

Memorandum 95-4

Administrative Adjudication: Draft of Recommendation

Background

Attached to this memorandum is a staff draft of the recommendation relating to administrative adjudication, incorporating Commission decisions made at the November 1994 meeting.

We anticipate comments on the draft from the Attorney General, the State Bar Committee on Administration of Justice, the State Bar Litigation Section, and others. We will analyze the comments in Memorandum 95-8, in advance of the January 1995 Commission meeting. Our objective at the meeting is to approve a final report on administrative adjudication for submission to the 1995 Legislature. We are taking steps to have the current draft introduced in bill form, and will amend in revisions made at the January meeting.

Note on Intervention

Proposed Section 11507.2 of the draft would add procedures to allow a third party to intervene in an administrative adjudication under the formal hearing procedure. An intervention determination by the administrative law judge would not be administratively or judicially reviewable. An agency could by regulation preclude intervention in its proceedings.

At the November meeting the Commission heard varying concerns about this provision. The State Bar Committee on Administration of Justice thought that intervention decisions should be reviewable. Professor Asimow thought the intervention provisions should be made applicable in all state administrative adjudication. The Attorney General thought that the intervention provisions should be omitted from the statute.

The Commission solicits further commentary on whether, and to what extent, statutory intervention provisions would be useful.

Underground Rules

The draft prohibits a penalty from being based on an agency guideline that has not been adopted as a regulation. Section 11425.50(e) (decision). The Commission asked that a Comment be developed to make clear that a violation of the prohibition does not automatically require reversal of the decision.

The staff will incorporate the following Comment language, developed by Professor Asimow in cooperation with the Office of Administrative law, in the final draft:

If a penalty is based on an “underground rule” — one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act — a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the *only* reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. See *Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 149 Cal. Rptr. 1 (1978).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Staff Draft

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

SUMMARY OF RECOMMENDATION

Purpose of Revision

This recommendation proposes to supplement the hearing provisions of both the 1945 California APA and other state agency hearing procedures. The proposed law would govern all state proceedings where an evidentiary hearing for determination of facts is statutorily or constitutionally required. The purpose of the revision is to:

- Promote greater uniformity in state agency hearing procedures.
- Make state agency hearing procedures more accessible to the public.
- Improve fairness of state agency hearing procedures.
- Modernize and add greater flexibility to state agency hearing procedures.

Effect on Existing Procedures

The proposed law would leave in place existing basic hearing procedures. It would superimpose on all state agency hearing procedures an “administrative adjudication bill of rights” providing fundamental due process and public policy protections. It would supplement existing procedures with optional provisions to add flexibility to state agency hearing procedures. And it would modernize the 1945 California APA.

Administrative Adjudication Bill of Rights

All state agency adjudicative proceedings would be subject to fundamental due process and public policy requirements:

- The agency must give notice and an opportunity to be heard, including the right to present and rebut evidence.
- The agency must make available a copy of its hearing procedure.
- The hearing is open to public observation.
- The presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency.
- The presiding officer must be free of bias, prejudice, and interest.
- The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. Credibility determinations made by the presiding officer are entitled to great weight on review. A penalty may not be based on an agency “guideline” unless the agency has adopted it as a regulation.
- The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.
- Ex parte communications to the presiding officer are prohibited.

- The agency must make available language assistance to the extent required by existing law.

Optional Provisions that Add Flexibility

The proposed law would expand the hearing procedure options available to a state agency. The agency could use the agency's regular hearing procedure, an informal hearing procedure, an emergency decision procedure, or a declaratory decision procedure. Other useful supplemental provisions include telephonic hearings, subpoena authority, provisions for enforcement of orders and imposition of sanctions, and alternative dispute resolution.

Informal Hearing Procedure. The informal hearing procedure satisfies due process and public policy requirements in a manner that is simpler and more expeditious than more formal basic hearing procedures, for use in appropriate circumstances. It provides an informal forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer, and can accommodate a hearing where by regulation or statute a member of the public may participate without intervening as a party. In an informal hearing the presiding officer regulates the course of the proceeding. The presiding officer must permit the parties and may permit others to offer written or oral comments on the issues, and may limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument.

Emergency Decision Procedure. The proposed law makes available to all agencies authority to act immediately in emergency situations. The decision is limited to temporary, interim relief in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action. The emergency decision must be followed up by a regular adjudicative proceeding.

Declaratory Decision Procedure. The proposed law makes clear that all agencies have discretionary authority to issue advice by means of declaratory decisions. Regular hearing procedures do not apply in this situation, since the declaratory decision is based on assumed facts.

