#N-100 ns121
10/09/92

Memorandum 92-70

Subject: Study N-100 - Administrative Adjudication (Revised Draft of Statute)

Attached to this memorandum is a the draft of the administrative adjudication statute, revised to incorporate Commission decisions at the July and September meetings.

The revised draft also presents a number of additional policy decisions for Commission determination. These derive from three sources:

(1) Professor Asimow has sent a letter suggesting reconsideration of the standard for disqualification of the administrative law judge. See Exhibits pp. 1-5. His suggestion is summarized in the Staff Note following Section 643.210 (grounds for disqualification of presiding officer).

(2) Professor Gregory L. Ogden of Pepperdine Universiy Law School has sent a memorandum commenting on various provisions in the draft. See Exhibits pp. 7-12. His suggestions are analyzed in Staff Notes following the sections to which they relate. Professor Ogden is the author/consultant for California Public Agency Practice, a 3-volume loose-leaf Mathew Bender publication.

(3) Comments of participants at the "Cosmic APA" presentation at the State Bar convention on October 4, 1992. The Executive Secretary was a panel member at that presentation and his notes of some of the comments made there are included in Staff Notes in the revised draft.

We also anticipate additional comments from some of our practitioner consultants before the October Commission meeting.

We hope that after the Commission's next review of the draft we will be in a position to prepare a tentative recommendation for the Commission's approval to circulate widely for comment.

Respectfully submitted,

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Executive Secretary

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September 17, 1992

Judge Arthur Marshall
Chair, California Law Revision Commission
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Dear Judge Marshall,

Section 643.210(a) of the current draft of the Administrative Procedure Act provides that a presiding officer should be disqualified "if a person aware of the facts might reasonably entertain a doubt that the presiding officer would be able to be impartial." As you recall, this is known as the "appearance of bias" standard. I argued in favor of an "actual bias" standard, but the Commission disagreed with me.

The attached case, Greenberg v. Board of Governors, Federal Reserve System, 968 F.2d 164 (2d Cir. 1992), involves this very issue under federal law. In this case, an ALJ's law clerk had formerly worked in the office of the government agency that was prosecuting the case. In fact, the clerk had worked on investigating this very case. However, he had not participated significantly in advising the ALJ in the case (he did some "administrative things" in regard to it).

The court conceded (at p. 167) that under the "appearance of bias" standard applicable to federal judges, the argument that the ALJ should be disqualified would be "plausible." Under the actual bias standard used in administrative law, however, the judge would not be disqualified.

Interestingly, the court in Greenberg observed that the "appearance of bias" standard could be used to disqualify any ALJ who actually worked for the agency for which he decided cases! That sounds like a good reason to reject the standard.

I wonder if the Commission would like to reconsider its decision to adopt the "appearance of bias" standard. My objection to that test is its vagueness and unpredictability. Because almost anything might give rise to an appearance of bias, the standard encourages people to seek judicial review and thus delay administrative action significantly. My argument is highlighted by the Greenberg case; the court thought that it was at least "plausible" that the judge would be disqualified under the apperance of bias standard because his law clerk had engaged in prosecuting a case even though the clerk had no involvement in giving advice to the judge in that case. Greenberg illustrates that bias arguments can come up in all sorts of unpredictable ways because it is so common that the adjudicating personnel in agencies have been involved in various ways with the parties or the issues in the cases they must decide.

As you may recall, my original study also summarized a long line of Washington cases that had extreme difficulty in applying the appearance of bias standard in the administrative law context.

I hope that the Commission will be impressed by Greenberg and that the case will cause the members to reconsider whether they want the problematic "appearance of bias" standard to govern all California administrative adjudication.

Incidentally, the Second Circuit in Greenberg also applied the separation of functions standard in federal law. It ruled that since the clerk had been involved only in a ministerial way in adjudicating the case, the clerk need not be disqualified as an adviser. I think this is correct. Note that the same result should occur under our draft California standard. Section 643.310 (the point is made especially clear in the second paragraph of the comment).

Thanks for your attention to this matter.

Sincerely,

Michael Asimow

WALKER, Circuit Judge:

Richard M. Greenberg and A. Frederick Greenberg ("the Greenbergs") petition for review of a decision of the Board of Governors of the Federal Reserve System ("the Board") barring the Greenbergs from further participation in the affairs of any federally supervised financial institution. The Greenbergs contend that bias tainted the administrative proceedings leading up to the Board's decision, that settlements reached with the Office of the Comptroller of the Currency (OCC) bar this enforcement proceeding, and that the Board erred in finding the Greenbergs' personally culpable. We affirm the Board's order of prohibition in all respects.

Background

This case arises out of the failure of the First City National Bank and Trust Company (the Bank) in 1989. The Greenbergs were members of the board of the Bank, served on the Bank's loan committee, and each owned at least 40% of the common stock of the Bank. A. Frederick Greenberg served as the Chairman of the Board, while Richard Greenberg assumed the role of acting Chairman in Frederick's absence.

On October 11, 1986, the Bank converted from a savings bank to a national banking association, placing the Bank under the supervisory authority of the OCC. Between the conversion in 1986 and the Bank's insolvency in 1989, the OCC raised numerous questions about the Bank's practices, focusing in particular on a series of transactions between the Bank and certain limited partnerships controlled or managed by the Greenbergs.

After the Bank failed, the OCC instituted a prohibition proceeding against the Greenbergs in March of 1990 based largely on these insider loans. That proceeding culminated in a hearing before an Administrative Law Judge (ALJ) in November of 1990, and the ALJ issued a lengthy recommended opinion concluding that the Greenbergs had engaged in several impermissible transactions and that this misconduct warranted barring the Greenbergs from the banking industry.

The Greenbergs filed objections to the recommended decision with the Board. After careful consideration, the Board rejected these objections, adopted with minor modifications the recommendations of the ALJ, and issued an order of prohibition barring the Greenbergs from the industry. This petition for review followed.

Discussion

The Greenbergs raise three principal issues on this petition for review. First, they argue that the ALJ's employment of a law clerk who had previously worked on the OCC's investigation of the Greenbergs irreparably tainted the proceedings. Second, they assert that prior settlements with the OCC bar this prohibition proceeding. Finally, they question whether substantial evidence in the record supported the Board's finding of misconduct.

1. The Law Clerk

[1] Shortly before the trial, the Greenbergs' counsel discovered that the ALJ's former law clerk had previously worked for the OCC and had participated in that agency's investigation of the Greenbergs. The Greenbergs thereupon requested that the ALJ recuse himself. The ALJ refused to do so. The ALJ explained that he had not known that the law clerk had previously participated in the Greenberg investigation and noted that the law clerk had worked for the judge for only six weeks "during the course of which he did some administrative things for me with regard to this case, but he had no substantive input." The ALJ assured the Greenbergs that the law clerk "ha[d] not said to me one word concerning any previous involvement in this case, nor said anything about the bank or the people involved." Accordingly, the ALJ concluded that there was no need to recuse himself. The Greenbergs did not investigate the matter further. On this petition for review, however, the Greenbergs assert that the participation by the ALJ's law clerk in the underlying investigation biased the entire administrative proceeding.

[2] The Greenbergs acknowledge that they have no evidence that the law clerk

improperly influenced the ALJ. Instead, they argue that the mere appearance of impropriety is sufficient to require the ALJ to recuse himself. Had this case been tried before a federal district judge, this might be a plausible argument. Under 28 U.S.C. § 455(a), a federal judge must recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned." That high standard of propriety applies, however, only to Supreme Court justices, magistrate judges, and "judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior." 28 U.S.C. § 451. The heightened standard cannot apply to administrative law judges who, after all, are employed by the agency whose actions they review. Otherwise, ALJs would be forced to recuse themselves in every case.

Instead, we think the Greenbergs' charge must be judged under the standards imposed on ALJs by the Administrative Procedure Act (APA), 5 U.S.C. § 554(d). That section requires that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision...."

[3] The APA is violated only where an individual actually participates in a single case as both a prosecutor and an adjudicator. Ministerial participation in one function will not disqualify the actor from more substantial participation in the other function. *See Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 779 (D.C.Cir.1983) (signing a reparations order a ministerial act, not the performance of a prosecutorial function, since signing "did not require the Judicial Officer to exercise any discretion or make any legal or factual judgments."); *Shultz v. Securities and Exchange Com'n*, 614 F.2d 561, 569 (7th Cir.1980) (no violation of APA where the agency prosecutor drafted the notice of decision for the agency, because the decision had been made by judges without any input from the prosecutor).

The uncontroverted facts in this case lead to the conclusion that the law clerk played only a ministerial role in the adjudicatory process. The ALJ stated that the law clerk had not spoken to the ALJ about the underlying investigation and had performed only administrative tasks in the case. The Greenbergs had the burden of establishing that the law clerk played a more significant role in the decision. *See Grolier Inc. v. FTC*, 615 F.2d 1215, 1221 (9th Cir.1980). The Greenbergs failed to present any facts that would contradict the ALJ's version of events. Indeed, the record does not indicate that the Greenbergs even attempted to depose the law clerk. Since the ALJ's version remains effectively unchallenged, we hold that there was no violation of the APA.

[4] As a final resort, the Greenbergs assert that the law clerk's participation in both the adjudicative and prosecutorial processes created such a risk of an unfair decision as to violate due process. We agree that a due process violation may be established without a showing of actual bias where "a court ... determin[es] from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." *Withrow v. Larkin*, 421 U.S. 35, 58, 95 S.Ct. 1456, 1470, 43 L.Ed.2d 712 (1975). However, the simple "combination of investigative and adjudicative functions does not, without more, constitute a due process violation." *Id.*

In *Withrow*, the Court approved an arrangement whereby the state medical board both brought and adjudicated charges against wayward physicians. The Court reasoned that the adjudicators were entitled to a presumption of honesty. *Id.* at 47, 95 S.Ct. at 1464. Absent specific evidence to the contrary, the Court was confident that the mixture of functions would not create "a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Id.* at 57, 95 S.Ct. at 1469. Here, where the former prosecutor (the law clerk) had no decisional

authority, but at most might have advised the decision maker, the risk of impropriety was not as high as that tolerated by the Court in *Withrow*. Accordingly, we reject the Greenbergs' due process challenge.

In sum, while we recognize that law clerks occasionally play more than a ministerial role in the decision making process, the uncontroverted record establishes that this law clerk did not. Accordingly, the law clerk's prior association with the prosecuting agency does not undermine our confidence in the fairness of the proceedings.

C. Res Judicata

The Greenbergs argue that prior OCC enforcement actions against them and the Bank bar this removal action. This claim has been before us once before. In *Greenberg v. Comptroller of the Currency*, 938 F.2d 8 (2d Cir.1991), the Greenbergs sought to enjoin the OCC action that resulted in the orders of prohibition at issue here. As one ground of attack, the Greenbergs asserted the preclusive effect of the prior enforcement proceedings. We declined to entertain the claim then, reasoning that the better course was to await the outcome of the OCC investigation, since "a judicial determination as to whether any issues in the current OCC proceedings have been settled in prior proceedings would require a comparison of the facts and transactions underlying both the prior and the current proceedings, a comparison that best can be made in the first instance by the OCC itself." *Id.* at 12. The OCC has now made that comparison. In the opinion recommending an order of prohibition, the ALJ ruled that "[n]one of the violations alleged here were at issue in the prior cases." We agree with the ALJ's conclusions, and therefore reject the Greenbergs' preclusion claim.

[5, 6] The doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits in one action bars subsequent relitigation of the same claim by the same parties and by those in privity with the parties. *N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254, 1259 (2d Cir.1983). That bar extends both to "issues actually decided in determining the claim asserted in the first action and [to] issues that could have been raised in the adjudication of that claim." *Id.* at 1259. However, preclusion is limited to the transaction at issue in the first action. Litigation over other transactions, though involving the same parties and similar facts and legal issues, is not precluded. *Id.* at 1259–60.

[7, 8] Res judicata applies to judgments by courts and by administrative agencies acting in an adjudicative capacity. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966). Settlements may also have preclusive effect. *May v. Parker–Abbott Transfer and Storage Inc.*, 899 F.2d 1007, 1009 (10th Cir.1990). The preclusive effect of a settlement is measured by the intent of the parties to the settlement. *Id.* at 1010–11.

With these principles in mind, we examine carefully the prior actions between the OCC and the Greenbergs to determine whether any of them concerned transactions that formed the basis of the order of prohibition. There are three different settlement actions at issue here, a letter of reprimand issued to the Greenbergs in 1988, civil money penalties assessed against the Greenbergs in 1989, and a settlement with the Bank reached in 1988 and amended in 1989.

a. The Letter of Reprimand

[9] The OCC issued a letter of reprimand to the Greenbergs dated June 15, 1988. That letter followed a March 19, 1987 letter informing the Greenbergs that the OCC was considering whether to assess civil money penalties based on violations of lending limit rules in several transactions, including one (the purchase of loans extended by Fidelity Funding, Inc. (FFI) to borrowers who used the funds to invest in limited partnerships in which the Greenbergs were general partners) that is at issue in this proceeding. In the letter of reprimand, the OCC informed the Greenbergs that "the Comptroller has determined not to assess penalties based upon

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

September 15, 1992

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, # D-2
Palo Alto, Ca 94304

Dear Mr. Sterling,

Thank you for sending me Memorandum 92-37, containing the combined draft of the administrative adjudication statute. I have read through it all, and it is a complex project. The draft is a significant improvement over the existing statute. Professor Asimow and your commission are to be commended for a job well done. I have comments on the draft that I am enclosing in a separate memo with this letter. I generally concur in your proposed timetable for submission to the legislature, combining the judicial review and adjudication materials as a package for the 1994 legislative session with a January 1, 1996 effective date. Hopefully by that time, the state budget crisis will be a matter of history. My publisher has committed to a substantial revision of California Public Agency Practice, to reflect the changes in the law brought about by this project. I will be writing the revision, and we plan to have the revised edition completed in time to provide substantial guidance to the bar and agencies about practice under and implementation of the new act. I was delighted to see that the text was useful to your staff in drafting the statute.

I have spoken to Professor Asimow, and I will be reading and commenting upon his study of the judicial review process for the Commission. I have appreciated keeping in contact with you on this project. I look forward to hearing about future developments with this project.

Very Truly Yours,

Gregory L. Ogden
Professor of Law

cc: Michael Asimow

MALIBU, CALIFORNIA 90263-4611 ❑ TELEPHONE 310/456-4611 ❑ FAX 310/456-4266

Memo To: Nathaniel Sterling

From: Prof. Gregory L. Ogden

Re: Memorandum 92-37

Date: September 15, 1992

1. Amended and Supplemental Pleadings: Amended and supplemental pleadings are included in definitional sections, 610.350, and 610.672, and the right to file such pleadings is described in section 642.360. It could be helpful to practitioners to define the difference between those two types of pleadings, or to refer to existing understandings of the two terms in civil procedure. Supplemental pleadings are defined in FRCP Rule 15(d) as a pleading that sets forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. By that definition, amended pleadings would include material that occurred before the date of the pleading to be supplemented.

As to practice under 642.360, the statute should specify that the common law doctrine of variance between pleading and proof is not applicable to administrative pleadings (See Code Civ. Proc. Sections 469 to 471; FRCP Rule 15(b)), and that the presiding officer has the discretion to allow amendments to the pleadings to conform to proof at the hearing. The statute should also include a section permitting amendments to relate back when a relevant statute of limitations has expired after the filing of the initial pleading, and a party seeks to amend their pleading to add new allegations and/or new parties. (See CCP 473 and FRCP Rule 15(c)) While this type of amendment may be less common in administrative adjudication than in civil procedure, any time that there is a statute of limitations on agency enforcement action, there is the potential for this type of issue to arise.

