#N-107

ns110
05/08/92

Memorandum 92-28

Subject: Study N-107 - The Process of Administrative Adjudication (Revised Draft of Statute)

Attached to this memorandum is a revised draft of the provisions relating to the administrative adjudication process. The draft includes statutory implementation of policy decisions made at the March and April Commission meetings that have not previously been reviewed by the Commission, as well as redrafts of statutes previously reviewed. We hope to cover the entire draft at the May meeting, stopping at issues raised by Commissioners, staff, and interested persons.

After the review at the May meeting we should be able to put together a combined draft that incorporates previously developed materials on the scope of the adjudication statute, impartiality of the adjudicator, and appeals within the agency. We will then be in a position to review the combined draft on administrative adjudication for consistency, logic of organization, gaps, etc. We will also be in a position to begin the process of comparing the draft with existing statutes affecting administrative adjudication of various agencies to see which may be eliminated and which may need to be preserved because they are and should be sui generis.

The Commission has previously decided to hold the administrative adjudication provisions until it has completed work on judicial review, and to submit the two as a package. If the Commission follows this course, the administrative adjudication material will not be submitted to the Legislature next session. While we are awaiting completion of the consultant's background study on judicial review we can do the cleanup and conforming revision work on administrative adjudication.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

THE ADMINISTRATIVE ADJUDICATION PROCESS

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DEFINITIONS

§ 610.350. Initial pleading 4/01/92

610.350. "Initial pleading" commencing an adjudicative proceeding includes an accusation, statement of issues, and order instituting investigation. The term also includes an amended or supplemental initial pleading as the context requires.

Comment. Section 610.350 supersedes former Section 11504.5 and portions of the first sentences of former Sections 11503 and 11504.

§ 610.670. Respondent 2/24/92

610.670. "Respondent" means a person named as a party in an adjudicative proceeding whose legal right, duty, privilege, immunity, or other legal interest is determined in the proceeding.

Comment. Section 610.670 supersedes former Section 11500(c).

§ 610.672. Responsive pleading 4/01/92

610.672. "Responsive pleading" to an initial pleading includes a notice of defense. The term also includes an amended or supplemental responsive pleading as the context requires.

Comment. Section 610.672 supersedes a portion of former Section 11506.

PROCEDURAL PROVISIONS

Article 1. Miscellaneous Provisions

§ 613.050. Voting by agency member 5/01/92

613.050. Agency members qualified to vote on a matter may vote by mail.

Comment. Section 613.050 continues former Section 11526. See also Section 610.280 ("agency member" defined).

§ 613.060. Oaths, affirmations, and certification of official acts 5/01/92

613.060. In proceedings under this division an agency, agency member, secretary of an agency, hearing reporter, or presiding officer has power to administer oaths and affirmations and to certify to official acts.

Comment. Section 613.060 continues former Section 11528.

Article 3. Representation of Parties

§ 613.310. Self representation 5/01/92

613.310. A party may represent itself without legal counsel.

Comment. Section 613.310 generalizes a provision of former Section 11509.

Staff Note. *A party is allowed to represent itself as a matter of right. In the case of an artifical person such as a partnership or corporation, may any officer or employee represent the entity?*

§ 613.320. Representation by attorney 5/01/92

613.320. (a) A party may be represented by an attorney at the party's own expense. A party is not entitled to appointment of an attorney to represent the party at public expense.

(b) An agency may by regulation preclude the right of representation by an attorney in an adjudicative proceeding involving a minor sanction or in which representation by counsel is otherwise inappropriate.

Comment. Subdivision (a) of Section 613.320 generalizes a provision of former Section 11509.

Subdivision (b) is new. Instances where representation by counsel may otherwise be inappropriate include a brief suspension from school. See, e.g., Perlman v. Shasta Joint Junior College Dist., 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970).

§ 613.330. Lay representation 5/01/92

613.330. (a) An agency may, in an adjudicative proceeding other than an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, permit a party to be represented by a person other than an attorney.

(b) An agency may adopt regulations that impose qualification and disciplinary standards for representation under this section.

Comment. Subdivision (a) of Section 613.330 recognizes the practice of some agencies to permit lay representation. See, e.g., Labor Code § 5700 (Workers Compensation Appeals Board); Unemp. Ins. Code § 1957 (Unemployment Insurance Appeals Board); 18 CCR § 5056 (State Board of Equalization).

Under subdivision (b) an agency may regulate such matters as standards of competency and character for lay representatives, standards of conduct (including confidentiality) and disciplinary control, and procedures to bar representatives guilty of violating the standards from future representation before the agency.

Article 4. Conversion of Proceedings

Staff Note. *We have included in this draft conversion provisions drawn from the model act, since the intent of the draft is to allow a formal adjudicative proceeding to be converted to a conference hearing*

in an appropriate case, and vice versa. It should be noted, however, that the model act is more broadly drawn to allow conversion of an adjudicative proceeding to a rulemaking proceeding and vice versa. We have kept the broad scope here even though we are not yet to the point of examining rulemaking procedures.

§ 613.410. Conversion authorized 5/01/92

613.410. (a) At any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

(1) May convert the proceeding to another type of agency proceeding provided for by this division if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party.

(2) Shall convert the proceeding to another type of agency proceeding provided for by this division, if required by regulation or statute.

(b) A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding.

Comment. Section 613.410 is drawn from 1981 Model State APA § 1-107(a)-(b).

Under subdivision (a)(1) the courts will have to decide on a case-by-case basis what constitutes substantial prejudice. Of course, even if the rights of a particular party are substantially prejudiced by a conversion, the party may voluntarily waive them. It should be noted that the substantial prejudice to the rights of a party limitation on discretionary conversions of agency proceedings from one type to another is not intended to disturb an existing body of law. In certain situations agencies may lawfully deny particular individuals adjudicatory hearings to which they otherwise would be entitled by conducting a rule-making proceeding that determines for an entire class issues that otherwise would be the subject of necessary adjudicatory hearings. See Note, "The Use of Agency Rule-making to Deny Adjudications Apparently Required by Statute," 54 Iowa L. Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing agencies, in certain situations, to make determinations through adjudicatory procedures that have the effect of denying a person opportunities the person might otherwise be afforded if rule-making procedures were used instead.

Subdivision (a)(2) makes clear that an agency must convert a proceeding of one type to a proceeding of another type when required by regulation or statute, even if a nonconsenting party is greatly prejudiced thereby. Under subdivision (b), however, both discretionary

and mandatory conversions must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate opportunity to protect their interests.

Within the limits of this section, agencies should be authorized to use those procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows agencies that desirable flexibility. For example, an agency that wants to convert a formal adjudicatory hearing into a conference hearing, or a conference hearing into a formal adjudicatory hearing, may do so under this provision if the conversion is appropriate, in the public interest, adequate notice is given, and the rights of no party are substantially prejudiced.

Similarly, an agency called on to explore a new area of law in a declaratory decision proceeding may prefer to do so by rule making. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the request of a specific party in a more limited proceeding. So long as all of the standards in this section are met, this section would authorize such a conversion from one type of agency proceeding to another.

While it is unlikely that a conversion consistent with all of the statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In adjudications, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of a later conversion.

§ 613.420. Presiding officer 5/01/92

613.420. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, that officer or official, in accordance with agency regulations, shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

Comment. Section 613.420 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

§ 613.430. Agency record 5/01/92

613.430. To the extent feasible and consistent with the rights of parties and the requirements of this division relating to the new proceeding, the record of the original agency proceeding must be used in the new agency proceeding.

Comment. Section 613.430 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of this division.

§ 613.440. Procedure after conversion 5/01/92

613.440. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

(a) Give additional notice to parties or other persons necessary to satisfy the requirements of this division relating to that proceeding.

(b) Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of this division relating to the new proceeding.

(c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of this division relating to that proceeding.

Comment. Section 613.440 is drawn from 1981 Model State APA § 1-107(e).

§ 613.450. Agency regulations 5/01/92

613.450. Each agency shall adopt regulations to govern the conversion of one type of proceeding to another. The regulations shall include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

Comment. Section 613.450 is drawn from 1981 Model State APA § 1-107(f).

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

§ 641.120. When adjudicative proceeding not required 2/24/92

641.120. An agency need not conduct a proceeding under this part as the process for formulating and issuing a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

Comment. Section 641.120 is drawn from 1981 Model State APA § 4-101(a). The provision lists the situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court.

§ 641.130. Modification or inapplicability of statute by regulation 4/23/92

641.130. If a provision of this part authorizes an agency to modify this part or make this part inapplicable by regulation:

(a) To that extent the agency may adopt a regulation pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, that modifies this part or makes this part inapplicable, and the regulation, and not this part, governs the matter.

(b) The provision does not apply to an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, unless the provision states expressly that this part may be modified or made inapplicable by regulation in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(c) The provision is subject to an express statute that governs the matter.

Comment. Section 641.130 recognizes that a number of the provisions of this part may be modified or made inapplicable by an agency to suit the circumstances of the particular type of adjudication administered by it. The modification or inapplicability may occur only

by regulation duly adopted and promulgated under the Administrative Procedure Act. The modification may alter, or make inapplicable to the agency's adjudicative proceedings, the particular provision as to which modification or inapplicability is permitted.

In the interest of uniformity of procedure, the opportunity for modification or inapplicability is restricted in cases being heard by Office of Administrative Hearings personnel. These cases historically have been subject to a uniform procedure under the former Administrative Procedure Act. A number of provisions expressly authorize modification or inapplicability in an Office of Administrative Hearings case. See, e.g., Sections 641.310 (regulations governing declaratory decision), 648.310 (burden of proof), [additional references to be supplied].

Article 3. Declaratory Decisions

Comment. Article 3 (commencing with Section 641.310) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances. See generally Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731 at 805-824 (1975).

It should be noted that an agency not governed by this article nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973).

§ 641.310. Regulations governing declaratory decision 4/23/92

641.310. (a) An agency may modify the provisions of this article or make the provisions of this article inapplicable by regulation. Notwithstanding Section 641.130, this subdivision applies in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) The Office of Administrative Hearings shall adopt and promulgate model regulations under this article that are consistent with the public interest and with the general policy of this article to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following:

(1) A description of the classes of circumstances in which an agency will not issue a declaratory decision.

(2) The form, contents, and filing of an application for a declaratory decision.

(3) The procedural rights of a person in relation to an application.

(4) The disposition of an application.

(c) An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern declaratory decisions of the agency.

Comment. Section 641.310 is drawn from 1981 Model State APA § 2-103(b). This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. An agency may choose to preclude declaratory decisions altogether. Cf. Section 641.130 (modification or inapplicability of statute by regulation).

Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the application; when, how, and where an application is to be filed; whether an applicant has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like.

Regulations also should require a clear and precise presentation of facts, so that an agency will not be required to rule on the application of law to unclear or excessively general facts. The regulations should make clear that, if the facts are not sufficiently precise, the agency can require additional facts or a narrowing of the application.

Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest--which includes the efficient and effective accomplishment of the agency's mission--and the express general policy of this article to facilitate and encourage the issuance of reliable agency advice. Within these general limits, therefore, an agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory decision.

§ 641.320. Declaratory decision permissive 4/23/92

641.320. (a) In case of an actual controversy, a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency.

(b) The agency in its discretion may issue a declaratory decision in response to the application. The agency shall not issue a declaratory decision if the agency determines that any of the following applies:

(1) Issuance of the decision would be contrary to a regulation adopted under this article.

(2) The decision would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory decision proceeding.

(c) An application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review.

Comment. Subdivisions (a) and (b) of Section 641.320 are drawn from 1981 Model State APA § 2-103(a); subdivision (c) is new. Unlike the model act, Section 641.320 is applicable only to cases involving an actual controversy, and issuance of a declaratory decision is discretionary with, rather than mandatory for, the agency.

