Testimony of Michael Asimow before the Little Hoover Commission
Meeting of Feb. 26, 2015

Thank you for the opportunity to present testimony on the subjects of ex parte communications in rulemaking and the Bagley Keene Act.

1. My credentials: To introduce myself, I'm a long-term visiting professor of law at Stanford Law School and a professor of law emeritus at UCLA School of Law. I have no conflicts of interest in this matter because I have no clients. I am a fulltime professor. My interest in these subjects is purely academic. I teach administrative law among other subjects.

I specialize in California administrative law. I was the consultant to the California Law Revision Commission (CLRC) in its project to update the Calif. Administrative Procedure Act (herein APA). I worked for CLRC for a number of years, starting in 1989. Our work resulted in a recommendation about amending the adjudication sections of the APA; these recommendations were enacted in 1995 and came into effect in 1997. CLRC also adopted a recommendation creating a simplified process for agency adoption of non-binding guidance documents; this recommendation passed the Legislature but was vetoed by the Governor. In addition, CLRC adopted a recommendation concerning reform of the system for judicially reviewing decisions of California agencies; this recommendation died in the Senate Judiciary Committee. Should the Little Hoover Commission have an interest in any of these subjects, I would be most happy to participate.

My work with the CLRC resulted in several law review articles. These are: "Toward a New California Administrative Procedure Act: Adjudication Fundamentals," 39 UCLA L. Rev. 1067 (1992); "The Scope of Judicial Review of Decisions of California Administrative Agencies," 42 UCLA L. Rev. 1157 (1995); "California Underground Regulations," 44 Admin. L. Rev. 43 (1992); "Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania," 8 Widener J. of Pub. L. 229 (1999); "The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act," 32 Tulsa L. Rev. 297 (1996). I also co-authored (with Marsha Cohen) a law school casebook entitled "California Administrative Law"(2002).

I am in the process of producing a three-volume treatise on California Administrative Law as a Rutter Group California Practice Guide. My co-authors on this project are ALJ Timothy Aspinwall, Herbert Bolz, and Michael Strumwasser. The first volume of this treatise on adjudication appeared in 2014. The volume on judicial review should be published in summer, 2015. The volume on rulemaking, Bagley Keene, and the Public Records Act should be published in 2016. I was also the ABA's representative in the process of drafting the Model State Administrative Procedure Act of 2010 (which will be further discussed below).

2. Ex parte communications in rulemaking: To summarize what follows, I am opposed to amending the APA to either prohibit oral ex parte contacts in rulemaking or to require that they be memorialized in memoranda. Of course, individual agencies should be encouraged to set forth their ex parte practice in procedural regulations and agencies may well decide to limit such contacts in the interest of saving staff time or assuring equal access or responding to public concerns about undue influence. But the APA should not be amended to enforce a one-size-fits-all requirement of disclosure of all oral ex parte communications. To explain my conclusion, I need to put this issue in a broader context, both by discussing the existing California rulemaking process and the theoretical nature of rulemaking and the role of lobbying in the rulemaking process.

a. Rulemaking ex parte contacts are valuable. The Administrative Conference of the US (ACUS) recently studied ex parte comments in rulemaking. The study is 99 pages long (it's available on the ACUS website). It stresses the great value of ex parte contacts both to public stakeholders and to rulemaking agencies. (pp 16-18). Often the agency heads need to have conversations with stakeholders to help them understand the issues presented by a rulemaking; realistically, the agency heads can't read through the voluminous comments filed by the public. They need to get a handle on the issues through informal discussion with outsiders. By the same token, stakeholders want and need to get their views across to the regulators in oral presentations. This is an inherent part of the political process and should not be prohibited or regulated in a one-size-fits-all manner. As I'll explain, mandatory disclosure of all oral ex parte communications relating to policy would discourage such contacts (or the candor with which opinions are expressed during such meetings).

