#N-100

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Memorandum 93-13

Subject: Study N-100 - Administrative Adjudication (Revised Preliminary Part of Tentative Recommendation)

Attached to this memorandum is a narrative description of the proposed recommendations on administrative adjudication. We are attempting to keep the description current as the Commission reconsiders earlier decisions. If you note an area where the Commission has made a change in its recommendation that is not reflected in the narrative description, please call it to the staff's attention so it can be conformed. Likewise, if you have any other suggestions or corrections for the narrative description, we would appreciate receiving them.

The narrative description will be included with the draft of the proposed legislation when the Commission circulates for comment its tentative recommendation on administrative adjudication.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

nsl24
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# ADMINISTRATIVE ADJUDICATION

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## INTRODUCTION

### History of Project

The Legislature in 1987 authorized the California Law Revision Commission to make a study of whether there should be changes to administrative law.[1] The Commission has divided the study into four phases, in the following order of priority: (1) administrative adjudication, (2) judicial review, (3) rulemaking, (4) non-judicial oversight.

This is the first in a series of reports on the administrative law study. It presents the Commission's tentative recommendations concerning administrative adjudication. Professor Michael Asimow of UCLA Law School served as the Commission's consultant on this phase of the study. The Commission also made extensive use of materials from other jurisdictions, including the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws,[2] and the federal Administrative Procedure Act.[3]

### Existing California Law Governing Administrative Adjudication[4]

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1. 1987 Cal. Stat. res. ch. 47; see *Annual Report,* 19 Cal. L. Revision Comm'n Reports 501, 517 (1988).

2. Referred to in this report as the "1981 Model State APA".

3. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5362, 7521 (1976), originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. The federal statute is referred to in this report as the "federal APA".

4. The description of existing California law governing administrative adjudication is drawn from the report on the matter prepared for the Commission by its consultant. See Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1071-73 (1992).

California's Administrative Procedure Act[5] was enacted in 1945[6] in response to a study and recommendations by the Judicial Council.[7] The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.[8] The decision to limit coverage to licensing agencies was not based on a principled decision that an administrative procedure act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other agencies were needed, but it was not prepared to make recommendations with respect to them.[9]

The Judicial Council's report and the resulting legislation was a pioneering effort. The creation of a central panel of hearing officers, for example, was an idea that was far ahead of its time. There were no comparable administrative procedure acts at that time and the idea of an administrative procedure code applicable to agencies in general was untried and controversial. The Judicial Council and the

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5. The Administrative Procedure Act appears at Government Code Sections 11340-11528. Adjudication is governed by Sections 11500-11528. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11370.5.

6. 1945 Cal. Stats. ch. 867. Provisions on rulemaking were added in 1947 and substantially revised in 1979. 1947 Cal. Stats. ch. 1425; 1979 Cal. Stats. ch. 567. The adjudication provisions have had only minor revisions since 1945.

7. Judicial Council of California, Tenth Biennial Report (Dec. 31, 1944). See Clarkson, *The History of the California Administrative Procedure Act*, 15 Hast. L. J. 237 (1964).

8. The Judicial Council recommended a scheme of judicial review applicable to all administrative adjudications, not just those of licensing agencies. See Judicial Council of California, Tenth Biennial Report 26 (Dec. 31, 1944). This statute was the precursor of present Code of Civil Procedure Section 1094.5.

9. Judicial Council of California, Tenth Biennial Report 10, 28 (Dec. 31, 1944). The Judicial Council expressed hope that its work would be adapted to nonlicensing agencies such as tax, workers' compensation, public utilities, and benefit adjudications. These agencies were not covered because of practical limitations on the resources of the Judicial Council. See Kleps, *California's Approach to the Improvement of Administrative Procedure*, 32 Calif. L. Rev. 416 (1944).

Legislature moved cautiously, but the Administrative Procedure Act was well conceived and has served well in the 45 years since it was enacted.

During that time, the provisions of the Administrative Procedure Act relating to adjudication and judicial review have been little changed.[10] Yet the regulatory and social welfare responsibilities of state government have broadened in ways unforeseen in 1945 and the scope of administrative adjudication is vastly greater now.

The California Administrative Procedure Act prescribes a single and unvarying mode of formal, trial-type adjudicatory procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.[11] The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.[12] There is little or no flexibility in the system to accommodate the many differing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only specified named agencies, and it covers only those functions required by the agency's organic statute.[13] Many important California agencies are wholly

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10. The Administrative Procedure Act now covers a few agencies engaged in prosecutory functions that are not concerned with occupational licensing, such as the Fair Political Practices Commission. Also the act has been amended to include provisions for interpreters and to ban ex parte contacts with administrative law judges. Gov't Code §§ 11500(g), 11501.5, 11513(d)-(i), 11513.5.

The provisions on rulemaking were completely rewritten in 1979 and cover almost all California agencies.

11. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. Government Code § 11504.

12. Gov't Code § 11517(b),(c). Thus the final decision rests with the agency heads who are also responsible for rulemaking and law enforcement. With very few exceptions (the only known exception is the Alcoholic Beverage Control Appeals Board), adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act.

13. Government Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovals. Bus. & Prof. Code §§ 485, 495. A list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice (Cal. Cont. Ed. Bar, Supp. 1991)

uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.[14]

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings. The only unifying theme is that adjudication in these agencies is not conducted by an administrative law judge assigned by the Office of Administrative Hearings. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.[15]

Comprehensive Revision of Administrative Adjudication Statute

The Law Revision Commission recommends enactment of a new California Administrative Procedure Act. The new act builds on the existing Administrative Procedure Act, but takes into account the many developments that have occurred in the 45 years since enactment of California's groundbreaking law. This period has seen an explosive growth of our knowledge and experience in administrative law and procedure, including development of well-articulated statutes in other states and at the federal level, as well as promulgation of several generations of model State Administrative Procedure acts.

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14. For example, the Administrative Procedure Act covers only certain adjudicatory functions of the Departments of Insurance and Corporations, Department of Motor Vehicles, and the Horse Racing Board.

15. In some agencies (such as the Coastal Commission), there is no initial decision; the agency head or heads hear the evidence and argument themselves and their initial decision is also the final decision.

Comprehensive revision of the administrative procedure statute will enable California to take full advantage of these major developments in the law. It will enable complete and thorough procedural reform that could not easily be achieved on a piecemeal basis. And it will enable development of a broad and flexible statute that has the potential to be applied to a wider range of agencies and functions than are now governed by the Administrative Procedure Act.

