint); see also Code Civ. Proc. § 1141.17. The staff should write a memorandum on this subject and send it to the California Judges Association and the State Bar Section on Litigation with the *Tentative Recommendation* for their views.

STUDY J-900 - SHIFTING OF ATTORNEY'S FEES BETWEEN LITIGANTS

The Commission considered Memorandum 90-55 concerning the scope of the study relating to shifting attorney's fees between litigants. The Commission discussed the possible scope of this study and directed the staff to seek more information from the California Judges Association, which requested this study, concerning the problems they see in current law and their expectations of this study. The Commission concluded that it would not proceed with this study, in light of other matters on the agenda, until further information is received from the California Judges Association.

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

The Commission considered Memorandum 90-48, a *Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney,* and a letter from Alan Rothenberg, President of the State Bar (attached to these Minutes as Exhibit 2). The Commission did not consider the Memorandum or *Tentative Recommendation* in detail. In view of the concerns expressed in Mr. Rothenberg's letter about how many notices would be filed with the State Bar, how many inquiries there would be, how long the State Bar would have to keep records, and what the costs of such a system would be, the Commission tabled the *Tentative Recommendation* until the State Bar Estate Planning, Probate and Trust Law Section can discuss these concerns with representatives of the State Bar Board of Governors and reach a satisfactory resolution.

The staff should write to the State Bar Board of Governors and the State Bar Estate Planning, Probate and Trust Law Section advising of the Commission's action.

STUDY L-646 - EXERCISE OF STOCK VOTING RIGHTS BY TRUSTEES

The Commission considered Memorandum 90-77 concerning exercise of stock voting rights by trustees and the potential conflict between Corporations Code Section 704 and Probate Code Section 15620. The Commission decided not to proceed on this matter because the problem does not appear to be significant, particularly in light of the fact that the statutory conflict has existed for many years.

STUDY L-1040 - APPOINTMENT OF PUBLIC ADMINISTRATOR AS PERSONAL REPRESENTATIVE

The Commission considered Memorandum 90-46, the First Supplement, a letter from Neal Wells to Anne Hilker (attached to these Minutes as Exhibit 3), a letter from Anne Hilker to Jim Quillinan for Team 3 of the State Bar Estate Planning, Trust and Probate Law Section (attached to these Minutes as Exhibit 4), and a letter from Melitta Fleck to Jim Quillinan also for Team 3 (attached to these Minutes as Exhibit 5). In view of the opposition of the State Bar Estate Planning, Trust, and Probate Law Section to the legislation proposed in the First Supplement, the Commission decided to put the matter over until representatives of the State Bar Section and the public administrators can work out a solution acceptable to both.

STUDY L-3009 - REPEAL OF CIVIL CODE SECTION 704 (U. S. SAVINGS BONDS)

The Commission considered Memorandum 90-78 and attached staff draft of a *Tentative Recommendation Relating to Repeal of Civil Code Section 704 (U. S. Savings Bonds)*. The Commission approved the Tentative Recommendation for distribution for comment.

STUDY L-3034 - GIFTS IN VIEW OF DEATH

The Commission considered Memorandum 90-54, a staff draft of a *Tentative Recommendation Relating to Gifts in View of Death*, a letter to Anne Hilker from Neal Wells (attached to these Minutes as Exhibit 6), and a letter to Jim Quillinan from Anne Hilker for Team 3 of the State Bar Estate Planning, Trust and Probate Law Section (attached to these Minutes as Exhibit 7).

The Commission considered whether gifts in view of death should be limited to tangible personal property as recommended by Team 3. The Commission thought they should not be so limited. The Commission asked the staff to consider whether a provision should be added to the *Tentative Recommendation* that there must be physical delivery, either of the property or of written evidence of title, for a gift in view of death to be valid. See generally 4 B. Witkin, Summary of California Law *Personal Property* §§ 102-106, 109, at 96-99, 100-101 (9th ed. 1987). The staff should write a memorandum on this, and bring the *Tentative Recommendation* back for further Commission consideration.

The Commission asked the State Bar Estate Planning, Probate and Trust Law Section for its view on Neal Wells' comment that the language of Civil Code Section 1149 should not be revised to define a gift in view of death as a present gift subject to revocation if the giver lives, rather than the existing language of conditional gift.

STUDY L-3036 - USE OF VIDEOTAPE IN CONNECTION WITH WILL

The Commission considered Memorandum 90-35 relating to use of a videotape in connection with a will. The Commission made the following decisions:

(1) A videotape should not be allowed to serve as the will itself.

(2) Legislation is not needed to provide that a videotape of the execution ceremony is admissible as supporting evidence of the validity and intent of the written will, because this is already allowed under

existing law. See Evid. Code § 250 ("writing" broadly defined); People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974) (videotape of testimony of deceased witness admissible).

(3) A provision should not be enacted to permit a written will to refer to a writing or videotape to dispose of items of tangible personal property not otherwise specifically disposed of by the will.

The Commission asked the staff to write a letter to Mary Ferris of Corning, California, to tell her that the Commission gave careful consideration to her suggestion, but that the Commission decided not to recommend legislation for the reasons stated above.

STUDY N-103 - ALJ CENTRAL PANEL

The Commission considered Memorandum 90-72 and the First and Second Supplements to Memorandum 90-72 (the Second Supplement was distributed at the meeting), containing letters from a number of state agencies relating to the administrative law judge central panel concept. The Commission heard oral remarks on this matter from representatives of the Workers' Compensation Appeals Board, the State Board of Equalization, the California Energy Commission, the California Public Utilities Commission, the California Unemployment Insurance Appeals Board, the Occupational Safety and Health Standards Board, the Office of Statewide Health Planning and Development, the Occupational Safety and Health Appeals Board, the Department of Social Services, and the State Banking Department. The Commission also heard oral remarks from a representative of the Association of California State Attorneys and Administrative Law Judges and the National Association of Administrative Law Judges.

The Commission also discussed its method of proceeding on this matter. The Commission plans to continue to gather information concerning the central panel concept. It anticipates a more specific indication from proponents of the concept of precisely what agencies or

hearings within agencies they believe should be subject to central panel treatment. The Commission will pursue this matter at its next meeting.

An edited transcript of the proceedings on this matter is attached to these Minutes.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

_____
Date

_____
Chairperson

_____
Executive Secretary

OVERTON, LYMAN & PRINCE
AN ASSOCIATION INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS
550 SOUTH FLOWER STREET, 7TH FLOOR
LOS ANGELES, CALIFORNIA 90071-2567
TELEPHONE (213) 683-1100

ERNEST E. JOHNSON
PROFESSIONAL CORPORATION

DIRECT DIAL (213) 683-5263

GEORGE W. PRINCE, JR. 1887-1971
EUGENE OVERTON 1880-1970
EDWARD D. LYMAN 1881-1962

TELECOPIER (213) 627-7795
CABLE ADDRESS "OLAP"

May 26, 1990

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

Re: Kendall legislation, etc.

Dear Mr. Sterling:

As we discussed, it is not possible to accept your invitation to appear at the session to discuss the tentative recommendations on use changes and reconsideration of the Kendall legislation. This letter supplements my previous letters on the matter and comments on the comments you sent me.

Professor Coskran emphasizes "freedom of contract." But a lease is more than a contract: it is also a conveyance of property. Thus for example in condemnation, both the landlord's property interests and the lessee's property interests receive compensation. As the American Law Institute said in the 1977 Restatement of Property, Second at page 86:

> "a. Rationale. A lease divides ownership of the leased property between the landlord and the tenant. Any curtailment of the freedom of alienability of these separate interests involves a restraint on alienation. Restraints on alienation of property interests normally stand in the way of making maximum use of such interests and hence are against public policy, except in circumstances where some countervailing public interest may justify them in particular situations. The freedom of alienability rule stated in this section gives general recognition to the undesirability of restraints on alienation."

Essentially my approach focuses upon this property nature of the lease transaction and expresses concern over the "taking" of property rights. To me restrictions on assignment and changes of use not based on commercially reasonable objections constitute unreasonable restraints on alienation. The Introductory Note to the 1977 Restatement of Property, Second, Part V, Chapter 15 (at page 85), notes:

> "Over the years there has been a constant battle between the forces that seek to restrain the alienation of property interests and the forces that regard any impediment to the free transferability of property interests as detrimental to society. In only a few instances have restraints on alienation survived this long battle. The extent to which restraints on alienation have survived in the context of the landlord-tenant relationship is described in Chapter 15."

While Professor Coskran is correct that the Restatement recognizes the possibility of an absolute right to withhold consent, the Restatement requires that this be a "freely negotiated provision" and defines that term on pages 106 and 107, to apply only where the party has "significant bargaining power in relation to the terms of the lease." In the real world I suggest this simply is not true of most tenants. In the absence of a "freely negotiated provision" (despite language giving the landlord absolute rights to withhold consent), the Restatement takes the position that the provision would be operative only if the consent was "not withheld unreasonably."

I disagree with Professor Coskran's reiteration that the law clearly allowed absolute discretion to the landlord prior to the Cohen case in 1983. Not only was there the Restatement in 1977 but there were several cases which questioned the Richard case and assumed that a commercially reasonable objection was required; these cases did not rule on the point but did question the continuing vitality of the Richard case. Further the Richard case was weak authority and as Mr. Behr emphasized in his 1980 State Bar Journal article, it would be unwise for any attorney to rely upon the authority of the Richard case.

Unless there is some advantage to be gained, a landlord will not normally object to a reasonable assignment or change of use; the problems of assignments and use changes in my experience and opinion are insignificant except in a context where the value of the leasehold has appreciated materially. And consequently, I view the "repeal" of Kendall/Pestana as a landlord effort to "take" from long-term tenants the appreciation in their leasehold property.

To repeat, it is my opinion that a lessee owns a property interest and should be entitled to assign that property interest under reasonable circumstances and to change the use of that

property interest in a reasonable manner without having to pay tribute or increased rent for the right to do so.

And this is particularly so in cases of technical or inconsequential transfers or changes where the landlord is not prejudiced except in an inability to "mark to market."

Sincerely,

Ernest E. Johnson, P.C.
of OVERTON, LYMAN & PRINCE

EEJ:kla

cc: Arthur K. Marshall
William G. Coskran

The State Bar of California

555 FRANKLIN STREET • SAN FRANCISCO, CA 94102 • (415) 561-8200

May 31, 1990

Robert J. Murphy, III
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Commission's Tentative Recommendation Relating to Deposit of Estate Planning Documents with Attorney

Dear Mr. Murphy:

Thank you for seeking the comments of the State Bar on the California Law Revision Commission's Tentative Recommendation Relating to Deposit of Estate Planning Documents with Attorney. This was considered by the Board Committee on Legislation and the full Board of Governors at its meetings on May 11 and 12, 1990. The Board voted to urge the Commission to study further the cost and administrative implications of establishing a system to record notices of transfer of estate planning documents.

The Tentative Recommendation appears to assume that all attorneys who leave the practice of law are now required to give the State Bar notice of cessation of practice (See Footnote 4 of the Tentative Recommendation). This is not the case. Under Business and Profession Code sections 6180 and 6180.1 attorneys now must provide a notice of cessation of law practice only when "required by the order of suspension to give notice of the suspension." (Section 6180) Thus, only those attorneys who leave the practice of law in connection with a disciplinary charge must file these notices; and such notices are handled by the State Bar attorney discipline system.

The State Bar has no general system for recording notices of cessation. Consequently, the State Bar would have to develop new systems for tracking depositors, transferors, transferees and documents concerning proof of death of depositors in order for attorneys to notify the State Bar of transfers of estate planning documents.

The Board acknowledged that there may be problems in locating estate planning documents and is willing to further explore solutions to these problems with the

Commission. The Board, however, considers the fiscal and administrative aspects of this proposal to be too uncertain.

Issues that need further development include: how frequently would this system be used; the number of depositors per notice that may be anticipated; the volume of inquiries about filings that may be anticipated; how long records would have to be kept in this system; whether the costs of operating the proposed notice system can be justified by the likely volume of use; and how the costs of creating and maintaining the system would be funded. The State Bar's Section on Estate Planning, Trust and Probate Law has indicated a willingness to work with the Law Revision Commission on these issues.

Thank you for the opportunity to comment on this proposal.

Very truly yours,

Alan I. Rothenberg

Alan I. Rothenberg
President, State Bar of California

DL:as

cc: James W. Obrien, Chair
Board Committee on Legislation
James V. Quillinan, Chair
Section on Estate Planning, Trust and Probate Law
Herbert M. Rosenthal
Mary G. Wailes
Diane C. Yu
Larry Doyle
David C. Long

Study L-1040 EXHIBIT 3 Minutes,
May 31-June 1, 1990

OSCAR LAWLER
1878-1966
MAX FELIX
1886-1964
JOHN M. HALL
1881-1978

LAW OFFICES OF
LAWLER, FELIX & HALL
700 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 626-8300

CABLE: OSLAW
TELEX: 67-4360
TELECOPIER: (213) 617-0656

H. NEAL WELLS III
PARTNER
DIRECT DIAL NUMBER
(213) 626-8363

May 18, 1990

Anne K. Hilker, Esq.
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071

Re: Memorandum 90-46 (1st Supplement)
(When Personal Representative Must Petition to Administer Estate)

Dear Anne:

This memorandum seems to address a question of economics, viz, how much should a county spend to subsidize the administration of small estates. The public administrators have previously sought to lessen the county's burden by modest increases in the minimum amounts which they are paid for estate administration and by obtaining greater authority to distribute small estates without probate. Apparently, this has not fully resolved the problem.

On the theory that "something is better than nothing" I would suggest that the minimum fee of the public administrator be increased to $2,000. If a known heir wishes to avoid this expense, the heir can petition to have the heir appointed personal representative. By copy of this letter I am asking Len Pollard whether $2,000 is sufficient encouragement to the public administrator.

If the fee becomes adequate, the new law may be acceptable to Mr. Serbin, and it may be reasonable to require the public administrator to file a petition in all cases where someone else has not done so. However, once again, we should look to Len Pollard for guidance.

Sincerely yours,

HNW/dp
cc: Leonard W. Pollard, II, Esq.
John T. Harris, Esq.
Melitta Fleck, Esq.
Charles G. Schultz, Esq.

Study L-1040 EXHIBIT 4 Minutes, May 31-June 1, 1990

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8289

May 29, 1990

REPLY TO:

BY TELECOPY

James V. Quillinan, Esq.,
Diemer, Schneider, Luce
& Quillinan
444 Castro Street
Suite 900
Mountain View, CA 94041

Re: Memorandum 90-46 (1st Supplement)

Dear Jim:

Team 3 has reviewed the first supplement to Memorandum 90-46 and is unanimously opposed to the changes proposed in the supplement.

Team 3 feels strongly that subsection (c) should be deleted. That section gives the public administrator the discretion to recommend against a probate proceeding. This can leave smaller, or more difficult, estates without any person or entity required to administer the estate, upon a determination that may not involve any parties other than the public administrator and the court. The function of the public administrator's office is to be that entity of "last resort" to take responsibility when others will not. To permit no administration makes possible a tangle of tax and title issues--years later--that should have been resolved at the time of death.

We do understand that the public administrator's resources are limited and that not all cases justify its intervention. However, we believe this should be resolved by increasing the fee awarded to the administrator, rather than by foregoing administration altogether. While we did not come up with a dollar figure, I do enclose a copy of a letter from Neal Wells of our team that includes such a proposal.

Thank you for the opportunity to comment.

Sincerely,

Anne K. Hilker

AKH/cm:7100n

cc: Andrew S. Garb
John T. Harris
Leonard W. Pollard, II
H. Neal Wells, III
Melitta Fleck
Terry Ross
Irv Goldring
Charles G. Schultz
Valerie Merritt

GRAY, CARY, AMES & FRYE
ATTORNEYS AT LAW
1200 PROSPECT STREET, SUITE 575
LA JOLLA, CALIFORNIA 92037
TELEPHONE (619) 454-0101
FAX (619) 455-3075

GORDON GRAY (1877-1967)
W. P. CARY (1888-1943)
WALTER AMES (1893-1980)
FRANK A. FRYE (1904-1970)

OTHER OFFICES
IN
SAN DIEGO
EL CENTRO

WRITER'S DIRECT LINE
(619) 456-3014

May 25, 1990

James V. Quillinan
Diemer, Schneider, Luce & Quillinan
444 Castro Street, Suite 900
Mountain View, CA 94041

Re: LRC Memo 90-46, First Supp. (Revised)

Dear Jim:

On behalf of Team 3, I am writing to report our thoughts on the above-referenced LRC Memo.

Team 3 is opposed to the amendments to Probate Code Section 7620 proposed by the memorandum. We believe that Section 7620 should remain in effect as it stands.

However, in order to address the concerns raised by Mr. Serbin, Team 3 supports a suggestion made by Neal Wells in the letter attached hereto. The letter proposes encouragement to the Public Administrator in the form a minimum fee. Neal suggests a minimum fee of approximately $2,000.00. We believe that the minimum fee may more appropriately be $3,000.00 which is the statutory fee equivalent for an estate of approximately $95,000.00. Accordingly, estates between $60,000.00 and $95,000.00 would generate a fee which is higher than the statutory fee that would otherwise be payable. This is intended to encourage the Public Administrator to handle these smaller, sometimes problematic, estates if no one with higher priority has petitioned for appointment.

The concept of additional compensation to the Public Administrator is currently contained in Probate Code Section 7623. We suggest that Section 7623 be amended to incorporate the concept of a fixed minimum level of additional compensation.

We also discussed the question of whether the minimum additional compensation should be payable to the administrator only or should be payable to both the Public Administrator and

the attorney for the Public Administrator who may be county counsel or outside counsel. In light of the subject, Len Pollard was asked to comment and he is in favor of providing the minimum fee to both the Public Administrator and counsel to the Public Administrator. The group did not reach a consensus on this issue.

Very truly yours,

Melitta Fleck
for
GRAY, CARY, AMES & FRYE

MF:vg
Enclosure

cc: Anne K. Hilker
H. Neal Wells
Leonard W. Pollard
Andrew S. Garb
John T. Harris
Charles G. Schulz

LAW OFFICES OF
LAWLER, FELIX & HALL
700 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 626-8300

OSCAR LAWLER
1875-1956
HAN FELIX
1899-1954
JOHN M. HALL
1901-1975

CABLE: OSLAW
TELEX: 674060
TELECOPIER: (213) 617-0268

H. NEAL WELLS III
PARTNER
DIRECT DIAL NUMBER
(213) 629-9983

May 18, 1990

RECEIVED
MAY 21 1990
AKH

Anne K. Hilker, Esq.
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071

Re: Memorandum 90-54
Gifts In View Of Death

Dear Anne:

I do not favor sanctioning gifts in contemplation of death of intangible personal property.