Nevertheless, as the ACUS study pointed out, there are obvious problems arising out of ex parte communications in rulemaking. They can consume too much staff time and there may be problems of equal access by different groups of stakeholders. Ex parte communications can suggest to the public that the agency has been captured by the interests it regulates. Consequently, agencies often adopt procedural regulations that contain various restrictions on such communications or impose disclosure requirements.

b. California's rulemaking APA. The provisions for rulemaking in California undoubtedly exceed in complexity the law of any other state or the federal government. As will become evident, I think California has vastly *overregulated* the rulemaking process. The rulemaking APA law runs from Government Code (hereinafter GC) §§11340 to 11361. I suggest that a newcomer to this subject should open up the Government Code and skim through these provisions to understand what an agency has to do to adopt a regulation in California. You'll find page after page of small print with mind-numbing complexity and detail. Nobody but a few experts can hope to keep all these requirements straight and agencies are constantly tripped up in trying to follow them. The Legislature constantly adds to these requirements but never removes any of them. In the interests of keeping this memo brief, I won't detail this process, but I want to highlight some elements of it.

When an agency wishes to propose a regulation, it must give notice to the public. The notice requirements of GC §§11346.4 and 11346.5 consume about four pages of statutory text space and describe in dizzying detail the scope and timing of the distribution of rulemaking notices as well as their contents. Among many other requirements, the notice must include an "informative digest," and an "initial statement of reasons" (ISR) for the proposal. The ISR must describe the problem to which the proposal is directed and the rationale for determining that the proposal is reasonably necessary to carry out the purpose for which it is proposed. It must identify all the data upon which the agency relies, and describe any alternatives it has considered and why it has rejected them. The agency must prepare an ever-increasing number of impact statements.

The agency must hold an oral hearing on the proposed rule and accept written comments. It must summarize "*each* objection or recommendation made regarding the [proposal], together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." If the final regulation differs in any substantial respect from the proposed regulation, the agency must re-notice the regulation for a 15-day additional comment. The agency must complete the entire process within one year or it must

start over. The agency must prepare a final statement of reasons (FSR) which is an updated version of the ISR.

Finally, all regulations must be submitted to the Office of Administrative Law (OAL) for a procedural and substantive review of the regulation. OAL checks that every procedural step required by the APA has been complied with. At the OAL stage, the agency must establish that the regulation is supported by the rulemaking record and is reasonably necessary as well as meeting the test of clarity. If OAL discovers any procedural or substantive flaws, it returns the rule to the agency.

I believe that the California APA's rulemaking requirements are too complex and costly. They generate an immense amount of useless busy work. The process must be overseen by skilled and experienced staff lawyers. The costs and delays inherent in satisfying the APA's rulemaking requirements undoubtedly deter agencies from adopting regulations and result in fewer regulations being adopted. In comparison, the federal APA's rulemaking provisions consist of a few sentences in 5 USC §553 calling for notice, comment, and a statement of reasons. While these skeletal requirement have been greatly expanded by court decisions, and while regulations with significant economic impact must be vetted by OIRA (a division of the Office and Management and Budget), there are far fewer requirements than in California. Similarly, the recently adopted 2010 Model State Administrative Procedure Act contains relatively few rulemaking requirements. See §§304-308.

Because I believe that California already overregulates the adoption of regulations, I oppose any additional restrictions on the rulemaking process, such as by requiring agencies to prepare memoranda on all oral ex parte communications between agency officials and stakeholders. Such a requirement would increase agency workloads. Either agency personnel must write summaries of their discussions with stakeholders or, if the memoranda are prepared by stakeholders, agency staff members have to read them carefully to make sure they are accurate and complete. This would be just one more time-consuming step necessary to get a regulation out the door.

I believe that memoranda summarizing oral ex parte communications are often extremely brief and unrevealing. (See ACUS report, p. 44) Whether they are prepared by the stakeholder or by the agency official, they conceal more than they reveal. A memo is likely to say something like "Stakeholder A and agency head B discussed the effect on California business of further increasing the costs of environmental compliance." Neither the agency officials or the stakeholders have any interest in placing on the record a detailed account of a policy/political discussion. But if the memoranda are brief and unrevealing (as I think is inevitable), this opens another door for attacking the final rule before OAL or on judicial review. The risk that an agency rule will be kicked back to the agency by OAL or overturned on judicial review is an ever-present concern of California agencies and I would not wish to create new opportunities for this to occur.

c. <u>Existing Calif. APA restrictions on ex parte communications</u>

The California APA *already* contains significant restrictions on ex parte communications in rulemaking. GC §11347.3(b)(6) provides that the rulemaking file shall include "All data and other factual information, any studies or reports, and written comments submitted to the agency..." Similarly, the file must contain: "All data and other *factual information*, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation." [§11347.3(b)(7)]

Thus the APA *already* requires that an agency's rulemaking file contain all *written* ex parte communications received by an agency staff member or by the agency head during the rulemaking process. In addition, the rulemaking file must contain memoranda summarizing all oral ex parte communications containing data or other factual information.