Consolidation of Law Governing Administrative Procedure

A major defect of the existing California law governing administrative adjudication by agencies is that the law as to the hearing procedures applicable in an individual agency may be relatively inaccessible. It is not atypical to find an agency's procedure governed by a combination of general procedural statutes, special statutes applicable to the particular agency, regulations adopted by the agency, rules of procedure that have not been adopted by regulation, and unwritten practices followed by the agency.[16] This situation makes it difficult in many cases for a person having to deal with the administrative procedures of an agency to know exactly what to expect and how to proceed.

One objective of the proposed revision of the California Administrative Procedure Act is to consolidate the law governing the procedures of an agency so that it is readily accessible to those having business before the agency. The law should be largely stated in the general administrative procedure act. Any variants of the law necessary for proceedings before a particular agency should be stated in the body of regulations adopted by that agency. This will ensure that a person having business before that agency will be able readily to find the governing administrative procedure.

Modification of Law by Agency Regulation

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16. Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1077-78 (1992).

The proposed administrative procedure act is designed to be sufficiently broad to accommodate most hearings of most agencies. Nonetheless, there are situations where it is clear that the provisions of the statute should be modified for the circumstances of a particular agency or type of hearing. In these situations, the statute permits the agency to modify the rule by regulation.

As a general rule, modification by regulation is permitted only in agencies whose hearings are not conducted by hearing personnel of the Office of Administrative Hearings. A uniform procedure applies now in those hearings, which are under the existing administrative procedure act, and that uniformity should be maintained to the extent practicable.

Adoption of a regulation is the only means authorized for an agency to depart from the general administrative procedure act. This compels an agency to conduct a rulemaking proceeding at which all constituencies will have an opportunity to call to the agency's attention inadequate procedures.

## Transitional Provisions

The proposed law has a deferred operative date of one year. This will enable agencies to promulgate any regulations necessary for smooth operation under the new statute. The new statute and implementing regulations would govern only cases initiated after the operative date. Pending cases would continue to be governed by former law.

# APPLICATION OF STATUTE

## Application to All State Agencies

The existing scheme of having different rules of administrative procedure applicable to different agencies, or in some cases having different rules applicable to the same agency depending on the type of proceeding, makes it difficult for the public and for practitioners who must deal with administrative agencies. The situation is aggravated by the fact that although the Administrative Procedure Act is readily accessible, other applicable rules of administrative procedure may not

be. It is often the case that the most important elements of an agency's procedural code are not written.[17]

The present system confers an advantage on agency staff and specialists who often deal with the agency or are former staff members or agency heads. They are familiar with the unwritten procedures and precedents and traditional ways of resolving issues. They know about the unwritten exceptions and ways of avoiding obstacles. Such a system seriously disfavors inexperienced advocates and the clients they represent, particularly community or public interest organizations that do not have access to the few experts in the procedure of a particular agency.

Uncodified procedures may be arbitrarily or unevenly applied because staff members may adhere to them or make exceptions to them as they feel is proper. In many cases, staff members would like to improve agency procedure, but agency heads resist changes or ignore established procedure. Since no one is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

When each agency has its own procedural law, the quality of judicial review is also degraded. For example, when a court engages in judicial review of agency action and a procedural issue is drawn into question, the court has recourse only to precedents relating to that agency, if there are any. Even though the same problem is clearly dealt with by the Administrative Procedure Act and there is a well

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17. Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1077 (1992):

> Nowhere is it written that outsider ex parte contacts with the agency heads are tolerated, yet they are in some agencies. The extent to which agency functions are internally separated remains obscure, as does the process whereby agency heads reconsider ALJ decisions. Alternatively, the regulations may provide for procedures that are in fact never used. Nowhere are the rules about discovery stated. The factors that an agency uses to make particular kinds of decisions are seldom reduced to regulations or guidelines or made available through a system of adjudicatory precedents. Essentially, a great deal of the substantive law and procedure of the non-APA agencies is accessible only through the institutional memory of the staff.

developed scheme of precedents relating to that problem, the court must reinvent an appropriate independent result.

For these reasons the Law Revision Commission recommends expansion of the Administrative Procedure Act to govern the hearing procedures of all state agencies.[18] In order to accomplish this result, it is necessary that the act be sufficiently flexible to accommodate all the variant types of proceedings engaged in by the agencies. The Commission believes that the proposed new California Administrative Procedure Act achieves this objective, as explained below. Of course, there are special cases where a limited exception is warranted or a special procedure is necessary. These cases are also noted below, but they constitute the exception rather than the rule.

Definition of "State Agency"

As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the result that it is unclear whether their administrative adjudications are to be governed by the new Administrative Procedure Act. The new act deals with these situations so as to effect the broadest possible coverage:

(1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the new act applies.[19]

(2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the new act.[20]

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18. This recommendation is limited to state agencies. Extension of the Administrative Procedure Act to local agencies is beyond the scope of the present study. [*But see forthcoming recommendations on Judicial Review.*]

19. This provision is drawn from 1981 Model Act § 1-102(1).

20. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501.

The new act also authorizes local agencies voluntarily to adopt the provisions of the new act. This may be useful for a local agency that needs administrative adjudication rules but does not have the resources or desire to formulate its own procedural code. Adoption of the new act will ensure the local agency of workable procedures that satisfy due process of law.

Separation of Powers

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs.[21]

The Legislature. The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its members and expulsion of members,[22] determination of ethics violations of members,[23] impeachment of state officers and judges,[24] and confirmation of gubernatorial appointments.[25] These judgments are politically sensitive in nature, and the procedure for arriving at them is not susceptible to formalization but must be left to the political judgment of the Legislature based on its determination of the propriety of the procedure for each of these decisions.

Exclusion of the Legislature from coverage of the new act would not frustrate the objective of a uniform body of administrative procedural law applicable to all state agencies, since the adjudicative

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21. The scope of the exemption may depend on whether a rulemaking or adjudicatory function of the government head is involved. The Law Revision Commission has not yet reviewed the rulemaking function.

22. Cal. Const. Art. 4, § 5.

23. Gov't Code §§ 8940-55 (Joint Legislative Ethics Committee).

24. Cal. Const. Art. 4, § 18.

25. See, e.g., Cal. Const. Art. 4, § 20 (approval by Senate of gubernatorial Fish and Game Commission appointees; removal by concurrent resolution adopted by each house).

decisions made by the Legislature are not the type that impact the relations between the average citizen and the state bureaucracy.

The Judicial Branch. The judicial branch of state government includes, besides the court system,[26] the Judicial Council,[27] the Commission on Judicial Appointments,[28] the Commission on Judicial Performance,[29] and the Judicial Criminal Justice Planning Committee.[30]

With respect to adjudicatory functions of the agencies within the judicial branch:

(1) The Judicial Council does not conduct constitutionally or statutorily required adjudicatory hearings.

(2) The Commission on Judicial Appointments conducts hearings to make judicial appointment confirmation decisions that are vested in the discretion of the commission and are political in nature. The administrative adjudication provisions of the new act would be inappropriately applied to them.