I also do not favor removing such gifts from the spectre of testamentary transfers by deeming them to be present gifts subject to conditions subsequent.

"Contemplation, fear or peril of death" and any accompanying terminal illness frequently reduce a person's capacity to reflect upon the breadth of the person's life and loved ones. Instead, the person often concentrates on his illness, his fear, his sadness, and upon those who are immediately assisting him in that time of dire need.

As a consequence, the person facing death sometimes makes gifts that he would have never even considered in the normal course of life. Intervivos gifts often include a T.V., a car, or cash. Testamentary gifts are often of intangible personal property or real estate and result in Will contests when a nurse, housekeeper, friend or distant relative who is kind enough to help out at the end of life suddenly becomes the primary object of the testator's bounty. This is particularly true where the beneficiary actively sought favors from the decedent.

There is no reason to liberalize the rules for Will substitutes for persons who are experiencing the mental trauma of facing death. To the contrary, people in such state benefit from the protection of testamentary requirements.

May Team 3 revisit these points on our next conference call?

Sincerely yours,

HNW/dp
cc: Andrew S. Garb, Esq.
John T. Harris, Esq.
Leonard W. Pollard, II, Esq.
Melitta Pieck, Esq.
Charles G. Schultz, Esq.

CALIFORNIA LAW REVISION COMMISSION
Edited Transcript of Meeting - May 31, 1990
Administrative Law - ALJ Central Panel

CONTENTS

CALIFORNIA LAW REVISION COMMISSION
Edited Transcript of Meeting - May 31, 1990
Administrative Law - ALJ Central Panel

The meeting is called to order by Roger Arnebergh (Vice Chairperson, California Law Revision Commission).

Nathaniel Sterling (Assistant Executive Secretary, California Law Revision Commission):

We've decided to skip the first two items on the agenda - Minutes of the last meeting and Administrative Matters - so that we can accommodate the visitors who are here to speak. So we're going directly to Agenda Item 3, which is the administrative law study, and particularly the issue of the administrative law judge central panel.

Let me just explain - for people who are new here and also for the two new Commissioners we have - a little about the background of the study and how we got into this particular issue. The Legislature has asked us to study administrative law and to give the study priority. The Commission has surveyed the entire area and decided it will study the area in discrete segments, the first segment being adjudication, or administrative hearings. When we complete that segment we plan to look into judicial review. Following that we'll be studying the role of administrative rulemaking. The final phase is going to be nonjudicial oversight of the administrative process.

Right now we are engaged in the first portion of the study on administrative adjudication, and the central panel issue is one of the issues we are looking at (although we will be looking at the entire Administrative Procedure Act). Our primary objective in this part is to develop a hearing statute that is adequate for all state agencies - all state administrative hearings that are required by statute or that are constitutionally required. Of course that would mean not only will there be formal hearings as part of the act, but there will also be the availability of less formal types of procedures. However, we have not got into the particular details of what would be in the act - whether it would look a lot like the current Administrative Procedure Act or not.

On the central panel issue, this is what we've done so far. Our consultant Professor Asimow (who is here) has prepared a background study on basic structural issues, of which this is one. As part of the study he did a survey of a number of agencies and had a questionnaire directed to administrative law judges in a couple of big agencies to get their perspectives on it. Basically he has recommended to the Commission that the existing system not be changed - that administrative law judges not be moved from the agencies they now serve over to a central panel. Of course, central panel agencies would continue to work with the central panel. But his recommendation is basically keep the existing structure with a few small possible

exceptions: As we look at what each agency does, there may be appropriate candidates for one or two special types of hearings that we could use central panel treatment for.

Having received our consultant's background study, we decided to collect more data on what other central panel states do and how well their panels work. We've examined the - approximately - dozen other central states and gathered data and found, generally, they have a pretty favorable experience with that sort of system. But also, their systems are quite similar to California's in that mainly licensing agencies are covered by the central panel and some of the specialized agencies, such as workers' compensation and public utilities, are not central panel. So it's not dissimilar to California in other places.

At the Commission's last meeting we heard from a number of administrative law judges urging that we adopt a core central panel system - that is, make a widespread removal of judges from their agencies. But the Commission felt that, before it could really entertain that idea, it needed to hear how the agencies felt about it. So earlier this month we sent out a letter to all the agencies we could identify easily that would have an interest in this subject. We may not have gotten all of them, but I think we have gotten most of the major ones. And we've invited you to either send us letters or to come here and tell us in person what your feelings are about it. And some of you I know are doing both - giving us letters and appearing here. We've received a bunch of letters in the past two days, and I've handed you all supplementary material here. There are more copies here in case you don't have it. *(The reference is to the Second Supplement to Memorandum 90-72.)*

One of the agencies here has previously submitted an analysis of how their agency works and why the central panel would not be good for it. That's the Public Employment Relations Board. They say now - in their current letter - that they're here, they're not planning to make a statement unless the Commissioners want to ask questions of them. If it looks like we're really interested in pursuing this further, then they would like to make an oral presentation on the point.

There's another interesting thing in this packet of most recent material. The administrative law judges from the Agricultural Labor Relations Board have given us a copy of a study prepared by the Department of Finance in 1977 on the issue of whether centralization would be economically feasible. I'd heard about that study but hadn't seen a copy yet; it's nice to have that. The basic conclusion of the Department of Finance was that it would not be a money-saving route to shift the administrative law judges. I would say as a generalization most of the - all of the - letters we have received from agencies are opposed to the concept for a number of fairly common reasons, and in my opinion very good reasons. The Commission is going to have to analyze those itself.

I think that at this point we would like to hear first from the agencies we've invited to speak, and who wish to speak. We do have a sign-up list; the first portion of it our Chairman has, I think.

There are more sign-up sheets up front if you are not on there and want to speak. People have asked me how they should proceed. I've suggested they make a brief statement describing the function of their agency, and the problems they have, and why the central panel wouldn't work with them, and then be ready to respond to questions the Commissioners might have.

Mr. Jarvis is called.

Donald B. Jarvis (National Conference of Administrative Law Judges and Association of California State Attorneys):

I think that it would be inappropriate for me to speak at this time. You want the opponents of the concept, and I'm a proponent.

Mr. Sterling:

He is here not on behalf of an agency. I think we should hear from the agencies first and then from anyone else who is interested.

Mr. Younkin is called.

Richard W. Younkin (Secretary and Deputy Commissioner, Workers' Compensation Appeals Board):

Good afternoon. My name is Richard Younkin. I'm Secretary and Deputy Commissioner of Workers' Compensation Appeals Board. I'm here to express the Industrial Relations Department's opposition to the use of an ALJ central pool to hear and decide workers' compensation claims as well as the proposal to have an independent agency assign the workers' compensation judges to hear cases.

I have a copy of the statement for you, and if you'd like to circulate that, I perhaps can shortcut some of the things that are in there. *(A copy of the Statement of the Workers' Compensation Appeals Board is attached to this transcript.)*

As you may well know, the Workers' Compensation Appeals Board is the adjudicatory body for determining workers' compensation disputes. As I've indicated in my statement, Article 14, Section 4, of the California Constitution vests the Legislature with a plenary power to create a complete system of workers' compensation by appropriate legislation, and it describes that complete system. I'm not going to read it all (it's in the statement), but that includes provision for disability benefits, medical treatment, insurance coverage, safety, self-insurance, and state compensation insurance fund. The legislation which was mandated by the Constitution was to have provision for an administrative body with requisite functions to determine workers' compensation disputes, and the public policy is that it should "accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character". And that's declared to be "the social public policy of this State".

The Constitution provides specifically that plenary power is either by an industrial relations commission or by the courts, by either or any combination thereof. And I point that out because there

may be, as far as the Workers' Compensation Appeals Board, a constitutional impairment at this time from having either a separate central panel or a separate agency make assignments.

The Legislature chose to treat workers' compensation in a special way for adjudication. They vested in the Workers' Compensation Appeals Board judicial power. As far as I know, in my small study of administrative law, it's the only administrative agency that the Legislature has given judicial power to in the United States. That judicial power is to adjudicate the disputes.

There is an administrative function which is part of what is now called the Division of Workers' Compensation. There is an administrative director who employs workers' compensation judges, hires them, trains them, and exercises the administrative powers.

The judicial and administrative powers are separated, so that the Workers' Compensation Appeals Board is an independent body when it comes to deciding cases. Consistent with the judicial power, the Board has contempt power to enforce its rules, practices, and procedures. The Appeals Board is not bound by the Administrative Procedure Act, but by its own Rules of Practice and Procedure which it is authorized by statute to adopt.

The Board delegates its judicial powers to workers' compensation judges, not administrative law judges. These judges are specifically obliged to follow the Canons of Judicial Ethics. Under new legislation, they must maintain an active membership in the State Bar. Their role and function is to hear and decide cases on behalf of the Appeals Board, utilizing its rules. The decisions of the workers' compensation judges are the decisions of the Board unless there is an appeal.

The judges not only adjudicate claims for workers' compensation benefits, they do interact with other bureaus in the Division of Workers' Compensation, such as rehabilitation specialists and rating specialists. Certified specialists appear regularly before workers' compensation judges. They must have a thorough knowledge of the special procedures and a thorough knowledge of substantive law on the issues, including rehabilitation, temporary disability, permanent disability, medical issues of causation, insurance coverage, Subsequent Injuries Fund benefits, and Uninsured Employers Fund liability. That is just a quick list of those types of issues which workers' compensation judges decide. In addition, workers' compensation judges not only determine the disputes but they do hear appeals from various bureaus. The do deal with uninsured employers cases - self-insured employers cases - and decisions that are made by the department.

The Workers' Compensation Appeals Board is an independent judicial function. The workers' compensation judges exercise the judicial powers delegated them subject only to the reconsideration and removal process as set forth in the Labor Code.

To insure that there is an expedited delivery of benefits, there is no recourse to the Superior Court. The decisions of the Board on appeals are subject to review by a petition for writ of review filed directly with the Courts of Appeal and thereafter a petition for review with the Supreme Court. This review process is designed to expedite the process of review consistent with the judicial powers granted the Commissioners of the Board. It is clear that the Legislature intended the Workers' Compensation adjudicatory system be no way intertwined with the Superior Court trial system. Direct appeal to the highest courts of the State not only serves the purpose of expediting cases but assures a consistent appellate review of cases and consistency in appellate decisions.

Arthur K. Marshall (Member, California Law Revision Commission):

When you say "an appeal" - where do you appeal to? The Court of Appeals?

Mr. Younkin:

The petition for writ of review is filed with the Court of Appeal.

Dr. Asimow suggests in page 45 of his study - and I won't quote the whole thing - basically, that "if the independent argument is unpersuasive in the case of a benefit dispensing agency, like the WCAB, that is already independent of the parties who litigate before it, and if only specialized judges can hear workers' compensation cases, there is little to argue for changing the status quo". The Board would agree with that.

On page 48, Professor Asimow indicates that, while he believes that the Legislature should continue to transfer appropriate sorts of cases to the existing central panel, he did not find the case persuasive for transfering judges from the benefit dispensing agencies, or the PUC, DMV, or the other ones that are listed there. And he indicates the reason for that, and I will not read that quote to you.

The workers' compensation adjudicatory system is part of a larger workers' compensation benefit system, requiring special skills and knowledge to adjudicate and administrate the workers' compensation laws so that benefits may be expeditiously delivered to deserving claimants. The Legislature intended that the administration and adjudication functions be entrusted to a single body so that the policies and law could be uniformly applied throughout the state. Any change in the manner in which workers' compensation judges are assigned to cases would require reevaluation of the whole concept of a separate commission for implementing the social policy mandated by Article 14, Section 4, as well as require proposals of wholesale changes in current legislation, all contrary to the intent of the Legislature that the judicial function be entrusted to the Workers' Compensation Appeals Board and the administrative function to the Division of Workers' Compensation.

In addition, the Legislature passed, effective January 1, 1990, the Margolin-Bill Greene Workers' Compensation Reform Act. This Act contains new procedures, under the jurisdiction of the Division of

Workers' Compensation and the Workers' Compensation Appeals Board, for expediting the workers' compensation system. The new legislation provides new procedures that affect workers' compensation judges that provide for the use of a new floor-level hearing officer (called referees) and arbitration. All these provisions in the new legislation are inconsistent with any proposals that would either refer workers' compensation cases to a central pool of administrative law judges or provide another agency to assign workers' compensation judges to the Workers' Compensation Appeals Board. This legislative process to achieve reform has taken many years and involved discussions by all the interest groups in the workers' compensation system, including labor, insurance carriers, attorneys, medical service providers, and other interest groups. A system that requires workers' compensation judges to be part of a central panel or to be assigned by an independent agency would severely undermine the implementation of this major reform of the workers' compensation system.

I'll be happy to answer any questions you may have.

Edwin K. Marzec (Chairperson, California Law Revision Commission):
Any questions? Professor Asimow.

Michael Asimow (Professor of Law, UCLA; Consultant to California Law Revision Commission on Administrative Law):
Am I to understanding you to contend that there is a constitutional prohibition on the Legislature's transferring the workers' comp judges to a central panel?

Mr. Younkin:
I am reading the language and there is a possible constitutional problem. The language of the Constitution says, "industrial accident commission or by the courts, or by either". If you read that literally, there is a constitutional mandate that it either be an industrial accident commission or the courts, those two agencies. Unless you change that constitutional provision to provide for another independent agency there may be a problem. It's only raised as a problem; I'm not sure how that would be decided, but there certainly is a problem by the literal language of Article 14, Section 4.

Mr. Marzec:
Professor, have you looked at that particular ...

Prof. Asimow:
I didn't think that it was a constitutional problem, in the sense that of course we're not suggesting that the Workers' Comp. Board lose its power to make the final decision. I don't personally think the constitutional provision would preclude the transfer of the workers' comp. judges to another agency. You have a similar problem for a couple of other constitutional agencies such as the Public Utilities Commission. I don't see that. I think in the case of the University of California, there is a constitutional problem. My own view is, without having really researched it in depth, that the Workers' Comp. Board really wouldn't be a problem.

Mr. Younkin:

It's certainly a problem, and it's certainly consistent with the history of what the Workers' Compensation Appeals Board and its predecessor, the Industrial Accidents Commission, was all about - the fact that the Legislature chose to give the responsibility to this body for the workers' compensation social policy. One of the problems with this decentralization, as we might term it, of workers' compensation judges to an independent agency is that it was intended that there should be a certain degree of control of the policy that the judges are to follow in en banc decisions. We have reassignment of cases, we have venue problems, we have other things that relate to the system itself - to expedite that system. The Legislature decided that that be controlled by the Workers' Compensation Appeals Board and its predecessor, the Industrial Accidents Commission. We see a whole lot of problems with that in terms of interference with what the policy was intended to be.

Our judges are independent in the sense that they're free to make any decision they wish to make. They're not like ... Professor Asimow in his study has indicated some of the problems with licensing agencies, the judges don't want to go against the finding of the licensing agency. In this particular case, there is recourse in the reconsideration process. Our judges make their decisions independently; it is an independent judicial power.

Mr. Marzec:

I'm certainly interested in the constitutional issue. I'm sure you'd like it to be viewed that way, Mr. Younkin. What I'd like to do, though, is to have ... I'm wondering if your brief contains any supporting authority for your claim of constitutional question.

Mr. Younkin:

I'd be happy, if it's desirable. I'll check with the powers-that-be that I represent. I think that they would be happy to supplement the record in that regard.

Mr. Marzec:

It would be greatly appreciated.

Prof. Asimow:

I'd be very interested to see that.

Mr. Marzec:

You may put him out of work, I want you to know. *Laughter.*

Mr. Younkin:

I'm sure I won't do that.

Mr. Sterling:

Speaking of supplementing the record, we do record these proceedings - we should talk about this for a second - we do record these proceedings for the purpose of preparing minutes. Last meeting

an issue came up about transcriptions. I think this may be a meeting where we may want to transcribe people's remarks and preserve them for future use, if that's acceptable to everyone.

Mr. Marzec:
I think that's a good idea.

Forrest A. Plant (Member, California Law Revision Commission)
Is this a warning? *Laughter.*

Mr. Sterling:
Yes, this is a warning. *Laughter.*

Mr. Marzec:
Are there any further questions of Mr. Younkin?

Judge Marshall:
What does the Workers' Compensation Appeals Board consist of?

Mr. Younkin:
The Board itself has seven Commissioners, one of whom is appointed by the Governor as Chairman. Under the new legislation each Commissioner serves for six years. The Chairman serves at the pleasure of the Governor. They basically are the reviewing agency - they review the cases - the decisions the workers' compensation judges make. The way the system is set up - the way it is designed by our rules - is the Workers' Compensation Appeals Board, in the big sense, is defined as the board members, all its Deputy Commissioners, and all its judges. So they consider that a decision of the workers' compensation judge is a decision of the Workers' Compensation Appeals Board unless a petition for reconsideration is filed. That decision becomes final with no petition for reconsideration.

Judge Marshall:
I thought you said that the Board reviews the decisions of the ...

Mr. Younkin:
They don't review every decision. As I say, the only way ...

Judge Marshall:
It's not routine, then.

Mr. Younkin:
No, it's not routine. I can't give you a percentage on it, but we have probably 5,000 to 6,000 cases that we review a year, out of the ones that are adjudicated. The adjudications ... it's difficult to tell, because we probably have 200,000 applications for adjudication and a substantial amount of those are settled or resolved by stipulation.

Judge Marshall:
And if you disagree in one of those thousands of cases, what happens? If the Board disagrees with the decision.

Mr. Younkin:

The Board may reverse, on the record. The Board has the power to reverse on facts or law. It is not like a Court of Appeal; it does not just reverse on a legal issue. Although the Courts of Appeals reverse on legal issues, sometimes, when they're really reversing on the facts.

Judge Marshall:

True. And if the Board reverses, what happens to the case? Goes back to the same judge?

Mr. Younkin:

If the Board reverses, a number of things can happen. The Board can reverse the decision and send it back to the judge. If it's a procedural error - due process - it goes back to the same judge to decide the case and give the due process. It goes back to the same judge on supplemental issues in most cases, but it can go to another judge on supplemental proceedings.

Judge Marshall:

And then after the Board makes its decision, it can go to the Court of Appeals?

Mr. Younkin:

An aggrieved party may go to the Court of Appeals. The Workers' Compensation Appeals Board is respondent in a Court of Appeal proceeding. And, it does have guidelines for appearance on behalf of the Board in the proceedings.

Judge Marshall:

How often are there reversals of a decision of the judges by the Appeals Board?