2. Waiver: Section 612.670 governs waiver of rights. The section should include a definition of waiver (intentional relinquishment of a known right, see Johnson v. Zerbst 304 U.S. 458, 464 (1938)) and should state a preference for waivers being in writing (as is the case with waivers in Section 643.220) but also recognizing that parties may waive rights by failing to act, such as failing to file a pleading, or failing to raise an issue on a timely basis. I also wonder whether the statute should read a person or a party can waive rights under the APA. Under definitional sections, party 610.460, is narrower than person, 610.520, but the two groupings may overlap.

3. Service: Section 613.210 should incorporate the certificate of mailing procedure for proof of service from CCP Section 1013.

4. Representation by Attorney: Section 613.320 governs representation by attorneys. The comment to that section should specify that agencies will not set standards for qualification and discipline of attorneys because that is the responsibility of the State Bar of California.

5. Venue: Venue is governed by section 642.430. Subsection (c) provides for a motion to change venue. Standards for those motions should be added using the language of CCP section 397 (1) not proper county, and 397 (3) convenience of witnesses and parties and ends of justice. The first standard, not proper county, recognizes that occasionally the wrong venue will be chosen, and the second codifies will established standards for changing venue in civil litigation.

6. Notice of Hearing: Section 642.440 should include a provision requiring completion of a certificate of mailing (See CCP 1013(b)) by the agency to show compliance with this section.

7. Disqualification: Section 643.210 governs disqualification of presiding officers. In addition to factors that are not sufficient for disqualification, the section should also include a list of disqualifying circumstances, such as the list contained in CCP Sections 170.1(a)(1) to (7), and 170.3(b)(2)(A). Section 643.220 governs waiver of disqualification. I believe that there should be further limits on the waiver authority along the lines suggested by CCP Section 170.3(b)(2) and (3).

8. Disqualification Procedure: Section 643.230(b) allows the presiding officer to decide the disqualification motion if he or she presides alone. I believe that disqualification motions should be decided by another judge, see CCP 170.3(c)(5), and this function could be centralized at OAH.

9. Motions to Compel Discovery: Motions to compel are governed by Section 645.310. This section should include a requirement patterned on CCP Section 2024(e) which states that motions to compel must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

10. Review of Discovery Orders: Section 645.370 should be integrated with future changes in judicial review provisions unless the intention is to retain the petition for writ of mandate for review of discovery orders regardless of what happens elsewhere with judicial review.

11. Discovery Sanctions: Section 645.380 should incorporate definitions of discovery abuses following the example of CCP Section 2023(a)(1) to (9), and could also expand the types of sanctions available by adapting language from CCP Section 2023(b).

12. Subpoenas: Section 645.410 should be reworked to indicate that a motion to quash is the procedurally proper way to raise objections to subpoenas. Also, the comments to that section should refer to CCP 1987.1 for standards for granting the motion.

13. Cross-examination: I prefer alternative 2 in Section 647.130 as a middle ground between conference hearings with no cross-examination, and full adjudicatory hearings with extensive cross-examination. Alternative B preserves needed flexibility, and doesn't force litigants or agencies to pick one extreme or the other.

14. Consolidation and Severance: Under Section 648.120, it would be preferable for the presiding officer to have the authority to hear and decide consolidation and severance motions.

15. Vacating Defaults: Section 648.130(c) should include some language stating grounds for vacating defaults, such as the language in FRCP Rule 60(b)(1) to (6). See also CCP 473, "mistake, inadvertence, surprise, or excusable neglect."

16. Open Hearings: Section 648.140 provides for open and public hearings but also allows closure in several circumstances. My concern with this section is that there is a public interest, as well as a media interest, in observing and reporting upon agency hearings. While this is less true with entitlement hearings, there would be strong public interest in certain types of license revocation hearings. I would like to see some expression either in the statute, or the comments, of the public and media interest in open agency hearings. For a case raising this issue, See Herald Co. v. Weisenberg, 59 N.Y. 2d 378 (1983). Section 648.140 should also provide a procedure to object to a decision to close a hearing.

17. Privileges: Section 648.440 should incorporate be reference or should list the Evidence Code privileges recognized in the State of California. These include Evidence Code Sections 930 to 1063.

18. Hearsay Evidence: I prefer alternative b2 on the question of judicial review of decisions supported by hearsay evidence under Section 648.450. Alternative b2 is consistent with the overwhelming majority of case law on the question of raising issues on appeal, not only in administrative law but also in civil and criminal appellate litigation. The reasons for this are very practical. You want to give the agency or lower court the opportunity to correct their own mistakes first, before the costly and time consuming appellate process is invoked.

19. Disqualification of Presiding Officers because of ex parte contacts: I am concerned by the potential for abuses by litigants who wish to seek disqualification of a presiding officer and who deliberately induce an ex parte communication for that very purpose. This could happen under Section 648.550 because there are no additional sanction in the ex parte communications sections of the proposed act other than disclosure of the communication, and

disqualification of the presiding officer. I would propose that Section 648.550, or a new section specify additional consequences for parties or persons who engage in improper ex parte communications. A model for that sanctioning language can be found in the federal APA, Section 557 (d)(1)(D).

20. Award of Attorneys Fees: The Staff note on page 91 of the draft refers to a State Bar proposal. There is a very similar provision in CCP 1028.5, added in 1981, that authorizes similar awards for civil court litigation.

21. Sanctions: Section 648.630 authorizes monetary sanctions for bad faith conduct. It is clearer to use the FRCP Rule 11 certification that signing a pleading, motion, or other paper means that the pleader has read the document, that based on a reasonable inquiry, the document is well grounded both factually and legally, and that it is not filed for any improper purpose. This sets an objective standard that provides fairly clear bright lines for attorneys.

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

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§ 600. Short title

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§ 610.250. Agency head
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CHAPTER 2. APPLICATION OF DIVISION

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Article 3. Representation of Parties
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CHAPTER 4. CONVERSION OF PROCEEDING

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CHAPTER 5. OFFICE OF ADMINISTRATIVE HEARINGS

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Article 3. Emergency Decision
§ 641.310. Agency regulation required
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§ 641.370. Agency review
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CHAPTER 2. COMMENCEMENT OF PROCEEDING

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Article 3. Separation of Functions
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§ 645.230. Discovery or statements, writings, and reports

Article 3. Compelling Discovery
§ 645.310. Time for response to discovery request
§ 645.320. Motion to compel discovery
§ 645.330. Lodging matters with presiding officer
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§ 645.360. Review of presiding officer's order

Article 4. Subpoenas
§ 645.410. Subpoena authority
§ 645.420. Issuance of subpoena
§ 645.430. Motion to quash
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Article 5. Sanctions
§ 645.510. Authority of presiding officer
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CHAPTER 7. PREHEARING AND SETTLEMENT CONFERENCES

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CHAPTER 7. HEARING ALTERNATIVES

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CHAPTER 8. CONDUCT OF HEARING

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#N-100 ns103

ADMINISTRATIVE PROCEDURE ACT

SECTION 1. Division 3.3 (commencing with Section 600) is added to Title 1 of the Government Code, to read:

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

Article 1. Short Title

§ 600. Short title 4/27/90

600. (a) This division, and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, constitute and may be cited as the Administrative Procedure Act.

(b) A reference in any other statute or in a rule of court, executive order, or regulation to the hearing provisions of the Administrative Procedure Act, or to Chapter 4 (commencing with Section 11370) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, means this division.

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a regulation to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. This division, as currently drafted, applies only to the administrative adjudication portion of the Administrative Procedure Act. When the division is expanded to include rulemaking, the general provisions will be reviewed for applicability.

References in section Comments in this division to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, and to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3344, 5362, 7521 (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237), from which a number of the provisions of this division are drawn.

Article 2. Definitions

§ 610.010. Application of definitions 7/9/92

610.010. (a) Unless the provision or context requires otherwise, the definitions in this article govern the construction of this division.

(b) The definitions in this article apply to grammatical variants of the terms defined.

Comment. Subdivision (a) of Section 610.010 restates the introductory portion of former Section 11500. Subdivision (b) is new. Under subdivision (b), for example, the definition of the term "license" in Section 610.360 to include "certificate" would extend, mutatis mutandis, to variant forms such as "licensed", "licensee", and "licensing" ("certificated", "certificate holder", and "certificate issuance").

§ 610.190. Agency 9/11/92

610.190. "Agency" means a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. To the extent it purports to exercise authority pursuant to any provision of this division, an administrative unit otherwise qualifying as an agency shall be treated as a separate agency even if the unit is located within or subordinate to another agency.

Comment. Section 610.190 supersedes former Sections 11000 and 11500(a). It is drawn from 1981 Model State APA § 1-102(1). The intent of the definition is to subject as many governmental units as possible to the provisions of this division. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council.

The last sentence of the section is in part derived from Federal APA § 551(1), treating as an agency "each authority of the Government of the United States, whether or not it is within or subject to review by another agency". A similar provision is desirable here to avoid difficulty in ascertaining which is the agency in a situation where an administrative unit is within or subject to the jurisdiction of another administrative unit.

§ 610.250. Agency head 11/30/90

610.250. "Agency head" means a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide.

Comment. The first portion of Section 610.250 is drawn from 1981 Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in whom the final legal authority over its operations is vested.

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.210 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member 11/30/90

610.280. "Agency member" means a member of the body that constitutes the agency head and includes a person who alone constitutes the agency head.

Comment. Section 610.280 restates former Section 11500(e) ("agency member" defined).

§ 610.310. Decision 9/11/92

610.310. (a) "Decision" means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

(b) Nothing in this section limits:

(1) The authority of an agency to make a declaratory decision pursuant to Article 2 (commencing with Section 641.210) of Chapter 1 of Part 4.

(2) The precedential effect of a decision pursuant to Article 3 (commencing with Section 649.310) of Chapter 9 of Part 4.

Comment. Section 610.310 is drawn from 1981 Model State APA § 1-102(5). The definition of decision makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. Section 13 (singular includes plural). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific identified individual or individuals. This is to be compared to a regulation, which is an agency action of general application, that is, applicable to all members of a described class. Sections 610.660 and 11342 ("regulation" defined). The primary operative effect of the definition of decision is in Part 4 (commencing with Section 641.110), governing adjudicative proceedings. This section is not intended to expand the types of cases in which an adjudicative proceeding is required; an adjudicative proceeding is required only where another statute or the constitution requires one. Section 641.110 (when adjudicative proceeding required).

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain utility company or a certain licensee, are decisions subject to the adjudication provisions of this statute. Cf. Federal APA § 551(4), defining all rate making as rulemaking. On the other hand, rate making and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations under this statute, subject to its rulemaking provisions. See the Comment to Section 610.660. However, some decisions may have precedential effect pursuant to Sections 649.310-649.340 (precedent decisions).

§ 610.350. Initial pleading 4/1/92

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.

§ 610.360. License 6/1/92

610.360. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

Comment. Section 610.360 is drawn from 1981 Model State APA § 1-102(4).

§ 610.370. Local agency 4/27/90

610.370. "Local agency" means a county, city, district, public authority, public agency, or other political subdivision or public corporation in the State of California other than the state.

Comment. Section 610.370 is new. Local agencies are not governed by this division, subject to exceptions. See Section 612.120 (application of division to local agencies). See also Section 610.770 ("state" defined).

Staff Note. The Comment to this section may need revision depending on the scope of the part on judicial review.

§ 610.460. Party 6/14/91

610.460. "Party", in an adjudicative proceeding, includes the agency that is taking action, the person to whom the agency action is directed, and any other person named as a party or allowed to intervene in the proceeding.

Comment. Section 610.460 restates former Section 11500(b); see also 1981 Model State APA § 1-102(6). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. For provisions on intervention, see Sections 644.110-644.150.

This section is not intended to address the question whether a person is entitled to judicial review. This division deals with standing to seek judicial review in Section [to be drafted].

§ 610.520. Person 4/27/90

610.520. "Person" includes an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

Comment. Section 610.520 supplements the definition of "person" in Section 17. It is drawn from 1981 Model State APA § 1-102(8). It would include the trustee of a trust or other fiduciary.

The definition is broader than Section 17 in its application to a governmental subdivision or unit; this would include an agency other than the agency against which rights under this division are asserted by the person. Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, petition an agency for the adoption of a regulation, and will be accorded all the other rights that a person will have under the division.

§ 610.660. Regulation 4/11/91

610.660. "Regulation" has the meaning provided in Section 11342.

Comment. Section 610.660 incorporates the definition of "regulation" found in the rulemaking provisions of the Administrative Procedure Act. Subdivision (b) of Section 11342 provides:

> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency. "Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

§ 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 4/1/92

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.

§ 610.680. Reviewing authority 11/30/90

610.680. "Reviewing authority" means the agency head and includes the person or body to which the agency head has delegated its review authority pursuant to Section 649.210 (availability and scope of review).

Comment. Section 610.680 is new. It is intended for drafting convenience.

§ 610.770. State 4/27/90

610.770. "State" means the State of California and includes any agency or instrumentality of the State of California, whether in the executive department or otherwise.

Comment. Section 610.770 supplements Section 18 ("state" defined). This division applies to state agencies other than the Legislature, the courts and judicial branch, the Governor and Governor's office, and the University of California. See Section 612.110 (application of division to state) and Comment; see also Section 610.190 ("agency" defined). It does not apply to local agencies. See Section 612.120 (application of division to local agencies); see also Section 610.370 ("local agency" defined).

Article 3. Transitional Provisions

§ 610.910. Operative date 6/1/92

610.910. This division becomes operative on January 1, 1996.

Comment. Section 610.910 provides a one-year deferred operative date to enable agencies to adopt any necessary regulations.

Staff Note. Transitional problems in mass adoption of regulations may be addressed by having existing regulations remain in effect until final regulations are adopted, or by allowing interim operation regulations to become effective immediately, subject to later OAL review. The staff will confer with OAL to see about developing a workable scheme.

§ 610.920. Pending proceedings 6/1/92

610.920. Subject to Section 610.930, an adjudicative proceeding commenced before the operative date of this division is governed by the applicable law in effect at the time of commencement of the adjudicative proceeding and not by this division.

Comment. Section 610.920 speaks in terms of commencement of a proceeding. A proceeding is considered commenced for purposes of this division on issuance of an initial pleading. Section 642.310; see also Section 610.350 ("initial pleading" defined).

§ 610.930. Commencement or remand after operative date 6/1/92

610.930. (a) An adjudicative proceeding commenced on or after the operative date of this division is governed by this division.

(b) An adjudicative proceeding conducted on a remand from a court or another agency after the operative date of this division is governed by this division.

Comment. Subdivision (b) of Section 610.930 is an exception to the rule of 610.920 (proceeding commenced before operative date governed by prior law).

CHAPTER 2. APPLICATION OF DIVISION

§ 612.110. Application of division to state 7/27/90

612.110. Except as otherwise expressly provided by statute:

(a) This division applies to all agencies of the state.

(b) This division does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

(c) This division does not apply to the University of California.

Comment. Section 612.110 supersedes former Section 11501. Whereas former law specified agencies subject to the Administrative Procedure Act, Section 612.110 reverses this statutory scheme and applies this division to all state agencies unless specifically excepted. The intent of this statute is to subject as many state governmental units as possible to the provisions of this division.

Subdivision (a) is drawn from 1981 Model State APA § 1-103(a).

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Note that exemptions from the division are to be construed narrowly.

Subdivision (b) exempts the entire judicial branch, and is not limited to the courts. Judicial branch agencies include the Judicial Council, the Commission on Judicial Appointments, the Commission on Judicial Performance, and the Judicial Criminal Justice Planning Committee.

Subdivision (b) exempts the Governor's office, and is not limited to the Governor. For an express statutory exception to the Governor's exemption from this division, see Bus. & Prof. Code § 106.5 ("The proceedings for removal [by the Governor of a board member in the Department of Consumer Affairs] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

Subdivision (c) recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, free of legislative control, and independent in administration of its affairs). Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 612.140.

Staff Note. At the State Bar "Cosmic APA" presentation there was opportunity for only a brief discussion of the overall approach of a single administrative procedure act applicable to all state agencies, with the opportunity for agencies to depart from the act by regulation if necessary at key points.