(3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the Judicial Council.[31]

(4) The Judicial Criminal Justice Planning Committee does not conduct constitutionally or statutorily required adjudicatory hearings.

Since the judicial branch agencies either do not conduct constitutionally or statutorily required administrative hearings, or

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26. The court system in California consists of the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. Cal. Const. Art. 6, § 1.

27. Cal. Const. Art. 6, § 6.

28. Cal. Const. Art. 6, § 7.

29. Cal. Const. Art. 6, § 7.

30. Penal Code § 13830.

31. Cal. Const. Art. 6, § 18(h) ("The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."). The Judicial Council Rules of Court provide procedures at Rules 901-922.

the hearings they do conduct are or should be constitutionally exempt, the new Administrative Procedure Act has been drafted to exempt the entire judicial branch (not just the courts) from its application.

The Governor's Office. Although the Administrative Procedure Act is designed primarily for executive branch agencies, the head of the executive branch--the Governor and the Governor's executive office--must be able to make the kinds of political decisions necessary to run the executive branch effectively, free of administrative procedure act formalities in a way that appears appropriate to the Governor. The Administrative Procedure Act maintains the integrity of the Governor and Governor's office by exempting it from application of the act.[32]

University of California

Article 9, Section 9 of the California Constitution makes the University of California independent and free of legislative control.[33] Although the Commission's fundamental recommendation is that the new Administrative Procedure Act should apply to all agencies

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32. There are a few exceptions to this general rule. See, e.g., Bus. & Prof. Code § 106.5 ("The proceedings for removal [of specified board members] 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.")

33. Subdivision (a) of the section provides in relevant part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

of the state, it does not appear that the University may be subjected to the new act under this provision.[34]

Basic due process constraints apply to rulemaking and adjudicatory proceedings by the University of California as they do to all other state agencies. The Commission's inquiry reveals that the University has developed well-articulated notice and hearing procedures. Given the constitutional independence of the University, the Commission recommends that the Legislature not mandate that the University of California be subject to the Administrative Procedure Act.

Nonetheless, the procedures provided in the new Administrative Procedure Act are reasonable, flexible, and satisfy basic due process constraints. The Commission believes the procedures provided in the new act are suitable for the University of California's adjudicatory proceedings. The statute should make clear that the University may voluntarily adopt the Administrative Procedure Act. Adoption of the act by the University would promote the important objective of a uniform body of law applicable throughout the state. It would also make consistent the University's internal governance with the procedures the University must follow in its external relations with the rest of the state.

## CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

### Background

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges and hearing officers employed by the Office of Administrative Hearings in the Department of General Services.[35] However, most of the major state agencies employ their own administrative law judges and hearing

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34. Cf. Scharf v. Regents of the University of California, 234 Cal. App. 3d 1393 (1991).

35. Gov't Code §§ 11501-2. The Office of Administrative Hearings has identified 95 state and miscellaneous agencies for which it currently conducts some or all adjudicative hearings.

officers.[36] The Law Revision Commission estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings. And this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

The Law Revision Commission has devoted substantial resources to consideration of whether independent administrative law judges, employed by the Office of Administrative Hearings or by a successor central panel, should play a greater role in the California administrative adjudication process. The Commission's conclusion, for the reasons outlined below, is that there should not be a general removal of state agency hearing personnel and functions to a central panel. Any transfer of an agency's hearing functions to the central panel should be specific to that agency and its functions and should be based on a showing of the need for the particular transfer.

History of Central Panel in California

California was the first, and for many years the only, jurisdiction in the United States to adopt the concept of a central panel of hearing officers who would hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.[37] The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert in a number of fields, yet who would not have a potential conflict of interest with

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36. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Unemployment Insurance Appeals Board, Department of Industrial Relations, Workers Compensation Appeals Board, Public Utilities Commission, Department of Social Services.

37. Judicial Council of California, Tenth Biennial Report 11 (1944).

the agency for which they conducted hearings and would impart an appearance of fairness to hearings. The Judicial Council also foresaw some organizational efficiency in this arrangement.

Although the Judicial Council considered the possibility that hearing officers be drawn from the central panel for all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise."[38]

The California system is generally considered a success. It has been copied elsewhere and central panels are now in place in Colorado, Florida, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, Washington, and Wisconsin. Proposals for adoption of the central panel system have recently been or are currently being considered in four other states of which the Law Revision Commission is aware--Hawaii, New York, North Dakota, and Oregon. Legislation is also pending in Congress for a central federal panel.

Expansion of California Central Panel

With this favorable experience, a logical conclusion might be that the central panel system should be expanded in California to cover all administrative hearings. The main argument in favor of broader use of the central panel is that central panel administrative law judges are independent of the agency and therefore are able to hold hearings that are fair both in appearance and in fact. Other benefits of centralization are felt to be economy, efficiency, and improved working conditions for administrative law judges.

The Law Revision Commission's study of the operation of the central panel system in California and in the other jurisdictions that have adopted it, including review of California's major administrative

38. Report at 14.

agencies not presently covered by the central panel, indicates that despite these potential benefits, there are a number of serious objections to expansion of the central panel beyond its present scope in California.[39]

First, there does not appear to be a compelling case for a general removal of hearing officers to the central panel. The concept of fairness and the appearance of fairness is sound in theory, but the Commission's investigation did not reveal any evidence of unfairness or a perception of unfairness in California.

Second, the various agencies are generally satisfied with their present in-house hearing personnel. They have tailored their systems

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39. Among the concerns with expansion of the central panel that have been expressed by various state agencies, the following are common:

(1) The agency deals in a specialized area for which special knowledge and expertise is necessary, which could not be maintained in a central panel setting.

(2) The agency has a high volume operation that must deal with cases in a way far different from the typical central panel administrative law judge hearing.

(3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.

(4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.

(5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.

(6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.

(7) The agency's hearing procedure is constitutionally exempt from legislative control.

(8) The whole purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.

(9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.

(10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.

(11) The agency conducts informal hearings; it would be inappropriate to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

to their particular needs and the hearing personnel appear to be functioning appropriately.

Third, further centralization is unlikely to generate savings for the state and it could increase costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges and concluded it was not clear any savings would result.[40] There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law judges serve several functions, acting as legal advisors as well as hearing officers; loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fourth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency.

Fifth, each agency, its mission and needs, is unique. The Commission has found that it is not possible to generalize with respect to the central panel issue and the propriety of the central panel for all agencies. Any recommendation for transfer of an agency's functions should be specific, based on a review of the individual agency and its operations.

## ROLE OF ADMINISTRATIVE LAW JUDGE

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40. California Department of Finance, Program Evaluation Unit, *Centralized v. Decentralized Services: Administrative Hearings* (November 1977).