Thus the only question before the Little Hoover Commission is whether the APA should be amended to impose *further* requirements. For example, the Commission must decide whether the APA should require that every agency must memorialize every oral ex parte communication in which stakeholders make arguments concerning law or policy or that repeat or re-emphasize factual data that has already been supplied to the agency in written comments.

d. Federal and state law on ex parte contacts in rulemaking

Under federal law, the D.C. Circuit at one time required agencies to prohibit or at least to place into the record all written or oral ex parte communications that the agency received during the rulemaking process. *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (*HBO*). The court in *HBO* was concerned that the FCC's rule was based on undue influence by industry groups rather than by a reasoned decision. It also indicated that the record available to the reviewing court must contain all of the inputs the agency received. Finally, the court believed that commentators on the rule need to know the content of ex parte communications to the FCC so that they could rebut arguments contained in those communications.

However, the D.C. Circuit has renounced *HBO* and indicated that ex parte communications in rulemaking (at least communications relating to law and policy) are appropriate and need not be included in the record (unless a statute or agency rule requires them to be included). It carefully distinguished the rulemaking process from the adjudication process (in which ex parte communication is prohibited). *Sierra Club v. Costle,* 657 F.2d 298 (D.C. Cir. 1981). Judge Wald's opinion in *Sierra Club* is of great importance in understanding the role of ex parte communication in rulemaking. She wrote:

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

Since the *Sierra Club* decision, the federal courts have indicated that ex parte communication in rulemaking is not prohibited and need not be included in the record, whether the communications come from private parties outside the agency or from the President or from Congress, unless such disclosure is required by a specific statute or by an agency rule.

At the hearing, I believe you'll hear from a representative of ACUS. In recommendation 77-3, ACUS expressed the view that ex parte communication in rulemaking should not be prohibited but should be appropriately dealt with through agency regulations. ACUS revisited this issue in Recommendation 2014-4 and came to the same conclusion. I've already referred to the study by Professor Sferra-Bonistalli that formed the basis of Rec.2014-4. That recommendation set forth best practices for handling ex parte communications, based on the practices of numerous federal agencies. I won't attempt to summarize the study here, but it did not recommend that the APA be amended to regulate ex parte communications. According to Rec. 2014-4, agency rules should often require disclosure of substantive oral ex parte communications, but only through careful agency-by-agency procedural rulemaking.

The rulemaking provisions of the 2010 Model State APA do not prohibit oral ex parte communication in rulemaking or require such communications to be included in the record (unless the agency prepared a transcript of the conversation). The Model Act does require that "information" the agency receives about a proposed rule must be included in the record. For this purpose, "information" means "all factual material, studies, and reports agency personnel relied on or consulted in formulating the proposed or final rule." §§302(b)(3) and 306(b). Thus the MSAPA is similar to the existing provisions of the Calif. APA on ex parte communications.

e. My bottom line: Of course, agencies should be encouraged to adopt procedural regulations tailored to the agency's specific concerns with ex parte rulemaking communications (as many federal agencies have done). These rules might assure equal access to stakeholders, limit staff time consumed by ex parte meetings, or require various forms of memorialization of such meetings. However, I oppose an APA amendment that would go beyond the requirements of existing law and would require all agencies to memorialize all oral ex parte contacts relating to policy.

First, as discussed above, such a requirement would increase agency workloads in rulemaking and would render the process even more complex than it already is. In particular, I am troubled by the impact on judicial review of a requirement that all oral ex parte contacts be summarized and disclosed. Inevitably, such memos will fall far short of a transcript of the meeting and thus their adequacy could be attacked on judicial review.

Second, my opinion is based on the nature of rulemaking and is similar to Judge Wald's opinion in *Sierra Club* which is quoted above. I believe rulemaking is quite different from administrative agency adjudication and this difference supports different treatment of ex parte communications. Adjudication affects the legal rights of specific parties, not the general public. In adjudication, the judge is confined to the record made during the proceeding. All inputs—whether of fact, law, or policy—must occur during the adjudicatory process so they can be rebutted by the opposing party. The administrative judge must be free of bias (meaning the judge cannot prejudge the facts concerning the parties). Agency staff members who have assumed adversarial roles in the adjudication cannot furnish ex parte advice to decisionmakers. Similarly, there is no place for ex parte communications from outsiders to an agency judge because such communications cannot be rebutted by the opposing side and give an unfair advantage to those who make the communications.

