

First Supplement to Memorandum 93-30

Subject: Study N-100 - Administrative Adjudication--Draft of Tentative Recommendation (Additional Material)

This supplementary memorandum presents additional material relating to the draft of the tentative recommendation attached to Memorandum 93-30.

Application of Statute

The statute by its terms does not apply to the Legislature, Judicial Branch, Governor, or University of California. Section 612.110. However, this exemption may be inappropriate for purposes of judicial review. We have not yet considered this matter in the context of judicial review, and the commentary should note this.

Office of Administrative Hearings

At the last meeting the Commission requested the staff to redraft the provisions relating to the Office of Administrative Hearings in order to avoid any implication that the term "office" might be confused with the Office of Administrative Law and "director" might be confused with the Director of the Office of Administrative Law.

We have instead resolved this problem in the draft by relocating the provisions relating to the Office of Administrative Hearings to the part of the statute dealing with hearings. See Sections 641.410-641.480. When rulemaking provisions are added to the statute, the Office of Administrative Law provisions will be located in that part of the statute. This physical and contextual separation of the two offices should be sufficient for our purposes.

However, a number of references to the Office of Administrative Hearing provisions have not been changed to reflect the relocation. This will be done before the tentative recommendation is circulated for comment. Any references in the draft to Sections 615.110-615.180 should refer instead to Sections 641.410-641.480.

Confidentiality and Admissibility of ADR Communications

Section 647.420 protects communications made in alternative dispute resolution proceedings (mediation and arbitration) in a way comparable to the protections provided in civil actions. Similar protection probably should be provided to protect the arbitrator or mediator in a subsequent de novo adjudicative proceeding to the same extent this type of protection applies in subsequent civil proceedings. See Evidence Code Section 703.5:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision or rule, occurring at or in conjunction with the prior proceeding [subject to exceptions].

There is legislation currently pending to extend this protection to mediators.

Respectfully submitted,

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