The existing administrative procedure act is based on a model of fact-finding by an administrative law judge employed by the Office of Administrative Hearings.[41] In general, the administrative law judge holds a hearing, formulates a proposed decision, and transmits it to the agency for which the hearing is held; the agency head may either adopt the proposed decision as its final decision, or reject the decision and decide the case itself on the record.[42]

This procedural format of the division of responsibilities between the administrative law judge and the agency head must be modified so it is adaptable for use by all agencies and for all types of cases. This includes agencies that employ their own administrative law judges, agencies where the agency head is both the finder of fact and the decision maker, and agencies that have lengthy hearings as well as those whose hearings are brief.

The basic device used in the proposed law to build sufficient flexibility into the new administrative procedure act to accommodate the wide range of hearings by state agencies is authority for the agencies to adopt regulations allowing it to depart from the basic procedure at certain key points. The regulation process will ensure that any deviation from the main line administrative procedure is publicly proposed, considered, and adopted, and is accessible as a published and compiled governing instrument, while still allowing the individual agency to build in necessary variations.[43]

The proposed law is based on the existing administrative procedure act, with several concepts drawn from the 1981 Model State APA, and various exceptions to accommodate the existing practices of state

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41. For a more detailed description of proceedings under the existing administrative procedure act, see Office of Administrative Hearings, "Outline of Administrative Practice before the Office of Administrative Hearings" (March 1989).

42. Gov't Code § 11517.

43. See discussion of "Modification of Law by Agency Regulation", *supra*.

agencies not covered by the administrative procedure act. The Commission believes the approach of the proposed law, outlined below, has the necessary flexibility to enable all state agencies to conduct their administrative hearings under one fundamental procedure.

(1) Each agency head decides whether the hearing in an administrative adjudication by that agency will be conducted by an administrative law judge or by the agency head itself. The agency head may, instead of sitting en banc, divide into panels, or delegate the hearing function to a person charged with that responsibility. However, a hearing of a type for which an administrative law judge from outside the agency is presently required by statute would continue to be heard by an independent administrative law judge, ordinarily provided by the Office of Administrative Hearings.

(2) If the agency head conducts the hearing, the agency head issues a final decision within 100 days after the end of the hearing. An agency whose hearings are more complex may adopt a regulation permitting more time; an agency whose hearings require less time or which are required by federal law to be rendered within a shorter period may adopt a regulation permitting less time.

(3) If an administrative law judge conducts the hearing, the administrative law judge renders a proposed decision within 30 days after the end of the hearing. Again, the agency may vary the time within which a proposed decision is required.[44] The agency head receives the proposed decision and has 100 days within which to act on it--either to adopt it, modify it, or commence review proceedings on it. This period also can be varied by regulation depending on the needs of the agency.[45] A proposed decision that is not acted on by

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44. Variance would not be available in hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Existing law requires a proposed decision within 30 days, and that requirement would be unchanged. Gov't Code § 11517(b).

45. Again, a variance would not be available unless the proposed decision is rendered after a hearing required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

the agency within the required period becomes a final decision by operation of law.

(4) Either a proposed decision or a final decision is subject to administrative review in the discretion of the agency. This reverses the general rule under existing law that an appeal to the agency head is available as a matter of right, with its attendant expense. The agency would have authority to review some but not all issues, or to preclude further administrative review outright. Where review is provided, an agency would have authority to delegate the review function to subordinate employees.

In order to avoid unnecessary review procedures, the proposed law provides expeditious means of correcting mistakes and technical errors in the decision. In the review process, the reviewing authority is limited to a review of the record, except for newly-discovered evidence or evidence that was otherwise unavailable at the time of the hearing. This will ensure that the parties to the administrative proceeding are not unduly exposed to the time and expense of a second formal hearing process. In addition, since the presiding officer at the hearing has had the opportunity to observe the witnesses, the presiding officer's credibility determinations based on observation of demeanor and the like are entitled to great weight on review.[46]

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46. The great weight requirement for credibility determinations would be applied only indirectly, as a factor in any judicial review of the administrative decision. This requirement would codify in California the general rule applied in federal cases, as well as in a number of state agencies. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) (federal Administrative Procedure Act); Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Labor Code § 1148 (Agricultural Labor Relations Board); [citation] (Public Employment Relations Board).

The end result of administrative review is either issuance of a final decision or a remand for further hearings within 100 days or other period adopted by agency regulation.[47]

## IMPARTIALITY OF DECISION MAKER

Fairness and due process are ensured in administrative adjudication by the basic requirement of impartiality of the decision maker. The Commission recommends codification of five fundamental elements of impartiality in the Administrative Procedure Act: (1) the decision should be based exclusively on the record in the proceeding, (2) ex parte communications to the decision maker should be prohibited, (3) the decision maker should be free of bias, (4) adversarial functions should be separated from decision making functions within the agency, and (5) decision making functions should be insulated from adversarial command influence within the agency. Each of these elements is elaborated below.

### Exclusivity of Record

Existing California case law requires that the decision be based on the factual record produced at the hearing.[48] Both the federal[49] administrative procedure and the model state[50] administrative procedure statutes codify this aspect of due process, and the proposed legislation does the same for California.

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47. The 100-day period could not be varied in the case of a hearing required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

48. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1126 (1992).

49. 5 U.S.C. § 556(e).

50. 1981 Model State APA § 4-215(d).

However, some agencies rely on the special factual knowledge and expertise of the decision maker in the area, and in fact agency members may be appointed for just this purpose. The proposed law addresses this situation by permitting evidence of record to include factual knowledge of the decision maker and other supplemental evidence not produced at the hearing, provided that the evidence is made a part of the record and all parties are given an opportunity to comment on it.

Ex Parte Communications

While existing California law is clear that factual inputs to the decision maker must be on the record, it is not clear whether ex parte contacts concerning law or policy are permissible.[51] Existing Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of Administrative Hearings, but is silent as to the majority of administrative adjudications in California that do not fall under it. In many state agencies ex parte contacts are tolerated or encouraged.[52]

Fundamental fairness in decision making demands that any arguments to the decision maker on law and policy be made openly and be subject to argument by all parties. The proposed legislation prohibits ex parte communications with the decision maker, subject to several qualifications necessary to facilitate the decision-making process:

(1) The ban on ex parte communications would not apply to a nonprosecutorial proceeding, such as an individualized ratemaking or initial licensing decision. Although these are trial-type proceedings, they involve a substantial element of policy determination where it may be important that the decision maker consult more broadly than the immediate parties to the proceeding.

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51. See Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1128 (1992).

52. See Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1130 (1992). Some, such as the California Public Utilities Commission, have developed elaborate ex parte prohibitions tailored to their specific needs.