Alternative Dispute Resolution. The proposed law encourages use of alternative dispute resolution techniques such as mediation and arbitration, in addition to settlement, by expressly authorizing these techniques and protecting communications.

Modernization of 1945 California APA

Important modernizations of the 1945 California APA include provisions for consolidation and severance, intervention, resolution of discovery disputes by the presiding officer rather than superior court, telephonic conduct of prehearing conferences, electronic reporting of proceedings, telephonic voting by agency members, and simple procedures for correction of errors and modification of decisions.

Costs

The proposed law is designed to limit transitional costs by minimizing and simplifying adoption of implementing regulations. The proposed law may generate substantial long-term savings through provision of less formal hearing options, alternative dispute resolution, simplified hearing processes, modernization of procedures (such as telephonic hearings and conferences and electronic reporting), summary review techniques, and other changes to expedite the administrative adjudication process and make it more efficient. The proposed law may also result in a public perception of fairness and greater satisfaction with the administrative hearing process, with a consequent decrease in the need for administrative and judicial review of state agency decisions.

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ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

BACKGROUND

Introduction

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 recommendations concerning administrative adjudication by state agencies.

History of Project

The Commission initiated this project by retaining Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare a background study. The Commission also collected and 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

The Commission's consideration of policy issues and draft statutory language occurred at a series of public meetings between 1990 and 1994. The meetings were held primarily in Sacramento as a convenience to the many state agencies headquartered there and were well-attended by agency representatives. In order to help achieve balance in its deliberations, the Commission named several non-agency experts as volunteer consultants to provide the Commission the benefit of their knowledge and experience.⁴

In 1993 the Commission released for comment a tentative recommendation to provide a single administrative procedure for all state agencies, with an opportunity for an agency to adopt regulations to tailor the procedure to suit its needs. Comment on the draft convinced the Commission the single procedure approach has substantial problems and that a variety of procedures is necessary to accommodate the wide range of state agency hearings. The Commission restructured the draft during 1994 to provide a variety of procedures, subject to

1. 1987 Cal. Stat. res. ch. 47; see also *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. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1988), 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 consultants are Richard Turner, Robert Sullivan, Gene Livingston, and James Mattesich, all of Sacramento; Mark Levin of Los Angeles; and Professor Preble Stolz of Berkeley.

fundamental due process and public policy requirements. Further comment on the restructured draft resulted in the present recommendation.

EXISTING CALIFORNIA LAW GOVERNING ADMINISTRATIVE ADJUDICATION⁵

California's Administrative Procedure Act⁶ was enacted in 1945⁷ in response to a study and recommendations by the Judicial Council.⁸ The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.⁹ 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.¹⁰

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 Legislature moved cautiously, but the Administrative Procedure Act was well conceived and has served well in the 50 years since it was enacted.

During that time, the provisions of the Administrative Procedure Act relating to adjudication have been little changed.¹¹ Yet the regulatory and social welfare

5. 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 (1992).

6. The Administrative Procedure Act appears at Government Code Sections 11340-11529. Adjudication is governed by Sections 11500-11529. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11370.5. The California statute is referred to in this report as "1945 California APA".

7. 1945 Cal. Stat. ch. 867. Provisions on rulemaking were added in 1947 and substantially revised in 1979. 1947 Cal. Stat. ch. 1425; 1979 Cal. Stat. ch. 567. The adjudication provisions have had only minor revisions since 1945.

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

9. 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.

10. Judicial Council of California, Tenth Biennial Report 10, 28-29 (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 Cal. L. Rev. 416 (1944).

11. 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. See Gov't Code §§ 11500(g), 11501.5, 11513(d)-(k), 11513.5.

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

responsibilities of state government have broadened in ways unforeseen in 1945 and the scope of administrative adjudication is vastly greater now.

The 1945 California APA prescribes a single and unvarying mode of formal, trial-type adjudicative procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.¹² The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.¹³ 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.¹⁴ Many important California agencies are wholly or largely 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, the Unemployment Insurance Appeals Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.¹⁵

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 adjudicative 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.¹⁶

12. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. See Gov't Code §§ 11503-11504.

13. 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, adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act. The only known exception is the Alcoholic Beverage Control Appeals Board.

14. Gov't Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reapprovals. 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. 1994).

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

16. 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.