Mr. Younkin:

I'm afraid those statistics I don't have. I would have to be honest and say that Commissions vary. We have differences; it's a political body ... there are appointments, and Commissions vary. But for the most part there's an effort to sustain the workers' compensation judges. There's a case called Garza v. WCAB which mandates that the Board give due regard to findings of credibility by workers' compensation judges. So in those kinds of cases there is great deference to workers' compensation judges. I would say that the majority of cases - in my experience, without the statistics - the judge is sustained.

Mr. Plant:

I hope we haven't created the impression - I don't think that we intended to - that asking for information on the constitutional issue is any indication that we are going to do anything that would require us to violate the Constitution. To my mind that is an interesting topic, at the moment, but I don't have any sense that we are expecting to take any action that would only be precluded by the Constitution. That was not in the professor's recommendations, and I haven't heard any suggestions that would be done.

Judge Marshall:
In other words, we intend to act constitutionally. *Laughter.*

Mr. Younkin:
No, our only purpose in this was to alert you to possible problems in that regard. It's certainly not to impugn or say that you would act unconstitutionally.

Mr. Marzec:
That's not what was just said in the hallway. *Laughter.* Anything further? Any other questions? Thank you, Mr. Younkin.

Mr. Younkin:
Thank you very much.

Mr. Marzec apologizes for his late arrival due to an air travel delay and welcomes the new members of the California Law Revision Commission.

Mr. Marzec:
There are sheets in the front of the room. If you'd like to speak or be heard - we have the agenda set, but we certainly can add anyone on that would like to speak, so please feel free.

Mr. Sterling:
That would be the pink sheet, not the green sheet. The green sheet is just a general sign-in; so if you want to speak, put your name on the pink sheet.

Mr. Marzec:
To follow up on what Commissioner Plant mentioned, and Judge Marshall, this Commission is not predisposed as to what it is going to do in this particular area, as I hope my letter to the agencies made clear. It is our hope to obtain information from everyone out there so that our decision can be made in a logical manner, and constitutionally of course. What we're trying to do now is get as much information and facts, and to learn about your business, your agencies and their business, in this particular area, so that what eventually is generated is something that will be acceptable and a positive result.

Mr. Jugum is called.

Gary Jugum (Assistant Chief Counsel, State Board of Equalization):
My name is Gary Jugum. I'm Assistant Chief Counsel to the State Board of Equalization. I've been asked to appear here today by Cindy Rambo, Executive Secretary of the Board, on her behalf. Our board is meeting across the street right now; she couldn't be here.

The State Board of Equalization opposes the proposal that the hearing officer functions be transferred from our agency to a centralized agency created to handle all administrative hearing functions. Now, we have described in detail the processes employed by the Board and our reasons for objection to the contemplated change in a letter addressed to you, Chairperson Marzec, dated May 30, 1990. I'll only say that we're a tax agency; we enforce the sales and use tax law

for the State of California and other excise tax laws. We collect approximately fifteen billion dollars a year in excise taxes for the State, and about four billion dollars a year for cities, counties, and various districts.

I can summarize our views as follows. First, the State Board of Equalization is unique in state government, because it is a popularly-elected board. It is directly answerable to the people for its own actions, as well as those of its employees. This direct accountability contains an inherent incentive for fairness and impartiality, that is not present in appointed bodies, which are at least one step removed in the electoral process.

Second, tax laws are highly complex. Tax law is a recognized legal specialty. The Board administers ten different excise tax laws, each of which may give rise to a multiplicity of unique legal issues. The subject matter demands specialization. It is the view of the Board that it is the responsible agency itself which is in the best position to develop a hearing officer corps with the technical expertise needed to ensure that the tax laws are applied accurately and uniformly, with the necessary sensitivity to taxpayers rights, to ensure that the tax laws are applied fairly.

Third, the proposed change promises no quantifiable economic benefit. As this gentleman indicated earlier, the issue of centralized versus decentralized administrative hearing services was studied by the Department of Finance in 1977. The Department concluded at that time that, "Policy considerations aside, there is no clear and obvious evidence that a centralized administrative law court would be either functionally or economically preferable to the present decentralized structure." We suggest that there would be no evidence today of any demonstrable social or economic benefit to be derived from centralized responsibility for review and evaluation of tax assessments.

If there are any questions about our procedures, I'll be happy to respond to them.

Prof. Asimow:

Would you describe in a little greater detail the ALJs in your agency. Who has that job, how they're supervised, and so on?

Mr. Jugum:

We have a group of six persons in the Staff Counsel classification, who handle hearings for us. We audit taxpayers to determine that the tax has been properly paid. We do about twenty thousand audits a year. We issue formal tax billings, called notices of determination under our law. We receive about 2,000 technical, formal protests on an annual basis. Most of those are resolved by agreement between the taxpayer and the agency.

Approximately 800 of those matters are referred by our Board to what we call a preliminary hearing. One of the attorneys or, in some cases a senior supervising tax auditor, will then meet with the taxpayer for the purposes of ascertaining what the factual questions

are, what the legal arguments are, so that the hearing officer may prepare for the Board what we call a decision and recommendation. Now, of the 800 cases actually heard by the hearing staff, approximately 600 are resolved without further hearing before the Board.

But under the sales and use tax law and the other laws we have, the oral hearing provided for by statute is a hearing before the Board itself. Only our Board has the power to issue subpoenas for witnesses; only our Board takes sworn testimony. So that after these decisions are written - decision and recommendation - if there is no objection by the taxpayer - if they're satisfied with the recommendation - the matter goes on what we call a non-appearance calendar. The Board itself makes the decision that the petition should be granted or denied or that some relief should take place.

So the position of the hearing officer and this whole preliminary hearing procedure is a creature of the Board's own regulations. It's not something provided for by the statutes themselves. In the minds of the Board - I think - it's an aid in the disposition of their workload. I don't know how many times a year you gentlemen meet, but our Board has a very heavy schedule. I think the purpose of this is to resolve matters as quickly, as economically, and as finally, as possible.

Prof. Asimow:
You said there are six hearing officers?

Mr. Jugum:
There are six persons classified as Senior Counsel, or Staff Counsel, series. And, at the present time, there are two persons who are Supervising Tax Auditors.

Prof. Asimow:
So there are six people who actually hear cases, and two supervisors?

Mr. Jugum:
There are eight people that hear cases. Six of them are attorneys, two of them are auditors. There's a lot of our audits that involve complex questions of costs, allocations ... that sort of thing.

Prof. Asimow:
When we spoke before you said this was a relatively recent innovation?

Mr. Jugum:
No. The difference we have now, since 1989, is that there's been a division between the advocacy function and what you might want to call the adjudicatory function. Previously, the staff hearing officers were a part of the general legal staff of the Board. And once they'd heard a matter and made a recommendation to the Board, they would then appear before the elected Board itself to sort of present to the Board what the issue was. This tended to upset a lot of people for some

obvious reasons. They've just gone to somebody and thought they were going to get a fair and independent review and hearing, and then three months later they find that the individual's on the other side.

So the Board has established within the agency an independent, separate appeals unit that reports directly to Ms. Rambo. It does not report to the legal staff or to audits staff. So the hearing officer, since April of last year, has been limited in function to taking a look at the facts, hearing the case, basically make it cleaner - it's going to go forward. Then the matter goes to the Board for final disposition, whether there's an oral hearing before the Board or whether it's disposed of as a non-appearance matter.

Judge Marshall:
Who appoints these hearing officers? The Board itself?

Mr. Jugum:
The Board itself. They are employees of the State Board of Equalization - as the audit staff, as the balance of the legal staff are - they are employees. Yes, sir.

Judge Marshall:
Are they appointed for a specific term?

Mr. Jugum:
No. Generally, once given that job they stay with that job, although there can be transfers to a position on the legal staff generally.

Judge Marshall:
And presumably they may be discharged by the Board?

Mr. Jugum:
Like any employee, under Government Code 19295, if they have cause for discharge, they can be discharged. Yes, sir.

Judge Marshall:
And have any of them ever been discharged?

Mr. Jugum:
No, sir.

Mr. Marzec:
Did you mention any qualifications that you've established for these positions?

Mr. Jugum:
No. The qualification is the same qualification ... These are not people that I would call administrative law judges. We don't use that as a working title - that's not their civil service classification. These people are qualified for the staff attorney classification in civil service.

Generally, they're people with the most experience. Our laws are very complex. If you have to start from the beginning it's very difficult. Historically we've tried to not put somebody in this position unless they have a full and complete understanding of all the detailed aspects of the various laws we administer.

Judge Marshall:
Does the Board ever override the decisions of the hearing officers?

Mr. Jugum:
I'll tell you, factually, I'm not aware, in the twenty years I've been with the Board, where the Board has ever overridden a decision where the hearing officer has recommended that the petition be granted (that the tax be cancelled). The Board frequently overrides the recommendation of the hearing officer where the recommendation is that the tax be upheld and be assessed.

Mr. Marzec:
Do you have printed procedures that you utilize at these hearings?

Mr. Jugum:
We have hearing regulations. We have a great batch of materials that are informative in nature that we distribute to persons who appear before our hearing officers. I think what we try to do is to have the hearing in as informal a manner as possible. There is no sworn testimony. We don't subpoena individuals to appear before our employees; we subpoena them to appear before the Board.

With respect to rules of evidence - even before the Board itself - the rules are not heavily followed. The Board's philosophy - that I've seen in all the years I've been there - is they just try to find out what's going on and what your position is. We can be very intimidating, being a taxing agency, and I think we've probably gone out of our way to try ... We don't deal just with attorneys, accountants, and professional people. Probably the bulk of people we deal with through our hearing process are just taxpayers - individuals - and I think we've gone out of our way to try and make people feel like they're not subject to artificial rules, that we just want to hear their story. So, I would describe our procedures as informal in the extreme for that purpose.

Judge Marshall:
How long has it been since you've had hearing officers "independent" as you say?

Mr. Jugum:
We began this division between the appeals unit and the general legal staff in April of 1989.

Judge Marshall:
I served as a tax counsel to the Board of Equalization and I never heard of it. That's why I ask.

Prof. Asimow:

I'm sort of jumping ahead to the next phase of my study (not quite relevant to what we're doing here). In the next phase, I'm going to be working on the relationship between the ALJ or hearing officer's decision and the final Board decision. I'm wondering whether I'm going to have a problem with the way you do it, because you actually rehear the case de novo before the Board, so the fact findings of your hearing officer really wouldn't be very important.

Mr. Jugum:

That is absolutely correct. The Board, I think - if I can speak for them - feels that they are the people who should be making the decision in these cases. They are the elected officials. Our agency is not an agency where we have a rubber-stamp direction from our members. They are very active in making the decisions themselves. They question the witnesses, they question the staff, they talk about all kinds of things. The feeling I think that the staff has is that the final decisions should be made by the Board. We are there in aid of developing the case - trying to handle their workload as best we can consistent with what we think their views are. Certainly the feeling is that we're not trying to take their place or to make final decisions. We're very respectful of their position as elected officials.

Judge Marshall:

Does the hearing officer have a subpoena power?

Mr. Jugum:

No.

Judge Marshall:

A contempt power?

Mr. Jugum:

No.

Judge Marshall:

Does he actually attempt to enforce any of the rules of evidence, or anything like that? Or is it a totally informal process?

Mr. Jugum:

It's a totally informal process to try and develop the information that would assist the Board ultimately in making its decision - or a hearing officer. We don't have rules about who can appear, time rules; we don't have rules of that nature.

Judge Marshall:

And each case which is taken over by the Board, is totally a rehearing - ab initio?

Mr. Jugum:

It's de novo, ab initio. They have a hearing report from a hearing officer. It's not like an appeal: it's not a review of the hearing officer's ... we throw that away. Well, we don't throw it

away, it's there in front of them. Somebody from the staff appears. They may make arguments that haven't been made previously, actually. The taxpayer appears - generally it's the taxpayer - and we start all over again. Actually, the system is designed for efficiency at the Board level, but members are so interested in making decisions themselves, it's actually quite inefficient.

Mr. Marzec:
Any further questions? Do you have anything further?

Mr. Jugum:
No.

Mr. Marzec:
Thank you very much.

Mr. Jugum:
Thank you.

Mr. Rhoads is called.

Stephen Rhoads (Executive Director, California Energy Commission):
My name is Stephen Rhoads, Executive Director of the California Energy Commission. With me today is Stan Valkosky, our Chief Hearing Officer. The Energy Commission and its hearing officers do not support the proposal to assign our hearing officers to a centralized panel.

The Energy Commission hearing officers handle extremely complex and technical cases related to licensing of large power plants in California. We call these cases certification proceedings. These proceedings include procedural and adjudicatory hearings. They cover complex environmental, energy, engineering, economic, and public health issues. In these proceedings, the Commission determines whether to license sites and equipment for the construction and operation of large power-producing facilities.

These cases are often controversial, and involve numerous parties and intervenors represented by counsel, as well as concerned citizens, community groups, and local government agencies. Since certification decisions affect projects costing tens, and even hundreds, of millions of dollars, project proponents are usually represented by major law firms. The complexities involved raise the level of our proceedings from an informal conference often conducted by many state agencies to formal reporting proceedings, the results of which are lengthy decisions based on an evaluation of often conflicting and extensive technical evidence.

Due to the highly specialized nature of our work, it is essential for our hearing officers to develop expertise in handling these proceedings. They must be familiar with a broad range of environmental statutes and regulations, as well as uniform building code provisions, public health and safety laws, federal energy laws, and economic forecasting policies established by the Energy Commission and other

regulatory agencies. We have discovered that it may take a new hearing officer one to two years just to learn the relevant technical terminology and interrelationships among the pertinent laws.

Most cases take from one to three years to resolve. The type of case management performed by our hearing officers can be analogized to a lengthy civil or criminal trial, where the replacement of the sitting judge may result in a mistrial. Although the hearings in each case may be scheduled sporadically over the course of a proceeding, hearing officers assigned to a particular case must be available on a continuous basis for ongoing review of evidence and to manage the records filed in each case.

Due to the number of parties often involved in our cases, there are many motions and petitions filed that require action by our hearing officers in order to meet the deadline set by state law. The records for most cases may fill an entire file cabinet, and the transcript typically runs into thousands of pages.

In conclusion, we do not see any advantage for us or for our hearing officers in the proposal to create a central panel. If our hearing officers were reassigned to a central panel, we would expect calendaring difficulties, which would create a greater problem than it would solve. It is doubtful that the Energy Commission hearing officers could be diverted to conduct daily hearings for other agencies, even if a special energy unit were established as part of a central panel. Moreover, it is equally doubtful that, due to the specialized nature of the work and the expertise required, untrained panel members could substitute during the certification proceeding.

However, we offer two suggestions, which we would ask you to consider. First, the Energy Commission does support the concept inherent in a central panel - that hearing officers, referees, administrative law judges, and others performing similar tasks be combined into a unified civil service class. We understand the need for a uniform career ladder for all state employees in this category, similar to the uniform career ladder and salary system for attorneys employed as staff counsel in various agencies throughout civil service. Such uniform classification structure would, we believe, achieve many of the same ends as the central panel concept.

Second, were the central panel proposal implemented, and even if the uniform classification structure were adopted, we believe the unique circumstances of some agencies, such as the Energy Commission, would still require their own hearing officers to deal with the specialized and complex proceedings handled by these agencies. We believe that when a particular agency requires a special expertise, there should be an exception which allows that agency to obtain its own hearing officers. Like staff counsel, the hearing officers so retained would be entitled to the salary equity and same promotional opportunities as those who sit on the central panel.

We would urge you to consider our recommendation. I would like to stress, again, that our hearing officers do not favor the central panel, for the reasons I've outlined today. Stan and I are here if you have any questions.

Mr. Marzec:
I have a question. What happens if the applicant who is applying for certification is denied? Do they have an appeal procedure in the courts?

Mr. Rhoads:
I believe so; yes.

Mr. Marzec:
What level does that go to - Superior Court?

Stan Valkosky (Chief Hearing Officer, California Energy Commission):
No, sir. In a certification proceeding - I'm using certification as a term involving power plants of over 50 megawatts - the statute presently provides direct appeal to the California Supreme Court, similar to that for the PUC.

Mr. Marzec:
Is there any superior court availability on that?

Mr. Valkosky:
Yes. If we have a decision on a matter ... We have broad jurisdiction ranging from certain energy-saving installations, on which we can have complaints (insulation quality standards, things like that), to investigation proceedings, whereby we would attempt, among other things, to determine jurisdiction over a prospective plant. In those cases, it would go to Superior Court - first level of appeal.

Mr. Marzec:
Which would be the majority of the types of cases you would handle? I would presume the certification appeals would be rare - they don't happen every day.

Mr. Valkosky:
The certification appeals certainly are rare. In fifteen years of the Commission's existence we've had one case go to the Supreme Court and we presently have one for which the plaintiff is asking for Supreme Court review.

Mr. Marzec:
So, correct me if I'm wrong, the majority of your activities then deal with reviews that are subject to Superior Court review, such as ...

Mr. Valkosky:
I wouldn't say the majority of our activities. The majority of our activities, I think, can fairly be characterized as dealing with power plant certification. The fact that we've only had one appeal to

the Supreme Court, with the other one I mentioned pending, I think more reasonably indicates the fact that most of the times our decisions are simply not appealed.

Mr. Marzec:
I'm trying to get a flavor for what you, as an administrative law judge for this agency, deal with the most. I would presume that you have a broad ...

Mr. Valkosky:
It's a broad spectrum of activity. Probably 75% of our time is devoted to power plant cases in one way, shape, or form; there are lots of different elements of what I would term a power plant case.

Mr. Marzec:
So then, a lot of these issues would go before a Superior Court judges on appeal?

Mr. Valkosky:
Unless it is the final certification decision.

Mr. Marzec:
O.K. All I'm trying to do is to establish that in most instances we have superior court judges (present company excepted of course, Judge Marshall) that would be dealing with this that are no more prepared than an administrative law judge that is on his first day on the job. Wouldn't you ...

Mr. Valkosky:
That's certainly possible.

Judge Marshall:
How often do you have cases to go the Superior Court?

Mr. Valkosky:
Very infrequently.

Judge Marshall:
What's infrequent? Once a year?

Mr. Valkosky:
Once every two years, two and a half years. I think, just running back (and I don't mean to attempt to represent the whole history of litigation on the Energy Commission) - I can think of probably half a dozen instances in the last fifteen years where we've actually gone to court or been taken to court.

Judge Marshall:
You are the State Energy Resources; is that right?

Mr. Valkosky:
The State Energy Resources Conservation and Development Commission.

Judge Marshall:
I see. And there are what - four hearing officers?