Agency representatives objected to the approach on the basis that (1) it will increase agency costs, (2) it will require agencies to readopt regulations to continue to do things in the appropriate way they're already doing them, and (3) it ain't broke.

Private practitioners pointed out the law is diverse and inaccessible from one agency to another, and that rights are lost as a result; it is better to spell things out clearly by statute and any modifying regulations.

§ 612.120. Application of division to local agencies 4/27/90

612.120. (a) This division does not apply to a local agency except to the extent this division is made applicable by statute.

(b) This division applies to an agency created or appointed by joint or concerted action of the state and one or more local agencies.

Comment. Section 612.120 is drawn from 1981 Model State APA § 1-102(1). See also Section 610.370 ("local agency" defined). Local agencies are excluded because of the very different circumstances of local government units when compared to state agencies. The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage.

This division is made applicable by statute to local agencies in a number of instances, including:

Suspension or dismissal of permanent employee by school district. Ed. Code § 44944.

Nonreemployment of probationary employee by school district. Ed. Code § 44948.5.

Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Ed. Code § 87679.

§ 612.130. [Reserved]

§ 612.140. Election to apply division 4/27/90

612.140. Notwithstanding any other provision of this chapter, by regulation, ordinance, or other appropriate action an agency may adopt this division or any of its provisions for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this division.

Comment. Section 612.140 is new. An agency may elect to apply this division even though the agency would otherwise be exempt (Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies)) or the particular action taken by the agency would otherwise be exempt (Section 641.110 (when adjudicative proceeding required)).

§ 612.150. Contrary express statute controls 3/20/90

612.150. Notwithstanding any other provision of this division, an statute expressly applicable to a particular agency prevails over a contrary provision of this division.

Comment. Section 612.150 makes clear that the general provisions of the administrative procedure act are not intended to override contrary statutes of express applicability to an agency.

§ 612.160. Suspension of statute when necessary to avoid loss of federal funds or services 6/1/92

612.160. (a) To the extent necessary to avoid a denial of funds or services from the United States that would otherwise be available to the state, by executive order the Governor may suspend, in whole or in part, any provision of this division. By executive order the Governor shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.

(b) If a provision of this division is suspended pursuant to this section, the Governor shall promptly report the suspension to the Legislature. The report shall include recommendations concerning any desirable legislation that may be necessary to conform this division to federal law.

Comment. Section 612.160 is drawn from 1981 Model State APA § 1-104. Cf. Section 8571 (power of Governor to suspend statute in emergency). This section permits specific functions of agencies to be exempted from applicable provisions of this division only to the extent that is necessary to prevent the denial of federal funds or a loss of federal services. The test to be met is simply whether, as a matter of fact, there will actually be a loss of federal funds or a loss of federal services if there is no suspension. And the suspension is effective only so long as and to the extent necessary to, avoid the contemplated loss.

The Governor is not required to issue a suspension determination merely on the receipt of a federal agency certification that a suspension is necessary. The suspension must be actually necessary. That is, the Governor must first decide that the federal agency is correct in its assertion that federal funds may lawfully be withheld from the state agency if that agency complies with certain provisions of this division, and that the federal agency intends to exercise its authority to withhold those funds if certain provisions of this division are followed. However, if these two requirements are met, the Governor may suspend the provision.

§ 612.170. Waiver of provisions 6/1/92

612.170. Except to the extent precluded by another statute or regulation, a person may waive a right conferred on the person by this division.

Comment. Section 612.170 is drawn from 1981 Model State APA § 1-105. It embodies the standard notion of waiver, which requires an intentional relinquishment of a known right. A right under this division is subject to waiver in the same way that a right under any

other civil statute is normally subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily preferable. This section applies to all affected persons, whether or not parties.

Staff Note. The staff has incorporated a number of suggestions of Professor Ogden in the Comment.

CHAPTER 3. PROCEDURAL PROVISIONS

Article 1. Miscellaneous Provisions

§ 613.110. Voting by agency member 9/11/92

613.110. Agency members qualified to vote on a matter may vote by mail or otherwise, without being present at a meeting of the agency.

Comment. Section 613.110 restates and broadens former Section 11526 to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote as a presiding officer in an adjudicative proceeding if the agency member did not hear the evidence. Section 643.120(d)(3). It should be noted that under the Open Meeting Law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). See also Section 610.280 ("agency member" defined).

§ 613.120. Oaths, affirmations, and certification of official acts 5/1/92

613.120. In a proceeding 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 613.120 restates former Section 11528.

Article 2. Notice

§ 613.210. Service 6/1/92

613.210. (a) If this division requires that an order or other writing be served on or notice given to a person, the writing or notice shall be delivered personally or sent by mail or other means pursuant to Section 613.220 to the person at the person's last known address or,

if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.

(b) For the purpose of this section, if a party is required by statute or regulation to maintain an address with the agency that is sending the order or other writing, the party's last known address is the address maintained with the agency.

Comment. Section 613.210 is intended for drafting convenience. It supersedes a provision of former Section 11517(b).

§ 613.220. Mail or other delivery 9/11/92

613.220. Unless a provision specifies the form of mail, service or notice by mail under this division may be by first class mail, registered mail, or certified mail, or by mail delivery service or facsimile transmission or other electronic means, in the discretion of the sender.

Comment. Section 613.220 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail). Failure of a person to receive notice of a hearing sent under this section is prima facie evidence of good cause for failure to attend the hearing. Section 648.130(c) (default).

Staff Note. Professor Ogden would incorporate the certificate of mailing procedure for proof of service from Code of Civil Procedure Section 1013. The Commission has previously considered and rejected this concept on the basis that the administrative procedure act should not be an instruction manual. In light of the fact that many parties in administrative adjudications act without counsel, the Commission may wish to reconsider this decision.

§ 613.230. Extension of time 9/11/92

613.230. Service or notice by mail or other means pursuant to Section 613.220 extends by five days any prescribed period of notice and any right or duty to do an act or make a response within a prescribed period after service or notice.

Comment. Section 613.230 is drawn from the portion of Code of Civil Procedure Section 1013 relating to service of notice by mail within California. This reverses existing law as to some administrative procedures. See, e.g., Southwest Airlines v. Workers' Compensation Appeals Board, 234 Cal. App. 3d 1421 (1991).

Article 3. Representation of Parties

§ 613.310. Self representation 6/11/92

613.310. A party may represent itself without an attorney.

Comment. Section 613.310 generalizes a provision of former Section 11509. In the case of a party that is an entity, the entity may select any of its members to represent it, and is bound by the acts of its authorized representative.

§ 613.320. Representation by attorney 5/21/92

613.320. 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.

Comment. Section 613.320 generalizes a provision of former Sections 11500(f)(3) and 11509. Qualification and discipline of attorneys that practice before administrative agencies is governed by the State Bar of California and not by the agencies.

Staff Note. We have added the sentence to the Comment concerning attorney qualification and discipline at Professor Ogden's suggestion.

§ 613.330. Lay representation 6/1/92

613.330. (a) An agency may permit a party to be represented by a person not otherwise authorized under this article.

(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.

§ 613.340. Authority of attorney or other representative of party 3/12/92

613.340. Unless the provision or context requires otherwise, any act required or permitted by this division to be performed by, and any notice required or permitted by this division to be given to, a party may be performed by, or given to, the attorney or other authorized representative of the party.

Comment. Section 613.340 is intended for drafting convenience. Cf. Code Civ. Proc. §§ 283, 446, 465, 1010, 1014 (authority of party or attorney in civil actions and proceedings). The section recognizes that an administrative proceeding may involve a non-attorney authorized representative of a party. Section 613.330.

CHAPTER 4. CONVERSION OF PROCEEDING

§ 614.110. Conversion authorized 5/21/92

614.110. (a) Subject to any applicable regulation adopted under Section 614.150, 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 the Administrative Procedure Act 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 the Administrative Procedure Act, 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 614.110 is drawn from 1981 Model State APA § 1-107(a)-(b). A reference in this section to a "party", in the case of an adjudicative proceeding means "party" as defined in Section 610.460, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. A reference to a proceeding provided by the Administrative Procedure Act includes a rulemaking proceeding as well as an adjudicative proceeding. Section 600.

Under subdivision (a)(1), a proceeding may not be converted to another type that would be inappropriate for the action being taken. For example, if an agency elects to conduct a full hearing in a case where it could have elected a conference hearing initially, a subsequent decision to convert to a conference hearing would be appropriate under subdivision (a)(1).

The further limitation in subdivision (a)(1) that the conversion may not substantially prejudice the rights of a party must also be satisfied. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice. The concept includes both the right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. Of course, even if the rights of a 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 conversion of an agency proceeding from one type to another is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual otherwise would be entitled by conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding. 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 an agency, in certain situations, to make a determination through an adjudicative proceeding that have the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding 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 a discretionary and a mandatory conversion 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, an agency 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 an agency that desirable flexibility. For example, an agency that wants to convert a formal adjudicative hearing into a conference hearing, or a conference hearing into a formal adjudicative 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 rulemaking. 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 an adjudication, 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.

See also Section 613.230 (extension of time).

§ 614.120. Presiding officer 5/1/92

614.120. 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, the officer or official shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

Comment. Section 614.120 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

§ 614.130. Agency record 5/1/92

614.130. To the extent practicable and consistent with the rights of parties and the requirements of the Administrative Procedure Act relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding.

Comment. Section 614.130 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 the Administrative Procedure Act.

§ 614.140. Procedure after conversion 6/1/92

614.140. 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 the Administrative Procedure Act relating to the new proceeding.

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

(c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

Comment. Section 614.140 is drawn from 1981 Model State APA § 1-107(e). See also Section 613.230 (extension of time).

§ 614.150. Agency regulations 5/21/92

614.150. An agency may adopt regulations to govern the conversion of one type of proceeding to another. The regulations may 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 614.150 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

CHAPTER 5. OFFICE OF ADMINISTRATIVE HEARINGS

§ 615.110. Definitions 4/11/91

615.110. Unless the provision or context requires otherwise, the following definitions govern the construction of this chapter:

(a) "Director" means the executive officer of the Office of Administrative Hearings.

(b) "Office" means the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 615.110 restates former Section 11370.1. Subdivision (b) is new.

§ 615.120. Office of Administrative Hearings 4/11/91

615.120. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as an administrative law judge employed by the office, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) A reference in a statute to the Office of Administrative Procedure means the Office of Administrative Hearings.

Comment. Section 615.120 restates former Section 11370.2.

§ 615.130. Administrative law judges 10/31/91

615.130. (a) The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges sufficient to fill the needs of the various state agencies.

(b) An administrative law judge employed by the office shall have been admitted to practice law in this state for at least five years immediately preceding the appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Subdivision (a) of Section 615.130 restates the first sentence of former Section 11370.3 and the second sentence of former Section 11502.

Subdivision (b) restates the third sentence of former Section 11502.

§ 615.140. Hearing personnel 11/30/90

615.140. The director shall appoint hearing reporters and such other technical and clerical personnel as may be required to perform the duties of the office.

Comment. Section 615.140 restates the second sentence of former Section 11370.3, deleting the reference to "hearing officers" and the "shorthand" hearing reporter limitation.

§ 615.150. Assignment of administrative law judges 10/31/91

615.150. (a) The director shall assign an administrative law judge employed by the office for an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the office.

(b) On request from an agency, the director may assign an administrative law judge employed by the office for an adjudicative proceeding not required by statute to be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge employed by the office or other employee assigned under this section is considered an employee of the office and not of the agency to which the administrative law judge or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge employed by the office may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 615.180.

Comment. Subdivision (a) of Section 615.150 supersedes the first part of the third sentence of former Section 11370.3. Adjudicative proceedings required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

[(1) A proceeding required to be conducted under the Administrative Procedure Act. Gov't Code § 11502.]

[(2) A proceeding arising under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code on request of a public prosecutor. Bus. & Prof. Code § 22460.5.]

Subdivision (b) restates the second part of the third sentence of former Section 11370.3.

Subdivision (c) restates the third part of the third sentence of former Section 11370.3.

Subdivision (d) restates the fifth sentence of former Section 11370.3.

Subdivision (e) restates the sixth sentence of former Section 11370.3.

Staff Note. Conforming changes will be needed in other statutes that now require hearings under the Administrative Procedure Act: they will be revised to require hearings by OAH personnel. In the course of preparing conforming revisions it may be possible to flip this structure on its head and provide that all hearings are conducted by OAH personnel unless expressly excepted.

§ 615.160. Regulations 6/1/92

615.160. The office may adopt regulations for all of the following purposes:

(a) To establish further qualifications of administrative law judges employed by the office.

(b) To establish procedures for agencies to request and for the director to assign administrative law judges employed by the office.

(c) To establish procedures and adopt forms, consistent with this part and other law, to govern administrative law judges employed by the office and to govern adjudicative proceedings under this division to the extent expressly provided by statute.

(d) To establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges employed by the office.

(e) To facilitate the performance of the responsibilities conferred on the office by this part.

Comment. Section 615.160 is drawn from 1981 Model State APA § 4-301(e).

§ 615.170. Cost of operation 11/30/90

615.170. The total cost to the state of maintaining and operating the office shall be determined and collected by the Department of General Services in advance or on such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Section 615.170 restates former Section 11370.4.

§ 615.180. Study of administrative law and procedure 4/11/91

615.180. (a) The office is authorized and directed to:

(1) Study the subject of administrative law and procedure in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this subdivision authorizes an agency to give access to records required by statute to be kept confidential.

Comment. Section 615.180 restates former Section 11370.5 with the addition of language protecting confidentiality of records. See also Section 610.190 ("agency" defined).

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PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

§ 641.110. When adjudicative proceeding required 6/1/92

641.110. (a) An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute.

(b) Nothing in this section precludes an agency from formulating and issuing a decision by settlement, pursuant to an agreement of the parties, without conducting a proceeding under this part.

(c) Nothing in this section limits the authority of an agency to provide any appropriate procedure for a decision that is not required to be conducted under this part.

(d) Nothing in this section requires a proceeding under this part for informal factfinding or informal investigatory hearing.

Comment. Section 641.110 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision, subject to settlement negotiations. This section does not specify which type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing, a conference hearing, or an emergency decision, in accordance with other provisions of this part.

Under this part, the formal hearing procedure is standard unless circumstances permit the conference hearing or emergency decision. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 612.170 (waiver of provisions) and 646.210 (settlement). However, a person who requests agency action without expressly requesting the agency to conduct appropriate proceedings will not be regarded, on that account, as having waived the appropriate procedures; see Section 642.220 and Comment (application for decision).

This part by its terms applies only to adjudicative proceedings required by constitution or statute. See also Code Civ. Proc. § 1094.5 ("a proceeding in which by law a hearing is required to be given"). However, by regulation an agency may require a hearing for a particular

decision that is not constitutionally or statutorily required, and may elect to have the hearing governed by this part. See Section 612.140 (election to apply division).

Staff Note. *Statutory hearings will be reviewed to determine whether this part will operate satisfactorily. See, e.g., Pub. Cont. Code § 4107 (Subletting and Subcontracting Fair Practices Act).*

§ 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. Likewise, an agency may issue an initial pleading under this part without first conducting a proceeding to decide whether to issue the pleading. See, e.g., Sections 642.210 (initiation by agency) and 610.350 ("initial pleading" defined).

§ 641.130. Modification or inapplicability of statute by regulation 9/11/92

641.130. (a) Except as otherwise provided in this section, if a provision of this part authorizes an agency to modify this part or make this part inapplicable by regulation, the agency may, to that extent, 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 so adopted, and not this part, governs the matter.

(b) A provision of this part that authorizes an agency to modify this part or make this part inapplicable by regulation 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) A provision of this part that authorizes an agency to modify this part or make this part inapplicable by regulation is subject to a statute that governs the matter expressly.