This section prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be indispensable--that is a "necessary"--party, and who does not consent to the determination of the matter by a declaratory decision proceeding. Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicatory proceeding to which the person would be entitled.

§ 641.330. Notice of application 4/23/92

641.330. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application to all persons to whom notice is required by any statute or regulation, and may give notice to any other person.

Comment. Section 641.330 is drawn from 1981 Model State APA § 2-103(c).

§ 641.340. Applicability of rules governing administrative adjudication 3/12/92

641.340. (a) The provisions of this part other than this article do not apply to an agency proceeding for a declaratory decision except to the extent the agency so provides by regulation or order.

(b) Notwithstanding subdivision (a), a person who qualifies under Chapter 5 (commencing with Section 645.010) (intervention) and files a timely motion for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.

Comment. Section 641.340 is drawn from 1981 Model State APA § 2-103(d). It makes clear that persons must be allowed to intervene in a declaratory decision proceeding to the same extent they are allowed to intervene in other adjudicatory proceedings under this part. It also makes clear that all the other specific procedural requirements for adjudications imposed by this part on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 641.310. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicatory provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to unproven facts furnished by the applicant. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process governed by this part.

A declaratory decision is, of course, subject to any provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions.

§ 641.350. Action of agency 4/23/92

641.350. (a) Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing:

(1) Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances.

(2) Set the matter for specified proceedings.

(3) Agree to issue a declaratory decision by a specified time.

(4) Decline to issue a declaratory decision, stating the reasons for its action.

(b) A copy of the agency's action under subdivision (a) shall be served promptly on the applicant and any other party.

(c) If an agency has not taken action under subdivision (a) within 60 days after receipt of an application for a declaratory decision, the agency is deemed to have declined to issue a declaratory decision on the matter.

Comment. Subdivision (a) of Section 641.350 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail to the respondent's last known address. Sections 613.010 (service) and 613.020 (mail).

Under subdivision (a)(4), when the agency declines to issue a declaratory decision it must also include a statement of the precise grounds for the disposition. The statement of reasons will help to ensure that the agency carefully considers the propriety of the denial of a declaratory decision in the circumstances.

§ 641.360. Declaratory decision 3/12/92

641.360. (a) A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion.

(b) A declaratory decision has the same status and binding effect as any other decision issued in an agency adjudicative proceeding.

Comment. Section 641.360 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

Note that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued.

Note also that the requirement in this section that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and other persons interested in the decision because of its possible precedential effect.

Article 4. Alternative Dispute Resolution

Staff Note. We have relocated and renumbered the alternative dispute resolution provisions from the preceding draft. The Commission has not yet reviewed the alternative dispute resolution provisions, except for settlement, which it moved to a separate article on settlement conferences.

§ 641.410. Mediation 4/23/92

641.410. (a) An agency may, with the consent of all the parties, refer a dispute that is subject to an adjudicative proceeding to mediation by an outside mediator. The mediator may use any mediation technique.

(b) The Office of Administrative Hearings shall adopt and promulgate model regulations that include provisions explaining how a mediator is selected and compensated, the qualifications of a mediator, and for confidentiality of the mediation proceeding. An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern disputes referred to mediation.

Comment. Section 641.410 is new. This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. The agency may choose to preclude mediation altogether.

The Office of Administrative Hearings could maintain a roster of mediators who are available for dispute settlement in all administrative agencies.

Staff Note. This section departs from Professor Asimow's recommendation that each agency should adopt mediation regulations, but is consistent with Professor Asimow's general suggestion that OAH adopt a model set of regulations that could be picked up by any agency.

§ 641.420. Nonbinding arbitration 4/23/92

641.420. (a) An agency may, with the consent of all the parties, refer a dispute that is subject to an adjudicative proceeding to nonbinding arbitration by an outside arbitrator.

(b) The arbitrator's decision in the nonbinding arbitration shall be the basis of settlement of the dispute, unless the arbitrator's decision is rejected by a party. If the arbitrator's decision is rejected by a party, the adjudicative proceeding shall proceed and, if

the final decision in the dispute is less favorable to the party than the arbitrator's decision, the party shall pay the costs and reasonable expenses of adjudication of the other parties.

(c) The Office of Administrative Hearings shall adopt and promulgate regulations that include provisions explaining how an arbitrator is selected and compensated, the qualifications of an arbitrator, and for confidentiality of the arbitration proceeding. An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern disputes referred to nonbinding arbitration.

Comment. Section 641.420 is new. This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. The agency may choose to preclude arbitration altogether.

The Office of Administrative Hearings could maintain a roster of arbitrators who are available for dispute settlement in all administrative agencies.

Staff Note. Subdivision (b) is problematical in a number of respects. Does it extend to judicial review as well as administrative hearing and review? "Costs and expenses" are not as well defined in administrative as in civil litigation. How are the agency's expenses to be calculated if it is using in-house legal and other personnel? The concept of a more favorable result may be even more nebulous in the context of administrative adjudication than it is in civil litigation. If, as typically occurs, the arbitrator compromises and splits the difference, we may have appeals on both sides: should this negate the cost shifting provision?

§ 641.430. Confidentiality of communications in alternative dispute resolution 4/23/92

641.430. (a) Notwithstanding any other statute, if a proceeding for mediation, non-binding arbitration, or other alternative dispute resolution occurs:

(1) Evidence of anything said or of any admission made in the course of the proceeding is not admissible in evidence, and disclosure of the evidence shall not be compelled, in any adjudicative proceeding or civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the proceeding, or copy of the document, is admissible in evidence, and

disclosure of the document shall not be compelled, in any adjudicative proceeding or civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation, non-binding arbitration, or other alternative dispute resolution consent to its disclosure.

Comment. Section 641.430 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified or made inapplicable by regulation). Section 641.430 is drawn from Evidence Code Section 1152.5(a)-(b).

Article 5. Conference Adjudicative Hearing

§ 641.510. When conference hearing may be used 5/01/92

641.510. ALTERNATIVE 1. A conference adjudicative hearing may be used if in the circumstances its use does not violate a statute or the federal or state constitution and the matter is entirely within one or more categories for which the agency has adopted this chapter by regulation.

ALTERNATIVE 2. The categories for which an agency may adopt this chapter are limited to the following:

(a) A matter in which there is no disputed issue of material fact.

(b) A matter in which there is a disputed issue of material fact, if the matter involves only:

(1) A monetary amount of not more than $1,000.

(2) A disciplinary sanction against a prisoner.

(3) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.

(4) A disciplinary sanction against a public employee that does not involve discharge from employment or suspension for more than 10 days.

(5) A disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment of a license.

Comment. Section 641.510 is drawn from 1981 Model State APA § 4-401.

ALTERNATIVE 2 sets forth a list of categories, so as to impose limits on the authority of the agency to adopt the conference adjudicative hearing by regulation.

Subdivision (a) permits the conference hearing to be used, regardless of the type or amount of the matter at issue, if no disputed issue of material fact has appeared. An example might be a utility rate proceeding in which the utility company and the Public Utilities Commission have agreed on all material facts. If, however, consumers intervene and raise material fact disputes, the proceeding will be subject to conversion from the conference adjudicative hearing to the formal adjudicative hearing in accordance with Sections 613.410-613.450.

Subdivision (b) permits the conference adjudicative hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner.

Staff Note. The Commission requested the staff to present both the broad authority approach (ALTERNATIVE 1) and the narrow listing approach (ALTERNATIVE 2) to conference adjudicative hearings, for Commission review.

§ 641.520. Procedure for conference adjudicative hearing 5/01/92

641.520. (a) The procedures of this part otherwise applicable to an adjudicative hearing apply to a conference adjudicative hearing except as provided in this section.

(b) If a matter is initiated as a conference adjudicative hearing, no prehearing conference may be held.

(c) Chapter 6 (commencing with Section 646.110) (discovery) does not apply to a conference adjudicative hearing.

(d) The presiding officer shall regulate the course of the proceeding and shall limit witnesses, testimony, evidence, cross-examination, rebuttal, and argument, in such a way that the parties may offer comments on the issues and only the parties may testify and present written exhibits.

Comment. Section 641.520 is drawn from 1981 Model State APA § 4-402. The section indicates that the conference adjudicative hearing is a "peeled down" version of the formal adjudicative hearing. The conference adjudicative hearing does not have a prehearing conference, discovery, or testimony of anyone other than the parties.

§ 641.530. Proposed proof 5/01/92

641.530. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or federal or state constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain the facts if the proceeding were converted to a formal adjudicative hearing.

Comment. Section 641.530 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 613.410-613.450.

Article 6. Emergency Adjudicative Proceeding

Staff Note. After the emergency procedure is developed, the staff will review existing emergency procedures available to various agencies to determine whether the statutes provide useful authority that should be retained or whether they may be superseded by the general procedure without loss. Existing emergency procedures include Section 11529 (medical licensee), Bus. & Prof. Code § 6007(c) (attorney), Bus. & Prof. Code § 10086(a) (real estate licensee), Health & Saf. Code §§ 1550 (last ¶), 1569.50, 1596.886 (health facilities and day care centers), Pub. Util. Code § 1070.5 (trucking license), and Veh. Code § 11706 (DMV license suspension).

§ 641.610. Agency regulation required 5/01/92

641.610. (a) An emergency adjudicative proceeding provided in this article is applicable in a proceeding by an agency that has adopted a regulation that makes this article applicable.

(b) The regulation shall do all of the following:

(1) Define the circumstances in which emergency action can be taken.

(2) State the nature of the interim relief that the agency may impose.

(3) Prescribe the procedures that will be available before and after the emergency action. The procedures may be more protective than those provided in this article.

Comment. Section 641.610 requires specificity in agency regulations that adopt the emergency adjudicative proceeding.

§ 641.620. When emergency adjudicative proceeding available 5/01/92

641.620. (a) An agency may use an emergency adjudicative proceeding in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(b) An agency may take only action under this article that is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

Comment. Section 641.620 is drawn from 1981 Model State APA § 4-501(a)-(b). An emergency adjudicative proceeding is available only if the agency has adopted an authorizing regulation. Section 641.610.

§ 641.630. Emergency hearing 5/01/92

641.630. (a) Before issuing a decision under this article, the agency shall, if practicable, give a person who will be required to comply with the decision notice and an opportunity to be heard.

(b) Notice and hearing under this section may be oral or written, including notice and hearing by telephone, facsimile transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as a conference adjudicative hearing.

Comment. Section 641.630 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For the conduct of a hearing in the manner of a conference adjudicative hearing, see Section 641.520 (procedure for conference adjudicative hearing).

The agency may prescribe the emergency notice and hearing procedure by regulation. See, e.g., State Bar Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective to a party than the provisions of this article. Section 641.610 (agency regulation required).

§ 641.640. Emergency decision 5/01/92

641.640. (a) The agency shall issue a decision, including a brief explanation of the factual and legal basis for the decision, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(b) The agency shall give such notice as is practicable to persons who are required to comply with the decision. The decision is effective when ordered.

Comment. Section 641.640 is drawn from 1981 Model State APA § 4-501(c)-(d).

§ 641.650. Completion of proceedings 5/01/92

641.650. After issuing a decision under Section 641.630, the agency shall proceed as quickly as practicable to complete any proceedings that would be required if the matter did not involve an immediate danger.

Comment. Section 641.650 is drawn from 1981 Model State APA § 5-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be "required" in the circumstances.

§ 641.660. Agency record 5/01/92

641.660. (a) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(b) Unless otherwise required by regulation, statute, or federal or state constitution, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review of the emergency decision.

Comment. Section 641.660 is drawn from 1981 Model State APA § 4-501(f)-(g). Under this section the agency has flexibility to act on the basis of nonrecord information, and to render its order orally, if necessary to cope with the emergency.

§ 641.670. Immediate judicial review 5/01/92

641.670. An emergency decision issued under this article is subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure without further administrative review. The relief that may be ordered on judicial review is limited to a stay of the emergency decision.