Mr. Valkosky:
There are six positions, four of which are presently filled. Yes, sir.

Judge Marshall:
And you are paid by the Energy Resources unit, is that right?

Mr. Valkosky:
The Energy Commission, that's right.

Judge Marshall:
Is there a range of salary? You start at one, and advance to others?

Mr. Valkosky:
We have presently two ranges of hearing officers: Hearing Officer I and Hearing Officer II. This equates roughly (and I think there are some minor differences) but essentially what used to be a Staff Counsel II and a Staff Counsel III range. I realize that's also been changed to an A, B, C, and D range, but it would be the upper end of that range.

Judge Marshall:
Then you can advance from I to II, is that it?

Mr. Valkosky:
That's correct.

Judge Marshall:
That's the end of the advancements, as far as hearing officers are concerned?

Mr. Valkosky:
Yes, sir.

Mr. Arnebergh:
Does your litigation involve actions by protestants of applicants?

Mr. Valkosky:
Usually, it would be someone protesting. I use the term "applicant" in the sense that we use it in the agency, which refers to someone wanting to build a major power facility. In that class of cases we've actually had very little court activity. It's really been in the class of cases which does not deal with power plants that we've had the bulk of our court activity. Such as building standards, insulation quality standards when that was topical, and things of that matter. I'm trying to be as clear as I can, but the Commission has a very broad spectrum of things it considers, and there are different procedures set up for this class.

Mr. Arnebergh:

For example, whether a nuclear plant would be allowed to operate or should be partly closed down, or something? Is there litigation on that basis?

Mr. Valkosky:

I'm happy to say that we had no involvement with the local nuclear plant. But we also have certain provisions of the Public Resources Code which essentially make it impossible to build a nuclear plant in California until waste disposal is taken care of, with the exception of the plants that had been grandfathered in at the time of the Act's passage.

Mr. Rhoads:

One of our chief functions is to site power plants. Geysers, cogeneration; and those, we've had very, very few appeals. Only one that I know of ... two, with the one that ...

Mr. Arnebergh:

And the wind machines that are power generators?

Mr. Valkosky:

No, they are not thermal power plants. There has to be something combusted to provide energy, and they have to be over 50 megawatts in generating capacity. The wind machines are not within our jurisdiction.

Prof. Asimow:

I wanted to ask a question that I probably should have asked of the previous speakers as well. Perhaps they can respond to it at the end. One of the ideas I'm toying with - that I want the Commission to think about - is, if we don't go to a central panel, should there be an institutionalized way whereby ALJs can put their names on a list and indicate their availability to hear cases in other agencies? This is designed to deal with the problem of ALJ burnout, which I think is a real problem for people who have to spend their entire careers hearing the same type of case every day. So that agencies would retain control over their own ALJs, but the ALJs would nevertheless have an organized method whereby they could - if their agency could spare them and if there was a need elsewhere - whereby they could hear other cases. Would you as an ALJ, or you as an agency, have a problem with that type of mechanism?

Mr. Valkosky:

I don't have a problem with it in concept. Speaking only from my case, I don't know how it would work in reality. I think a lot of that would depend on my personal workload and whatever I could offer to another agency in terms of expertise. For example, I've done medical disability cases; I probably would have not too much trouble getting up to speed on something like that. Other gentlemen before us - talking about tax cases - I'm not sure, frankly, that I would want to do a tax case.

Prof. Asimow:

The idea here is that you would volunteer to do the type of case you wanted to do, and if you could be used there, and spared by your own agency, then there would be a way whereby you could.

Mr. Valkosky:

Yes. As a concept, it seems attractive; it really does. I can't think of anything that would prohibit it.

Prof. Asimow:

I would like the Commission to consider whether that might not be recommended, along with the other recommendations on this point.

Mr. Rhoads:

Speaking for the agency, we would not have a problem with that. Anything that gives greater flexibility and greater efficiency, and gives more options for people, we would not be opposed to. As long as we would be able to meet our own needs for specialized hearing officers.

Mr. Marzec:

Would it not then be possible, if there was a central panel, to have a pool that specialized in your area, and draw from that pool, while allowing them to serve in other areas; similar to the courts having specialized criminal as opposed to civil, or family law ... ?

Mr. Rhoads:

We've given thought to that. We're just not too sure how that would work out, especially since, because of the broad nature of the work we do (and I tried to hit that in my speech) and the topics that we have to cover, it's so specialized. I think people would come to the conclusion that the central panel needs to be put under the Energy Commission. They need to be there, they need to be present just in attending hearings and answering questions and so forth. And the length of our hearings - one to three years average length ... I don't think that it would be a really good, workable situation. Stan may want to offer a few more comments.

Mr. Valkosky:

I think what Mr. Rhoads said is right. In addition - and from what I've heard from the panelists I've inspected - we also work quite closely with our Commissioners. There are a lot of times where a Commissioner will have an idea or want to explore a concept, and we'll do that from a legal perspective - a law and policy perspective - with a Commissioner. I think that performs a valuable function. It certainly does for our part and I believe it does for our Commissioners (who, by the way, are all gubernatorial appointees). I'm not sure, frankly, that they would be willing to give up that ability. It's very convenient the way we are: we're a modest-sized agency, there's a lot of direct contact with the Commissioners and the hearing officers. Again, I think that leads to an improved quality of the decisions.

Mr. Rhoads:

I can speak for the Commissioners, and they would not want to give up that flexibility. But also, I don't think the applicants would. These are multi-million dollar projects, and the convenience of being able to have access to people: it is convenient when everyone is in the same office, in the same building.

Mr. Marzec:

Do applicants have access to the hearing officers prior to the hearing?

Mr. Rhoads:

For scheduling, procedural matters.

Mr. Valkosky:

That is the only access that is permitted. They are specifically prohibited from discussing substantive matters pursuant to our ex parte rule.

Mr. Marzec:

They are specifically prohibited ...?

Mr. Valkosky:

Prohibited from discussing substantive matters. Yes, sir.

Judge Marshall:

Any of you hearing officers are lawyers?

Mr. Valkosky:

We are all lawyers.

Judge Marshall:

Have any hearing officers been transferred to other agencies? By force or voluntarily, either way?

Mr. Valkosky:

No, sir. Certainly not by the former.

Judge Marshall:

Do you have a subpoena power?

Mr. Valkosky:

Yes, we do.

Judge Marshall:

And the power to hold in contempt as well?

Mr. Valkosky:

No, we don't. Just subpoena.

Mr. Marzec:

Does the agency have guidelines for qualifications of hearing officers?

Mr. Rhoads:
Yes, we do. It's a civil service classification.

Mr. Marzec:
Any in addition to the basic civil service requirements?

Mr. Rhoads indicates no.

Mr. Marzec:
Do you have printed procedures that you utilize for your hearings?

Mr. Valkosky:
Yes, we do. We have the bare bones regulations contained in Title 20, which just set forth general guidelines for the conduct of the proceedings. We also typically accompany that in our own notices with a detailed explanation of what is going on or what will go on in the hearings.

In addition, the Commission has an Office of the Public Advisor, which, while not unique to state service, is certainly different. I'm aware of really only one other agency that has such an office. The Public Advisor, who again is appointed by the Governor, functions to apprise all of the various parties that may come into our proceedings of various procedures - rights that they may have, the way the proceedings will operate, things of that nature. The Public Advisor cannot advocate a substantive position, but his job is to give procedural advice primarily to the public groups and the unrepresented citizens who may appear before us.

Judge Marshall:
Sort of like an ombudsman?

Mr. Valkosky:
Yes. I think that's a good analogy; it's very close to it.

Mr. Marzec:
Are your guidelines - hiring guidelines and procedures - a matter of public record?

Mr. Valkosky:
Yes, sir.

Mr. Marzec:
So, we can get copies of those?

Mr. Valkosky:
Certainly.

Mr. Marzec:
Mr. Jugum, yours are also a matter of public record, so we can get copies readily?

Mr. Jugum:

We, can send you what we have. All we really have is the notices for Staff Counsel positions that are normal civil service listings.

Mr. Marzec:

O.K., thank you. Any further questions? Anything further, gentlemen? Thank you.

Mr. Day is called.

Michael Day (Deputy General Counsel for California Public Utilities Commission):

Good afternoon, Mr. Chairman and members of the Commission. I'd like to thank you on behalf of our Commission for the opportunity to talk to you about the proposal.

Our agency regulates the gas, electric, water, telecommunications, and motor transportation utilities in the State of California. We have literally hundreds of hearings, comprising thousands of hours of hearing time, each year. We have between 35 and 37 ALJs at any given time; I believe at the moment we're about 35. Our administrative law judges almost exclusively come from within the Commission itself. They are engineers, accountants, lawyers, who have been employed with the Commission and developed the expertise necessary to hear our cases, which really cover a wide variety of utility matters.

There is no one typical type of Public Utilities Commission case. An ALJ may be faced with handling small complaints about a utility bill, or a major utility rate case in which hundreds of millions of dollars of rate changes are proposed, or extraordinary proceedings of an entirely different nature, such as now we have a couple of ALJs hearing a case to decide whether Southern California Edison and San Diego Gas & Electric should be allowed to merge into one giant utility.

With respect to the proposals that have been addressed today, our Commission would make two points. I'll summarize them briefly. We have submitted a letter to you, which is contained in the Second Supplement that was passed out for you today. First, we believe that the constitutional status of the Public Utilities Commission and the history of our Commission's evolution as a regulatory agency provides unique reasons for not isolating our administrative law judges from the PUC. And secondly, we believe that there would be serious disruptive consequences from such a move, in the form of delaying Commission decisions, lowering the quality of decision making in our Commission, and inhibiting the responsible administration of our Commission's extensive caseload. We are a very busy agency, with a great deal of pressure to get out our decisions as quickly as possible, because obviously they affect the rates that utilities are charged and there are tremendous financial consequences for the utilities if they are unable to meet their expenses by recovering the correct amount of rates.

Judge Marshall:

What is your unit called?

Mr. Day:
The Public Utilities Commission.

Judge Marshall:
Ah, I've found your letter; thanks.

Mr. Day:
With respect to the first point, the Commissioners who were from the original agency (which was called the California Railroad Commission) are of course responsible, under the provisions of the Constitution, for determining just and reasonable rates for California utilities. In the beginning, the Commissioners heard all the rate cases themselves. Later on, hearing officers - the position which developed into administrative law judges - were added as assistants for the Commissioners, essentially helping the Commissioners to develop a record. The remnant of this procedure remains in place today, because for each one of our rate cases there is an assigned Commissioner responsible for ultimately making procedural decisions about the course of the case, and then helping fellow Commissioners to decide it. The ALJ and the assigned Commissioner usually work in concert on preliminary procedural rulings, and there are many of those that are proposed.

Judge Marshall:
They sit together?

Mr. Day:
They can. We often have Commissioners come down and sit in the hearing room to watch particularly interesting testimony in a case, but it is not the norm. Usually in certain circumstances.

The Public Utilities Commission is exempt from the provisions of the APA, and constitutionally is entitled to establish its own procedures. One point that we mentioned in our letter that I think is critical to mention, is that as it is set up now, the administrative law judges do not rule on the appropriateness of Commission decisions, as they would in perhaps a licensing agency. They formulate a preliminary view - a record and a proposed decision - before the full Commission hears the case. So it's not the situation where they would be in a position of critiquing the Commission which is their hiring power. They develop an initial decision, which the proposed decision is now required by Section 311 (I believe) to be published for 30 days before the full Commission can act on it, and then the full Commission can adopt that without any changes at all, or they can modify the proposed decision in whatever form they like for their proposed and for their final decision.

Our administrative law judges do not have any function in the appellate process, other than minor requests for modification of decisions. The rehearing process is handled by the Commission's legal staff, and appeal from the Commission's rehearing decision is directly to the California Supreme Court.

With respect to the administrative consequences of isolating the ALJs from the PUC, we would be very concerned in a number of respects. First of all, the administrative law judges, because of their expertise, because of their familiarity with the record in the case - hearing the witnesses and examining the technical exhibits as they are entered in the case (and this can, for a major rate case, be hundreds and hundreds of pages of documents) - they are of invaluable assistance to our Commissioners in making their final decision. The Commissioners will routinely have to ask the ALJ, "Is there evidence in the record on this point? What does it consist of? If I wanted to recalculate this rate based on this information, how would it be done?" That expertise would be unavailable to our Commissioners, we believe, if the ALJs were transferred to a separate agency.

We also have a significant problem in coordinating decisions, and the cases, and the hearings themselves. For instance, at the end of each calendar year, we are required to get out our general rate case decisions, so the rates can go into effect on January 1st. We usually have a series of preliminary decisions on the rate of return the utilities will be granted, which are done generically, that must be decided before the rate cases for the individual utilities. If we did not have control over the ALJs or the ability to assign ALJs to particular cases and to determine that they would conclude their hearings by a certain point in time, it would be extremely difficult, if not impossible, for the Commission to make sure that the preliminary decisions were made in time for those results to be included in the calculations of regular rate cases. That's critical to our decision making process.

We're also afraid the ALJs themselves might lose some of the resources that they have available to themselves at this point. The Commission's Advisory and Compliance Division routinely provides technical assistance to ALJs during the course of a hearing. That may not be as easily accessible, or even available at all, if the ALJs were in a separate agency.

And finally, like the other agencies that have spoken today and I'm sure will speak after me, we believe that the type of proceedings that our Commission handles are of such complexity that it's a tremendous advantage to have ALJs who have come up through the ranks, so to speak, of the PUC. We think that it would be very difficult to maintain the same type of level of expertise in ALJs if they were employed by a separate agency, even if they tried to specialize in, say, energy-related hearings.

Thank you very much for your attention. I'll be happy to answer any questions you may have.

Mr. Marzec:
Any questions, gentlemen?

Judge Marshall:
Do you have different ranks of ALJs?

Mr. Day:

Yes. We have two classifications: ALJ I and ALJ II. I note that there were some questions about career path options. I will also note that it has happened, not infrequently in our Commission, that ALJs are often promoted to division director or assistant general counsel positions after they've been senior ALJs for a period of time.

Mr. Arnebergh:

What percentage of your cases involve really technical or involved problems?

Mr. Day:

I would say 75%. The other 25% would be the routine billing complaints, the minor trucking disputes. But the rest are major rate cases that the utilities and their customers put a lot of litigation effort into.

Unidentified Commissioner:

In these proceedings, the Public Utilities Commission staff advocates a position before the ALJ?

Mr. Day:

That's correct. We have a separate division called the Division of Ratepayer Advocates, which takes a litigation position on behalf of the general interest of all ratepayers. They will be opposed by the utility representatives. Then there are intervenors - who could be consumer groups, industry groups, literally any combination of parties - who would also participate. They would all litigate the case before the ALJ.

Unidentified:

What's the relationship between that part of the Commission staff and the part of the staff which is providing at the same time technical input to the ALJ?

Mr. Day:

They are structurally separated. There is virtually no crossover between the Division of Ratepayer Advocates and the Advisory and Compliance Division with respect to the proceedings in any given case. They have occasionally worked together to develop computer models for general application - things like that. But there is intended to be a firm structural separation between them. We have the same thing on the legal staff: the section that I supervise and one other advise the Commission and handle appellate matters. There are two separate legal sections that handle representing the DRA in hearings before the ALJ. We maintain this structural separation throughout the Commission.

Unidentified:

What are the ex parte rules with regard to contacts between the advocacy portion of the staff and the ALJ?

Mr. Day:

There are no formal ex parte rules in effect at our Commission. But generally speaking the ALJs themselves enforce rules whereby they will only receive communications on procedural matters from the parties, and require parties to send information by letter to all the other parties.

Unidentified:

When you say "parties", does that include the advocacy portion of the Commission staff?

Mr. Day:

Yes, that is correct. The Division of Ratepayer Advocates is treated as a party for all practical purposes, save and except that they cannot apply for rehearing or appeal a Commission decision.

Judge Marshall:

What happens if the Commission disagrees with one of the ALJs?

Mr. Day:

They have the opportunity to modify the proposed decision and vote out an alternate decision that is usually prepared by the Commissioners and their own legal advisors. It is sometimes prepared with the cooperation of the ALJs, sometimes with the cooperation of the Advisory and Compliance Division staff. Any of those alternatives are possible.

Judge Marshall:

Does this happen frequently or infrequently?

Mr. Day:

I would say, a fair amount of the time. In routine cases, and in minor rate cases, it's very unlikely that an ALJ's decision would be modified. In a major rate case, it's likely that it will be modified slightly. And there are cases in which the decisions are modified significantly.

Mr. Marzec:

Do you have guidelines for the hearing and administrative law judges?

Mr. Day:

Yes, we have civil service classifications and requirements. I don't know the details of them off the top of my head, but they are mainly concerned with the number of years of experience in public utilities work.

Mr. Marzec:

How about procedural ... ?

Mr. Day:

We have rules of practice and procedure which are published and available for all parties. They are very general in scope. One of the rules is that our Commission shall not permit any given formality in procedural rules to inhibit the presentation of evidence. We try and allow parties a fair amount of scope to present their testimony.

Judge Marshall:

The rules of evidence aren't too well followed, I gather.

Mr. Day:

I would have to say I was very surprised, coming to the Commission as a lawyer in private practice, that it is not routinely followed. Hearsay evidence is our mainstay, because no one person can, of their personal knowledge, know everything about a major utility company. But the rules of evidence are followed in the disputes about privilege, the controversy about discovery of documents, and so forth. So we do have reference to them, and we educate the ALJs about them. But a given technical objection in cross-examination may not be sustained.

Judge Marshall:

What do you pay an ALJ, anyway? What's the salary range?

Mr. Day:

I ought to ask Don Jarvis about this, because I'm not familiar with the range, specifically, myself. But we certainly can provide that to you. I wouldn't want to hazard a guess.

Judge Marshall:

I'd like to know.

Mr. Day:

We'll provide that.

Prof. Asimow:

Mr. Day, I had two questions. One was if you would address a little further for the Commission the assigned Commissioner practice that you alluded to in your statement, which I think is pretty much unique to your agency. It is a vestige, as you said, of earlier times. In looking at that and talking to a great many people at the Commission, it seems to me to perhaps be something that creates more problems than it solves at this point.

The other question I wanted to ask and I also wanted to address it to Judge Jarvis, was whether you'd have a problem with the kind of thing I mentioned to the previous speaker, which is a voluntary system whereby judges can work for other agencies when they want to and they can be available.