(d) Nothing in this section limits the authority of an agency to adopt implementing regulations not inconsistent with a provision of this part to the extent directed or permitted by this part.

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 641.210 (regulations governing declaratory decision), 647.210 (regulations making alternative dispute resolution inapplicable), 648.310 (burden of proof).

Article 2. Declaratory Decision

Comment. Article 2 (commencing with Section 641.210) 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.

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).

Staff Note. At the State Bar "Cosmic APA" presentation there was concern that a party might initiate a declaratory decision proceeding only to have the agency decide to convert it to a full-fledged adjudicative proceeding to the party's detriment. The staff agrees that this should be precluded in the draft.

Concern was also expressed that the declaratory decision device might be subverted into a way for agencies to avoid rulemaking.

Agency representatives noted that the statute should make clear that if a declaratory decision is designated as precedential, this does not preclude a later-constituted agency head from decertifying it as

precedential. The staff agrees; this is a problem with precedential decisions in general, and should be dealt with in the precedent decision statutes.

§ 641.210. Regulations governing declaratory decision 9/11/92

641.210. (a) 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.

(b) The regulations adopted by the Office of Administrative Hearings under this article apply in an adjudicative proceeding unless an agency adopts its own regulations to govern declaratory decisions of the agency.

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

Comment. Section 641.210 is drawn from 1981 Model State APA § 2-103(b). 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.

Staff Note. The staff will explore with OAL the possibility of automatic inclusion of OAH regulations in the regulations of each agency, or alternatively a central collection of administrative hearing regulations of all agencies in one volume of the code of regulations.

§ 641.220. Declaratory decision permissive 4/23/92

641.220. (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 641.220 are drawn from 1981 Model State APA § 2-103(a); subdivision (c) is new. Unlike the model act, Section 641.220 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 adjudicative proceeding to which the person would be entitled.

§ 641.230. Notice of application 5/21/92

641.230. 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 of an adjudicative proceeding is otherwise required, and may give notice to any other person.

Comment. Section 641.230 is drawn from 1981 Model State APA § 2-103(c). See also Section 613.230 (extension of time).

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

641.240. (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 4 (commencing with Section 644.110) (intervention) and files a timely motion for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.

Comment. Section 641.240 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 adjudicative 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 641.210. 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 adjudicative 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 provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions.

§ 641.250. Action of agency 4/23/92

641.250. (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 considered to have declined to issue a declaratory decision on the matter.

Comment. Subdivision (a) of Section 641.250 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 or other means to the respondent's last known address. Sections 613.210 (service) and 613.220 (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.

Staff Note. At the State Bar "Cosmic APA" presentation a discrepancy was noted between subdivision (a)(4), which requires a statement of reasons when an agency declines to issue a declaratory decision, and subdivision (c), which provides simply that if an agency does not act within 60 days it is deemed to have declined to issue a declaratory decision. The staff would delete the statement of reasons from (a)(4)--it simply provides a litigation issue.

§ 641.260. Declaratory decision 3/12/92

641.260. (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 641.260 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 3. Emergency Decision

Staff Note. At the State Bar "Cosmic APA" presentation concern was expressed by private practitioners about the loss of due process protections in an emergency decision. It was suggested that current law, which enables an emergency decision of sorts through the TRO process, requiring an agency to go to court, is a superior system in its protection of due process.

Existing emergency procedures available to various agencies will be reviewed 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).

§ 641.310. Agency regulation required 5/21/92

641.310. (a) An agency may issue an emergency decision for temporary, interim relief under this article if the agency has adopted a regulation that makes this article applicable.

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

(1) Define the circumstances in which an emergency decision may be issued under this article.

(2) State the nature of the temporary, interim relief that the agency may order.

(3) Prescribe the procedures that will be available before and after issuance of an emergency decision under this article. The procedures may be more protective of the respondent than those provided in this article.

(c) This section does not apply to an emergency decision issued pursuant to other express statutory authority.

Comment. Section 641.310 requires specificity in agency regulations that adopt an emergency decision procedure.

§ 641.320. When emergency decision available 5/21/92

641.320. (a) An agency may issue an emergency decision under this article in a situation involving an immediate danger to the public health, safety, or welfare that requires 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 issuance of an emergency decision.

(c) An emergency decision issued under this article is limited to temporary, interim relief. The temporary, interim relief is subject to administrative and judicial review under Sections 641.370 and 641.380, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding pursuant to Section 641.350.

Comment. Section 641.320 is drawn from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is available only if the agency has adopted an authorizing regulation. Section 641.310.

§ 641.330. Emergency decision procedure 5/1/92

641.330. (a) Before issuing an emergency decision under this article, the agency shall, if practicable, give the respondent 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 641.330 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 647.120 (procedure for conference adjudicative hearing).

By regulation the agency may prescribe the emergency notice and hearing procedure. 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 the respondent than the provisions of this article. Section 641.310 (agency regulation required).

See also Section 613.230 (extension of time).

§ 641.340. Emergency decision 5/1/92

641.340. (a) The agency shall issue an emergency decision, including a brief explanation of the factual and legal basis and reasons for the emergency decision, to justify the determination of an immediate danger and the agency's emergency decision to take the specific action.

(b) The agency shall give notice to the extent practicable to the respondent. The emergency decision is effective when issued.

Comment. Section 641.340 is drawn from 1981 Model State APA § 4-501(c)-(d). Under this section the agency has flexibility to issue its emergency decision orally, if necessary to cope with the emergency. See also Section 613.230 (extension of time).

§ 641.350. Completion of proceedings 5/21/92

641.350. (a) After issuing an emergency decision under this article for temporary, interim relief, the agency shall conduct an adjudicative proceeding to resolve the underlying issues giving rise to the temporary, interim relief.

(b) The agency shall commence an adjudicative proceeding within 10 days after issuing an emergency decision under this article, notwithstanding the pendency of proceedings for administrative or judicial review of the emergency decision.

Comment. Section 641.350 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.

§ 641.360. Agency record 5/01/92

641.360. (a) The agency record consists of any documents concerning 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 an emergency decision or for administrative or judicial review of an emergency decision under this article.

Comment. Section 641.360 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 if necessary to cope with the emergency.

§ 641.370. Agency review 5/21/92

641.370. (a) On petition by the respondent, the agency head or other reviewing authority shall, on the earliest day that the business of the agency will admit of, but not later than 15 days after service of the petition on the agency, review and confirm, revoke, or modify an emergency decision issued under this article.

(b) The procedure for administrative review of the emergency decision under this section shall be the same as the procedure for administrative review of a proposed decision under Section 649.230.

Comment. Section 641.370 requires prompt administrative review of an emergency decision on petition of the respondent. Administrative review under this section is not a prerequisite for judicial review. See Section 641.380 (judicial review).

The administrative review procedure is prescribed in Section 649.230. The procedure includes decision on the record, with the possibility of supplementation by additional evidence. Section 649.230(a). Each party has an opportunity to present a written brief or oral argument, as determined by the reviewing authority. Section 649.230(b).

§ 641.380. Judicial review 5/21/92

641.380. (a) On issuance of an emergency decision under this article, the respondent may obtain judicial review of the decision in the manner provided in this section without prior administrative review.

(b) On confirmation or modification of an emergency decision pursuant to Section 641.370, the respondent may obtain judicial review of the decision in the manner provided in this section.

(c) Judicial review under this section shall be pursuant to Section 1094.5 of the Code of Civil Procedure, subject to the following provisions:

(1) The hearing shall be on the earliest day that the business of the court will admit of, but not later than 15 days after service of the petition on the agency.

(2) Where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(3) The relief that may be ordered on judicial review is limited to a stay of the emergency decision.

Comment. Section 641.380 is drawn from Section 11529(h) (interim suspension of medical care professional).

If the emergency decision is issued orally, a person seeking judicial review of the emergency 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. We have picked up the general review procedures of the administrative mandamus statute in this section, with modifications to make it workable for review of an emergency decision. This will be subject to change as we revise the general judicial review provisions themselves.

CHAPTER 2. COMMENCEMENT OF PROCEEDING

Article 1. General Provisions

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

642.110. By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

Comment. Section 642.110 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. Initiation

§ 642.210. Initiation by agency 2/24/92

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

Comment. Section 642.210 is drawn from 1981 Model State APA § 4-102(a). It prevents any implication that Section 642.220 (application for decision) sets forth the exclusive circumstances under which an agency may initiate an adjudicative proceeding.

§ 642.220. Application for decision 2/24/92

642.220. (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 642.220 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. 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.

§ 642.230. Agency action on application 5/21/92

642.230. An agency shall initiate an adjudicative proceeding on application of a person for an agency decision for which a hearing or other adjudicative proceeding would otherwise be required by Section 641.110 (when adjudicative proceeding required), unless any of the following provisions applies:

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

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

(c) 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.

(d) 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.

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

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

Comment. Section 642.230 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 642.210, 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 642.240 (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.

The introductory clause reinforces the point that this part only applies where a hearing is statutorily or constitutionally required. See Section 641.110 (when adjudicative proceeding required).

Subdivision (b) 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 (c) 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 642.210 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 (d) 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 denial because the requested agency action would not be a "decision". Subdivision (d) 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.

§ 642.240. Time for agency action 10/7/92

642.240. (a) 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 642.240 is drawn from 1981 Model State APA § 4-104(a). See also Bus. & Prof. Code §§ 485, 487 (procedure on denial of license application). It establishes time limits and notification requirements for agency action on applications for decisions other than declaratory decisions. 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 denial, 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.

By regulation an agency may modify the provisions of this section or make the provisions of this section inapplicable to tailor the procedures to suit its individual needs. The agency may, for example, provide shorter times for emergencies, and the like. Section 642.110. 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).

See also Section 613.230 (extension of time).

Article 3. Pleadings

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

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

Comment. Section 642.310 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 642.210-642.240 (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 by regulation the agency provides otherwise. Section 642.320 (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).

§ 642.320. Contents of initial pleading 10/7/92

642.320. (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 justify a decision against the respondent. 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.

(3) The remedy sought.

(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 642.320 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 642.310 (proceeding commenced by initial pleading).

§ 642.330. Service of initial pleading and other information 5/21/92

642.330. (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 642.350.

(4) A copy of Chapter 5 (commencing with Section 645.110) (discovery).

(5) Any other information the agency determines is appropriate.

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

> You may request a hearing on this matter. If you do not request a hearing, [here insert name of agency] may proceed on the initial pleading without a hearing. Your failure to request a hearing does not preclude you from serving on [here insert name of agency] a statement by way of mitigation.
>
> In order to request a hearing, you or a person acting on your behalf must sign either the enclosed form entitled Responsive Pleading or your own form of responsive pleading as provided in Section 642.350 of the Government Code, and deliver or send it to: [here insert name and address of agency]. You must deliver or send the responsive pleading

within 15 days after the initial pleading was personally served on you, or within 20 days after the initial pleading was sent to you.

You may, but need not, be represented by an attorney or other authorized representative at any or all stages of this proceeding.

To request the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 645.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

(c) Notwithstanding Sections 613.210 (service) and 613.220 (mail), service under this section shall be by certified or registered mail or by personal delivery. Service may be by first class mail or other means pursuant to Section 613.220 to initiate an adjudicative proceeding before an independent appeals board or other independent agency if the respondent has previously appeared in the same or a related proceeding.

Comment. Section 642.330 is drawn from former Sections 11504 and 11505. Service is made by personal delivery or mail or other means to the respondent's last known address. Sections 613.210 (service) and 613.220 (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 613.210(b).

An agency that fails properly to serve the respondent does not acquire jurisdiction unless the respondent makes a general appearance. Section 642.340 (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 642.350.

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

§ 642.340. Jurisdiction over respondent 2/24/92

642.340. 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 642.340 restates a portion of former Section 11505(c).

§ 642.350. Responsive pleading 3/12/92

642.350. (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 considered 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). A responsive pleading constitutes 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 642.350 is drawn from former Section 11506. See also Sections 613.340 (authority of attorney or other representative of party), 613.210 (service), 642.360 (amended and supplemental pleadings). If service is by mail or other means, the respondent has 20 days after the date of sending in which to respond. Section 613.230 (extension of time).

The references to a "hearing" include a conference hearing where appropriate.

§ 642.360. Amended and supplemental pleadings 10/7/92

642.360. (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, including an amendment to conform to proof at the hearing.

(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 considered 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 642.360 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. Cf. Code Civ. Proc. § 464 (supplemental pleading alleges facts material to case occurring after former pleading).

Staff Note. Professor Ogden suggests it could be helpful to practitioners to distinguish between amended and supplemental pleadings. The staff has added a reference in the Comment to Code of Civil Procedure Section 464 (supplemental complaint and answer).

Professor Ogden would state in the statute that the doctrine of variance between pleading and proof is inapplicable in administrative proceedings. See Code Civ. Proc. §§ 469-471. The staff would not do this, since the administrative adjudication statute does not as a general rule incorporate rules of civil procedure; if a specific rule is appropriate for administrative adjudication, the statute deals with it specifically. We have added to this section at Professor Ogden's suggestion a provision that the presiding officer has discretion to allow amendments to conform to proof.

Professor Ogden also suggests that the statute include the doctrine of relation back of amendments after expiration of the statute of limitations. "While this type of amendment may be less common in administrative adjudication than in civil procedure, any time that there is a statute of limitations on agency enforcement action, there is the potential for this type of issue to arise." We would inquire of the agencies about the extent of this problem before acting on this suggestion.

Article 4. Setting Matter for Hearing

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

642.410. (a) The agency conducting the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be held 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 are subject to the availability of its staff.

Comment. Section 642.410 is drawn from former Sections 11508 and 11509.

642.420. Continuances 5/21/92

642.420. (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.

Comment. Section 642.420 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. The section eliminates the provision for special judicial review of denial of a continuance request; this matter is subject to judicial review at the same time and in the same manner as other disputed matters. Section [to be drafted].

Staff Note. The issue of immediate judicial review of a continuance request will be considered in the context of general judicial review principles.

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

642.430. (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. By regulation an agency may modify the provisions of this section or make the provisions of this section inapplicable (Section 642.110) 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). Grounds for change of venue include selection of an improper county and promotion of convenience of witness and ends of justice. Cf. Code Civ. Proc. § 397.

Staff Note. Professor Ogden would add standards to subdivision (c) drawn from civil practice--that the place selected is not the proper venue or that the convenience of witnesses and the ends of

justice would be promoted by the change. We have added this material to the Comment but not the statute, since we do not want to impliedly restrict the possible bases for a change of venue.

§ 642.440. Notice of hearing 10/7/92

642.440. (a) The agency shall serve a notice of hearing on all parties at least 15 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 [here insert date of hearing], 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 an attorney.
>
> 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] or the presiding officer, or by your attorney of record.

Comment. Section 642.440 is drawn from former Sections 11509 and 11505, with an increase in time from 10 to 15 days. If notice of hearing is sent by mail or other means, it must be sent at least 20 days before the hearing date. Section 613.230 (extension of time).

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

For limitations on procedures in a conference adjudicative hearing, see Section 647.120 (procedure for conference adjudicative hearing).

Staff Note. Professor Ogden would include in the notice of hearing form a certificate of mailing by the agency to show compliance with this section. See Note to Section 613.220.

CHAPTER 3. PRESIDING OFFICER

Article 1. Designation of Presiding Officer

§ 643.110. Designation of presiding officer by agency head 4/11/91

643.110. Except as otherwise provided by statute, any one or more of the following persons may, in the discretion of the agency head, be the presiding officer:

(a) The agency head.

(b) An agency member.

(c) An administrative law judge assigned by the director of the Office of Administrative Hearings.

(d) Another person designated by the agency head.

Comment. Section 643.110 is drawn from 1981 Model State Act § 4-202(a). It uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the persons may serve as spokesperson, but all persons collectively are regarded as the presiding officer. See also Section 13 (singular includes plural).

Assignment of an administrative law judge under subdivision (c) is pursuant to Section 615.150 (assignment of administrative law judges). Discretion of the agency head to designate "another person" to serve as presiding officer under subdivision (d) is subject to Section 643.320 (separation of functions).