(2) The decision maker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decision maker is from personnel within the agency that is a party to the proceeding. However, the decision maker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.[53]

(3) Discussion of noncontroversial matters of practice or procedure is permissible.

Where an improper ex parte contact has been made, the proposed legislation provides several curative devices. A decision maker who receives an improper ex parte communication must place it on the record of the proceeding and advise the parties of it, and the parties are allowed an opportunity to respond. To rectify cases where the ex parte communication would unduly prejudice the decision maker, the ex parte communication could be grounds for disqualification of the decision maker. In such a case, the record of the communication would be sealed by protective order of the disqualified decisionmaker.

<u>Bias</u>

The existing California Administrative Procedure Act makes clear that a decision maker may be disqualified if unable to "accord a fair and impartial hearing or consideration".[54] The proposed law would recodify this standard in the more concrete traditional terms of "bias, prejudice, interest".[55]

Case law apart from the Administrative Procedure Act makes clear that an appearance of bias is not a sufficient ground for disqualification; there must be a showing of actual bias.[56] This requirement makes bias difficult to prove, even though in a particular

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53. See discussion of "Separation of Functions", <u>infra</u>.

54. Gov't Code § 11512(c).

55. The proposed law would also permit an agency to provide by regulation for peremptory challenge of the decision maker regardless of bias. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

56. Andrews v. ALRB, 28 Cal. 3d 781, 171 Cal. Rptr. 590 (1981).

case it may seem apparent. To address this problem, the proposed law would add as grounds for disqualification, that "a person aware of the facts might reasonably entertain a doubt that the decision maker would be able to be impartial". This is the standard applicable to judges in civil proceedings in California[57], and it has proved workable in practice.[58] It fosters the concept that administrative adjudication should be fair in appearance as well as in fact.

Notwithstanding actual bias, existing law adopts a "rule of necessity" that if disqualification of the decision maker would prevent the agency from acting (e.g., causing lack of a quorum), the decision maker may nonetheless participate. The proposed law addresses this problem with a provision drawn from the Model State Administrative Procedure Act that disqualifies the decision maker and provides for substitution of another person by the appointing authority.[59]

Separation of Functions

Existing California statute and case law on separation of functions is unclear.[60] To avoid prejudgment, the decision maker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. Nor should a person assisting or advising the decisionmaker have served in that capacity. The proposed law codifies these principles.

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57. Code Civ. Proc. § 170.1(a)(6)(C).

58. The "appearance of bias standard" is circumscribed by a specification of characteristics that do not constitute bias, including cultural factors affecting the judge, prior expressions of the judge on legal and factual issues that arise in the proceeding, and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2. The proposed law applies these standards to bias determinations in administrative adjudication as well.

59. 1981 Model State APA § 4-202(e)-(f).

60. See discussion in Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1168-70 (1992).

As a practical matter, the separation of functions requirement could cripple an agency in a number of situations, due to staffing limitations. The proposed law addresses these situations specifically:

(1) A lengthy nonprosecutorial case such as individualized ratemaking or power plant siting may continue for years while agency personnel transfer from one type of function to another within the agency. The proposed law allows violation of the separation of functions principle in nonprosecutorial cases where the contrary function occurred more than one year before the decision making.

(2) A nonprosecutorial case may involve specialized technical issues for which the decision maker needs advice that is available only from an agency employee who has also been involved in other aspects of the case. The proposed law would allow such technical advice to be given, provided it is summarized in the record and made available to all parties.

(3) Prosecutorial personnel must be able to advise the decision maker concerning aspects of a settlement proposed by the prosecution. The proposed law recognizes this situation.

(4) Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would gridlock the system. The proposed law exempts drivers' licensing cases from the separation of functions requirements. The exemption is limited in scope and would not extend to other types of operators' certificates, such as schoolbus driver certificates.

Command Influence

A corollary of the separation of functions concept is the requirement that the decisionmaker should not be the subordinate of an investigator, prosecutor, or advocate in the case, for fear that their relative positions within the agency will allow the adversary to dictate the result to the decision maker. The proposed law codifies the command influence prohibition.

The command influence prohibition may pose difficulties for a small agency that has insufficient personnel to avoid using a subordinate as a hearing officer. The proposed law makes clear that in

such a case the agency head may go outside the agency, for example to the Office of Administrative Hearings, for an alternate hearing officer.

## THE ADJUDICATION PROCESS

### Modification of Statute by Regulation[61]

The proposed law sets out a basic procedure for the adjudicative process that is complete in itself. The procedure builds on the 1945 California APA,[62] which is widely applicable in California agencies.[63] However, because of the expanded scope and application of the proposed law, there will be some procedural details that are not appropriate for all agencies. For this reason, the proposed law permits an agency to modify key aspects of its administrative procedure or to provide that certain provisions of the new law are inapplicable to the agency.[64]

There are two significant limitations on the ability of an agency to modify specified aspects of the proposed law by regulation.

First, the modification option is generally not available in proceedings that are currently governed by the 1945 California APA.[65] The opportunity for modification is generally not necessary in those

61. See also general discussion, "Modification of Law by Agency Regulation", *supra*.

62. Gov't Code §§ 11500-11529.

63. For a current listing of administrative hearings in which the California Administrative Procedure Act is applicable, see California Administrative Hearing Practice, Appendix A: Table of State-Level Adjudicatory Activities (Cal. Cont. Ed. Bar, Supp. 1991).

64. Major areas where agency modification is permitted include declaratory decisions, emergency adjudicative proceedings, pleading and scheduling details, discovery, prehearing conference, and details concerning the conduct of the hearing (including evidence and burden of proof).

65. There are a few modification opportunities available even to existing Administrative Procedure Act agencies. See, e.g., proposed Sections 641.310 (declaratory decision) and 648.310 (burden of proof).

proceedings since the proposed law is based upon them. Restricting modification in this situation will also promote uniformity of administrative procedure among state agencies--one of the chief goals of the proposed law.

Second, any modification must be done by regulation through the rulemaking provisions of the Administrative Procedure Act.[66] This process will ensure the opportunity for participation of interested and affected parties in the procedures of the agencies with which they are involved. It will also ensure that any variations from the statutory procedure are embodied in regulations that are accessible to the public.

## Notice and Pleadings

Terminology. Existing administrative procedures in California employ a wide variety of terminology to describe the parties and their pleadings. These include "accusation", "statement of issues", "order initiating investigation", "notice of defense", "appeal", "notice of adverse action", and "petition for hearing". The proposed law standardizes the terminology. The parties to an administrative adjudication are the agency and the respondent; their pleadings are the initial pleading and the responsive pleading.