Rulemaking is quite different from adjudication. It is often referred to as quasi-legislative because it is more like legislation than adjudication. Rulemaking is a political process that calls for making hard choices and difficult compromises. The interests—often vital interests—of the general public and of regulated parties are at stake. Making rules calls for the exercise of wisdom and

discretion and often the tradeoffs involved are quite political in nature. For examples, rules frequently trade off public environmental benefits against business costs. Drawing these kinds of lines is an inherently political process.

A legislature is free to use whatever investigatory and information gathering and deliberative process it wishes. Lobbying the legislature is an accepted procedure and, indeed, is constitutionally protected. Unlike the legislature, the APA requires agencies to follow a defined process when they make rules. This process—often referred to as one of the greatest inventions of modern government—entails public notice about a proposed rule and an invitation to the public to submit comments. The agency must respond to the comments and must submit a reasons statement that explains what it has done and why it rejected various alternatives. A reviewing court determines whether the agency engaged in reasoned decisionmaking and whether there is support in the rulemaking record for the choices the agency made.

Nevertheless, the APA does not convert rulemaking into adjudication. Rulemaking is not a trial, even though it is accompanied by a system of public comment. The choices the agency heads made are fundamentally political ones that will affect the general public and regulated parties in substantial and very significant ways. There is no concept of an "exclusive record" in rulemaking like the requirement applicable in adjudication. The rules of bias applicable in adjudication don't apply in rulemaking. Unlike adjudication, any staff member can advise the agency heads, regardless of whether that staff member has been actively involved in the rulemaking.

By the same token, agency heads should be free to seek policy or even political advice from anyone they choose, inside or outside of the government. Lobbying is acceptable because it is so valuable to stakeholders and to the agency itself. So long as the resulting rule meets the standard of reasoned decisionmaking and is supported by the rulemaking record, it should not be overturned by a court, even if extensive undisclosed lobbying took place during the rulemaking process. Obviously, agencies can and should choose to regulate ex parte communication through their own procedural rules, but in my opinion the APA should not regulate it on a one-size-fits-all basis.

A requirement that all outsider policy advice to the agency heads must be recorded in a memorandum and included in the record would often discourage people from furnishing the advice and the agency heads from seeking it. Or it would inhibit the candor with which views are expressed in a private meeting. Or, as already pointed out, the memo that summarizes such conversations will conceal far more than it reveals. We recognize an agency shouldn't be required to disclose the content of all staff communications to the agency heads, because this would discourage the staff from furnishing candid policy advice. For the same reason, there should not be a blanket requirement that stakeholder communications with agency heads be disclosed.

3. Bagley Keene Act. You have also asked for my views on the Bagley Keene Act. This memo is already too long and a thorough discussion of Bagley Keene would probably double its size. Suffice it to say that all empirical accounts of open meeting laws indicate that they are destructive to the deliberative process of multi-member agencies. The agency heads simply won't conduct candid discussions of policy issues in public. The public meetings are scripted and unrevealing.

We employ the multi-member agency structure in order to bring divergent policy views and different skill sets to the decisionmaking process. To achieve this purpose, the heads must be able to conduct serious and candid discussions of policy issues as well as agency management and priority-

setting. But the members are unwilling to carry on such discussions in public. They need to employ various suboptimal strategies to get around open meeting laws and achieve a consensus—and many of those strategies that are often employed in federal agencies or in other states are prohibited by recent amendments to Bagley Keene.

Recently, a member of the federal Equal Employment Opportunities Commission related in a speech before the American Association of Law Schools how the federal sunshine law throttles deliberation by that body. My interviews with officials of the Calif. Public Utilities Commission indicate that the CPUC is tied in knots by Bagley Keene and unable to properly carry out its vast and vital regulatory responsibilities. It cannot manage the agency, achieve consistent results in different cases, or set priorities. There are many other accounts of the effect of open meetings in the literature. There needs to be a serious relaxation of Bagley Keene so that the members of agencies can engage in uninhibited discussion of important management and policy issues (without making final decisions on them). But I don't think this memo is the place to suggest how Bagley Keene can be amended to allow such discussions.

Thanks again for the opportunity to give my views about ex parte communication in rulemaking and Bagley Keene.