One consequence of determining who shall preside is provided in Sections 649.110 and 649.210. Under Section 649.110 (proposed and final decisions), if the agency head presides, the agency head shall issue a final decision; if any other presiding officer presides, a proposed decision must be issued. Section 649.210 (availability and scope of review) establishes the general appealability of proposed and final decisions to the agency head.

For a statutory exception to the right of the agency head to designate the presiding officer, see Section 643.120 (OAH administrative law judge as presiding officer).

§ 643.120. OAH administrative law judge as presiding officer 11/30/90

643.120. If an adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the following provisions apply:

(a) The presiding officer shall be an administrative law judge assigned by the director of the Office of Administrative Hearings.

(b) In the discretion of the agency head, the administrative law judge may hear the case alone or the agency head may hear the case with the administrative law judge.

(c) If the administrative law judge hears the case alone, the administrative law judge shall exercise all powers relating to the conduct of the hearing.

(d) If the agency head hears the case with the administrative law judge:

(1) The administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency head on matters of law.

(2) The agency head shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

(3) The agency head shall issue a final decision as provided in Section 649.110. The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency head. No agency member who did not hear the evidence shall vote.

(4) Notwithstanding any other provision of this subdivision, if after the hearing has commenced a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall deliver a proposed decision to the agency head as provided in Section 649.110.

Comment. Section 643.120 restates the substance of the first sentence of former Section 11512(a). It recognizes that a number of statutes require an administrative law judge employed by the Office of Administrative Hearings. Assignment of an administrative law judge under subdivision (a) is governed by Section 615.150 (Office of Administrative Hearings).

Subdivision (b) restates the second sentence of former Section 11512(a).

Subdivision (c) restates the second sentence of former Section 11512(b).

Subdivisions (d)(1) and (2) restate the first sentence of former Section 11512(b). Subdivision (d)(3) restates former Section 11517(a) with the addition of a sentence that makes clear the agency head may issue a final decision in the proceeding. Subdivision (d)(4) restates former Section 11512(e).

§ 643.130. Substitution of presiding officer 9/30/92

643.130. (a) If a substitute is required for a presiding officer who is disqualified or is unavailable for any other reason, the substitute shall be appointed by the appointing authority.

(b) A substitute appointed under this section is subject to the same qualifications as an original presiding officer.

(c) An action taken by a substitute appointed under this section is as effective as if taken by an original presiding officer.

Comment. Section 643.130 is drawn from 1981 Model State APA § 4-202(e)-(f). This provision also applies to the reviewing authority. Section 649.230 (review procedure). The section only applies where a substitute is "required", i.e., is necessary because the presiding officer is otherwise unable to act, for example because of lack of a quorum.

In cases where there is no appointing authority, e.g., the presiding officer is an elected official, this section provides for no appointment of a substitute, and the "rule of necessity" applies. Cf. former Section 11512(c) (no agency member subject to disqualification if disqualification would prevent existence of quorum qualified to act).

Article 2. Disqualification

§ 643.210. Grounds for disqualification of presiding officer 1/24/92

643.210. (a) The presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this part, or if a person aware of the facts might reasonably entertain a doubt that the presiding officer would be able to be impartial.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(c) By regulation an agency may provide for peremptory challenge of the presiding officer.

Comment. Section 643.210 supersedes former Section 11512(c). Section 643.210 applies whether the presiding officer serves alone or with others. Other causes of disqualification provided in this part include receipt of ex parte communications. Section 648.550 (disqualification of presiding officer). For separation of functions requirements, see Section 643.320. This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivision (a) specifies grounds for disqualification drawn from 1981 Model State APA § 4-202(b). It adds as a ground for disqualification that a person might reasonably doubt the ability of the presiding officer to be impartial. This standard is drawn from Code of Civil Procedure Section 170.1(a)(6)(C) (disqualification of judges).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding does not in itself disqualify the presiding officer under Section 643.210, disqualification in such a situation might occur under Section 643.320 (separation of functions).

Subdivision (c) codifies existing practice. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

Staff Note.

Ogden Issue

Professor Ogden suggests additional grounds for disqualification drawn from various provisions of the Code of Civil Procedure applicable to judges:

(1) Personal knowledge of disputed evidentiary facts.

(2) Service as lawyer in proceeding or for a party or involving same issues.

(3) Financial interest in proceeding or party.

(4) Relative of party.

(5) Relative of lawyer.

(6) Furtherance of interests of justice or doubt as to ability to be impartial.

(7) Permanent or temporary physical impairment.

(8) Personal bias or prejudice against party.

The staff is reluctant to get too specific, since many of these grounds, while of concern in civil practice, are generally irrelevant to administrative law judges or are covered by separation of functions provisions (e.g. service as lawyer for party). We could have a general catchall in the section, although the "appearance of bias" provision currently in the draft is criticized by Professor Asimow immediately below. The Model Act simply adds "any other cause ... for which a judge is or may be disqualified."

Asimow Issue

Professor Asimow writes to recommend reconsideration of the "appearance of bias" standard in subdivision (a). He notes the recent case of Greenberg v. Board of Governors of Federal Reserve System, 968 F.2d 164 (1992), where the law clerk of the Administrative Law Judge had formerly worked in the office of the government agency prosecuting the case. The respondent argued that the ALJ should be disqualified on the basis of an appearance of bias, even though the law clerk's only involvement in the case was to attend to a few administrative things on it and not to advise the judge. The court held that "appearance of bias" is applicable only to the judiciary and not to administrative adjudicators. "The heightened standard cannot apply to administrative law judges who, after all, are employed by the agency whose actions they review. Otherwise, ALJs would be forced to recuse themselves in every case." 968 F.2d at 167.

Professor Asimow notes that his objection to the appearance of bias test is its vagueness and unpredictability.

> *Because almost anything might give rise to an appearance of bias, the standard encourages people to seek judicial review and thus delay administrative action significantly. My argument is highlighted by the Greenberg case; the court thought that it was at least "plausible" that the judge would be disqualified under the appearance of bias standard because his law clerk had engaged in prosecuting the case even though the clerk had no involvement in giving advice to the judge in that case. Greenberg illustrates that bias arguments can come up in all sorts of unpredictable ways because it is so common that the adjudicating personnel in agencies have been involved in various ways with the parties or the issues in the cases they must decide.*

The full text of Professor Asimow's letter, and an excerpt of the relevant portion of the Greenberg case is attached to Memorandum 92-70.

Cosmic APA Issue

At the State Bar "Cosmic APA" presentation there was a suggestion that the peremptory challenge be made a matter of right. The concern was that it is difficult to disqualify an administrative law judge, particularly with the ALJ making the decision on the ALJ's own disqualification. Moreover, to challenge an administrative law judge is foolhardy, since there will be prejudice thereafter against the challenger.

§ 643.220. Self disqualification 1/24/92

643.220. (a) The presiding officer shall disqualify himself or herself and withdraw from a proceeding in which there are grounds for disqualification.

(b) The parties may waive disqualification under subdivision (a) by a writing that recites the basis for disqualification. The waiver is effective only when signed by all parties, accepted by the presiding officer, and included in the record.

Comment. Section 643.220 is drawn from the first sentence of former Section 11512(c) and from Code of Civil Procedure Section 170.3(b)(1). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

A waiver of disqualification under subdivision (b) is a voluntary relinquishment of rights by the parties. It should be noted that the waiver may be signed by the attorney or other authorized representative of a party. Section 613.340 (authority of attorney or other representative of party). The presiding officer need not accept a waiver; the waiver is effective only if accepted by the presiding officer.

Staff Note. Professor Ogden suggests further limits on waiver of disqualification along the lines suggested by Code of Civil Procedure Section 170.3(b)(2)-(3), which provide:

> *(2) There shall be no waiver of disqualification where the basis therefor is either of the following:*
>
> *(A) The judge has a personal bias or prejudice concerning a party.*
>
> *(B) The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning it.*
>
> *(3) The judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification.*

§ 643.230. Procedure for disqualification of presiding officer 1/24/92

643.230. (a) A party may request disqualification of the presiding officer by filing an affidavit within 10 days after receipt of notice of the presiding officer's identity or within 10 days after discovering facts establishing grounds for disqualification, whichever is later. The affidavit shall state with particularity the grounds of the request for disqualification of the presiding officer.

(b) The presiding officer whose disqualification is requested shall determine whether to grant the request. If the presiding officer is more than one person, the person whose disqualification is requested shall not participate in the determination. The agency may by regulation provide for determination of a disqualification request by a person other than the presiding officer whose disqualification is requested.

(c) The determination of the disqualification request shall state facts and reasons for the determination. Unless by regulation the agency provides for administrative review at an earlier time, the

determination is subject to administrative and judicial review at the same time, in the same manner, and to the same extent as other determinations of the presiding officer in the proceeding.

Comment. Section 643.230 supersedes former Section 11512(c). It is drawn from 1981 Model State APA § 4-202(c)-(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure). See also Section 613.230 (extension of time).

Staff Note. Professor Ogden objects to the provision of subdivision (b) allowing the challenged presiding officer to decide the challenge. "I believe that disqualification motions should be decided by another judge, see CCP 170.3(c)(5), and this function could be centralized at OAH."

We note that the existing administrative procedure act, as well as the Model Act, provide for disqualification determination by the challenged person. We have not heard of problems with this procedure, and administrative and judicial review are available as correctives. There is a concern of enabling parties to delay administrative proceedings by routinely filing disqualification motions and having the motions referred elsewhere for resolution.

Article 3. Separation of Functions

§ 643.310. Adoption of stricter limitations 9/11/92

643.310. Nothing in this article limits the authority of an agency by regulation to adopt limitations in addition to or greater than the limitations in this article. Notwithstanding Section 641.130, the authority of an agency to adopt limitations in addition to or greater than the limitations in this article extends to a regulation applicable in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 643.310 allows an agency to expand but not to diminish separation of functions requirements. 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 is included among the agencies that may adopt stricter limitations by regulation despite the general rule of Section 641.130 (modification or inapplicability of statute by regulation).

§ 643.320. When separation required 9/30/92

643.320. (a) Except to the extent provided in Section 643.330:

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person who is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer in the same proceeding.

(b) This section does not apply to issuance, denial, revocation, or suspension of a driver's license pursuant to Division 6 (commencing with Section 12500) of the Vehicle Code.

Comment. Section 643.320 is drawn from 1981 Model State APA § 4-214(a)-(b). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

In subdivision (a), the term "a person who has served" in any of the capacities mentioned is intended to mean a person who has personally carried out the function, and not one who has merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by the limitations of subdivision (a).

The separation of functions requirements of subdivision (a) are not limited to agency personnel, but include participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the reviewing authority at the administrative review level, except with respect to settlement matters. Section 643.330 (b)(4).

While subdivision (a) precludes an adversary from assisting or advising a presiding officer, it does not preclude a presiding officer from assisting or advising an adversary. Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed.

Subdivision (a)(2), unlike 1981 Model State APA § 4-214(b), does not preclude a subordinate of an adversary from assisting or advising the presiding officer. However, by regulation an agency may adopt a more stringent separation of functions requirement. Section 643.310.

Subdivision (b) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Although subdivision (b) makes separation of powers requirements inapplicable in drivers' licensing cases, the separation

of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus operation certificate hearings.

Staff Note. See Note to Section 641.110.

§ 643.330. When separation not required 3/12/92

643.330. (a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person may serve as presiding officer at successive stages of the same adjudicative proceeding.

(3) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding may advise the presiding officer concerning a settlement proposal advocated by the person in the same proceeding.

(4) A person who has served as investigator or advocate in an adjudicative proceeding may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character and the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate.

(5) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the presiding officer concerning a technical issue involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice.

(b) Nothing in this section authorizes a communication between the presiding officer and another person to the extent the communication is otherwise prohibited by Section 648.520.

Comment. Section 643.330 is drawn from 1981 Model State APA § 4-214(c)-(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivisions (a)(1) and (2), dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 648.520, which prohibits certain ex parte communications. The policy issues in Section 648.520, regarding ex parte communication between two persons, differ from the policy issues in subdivisions (a)(1) and (2) regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications. Subdivision (b); Section 648.550. See also Section 643.210 (grounds for disqualification of presiding officer).

Subdivision (a)(3), permitting an investigator, prosecutor, or advocate to advise the presiding officer regarding a settlement proposal, is limited to advice in support of the proposed settlement; the insider may not use the opportunity to argue against a previously agreed-to settlement. Cf. Alhambra City and High School Districts (1986) PERB Decision No. 560 [10 PERC ¶ 17046]. Insider access is permitted here in support of public policy favoring settlement, and because of the consonance of interest of the parties in this situation.

Subdivisions (a)(4) and (5) apply to nonprosecutorial types of administrative adjudications, such as individualized ratemaking and power plant siting decisions. The subdivisions recognize that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the separation of functions requirements, given limited staffing and personnel. Subdivision (a)(4) excuses compliance with the separation of functions requirements in such a case if more than one year has elapsed between the contrary functions. Subdivision (a)(5) recognizes such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer under standard separation of functions doctrine.

Staff Note. There was comment both ways on this section at the State Bar "Cosmic APA" presentation. Private practitioners felt that the exceptions to separation were too broad, allowing the trier of fact to be easily prejudiced. They were also concerned that agency personnel would have access to the presiding officer in connection with settlement proposals, but not the respondent. Agency representatives complained that the exceptions were too restrictive, particularly in agencies with small staffs; the provisions would preclude the agency head from receiving legal advice from the agency's own staff.

One thought expressed at the meeting was that a distinction might be drawn between separation of functions in an agency that is both the prosecutor and decision-maker, and in an agency that is simply adjudicating a dispute between another agency and a respondent. Presumably the separation of functions principles could be looser where the decision maker is a neutral party.

§ 643.340. Staff assistance for presiding officer 9/11/92

643.340. A presiding officer may receive assistance from a staff assistant if the assistant does not (1) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (2) furnish, augment, diminish, or modify the evidence in the record.

Comment. Section 643.340 is drawn from 1981 Model State APA § 4-213(b). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Staff Note. This section will be relocated to ex parte communications in the next draft.

CHAPTER 4. INTERVENTION

Staff Note. At the State Bar "Cosmic APA" presentation there was not much support for allowing intervention, either in licensing cases or in benefit cases. There appeared to be a concert of opinion on this matter from both the agency perspective and the private practitioner perspective, that outsiders (including complainants) ought not to be intruding in the proceeding.

§ 644.110. Intervention 4/23/92

644.110. 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 served on 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 prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the 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 644.110 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)).

§ 644.120. Conditions on intervention 3/12/92

644.120. 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 proceeding.

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

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

Comment. Section 644.120 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.

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

644.130. (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 644.130 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 644.140 (intervention determination nonreviewable). See also Section 613.230 (extension of time).

§ 644.140. Intervention determination nonreviewable 2/24/92

644.140. 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 644.140 is new.

§ 644.150. Participation short of intervention 5/21/92

644.150. Nothing in this chapter precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 5 (commencing with Section 648.510) of Chapter 8 (ex parte communications).

Comment. Section 644.150 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 example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

CHAPTER 5. DISCOVERY

Article 1. General provisions

§ 645.110. Application of chapter 4/23/92

645.110. (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) By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

Comment. Subdivision (a) of Section 645.110 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 except to the extent a provision of this part incorporates them.

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 additional discovery or could limit discovery or eliminate the right of discovery completely.

Staff Note. At the State Bar "Cosmic APA" presentation it was suggested that interrogatories might be an appropriate means of discovery in administrative proceedings, if proper limitations were imposed to prevent abuse. Some agencies do allow interrogatory practice in proceedings before the agency.

The Commission decided against providing for interrogatories because of the history of abuse in civil actions. Its costs in time and expense outweigh its benefits in the context of administrative proceedings which are intended to be relatively simple and expeditious.