Initiation of proceedings. The proposed law makes clear that a proceeding is initiated by the agency having jurisdiction over the matter, either on its own motion or in response to an application from a person. To encourage agency responsiveness to applications for agency action, the proposed law requires the agency within 30 days to acknowledge receipt of the application and provide contact information, and within 90 days to act on the application, either by granting or denying it or by commencing an adjudicative proceeding in response. The proposed law makes clear that a third party does not have a right to compel an agency to prosecute a case. An agency is permitted to

66. Government Code §§ 11340-11356.

modify these requirements by regulation, and a special statute may provide a different rule for a specific situation.[67]

Service. First class mail is generally permitted for notices, and the proposed law adds flexibility by authorizing other means of notification such as delivery service and facsimile transmission. However, service of the initial pleading and notice must be by registered or certified mail or personal service. This requirement would not apply where the respondent has previously appeared in the same or a related proceeding; service in a proceeding before an appeals board, for example, could be by first class mail or other means.

Amendment of pleadings. The 1945 California APA allows amendment of the initial pleading.[68] The law is silent concerning amendment of responsive pleadings, and there is doubt about the propriety of amendment of pleadings outside of the 1945 California APA.[69] The proposed law makes clear that both the initial pleading and the responsive pleading may be amended or supplemented at will before commencement of the hearing, subject to the right of the other party to prepare a case in response. After commencement of the hearing, amendments are discretionary with the presiding officer.

Continuances

The 1945 California APA includes a special proceeding for judicial review of an agency decision to deny a request for a continuance of an administrative proceeding.[70] Denial of a continuance is potentially no more prejudicial to a person that is the subject of agency action than any other adverse decision in the hearing process, and should not

67. 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).

68. Gov't Code §§ 11507, 11516.

69. See discussion in Asimow, The Adjudication Process 16 fn. 30 (Oct. 1991).

70. Gov't Code § 11524(c). The special provision does not apply to the Department of Alcoholic Beverage Control.

require an early and separate judicial review. In the interest of judicial economy, the proposed law eliminates the special appeal for denial of a continuance. Instead, an appeal on this issue is made with other matters judicially reviewable at the end of the administrative adjudication process.

## Intervention

The 1945 California APA is not clear on the right of a third party to intervene in an administrative adjudication. Yet situations do arise when an administrative adjudication will affect the legal rights, duties, privileges, or immunities of a person who has not been made a party to the proceeding. In such a situation, the proposed law would permit intervention by the affected party if the intervention will not impair the interests of justice and the orderly and prompt conduct of the proceedings. This determination is vested in the presiding officer, and the presiding officer's decision is final and nonreviewable. The presiding officer may impose appropriate conditions on intervention, such as limiting the issues addressed by the intervenor, regulating discovery and cross-examination by the intervenor, and limiting the intervenor's involvement in settlement negotiations.

## Discovery and Subpoenas

The 1945 California APA provides for limited discovery in administrative adjudications.[71] The Commission believes the extensive discovery available in civil proceedings is inappropriate for administrative adjudications, which should be simple, quick, and inexpensive. For this reason the proposed law continues the limited discovery approach of existing law, subject to a number of minor

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71. Gov't Code §§ 11507.5, 11507.6, 11507.7, 11511; State of California v. Superior Court, 16 Cal. App. 3d 87, 93 Cal. Rptr. 663 (1971).

changes,[72] and broadens its application to all agencies. This would not preclude an agency from providing by regulation for more extensive discovery if appropriate to the type of case administered by that agency, or from otherwise regulating discovery, for example by providing for protection of confidential information or other privileges.

Under the 1945 California APA an agency has broad subpoena authority.[73] The proposed law continues this authority and extends it to the other state agencies, and adds provisions clarifying procedures for quashing a subpoena once issued. In addition, the proposed law permits the respondent to request issuance of a subpoena duces tecum for production of a document at any reasonable time and place, rather than only at the hearing. This will enable the respondent adequate time to prepare and help avoid the need for a continuance.

Under existing law, discovery disputes between the parties are referred to the superior court for resolution and enforcement. To expedite the discovery process, the proposed law vests this matter in the presiding officer. Direct judicial review of the presiding officer's decision, without intervening administrative review, is provided, also in the interest of expediting the process.

Prehearing Conference

The proposed law makes the prehearing conference, presently available in proceedings before 1945 California APA agencies, applicable to all state agencies, subject to the ability of an agency

72. For example, a recent case has questioned the fairness and constitutionality of the existing provision that the agency can refuse to authorize the respondent to depose an unavailable witness. Gov't Code § 11511; Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986). The proposed law addresses this point by vesting the decision in the presiding officer, if one has been appointed, instead of the adversary, with notice to the adversary.

The proposed law fills a gap in existing statutes by making clear that a party on whom a discovery request is served has a continuing duty to disclose any supplemental matter on learning of it.

73. Gov't Code § 11510.

to control its use by regulation. The proposed law adds the following features designed to enhance the effectiveness of the prehearing process:

(1) The conference may be conducted by telephone or other electronic means.

(2) A party who fails to attend the conference may be held in default.

(3) The conference should serve as a forum for exchange of discovery information, where appropriate.

(4) The conference should offer the opportunity for alternative dispute resolution, and where appropriate be converted into a conference adjudicative hearing.

The prehearing conference is conducted by the presiding officer who will preside at the hearing. Settlement possibilities may be explored at the prehearing conference. If it appears that there is a possibility of settlement, the proposed law allows the presiding officer to order a separate mandatory settlement conference, to be held before a different settlement judge, if one is available. Communications in the settlement conference are confidential to encourage open and frank exchanges in the interest of achieving settlement.

Declaratory Decisions

Declaratory relief may be a useful means by which a person may obtain fully reliable information concerning application of agency regulations to the person's particular circumstances. The federal administrative procedure act provides for declaratory orders,[74] as do modern state statutes.[75] However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

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74. Federal APA § 554(e).

75. Cf. 1981 Model State APA § 2-103.

The proposed law creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. Its purpose is to provide an inexpensive and generally available avenue for obtaining advice from an administrative agency. Issuance of a declaratory decision is discretionary with the agency. Procedural details may be provided by agency regulation. The Office of Administrative Hearings is charged with promulgation of model regulations that are applicable unless different rules are adopted by an agency. The agency may choose to preclude a declaratory decision by regulation if it appears that a declaratory decision is inappropriate for the matters administered by it.

Under the proposed law a declaratory decision is available only in case of an actual controversy, and issuance of a declaratory decision is discretionary with the agency. The general rules of administrative hearing practice are inapplicable, since there is no fact-finding involved--only application of laws or regulations to a prescribed set of facts. A declaratory decision has the same status and binding effect as to those facts as any other agency decision.