Mr. Day:

With regard to the second point, certainly to the extent it provides additional opportunities for ALJs to get a variety of work and ease them from the burnout syndrome and so forth, I don't think we'd have any objection to it, so long as it were, (1) voluntary on the part

of the ALJ, and (2) would only be undertaken with the approval of the ALJ's supervisor. The one thing I can think of: At various times of the year, our Commission's hearing schedules are so difficult to manage that it would not be possible to allow the ALJs to be taken away for any significant period of time. One of the problems you can foresee is that someone volunteers to take a case which appears routine but then turns out to be rather protracted in nature, and maybe we were counting on getting that ALJ back to do a very important rate case in the fall. As long as practical things like that could be worked out I don't think there would be a problem.

With respect to the assigned Commissioner procedure, every rate case or each application that comes before the Commission is assigned to one of the five Commissioners by the President. (The President of the Commission is elected by its fellow Commissioners annually, and serves as the administrative leader of the Commission.) Those Commissioners are responsible for essentially tracking the case through the rate case process. They make themselves known to the ALJ. If there is a procedural question that will come up during the case, almost always the ALJ will discuss the appropriate procedural practice with the assigned Commissioner. This will often come because parties will request a delay, or additional time to prepare testimony, whereas the Commission is obviously faced with a problem of trying to get these cases done as quickly as possible and coordinating it with other proceedings. So there is a need to coordinate unrelated cases which may be handled either by the same ALJ or by the same Commissioner.

At the time of the decision, the assigned Commissioner, as I said, may have little or no role in reviewing the proposed decision of the administrative law judge, or they may wish to make substantial revisions. The assigned Commissioner is the one essentially responsible for proposing the decision to the full Commission. So, when the Commission meets in formal session, the proposed decision of the ALJ will be there, as well as any alternates written or prepared by the assigned Commissioner. Other Commissioners are free to do that as well, but generally most modifications are made in concert with the office of the assigned Commissioner. And then the full Commission will vote on whether to accept the proposed decision, or to modify an alternate. Occasionally there is more than one alternate, and they vote on that.

But it's really a process by which the Commission can directly keep track of the management of the cases so they cannot just sort of bounce along without supervision. We have a major caseload problem at the Commission and it's important for our Commissioners to move them along as quickly as possible. I know they view that as the primary benefit of the assigned Commissioner policy.

Prof. Asimow:

Couldn't that be done just as well by the supervising ALJ, for example?

Mr. Day:

- Well, it is in fact a function that is partly done by the chief ALJ. The chief ALJ has overall responsibility for looking at the caseload of all the administrative law judges and in fact recommending which judge gets which case. The assigned Commissioners do not do that.

Judge Marshall:

I gather that you have a supervisor of the ALJs? What is his function?

Mr. Day:

Yes. The chief ALJ does the hiring of the ALJs and the assignment of the cases to the ALJs, as well as responsible for coordinating their work, as I said, trying to make sure that the hearings in one case are finished in time for a decision in another case where a related decision will be utilized. And there are, I believe, three assistant chief ALJs under the chief ALJ who supervise ALJs in specific subject matter areas.

Judge Marshall:

How many ALJs do you have?

Mr. Day:

I believe about 35 or 36 at the present time.

Judge Marshall:

So, what does the supervisor do? Of the ALJs?

Mr. Day:

I'd say the primary function is assigning the cases and ...

Judge Marshall:

That was the ALJ that did that. I thought you said something about a supervisor.

Mr. Day:

Yes. There is also review of work product. The ALJs' decisions are examined for consistency with past Commission precedent, and just general good decision making practices by their supervisors and occasionally by the chief ALJ as well.

Judge Marshall:

I still don't know what the supervisor is. Who is he?

Mr. Day:

The supervisors themselves are ALJs, who have their own cases, but they also have subordinate supervisory responsibilities, essentially assisting the chief ALJ in her function.

Mr. Marzec:

Any further questions?

Mr. Day:

Thank you very much.

Mr. Marzec:

We're going to take a five minute break.

There is a recess.

Mr. Marzec:

If we can reconvene, please, we have some additional speakers. For those of you who are here on the commercial lease matter - the Kendall legislation, also remedies and use restrictions - we'll be getting to that in about an hour, so bear with us. *(The Chairperson is handed a supplementary speaker list.)* It may be an hour and a half.

Mr. McArdle is called.

Tim McArdle (Secretary and Chief Counsel, California Unemployment Insurance Appeals Board):

Thank you. My name is Tim McArdle. I am Secretary and Chief Counsel for the California Unemployment Insurance Appeals Board. The Appeals Board looks upon this study and the reforms that are likely to be the outcome of this study in a very positive light. We view it as a very positive development, and congratulate this Commission on taking on this historic undertaking.

I want to start by just saying a few words - a description - about the Appeals Board itself. The Board is an independent agency whose functions are purely adjudicatory. The Board itself consists of a seven-member Board that serves staggered four year terms. Five members are appointed by the Governor, one member is appointed by the Speaker of the Assembly, and one member by the Senate Rules Committee. The Board structurally is organized into a lower authority and a higher authority. The lower authority consists of approximately 115 administrative law judges, stationed at eleven offices of appeals throughout the state, who hear and decide cases involving unemployment insurance, disability insurance, and employment tax cases, from decisions made by the Employment Development Department. Last year, the lower authority issued approximately 138,000 dispositions. The higher authority, here in Sacramento, consists of the seven Board members and fifteen administrative law judges, who review appeals taken from decisions of administrative law judges and issue decisions based upon those appeals, using the substantial evidence test. Appeals from final Board decisions are by way of writ of mandate in Superior Court. We have approximately 278 cases before the Superior Courts around the state at the present time. Approximately 12 cases are in the Courts of Appeal.

We have spent some time with Professor Asimow during the course of his study - during the development of his study - and have passed on comments to him and to your staff during the past approximately 18 months. As I say, generally the Board considers this study in a very positive light. We have had some minor problems along the way, but we've voiced our concerns here and we felt that they've been adequately addressed.

With the central panel, however, the Appeals Board has taken an official position in opposition to having its ALJs removed to a central panel; the sentiments were expressed in my letter to you of May 14th. The staff has responded to the letter. The letter really is a point-by-point analysis of the issue. Professor Asimow has advised, and the staff has recommended, that our judges be left where they are. I'm not going to take up your time this afternoon with a repetition of what I've already put in that letter.

I would like to comment, though, that the essence of the letter is that the Appeals Board is an agency that is working well right now. It is an agency that is providing due process of law at every stage of the proceedings to the literally hundreds of thousands of parties that appear before it every year. There has been no compelling case made for a change in the present structure. As Board counsel, I've litigated hundreds of cases before the superior courts, and courts of appeal, and never once has the adequacy of the due process the Board provides, at least on a structural level, ever been challenged or indeed been brought into issue. Of course, there have been some individual lapses, but they have been addressed on an individual basis. But the adequacy of the structure of due process provided for in the current system has never been questioned.

In my letter of May 14th, I said that I would provide you with additional economic data, in terms of the Board as an efficient and economical agency, and I made the statement in there that I seriously doubted that the Board's function could be handled more economically by a central panel. I have that data with me today, and I'll leave it with Mr. Sterling. Basically, cutting to the bottom line, last year the Board expended approximately 25 million dollars in its operations, and in the process disposed of 145,000 cases. So, I think that's a mighty testament to an agency that's working well right now from an economic standpoint. *(A copy of the data provided is attached to this transcript.)*

I submitted my letter on May 14th, and on May 17th our judges convened for an annual conference. We had the privilege of being joined by Professor Asimow, who conducted an informal poll of our judges. The question posed to them was whether or not they favored being removed to a central panel, with the understanding that they would still be hearing basically the same types of cases they hear now - unemployment, disability, and employment tax. By about a 3 to 1 margin they opposed the idea of being removed to a central panel. The issue was rephrased to allow for an opportunity to hear different types of cases, while still hearing unemployment cases in the mainstream, but an opportunity for occasional rotational assignments to hear a variety of cases. And, when the issue was framed that way, it was about evenly split, with perhaps a slight majority favoring removal to a central panel. Now, in my May 14th letter, right toward the end, I suggested that very point to the Commission. I suggested that, perhaps in an agency particularly such as ours - a high-volume agency - that our judges might be subject to job stress, to job burnout, perhaps - after years and years of hearing the same types of cases - to a disinterest in the function as a whole. That there should be some way to create

some kind of apparatus within state government, whereby our ALJs could rotate to another agency for a limited term on a voluntary basis to hear other types of cases. I've heard Professor Asimow make that same recommendation a couple of times this afternoon, at least that same observation. I would urge it upon you to consider that seriously in your deliberations on this issue.

On behalf of the Appeals Board, I want to thank you for this opportunity and the opportunities you've given us in the past to share our concerns and our comments with you. I'd be glad to entertain any questions you have.

Mr. Plant:
We're talking now about the upper level - you referred to the upper level. What is the relationship between the administrative law judges - the fifteen - and the board members at that upper level.

Mr. McArdle:
The fifteen administrative law judges at the higher authority work directly for the Board. They are assigned cases. They read the transcript and the exhibits, and then propose a decision to a randomly-selected panel of two members of the Appeals Board. In proposing their decisions, they employ a substantial evidence test to the decision reached by the administrative law judge who heard and decided the case originally. They work directly for the Board.

Mr. Plant:
So they make a recommendation to the Board.

Mr. McArdle:
That is correct.

Mr. Plant:
And the Board can either accept that or reach another conclusion.

Mr. McArdle:
That's absolutely correct.

Judge Marshall:
The recommendation is based on a review of the ALJ's decisions, is it not?

Mr. McArdle:
That's right. There is no further hearing conducted at the higher authority. It's strictly a review of the transcript and the exhibits.

Judge Marshall:
How often is there a reversal of what the ALJ does?

Mr. McArdle:
First of all, about 10% of the ALJs' decisions are appealed to the higher authority. Basically, you have two types of parties appearing before the Board - claimants and employers. In employer appeals to the Board, last year, we reversed about 14% of ALJ decisions. For claimant

appeals, it's closer to 10%. In other words, the vast majority are affirmed. I might add that our ALJs in the field reverse the Employment Development Department about 40 to 45% of the time.

Judge Marshall:
What's the salary range on the ALJs?

Mr. McArdle:
I was afraid you'd ask that. I'm not really sure; I think that it tops out about $74,000 a year.

Judge Marshall:
Would you have any objection to the removal of the power to promote or to pay, to say, the State Personnel Board?

Mr. McArdle:
Well, right now, the salary is already established by the state Department of Personnel Administration, and state civil service laws and rules provide for the hiring and promotion of ALJs. Since we are already a completely self-contained adjudicatory agency, answerable not to anybody else but to itself and of course its appointing powers, I don't really see a need for removing that particular promotional authority to another agency.

Judge Marshall:
What promotions are there, anyway?

Mr. McArdle:
Well basically, the only promotional level or opportunity within the agency is to presiding administrative law judge. We have 11 of those. We have two career executive assignments as well.

Judge Marshall:
And their salary is what?

Mr. McArdle:
The presiding ALJ is 5% above the working ALJ.

Unidentified Commissioner:
Are the ALJs in the lower authority and the higher authority on the same level, salary-wise?

Mr. McArdle:
Yes, they are.

Unidentified Commissioner:
It's not a promotion?

Mr. McArdle:
No, it's not. In fact, they transfer back and forth; we rotate the lower authority ALJs to the higher authority so they have a chance to review their peers' work and provide an additional perspective on their job.

Mr. Marzec:

Do you have - I've asked this question and I'll continue to ask it - do you have written guidelines for the ALJs?

Mr. McArdle:

Our hearing procedures for the higher authority are contained in Title 22 of the California Code of Regulations. In addition, we have in-house procedures. We have a decision-writing manual, and things of that nature; we have annual training sessions and the like. But the procedures are in the regulations.

Mr. Marzec:

Could we secure a copy of your procedures, and your decision-writing manual?

Mr. McArdle:

Certainly.

Prof. Asimow:

Mr. McArdle, I wondered if you could tell the Commission (this is not really germane to today's inquiry, but it's an issue that they'll be facing in the near future) about your system of precedent decisions. To me, it's an excellent part of your procedure, and it's not something you generally see in most state adjudicating agencies where there really is no way for you to look up the adjudicatory law of most licensing agencies. Could you talk about that a little?

Mr. McArdle:

Sure, thanks; in fact I meant to mention that. Since 1967 the Board has had the statutory authority to designate certain of its decisions as precedents. By "precedent" I mean that they are binding upon the Board, upon its administrative law judges, and upon the Employment Development Department, for the legal principles set forth in those decisions. The decisions are fully indexed and digested; that's a publication which I update annually. To date, we've had 479 precedent decisions since 1967. They cover areas of tax, of employment rulings, of unemployment insurance, disability insurance, and so on. Not only are they challengeable in superior court by way of writ of mandate, but also any Californian can challenge precedent decisions by an action for declaratory relief. So, those challenges are not limited to the parties in the case.

Judge Marshall:

That's in superior court?

Mr. McArdle:

In superior court, that's right.

Mr. Marzec:

Any further questions? Do you have anything further?

Mr. McArdle:

I have nothing further.

Mr. Marzec:
Thank you very much.

Mr. Jablonsky is called.

Steve Jablonsky (Executive Officer, Occupational Safety and Health Standards Board):

Material not recorded due to changing of tape.

The Standards Board members themselves are part-time. I administer the agency on a day-to-day basis. We have a very small staff.

We're the standards-setting agency within the CAL-OSHA program. We probably have as many regulations as any other agency. At one time - during the regulatory reform - somebody must have counted the pages: there were 3,700 pages of regulations (referred to as safety orders) that are the work standards for the working people in California. The Standards Board can grant variances from those standards to an employer, provided there's some alternative means to protect the safety and health that's provided.

On May 15th, I send you a letter that kind of summarized our agency, and our comments. Our primary concern was for not losing the one hearing officer we have who presides over these variance hearings. I'm not here before you today to restate those points and comments, but rather to simply say that I was pleased to see the staff's recommendations regarding our agency and I'm here to respond to any questions.

Mr. Marzec:
How many hearing officers do you have?

Mr. Jablonsky:
Just one. Our experience has been ... From the outset of the Cal-OSHA program in 1974 we utilized the Office of Administrative Hearings initially (that was before my time). Then at some point, when the variance workload picked up, our sister agency - the Occupational Safety and Health Appeals Board - provided their hearing officers to conduct our variance hearings until the workload came up. Then we hired one hearing officer who served also ... kind of two hats: the majority of the time was as a hearing officer (it is a civil service class that's utilized); also provided legal advice to the Executive Officer and the Board members. The Board members are laypersons and come from a labor-management ... there's a balance. That same hearing officer stayed until the budget reduction in 1987, and she's now working with the Unemployment Insurance Appeals Board. So we're only on our second hearing officer. The workload during the so-called disengagement - when the Cal-OSHA program was applied only to the public sector - places of employment obviously fell way down. It's now coming back, and the hearing officer is still - at this point in time - able to provide some time for legal advice.

Mr. Marzec:

So you still have the hearing officer. I guess no pyramiding in the advancement ladder. *Laughter.*

Mr. Jablonsky:

I haven't had that kind of a history.

Mr. Plant:

Mr. Jablonsky, we have a piece of paper here - a memo - that says you have seven administrative law judges. Do you have ones that do something else?

Mr. Sterling:

I may be able to clarify. I think that lumps together the Appeals Board and the Standards Board.

Mr. Plant:

Oh, I see.

Judge Marshall:

No, you have two different figures for that. You have six for the Appeals Board and seven for the Standards Board.

Mr. Jablonsky:

I think that the Appeals Board has more than six, and we only have one.

Mr. Marzec:

Are there any other questions? I do have the same question I asked before. Have you developed any standards in addition to the civil service requirements for your hearing officer?

Mr. Jablonsky:

No. In fact, we're so small, we use the civil service list of the Appeals Board to hire in both cases. We only have a history of two hires, and the salaries are set through the civil service system.

Mr. Marzec:

How about procedures for your hearings?

Mr. Jablonsky:

We have rules of procedures that are codified as part of Title 8. I'm not an attorney ... they are not too detailed, but there are rules of evidence and there is subpoena power. Generally the hearing officer's primary responsibility is to preside. We have two Board members that generally sit as a panel with him. He is responsible for the rules of evidence and establishing an adequate record. He writes up a proposed decision that is then adopted by the full Board.

The proceeding is not an adversarial proceeding. In most cases, employees or employee representatives do not take advantage of the opportunity to seek party status. So, it's a very informal kind of hearing. The bottom line is that the employee's safety and health are protected by some other means, because the employer either has a unique

operation and cannot comply with the standard that's applied to everyone, or it's economically not feasible, or for a variety of reasons. There are no legal reasons except that he must provide either equivalent or better protection for the safety and health of those employees.

Mr. Marzec:
Thank you, Mr. Jablonsky.

Judge Marshall:
So your solitary hearing officer makes a decision. What happens to it?

Mr. Jablonsky:
He writes a proposed decision and it's adopted by the full Board. Or if it's not adopted, they give him further direction and he would modify the proposed decision, bring it back to the Board. (Since it's a part-time Board, these things operate on a cycle.) They would then adopt the modified or amended proposed decision. There are provisions for a petition for reconsideration by either party, and then the recourse is to the superior court.

Mr. Marzec:
Any further questions? Thank you very much.

Ms. Herse is called.

Beth Herse (Staff Counsel, Office of Statewide Health Planning and Development):
Good afternoon. My name is Beth Herse. I'm a staff counsel with the Office of Statewide Health Planning and Development. I don't have formal remarks today, but I just wanted to speak briefly because the concern we have is not one that I've heard reflected by the other speakers.

The proposal being considered essentially is two parts. One would require that all administrative hearings be heard by administrative law judges, and the second that those judges be in a central panel. Our office currently has at least two types of appeals that are heard not by administrative law judges but by members of boards and commissions that are advisory to our office.

The process has worked very well for us and we would be very reluctant to see it changed. It offers several advantages. First, the members of the boards and commissions have been chosen for their expertise in certain fields. The positions on both those boards and commissions are appointed: for the one they're appointed by the Director, and for another they are gubernatorial and legislative appointees. The issues at stake in the hearings are usually not legal issues per se. They tend to be factual, they tend to be programmatic. And they tend to deal with very flexible standards that are best applied in context for the people involved who know what's going on, are familiar with the process, even with the programs. The panels have not been perceived to have a problem with being biased toward

supporting the agency. They have been well-received by the appellants that appear before them. Basically, we've just been very satisfied with that process, as have the members of the health industry that we serve.

Our concern is with any process that would make the hearings more onerous to the health facilities, and that would then make them less inclined to use those. At this point it is rare for the health facilities involved to be represented by counsel. The hearings can usually be scheduled at a time and place that is reasonably convenient for the facilities. It's a fairly informal, but efficiently-working, system.