Comment. Section 641.670 is drawn from Section 11529(h) (interim suspension of medical care professional).

If the emergency adjudicative decision is issued orally, a person seeking judicial review of the decision must set forth in the petition for review a summary or brief description of the agency action; see Section [to be drafted]. See also Sections [to be drafted] on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

Staff Note. Professor Asimow states that the court should not delay the agency from putting the emergency decision into effect if the agency has followed the procedures spelled out in its regulations and this article; nor should the court grant a hearing that supplants the procedures that the agency must provide. If we wish to so limit the scope of judicial review, we will need to do it directly in this section.

CHAPTER 2. INITIATION OF PROCEEDING

§ 642.010. Initiation by agency 2/24/92

642.010. An agency may initiate an adjudicative proceeding with respect to a matter within the agency's jurisdiction.

Comment. Section 642.010 is drawn from 1981 Model State APA § 4-102(a). It prevents any implication that Section 642.020 (application for decision) sets forth the exclusive circumstances under which an agency may initiate an adjudicative proceeding.

§ 642.020. Application for decision 2/24/92

642.020. (a) Any person may make an application for an agency decision.

(b) An application for an agency decision includes an application for the agency to initiate an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding.

Comment. Section 642.020 is drawn from 1981 Model State APA § 4-102(c). It ensures that a person who requests an agency to issue a decision, but does not expressly request the agency to conduct an adjudicative proceeding, will not on that account be regarded as having

waived the right to any available adjudicative proceeding. See Section 648.130 (default). This assurance may be especially important to protect unrepresented parties. In addition, this provision clarifies that the term "application", as used in this part, may refer either to the request for the agency to issue a decision, or to the request for the agency to conduct an appropriate adjudicative proceeding, or both, as the context suggests. Similarly, the term "applicant" may be used with either or both meanings.

§ 642.030. Agency action on application 5/01/92

642.030. An agency shall initiate an adjudicative proceeding on application of a person for an agency decision, unless any of the following provisions applies:

(a) A hearing or other adjudicative proceeding is not required for the decision by Section 640.010 (when adjudicative proceeding required).

(b) The agency lacks jurisdiction of the subject matter.

(c) Resolution of the matter requires the agency to exercise discretion within the scope of Section 641.120 (when adjudicative proceeding not required).

(d) A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding and, in the exercise of discretion, the agency has determined not to conduct an adjudicative proceeding.

(e) Resolution of the matter does not require the agency to issue a decision that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

(f) The matter is not timely submitted to the agency.

(g) The matter is not submitted in a form substantially complying with an applicable statute or regulation.

Comment. Section 642.030 is drawn from 1981 Model State APA § 4-102(b). It requires an agency to initiate an adjudicative proceeding on application of any person for an agency decision within the scope of this part. If the agency determines that any of the exceptions provided in this section is applicable, the agency may deny the application without commencing an adjudicative proceeding, or the agency may, in its discretion under Section 642.010, commence an adjudicative proceeding although under no compulsion to do so. For the time within which an agency must act with respect to an application, see Section 642.040 (time for agency action). In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to initiate an adjudicative proceeding.

Subdivision (a) reinforces the point that this part only applies where a hearing is statutorily or constitutionally required. See Section 640.010 (when adjudicative proceeding required).

Subdivision (c) relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion to initiate or not to initiate an investigation, prosecution, adjudicative proceeding, or other proceeding before the agency or another agency or a court. For example, a person who submits a complaint about a licensee cannot compel the licensing agency to commence an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to commence or not to commence an adjudicative proceeding in each case. The agency's decision whether or not to commence an adjudicative proceeding need not itself be preceded by an adjudicative proceeding. Section 641.120 (when adjudicative proceeding not required).

Subdivision (d) does not and could not authorize an agency to deprive any person of procedural rights guaranteed by the constitution. If a statute purporting to authorize an agency to dispense with an adjudicative proceeding, conflicts with constitutional guarantees the agency may exercise its discretion under Section 642.010 to conduct an adjudicative proceeding even though the statute does not require it or, if the agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give appropriate relief.

Subdivision (e) closely relates to the definition of "decision" in Section 610.310 as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person". If the applicant does not request agency action that would fit within the definition of a "decision", the agency need not commence an adjudicative proceeding. For example, if a person asks the agency to commence an adjudicative proceeding for the purpose of adopting a rule, or of carrying out a housekeeping function that affects nobody's legal rights, the request would be subject to dismissal because the requested agency action would not be a "decision". Subdivision (e) provides that an agency need not commence an adjudicative proceeding unless the applicant's legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested decision. Interpretation of these terms, ultimately a matter for the courts, will clarify the range of situations in which this part entitles a person to require an agency to initiate an adjudicative proceeding. The availability of various types of adjudicative proceedings may persuade courts to develop a more hospitable approach toward applicants than would have been feasible or practicable if the only available type of adjudicative proceeding were a trial-type, formal hearing.

§ 642.040. Time for agency action 3/12/92

642.040. (a) An agency may modify the provisions of this section or make the provisions of this section inapplicable by regulation The time limits in this section apply except to the extent they are inconsistent with limits established by another statute for any stage of the proceeding or with limits established by the agency by regulation.

(b) Within 30 days after receipt of an application for an agency decision, the agency shall examine the application, notify the applicant of any apparent error or omission, request any additional information from the applicant or another source that the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of an agency member or employee who may be contacted regarding the application. Nothing in this subdivision limits the authority of the agency to request additional information more than 30 days after receipt of an application for an agency decision, but such a request and any response to the request do not extend the time provided in subdivision (c).

(c) Within 90 days after the later of (i) receipt of an application for an agency decision or (ii) receipt of the response to a timely request made by the agency under subdivision (b), the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part. The agency shall serve on the applicant a written notice of any denial, which shall include a brief statement of the agency's reasons and of any administrative review available to the applicant.

(2) Commence an adjudicative proceeding.

Comment. Section 642.040 is drawn from 1981 Model State APA § 4-104(a). The effect of this section, when combined with Section 641.120, is that this part imposes no procedures on the agency when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of dismissal, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this part, are subject to judicial review as a final agency action under Section [to be drafted].

Failure of an agency to meet the time limits provided in this section does not entitle the applicant to issuance of a license or other action sought in the application. The applicant's remedy for the agency's failure is judicial action by writ of mandate to compel appropriate agency action.

An agency may modify the provisions of this section or make the provisions of this section inapplicable by regulation to tailor the procedures to suit its individual needs. The agency may, for example, provide shorter times for emergencies, and the like. The right of an agency to modify these provisions or make these provisions inapplicable does not apply to hearings required to be conducted by an

administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

It should be noted that the time limits provided in this section are subject to contrary statutes that govern particular proceedings. See, e.g., Bus. & Prof. Code §§ 10086 (hearing must commence within 30 days after request to Real Estate Commissioner); 11019 (hearing must commence within 15 days after request to Real Estate Commissioner).

Staff Note. This section will be coordinated with the general provisions on administrative review of agency decisions.

CHAPTER 3. COMMENCEMENT

Article 1. General Provisions

§ 643.110. Provisions may be modified or made inapplicable by regulation 4/23/92

643.110. An agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable by regulation.

Comment. Section 643.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

Article 2. Pleadings

§ 643.210. Proceeding commenced by initial pleading 3/12/92

643.210. An adjudicative proceeding is commenced by issuance of an initial pleading by an agency.

Comment. Section 643.210 supersedes portions of the first sentences of former Sections 11503 and 11504. See also Section 610.350 ("initial pleading" includes accusation and statement of issues). Included among the issues that may be adjudicated are whether a right, authority, license, or privilege should be granted, issued, or renewed on application of a person, or revoked, suspended, limited, or conditioned on initiation of an agency. Sections 642.010-642.040 (initiation of proceeding).

It should be noted that by regulation an agency may require preparation of the initial pleading by another party or may permit a denied application to serve as the initial pleading. In such a case, verification is required unless the agency provides otherwise by regulation. Section 643.220 (contents of initial pleading).

Nothing in this part requires an agency to commence a proceeding on demand of a third party. Such a right might have been implied under former Sections 11503 and 11504. There may, however, be specific

statutes that provide initiation rights to third parties. See, e.g., Bus. & Prof. Code § 24203 (accusations against liquor licensees filed by various public officials).

§ 643.220. Contents of initial pleading 3/12/92

643.220. (a) The initial pleading shall be in writing and shall include all of the following:

(1) A statement that sets forth in ordinary and concise language the issues to be determined in the adjudicative proceeding, including any acts or omissions with which the respondent is charged and any particular matters that have come to the attention of the agency and that would authorize a denial of the application. The statement shall be sufficient to enable the respondent to prepare a case.

(2) A specification of the statutes and regulations that are at issue in the adjudicative proceeding, including any the respondent is alleged to have violated or with which the respondent must show compliance by producing proof at the hearing. The specification shall not consist merely of issues or charges phrased in the language of the statutes and regulations.

(b) The initial pleading shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. Section 643.220 supersedes portions of former Sections 11503 and 11504. The verification requirement would apply where an agency permits preparation of the initial pleading by another party, unless the requirement is modified or made inapplicable by regulation. Cf. Comment to Section 643.210 (proceeding commenced by initial pleading).

§ 643.230. Service of initial pleading and other information 3/12/92

643.230. (a) On issuance of the initial pleading, the issuing agency shall serve on the respondent all of the following:

(1) A copy of the initial pleading.

(2) A statement to the respondent in the form provided in subdivision (b).

(3) A form of responsive pleading that acknowledges service of the initial pleading and constitutes a responsive pleading under Section 643.250.

(4) A copy of Chapter 6 (commencing with Section 646.110) (discovery).

(5) Any other information the agency deems appropriate.

(b) The statement to the respondent shall be substantially in the following form:

> Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying initial pleading is delivered or mailed to the agency within 15 days after the initial pleading was personally served on you or within 20 days after the initial pleading was mailed to you, [here insert name of agency] may proceed on the initial pleading without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Responsive Pleading, or by delivering or mailing a responsive pleading as provided by Government Code Section 643.250 to: [here insert name and address of agency].
>
> You may, but need not, be represented by an attorney or other authorized representative at any or all stages of this proceeding.
>
> If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 646.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

(c) Notwithstanding Sections 613.010 (service) and 613.020 (mail), service under this section shall be by certified or registered mail or by personal delivery. Service may be by first class mail in an adjudicative proceeding before an appeals board if the respondent has previously appeared in the same or a related proceeding.

Comment. Section 643.230 is drawn from former Sections 11504 and 11505. Service is made by personal delivery or mail to the respondent's last known address. Sections 613.010 (service) and 613.020 (mail). Service under this section is limited to personal service or registered or certified mail; first class mail is not permissible except in cases before an appeals board such as the Unemployment Insurance Appeals Board, where the respondent has previous involvement in the controversy and initial service provisions are therefore unnecessary.

For purposes of service, the respondent's last known address is the address maintained with the agency, if the respondent is required to maintain an address with the agency. Section 613.010(b).

An agency that fails properly to serve the respondent does not acquire jurisdiction unless the respondent makes a general appearance. Section 643.240 (jurisdiction over respondent).

The form of responsive pleading may be a post card or other form provided by the agency. Signing and returning the form by the respondent acknowledges service of the initial pleading and constitutes a responsive pleading under Section 643.250.

The respondent may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

Staff Note. Statutory forms will be revised to reflect substantive changes made in the draft statute.

§ 643.240. Jurisdiction over respondent 2/24/92

643.240. The agency shall make no decision adversely affecting the rights of the respondent unless the respondent has been served as provided in this article or has responded or otherwise appeared.

Comment. Section 643.240 continues a portion of former Section 11505(c).

§ 643.250. Responsive pleading 3/12/92

643.250. (a) Within 15 days after service of the initial pleading, or a later time that the agency in its discretion permits, the respondent may serve a responsive pleading on the agency.