§ 645.120. Discovery of evidence of sexual conduct 2/24/92

645.120. (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 645.120 supersedes subdivision (g) of former Section 11507.6.

§ 645.130. Depositions 4/23/92

645.130. (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 requested.

(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 the hearing.

(c) The applicant shall serve notice of hearing 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 agency, which shall obtain an order of the Superior Court to that effect either in the county where the proceeding is conducted or the County of Sacramento.

Comment. Section 645.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition where the witness resides within the state. The section also requires notice to the other parties of the hearing on the petition. See also Section 613.230 (extension of time).

Article 2. Discovery

§ 645.210. Time and manner of discovery 9/11/92

645.210. (a) 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.

(b) 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. Subdivision (a) of Section 645.210 supersedes the introductory portion of the first paragraph of former Section 11507.6. Subdivision (b) is new. For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

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

645.220. 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 645.220 supersedes clause (1) of the first paragraph of former Section 11507.6. For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

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

645.230. (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 witness then proposed to be called by the party or of any other person, including a party or the complainant, having personal knowledge of the acts, omissions, or events that are the basis for the proceeding.

(2) 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.

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

(4) 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 645.230 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).

Subdivision (b)(1) generalizes specific provisions of former law that allowed discovery of both (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. This generalization is for drafting convenience and is not intended to repeal any authority for discovery that existed under former law; that authority is continued in the new provision.

Although subdivision (b)(3) permits discovery of anything that is relevant and admissible, it should be noted that Section 648.420 provides the presiding officer discretion to exclude evidence.

For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

Article 3. Compelling Discovery

§ 645.310. Time for response to discovery request 10/7/92

645.310. A party shall respond to a request for discovery within 20 days after service of the request.

Comment. Section 645.310 is new. If the request is served by mail or other means, the party has 25 days after the date of sending in which to respond. Section 613.230 (extension of time).

§ 645.320. Motion to compel discovery 10/7/92

645.320. (a) If a party fails to respond to a request for discovery within the time provided in Section 645.310, the party making the request may make a motion to the presiding officer to compel discovery.

(b) A motion to compel discovery shall be made and notice of motion served on the party within 10 days after expiration of the time provided in Section 645.310, or if the party evidences refusal to respond before expiration of the time provided in Section 645.310, within 10 days after the evidence of refusal.

(c) The motion shall state facts showing the party's failure or refusal to comply with the request for discovery, a description of the matter sought to be discovered, the reason the matter is discoverable under this chapter, that a reasonable and good faith attempt at an informal resolution of the issue has been made, and the ground of the party's refusal so far as known to party making the request.

Comment. Section 645.320 supersedes subdivision (a) and a portion of subdivision (b) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

Staff Note. We have added a requirement to subdivision (c) that the motion state facts showing a reasonable and good faith attempt at informal resolution. This requirement is drawn from Code of Civil Procedure Section 2024 and is suggested by Professor Ogden. However, given the short fuse on the motion to compel discovery, it may be impractical to make much of an effort at informal resolution.

§ 645.330. Lodging matters with presiding officer 5/1/92

645.330. Where the matter sought to be discovered is under the custody or control of the opposing party and the opposing party asserts that the matter is not discoverable 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 645.330 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.

§ 645.340. Hearing 10/7/92

645.340. (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 that the presiding officer allows.

(b) The presiding officer shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the party requesting discovery, 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 645.340 supersedes a portion of subdivision (b) and subdivision (f) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.350. Order compelling discovery 10/7/92

645.350. (a) Unless otherwise stipulated by the parties, the presiding officer shall no later than 15 days after the motion make its order denying or granting the motion. The presiding officer may on its own motion for good cause extend the time an additional 15 days.

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

(c) 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 party. Where the order denies relief to the party requesting discovery, the order is effective on the date it is served on the party.

Comment. Section 645.350 supersedes subdivision (g) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.360. Review of presiding officer's order 10/7/92

645.360. (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 10 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 645.360 supersedes subdivision (h) of former Section 11507.7.

Staff Note. The time, manner, and possibility of a stay for judicial review is preserved here pending the Commission's consideration of general provisions relating to interim judicial review.

Article 4. Subpoenas

§ 645.410. Subpoena authority 7/9/92

645.410. Subpoenas and subpoenas duces tecum may be issued under this article for attendance at the hearing and for production of documents at any reasonable time and place or at the hearing.

Comment. Section 645.410 supersedes a portion of former Section 11510. This article gives all adjudicating agencies, and attorneys for parties, subpoena power. See Section 645.420 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also broadens former law to allow a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

This article incorporates privacy protections from civil practice. Section 645.420(a).

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 645.110. 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 subpoenas compelling the attendance of witnesses and subpoenas duces tecum.

§ 645.420. Issuance of subpoena 7/9/92

645.420. (a) Subpoenas and subpoenas duces tecum may be issued by the agency, presiding officer, or attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) 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.

(c) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

Comment. Section 645.420 restates a portion of former Section 11510, and expands it to include issuance by an attorney and to incorporate civil practice privacy protections. See Code Civ. Proc. §§ 1985-1985.4. For enforcement of a subpoena, see Section 645.440. See also Section 613.230 (extension of time).

§ 645.430. Motion to quash 10/7/92

645.430. (a) Any objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, shall be made in the manner and be determined in accordance with the standards provided in Section 1987.1 of the Code of Civil Procedure.

(b) The objection shall be resolved by the presiding officer.

(c) A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

Comment. Section 645.430 addresses matters not previously covered by statute but covered by regulation in some agencies. See, e.g., 20 Cal. Code Regs. § 61 (Public Utilities Commission).

Staff Note. We have revised this section along lines suggested by Professor Ogden.

§ 645.440. Witness fees 6/1/92

645.440. 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:

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

(b) The same fees allowed by law to a witness in a civil case.

This subdivision does not apply to an officer or employee of the state or a political subdivision of the state.

Comment. Section 645.440 restates a portion of former Section 11510. Its coverage 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).

Article 5. Sanctions

§ 645.510. Authority of presiding officer 7/9/92

645.510. If the presiding officer finds that a person or the person's attorney or other authorized representative, without substantial justification, failed or refused to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer under this chapter, or, without substantial justification, filed a motion to compel discovery under this chapter, the presiding officer may order appropriate relief, including but not limited to the sanctions provided in Section 2023 of the Code of Civil Procedure, subject to Section 645.520 (certification to court).

Comment. Section 645.360 supersedes subdivision (i) of former Section 11507.7. See also Section 613.340 (authority of attorney or other representative of party).

The sanctions provided in Code of Civil Procedure Section 2023 include a monetary sanction, an issue sanction, an evidence sanction, a terminating sanction, and a contempt sanction. These sanctions are subject to Section 645.520, which requires certification of monetary and contempt sanctions to the superior court. See also Section 648.620 (contempt).

Staff Note. Professor Ogden would expand the grounds for sanctions following the example of Code of Civil Procedure Section 2023(a), which includes:

(1) Persisting in an attempt to obtain information outside the scope of discovery.

(2) Using discovery in a manner that does not comply with specified procedures.

(3) Employing discovery to cause unwarranted annoyance, embarrassment, oppression, or undue burden and expense.

(4) Failing to respond or to submit to an authorized method of discovery.

(5) Making unmeritorious objection.

(6) Making evasive response.

(7) Disobeying order to provide discovery.

(8) Making or opposing unsuccessfully a motion to compel or limit discovery.

(9) Failing to confer with opposing party in reasonable and good faith attempt at informal resolution of discovery dispute.

§ 645.520. Certification to court 7/9/92

645.520. (a) If the presiding officer determines that a monetary sanction or contempt sanction is appropriate under Section 645.510, the presiding officer shall certify that fact to the superior court in either of the following counties:

(1) The county where the person against whom the sanction is sought resides or is located.

(2) The county where the proceeding is or will be conducted or, if the county where the proceeding will be conducted has not been determined, the County of Sacramento.

(b) Certification of the facts to the superior court under subdivision (a) shall be treated in the same manner as a request for sanctions under Section 2023 of the Code of Civil Procedure, and the court shall proceed in the manner and with the notice and opportunity for hearing provided in that section. If the court determines that the monetary or contempt sanction is appropriate under Section 645.510, the court shall impose that sanction.

Comment. Section 645.525 supersedes a portion of former Section 11525.

CHAPTER 7. PREHEARING AND SETTLEMENT CONFERENCES

Article 1. Prehearing Conference

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

646.110. By regulation an agency may modify the provisions of this article or make the provisions of this article inapplicable.

Comment. Section 646.110 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, by regulation an agency may dispense with or change the provisions of this article relating to prehearing conferences.

§ 646.120. Conduct of prehearing conference 4/23/92

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

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

(c) The presiding officer may conduct all or part of the 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 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 prehearing conference shall so inform the parties.

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

Comment. Subdivisions (a) and (b) of Section 646.120 supersede former Section 11511.5(a). See also Section 613.230 (extension of time).

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 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.

§ 646.130. Subject of prehearing conference 4/23/92

646.130. A 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 646.130 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 5 (commencing with Section 645.110), it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing.
Subdivision (j) implements Section 644.110 (intervention).

§ 646.140. Prehearing order 2/24/92

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

Comment. Section 646.140 supersedes former Section 11511.5(c).

Article 2. Settlement Conference

§ 646.210. Settlement 7/9/92

646.210. (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) This section is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 646.210 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).

§ 646.220. Mandatory settlement conference 7/9/92

646.220. (a) The presiding officer may order the parties to attend and participate in a settlement conference.

(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. Under Section 646.220 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur); the conduct of the settlement conference parallels that of the prehearing conference. See Sections 646.120, 646.130 and Comments (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.

See also Section 613.230 (extension of time).

§ 646.230. Confidentiality of settlement communications 5/1/92

646.230. 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 647.240.

Comment. Section 646.230 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified or made inapplicable by regulation). See Section 647.240 and Comment (confidentiality of communications in alternative dispute resolution).

CHAPTER 7. HEARING ALTERNATIVES

Article 1. Conference Adjudicative Hearing

Staff Note. At the State Bar "Cosmic APA" presentation concern was expressed by private practitioners about the loss of due process protections in a conference hearing.

§ 647.110. When conference hearing may be used 7/9/92

647.110. A conference adjudicative hearing may be used in proceedings where:

(a) There is no disputed issue of material fact.

(b) 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 an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.

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

(c) By regulation the agency has authorized use of a conference hearing if in the circumstances its use does not violate a statute or the federal or state constitution.

Comment. Section 647.110 reverses 1981 Model State APA § 4-401. Subdivision (a) permits the conference hearing to be used, regardless of the type or amount 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 614.110-614.150.

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. The reference to a "licensee" in subdivision (b)(5) includes a certificate holder. Section 610.360 ("license" defined).

Subdivision (c) imposes no limits on the authority of the agency to adopt the conference adjudicative hearing by regulation, other than statutory and constitutional due process limits.

§ 647.120. Procedure for conference adjudicative hearing 7/9/92

647.120. (a) Except as provided in this article, the procedures of this part otherwise applicable to an adjudicative hearing apply to a conference adjudicative hearing.

(b) The presiding officer shall regulate the course of the proceeding and may limit witnesses, testimony, evidence, rebuttal, and argument, provided that the presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues.

Comment. Section 647.120 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 need not have a prehearing conference, discovery, or testimony of anyone other than the parties. However, it is intended to permit agencies to allow public participation where appropriate.

§ 647.130. Cross-examination 7/9/92

647.130. (a) Notwithstanding Section 647.110, a conference adjudicative hearing may not be used if in the circumstances it appears that cross-examination of witnesses will be necessary for proper determination of the matter.

(b) If after a conference adjudicative hearing is commenced it appears that cross-examination of a witness will contribute substantially to proper determination of the matter, the conference adjudicative hearing shall be converted to a formal adjudicative hearing unless it appears to the presiding officer that any delay, burden, or complication due to the cross-examination will be minimal in the circumstances.

Comment. Section 647.130 strictly limits availability of cross-examination in a conference adjudicative hearing.

Staff Note. Professor Ogden prefers a more liberal version of this section that would, in essence, delete subdivision (a)--this would preserve needed flexibility without forcing litigants or agencies to choose either formal proceedings with cross-examination or conference proceedings without.

§ 647.140. Proposed proof 5/1/92

647.140. (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 647.140 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 614.110-614.150.

Article 2. Alternative Dispute Resolution

§ 647.210. Application of article 5/21/92

647.210. (a) This article is subject to a statute that requires mediation or arbitration in an adjudicative proceeding.

(b) By regulation an agency may make this article inapplicable. Notwithstanding Section 641.130, the authority of an agency to make this article inapplicable by regulation extends to a regulation applicable in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 647.210 recognizes that some statutes require alternative dispute resolution techniques. See, e.g., [references to be supplied, particularly relating to labor relations disputes].

It should be noted that under subdivision (b) an agency whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings is included among the agencies that may make alternative dispute resolution techniques inapplicable by regulation despite the general rule of Section 641.130 (modification or inapplicability of statute by regulation).

§ 647.220. ADR authorized 7/9/92

647.220. (a) An agency may, with the consent of all the parties, refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator.

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the agency head a party requests the agency for a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure (judicial arbitration) insofar as applicable in the adjudicative proceeding.

Comment. Section 647.220 is new. Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21. The costs and fees specified in Section 1141.21 for a civil proceeding may not all be applicable in an adjudicative proceeding, but subdivision (c) requires such costs and fees to be assessed to the extent they are applicable.

Staff Note. The Commission deferred decision on subdivision (b) pending research on whether delegation of decision-making authority to a person other than the agency head would be legal.

The staff has found nothing directly on point. There are a number of relevant and well-established principles that bear on the issue. The general rule is that an agency head in whom discretionary authority is vested may not further delegate final decision-making authority. This does not mean that the agency head may not delegate the power to take evidence and issue a proposed decision, provided the agency head retains review power.

Suppose, however, the agency head does not exercise review power? The cases all involve situations where the statute requires the agency head to make the decision, so the agency head's delegation is a violation of the statute (and of the general rule that one vested with discretion cannot further delegate the discretion). The cases do not involve a situation where a statute expressly authorizes the agency head to make a further delegation. As far as we can tell, the anti-delegation rule is a common law and statutory principle, and there is no due process consideration that would preclude delegation of decision-making to a person other than the agency head if expressly authorized by statute. The person to whom decision-making authority is delegated would of course have to proceed in accordance with due process.

The present draft assumes the legality of the agency head's delegation of decision-making authority pursuant to express statutory authority in several instances. See, e.g., Sections 646.210(b) (agency head may delegate power to approve a settlement); 649.210(a)(2) (agency head may delegate administrative review authority); 649.210(b) (agency head may preclude administrative review of proposed decision). See also Section 610.250 ("agency head" includes person or body to which power is delegated pursuant to authority to delegate). This is consistent with the existing Administrative Procedure Act, which provides that, in the Act:

> *[W]herever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.*

Gov't Code § 11500(a).

It would therefore be not inconsistent with the remainder of the draft to permit an agency to refer a matter to binding arbitration. However, some "constitutional" agencies may have decision-making authority vested in the constitutional agency members. For this reason, the staff would add a general provision that this, and other, delegation of authority statutes are "subject to an express limitation

in the state constitution". The Comment would refer to the specific constitutional limitations. Contrary statutes expressly applicable to particular agencies also prevail. Section 612.150.

§ 647.230. Regulations governing ADR 5/21/94

647.230. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations for dispute resolution under this article. The model regulations govern dispute resolution by an agency under this article, unless by regulation the agency modifies the model regulations or makes the model regulations inapplicable.

(b) The model regulations shall include provisions for selection and compensation of a mediator or arbitrator, qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding.

Comment. Section 647.230 does not require each agency to adopt regulations. The model regulations developed by the Office of Administrative Hearings will automatically govern mediation or arbitration for an agency, unless the agency provides otherwise. The agency may choose to preclude mediation or arbitration altogether. Section 647.210 (application of article).