Commissioner (unidentified):

Could you give us some examples of these advisory boards and commissions? I'm not familiar with them. And also, a couple of examples of some issues.

Ms. Herse:

Yes, sure. We did send a letter, and I wasn't sure how much detail you would want. Basically, we have two programs that are involved here. One is the Office of Statewide Health Planning, that administers a data collection program for health facilities. All hospitals and nursing homes throughout the state have to file certain financial and patient information with us. Those reports are mandated by law and there's an automatic civil penalty for delinquent filing. It's appeals of those penalties that create one set of hearings; that is fairly frequent.

The other situation is that our office administers the Hospital Seismic Safety Act, which involves building and construction of health facilities. Any appeals of the application of the building standards to the actual construction as it occurs can be made to the Building Standards Board. So in most cases, the law is fairly straightforward. The building codes are there. It's how they're applied - if it's appropriate, if the application is more onerous and therefore becomes inappropriate. Those are the kinds of factors that have to be weighed in a hearing.

And likewise with the data division hearings, the requirement that the data be filed are very straightforward. There is almost never a legal issue about: Was the report due at a certain date. The issue, by statute, is: Is there good cause to waive or reduce the penalties that were therefor accrued. It's a flexible standard.

Mr. Marzec:

Wouldn't that be a legal question, though - good cause?

Ms. Herse:

In a sense it is a legal question, but there are not a lot of strict legal guidelines on what determines good cause in this situation.

Mr. Marzec:

So, your concern - and it's expressed in a letter by Mr. Meeks, the director of your agency - is whether your agency would be required by any proposed statute to have hearings conducted by administrative law judges?

Ms. Herse:

Exactly. Under the current law regarding our data collection program, we do have the option of having those penalty appeals heard by an administrative law judge employed by the Office of Administrative Hearings or having the hearings heard by the members of the Commission. We have traditionally chosen the option of having appeals heard by members of the Commission. That has been, for us, a very useful conduct.

Mr. Marzec:

So, you have health facilities attending hearings before your agency. And who else did you say would come before your agency?

Ms. Herse:

In either case, it's usually the health facility. Either the facility (or their corporate office) was late in submitting data, or the people involved in the construction or alteration of a health facility are concerned about the building standards being applied.

Mr. Marzec:

Does this include retirement homes, convalescent hospitals, and so on?

Ms. Herse:

Under certain circumstances, yes.

Mr. Marzec:

And how many of these cases do you have per year? Do you have any idea?

Ms. Herse:

The hearings of penalties for late filing of data are probably around 12 to 15 a year on average; sometimes a little more. And the appeals on building standards are fairly rare - a few.

Mr. Marzec:

And what sanctions are you able to impose on - for example - a health facility? Can you remove - or revoke - their license, I should say?

Ms. Herse:

The sanctions differ with the program. With the data collection program, the sanctions are automatic. It's the $100 per day penalty for late filing. And so the option of the panel that hears the appeal is basically to recommend that the penalty be waived or reduced. And as far as the building standard: When a facility is informed that they must comply with a certain standard and they choose to dispute that, if

the Office is upheld they are told that they must indeed comply with the standard. The sanctions have to do with things like stop-work orders, and so on, in the construction process.

Judge Marshall:
How many hearing officers do you have?

Ms. Herse:
We don't have any hearing officers at all.

Mr. Marzec:
How many employees do you have listening to these cases?

Ms. Herse:
I'm sorry. We have...

Mr. Marzec:
I have to have to help the judge.

Commissioner (unidentified):
They're actually not employees. They're commissioners or board members that are involved here.

Ms. Herse:
Exactly. The Building Safety Board has 17 members and those members are compensated at $100 per day for their time, and expenses; they meet on an as-needed basis. The members of the California Health Policy and Data Advisory Commission are also compensated $100 per day and expenses; there are eleven members of that body.

Judge Marshall:
And, who reviews these decisions after they're made?

Ms. Herse:
The CHPDAC panel ... the data decisions are made as recommendations to the Director.

Judge Marshall:
And the Director has the power to do what?

Ms. Herse:
The Director can either accept or reject the decision.

Judge Marshall:
And does he frequently reject?

Ms. Herse:
Very infrequently.

Judge Marshall:
I see. Thank you.

Mr. Marzec:

Any other questions? Do you have any further comments? All right, thank you very much.

Ms. Herse:

Thank you.

Mr. Marzec:

Again, I would announce to anyone who is late, if you would like to speak, there are pink sign-up sheets. I notice Brian Walkup just arrived. I've very rarely seen him attend one of these where he didn't want to speak. No?

Mrs. Donaldson is called.

Elaine Donaldson (Chairperson, Occupational Safety and Health Appeals Board):

Yes, my name is Elaine Donaldson. I am Chairman of the Cal-OSHA Appeals Board. I did write to you, on May 23rd, and I have received a nice reply from Mr. Sterling, saying that he is recommending that we not be included. However it did appear to me as I was sitting back there, that perhaps some clarification might help - as to what our board does and how we operate. If so, I'm up here to do some of that, and to answer questions if I can.

The Appeals Board is composed of three members. We are full-time, as opposed to what the Standards Board does. We are appointed by the Governor. We have one from labor, one from management, and one from the public. I am the management member. The Governor designates the Chairman, which he did to me in 1984; I'm in my second term. We adjudicate citations and violations, and petitions that come to us for citations that are made by the enforcement division of the Cal-OSHA program.

The Cal-OSHA program was started in 1973. It has four components. It has the Division which does the citing; the Standards Board (and you heard from Mr. Jablonsky); the Appeals Board; and the Consultation Service. Those are the four elements. We, as an appeals board, are completely independent of the Division. We do not really answer to them, and we operate as a department. So, we have no problem with bias ... have not from the beginning.

In my memo, I did outline two things, and I'll just briefly go over those again. The Appeals Board was specifically established as a statutorily independent body to negate questions of bias. In preliminary remarks at each hearing, its independence is made very clear to all the parties by the ALJ.

Occupational safety and health law is a specialty. This area is linked to over 10,000 regulations found in Title 8, California Code of Regulations. It demands legal specialists, not generalists. There is no clear evidence that the central panel concept would be functional or economic. In the instance of our board, we probably would have to hire additional staff to assist the chief counsel in preparing additional

decisions after reconsideration, which would come from utilizing generalists instead of hearing officers familiar with OSHA law. And of course, with our board, we are not required to be attorneys, so none of us on the board are attorneys. I came out of the small business world, and while I now know a lot about OSHA, I didn't when I got there. I don't know what I'd do without our legal staff. At the inception of our program in 1973, hearing officers were utilized from OAH, and it was not a satisfactory experience at all, primarily, again, because of the lack of specialized knowledge of our program.

One other point that hasn't been made is that, because California has its own state plan under the federal OSHA program, any changes more than likely would have to be approved by federal OSHA. Now we haven't checked that out completely, but we did check it through the chief counsel for the department. He seemed to feel that was a very big possibility.

I do want to comment that I've heard the term "burnout" since I've been here today. I've never heard one of our attorneys come up with that. We have such a wide variety of cases that I'm completely fascinated by it every year, and I've been there six years. I can't imagine that they would have any burnout. They seem to enjoy the work, they have a lot of give and take among them, are able to discuss their decisions. I think that's a very positive side of what we do.

Judge Marshall:
Maybe we ought to have transfers to your department. *Laughter.*

Mrs. Donaldson:
Well, you know, they can come over and see what it's like. We have two offices, one in Sacramento and one in West Covina (in the southern end of the state). We have eight hearing officers and one presiding administrative law judge. Other than that, that's our program. I'll be happy to answer any questions.

Judge Marshall:
Do you have hearing officers?

Mrs. Donaldson:
Yes. We have eight hearing officers, which we call ALJs. They do the first-level hearings. Like some others that were mentioned earlier, in 30 days those are final decisions of the Board. We can - and unlike some of the other agencies we do - as a Board read every single decision that is put out by our judges. We meet every Thursday and discuss them. So we do have the opportunity to recon on our own motion - in other words, to bring it back and say: This isn't the way we want it. But we have to do that within certain amount of time. So those things have to be done timely.

Judge Marshall:
So the Board reviews and does reverse on occasion, is that right?

Mrs. Donaldson:
Yes.

Judge Marshall:
How frequently does it reverse?

Mrs. Donaldson:
I don't ... I knew you'd ask me that. We really don't keep those kinds of records. We don't really know, for instance, how many times we've agreed with the employer, how many times we've agreed with the division. Because we don't want to know. We don't want to start keeping records and say: "Oh, oh; we've had too many of those." We try to be very fair. So as far as statistics about what we've done and aren't doing - I don't have those.

Mr. Plant:
On reconsideration, do you just work with the record, or do you hear the witnesses?

Mrs. Donaldson:
No, we do not hear. I don't think that it's necessarily so that we couldn't, but that's not the practice. We do have our chief counsel, who answers to the Board. He's the one that does the draft on the reconsideration, based on discussion that the Board has had as to how they want him to go. And then we have several revisions of that draft. He will come back to us each week with a new revision until we are completely satisfied that that's the way we want to go. Someone up here asked about regulations - was that you?

Mr. Marzec:
I've asked that question.

Mrs. Donaldson:
We, I'm proud to say, we do have them. *(Displays booklet of Appeal Information for the Occupational Safety and Health Appeals Board, and delivers copy to Commission staff.)* We make these available to the public; it's a part of our budget. We try to let everybody know that certainly appeals are available, because we deal with employers - from perhaps two in a barbershop on up to thousands in the technical world. And we deal a lot with construction, in trenching ... all kinds of different things ... scaffolding ... So we have a wide, wide variety of things we have to look at. It's a fascinating business. Anything else?

Mr. Marzec:
No. Thank you very much.

Mrs. Donaldson:
You're welcome.

Mr. Marzec:
We have an administrative problem. We are going to lose Mr. Skaggs, and I'm wondering if we would want to take care of some of our administrative matters. Will you be here tomorrow?

Mr. Skaggs:
Yes, I will be.

Mr. Marzec:
Oh; well then we'll take care of it tomorrow.

Mr. Wilcock is called.

Tom Wilcock (Chief Administrative Law Judge, Department of Social Services):
Good afternoon. My name is Tom Wilcock. I'm the chief administrative law judge with the Department of Social Services. I'm here today to speak on behalf of the Department, in opposition of the central panel proposal. The Department believes that the ALJs of the Department of Social Services should not be removed to the central panel.

As you may be aware, federal and state law guarantees the right of public assistance applicants and recipients the right to a fair hearing if dissatisfied with any action of the county welfare departments. The Department of Social Services has employed hearing officers to conduct these hearings since the mid-1950's. These early hearing officers were primarily hearing officers with a social welfare background. Since 1971, the agency has hired primarily attorneys as hearing officers. This was due to a variety of reasons at that time, including the constantly-changing status of the law regarding welfare, numerous court orders on welfare laws, and an increased representation at that time by attorneys in the hearings. At the present time, there are still both law and social work trained ALJs involved in the hearing function. Approximately 12% of our staff are not attorneys. In 1986, however, the hearing officers were reclassified to administrative law judges, requiring a legal background with 5 years of experience. I believe the salary for that does top out at about $74,000.

Judge Marshall:
What happened to those ... that 14%?

Mr. Wilcock:
They were grandfathered in.

Judge Marshall:
Grandfathered in?

Mr. Wilcock:
Yes.

The reasons why our department opposes the central panel proposal were set forth in a letter dated May 23rd to the Commission. I would like to briefly summarize some of those reasons and highlight the important ones.

As indicated in that letter to the Commission, one of the major reasons the Department is opposed to the proposal is based on the nature of public assistance/welfare cases and the unique system which has been established by federal law. Individuals who request our hearings - before the Department of Social Services - are generally in immediate need of benefits, and may be destitute. As a result,

hearings have federally-mandated time frames which require the Department to take final administrative action within 90 days of the appeal, and in the food stamp program, within 60 days of the appeal. There's tremendous pressure - at this time - the Department is under in terms of issuing decisions in a timely manner. Internally, the Department is doing very well in that regard. We're issuing about 93% of our decisions within those time frames.

Because most claimants are not represented by counsel (or represented at all) in the hearings, the hearings are very informal. And, in fact, are required by federal law and state law to be informal, and to be tailored to the capacities of the parties that are appearing before us. Federal regulations governing the AFDC program, for example - and this applies to other programs as well - require that the single state agency responsible for the program shall be responsible for the fulfillment of the hearing provisions. In California the Department of Social Services has been designated as the single state agency to carry out that function. A transfer of responsibility for hearings from the Department to a central panel may place the state out of compliance with federal law and may jeopardize federal aid. This contention was raised in the State of Minnesota and resulted in the human services agencies being exempt from the central panel in that state. It was also one of the reasons the central panel bill was vetoed last year in the State of New York.

Another reason the Department opposes the proposal - at least for our ALJs - is the loss of agency control over the administrative process. In order to manage the high volume of appeals that we deal with - generally between about 45,000 and 50,000 appeals per year - and to process those within the mandated time frames, the Division has developed a large data processing system which enables the Department to process and schedule these requests efficiently and in a timely manner. The Department - as I said - is the single state agency responsible for the timely resolution of these appeals; and while the Department would still be accountable to the federal government for processing these cases timely, it is our concern that we would lose control over these case-processing functions at the front end of the process.

Another reason in terms of the expertise of our ALJs and the need for expertise: Social service ALJs conduct hearings in a wide variety of programs. In the letter to the Commission I set forth all the various programs that we hear cases on. There are at least 10 to 15 different public assistance-type programs that we hear cases on, all of which have their own federal regulations, state statutes, state regulations, and department policy letters. The ALJs are dealing with a large, complex, and constantly changing body of law, regulations, and policy letters. The lack of legal representation in the hearings requires the ALJs to take a much more active role in the conduct of the hearings in order to ensure that the full factual picture is presented. This requires a detailed understanding of a complex body of law.

Finally, in terms of the issue of having the ALJs employed by the agency which is responsible for the decision: As was pointed out in the letter to the Commission, the Department resolves disputes between public assistance recipients and county welfare departments. So, the Department is not a party to the disputes that are addressed by the ALJs. Although the State does provide a portion of the funds for welfare benefits, the funding is a combination of federal, state, and county funds for some programs, and 100% federal funding for the food stamp program. Therefore, we agree with your consultant's conclusion that the central panel is best suited for licensing agencies that exercise prosecutorial functions and not for the benefit-disbursement type agencies that do not exercise strongly conflicting functions.

Our department, I might add, also has a community-care licensing division. Those cases are heard by the central panel - the Office of Administrative Hearings - currently. We feel that is working out very well. However, in the benefit area, it's the feeling that since these strongly conflicting functions are not present, there isn't the need to remove the ALJs.

Finally, the claimants who use our hearings are generally - as I indicated - destitute and in immediate need of benefits. They are in need of a system which is informal, less costly than litigation, with a decision maker who possesses specialized knowledge of the programs, and which renders a decision in a timely and speedy manner.

One of the problems the proposal of a central panel responds to, or attempts to correct, is this perception of unfairness. This question was raised in the State of New York over the central panel issue; the issue was whether the result of a perception of fairness could be achieved by less costly and less dramatic means. New York determined that it could, and we agree with their determination. I think in the State of New York they did come up with guidelines for administrative agencies in terms of the conduct of the hearings. In reviewing those guidelines, the Department of Social Services feels that many of those have already been carried out within our department.

The Department has attempted to ensure the integrity of our hearing process by: One, creating a separate Division. This Division reports directly to the Director of the Department of Social Services. It is not connected with the program bureaus or with the legal division of the Department. Secondly, our Welfare and Institutions Code provides that hearings - the decisions - should be prepared in a fair, impartial, and independent manner. And finally, when the reclassification occurred in 1986 to administrative law judge, the Director delegated final decision authority to the ALJs in certain cases, so that currently, in about 45% of the cases, the ALJs are issuing final decisions. Finally, we feel that our system does allow the Department to implement its policies yet at the same time when there are ambiguities in those policies or in the legal interpretations of them, the ALJs are certainly free to set forth their own interpretations of those policies.

Thank you.

Mr. Marzec:
Any questions?

Judge Marshall:
You have what, 61 hearing officers?

Mr. Wilcock:
Currently we have 59.

Judge Marshall:
59. If there is a disagreement by the agencies with the decision, what happens?

Mr. Wilcock:
Currently, under our system - as I said - the ALJs do have final decision authority which has been delegated to them in certain cases. And as I said - that's about 45% of the cases. The supervising ALJs - we have four of those, in each of our four regional offices - also have been delegated the authority to adopt proposed decisions or recommended decisions. Probably in about another 30% or 35% of the cases, although the ALJ will write a recommended decision, it's reviewed in the local office, the regional office; if there are no problems ...

Judge Marshall:
Who reviews it?

Mr. Wilcock:
That would be the supervising ALJ who would review the decision; and that decision could be adopted out of the local office.

Judge Marshall:
And, after the supervising ALJ gets through, who reviews his decision?

Mr. Wilcock:
In the remaining cases, which is probably about 15% of the cases, those would come to Sacramento here for review by myself. Those would then be prepared for discussion with either the chief deputy director or deputy director of our legal division. Under the Welfare and Institutions Code, the Director has three options once a proposed decision comes to her. She can adopt it. If she disagrees with it, she may propose her own decision or write her own decision. And the third option is, if there's a determination that additional evidence is needed, a new hearing can be ordered or an additional hearing can be ordered. So, only about ... probably ... anywhere from 5 to 7% are reversed. That is, what we call an alternate decision is prepared and issued by the Director.

Judge Marshall:
What's the salary range of your hearing officers?

Mr. Wilcock:
As I said at the outset, I'm not exactly sure. I think it tops out though at $74,000.

Judge Marshall:
And are there several steps in there?

Mr. Wilcock:
Only two. We have an ALJ I and an ALJ II, which is the supervising level at the regional offices.

Judge Marshall:
Would you have any objection to the State Personnel Board doing the promoting from ALJ I to ALJ II?

Mr. Wilcock:
We don't have that many positions right now, and it is a straight civil service classification in terms of the pay and the criteria that set out ... The promotional opportunities we have right now are only those ...

Judge Marshall:
From I to II?

Mr. Wilcock:
Yes, exactly. It seems right now the trend is for the Personnel Board to be delegating all that to the agencies. We have been conducting our examinations in a lot of different areas that the Board has conducted to us, and I think it would be unusual, at this point in time anyway, going back to the Board for that.

Mr. Marzec:
Doctor Kizer, I believe, is your director, is that correct?

Mr. Wilcock:
No. He is Director of the Department of Health Services. This would be Linda McMahon, Director of the Department of Social Services. We do hear cases for the Department of Health Services, in the MediCal area, under contract with the Department of Health Services.