(b) A responsive pleading shall be in writing signed by the respondent and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(c) A responsive pleading may do one or more of the following:

(1) Request a hearing.

(2) Object to the initial pleading on the ground that it does not state an act or omission or other ground on which the agency may proceed.

(3) Object to the form of the initial pleading on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a case. Unless objection is taken under this paragraph, all further objections to the form of the initial pleading are deemed waived.

(4) Admit the initial pleading in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the initial pleading on the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation adopted by another agency affecting substantive rights.

(7) Raise such other matter as may be appropriate.

(c) The respondent is entitled to a hearing on the merits if the respondent serves a responsive pleading on the agency under subdivision (a). Any responsive pleading is deemed a specific denial of all parts of the initial pleading not expressly admitted.

(d) Failure to serve a responsive pleading on the agency under subdivision (a) is a default subject to the right of the respondent to serve a statement by way of mitigation under Section 648.130 (default).

Comment. Section 643.250 is drawn from former Section 11506. See also Sections 613.040 (attorney or other representative of party), 613.010 (service), 643.260 (amended and supplemental pleadings). If service is by mail, the respondent has 20 days after the date of mailing in which to respond. Section 613.030 (extension of time).

§ 643.260. Amended and supplemental pleadings 3/12/92

643.260. (a) At any time before commencement of the hearing a party may amend or supplement a pleading. After commencement of the hearing a party may amend or supplement a pleading in the discretion of the presiding officer.

(b) An amended or supplemental pleading shall be served on all parties.

(c) If an amended or supplemental pleading presents a new issue, the opposing party shall be given a reasonable opportunity to prepare a case. Any new matter is deemed controverted without further pleading, and any objection to the amended or supplemental pleading may be made orally and shall be noted in the record.

Comment. Section 643.260 supersedes former Sections 11507 and Section 11516. It is broadened to permit amendment of responsive pleadings as well as initial pleadings, but is narrowed to subject amendments to the presiding officer's discretion after commencement of the hearing.

Article 3. Setting Matter for Hearing

§ 643.310. Time and place of hearing 2/24/92

643.310. (a) The agency conducting the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be before expiration of the time within which the respondent is entitled to respond.

(b) If the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the agency shall consult the office and the time and place of hearing shall be subject to the availability of its staff.

Comment. Section 643.310 is drawn from former Sections 11508 and 11509.

643.320. Continuances 5/01/92

643.320. (a) The presiding officer may grant a continuance for good cause.

(b) A party shall apply for a continuance within 15 days after the party discovered or reasonably should have discovered the event or occurrence that establishes good cause for the continuance. A continuance may be granted for good cause after the 15 days have elapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) If an application for a continuance is denied and the applicant seeks judicial review of the denial, the applicant shall, within 15 days after the denial, apply for appropriate judicial relief in the superior court or be barred from judicial review of the denial as a matter of jurisdiction. A party applying for judicial review of the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of the application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

Comment. Section 643.320 supersedes former Section 11524. The section vests continuance decisions in the presiding officer, whether or not employed by the Office of Administrative Hearings, and revises the times from 10 working days to 15 calendar days.

Staff Note. The reference to CCP § 1010 will be unnecessary if we do not adopt a provision incorporating general rules of civil procedure.

We do not know why ABC is subject to different rules on judicial review than other agencies. Since our effort here is to provide uniform rules, our bias is to eliminate the ABC exception. However, we will investigate this further before taking any action on it.

§ 643.330. Venue and change of venue 3/12/92

643.330. (a) The hearing shall be held in the following location:

(1) City and County of San Francisco, if the transaction occurred or the respondent resides or is located within the First or Sixth Appellate District.

(2) County of Los Angeles, if the transaction occurred or the respondent resides or is located within the Second Appellate District or within the Fourth Appellate District other than the County of Imperial or San Diego.

(3) County of Sacramento, if the transaction occurred or the respondent resides or is located within the Third or Fifth Appellate District.

(4) County of San Diego, if the transaction occurred or the respondent resides or is located within the Fourth Appellate District in the County of Imperial or San Diego.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence or location, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides or is located.

(3) The parties may select any place within the state by agreement.

(c) The respondent may move for, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing.

Comment. Section 642.330 is drawn from former Section 11508. An agency may modify the provisions of this section or make the provisions of this section inapplicable by regulation (Section 643.110) unless the hearing is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

Subdivision (a)(4) recognizes creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) is new. It codifies practice authorizing a motion for change of venue. See 1 Ogden, Cal. Public Agency Prac. § 33.02[4][d] (1991).

§ 643.340. Notice of hearing 5/01/92

643.340. (a) The agency shall serve a notice of hearing on all parties at least 10 days before the hearing.

(b) The notice of hearing shall be substantially in the following form and may include other information:

> A hearing will be held before [here insert name of agency] at [here insert place of hearing] on the _____ day of _____, 19__, at the hour of _____, on the charges made or issues stated in the initial pleading served on you.
>
> The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the presiding officer within 15 days after you discover the good cause. Failure to notify the presiding officer within 15 days will deprive you of a postponement.
>
> You may be present at the hearing. You have the right to be represented by an attorney or other authorized representative at your own expense. You are not entitled to the appointment of an attorney or other authorized representative to represent you at public expense. You are entitled to represent yourself without legal or other counsel.
>
> Unless the hearing is a conference adjudicative hearing: You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to [here insert appropriate office of agency].

Comment. Section 643.340 is drawn from former Sections 11509 and 11505, with an increase in time from 10 to 15 days. If notice of hearing is mailed, it must be mailed at least 20 days before the hearing date. Section 613.030 (extension of time).

The respondent may be represented by an attorney or, in some circumstances, an other authorized representative. See Sections 613.310-613.330 (representation of parties).

For limitations on procedures in a conference adjudicative hearing, see Section 641.520 (procedure for conference adjudicative hearing).

Staff Note. Statutory forms will be revised to reflect substantive changes made in the draft statute.

It does seem a little unusual to provide a 19__ blank in a form that will only apply in the last few years of the 1900's.

CHAPTER 5. INTERVENTION

§ 645.010. Intervention 4/23/92

645.010. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(a) The motion is submitted in writing to the presiding officer, with copies mailed to all parties named in the notice of the hearing.

(b) The motion is made as early as practicable in advance of the hearing. If there is a general prehearing conference, the motion shall be made in advance of the general prehearing conference and shall be resolved at the general prehearing conference.

(c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities may be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

(d) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

Comment. Section 645.010 is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (c) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities may be substantially affected by the proceeding". However, subdivision (d) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings on the legal rights, etc. of the applicant for intervention (subdivision (c)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (d)).

§ 645.020. Conditions on intervention 3/12/92

645.020. If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include the following:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(b) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceedings.

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) Limiting or excluding the intervenor's participation in settlement negotiations.

Comment. Section 645.020 is drawn from 1981 Model State APA § 4-209(c). This section, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceedings, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceedings to unreasonably burdensome or repetitious presentations.

§ 645.030. Order granting, denying, or modifying intervention 3/12/92

645.030. (a) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying each motion for intervention, specifying any conditions, and briefly stating the reasons for the order.

(b) The presiding officer may modify the order at any time, stating the reasons for the modification.

(c) The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant for intervention and to all parties.

Comment. Section 645.030 is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this section is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding. If the order was unfavorable, the applicant may not seek judicial review on an expedited basis before the hearing commences or otherwise. Section 645.040 (intervention determination nonreviewable).

§ 645.040. Intervention determination nonreviewable 2/24/92

645.040. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's sole discretion based on

the knowledge and judgment of the presiding officer at that time, and the presiding officer's determination is not subject to administrative or judicial review.

Comment. Section 645.040 is new.

§ 645.050. Participation short of intervention 3/12/92

645.050. Nothing in this chapter precludes an agency from by regulation permitting participation by a person short of intervention as a party, subject to Chapter 8 (commencing with Section 642.810) (ex parte communications).

Comment. Section 645.050 recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

CHAPTER 6. DISCOVERY

Article 1. General provisions

§ 646.110. Application of chapter 4/23/92

646.110. (a) Subject to subdivision (b), the provisions of this chapter provide the exclusive right to and method of discovery in a proceeding governed by this part.

(b) An agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable by regulation.

Comment. Subdivision (a) of Section 646.110 supersedes former Section 11507.5 and broadens it to apply to all adjudicative proceedings covered by this part. Under subdivision (a), the civil discovery provisions of the Code of Civil Procedure are inapplicable to this part.

Subdivision (b) does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, or where there is a specifically applicable statute that governs the matter such as in the case of workers' compensation or Insurance Commission ratemaking. Section 641.130 (modification or inapplicability of statute by regulation). Regulations adopted by an agency under authority of subdivision (b) could provide for such matters as protection of confidential information or other privileges, or could eliminate the right of discovery completely.

§ 646.120. Limitations on discovery 2/24/92

646.120. (a) This section is intended only to limit the scope of discovery. It is not intended to affect the methods of discovery allowed under this chapter.

(b) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under Section 648.470 (evidence of sexual conduct).

Comment. Section 646.120 supersedes subdivision (g) of former Section 11507.6.

§ 646.130. Depositions 4/23/92

646.130. (a) A party may, by petition as provided in this section, request an order that the testimony of a material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions.

(b) The petition shall be verified, shall request an order that the witness appear and testify before an officer named in the petition for that purpose, and shall state all of the following:

(1) The nature of the pending proceeding.

(2) The name and address of the witness whose testimony is desired.

(3) A showing of the materiality of the testimony of the witness.

(4) A showing that the witness will be unable or can not be compelled to attend.

(c) The applicant shall serve notice of the hearing on the petition and a copy of the petition on the other parties to the proceeding at least 10 days before the hearing.

(d) If the witness resides within the state, the petition shall be made to, and an order may be issued by, the presiding officer or, if a presiding officer has not been appointed, the agency. If the witness resides without the state, the petition shall be made to, and an order may be issued by, the superior court in Sacramento County.

Comment. Section 646.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition, and requires the moving party to obtain a court order where necessary. The section also requires notice to the other parties of the hearing on the petition.

§ 646.140. Subpoenas 5/01/92

646.140. (a) The agency or the presiding officer shall, on motion of a party, issue subpoenas for attendance at the hearing and subpoenas duces tecum for production of documents at any reasonable time and place or at the hearing.

(b) Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure, except that a subpoena duces tecum may not be issued unless at least 10 days before the hearing the applicant has served on the other parties to the proceeding notice of the hearing on the petition and a copy of the petition. The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(c) Any objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, shall be resolved by the presiding officer. A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

(d) A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the appearance the following mileage and fees, to be paid by the party on whose motion the witness is subpoenaed:

(1) The same mileage allowed by law to a witness in a civil case.

(2) The same fees allowed by law to a witness in a civil case. This paragraph does not apply to an officer or employee of the state or a political subdivision of the state.

Comment. Section 646.140 supersedes former Section 11510. It gives all adjudicating agencies subpoena power. The Coastal Commission previously lacked statutory subpoena power.

An agency, other than an agency whose hearings are required to be conducted by Office of Administrative Hearings personnel, may modify the subpoena provisions or make the subpoena provisions inapplicable by regulation. Section 646.110. Regulations might provide, for example, that a subpoena will not issue unless the party seeking it first

establishes the relevance of the evidence sought; or the regulation could provide different standards for subpeonas compelling the attendance of witnesses and subpoenas duces tecum.

Subdivision (a) broadens former law to allow a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

The first sentence of subdivision (c) adopts a procedure applicable in proceedings before the Public Utilities Commission. See 20 Cal. Code Regs. § 61. The second sentence clarifies the law on a previously unresolved issue.

The coverage of subdivision (d) is extended to a subpoena duces tecum as well as a subpoena, and is conformed to the mileage and fees applicable in civil cases. See Sections 68093-68098 (mileage and fees in civil cases).