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

§ 647.240. Confidentiality of ADR communications 7/9/92

647.240. (a) Notwithstanding any other statute, in settlement, mediation, or nonbinding arbitration proceedings:

(1) Evidence of anything said or of any admission made in the course of the proceedings 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 provides otherwise, no document prepared for the purpose of, in the course of, or pursuant to, the proceedings, 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 parties to the proceedings consent.

Comment. Section 647.240 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified or made inapplicable by regulation). Section 647.240 is drawn from Evidence Code Section 1152.5(a)-(b).

CHAPTER 8. CONDUCT OF HEARING

Article 1. General Provisions

§ 648.110. Provisions may be modified or made inapplicable by regulation 7/9/92

648.110. (a) By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

(b) Subdivision (a) does not apply to Article 2 (commencing with Section 648.210) (language assistance).

Comment. Subdivision (a) of 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 7/9/92

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

(b) The agency or presiding officer on its own motion or on motion of a party, 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.

(c) If the agency and presiding officer make conflicting orders under this section, the agency's order controls.

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).

Staff Note. Professor Ogden believes it would be preferable to have the presiding officer determine these matters. This responds to an earlier draft which vested them in the agency. The current draft allows either to make a consolidation or severance decision.

We have added to this section a provision allowing the respondent to initiate a consolidation or severance decision by motion, pursuant to a suggestion at the State Bar "Cosmic APA" presentation.

§ 648.130. Default 10/7/92

648.130. (a) Failure of the respondent to serve a responsive pleading or to appear at a prehearing conference or settlement conference or at the hearing is a default.

(b) If the respondent defaults:

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

(2) 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.

(3) 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.

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

(d) 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 on a showing of good cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the respondent to receive notice sent pursuant to Section 613.220.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Comment. Subdivisions (a)-(c) 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. See also Section 613.230 (extension of time). Subdivision (d) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

Staff Note. We have added a reference to "mistake, inadvertence, surprise, or excusable neglect" (CCP § 473) at Professor Ogden's suggestion.

§ 648.140. Open hearings 7/9/92

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

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

(2) The presiding officer determines it is necessary to close the hearing in whole or in part 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. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings.

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)(2) 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).

Staff Note. Professor Ogden would limit the ability to order a closed hearing under this section.

My concern with this section is that there is a public interest, as well as a media interest, in observing and reporting upon agency hearings. While this is less true with entitlement hearings, there would be strong public interest in certain types of license revocation hearings. I would like to see some expression either in the statute, or the comments, of the public and media interest in open agency hearings. For a case raising this issue, see Herald Co. v. Weisenberg, 59 N.Y. 2d 378 (1983).

This concern would be addressed somewhat by the Commission's previous deletion of the provision of this draft that would have allowed closure by agreement of the parties. The staff has also added language to the Comment about the public interest in open hearings.

Professor Ogden would also provide a procedure to object to a decision to close a hearing. It is not clear whether he envisions the objection coming from the agency or a party, or from the public. An objection procedure would necessarily delay things, although that problem may be minimal given the relative rarity of a decision to close

a hearing. The staff suggests we hold this issue for resolution in connection with judicial review generally, and whether there should be principled exceptions to the rule precluding interim review.

§ 648.150. Hearing by electronic means 7/9/92

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 and to observe exhibits.

(b) The presiding officer may not conduct all or part 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 proceeding in the physical presence of all participants.

§ 648.160. Report of proceedings 7/9/92

648.160. (a) Except as provided in subdivision (b), the proceedings at the hearing shall be reported by a stenographic 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, if the presiding officer determines electronic reporting will not provide an adequate record of the proceedings, require stenographic reporting.

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

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

Article 2. Language Assistance

§ 648.210. "Language assistance" 5/1/92

648.210. As used in this article, "language assistance" means oral interpretation or written translation into English of a language other than 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.

§ 648.220. Interpretation for hearing-impaired person 5/1/92

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.

§ 648.230. Application of article 5/1/92

(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.

(c) Nothing in this section prohibits an agency from providing an interpreter during an informal factfinding or informal investigatory hearing.

Comment. Subdivisions (a) and (b) of Section 648.230 restate former Section 11501.5. Subdivision (c) restates a portion of former Section 11500(f).

§ 648.240. Provision for interpreter 7/9/92

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 before commencement of the hearing the party requests language assistance, an agency subject to the language assistance requirement of this article shall provide the party or witness an interpreter approved by the presiding officer.

Comment. Section 648.240 restates 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 5/1/92

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 workers' 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 restates the third, fourth, and fifth sentences of former Section 11513(d).

§ 648.260. Selection of interpreter 5/1/92

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 considered 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 restates the last portion of subdivision (d), and subdivisions (e) and (f) of former Section 11513.

§ 648.270. Duty to advise party of right to interpreter 5/1/92

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 restates former Section 11513(g). See also Section 613.230 (extension of time).

§ 648.280. Confidentiality and impartiality of interpreter 5/1/92

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 restates former Section 11513(h).
Subdivision (b) restates former Section 11513(i).

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 by regulation the agency provides a different burden. Notwithstanding

Section 641.130, the authority of an agency to provide a different burden by regulation extends to a regulation applicable 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). As used in this section, "license" includes "certificate". Section 610.360 ("license" defined).

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 is included among the agencies that 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 612.150 (contrary express statute controls).

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 7/9/92

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

(1) Call and examine witnesses.

(2) Introduce exhibits and examine exhibits introduced by the opposing party.

(3) Cross-examine and confront 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) A party or person identified with a party may be called and examined as if under cross-examination by an adverse party at any time during the presentation of evidence by the party calling the witness.

Comment. Section 648.320 supersedes former Sections 11500(f)(2) and 11513(b). Subdivision (b) is drawn from Evidence Code § 776(a).

§ 648.330. Oral and written testimony 7/9/92

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 claim of 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 and an excerpt with the complete text if available.

Comment. Subdivision (a) of Section 648.330 restates former Sections 11500(f)(1) and 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 and an excerpt with the complete text, "if available". If the original is not available, the copy or excerpt may still be received in evidence, but its probative effect is likely to be weaker than if the original or complete text were available.

For general provisions on oaths, affirmations, and certification of official acts, see Section 613.120.

§ 648.340. Affidavits 7/9/92

648.340. (a) At any time 15 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 or authorized representative] at [here insert address] that you wish to cross-examine the affiant.
>
> To be effective your request must be sent or delivered to [here insert name of proponent or proponent's attorney or authorized representative] on or before [here insert a date seven days after the date of sending or delivery of the affidavit to the opposing party].

(b) Unless the opposing party, within ten 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.

(d) As used in this section, "affidavit" includes declaration under penalty of perjury.

Comment. Section 648.340 restates former Section 11514, except the notice must be served at least 15, rather than ten, days before the hearing, and the opposing party has ten, rather than seven, days to request cross-examination. See also Section 613.230 (extension of time). Subdivision (d) is a specific application of the general rule stated in Code of Civil Procedure Section 2015.5 (affidavit includes declaration under penalty of perjury "under any law of this state").

§ 648.350. Protection of child witnesses 7/9/92

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses and closing the hearing, in a way that is 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 5/1/92

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 rebut the officially noticed matters by evidence or by written or oral presentation of authority, the manner of rebuttal 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 rebut 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).

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 restates 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 proposed 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 restates the first portion of the last sentence of the first paragraph of former Section 11513(c). Under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions.

Staff Note. Professor Ogden would incorporate by reference or list the Evidence Code privileges in this section. The staff would not change this section. It was drafted in its present form by the Law Revision Commission in conjunction with the 1965 enactment of the Evidence Code. The Commission's comment states that "under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions." A general reference is preferable to a specific listing since the Evidence Code may be amended, but the specific listing in this section may be neglected and fail to be revised. We have picked up the old Law Revision Commission Comment in this draft.

§ 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 restates the third sentence of former Section 11513(c).

It should be noted that by regulation 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 than the one provided in this section. See Section 648.110 (provisions may be modified or made inapplicable by regulation) and Comment. See also Section 641.130 (modification or inapplicability of statute by regulation).

Staff Note. The Commission has deferred decision between the alternatives for determination in connection with judicial review generally.

Professor Ogden prefers alternative (b)(2). It "is consistent with the overwhelming majority of case law on the question of raising issues on appeal, not only in administrative law but also in civil and criminal litigation. The reasons for this are very practical. You want to give the agency or lower court the opportunity to correct their own mistakes first, before the costly and time consuming appellate process is invoked." His comments do not address the concern that it may be impractical to raise this issue at the hearing level because it is does not become clear until after the hearing is over that the residuum rule has been violated and the decision maker has based a decision on uncorroborated hearsay evidence.

§ 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.

§ 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 paragraph (2). 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 restates former Section 11513(k). Paragraph (b)(1) restates the second paragraph of former Section 11513(c). Paragraph (b)(2) restates former Section 11513(j). This section applies notwithstanding agency rules to the contrary.

Article 5. Ex Parte Communications

§ 648.510. Scope of article 9/11/92

648.510. Nothing in this article limits the authority of an agency to do either of the following by regulation:

(a) Impose greater restrictions on ex parte communications than are provided in this article.

(b) In the case of a proceeding that is nonprosecutorial in character, impose different restrictions on ex parte communications than are provided in this article, so long as the restrictions ensure that the content of an ex parte communication is disclosed on the record and all parties have an opportunity to comment on the communication.

Comment. Under Section 648.510(a) an agency may adopt more stringent requirements if appropriate to its hearings. Subdivision (b) permits different approaches in the case of nonprosecutorial adjudications. See, e.g., Cal. P.U.C. R. 84-12-0128.

Nothing in this article limits the authority of the presiding officer to conduct an in camera examination of proffered evidence. Cf. Section 645.330 (lodging discovery matters with court).

An agency may not by regulation provide greater or different ex parte communication rules under this section if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130.

§ 648.520. Ex parte communications prohibited 9/11/92

648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, between the following persons without notice and opportunity for all parties to participate in the communication:

(1) Between the presiding officer and a party or the attorney or other authorized representative of a party, including an employee of an agency that is a party.

(2) Between the presiding officer and an interested person outside an agency that is a party.

(b) A communication otherwise prohibited by this section is permissible in any of the following circumstances:

(1) The communication is for the purpose of assistance and advice to the presiding officer by an employee of the agency that is a party or the attorney or other authorized representative of the agency, provided the assistance or advice does not violate Section 643.320 (separation of functions).

(2) The proceeding is nonprosecutorial in character, provided the content of the communication is disclosed in the manner prescribed in Section 648.540 and all parties are given an opportunity to comment on it.

(3) The communication is required for the disposition of an ex parte matter specifically authorized by statute.

(4) The communication concerns a matter of procedure or practice that is not in controversy.

Comment. Subdivision (a) of Section 648.520 is drawn from subdivisions (a) and (b) of former Section 11513.5. See also 1981 Model State APA § 4-213(a), (c). This provision also applies to the reviewing authority. Section 649.230 (review procedure). Subdivision (a) applies to communications initiated by the presiding officer as well as communications initiated by others.

Subdivision (a) is not intended to apply to communications made to or by a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service. Subdivision (b)(4). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case. However, it should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.340 (staff assistance for presiding officer).

Subdivision (a) does not preclude ex parte contacts between the agency head making a decision and any person who presided at a previous stage of the proceeding. This reverses a provision of former Section 11513.5(a).

The reference in subdivision (a)(1) to the attorney or representative of a party is consistent with Section 613.340 (authority of attorney or other representative of party).

The reference in subdivision (a)(2) to an "interested person outside the agency" replaces the former reference to a "person who has a direct or indirect interest in the outcome of the proceeding", and is drawn from federal law. See Federal APA § 557(d)(1)(A); see also PATCO v. Federal Labor Relations Authority, 685 F. 2d 547 (D.C. Cir. 1982) (construing the federal standard to include person with an interest beyond that of a member of the general public).

Subdivision (b)(1) qualifies the provision of this section that otherwise would preclude a presiding officer from obtaining advice from expert agency personnel even though not involved in the matter under adjudication.

§ 648.530. Prior ex parte communication 1/24/92

648.530. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication in the manner prescribed in Section 648.540 and all parties shall be given an opportunity to comment on it.

Comment. Section 648.530 is drawn from former Section 11513.5(c), but is limited to communications received during pendency of the proceeding. See also 1981 Model State APA § 4-213(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure). A proceeding is pending on issuance of an initial pleading. Section 642.310 (proceeding commenced by initial pleading).

§ 648.540. Disclosure of ex parte communication received 9/11/92

648.540. (a) A presiding officer who receives a communication in violation of this article shall make all of the following a part of the record of the proceeding:

(1) If the communication is written, the writing and any written response to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made, and the identity of each person from which the presiding officer received the communication.

(b) If an agency regulation requires disclosure on the record by a party that makes an ex parte communication rather than by the presiding officer, the presiding officer shall review the disclosure for accuracy before it is made a part of the record of the proceeding.

(c) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record. A party that requests an opportunity to comment on the communication within ten (10) days after notice of the communication shall be allowed to comment.

Comment. Section 648.540 is drawn from former Section 11513.5(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Section 648.540 does not preclude ex parte communications with assistants, subject to separation of functions limitations. See Sections 648.520 and 643.320. Agency rules may go further and prohibit the participation of a staff adviser who has received ex parte contacts. Section 648.510 (scope of article).

See also Section 613.230 (extension of time).

§ 648.550. Disqualification of presiding officer 10/7/91

648.550. Receipt by the presiding officer of a communication in violation of this section may provide the basis for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

Comment. Section 648.550 is drawn from former Section 11513.5(e). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Section 648.550 permits the disqualification of a presiding officer if necessary to eliminate the effect of an ex parte communication. For the disqualification procedure, see Section 643.230.

In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Issuance of a protective order under this section is permissive, not mandatory, and is therefore within the discretion of a presiding officer who has knowledge of the improper communication.

Staff Note. Professor Ogden is concerned about possible abuse by litigants to seek disqualification of a presiding officer by deliberately inducing an ex parte communication. He suggests this could be curbed by providing sanctions against persons who engage in improper ex parte communications. The Commission has already decided to do this in Section 648.610 (misconduct in proceeding), providing for the contempt sanction for violation of the ex parte communication prohibition.

Article 6. Enforcement of Orders and Sanctions

§ 648.610. Misconduct in proceeding 9/11/92

648.610. A person is subject to the contempt sanction for any of the following in a proceeding before an agency under this part:

(a) Disobedience of or resistance to a lawful order.

(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.

(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.

(2) Breach of the peace, boisterous conduct, or violent disturbance.

(3) Other unlawful interference with the process or proceedings of the agency.

(d) Violation of the prohibition of ex parte communications under Section 648.520.

Comment. Section 648.610 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new.

§ 648.620. Contempt 9/11/92

648.620. (a) The presiding officer or reviewing authority may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge 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.

Comment. Section 648.620 restates a portion of former Section 11525 of the Government Code, but vests certification authority in the presiding officer or reviewing authority. For monetary sanctions for bad faith tactics, see Section 648.630. For enforcement of discovery orders, see Sections 645.310-645.360.

§ 648.630. Monetary sanctions for bad faith actions or tactics 9/11/92

648.630. (a) The presiding officer or agency may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to administrative and judicial review in the same manner as a decision in the proceeding, and is enforceable by writ of execution, by the contempt sanction, or by other proper process.

Comment. Section 648.630 is new. It permits monetary sanctions against a party (including the agency) for bad faith tactics. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

For authority to seek the contempt sanction, see Section 648.620. For enforcement of discovery orders, see Sections 645.310-645.360.

Staff Note. This section picks up the bad faith actions or tactics standards of Code of Civil Procedure Section 128.5. Professor Ogden suggests it would be clearer to use FRCP Rule 11 certification that signing a pleading, motion, or other paper means that the pleader has read the document, that based on a reasonable inquiry, the document is well grounded both factually and legally, and that it is not filed for any improper purpose. "This sets an objective standard that provides fairly clear bright lines for attorneys."