Commissioner (unidentified):
After the decision is final in one of the ways that you mentioned, what further right of appeal or review is there?

Mr. Wilcock:
Either party, either the claimant, the recipient, or the county welfare department, may request a rehearing within 30 days, of the agency. The case is reviewed. It is discretionary in terms of granting a rehearing. But if one is granted, then a new hearing is held. After that, the next step would be a writ of mandate in superior court.

Judge Marshall:
Get many of them?

Mr. Wilcock:

Currently, I think we are getting more in terms of the writ of mandates. I don't have the figures on that, since that is handled by our legal office primarily.

Prof. Asimow:

I was wondering how you, as an ALJ, felt about the idea I have mentioned before: There would be a voluntary system whereby you could hear cases in other agencies if your own agency could spare you. Do you think that would work out O.K.? Is it something that appeals to you as an ALJ, for example?

Mr. Wilcock:

I think it possibly could work out, assuming some of the practical problems could be worked out. On a theoretical level, it does sound appealing. Our ALJs do hear a variety of cases - as I mentioned - they're hearing cases in about 10 to 15 different programs. With the constantly changing regulations, which come out (it seems like) every day, there are always new issues. You'd think that after 15/17 years in the welfare area you'd begin to see the same issues come up again and again. However, it just seems like every day there are new issues that come up. It's somewhat like tax law, I think. It seems like it's simple on the surface - it should be straightforward - but then there's a multitude of exceptions. But I think that if the practical problems could be worked out in terms of releasing the individual, workload, those kinds of things ... Yes, it probably would be appealing.

Mr. Marzec:

Any other questions? All right, thank you very much.

Mr. Wilcock:

Thank you.

Mr. Marzec:

Would anyone else like to be heard that has not signed up?

Mr. Jarvis is recognized.

Donald B. Jarvis (National Conference of Administrative Law Judges and Association of California State Attorneys and Administrative Law Judges):

I'm an administrative law judge with the Public Utilities Commission. My disclaimer is I do not speak for the Commission. Mr. Day did, here today. Secondly, I'm speaking for ACSA (the Association of California State Attorneys and Administrative Law Judges) and the National Conference of Administrative Law Judges. I am not going to repeat the remarks I made at your last meeting as a proponent of this. But there are a few observations I would like to make in view of the presentations that have been made today.

My first observation is that there is a confusion about who we think should be in the corps. Obviously, there are a great deal of events occurring in the State of California that are called "hearings". Not all of these are hearings that we consider to be

hearings done under the Administrative Procedure Act or equivalent statute, in which the adjudicator - the administrative law judge - has the power to issue subpoenas, where there is a court reporter, where there is a right to cross-examine witnesses, et cetera. When we proposed the concept of the corps, we were only proposing a corps of those that heard that type of case.

There is another side issue here: that's an organic statutory issue as to what type of hearing deserves what type of procedure. I'm not addressing that issue. One of the things I would just point out is that today there were a group of hearings mentioned that we would not consider to be those which would come under the purview of the corps.

Another facet that I would point attention to is that we don't think that someone who sits as an administrative law judge or hearing officer part-time, and then is an attorney for the agency, is a true independent adjudicator. We would not propose to include such a person in a corps, or that type of hearing in a corps. I think these distinctions ought to be made.

There was one issue that was raised earlier that I would comment on briefly - and I think that it's a diversion - and that is the constitutional agencies, of which I am employed by one. It is true that the constitutional agencies are created by the Constitution, but they usually have a provision in the Constitution that says the Legislature has plenary power to legislate in that area. In response to the Workers' Compensation Appeals Board presentation and the PUC presentation, where they suggested there may be a constitutional impediment, I can point to at least four statutes that come to mind very quickly in which the Legislature has imposed procedural controls upon the Public Utilities Commission. I would assume that if they can impose those procedural controls, they can impose removing the administrative law judges elsewhere.

I will, in a follow up letter, try to address some of these concerns, and I would ask the indulgence of the Commission to present further responses in that way.

The one other observation I would make ... well, before I do that: In response to Judge Marshall's question as to what does an administrative law judge make. At the PUC, the top of our II range is just slightly under $80,000 per year.

I think universally the objections to the concept are: the agency is unique, the matters are complex, we need the specialists, and we need them here. I would suggest that in your record already is the New Jersey Commission's review of the attempt to split up the corps in New Jersey and the responses there, which I think very adequately discusses those issues.

I thank you for your time.

Mr. Plant:

May I ask a question? What is your response to a thread that ran through many of these presentations to the effect that there are a huge volume of cases, that there are sometimes constraints on the time within which decisions must be made, and that if the agency doesn't have the control over the judges who are rendering these decisions, they can't get their work done?

Mr. Jarvis:

My response is several-fold. One, I think it can be done. I think if the time limits are put upon the judge to adjudicate within the statutory time limits, that you have to do it. I think if you take a state that has a central corps where it's done ... it is being done in those states that have the central corps. And, in certain aspects of it, I think it might speed up the decisional process. Certainly, with the Public Utilities Commission (I can't speak to the internal processes of other agencies) it would seem to me that it is not a detriment and could be worked out. I can understand the concern: you lose direct control of your judges, you have all sorts of fears. But I don't think they are fears that would be realized.

Mr. Plant:

Don't you run into the problem that the administrative ... First of all, in these agencies that we're talking about, they would say (as I understand it), "We've got this volume of cases. You're assigned this case and you have to get it out in 30 days. We've got this load; you've got to do it." Somebody who is the boss is telling them to do that. If the administrative law judge comes from some other agency - the central corps - this man who is trying to tell him to get the work out in 30 days is not his boss. His boss is somewhere over in another building someplace. Doesn't that really create a practical problem? Frankly, I'm impressed by that problem that some of these gentlemen have talked about, and ladies: that they have to have control over assignment of cases to their people. Being able to push them and say, "This has to be done because we have these constraints, and I'm your boss and I can tell you to do that." If he comes from someplace else, you lose that ability to administer the case load, it seems to me.

Mr. Jarvis:

I think the experience in the states that have central panels - where the same problem exists - is that has not been a problem. I think if you have the same - or even less - number of judges doing the cases, with an assignment policy that takes into consideration the deadlines involved, and you have judges that are doing their jobs, you will get the results. And, I think we discussed at the last time (I didn't want to be repetitive) ...

Material not recorded due to changing of tape.

... there would be movement between these, on occasion, depending on workload. I don't think the idea is to take cases in rotation and put in people that have no experience in the area to try to meet these deadlines.

Mr. Plant:
Thank you.

Mr. Marzec:
Would the panel if it had sufficient staffing ... Do you think it would be able to handle the volume of hearings produced by the various agencies in the State of California, if one were to be created - a central panel?

Mr. Jarvis:
I think it would. If the judges in the individual agencies can handle the workload, then there's no reason why, in consolidation, they shouldn't be able to handle the workload.

Marzec:
Any further questions?

Judge Marshall:
You're saying then that there are certain kinds of hearings that you don't believe should be handled by ALJs in a central panel. Is that correct? Am I stating your stating your conclusion correctly?

Mr. Jarvis:
Yes.

Judge Marshall:
What ones are you referring to? We have a list of them here. Would you like to examine the list and tell us?

Mr. Jarvis:
I would be pleased to, at a later time. I can pick one or two examples. I think the example of the tax hearing, where if the result is unsatisfactory to the taxpayer and it goes before the full Board of Equalization - where the person conducting the hearing has no subpoena power, where you can't cross-examine witnesses and obtain the attendance of witnesses - is not the kind of hearing that I would call one that is conducted under the Administrative Procedure Act (or equivalent) and doesn't require an administrative law judge. The fact that it's called a hearing ... I think even motor vehicle people - when you didn't get a drivers license - have what they called a "hearing". You went to another license examiner and he gave you a hearing to see if you passed the driving. I don't think you need an administrative law judge for that.

I think the problem comes in that there's a whole variety of things called hearings. What we're talking about are the people who are responsible for holding hearings at a Goldberg v. Kelly minimum, but under a very high standard, for which you need an independent adjudicator who has the authority to have witnesses and have a public record or a court-reported record, and there is a definite pattern of appeals to the court system. Those are the kinds of hearings that those of us that talk about a corps envision being assigned to in the corps - not everything that's called a hearing in the State of California.

Judge Marshall:
Would you supply us with a letter indicating which ones you think qualify for the full fledged hearing that you're referring to?

Mr. Jarvis:
I will send a letter. I will attempt as best I can, with the information that I have about some of the agencies, to quantify that. But it may not be completely responsive to every agency because frankly there are some agencies that I do not know.

Judge Marshall:
As many as you can.

Mr. Jarvis:
Yes.

Judge Marshall:
Thank you.

Mr. Marzec:
Anything further? All right. Mr. Walkup, I have your letter dated ... This is from the State Banking Department, Brian Walkup is the Legislative Counsel. *(A copy of the letter referred to is attached to this transcript.)* By the way, I have no clients with matters before your agency at the present time. (Now I'm getting even with him.) No, actually, I do have some questions. One of your arguments deals with the issue of hearings that are investigatory (this is in paragraph two of your letter). At the end, you talk about ... the Superintendent often designates administrative law judges from OAH as hearing officers. The Superintendent sometimes assigns persons within the State Banking Department to hear matters.

Brian Walkup (Legislative Counsel, State Banking Department):
Correct.

Mr. Marzec:
What is the criteria for making that decision? Are there any set standards?

Mr. Walkup:
To my knowledge, no. It's basically done on a case-by-case basis. Where it has to be done expeditiously and, with the time lag built into OAH's process, we can't afford that - if its a troubled bank, we have to basically act fairly quickly. Another area is, if it's a highly detailed case and we need a particular expertise, then we will appoint from within the Department.

Mr. Marzec:
So, for example, if you have a bank that's in trouble, or there is a possibility of waste, or absconding with assets, or something, you want to move in quickly? Or, not a bank, but one of the agencies that ...

Mr. Walkup:

They would have a right to a hearing on that closure, so we would hold a hearing as soon as possible. We can't afford to wait the 60 to 90, or possibly longer period of time, that OAH has built in.

Mr. Marzec:

Now, just so you understand where I'm coming from, I'm not really speaking to the issue of mandatory pooling of ALJs or anything. I'm now speaking of having a set of rules that determines when administrative law judges would be appropriate. This is certainly a significant factor: there has to be some consideration of a situation that must be expedited, for example the ones that we were speaking of. In such instances, there may not be sufficient time to have any of the administrative law judges within the agency appointed; I think that's something we have to look at and concern ourselves with.

The other thing does have to do with the central panel. I just ...

Prof. Asimow:

Could I just point out one thing about that?

Mr. Marzec:

Oh, I'm sorry - go ahead.

Prof. Asimow:

Because it's a good point. I am disposed toward saying that, in an agency like yours - and I did spend quite a bit of time with your agency - that there probably should be staff designated as hearing officers (administrative law judges) to hear contested cases, as distinguished from simply assigning a staff member to do it. Is Mr. Marzec's point a serious one? That if you did that you might not have enough ALJs to deal with some emergencies?

Mr. Walkup:

Possibly. We were short attorneys for a period of time. We're now up to full strength. If we'd hit a low spot, it might have created problems. If we're at full strength, I don't think it would be a problem.

Mr. Marzec:

Wouldn't that be a factor of how many ALJs would be on this panel? Right now it's a rather limited number, from what we heard at our last meeting. Isn't there someone from OAH here today? I thought we had someone last time.

Unidentified:

They have between 30 and 40 people.

Mr. Sterling:

Currently they have 27. Assuming funding comes through in the budget (which is a problem), they expect to have about 40 in September.

Mr. Marzec:

Not to mislead anyone there - but just as a hypothetical - if a central panel were required, and the Legislature felt that this was appropriate, obviously the staffing would increase tremendously to handle the workload. I would presume that would be the end result.

Mr. Walkup:

I think that it would have to.

Mr. Marzec:

So then, maybe that would not be a problem. I know that it was brought up on several occasions. What I'm really concerned with though is the situation where you have to move quickly. Obviously, with the regulatory agencies, such as the Public Utilities Commission, or the one that handles nuclear reactors ... if one is going and has to have a hearing, we're certainly not going to wait around for an administrative law judge to save ... La Jolla, I guess.

Prof. Asimow:

But, that's the advantage of having the in-house ones - is that you do have control of time.

Mr. Marzec:

Maybe we don't want to save La Jolla. *Laughter.*

Prof. Asimow:

Clearly, that's part of the idea of maintaining control over your judges, that so many mentioned today. But, assuming you did have your own judges - although you have the power to use OAH judges if you wanted to - if you had people within the Banking Department who did specialize just in holding hearings, does that create problems?

Mr. Walkup:

No, it would not. I wouldn't think so, because we build that in during the budgetary process.

Mr. Marzec:

Would your agency have any problems with a set of standards that would be created to determine when someone within the agency could act as a hearing officer and when we would have to have an administrative law judge?

Mr. Walkup:

In concept, no. It would depend upon how the standards were drawn.

Mr. Marzec:

You don't have any standards or know what the Superintendent ... what would trigger that particular decision?

Mr. Walkup:

Again, mostly it's expeditious handling - the need for it - or the need for particular expertise that OAH couldn't provide.

Mr. Marzec:

One last question. We've talked about expertise again and again. I have a little bit of problem with that; maybe you can respond to it. Superior court judges certainly are not an expert in any particular field. I mean, they may be a criminal law specialist, they may be a family law specialist, but in general in superior court ... (Judge Marshall has told me he's an expert in everything.) When a judge has a case come before him, and it deals with computers, or whether or not a computer was adequate for a particular need, he has to become an expert in that particular field. Superior court judges also handle questions involving reactors, involving power stations, involving many areas that we all talk about, including banking. Maybe I'm missing the problem, but it would seem to me that administrative law judges in a pool (I use that term to refer to the OAH group of hearing officers) would be able to develop the expertise in their area.

Mr. Walkup:

Over a period of time, I'm sure they could.

Mr. Marzec:

What do you do with a new hearing officer - or what could you do with a new hearing officer - that has to become familiar (as you talk about here in your letter) with the Financial Code? Does he handle small cases to begin with, or ... ?

Mr. Walkup:

What would the Superintendent designate, you mean?

Mr. Marzec:

You say one of the problems you're having is someone to develop an expertise in the Financial Code sections.

Mr. Walkup:

Correct. In that case, the expertise ... The Superintendent would pick probably from within - someone from the legal staff who was familiar with the particular problem we're having. I'm sure other agencies do the same thing.

Mr. Marzec:

Would a pool ... For example, in the court system we have judges assigned to the criminal bench, or the civil trials; and as I mentioned, again, probate has a section, and family law. Could this be a possible solution to these problems of expertise?

Mr. Walkup:

Potentially. Again, assuming a large enough pool of experts. But I think it's an acquired expertise in most areas. PUC folks deal with their own areas. I think it would take a fairly long period of time to potentially build up a sufficient pool of experts to handle it. And I still think you need the added flexibility to handle that special case, where you've got to deal with it today, literally.

Mr. Marzec:

OK, thank you, Mr. Walkup. More questions?

Judge Marshall:
I presume you heard Mr. Jarvis a moment ago. He mentioned having sub-panels. In other words, there would be within the central group an area carved out which would handle banking, insurance appeals cases, et cetera. What do you think of that idea?

Mr. Walkup:
That's a possibility.

Judge Marshall:
Wouldn't those sub-panels be experienced, and have expertise?

Mr. Walkup:
Potentially. Again, depending on how it's set up and where you pull the original panelists from, you could have some expertise there. Or, if you bring them in green, it will take a learning curve.

Judge Marshall:
How many hearing officers do you have?

Mr. Walkup:
We have none.

Mr. Marzec:
How many employees - people within the department - act as hearing officers or hear ... ?

Mr. Walkup:
Potentially, I would have to say a dozen - it's within two or three people - depending upon workload and the particular issue involved.

Mr. Marzec:
And, they don't hear any particular cases - it's just how it's assigned by the Superintendent?

Mr. Walkup:
Correct.

Mr. Marzec:
So, theoretically, the Superintendent could assign everything to these agency employees.

Mr. Walkup:
I'm not sure about that. I think OAH does get involved in our process; I'm not sure whether there are specific areas right now that they have to take.

Mr. Marzec:
Could you do me the favor of finding out what the standard would be to kick that into one area or the other?

Mr. Walkup:
Certainly.

Mr. Marzec:

--I would greatly appreciate it. Also, if you have any procedural guidelines, that would be helpful. You understand, I've been asking this question ... what we're trying to do is find out if there are any good tricks or procedures out there that we should include or maybe even ...

Mr. Walkup:

Sure.

Mr. Marzec:

Any further questions of Mr. Walkup? Thanks for being here; sorry to have to put you on the spot.

Mr. Walkup:

No problem.

Mr. Marzec:

I have made some comments, and other Commissioners have, regarding increasing a pool to handle workload, which seems to be a consistent argument throughout most of the letters. Also, some comments on developing an expertise. If there is anyone that has spoken or has made comments who would like to respond to that, please feel free to take advantage of this opportunity.

If not, then what we'll do is move on to the next item on our agenda, and I think that brings to a conclusion our discussion regarding the ALJ central panel. Oh, yes?

Mr. Sterling:

Also, I would like to add at this point that there are a number of other agencies that do wish to get written comments in. Their commissions or boards are not meeting until after our meeting, so they weren't able to do it in advance. At some point, we need to schedule time to review their comments.

Mr. Marzec:

OK.

Mr. Sterling:

Also, one of the letters - from Paul Wyler - requests that, when we get to the point of actually making decisions with respect to specific agencies, the proponents of this suggestion would like to be able to respond with specifics as to those agencies.

Judge Marshall:

Fair enough.

Mr. Marzec:

I'm going to make sure that everyone here, every agency that has responded, be put on our distribution list so that you will be aware of every step that is taken and every proposal in this process. You may regret having your names and addresses here because of the volume of

material you may receive. But we would greatly appreciate it to be reviewed and responded to - it's a great help to us. So, thank you very much.

Prof. Asimow:
Just a question. Does the Commission plan to make a final decision on this at the next subsequent meeting?

Mr. Marzec:
I don't know if we're prepared to make a decision just yet.

Judge Marshall:
Not yet.

Mr. Marzec:
I don't know if it will be at the next meeting, but...

Mr. Sterling:
We should tell them how we want to proceed. Do we want to proceed in this vein? That is, get some more letters, and maybe have them summarized, and ...

Mr. Marzec:
Well, I think there's a lot of - if we want to talk about this for a few minutes - very persuasive comments in these letters. I'm wondering now if we can - as you said earlier - not shift the burden to some of the administrative law judges who had suggested or supported the panel approach. And let's see what their best shots are.