For enforcement of a subpoena, see Section [11525].

Staff Note. Professor Asimow recommends that the contempt procedures for enforcing subpoenas (Section 11525) be revised to make clear that either party may apply to the court for enforcement, but only after a good faith effort to resolve the dispute, and the party held in contempt would have the opportunity to respond after the court has upheld the subpoena. See Background Study at p. 35. We will address these matters in the context of general enforcement of orders in the administrative adjudication process.

Article 2. Discovery

§ 646.210. Time and manner of discovery 2/24/92

646.210. After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after service on the party of the initial pleading or within 15 days after service on the party of an additional or supplemental initial pleading, is entitled to discovery to the extent provided in this article.

Comment. Section 646.210 supersedes the introductory portion of the first paragraph of former Section 11507.6.

§ 646.220. Discovery of witness list 2/24/92

646.220. A party requesting discovery under this article is entitled to obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

Comment. Section 646.220 supersedes clause (1) of the first paragraph of former Section 11507.6.

§ 646.230. Discovery of statements, writings, and reports 2/24/92

646.230. (a) As used in this section, "statement" includes all of the following:

(1) A written statement by a person signed or otherwise authenticated by the person.

(2) A stenographic, mechanical, electrical, or other recording or transcript of an oral statement by a person.

(3) A written report or summary of an oral statement by a person.

(b) A party requesting discovery under this article is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of another party:

(1) A statement of a person, other than the respondent, named in the initial pleading, when it is alleged that the act or omission of the respondent as to the person is the basis for the adjudicative proceeding.

(2) A statement pertaining to the subject matter of the proceeding made by a party to another party or person.

(3) A statement of a witness then proposed to be called by the party and of any other person having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, not included in paragraph (1) or (2).

(4) All writings, including, but not limited to, reports of mental, physical, and blood examinations, and things that the party then proposes to offer in evidence.

(5) Any other writing or thing that is relevant and that would be admissible in evidence.

(6) An investigative report made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report (i) contains the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, or (ii) reflects matters perceived by the investigator in the course of the investigation, or (iii) contains or includes by attachment any statement or writing or summary of a statement or writing described in this section.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Comment. Section 646.230 supersedes clause (2) of the first paragraph, subdivisions (a)-(f), and the second and third paragraphs of former Section 11507.6. See also Section 610.350 ("initial pleading" defined).

§ 646.240. Continuing duty to disclose 5/01/92

646.240. Notwithstanding a party's compliance with a request for discovery under this article, the party has a continuing duty to disclose and make available to the requesting party any supplemental matter within the scope of the request for discovery immediately on obtaining knowledge, possession, custody, or control of the matter.

Comment. Section 646.240 is new.

Article 3. Compelling Discovery

Staff Note. The procedures for compelling discovery, under the existing administrative procedure act, are before the superior court. The Commission at the April 1992 meeting decided to provide for administrative, rather than judicial enforcement, of discovery.

In this draft, we have taken the existing court enforcement procedures and converted them to administrative enforcement procedures. The draft presents a number of issues.

(1) Under the draft, the person resolving the dispute is the presiding officer. This may be the agency head in cases where a separate hearing officer is not designated. Even in cases where a separate hearing officer is designated, this may mean that no action can be taken on the discovery dispute until such a time as the designation of the presiding officer occurs.

(2) For administrative resolution, the procedures in this draft may be somewhat elaborate, including such matters as orders to show cause, stays, and in camera review of disputed material. However, we have preserved them on the theory that they are designed to provide a fair resolution of the discovery dispute, regardless of whether it is the superior court or the presiding officers that is attempting to resolve the dispute.

(3) Review of the presiding officer's resolution is directly in the superior court, omitting the agency head. This is intended to expedite dispute resolution, as well as to alleviate the possibility of prejudicing the ultimate decision maker in the case.

(4) Existing law allows the court to impose monetary sanctions for abuse of discovery. This draft gives the authority to the presiding officer, although this matter is subject to judicial review. Perhaps monetary sanctions should be left to general provisions on the matter. This is discussed in Memorandum 92-22 and its supplements.

(5) A court can enforce its orders by its contempt power, but the presiding officer does not have contempt power; the agency may certify a matter to the superior court for enforcement by the contempt

sanction. This is part of the general problem of enforcement of orders in the administrative adjudication process. This matter is also discussed in Memorandum 92-22 and its supplements.

§ 646.310. Motion to compel discovery 5/01/92

646.310. (a) A party claiming that a request for discovery under this chapter has not been complied with may make a motion to the presiding officer to compel discovery, naming as responding party the person refusing or failing to comply with the request.

(b) The motion shall state facts showing the responding party failed or refused to comply with the request, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under this chapter, and the ground or grounds of responding party's refusal so far as known to the moving party.

Comment. Section 646.310 supersedes subdivision (a) of former Section 11507.7. See also Sections 613.040 (attorney or other representative of party) and 613.010 (service). Under this article proceedings to compel discovery are before the presiding officer rather than the superior court. A reference in this article to a matter or order includes part of a matter or order.

§ 646.320. Time for motion 5/01/92

646.320. (a) Subject to subdivision (b), the motion shall be made and served on the responding party within 15 days after the responding party first evidenced failure or refusal to comply with the request, or within 30 days after the request was made and the party has failed to reply to the request, whichever period is longer.

(b) No motion may be filed within 15 days of the date set for commencement of the hearing except on order of the presiding officer after motion and notice and for good cause shown. In acting on the motion, the presiding officer shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the hearing on the date set, and the possible prejudice to any party.

Comment. Section 646.320 supersedes subdivision (b) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 646.330. Order to show cause 5/01/92

646.330. (a) If from a reading of the petition the presiding officer is satisfied that the motion sets forth good cause for relief, the presiding officer shall issue an order to show cause directed to the responding party; otherwise the presiding officer shall enter an order denying the motion.

(b) The order to show cause shall be served on the responding party and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the making of the motion.

(c) The responding party has the right to make and serve a written response to the motion and order to show cause.

Comment. Section 646.330 supersedes subdivision (c) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 646.340. Stay of proceedings 5/01/92

646.340. The presiding officer may in its discretion order the adjudicative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to give the parties time to comply with the presiding officer's order.

Comment. Section 646.340 supersedes subdivision (d) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 646.350. Lodging matters with presiding officer 5/01/92

646.350. Where the matter sought to be discovered is under the custody or control of the responding party and the responding party asserts that the matter is not a discoverable matter or is privileged against disclosure under this chapter, the presiding officer may order lodged with it matters provided in, and examine the matters in accordance with the provisions of, subdivision (b) of Section 915 of the Evidence Code.

Comment. Section 646.350 supersedes subdivision (e) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 646.360. Presiding officer's order 5/01/92

646.360. (a) The presiding officer shall decide the case on the matters examined by the presiding officer in camera, the papers filed by the parties, and oral argument and additional evidence the presiding officer allows.

(b) Unless otherwise stipulated by the parties, the presiding officer shall no later than 30 days after the motion make its order denying or granting the petition. The presiding officer may on its own motion for good cause extend the time an additional 30 days.

(c) The order of the presiding officer shall be in writing setting forth the matters the moving party is entitled to discover under this chapter.

(d) The presiding officer shall serve the order on the parties. Where the order grants the motion in whole or in part, the order does not become effective until 10 days after the date the order is served on the responding party. Where the order denies relief to the petitioning party, the order is effective on the date it is served on the petitioning party.

Comment. Section 646.360 supersedes subdivisions (f) and (g) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 646.370. Review of presiding officer's order 5/01/92

646.370. (a) The order of the presiding officer is subject to judicial review by petition for writ of mandate.

(b) A party aggrieved by the presiding officer's order may within 15 days after service of the order petition for a writ of mandate in the superior court for the county in which the hearing will be held.

(c) Where judicial review is sought from an order granting discovery, the order of the presiding officer and the adjudicative proceeding shall be stayed on the filing of the petition for writ of mandate, provided, however, the superior court may dissolve or modify the stay thereafter if it is in the public interest to do so. Where judicial review is sought from a denial of discovery, neither the presiding officer's order nor the administrative proceeding shall be stayed by the superior court except on a clear showing of probable error.

Comment. Section 646.370 supersedes subdivision (h) of former Section 11507.7.

§ 646.380. Sanctions 5/01/92

646.380. Where the presiding officer finds that a party or the party's attorney, without substantial justification, failed or refused to comply with the request for discovery, or, without substantial justification, filed a petition to compel discovery under this article, or, without substantial justification, failed to comply with any order of the presiding officer made under this article, the presiding officer may award costs and reasonable attorney fees to the opposing party.

Comment. Section 646.380 supersedes subdivision (i) of former Section 11507.7. See also Section 613.040 (attorney or other representative of party). Under this article proceedings to compel discovery are before the presiding officer rather than the superior court. The provision of former Section 646.380(i) relating to the power of the court to compel obedience to its orders by contempt proceedings is not continued for that reason.

CHAPTER 7. PREHEARING CONFERENCES

Article 1. General Prehearing Conference

§ 647.110. Modification or inapplicability by regulation 4/23/92

647.110. An agency may modify the provisions of this article or make the provisions of this article inapplicable by regulation.

Comment. Section 647.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation). In other hearings, an agency may dispense with or change the provisions of this article relating to general prehearing conferences by regulation.

§ 647.120. Conduct of general prehearing conference 4/23/92

647.120. (a) On motion of a party or by order of the presiding officer, the presiding officer may conduct a general prehearing conference.

(b) The presiding officer shall set the time and place for the general prehearing conference, and the agency shall give reasonable written notice to all parties.

(c) The presiding officer may conduct all or part of the general prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(d) At the general prehearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing for disposition of the matter as provided in this part. The notice of the general prehearing conference shall so inform the parties.

(e) A party who fails to attend or participate in a general prehearing conference may be held in default under this part. The notice of the general prehearing conference shall so inform the parties.

Comment. Subdivisions (a) and (b) of Section 647.120 supersede former Section 11511.5(a).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the general prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii).

Subdivision (e) is drawn from 1981 Model State APA § 4-204(3)(viii). For default procedures, see Section 648.130.

§ 647.130. Subject of general prehearing conference 4/23/92

647.130. A general prehearing conference may deal with one or more of the following matters:

(a) Exploration of settlement possibilities.

(b) Preparation of stipulations.

(c) Clarification of issues.

(d) Rulings on identity and limitation of the number of witnesses.

(e) Objections to proffers of evidence.

(f) Order of presentation of evidence and cross-examination.

(g) Rulings regarding issuance of subpoenas and protective orders.

(h) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(i) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

(j) Motions for intervention.

(k) Any other matters that promote the orderly and prompt conduct of the hearing.

Comment. Section 647.130 supersedes former Section 11511.5(b). Subdivision (i) is new. If a party has not availed itself of discovery within the time periods provided by Chapter 6 (commencing with Section 646.110), it should not be permitted to use the general prehearing conference as a substitute for statutory discovery. The general prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing.

Subdivision (j) implements Section 645.010 (intervention).

§ 647.140. Prehearing order 2/24/92

647.140. The presiding officer shall issue a prehearing order incorporating the matters determined at the general prehearing conference. The presiding officer may direct one or more of the parties to prepare the prehearing order.

Comment. Section 647.140 supersedes former Section 11511.5(c).

Article 2. Settlement Conference

§ 647.210. Settlement 4/23/92

647.210. (a) The parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. This subdivision applies:

(1) After issuance of an initial pleading in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned.

(2) Before or after issuance of an initial pleading in a case other than a case described in paragraph (1).

(b) An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 647.210 codifies the rule in Rich Vision Centers, Inc. v. Bd. of Med. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983). It also makes clear that an agency can settle a case without filing an initial pleading, except in a licensing disciplinary case. This provision is subject to a specific statute to the contrary governing the matter. See, e.g., Labor Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

Staff Note. In response to concerns from licensing agencies about making sure that disciplinary proceedings remain a matter of public record, the Commission limited the settlement provision to instances where an initial pleading has been issued. Since this can

unnecessarily impede the settlement process in other cases, the staff has drafted the limitation so it only applies in licensing disciplinary cases.