Settlement

An agency has implied power to settle a case.[76] The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a settlement.[77] This resolves the difficulty under the 1945 California APA that the agency head is required to approve a settlement but in many cases the agency head is a body of part-time appointees unable to meet and consider the settlement for a considerable period of time. The proposed law also makes clear that a

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76. Rich Vision Centers, Inc. v. Bd. of Medic. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983).

77. Power to settle licensing cases before the Department of Social Services has been delegated so that settlements can be approved on the spot.

settlement may be made before or after issuance of the initial pleading, except in an occupational licensing case.[78]

Alternative Dispute Resolution

Alternative dispute resolution techniques, such as mediation and arbitration, offer the potential of substantial savings of time and money in administrative adjudication. Federal administrative procedure in recent years has made effective use of alternative dispute resolution,[79] and in 1990 Congress amended the federal APA to require agencies to explore and utilize alternative dispute resolution techniques in all agency functions.[80] The 1945 California APA is silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.[81] A negotiated outcome is preferable in most situations to the costly, time-consuming, and difficult process of adjudication and judicial review. The Law Revision Commission recommends that alternative dispute resolution be fostered in California administrative adjudication by statutorily recognizing these techniques and encouraging agencies to put in place feasible mechanisms to facilitate them.

The proposed law makes clear that all agencies have authority to refer cases, with the consent of the parties, for mediation or for binding or nonbinding arbitration by neutral dispute resolution personnel. Communications are kept confidential just as such

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78. An occupational licensing case may be settled only after issuance of the initial pleading in order to ensure that the disciplinary action is a matter of public record.

79. See discussion in Asimow, The Adjudication Process 45-47 (Oct. 1991).

80. Administrative Dispute Resolution Act, P.L. 101-552.

81. See discussion in Asimow, The Adjudication Process 44-45 (Oct. 1991).

communications remain confidential in civil proceedings.[82] The Office of Administrative Hearings is charged with responsibility to develop model regulations for alternative dispute resolution proceedings that govern disputes referred to alternative dispute resolution unless modified by the agency. The Commission believes these provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

Conference Hearings

The standard formal adjudicatory hearing procedure under the 1945 California APA may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process.[83]

To address this concern, the proposed law permits agencies to resolve matters involving only a minor sanction or matters in which there is no factual dispute by means of a conference adjudicative hearing process, drawn from the 1981 Model State APA.[84] This process would also be available to an agency that specifies classes of cases where it would be appropriate, provided use of the conference process would not violate due process requirements for those cases.

A justification for providing a less formal alternate procedure is that without it, many agencies will either attempt to obtain enactment of statutes to establish procedures specifically designed for them, or will proceed "informally" in a manner not spelled out by any statute. As a consequence, wide variations in procedure will occur from one

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82. Evid. Code § 1152.5.

83. See discussion in Asimow, The Adjudication Process 87-91 (Oct. 1991).

84. 1981 Model State APA §§ 4-401-3. The notion of establishing alternate adjudicative procedures is found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Admin. L. Rev. 31, 47 (1979).

agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel and reviewing courts, as well as for lawyers. These results have already happened, to a considerable extent, at both the state and federal levels.

The proposed conference hearing process is a simplified administrative adjudication, involving no prehearing conference or discovery. At the hearing the presiding officer regulates the course of proceedings and limits witnesses, testimony, evidence, rebuttal, and argument. Cross-examination is ordinarily not permitted, and a conference hearing should only be used in a case that is susceptible of determination without the need for cross-examination.

"Thus a conference hearing is essentially just that--a conference that lacks courtroom drama but nevertheless provides assurance that the issues will be aired, an unbiased decisionmaker will make a decision based exclusively on the record of the proceedings, the decision will be explained, and it will be reviewed by a higher-level decisionmaker (such as the agency heads)."[85]

The conference hearing may be particularly useful in a number of situations:[86]

--Where there is no disputed issue of fact but only a question of law, policy, or discretion.

--A decision to deny a discretionary permit, grant, or license where a hearing is required by statute or due process of law.

--Various land use planning and environmental decisions.

--An individualized ratemaking case.

--Tax adjudications conducted by the State Board of Equalization.

Emergency Decision

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85. Asimow, The Adjudication Process 93 (Oct. 1991).

86. See discussion in Asimow, The Adjudication Process 94-97 (Oct. 1991).

In some circumstances there is a need for an agency to take immediate action for the protection of the public. If there is serious abuse that causes immediate and irreparable physical or emotional injury to a ward in a child or elder care facility, for example, an agency may need to act quickly to remove the ward or close the facility or temporarily suspend its license. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation.

The 1945 California APA does not recognize the need of an agency to make a quick decision in an emergency situation, although a few special statutes provide individual agencies the ability to act quickly in cases of necessity.[87] All agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

The proposed law permits an agency to adopt a regulation authorizing emergency action where there is immediate danger to the public health, safety, or welfare. Under the emergency proceeding the affected person is given notice and an opportunity to be heard before the agency acts, if this is feasible. The notice and hearing may be telephonic or by other electronic means.

The emergency decision is limited to interim, temporary relief, and is subject to immediate administrative and judicial review. Issuance of the emergency relief does not resolve the underlying issue, and the agency must proceed promptly to determine the basic dispute by standard administrative adjudication processes.

Consolidation and Severance

87. 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).

The 1945 California APA contains no provisions allowing agencies to consolidate related cases or to sever issues in a case that could be more economically handled in several parts. The proposed law follows the consolidation and severance procedures of the Code of Civil Procedure,[88] which have worked well in practice in civil cases. Control of consolidation and severance issues is vested in the administering agency.

## Hearing Procedures

Transcripts. The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improvement of the quality of electronic recording, and with the use of multi-track recorders, monitors, and trained hearing officers, the problems of electronic recording are minimized, and the cost saving may be substantial. For these reasons the proposed law permits an agency to provide electronic recording of proceedings in all cases. The presiding officer would have authority to require stenographic reporting in an appropriate situation, and a party could require it at the party's own expense.

Telephone hearings. The 1945 California APA contemplates a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical attendance at the hearing difficult. Moreover, an in-person hearing may require parties or witnesses to sit and wait for long periods of time. In such situations, it makes sense to take testimony telephonically. The Unemployment Insurance Appeals Board makes use of telephone hearings with a great amount of success.[89]

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88. Code Civ. Proc. § 1048.

89. See discussion in Asimow, The Adjudication Process 106-107 (Oct. 1991).

The proposed law permits a hearing to be conducted by conference telephone call, video-conferencing, or other appropriate telecommunications technology, provided all participants are audible to each other. A party may object to a telephonic hearing on a showing that a credibility determination is important to the case and that the telephone hearing will impair a proper determination of credibility.

Interpreters. Existing provisions for interpreters for language-disabled parties[90] are expanded by the proposed law to include language-disabled witnesses.