Mr. Sterling:
That would be my thought; I agree. After reading through the various letters, I was clearly convinced that they had met the burden of showing that there was a good and sufficient reason for doing it the way they do. So, if someone wishes to shift them from one agency to a central panel, they should come up with evidence showing there is a good reason to. Of course you asked Mr. Jarvis to give us a list of the ones he thought ... that will help narrow this down. We can maybe excuse some of these people from having to follow this issue.

Mr. Marzec:
I'll tell you, I think that the arguments against fall into several major categories. One is not having quick response from the pool. I think that certainly is a problem, but it is one that is caused by not really having an adequate pool. There was no need for it, because it has been handled in-house by the various agencies. The other one is the development of an expertise. I'm really not - this is my own opinion - I'm not troubled by that, for the reasons I brought up regarding courts. A municipal court or superior court judge has the same problem. And certainly there could be, where tremendous expertise is necessary, specialists in the pool, for example ...

Judge Marshall:
Sub-panels...

Mr. Marzec:

That's right. As they do in the court system: the criminal as opposed to civil, and so on. The other area that came up is the cost savings and whatnot, an argument that - and this happened in several of these - "We've been in existence for 15 years, and we've handled a thousand cases, and we've had no appeals." That tells me maybe everyone's afraid to appeal. Maybe that is more of a negative result rather than a positive one. Certainly, if you have a major agency - and I'm only using the Public Utilities Commission (this was certainly not in their letter nor is this the case) - if you have someone like the Public Utilities Commission, and you have a public utility that has hundreds of millions of dollars depending on how a case will be heard, they're certainly not going to appeal the little stuff for fear of angering the agency. I'm not sure that would even enter their minds, but I'm using that agency as an example, and it's truly hypothetical. And, these are some of the things I want to look at.

Mr. Sterling:

There are a couple of other common threads too. At one point I made a list; I don't have it with me. Another common thread in some of the letters is that these are joint state-federal programs, and there are federal requirements as to how it's conducted within a single agency and so forth. It's not just social services, there are a number of others that we have letters from that have the federal funding problem. There also are a number of constitutional issues, and some of them I believe are real. For example, the first letter we got was from the Commission on Judicial Performance. If you read their constitutional authority, it says right there, "the Judicial Council shall" prescribe the method of procedure. And there are a number of others; we'd have to look at each one.

The other feeling I got from reading through: Although there were common arguments, each agency was really almost unique in its functions, the kinds of problems it had, and the way they had developed their procedures.

Oh, and another very common one, which Professor Asimow identified, is that "This agency is independent. The whole reason for having separate administrative law judges is so that you have a neutral party. The agency itself was created for the purpose of neutrality, and charged by the Legislature with that function." Some of the agencies fall into that category.

Every one ... Well, I think you can't really generalize ...

Mr. Marzec:

There are going to be some exceptions. On the other hand, if an agency has the power to revoke a license for a health provider - that puts them out of business, and that certainly is an adversary situation.

Mr. Sterling:

Some of their functions ... that's right. Professor Asimow's suggestion was that we look at even functions within an agency, that we might want to ...

Mr. Marzec:

And that certainly applies to yanking someone's license, whether it be a judge, an escrow officer, a lawyer, a doctor. Any of these areas, I think, becomes quite adversary.

The last point (and it's something I would like the professor to ...) - I made mention of this but would like to emphasize - is (and I don't think she's here), Ms. Herse talked about situations where they didn't think it was necessary for hearing officers so they did it with an in-house employee. That very well may be her consideration; but, if they have the power to revoke a license of a health provider, that to me is a prime situation for an administrative law judge. What I'd like to do is to have us review the agencies to find out how many do have this option or authority, and how many do not use an administrative law judge. I think that's another factor that should be considered. A little bit of it was brought out with State Banking. I can certainly understand the need for emergency action, and that certainly should be something we consider, but ...

Well, where do you think we should go from here? I'm asking the Commission as a whole.

Judge Marshall:

I think we ought to wait for the letters to come in. We've asked several persons to submit letters. Let's get those, and get some idea ... Then we could discuss it at that time.

Mr. Arnebergh:

I think we should have some time when we have the proponents.

Judge Marshall:

Yes.

Mr. Marzec:

Yes. I certainly think it should be on the agenda for our next meeting. Let's see if we can get things going.

Mr. Sterling:

All right. And we'll ask the proponents to also address specific agencies where they have suggestions, so we'll be able to focus this a little better.

Prof. Asimow:

I think that is the right way to go. Isolate the specifics. We probably never will come up with all the ones in the state that are appropriate. I wholly agree with the Chair that the yanking of licenses is a very important function that ought to be shifted to Sacramento.

Judge Marshall:

Well, Mr. Jarvis is going to try to cut down on what agencies he thinks ...

Prof. Asimow:

He left in the benefit agencies. He was only taking out the ones such as Department of Motor Vehicles and the Energy Commission ...

Judge Marshall:

He wants to take out all those who don't have, in his mind, a full-fledged hearing.

Mr. Sterling:

His suggestions for what a full fledged hearing would be ... There's a definition in the packet from the Department of Finance where they did a fiscal analysis of whether this would save money. They attempt to define what a hearing is, and they have a list of criteria I think he may be thinking of.

Judge Marshall:

Oh, really?

Mr. Sterling:

Talking about subpoena power and a full panoply in there. He's talking about formal types of hearings.

Mr. Marzec:

Doesn't Goldberg v. Kelly establish some definitions?

Prof. Asimow:

I think that would mean you'd be back to covering exclusion of a student from the Maritime Academy.

Mr. Marzec:

Can we get around the guidelines established in Goldberg v. Kelly?

Prof. Asimow:

No, you certainly can't get around them. You have to provide at least the rudiments of a hearing required there. But that case doesn't require an independent agency.

Mr. Marzec:

OK.

Prof. Asimow:

At the previous time we discussed this, the Commission decided that the new APA would be drafted and would cover all the hearings required by statute and required by due process, which is your Goldberg v. Kelly types of hearings. So you are covering a vast number of conflicts between the state and regulated people. And it doesn't matter whether there is subpoena power or not, or other factors; you would be covering them.

Mr. Plant:

But, that doesn't mean that we have to have the same degree of formality and the same procedure apply to all of them.

Prof. Asimow:
Definitely not. Absolutely not.

Mr. Plant:
In fact, I think what we're thinking of is having different levels of ...

Mr. Marzec:
Sub-panels ...

Mr. Plant:
Well, no; different levels of procedure.

Prof. Asimow:
Different levels of formality.

Mr. Plant:
Absolutely right.

Mr. Marzec:
I was talking about Goldberg v. Kelly: I think we have to be cognizant of the fact that the attention given to a motor vehicle license test, or driver's license test, when someone fails it, is certainly - although it may be significant to that individual - is a little bit different than a rate increase for a public utility, or for the State Banking ... shutting down a financial institution ...

Prof. Asimow:
Exactly right, and that's why it's difficult to say that you should shift all the people who hear all the cases to the central panel. There's such a vast difference, as Nat said a minute ago, between the kinds of poles that you mentioned. That's why I think when you're talking central panel (the issue before us now) you really have to be discriminating as to exactly which judges should be transferred. To me, that basically means those where there's a significant sanction involved and the agency itself has compliance functions - that it is both the prosecuting/investigating agency and the deciding agency.

Judge Marshall:
Is Mr. Jarvis speaking to us as a representative of a group?

Mr. Sterling:
Yes. He's the representative of the Association of State Attorneys and Administrative Law Judges and the National Association of Administrative Law Judges; but not on behalf of any agency.

Mr. Marzec:
ACSA and National Conference ...

Judge Marshall:
So, a letter from him indicating what he thinks should be in the central panel will be of some significance - at least so far as his group is concerned.

Mr. Marzec:

I think we also should get more input from the OAH - what representative was here?

Prof. Asimow:

That was Mr. Engeman.

Mr. Marzec:

Certainly he would have an idea of what that pool would be capable of and certainly what it is not capable of.

Judge Marshall:

I think that would be very valuable. We ought to get that.

Mr. Marzec:

Now, as far as whether to go with the pool approach at all. After we obtain a bit more information, we should make that decision, because we may find that its just inappropriate at all to do that. Mr. Engeman maybe should be invited here at the next meeting so that we can ...

Judge Marshall:

That would be a good idea.

Mr. Marzec:

Any other comments? We haven't made any motions, I don't believe. Thank you, professor. Now, let's get on to the next matter.

STATEMENT OF
WORKERS' COMPENSATION APPEALS BOARD

May 31, 1990

My name is RICHARD W. YOUNKIN, and I am the Secretary and a Deputy Commissioner of the Workers' Compensation Appeals Board. I am here to express the Department of Industrial Relations' opposition to the use of an ALJ central pool to hear and decide workers' compensation claims as well as the proposal to have an independent agency assign workers' compensation judges to hear workers' compensation cases.

Article XIV, Section 4, of the California Constitution expressly vested the Legislature with a plenary power to create and enforce a complete system of workers' compensation by appropriate legislation. A complete system of workers' compensation included "adequate provisions for comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequence of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage and all its aspects, including the establishment and management of a State Compensation Insurance Fund; and "full provision for otherwise securing the payment of compensation."

Such legislation also was to have full provision for vesting power, authority and jurisdiction in an administrative body with all requisite government functions to determine any workers' compensation dispute to the end that administration of workers' compensation legislation "shall accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character;

all of which matters are expressly declared to be the social public policy of this State, ..."

The Constitution specifies that the Legislature has plenary power to provide for settlement of disputes by "an industrial accident commission by the courts, or by either, any or all of these agencies, either separately or in combination ...." (Emphasis added)

The Legislature chose to treat workers' compensation in a special way by vesting in the Workers' Compensation Appeals Board "judicial power" to adjudicate workers' compensation disputes. The administrative function was vested in the Administrative Director of the Division of Workers' Compensation (formerly Division of Industrial Accidents), thus separating the judicial power from other administrative and/or enforcement functions.

Consistent with this judicial power, the Workers' Compensation Appeals Board was given contempt powers to enforce its Rules of Practice and Procedure and orders. The Workers' Compensation Appeals Board is not bound by the Administrative Procedures Act but by its own Rules of Practice and Procedure which it is authorized by statute to adopt. The Workers' Compensation Appeals Board delegates its judicial powers to workers' compensation judges, not administrative law judges. Workers' compensation judges are obliged by statute to follow the Canons of Judicial Ethics and their role and function is to hear and decide cases on behalf of the Workers' Compensation Appeals Board utilizing the rules and procedures of the Workers' Compensation Appeal Board. The decisions of the workers' compensation judges are the decisions of the Appeal Board unless a petition for reconsideration is filed. Workers' compensation judges adjudicate claims for workers' compensation benefits under the workers' compensation laws. Since certified specialists in workers' compensation law appear regularly before workers' compensation judges, they must have a thorough knowledge of the special procedures, a thorough knowledge of substantive law on issues, including rehabilitation, temporary disability, permanent disability, medical issues of causation, insurance coverage, Subsequent Injuries Fund benefits, and Uninsured

Employers Fund liability. In addition, workers' compensation judges not only determine disputes arising from claims for workers' compensation benefits but hear appeals from various bureaus within the Division of Workers' Compensation. The Workers' Compensation Appeals Board is an independent judicial function and the workers' compensation judges exercise the judicial powers delegated them subject only to the reconsideration and removal processes set forth in the Labor Code.

To insure expedited delivery of benefits, there is no recourse to the Superior Court. The decisions of the Workers' Compensation Appeals Board are subject to review by petition for writ of review filed directly with the Courts of Appeal. This review process is designed to expedite the process of review consistent with the full judicial powers granted to the commissioners of the Workers' Compensation Appeals Board. It was clear that the Legislature intended the workers' compensation adjudicatory system be no way intertwined with the Superior Court trial system. Direct appeal to the highest courts of the State not only serves the purpose of expediting cases, but assures a consistent appellate review of cases and consistency in appellate decisions.

Dr. Asimow suggests in page 45 of his study:

> "So if the independent argument is unpersuasive in the case of a benefit dispensing agency like WCAB that is already independent of the parties who litigate before it, and if only specialized judges can hear workers' compensation cases, there is little to argue for changing the status quo."

On page 48, Professor Asimow indicates:

> "While I believe that the Legislature should continue to transfer appropriate sorts of cases to the existing central panel, I did not find that the case was persuasive for transferring judges from the benefit dispensing agencies, or from the PUC, DMV, SPB, Insurance Commissioner, or SBE to a

central panel. That criterion of accuracy suggests that the transfer should not occur (at least not if it would diminish specialization), efficiency would probably not be served by a transfer, and acceptability points rather weakly in favor of transfer. There is not a strong enough case for making such a fundamental change."

The workers' compensation adjudicatory system is part of a larger workers' compensation benefit system requiring special skills and knowledge to adjudicate and administrate the workers' compensation law so that benefits may be expeditiously delivered to deserving claimants. The Legislature intended that the administration and adjudication functions be entrusted to a single body so that policies and law could be uniformly applied throughout the State. Any change in the manner in which workers' compensation judges are assigned to cases would require re-evaluation of the whole concept of a separate commission for implementing the social policy mandated by Article XIV, Section 4, as well as require proposals of wholesale changes in the current legislation, all contrary to the intent of the Legislature that the judicial function be entrusted to the Workers' Compensation Appeals Board and the administrative function to the Division of Workers' Compensation.

In addition, the Legislature has passed, effective January 1, 1990, the Margolin-Bill Greene Workers' Compensation Reform Act of 1989 which contains new procedures under the jurisdiction of the Division of Workers' Compensation and the Workers' Compensation Appeals Board for expediting the workers' compensation system. The new legislation provides new procedures affecting workers' compensation judges as well as provision for the use of referees and arbitration, all of which is inconsistent with the proposals to either refer workers' compensation cases to a central pool of administrative law judges or provide another agency to assign workers' compensation judges to the Workers' Compensation Appeals Board.

The legislative process to achieve reform has taken many years and involved discussions by all the interest groups in

the workers' compensation system including labor, employers, insurance carriers, attorneys, medical service providers and other interest groups. A system that requires workers' compensation judges be part of a central panel or to be assigned by an independent agency would severely undermine the implementation of this major reform of the workers' compensation system.

CUIAB

Dispositions

Higher Authority

SFY 87/88	13,978
SFY 88/89	12,882

Lower Authority

SFY 87/88	132,141
SFY 88/89	132,943

Total

SFY 87/88	146,119
SFY 88/89	145,825

Cost of Operations

	Dependent/EDD	Independent/EDD
Higher Authority		
SFY 87/88	$ 4,415,938	$ 4,466,811
SFY 88/89	$ 4,359,064	$ 4,415,478
Lower Authority		
SFY 87/88	$21,036,883	$21,285,262
SFY 88/89	$20,301,412	$20,576,846
Total		
SFY 87/88	$25,452,821	$25,752,073
SFY 88/89	$24,660,476	$24,992,324

Cost Per ~~Hearing~~ Decision

Higher Authority		
SFY 87/88	$316	$320
SFY 88/89	$338	$343
Lower Authority		
SFY 87/88	$159	$161
SFY 88/89	$153	$155
Total		
SFY 87/88	$174	$176
SFY 88/89	$169	$171

STATE BANKING DEPARTMENT
1107 NINTH STREET, SUITE 360
SACRAMENTO, CA 95814
(916) 322-5966

May 31, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Conduct of Administrative Hearings

Dear Mr. Marzec:

This is in response to your letter dated May 3, 1990, in which you solicited our comments concerning a proposal under consideration by the California Law Revision Commission ("Commission") to require that all statutorily required administrative hearings of state agencies be conducted by administrative law judges employed and assigned by the Office of Administrative Hearings ("OAH"). While we appreciate the arguments in favor of the proposal, in particular the neutrality provided by OAH's administrative law judges, we have serious concerns regarding the practicality of the proposal.

Certain orders issued by the Superintendent of Banks (for example, cease and desist orders pursuant to Financial Code Sections 1912 and 1913) are subject to a statutory requirement that a hearing be afforded the affected parties before the order can become final. In addition, the Superintendent's denial of certain license applications (for example, the denial of a money transmitter license application pursuant to Financial Code Section 1802.2) cannot become final until the applicant is afforded a hearing. Further, the Superintendent may convene a hearing to investigate matters within his jurisdiction, either on his own initiative or upon the request of certain parties. In scope as well as in degree of complexity, these hearings are enormously varied. Although the Superintendent often designates administrative law judges from OAH as hearing officers, the Superintendent sometimes assigns persons within the State Banking Department to hear matters.

We are concerned that mandatory use of administrative law judges from OAH would eliminate the Superintendent's flexibility. Because the regulation of state-chartered banks and other licensees pursuant to the Financial Code is an extremely narrow and complex field, certain hearings require a level of technical expertise which is unobtainable outside a relatively small group of specialized practitioners. Our experience has been that it requires almost two years of formal training and daily immersion in the field for even experienced attorneys to reach a level of expertise sufficient to perform competently in all Department functions. It seems unrealistic to expect an administrative law judge to acquire expertise in some of the more complex areas of the laws administered by the State Banking Department through occasional contact with the wide variety of hearings possible pursuant to the Financial Code.

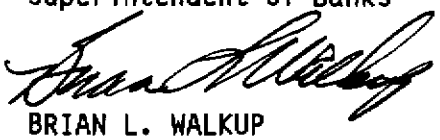
A related, but larger, concern regarding the proposal is one of practicality. Our experience has been that, despite consistent and much-appreciated attempts to meet our needs, OAH has usually been unable to provide administrative law judges in a timely manner when the Superintendent must act expeditiously. The vast majority of our licensees, and thus the greatest need for hearings, are in the metropolitan Los Angeles and San Francisco Bay areas. The lead time necessary to obtain an administrative law judge from OAH in San Francisco averages 60 to 90 days, and the situation is worse in Los Angeles. While such delays do not generally present a problem for the Superintendent in matters such as license application denials, they are not acceptable in situations such as cease and desist orders directed at problem banks. Our dealings with OAH have convinced us that it simply lacks the capacity to respond to matters of urgency.

For these reasons, we suggest that any proposal for a central panel of hearing officers be subject to exceptions allowing the Superintendent to designate other hearing officers when necessary because of such factors as the exigencies of time or the need for specialized knowledge.

We appreciate this opportunity to present our views to the Commission. If we may provide any additional information that would be of assistance to the Commission, please feel free to contact us.

Very truly yours,

JAMES E. GILLERAN
Superintendent of Banks

By 

BRIAN L. WALKUP
Legislative Counsel

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