§ 647.220. Mandatory settlement conference 5/01/92

647.220. (a) The presiding officer may order the parties to attend and participate in a settlement conference. The settlement conference shall be separate from the general prehearing conference, if any.

(b) If the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference shall be different from the presiding officer at the hearing. If the adjudicative proceeding is not required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference may, but need not, be different from the presiding officer at the hearing.

(c) The presiding officer shall set the time and place for the settlement conference, and the agency shall give reasonable written notice to all parties.

(d) The presiding officer may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(e) A party who fails to attend or participate in a settlement conference may be held in default under this part. The notice of the settlement conference shall so inform the parties.

Comment. Section 647.220 provides a settlement conference separate from the general prehearing conference, even though exploration of settlement issues may occur in the general prehearing conference and the conduct of the settlement conference parallels that of the general prehearing conference. See Sections 647.120, 647.130 & Comments (general prehearing conference).

Attendance and participation in the settlement conference is mandatory. For default procedures, see Section 648.130.

An agency may, but is not required to, put in place a system of settlement judges, whereby a judge of comparable status to the presiding officer who will hear the case is assigned to help mediate a settlement. Separate settlement judges are required in settlement conferences before the Office of Administrative Hearings.

§ 647.230. Confidentiality of settlement communications 5/01/92

647.230. Notwithstanding any other statute, settlement negotiations under this article are subject to the same protection for confidentiality of communications as is provided for communications in alternative dispute resolution by Section 641.430.

Comment. Section 647.230 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified or made inapplicable by regulation). See Section 641.430 & Comment (confidentiality of communications in alternative dispute resolution).

CHAPTER 8. CONDUCT OF HEARING

Article 1. General Provisions

§ 648.110. Provisions may be modified or made inapplicable by regulation 4/23/92

648.110. An agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable by regulation.

Comment. Section 648.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

§ 648.120. Consolidation and severance 2/24/92

648.120. (a) When proceedings that involve a common question of law or fact are pending, an agency may order a joint hearing of any or all the matters in issue in the proceedings. The agency may order all the proceedings consolidated and it may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) An agency, in furtherance of convenience or to avoid prejudice, or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the responsive pleading, or of any number of issues.

Comment. Section 648.120 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding, and to enable an agency to employ class action procedures in the agency's discretion. See also Section 13 (singular includes plural).

§ 648.130. Default 4/23/92

648.130. (a) If the respondent fails to serve a responsive pleading or to appear at a general prehearing conference or settlement conference or at the hearing:

(1) The default is a waiver of the respondent's right to a hearing.

(2) Notwithstanding the default, the respondent may serve a statement and make a showing by way of mitigation.

(3) The agency may take action based on the respondent's express admissions or on other evidence. Affidavits may be used as evidence without notice to the respondent.

(4) Where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) Notwithstanding the respondent's default, the agency or the presiding officer in its discretion may, before an initial decision is issued, grant a hearing on reasonable notice to the parties.

(c) Within 7 days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing.

Comment. Subdivisions (a) and (b) of Section 648.130 are drawn from subdivisions (b) and (d) of former Section 11506 (with the addition of the provision enabling the presiding officer to waive a default and requiring reasonable notice) and from former Section 11520. Subdivision (c) is new.

§ 648.140. Open hearings 5/01/92

648.140. (a) The hearing is open to public observation except in the following circumstances:

(1) All parties agree to a closed hearing.

(2) A closed hearing is required by statute or by federal or state constitution.

(3) The presiding officer determines that a closed hearing is necessary to ensure a fair hearing in the circumstances of the particular case.

(b) To the extent that a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

Comment. Section 648.140 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Subdivision (a) codifies existing practice. See discussion in 1 G. Ogden, Cal. Public Agency Prac. § 37.03 (1991). Discretion of the presiding officer under subdivision (a)(3) could include such matters as protection of a child witness. Cf. Section 648.350 (protection of child witnesses). Subdivision (b) is drawn from 1981 Model State APA § 4-211(6).

§ 648.150. Hearing by electronic means 5/01/92

648.150. (a) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(b) The presiding officer may not conduct all or party of a hearing by telephone, television, or other electronic means if a party shows that a determination in the proceeding will be based substantially on the credibility of a witness and that a hearing by telephone, television, or other electronic means will impair a proper determination of credibility.

Comment. Subdivision (a) of Section 648.150 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

§ 648.160. Report of proceedings 5/01/92

648.160. (a) Except as provided in subdivision (b), the proceedings at the hearing shall be reported by a phonographic reporter or electronically, in the discretion of the agency.

(b) Notwithstanding an agency's election of electronic reporting of proceedings:

(1) The presiding officer may in the presiding officer's discretion require phonographic reporting.

(2) A party may at the party's own expense require phonographic recording.

Comment. Section 648.160 supersedes former Section 11512(d).

Article 2. Language Assistance

§ 648.210. "Language assistance" 5/01/92

648.210. As used in this article, "language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

Comment. Section 648.210 supersedes former Section 11500(g). It extends this article to language translation for witnesses as well as for parties.

Staff Note. The effect of the additions to this section is to impose added duties on agencies that have interpreter responsibilities.

§ 648.220. Interpretation for hearing-impaired person 5/01/92

648.220. Nothing in this article limits the application or effect of Section 754 of the Evidence Code to interpretation for a deaf or hard-of-hearing party or witness in an adjudicative proceeding.

Comment. Section 648.220 makes clear that the language assistance provisions of this article are not intended to limit the application to adjudicative proceedings of the provisions of Evidence Code Section 754.

Staff Note. Professor Asimow's study recommends that the language assistance provisions of this article be extended to hearing-impaired persons. It appears to the staff that this would limit the very broad application of Evidence Code Section 754, so we have instead added this section to make cross-reference to the Evidence Code. Section 754 provides in part:

> *In any civil or criminal action, including any action involving a traffic or other infraction or any juvenile court proceeding, or any proceeding to determine the mental competency of a person, or any administrative hearing, where a party or witness is a deaf or hard-of-hearing person and the deaf or hard-of-hearing person is present and participating, the proceedings shall be interpreted in a language that the deaf or hard-of-hearing person understands by a qualified interpreter appointed by the court, tribunal, hearing officer, or other appropriate authority, or as agreed upon by the parties.*

§ 648.230. Application of article 5/01/92

(a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

Agricultural Labor Relations Board

State Department of Alcohol and Drug Abuse

Athletic Commission

California Unemployment Insurance Appeals Board

Board of Prison Terms

Board of Cosmetology

State Department of Developmental Services

Public Employment Relations Board

Franchise Tax Board

State Department of Health Services

Department of Housing and Community Development

Department of Industrial Relations

State Department of Mental Health

Department of Motor Vehicles

Notary Public Section, office of the Secretary of State

Public Utilities Commission

Office of Statewide Health Planning and Development

State Department of Social Services

Workers' Compensation Appeals Board

Department of the Youth Authority

Youthful Offender Parole Board

Bureau of Employment Agencies

Board of Barber Examiners

Department of Insurance

State Personnel Board

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 648.260.

Comment. Section 648.230 continues former Section 11501.5. without substantive change.

§ 648.240. Provision for interpreter 5/01/92

648.240. (a) The hearing shall be conducted in the English language.

(b) If a party or the party's witness does not proficiently speak or understand the English language and the party requests language assistance, the party or witness shall be provided an interpreter approved by the presiding officer.

Comment. Section 648.240 continues the first sentence of former Section 11513(d) and extends it to witnesses as well as parties. See Section 648.210 ("language assistance" defined).

§ 648.250. Cost of interpreter 5/01/92

648.250. (a) The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the presiding officer so directs, otherwise by the party at whose request the interpreter is provided.

(b) The presiding officer's decision to direct payment shall be based on equitable consideration of all the circumstances in the case, such as the ability of the party in need of the interpreter to pay.

(c) Notwithstanding any other provision of this section, in a hearing before the Workers' Compensation Appeals Board or the Division of Industrial Accidents relating to worker's compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Industrial Accidents, as appropriate.

Comment. Section 648.250 continues the third, fourth, and fifth sentences of former Section 11513(d) without substantive change.

§ 648.260. Selection of interpreter 5/01/92

648.260. (a) An interpreter shall be selected under this article pursuant to regulations issued by both of the following:

(1) The State Personnel Board, which shall establish criteria for an interpreter's proficiency in both English and the language in which the person will testify.

(2) The employing agency, which shall establish materials and examinations for an interpreter's understanding of its technical program terminology and procedures.

(b) The State Personnel Board shall compile and publish a list of interpreters it has determined to be proficient in various languages and any interpreter so listed shall be eligible to be examined by each employing agency relating to its technical program terminology and procedures. Any interpreter whose language proficiency and knowledge of the terminology and procedures has been satisfactorily determined by the employing agency shall be deemed to be approved by a presiding officer of the agency.

(c) In the event that interpreters on the approved list cannot be present at the hearing, or if there is no interpreter on the approved list for a particular language, the hearing agency has discretionary authority to provisionally qualify and utilize another interpreter.

Comment. Section 648.260 continues the last portion of subdivision (d), and subdivisions (e) and (f) of former Section 11513 without substantive change.

§ 648.270. Duty to advise party of right to interpreter 5/01/92

648.270. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing so that appropriate arrangements can be made.

Comment. Section 648.270 continues the substance for former Section 11513(g).

§ 648.280. Confidentiality and impartiality of interpreter 5/01/92

648.280. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding, apply to any interpreter in the hearing, whether or not the rules so state.

(b) The interpreter shall not have had any involvement in the issues of the case before the hearing.

Comment. Subdivision (a) of Section 648.280 continues former Section 11513(h) without substantive change.

Subdivision (b) continues former Section 11513(i) without substantive change.

Article 3. Testimony and Witnesses

§ 648.310. Burden of proof 2/24/92

648.310. (a) The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter. Except as provided in subdivision (b), the burden of proof is a preponderance of the evidence.

(b) In an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, the burden of proof is clear and convincing proof unless the agency provides a different burden by regulation. Notwithstanding Section 641.130, an agency may provide a different burden by regulation in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 648.310 generally codifies case law concerning the burden of proof in adjudicative proceedings. See discussion in 1 G. Ogden, California Public Agency Practice § 39 (1991).

It should be noted that an agency whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings may provide a different burden of proof by regulation than that provided in subdivision (b) despite the general rule of Section 641.130 (modification or inapplicability of statute by regulation). See also Section 648.110 (provisions may be modified or made inapplicable by regulation).

This section is also subject to specific statutes to the contrary. See Section 642.010 (applicable hearing procedure).

If a party defaults in a case where the party has the burden of proof, the agency may act without taking evidence. Section 648.130 (default).

§ 648.320. Presentation of testimony 2/24/92

648.320. (a) Each party has the right to do all of the following:

(1) Call and examine witnesses.

(2) Introduce exhibits.

(3) Cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.

(4) Impeach a witness regardless of which party first called the witness to testify.

(5) Rebut the evidence against the party.

(b) If the respondent does not testify in the respondent's own behalf, the respondent may be called and examined as if under cross-examination.

Comment. Section 648.320 continues former Section 11513(b).

§ 648.330. Oral and written testimony 5/01/92

648.330. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Any part of the evidence may be received in written form if to do so will expedite the hearing without substantial prejudice to the interests of a party.

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original if available.

Comment. Subdivision (a) of Section 648.330 continues former Section 11513(a).

Subdivision (b) is drawn from 1981 Model State APA § 4-212(d).

Subdivision (c) is drawn from 1981 Model State APA § 4-212(e). It requires that parties be given an opportunity to compare a copy with the original, "if available". If the original is not available, the copy may still be received in evidence, but its probative effect is likely to be weaker than if the original were available.