The staff agrees this would be helpful, but we are concerned that it is more restrictive than Code of Civil Procedure Section 128.5, which includes but is not limited to making and opposing motions and pleadings.

CHAPTER 9. DECISION

Article 1. Issuance of decision

§ 649.110. Proposed and final decisions 9/11/92

649.110. (a) If the presiding officer is the agency head, the presiding officer shall issue a final decision within 100 days after the case is submitted or other time provided by agency regulation.

(b) If the presiding officer is not the agency head, the presiding officer shall deliver a proposed decision to the agency head within 30 days after the case is submitted or other time provided by agency regulation, and make proof of delivery. Failure of the presiding officer to deliver a proposed decision within the time required does not prejudice any rights of the agency in the case.

(c) A proposed decision becomes a final decision at the time provided in Section 649.150.

Comment. Subdivision (a) of Section 649.110 restates the second sentence of former Section 11517(d), with the addition of authority for an agency to provide a different decision period. See also 1981 Model State APA § 4-215(a).

The first sentence of subdivision (b) restates the first sentence of former Section 11517(b), with the addition of authority for an agency to provide a different decision period. The second sentence makes clear that the agency is not accountable for the presiding officer's failure to meet required deadlines. Nothing in subdivision

(b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a proposed decision.

A case is submitted for purposes of this section when the hearing record is closed, in the sense that evidence has been taken and briefs submitted, or as otherwise specified in agency regulations.

The time limits in this section may be modified by another statute or by agency regulation. See Section 612.150 (contrary express statute controls). The agency may not by regulation provide another time under this section if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130.

For the form and contents of a decision, whether proposed or final, see Section 649.120.

Either a proposed or final decision may be subject to administrative review. Section 649.210 (availability and scope of review). See also Section 610.310 ("decision" defined). Errors in a final decision may be corrected under Section 649.170 (correction of mistakes in final decision). A proposed decision becomes final unless it is subjected to administrative review under Article 8 (commencing with Section 649.210).

§ 649.120. Form and contents of decision 9/11/92

649.120. (a) A proposed decision or final decision shall be in writing and shall include a statement of the factual and legal basis and reasons for the decision as to each of the principal controverted issues.

(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) The statement of the factual basis for the proposed or final decision 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 facts known to the presiding officer 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. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

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

Comment. Section 649.120 supersedes the first two sentences of former Sections 11500(f)(4) and 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).

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 reasons for the decision is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the reasons in the agency's decision facilitates administrative and judicial review; helps clarify the effect of any precedential decision, see Article 3 (commencing with Section 649.310); and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings.

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.

The first sentence of subdivision (c) 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 second sentence codifies existing practice in some agencies. Third sentence is drawn from 1981 Model State APA § 4-215(d).

Staff Note. At the State Bar "Cosmic APA" presentation, the concern was expressed with subdivision (a) that, although including reasons is good practice, a legal requirement that reasons be included is inadvisable. It may generate litigation over the sufficiency of the reasons stated in the decision, even though the decision is clearly correct on the record. Suppose the right decision is made, but for the wrong reasons; must the decision be reversed, or the matter reheard?

Concerns were also expressed about the proposal to require that the presiding officer's fact determinations based on credibility of a witness be given "great weight" on review:

(1) A presiding officer who wants to make the decision reversal proof could easily do so by the device of basing the decision on "credibility" determinations.

(2) The rule could allow a biased administrative law judge's decision to go unchecked, since the agency head is precluded from rehearing the evidence de novo and making its own credibility determinations.

§ 649.130. Issuance of proposed decision 10/31/91

649.130. (a) Within 30 days after delivery of a proposed decision to the agency head or other time provided by agency regulation, the agency head shall issue the proposed decision as a public record, and serve a copy of the proposed decision on each party.

(b) Issuance and service under this section is not an adoption of a proposed decision by the agency head. Nothing in this section limits the time within which a proposed decision becomes a final decision under Section 649.150.

Comment. Subdivision (a) of Section 649.130 restates the second paragraph of former Section 11517(b) and extends it to hearings not required to be conducted by an OAH administrative law judge, along with the authority of those agencies to vary the time allowed for issuance. The agency may not by regulation provide another time if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130. Service on a party is accomplished by service on the party's attorney or authorized representative if the party has an attorney or authorized representative of record in the proceeding. Section 613.210 (service).

Subdivision (b) makes clear the distinction between the issuance requirement for a proposed decision (this section) and the time within which the agency must act before a proposed decision becomes final (Section 649.150). The time within which a proposed decision must be issued does not affect the time the agency has for acting on the proposed decision.

§ 649.140. Adoption of proposed decision 10/31/91

649.140. (a) Within 100 days after delivery of the proposed decision to the agency head or other time provided by agency regulation, the agency head may summarily do any of the following:

(1) Adopt the proposed decision in its entirety as a final decision.

(2) Make technical or other minor changes in the proposed decision and adopt it as a final decision. Action by the agency head under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(3) Reduce or otherwise mitigate a proposed remedy and adopt the balance of the proposed decision as a final decision.

(b) In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

Comment. Section 649.140 is drawn from the second paragraph of former Section 11517(b). The authority in subdivision (a)(2) to adopt "with changes" supplements the general authority of the agency head under Section 649.170 (correction of mistakes and clerical errors in final decision).

Mitigation of a proposed remedy under subdivision (a)(3) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity.

It should be noted that the adoption procedure is available to an agency as an alternative to review procedures under Article 8 (commencing with Section 649.210) (administrative review of proposed decision).

The agency may not by regulation provide another time under this section if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130.

§ 649.150. Time proposed decision becomes final 9/11/92

649.150. Unless adopted as a final decision under Section 649.140 or reviewed under Article 8 (commencing with Section 649.210), a proposed decision becomes a final decision at the earliest of the following times:

(a) If pursuant to Section 649.210 by regulation the agency precludes administrative review, at the time the proposed decision is issued by the presiding officer.

(b) If pursuant to Section 649.210 by regulation the agency limits administrative review, at the time limited in the regulation.

(c) If the agency head in the exercise of discretion denies administrative review, at the time administrative review is denied.

(d) One hundred days after delivery of the proposed decision to the agency head, or longer time provided by agency regulation.

Comment. Section 649.150 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b). The time within which a proposed decision becomes final is not affected by the time within which a copy of the proposed decision must be issued by the agency as a public record. See Section 649.130 & Comment (issuance of proposed decision).

An agency that wishes to reject a proposed decision must do so through the administrative review procedure. Cf. Section 649.240 (decision or remand).

The 100-day period after which a proposed decision becomes final may not be extended by agency regulation in a hearing 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).

§ 649.160. Service of final decision on parties 9/11/92

649.160. (a) The agency shall serve a copy of the final decision in the proceeding on each party within 10 days after the final decision is issued. The final decision shall state its effective date and shall be accompanied by a statement of the time within which judicial review of the decision may be initiated. Failure to state the time within which judicial review may be initiated extends the time to six months after service of the decision.

(b) If a proposed decision is issued and served on the parties in the proceeding and the agency head adopts the proposed decision as a final decision under Section 649.140 or the proposed decision becomes a final decision by operation of law under Section 649.150, the agency may satisfy subdivision (a) by service of a notice that states the effective date and judicial review period and that the proposed decision is the final decision or, if the final decision makes technical or other minor changes in the proposed decision, that the proposed decision is the final decision, with specified changes. A notice under this subdivision may be served simultaneously with service of a copy of the proposed decision under Section 649.130.

(c) The final decision shall be issued immediately by the agency as a public record.

Comment. Section 649.160 supersedes the third sentence of former Section 11517(b), former Section 11517(e), and the third sentence of former Section 11518. For the manner of service (including service on a party's attorney or authorized representative of record instead of the party), see Section 613.210.

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

Staff Note. The judicial review period has not yet been addressed.

§ 649.170. Correction of mistakes and clerical errors in final decision 10/31/91

649.170. (a) Within 15 days after service of a copy of a final decision on a party, the party may apply to the agency head for correction of a mistake or clerical error in the final decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking administrative or judicial review.

(b) The agency head may refer the application to the presiding officer who formulated the proposed or final decision or may delegate its authority under this section to one or more persons.

(c) The agency head may deny the application, grant the application and modify the final decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency head does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency head, on its own motion or on motion of the presiding officer, from modifying a final decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the final decision.

(e) The agency head shall, within 15 days after correction of a mistake or clerical error in a final decision, serve a copy of the correction on each party on whom a copy of the final decision was previously served.

(f) By regulation the agency may provide a period longer than 15 days for proceedings under this section, except that the regulation shall not permit proceedings under this section after initiation of administrative or judicial review.

Comment. Section 649.170 supersedes former Section 11521 (reconsideration). It is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 610.460 ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the final decision without the need for administrative or judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the final decision. This supplements the authority in Section 649.140(a)(2) of the agency head to adopt a proposed decision with technical or other minor changes.

For general provisions on notices to parties, see Sections 613.210 (service) and 613.220 (mail). The times provided in this section are extended in the case of service by mail or other means. Section 613.230 (extension of time).

Article 2. Administrative Review of Decision

§ 649.210. Availability and scope of review 9/11/92

649.210. (a) Subject to subdivision (b), an agency may review a proposed or final decision on its own motion or on petition of a party. In the exercise of discretion under this subdivision, the agency head may do any of the following with respect to administrative review of the proposed or final decision:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(b) By regulation an agency may mandate administrative review, or may preclude or limit administrative review, of proposed or final decisions. Notwithstanding Section 641.130, this subdivision extends to an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 649.210 is drawn from 1981 Model State APA § 4-216(a)(1)-(2). A proposed decision that is not reviewed becomes final at the time specified in Section 649.150.

This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. See, e.g., Greer v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Education Code § 13443).

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 is included among the agencies that may by regulation mandate, preclude, or limit administrative review despite the general rule of Section 641.130 (modification or inapplicability of statute by regulation).

§ 649.220. Initiation of review 9/11/92

649.220. (a) On service of a copy of a proposed or final decision that is subject to review under Section 649.210, but not later than the effective date of the decision stated in the decision or if the effective date is not stated in the decision not later than 30 days after service:

(1) A party may petition the agency head for administrative review of the proposed or final decision. The petition shall state the basis for review.

(2) The agency head on its own motion may give written notice of administrative review of the proposed or final decision. The notice shall be served on each party and, if review is limited to specified issues, shall identify the issues for review.

(b) By regulation an agency may provide a different period for initiation of administrative review than that provided in this section. Notwithstanding Section 641.130, this subdivision extends to an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 649.220 supersedes a portion of the first sentence of former Section 11517(d). See also 1981 Model State APA § 4-216(b)-(c). For the manner of service, see Section 613.210. See also Section 613.230 (extension of time).

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 is included among the agencies that may by regulation provide a different period for initiation of administrative review than that provided in this section despite the general rule of Section 641.130 (modification or inapplicability of statute by regulation).

§ 649.230. Review procedure 9/11/92

649.230. (a) The reviewing authority shall decide the case on the record, including a transcript or a summary of evidence, a recording of proceedings, or other record used by the agency, of the portions of the proceeding under review that the reviewing authority considers necessary. A copy of the record shall be made available to the parties. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

(b) The reviewing authority shall allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority.

(c) The reviewing authority may remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed decision, if reasonably available.

(d) The reviewing authority is subject to the same provisions governing qualifications, separation of functions, ex parte communications, and substitution that would apply to the presiding officer in the hearing.

Comment. Section 649.230 restates the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence (except evidence unavailable at the hearing before the presiding officer). *Cf.* Code Civ. Proc. § 1094.5(e); see also 1981 Model State APA § 4-216(d)-(f). The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

Subdivision (a) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation.

Subdivision (d) extends to the reviewing authority the provisions of this part governing qualifications (Sections 643.210-643.230), separation of functions (Sections 643.310-643.340), ex parte communications (Sections 648.510-648.550), and substitution (Section 643.130), that are applicable to the presiding officer.

If further proceedings are required, they may be obtained on remand under Section 649.240.

§ 649.240. Decision or remand 10/31/91

649.240. (a) Within 100 days after presentation of briefs and arguments, or if a transcript is ordered, after receipt of the transcript, or other time provided by agency regulation, the reviewing authority shall do one of the following:

(1) Issue a final decision disposing of the proceeding.

(2) Remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed or final decision, if reasonably available.

(3) Reject the proposed or final decision, without remand. The reviewing authority shall dispose of the proceeding within a reasonable time after rejection.

(b) The time under subdivision (a) may be waived or extended with the written consent of all parties or for good cause.

(c) A final decision or a remand for further proceedings shall be in writing and shall include, or incorporate by express reference to the original proposed or final decision, all the matters required by Section 649.120 (form and contents of decision). A remand for further proceedings shall specify the ground for remand and shall include precise instructions to the presiding officer of the action required.

(d) The reviewing authority shall cause a copy of the final decision or remand for further proceedings to be served on each party.

Comment. Section 649.240 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j).

Remand is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

Specification of the ground for remand must be precise, but need not include the same details of explanation as a final decision would contain. The specification may include such matters as the need for additional proceedings resulting from newly discovered evidence.

The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.210.

The agency may not by regulation provide another time under subdivision (a) if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130.

§ 692.250. Procedure on remand 6/14/91

692.250. (a) On remand, the reviewing authority may order authorized and appropriate temporary relief.

(b) The presiding officer shall prepare a revised proposed or final decision on remand based on the additional evidence and the record of the prior hearing.

(c) The revised proposed or final decision on remand shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original proposed or final decision.

Comment. Subdivision (a) of Section 692.250 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) restate the third and fourth sentences of former Section 11517(c). For the record in the proceeding, see Section 649.230 (review procedure). For the manner of service, see Section 613.210.

Article 3. Precedent Decisions

§ 649.310. Precedential effect of decision 9/11/92

649.310. A decision may not be expressly relied on as precedent unless it has been designated as a precedent decision by the agency.

Comment. Section 649.310 is new.

§ 649.320. Designation of precedent decision 9/11/92

649.320. (a) An agency shall designate as precedential a final decision or part of a final decision that contains a significant legal or policy determination of general application that is likely to recur.

(b) Designation of a decision or part 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.

(c) An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as precedential is not subject to judicial review.

Comment. Section 649.320 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 649.320 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.

This section applies notwithstanding any contrary implication in Section 11347.5 ("underground regulations"). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

§ 649.330. Index of precedent decisions 9/11/92

649.330. (a) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update.

(b) The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

Comment. The index required by Section 649.330 is a public record, available for public inspection and copying.

Staff Note. The Commission asked to see a draft of the provisions set out in this section.

§ 649.340. Article not retroactive 5/1/92

649.340. (a) This article applies to final decisions issued on or after January 1, 1996.

(b) Nothing in this article precludes an agency from designating as precedential a final decision issued before January 1, 1996.

Comment. Section 649.340 minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

CHAPTER 10. IMPLEMENTATION OF DECISION

§ 650.110. Effective date of decision 9/11/92

650.110. (a) The decision is effective on the date stated in the decision or, if the effective date is not stated in the decision, 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 decision unless the party has been served with or has actual knowledge of the final decision.

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

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Sections 641.310-641.370 (emergency decision).

Comment. Subdivision (a) of Section 650.110 restates subdivision (a) and a portion of the first sentence of subdivision (b) of former Section 11519, with the addition of the provision for statement of the effective date in the decision. The remainder of the section is drawn from 1981 Model State APA § 4-220(c)-(d). The section distinguishes between the effective date of a decision and the time when it can be enforced. For provisions on stays, see Section 650.120.

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.

§ 650.120. Stay 5/1/92

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

Comment. Section 650.120 restates the first sentence of former Section 11519(b).

§ 650.130. Probation 5/1/92

650.130. (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 650.130 restates the last sentence of former Section 11519(b). Subdivision (b) restates former Section 11519(d).