Open hearings. The 1945 California APA is silent on the issue whether an administrative hearing is open to the public. The general assumption is that hearings are open, and there is authority that this is a matter of due process.[91] The proposed law makes clear that a hearing is open to the public unless the parties agree that it should be closed or unless a special statute mandates that a particular type of hearing be closed.

## Evidence

Under the 1945 California APA technical rules of evidence are inapplicable--any relevant evidence is admissible if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.[92] The reasons for adoption of this rule in 1945 were that many parties are unrepresented by counsel in administrative adjudications, and that the protections of the rules of evidence designed for fact-finding by lay juries are unnecessary in administrative decision making by experts in the field.[93] These

90. Gov't Code §§ 11500(g), 11501.5, 11513(d)-(n).

91. See discussion in Asimow, The Adjudication Process 109 (Oct. 1991).

92. Gov't Code § 11513(c).

93. Judicial Council of California, Tenth Biennial Report 21 (1944).

reasons are sound to this day, and the proposed law preserves the basic rule of broad admissibility, subject to the right of an agency by regulation to require adherence to technical rules of evidence.

The proposed law codifies a few key exceptions to the general rule of admissibility. Existing law permits the presiding officer to exclude irrelevant and unduly repetitious evidence.[94] This authority should be broadened so that the presiding officer also has discretion to exclude evidence that contributes little to the result but promotes delay and confusion. The proposed law adopts the standard of Evidence Code Section 352, which provides for exclusion of evidence whose 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.

Where evidence is based on a method of proof that is not generally accepted as reliable in the scientific community, rules applicable in civil litigation require exclusion of the evidence.[95] This principle has been applied in administrative adjudication as well,[96] and the proposed law codifies it. The factfinder should not be compelled to weigh in each case the probative value of testimony that is based on methodologies not recognized as scientifically reliable--this is a specific instance of evidence that does not satisfy the general requirement that it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

The 1945 California APA permits use of affidavits as evidence, with notification of the intent to introduce the affidavit at least 10 days before the hearing.[97] The affidavit procedure is useful, and the proposed law extends it to all state agencies, subject to the right of

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94. Gov't Code § 11513(c).

95. See discussion in Asimow, The Adjudicative Process 61-63 (October 1991).

96. Seering v. Dept. Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987).

97. Gov't Code § 11514.

an agency to limit use of affidavits by regulation. The 10 day notice requirement is extended to 30 days, to give the opposing party an adequate opportunity to retain counsel and respond by cross-examination or otherwise.

Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding.[98] The proposed law extends this provision (known as the "residuum rule") to other agencies as well, subject to the right of an agency to adopt a different rule by regulation. The residuum rule is desirable as a general matter because it forces the use of reliable evidence, which may be particularly important in an administrative adjudication in which the sanction is severe, such as a license revocation.

The proposed law also makes clear that the residuum rule can be raised for the first time on administrative or judicial review. Existing law is unclear on this matter.[99] It may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence.

It is not clear whether the evidentiary rulings of the presiding officer are subject to administrative review. An argument can be made that the rulings are conclusive.[100] The proposed law makes clear that the agency head may review evidentiary determinations of the presiding officer. The adjudicatory authority is vested in the agency head, and the agency head should be the ultimate administrative decisionmaker.

## Burden of Proof

The 1945 California APA is silent on the issue of burden of proof in an administrative hearing, but cases put the burden on the proponent

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98. Gov't Code § 11513(c).

99. See discussion in Asimow, The Adjudication Process 71-73 (1991).

100. See discussion in Asimow, The Adjudication Process 66-67 (Oct. 1991).

of an order.[101] The proposed law codifies this rule, and provides generally that the burden is a preponderance of the evidence. In the case of an occupational license, however, because of the potential severity of the sanction, the burden is clear and convincing evidence. An agency, including a licensing agency, would have the ability to change the burden of proof in light of the circumstances in adjudications administered by it.

## Decision

Voting by agency members. The 1945 California APA permits boting by agency members by mail.[102] The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

Findings and reasons. The 1945 California APA requires the decision to contain findings of fact and a determination of issues, together with the penalty if any.[103] The statute is supplemented by the constitutional requirement that the decision contain whatever necessary sub-findings are need to link the evidence to the ultimate facts.[104] The proposed law augments this recitation with the requirement that the reasons for the decision be stated as to each of the principal controverted issues. This will force the decision maker to articulate the basis of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

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101. See discussion in Asimow, The Adjudication Process 73 (Oct. 1991).

102. Gov't Code § 11526.

103. Gov't Code 11518.

104. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974).

Precedent decisions. The proposed law requires that an agency designate as precedential a decision that contains a significant legal or policy determination that is likely to recur and maintain an index of determinations made in precedent decisions. This requirement recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although agency decisions are public records, they are inaccessible to the public except in the case of the few existing agencies that publish their decisions or designate precedent decisions.[105]

Extension of the precedent decision requirement to all agencies would make the decisions generally available and would benefit everyone, including counsel for both the agency and the parties and the presiding officers and agency heads who make the decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in an administrative adjudication. And it is more efficient to cite an existing decision than to reconstruct the policy or even decide inconsistently without knowing or acknowledging that this has occurred.

## Conversion of Proceedings

It may become apparent in an adjudicative proceeding that the issues are such that a formal hearing is unnecessary and the matter can be resolved by a conference hearing. Or, the agency may conclude that the matter should be resolved not by an individual decision but by adoption of general regulations. These and other circumstances indicate the desirability of a procedure permitting conversion of administrative proceedings from one type to another appropriate type.

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105. Agencies that routinely publish all their decisions include the Agricultural Labor Relations Board, Public Utilities Commission, Public Employment Relations Board, and Workers Compensation Appeals Board.

The Fair Employment and Housing Commission (Gov't Code § 12935(h)), the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409), and the State Personnel Board (Gov't Code § 19582.5) designate and publish precedent decisions.

There are no provisions in the 1945 California APA for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.[106] Under this procedure, the presiding officer or other agency official responsible for the proceeding may convert it to another type if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party. Notice to affected parties is required.

Enforcement of Orders and Sanctions

The 1945 California APA provides that disobedience of orders or obstructive or contumacious behavior in an administrative adjudication proceeding may be certified to the superior court for contempt proceedings.[107] This authority is continued in the proposed law.

The proposed law also seeks to curb bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. These are addressed in civil actions by monetary sanctions,[108] where experience has been favorable. The proposed law extends to the presiding officer or agency in an adjudicative proceeding the right to order monetary sanctions for such behavior. The order is subject to administrative and judicial review to the same extent as other orders in the adjudicative proceeding.

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106. 1981 Model State APA § 1-107.

107. Gov't Code § 11525.

108. Code Civ. Proc. § 128.5.