For general provisions on oaths, affirmations, and certification of official acts, see Section 613.060.

§ 648.340. Affidavits 2/24/92

648.340. (a) At any time 30 or more days before a hearing or a continued hearing, a party may serve on the opposing party a copy of an affidavit the party proposes to introduce in evidence, together with a notice substantially in the following form:

> The accompanying affidavit of [here insert name of affiant] will be introduced as evidence at the hearing in [here insert title of proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question the affiant unless you notify [here insert name of proponent or proponent's attorney] at [here insert address] that you wish to cross-examine the affiant.
>
> To be effective your request must be mailed or delivered to [here insert name of proponent or proponent's attorney] on or before [here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party].

(b) Unless the opposing party, within seven days after service, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally.

(c) If an opportunity to cross-examine an affiant is not given after request to cross-examine is made as provided in this section, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

Comment. Section 648.340 continues former Section 11514, except the notice must be served at least 30, rather than seven, days before the hearing.

Staff Note. Statutory forms will be revised to reflect substantive changes made in the draft statute.

§ 648.350. Protection of child witnesses 2/24/92

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses, in such a way as may be appropriate to protect a child witness from intimidation or other harm, taking into account the rights of all persons.

Comment. Section 648.350 codifies an aspect of Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987).

§ 648.360. Official notice 5/01/92

648.360. (a) Official notice may be taken of any of the following:

(1) A generally accepted technical or scientific matter within the agency's special field.

(2) A fact that may be judicially noticed by the courts of this state.

(b) Official notice may be taken before or after submission of the case for decision. The matters of which official notice is taken shall be noted in, referred to in, or appended to, the record.

(c) All parties present at the hearing shall be notified at the hearing, or before issuance of an initial or final decision, of the matters of which official notice is taken. A party shall have a

reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of refutation to be determined by the agency.

Comment. Section 648.360 supersedes former Section 11515. For matters subject to judicial notice by the courts, see Evidence Code §§ 451-52.

An agency may limit the matters subject to official notice. Section 648.110 (provisions may be modified or made inapplicable by regulation). See, e.g., 18 CCR 5006, 20 CCR 73 (limitation to judicially noticeable matters in State Board of Equalization and Public Utilities Commission).

Section 648.360 makes clear that all parties have an opportunity to refute an officially noticed matter, including the agency that is a party to the adjudicative proceeding. Contrast Harris v. ABC App. Bd., 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965).

Staff Note. Professor Asimow suggests adding to the statute a provision from 1981 Model State APA § 4-215(d) that "The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence." He notes that this provision confirms a well established distinction in administrative law between (1) receiving evidence through testimony or official notice and (2) evaluating evidence already in the record. We will find an appropriate location in the statute for this provision.

Article 4. Evidence

§ 648.410. Technical rules of evidence inapplicable 2/24/92

648.410. (a) Except as provided in this chapter, the hearing need not be conducted in accordance with technical rules relating to evidence and witnesses.

(b) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil action.

Comment. Section 648.410 continues the first two sentences of former Section 11513(c). The intent of Section 648.410 is to make available to the fact finder evidence that might not be admissible under evidentiary limitations of civil or criminal cases. Thus, for example, the Evidence Code rules relating to excludability of evidence about prior convictions should not apply automatically in the administrative setting. Contrast Coburn v. State Personnel Board, 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (1978).

An agency may make the Evidence Code applicable in the agency's administrative hearings notwithstanding this section. Section 648.110. An agency may not modify the rules in this chapter or make the rules in this chapter inapplicable for hearings required to be

conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

§ 648.420. Discretion of presiding officer to exclude evidence 2/24/92

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Comment. Section 648.420 supersedes the last clause of the first paragraph of former Section 11513(c) (exclusion of irrelevant and unduly repetitious evidence). It is drawn from Evidence Code Section 352.

§ 648.430. Review of presiding officer evidentiary rulings 2/24/92

648.430. A ruling of the presiding officer admitting or excluding evidence is subject to administrative review in the same manner and to the same extent as the presiding officer's initial decision in the proceeding.

Comment. Section 648.430 is new. It overrules any contrary implication that might be drawn from former Section 11512(b).

§ 648.440. Privilege 2/24/92

648.440. The rules of privilege are effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Comment. Section 648.440 continues the first portion of the last sentence of the first paragraph of former Section 11513(c).

§ 648.450. Hearsay evidence and the residuum rule 2/24/92

648.450. (a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

ALTERNATIVE (b1) On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of subdivision (a), whether or not the objection was previously raised in the adjudicative proceeding.

ALTERNATIVE (b2) On judicial review of the decision in the proceeding, a party may not object to a finding supported only by hearsay evidence in violation of subdivision (a), unless an objection was previously raised in the adjudicative proceeding, either during the hearing or on administrative review. This subdivision applies only if administrative review of the decision after the hearing was available.

Comment. Subdivision (a) of Section 648.450 continues the third sentence of former Section 11513(c).

It should be noted that an agency, other than one whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, may provide a different rule by regulation than the one provided in this section. See Section 648.110 (provisions may be modified or made inapplicable by regulation) & Comment. See also Section 641.130 (modification or inapplicability of statute by regulation).

Staff Note. The Commission asked to see two alternative drafts concerning the right to raise the residuum rule for the first time on judicial review. These are set out as (b1) and (b2).

§ 648.460. Unreliable scientific evidence 2/24/92

648.460. Notwithstanding any other provision of this chapter, evidence based on methods of proof that are not generally accepted as reliable in the scientific community shall be excluded.

Comment. Section 648.460 codifies case law applicable to administrative hearings. Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). This section applies notwithstanding agency rules to the contrary.

Staff Note. The introductory clause of this section would preclude an agency from overriding it by regulation.

§ 648.470. Evidence of sexual conduct 2/24/92

648.470. (a) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

(b) Notwithstanding any other provision of this chapter:

(1) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at the hearing unless offered to attack the credibility of the complainant, as

provided for under subdivision (c). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(2) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Comment. Subdivision (a) of Section 648.470 continues former Section 11513(k). Subdivision (b) continues the second paragraph of former Section 11513(c). Subdivision (c) continues former Section 11513(j). This section applies notwithstanding agency rules to the contrary.

CHAPTER 9. DECISION

Article 1. Issuance of Decision

§ 649.120. Form and contents of decision 05/01/92

649.120. (a) A proposed decision or final decision shall be in writing and shall include, separately stated, an explanation of the factual and legal basis for the proposed or final decision, and policy reasons for the decision if it is an exercise of the agency's discretion, as to each of the principal controverted issues including the remedy prescribed. The statement shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include factual knowledge of the decision maker and supplements to the record that are made after the hearing, provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it.

(b) The statement of the factual basis for the proposed or final decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the proposed or final decision. If the factual basis for the proposed or final decision includes a determination based substantially

on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.

(c) Nothing in this section limits the information that may be contained in a proposed or final decision, including a summary of evidence relied upon.

Comment. Section 649.120 supersedes the first two sentences of former Section 11518. Under Section 649.120, the form and contents of a proposed decision and final decision are the same. Cf. former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

The first sentence of subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of policy reasons for the decision, if it is an exercise of the agency's discretion, is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rule making. Articulation of the policy reasons in the agency's decision facilitates administrative and judicial review; clarifies the precedential effect of the decision, see Article 2 (commencing with Section 649.210); and focuses attention on policy questions that the agency should address in subsequent rule making to supersede the policy that has been developed through adjudicative proceedings.

The second sentence of subdivision (a) codifies existing California case law. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn from the first sentence of 1981 Model State APA § 4-215(d). The third sentence codifies existing practice in some agencies.

The requirement in subdivision (b) that a mere repetition or paraphrase of the relevant statute or regulation be accompanied by a statement of the underlying facts is drawn from the second sentence of 1981 Model APA § 4-215(c).

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Rev. Code of Wash. Ann. §§ 34.05.461(3) and 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the observed demeanor, manner, or attitude of the witness that supports the determination. Code Civ. Proc. § 1094.5 (administrative mandamus). The observed manner of a witness includes observed actions of the witness.

Staff Note. The Commission has previously worked on this provision as Section 642.720. When the various drafts are combined they will be numbered in an appropriate and consistent sequence.

The new material, not seen in previous drafts of this section, appears in the first sentence of subdivision (a)--a requirement that the statement of decision explain the remedy prescribed and include

policy reasons for any exercise of discretion. This implements a Commission decision at the April 1992 meeting. The Comment includes a reference to the Topanga case.

Article 2. Precedent Decisions

Staff Note. The Commission directed the staff to prepare for further Commission review a draft that would implement Professor Asimow's suggestion that agencies be required to designate significant adjudicatory decisions as precedential, without subjecting them to the rulemaking process. This draft is solely for the purpose of focusing Commission consideration of this matter; the Commission has made no policy decision for or against precedential decisions.

§ 649.210. Application of article 5/01/92

649.210. This article does not apply to an agency that publishes all of its final decisions.

Comment. Section 649.210 recognizes that a number of agencies, including the Agricultural Labor Relations Board, Public Utilities Commission, Public Employment Relations Board, and Workers Compensation Appeals Board, routinely publish all their decisions.

§ 649.220. Precedential effect of decision 5/01/92

649.220. A decision may not be relied on as precedent by an agency to the detriment of any person unless it has been designated as a precedent decision by the agency.

Comment. Section 649.220 provides a sanction for failure of an agency to comply with the mandate of this article.

Staff Note. This section is set out for purposes of discussion only. Professor Asimow does not suggest a sanction for failure of an agency to designate precedent decisions. He notes that he would be satisfied to leave the selection process to the agency heads. "Under that approach, there would be no effective sanction if an agency failed to designate any of its decisions as precedential. However, I would anticipate that the public and perhaps the legislature would criticize an agency's failure to designate any of its decisions as precedential. This sort of criticism should be a sufficiently effective incentive to designate decisions."

§ 649.230. Designation of precedent decision 5/01/92

649.230. (a) An agency shall designate as precedential a final decision that contains a significant legal or policy determination.

(b) Designation of a decision as precedential is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, relating to rulemaking.

Comment. Section 649.230 recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Section 12935(h) (Fair Employment and Housing Commission); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 649.230 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicatory decision.

§ 649.240. Index of precedent decisions 5/01/92

649.240. An agency shall maintain an index of significant legal and policy determinations made in precedent decisions.

Comment. The index required by Section 649.240 is a public record, available for public inspection and copying.

§ 649.250. Article not retroactive 5/01/92

649.250. (a) This article applies to final decisions issued on or after [January 1, 1995].

(b) Nothing in this article precludes an agency from designating as precedential a final decision issued before [January 1, 1995].

Comment. Section 649.250 minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

CHAPTER 12. ENFORCEMENT OF DECISION

§ 652.010. Effective date of decision 5/01/92

652.010. (a) The decision is effective 30 days after it becomes final unless:

(1) The agency head orders that the decision becomes effective sooner.

(2) The agency head orders that enforcement of the decision shall be stayed.

(b) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order.

(c) A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order.

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Sections 641.610-641.670 (emergency adjudicative proceeding).

Comment. Subdivision (a) of Section 652.010 continues the substance of subdivision (a) and a portion of the first sentence of subdivision (b) of former Section 11519. The remainder of the section is drawn from 1981 Model State APA § 4-220(c)-(d). The section distinguishes between the effective date of an order and the time when it can be enforced. For provisions on stays, see Section 652.020.

The requirement of "actual knowledge" in subdivisions (b) and (c) is intended to include not only knowledge that an order has been issued, but also knowledge of the general contents of the order insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of an order, this must be resolved in the manner that other fact questions are resolved.

The binding effect of an order on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues an order revoking the license of a particular dealer, this order is binding on any wholesaler who has actual knowledge of it, even before the order is made available for public inspection and copying; the order binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 652.020. Stay 5/01/92

652.020. A stay of enforcement may be included in the decision or may be ordered at any time before the decision becomes effective.

Comment. Section 652.020 continues the first sentence of former Section 11519(b).

§ 652.030. Probation 5/01/92

652.030. (a) A stay of enforcement may be accompanied by an express condition that the respondent comply with specified terms of probation. Specified terms of probation shall be just and reasonable in the light of the findings and decision.

(b) Specified terms of probation may include an order of restitution that requires the respondent to compensate the other party to a contract damaged as a result of a breach of contract by the respondent. In such a case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of the breach. If restitution is ordered

and paid under this subdivision, the amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Subdivision (a) of Section 652.030 continues the last sentence of former Section 11519(b). Subdivision (b) continues former Section 11519(d).

Staff Note. The staff proposes to relocate this section from the administrative procedure act to an appropriate place in the Business and Professions Code.

§ 652.040. Registration with public officer 5/01/92

642.040. If a person whose license has been revoked or suspended was required to register with a public officer, a notification of the suspension or revocation shall be sent to the officer after the decision has become effective.

Comment. Section 652.040 continues former Section 11519(c).

Staff Note. The staff proposes to relocate this section from the administrative procedure act to an appropriate place in the Business and Professions Code.

652.050. Reinstatement of license or reduction of penalty 5/01/92

652.050. (a) A person whose license has been revoked or suspended may apply to the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.

(b) The agency shall give notice to the Attorney General of the application and the Attorney General and the applicant shall be given an opportunity to present either oral or written argument before the agency head.

(c) The agency head shall decide the application, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement.

(d) This section does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Section 652.050 continues former Section 11522.

Staff Note. The staff proposes to relocate this section from the administrative procedure act to an appropriate place in the Business and Professions Code.

Gov't Code § 11500 (repealed). Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(g) "Language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party who cannot speak or understand English or who can do so only with difficulty.

Comment. Subdivision (c) is superseded by Section 610.670 ("respondent" defined).

Subdivision (g) is superseded by Section 648.210 ("language assistance" defined).

Gov't Code § 11501.5 (repealed). Language assistance; provision by state agencies

11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:

Agricultural Labor Relations Board

State Department of Alcohol and Drug Abuse

Athletic Commission

California Unemployment Insurance Appeals Board

Board of Prison Terms

Board of Cosmetology

State Department of Developmental Services

Public Employment Relations Board

Franchise Tax Board

State Department of Health Services

Department of Housing and Community Development

Department of Industrial Relations

State Department of Mental Health

Department of Motor Vehicles

Notary Public Section, office of the Secretary of State

Public Utilities Commission

Office of Statewide Health Planning and Development

State Department of Social Services

Workers' Compensation Appeals Board

Department of the Youth Authority

Youthful Offender Parole Board

Bureau of Employment Agencies

Board of Barber Examiners

Department of Insurance

State Personnel Board

(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.

Comment. Former Section 11501.5 is continued in Section 648.230 (application of article) without substantive change.

Gov't Code § 11503 (repealed). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. The first sentence of former Section 11503 is superseded by Sections 610.350 ("initial pleading" includes accusation) and 643.210 (proceeding initiated by initial pleading). The remainder is superseded by Section 643.220 (contents of initial pleading).

§ 11504 (repealed). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Comment. The first sentence of former Section 11504 is superseded by Sections 610.350 ("initial pleading" includes statement of issues) and 643.210 (proceeding initiated by initial pleading). The remainder is superseded by Sections 643.220 (contents of initial pleading) and 643.230 (service of initial pleading).

§ 11504.5 (repealed). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Comment. Section 11504.5 is superseded by Section 610.350 ("initial pleading" includes accusation and statement of issues).

§ 11505 (repealed). Service on respondent

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within 10 working days after you discover the good cause. Failure to notify the agency within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in

any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

Comment. Section 11505 is superseded by Sections 643.230 (service of initial pleading and other information), 643.340 (notice of hearing), 643.240 (jurisdiction over respondent), 613.010 (service), and 613.020 (mail).

§ 11506 (repealed). Notice of defense

11506. (a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's

right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Comment. Former Section 11506 is superseded by Sections 610.672 ("responsive pleading" defined), 643.250 (responsive pleading), and 613.010 (service).

§ 11507 (repealed). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Comment. Former Section 11507 is superseded by Section 643.260 (amended and supplemental pleadings).

§ 11507.5 (repealed). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Comment. Former Section 11507.5 is superseded by Section 646.110 (application of article).

§ 11507.6 (repealed). Discovery

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigate reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

Comment. Former Section 11507.6 is superseded by Sections 646.210 (time and manner of discovery), 646.220 (discovery of witness list), 646.230 (discovery or statements, writings, and reports), and 646.120 (limitations on discovery).

§ 11507.7 (repealed). Petition to compel discovery

11507.7. (a) Any party claiming his request for discovery pursuant to Section 11507.6 has not been complied with may serve and file a verified petition to compel discovery in the superior court for the county in which the administrative hearing will be held, naming as respondent the party refusing or failing to comply with Section 11507.6. The petition shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why such matter is discoverable under this section, and the ground or grounds of respondent's refusal so far as known to petitioner.

(b) The petition shall be served upon respondent party and filed within 15 days after the respondent party first evidenced his failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within

15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.

(c) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition. The respondent party shall have the right to serve and file a written answer or other response to the petition and order to show cause.

(d) The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.

(e) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that such matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under such provisions, the court may order lodged with it such matters as are provided in subdivision (b) of Section 915 of the Evidence Code and examine such matters in accordance with the provisions thereof.

(f) The court shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and such oral argument and additional evidence as the court may allow.

(g) Unless otherwise stipulated by the parties, the court shall no later than 30 days after the filing of the petition file its order denying or granting the petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days. The order of the court shall be in writing setting forth the matters or parts thereof the petitioner is entitled to discover under Section

11507.6. A copy of the order shall forthwith be served by mail by the clerk upon the parties. Where the order grants the petition in whole or in part, such order shall not become effective until 10 days after the date the order is served by the clerk. Where the order denies relief to the petitioning party, the order shall be effective on the date it is served by the clerk.

(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.

(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.

Comment. Former Section 11507.7 is superseded by Sections 646.310-646.380 (compelling discovery).

§ 11508 (repealed). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate

District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or fifth Appellate District.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides.

(3) The parties by agreement may select any place within the state.

Comment. Former Section 11508 is superseded by Sections 643.310 (time and place of hearing) and 643.330 (venue and change of venue).

§ 11509 (repealed). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the _____ day of _____, 19___, at the hour of _____, upon the charges made in the accusation served upon you. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency].

Comment. Former Section 11509 is superseded by Sections 643.310 (time and place of hearing) and 643.340 (notice of hearing).

§ 11510 (repealed). Subpoenas

11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

Comment. Former Section 11510 is superseded by Section 646.140 (subpoenas).

§ 11511 (repealed). Depositions

11511. On verified petition of any party, an agency may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose

testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the State and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

Comment. Former Section 11511 is superseded by Section 646.130 (depositions).

§ 11511.5 (repealed). Prehearing conferences

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(9) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Comment. Former Section 11511.5 is superseded by Article 6.5 (commencing with Section 647.110) (general prehearing conference).

§ 11513 (repealed). Evidence

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (j). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(d) The hearing shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter approved by the administrative law judge or hearing officer conducting the proceedings. The cost of providing the interpreter

shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.

The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except with respect to hearings before the Workers' Compensation Appeals Board or the Division of Industrial Accidents relating to worker's compensation claims. With respect to these hearings, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Industrial Accidents, as appropriate. Such an interpreter shall be selected pursuant to regulations issued by both of the following:

(1) The State Personnel Board which shall establish criteria for an interpreter's proficiency in both English and the language in which the person will testify.

(2) The employing agency which shall establish materials and examinations for an interpreter's understanding of its technical program terminology and procedures.

(e) The State Personnel Board shall compile and publish a list of interpreters it has determined to be proficient in various languages and any interpreter so listed shall be eligible to be examined by each employing agency relating to its technical program terminology and procedures. Any interpreter whose language proficiency and knowledge of the terminology and procedures has been satisfactorily determined by the employing agency shall be deemed to be approved by an administrative law judge or a hearing officer of the agency.

(f) In the event that interpreters on the approved list cannot be present at the hearing, or if there is no interpreter on the approved list for a particular language, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters.

(g) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date. Each party in need of an interpreter

shall also be encouraged to give timely notice to the agency conducting the hearing so that appropriate arrangements can be made.

(h) The rules of confidentiality of the agency, if any, which may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing, whether or not the rules so state.

(i) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.

(j) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

(k) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.

Comment. Subdivision (a) of former Section 11513 is superseded by Section 648.330(a) (oral evidence).

Subdivision (b) is superseded by Section 648.320 (presentation of evidence).

The first two sentences of subdivision (c) are superseded by Section 648.410 (technical rules of evidence inapplicable). The third sentence is continued in Section 648.450 (hearsay evidence and the residuum rule). The fourth sentence is superseded by Sections 648.440 (privilege) and 648.420 (discretion of presiding officer to exclude evidence). The second paragraph is continued in Section 648.470(b).

The first sentence of subdivision (d) is continued in Section 648.240 (provision for interpreter). The second, third, and fourth sentences are continued in Section 648.250 (cost of interpreter). The last portion of subdivision (d), together with subdivisions (e) and (f) are continued in Section 648.260 (selection of interpreter).

Subdivision (g) is continued in Section 648.270 (duty to advise part of right to interpreter).

Subdivisions (h) and (i) are continued in Section 648.280 (confidentiality and impartiality of interpreter).

Subdivision (j) is continued in Section 648.470(c).

Subdivision (k) is continued in Section 648.470(a).

§ 11514 (repealed). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any part may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Comment. Former Section 11514 is continued in Section 648.340 (affidavit evidence), except that the seven day period for service of notice of intent to produce affidavit evidence is changed to 30 days.

Gov't Code § 11515 (repealed). Official notice

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall

be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Comment. Former Section 11515 is superseded by Section 648.360 (official notice).

Gov't Code § 11516 (repealed). Amendment of accusation after submission of case

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Comment. Former Section 11516 is superseded by Section 643.260 (amended and supplemental pleadings).

Gov't Code § 11519 (repealed). Effective date of decision; stay of execution; notification; restitution

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; provided, however, that the terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to such officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution which requires the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged as a result of a breach of

contract by the party against whom the decision is rendered. In such case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of such breach. Where restitution is ordered and paid pursuant to the provisions of this subdivision, such amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Former Section 11519 is continued in Chapter 12 (commencing with Section 652.020) (enforcement of decision).

§ 11520 (repealed). Defaults

11520. (a) If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence.

(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

Comment. Former Section 11520 is superseded by Section 648.130 (default).

Gov't Code § 11522 (repealed). Reinstatement of license or reduction of penalty

11522. A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Former Section 11522 is continued in Section 652.050 (reinstatement of license or reduction of penalty).

Gov't Code § 11523 (repealed). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Staff Note. This section has not yet been disposed of.

Gov't Code § 11524 (repealed). Continuances; grant time; good cause; denial; notice review

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the administrative law judge in charge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

Comment. Former Section 11524 is superseded by Section 643.320 (continuances).

Gov't Code § 11525 (repealed). Contempt

11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify

the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Staff Note. This section has not yet been disposed of. See Memorandum 92-22 and its supplements.

Gov't Code § 11526 (repealed). Voting by mail

11526. The members of an agency qualified to vote on any question may vote by mail.

Comment. Former Section 11526 is continued in Section 613.050 (voting by agency member).

Gov't Code § 11527 (repealed). Charge against funds of agency

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

Comment. Section 11527 is not continued.

Gov't Code § 11528 (repealed). Oaths

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

Comment. Former Section 11528 is continued in Section 613.060 (oaths, affirmations, and certification of official acts).