PROPOSED REVISION OF ADMINISTRATIVE ADJUDICATION

Basic Hearing Procedures Unchanged

Although the Law Revision Commission has given careful consideration to the concept of unifying the various administrative adjudication statutes, the Commission cannot recommend a uniform statute at this time. State agencies have suffered substantial reductions in staffing and other resources in recent years. Many agencies are pressured to perform their primary missions and cannot afford to divert their resources to review of new procedures, adoption of implementing regulations, retraining of staff, education of parties that appear before them, and other consequences of a comprehensive revision of their hearing procedures. Although long-term benefits to the state and the public would result from unification of procedures, the Commission does not recommend it at this time because of the short-term costs involved.

The Commission recommends instead enactment of a more narrowly focused revision of the California administrative adjudication statutes. The revision would leave in place the existing hearing procedures, which are familiar to the agencies and persons appearing before them, but would supplement the existing procedures with provisions that take into account the many developments in administrative procedure that have occurred over the past 50 years. This period has seen an explosive growth of our knowledge and experience in administrative adjudication, 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. The Commission's proposals are designed to achieve important improvements in state administrative procedure without imposing substantial costs on state agencies.

Administrative Adjudication Bill of Rights¹⁷

The Commission recommends that existing state agency hearing procedures be subject to a set of fundamental public policy and due process requirements. These requirements are:

- Notice and an opportunity to be heard, including the right to present and rebut evidence.
- An accessible hearing procedure.
- A presiding officer free of bias, prejudice, and interest.
- A neutral presiding officer, achieved by separating adjudicative from investigative, prosecutorial, and advocacy functions within an agency.
- Prohibition of *ex parte* communications.
- Open hearings.

17. For a more detailed discussion, see "Administrative Adjudication Bill of Rights" *infra*.

- Language assistance.
- A written decision based on the record, including a statement of its factual and legal basis. Credibility determinations made by the presiding officer are given great weight on review. A penalty may be based on an agency “guideline” only if adopted as a regulation.
- Designation and indexing of precedent decisions.

The hearing procedures of most agencies already satisfy some or all of these requirements. The proposed law would extend the requirements uniformly to all state agency administrative adjudications.

Flexibility in Hearing Procedures¹⁸

A significant limitation of the 1945 California APA and many other agency hearing procedures is that they provide a single type of relatively formal adjudicative proceeding. But a less formal procedure is needed for many types of agency decisions, and an expedited process may be required for others. The proposed law expands the opportunity for an agency to select the type of procedure that is most appropriate for a particular decision. These options include:

- *The Agency’s Existing Hearing Procedure.* The proposed law does not affect an agency’s existing hearing procedure, which remains the default procedure applicable to the hearing unless one of the other options is available and selected.

- *The Informal Hearing Procedure.* The informal hearing procedure is intended for small cases and is useful in other situations such as for taking public testimony. It is more in the nature of a conference than a trial, with the presiding officer authorized to limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument.

- *Emergency Decision Procedure.* An agency may need to act immediately in an emergency situation, and the agency’s existing hearing procedure may be inadequate for this purpose. A few statutes provide authority for an agency to take immediate action for certain types of decisions, but there is no general provision to this effect. The proposed law provides an emergency decision framework for any agency that adopts a regulation specifying the parameters of the procedure.

- *Declaratory Decision Procedure.* It may be important that an agency issue advice on the application of statutes or regulations it administers. The proposed law provides a declaratory decision structure in which agencies may do this. Other hearing procedures do not apply in this situation, since the declaratory decision is based on stipulated facts.

The proposed law also encourages alternative dispute resolution techniques and makes clear agency authority to settle cases without a hearing. Other procedural enhancements are provided for all state agency hearings.

18. For a more detailed discussion, see “Flexibility in Hearing Procedures” *infra*.

Modernization of 1945 California APA¹⁹

In addition to the administrative adjudication bill of rights and the added flexibility in hearing procedures that would be applicable to all agencies, the proposed law includes modernization of the 1945 California APA. For example, provisions are added for intervention, consolidation and severance, resolution of discovery disputes, settlement conferences, correction of mistakes in decisions, and electronic voting by agency members.

Transitional Provisions

The proposed law defers the operative date for a year and a half. This will enable agencies to promulgate any regulations necessary for smooth operation under the proposed law. The proposed law also allows for immediate adoption of interim regulations by an agency, to ease the transition process. The proposed law and implementing regulations would govern only cases initiated after the operative date. Pending cases would continue to be governed by existing law.

Cost Considerations

The Commission's recommendations seek to achieve the basic goals of promoting greater uniformity in state agency hearing procedures, making state agency hearing procedures more accessible to the public, improving the fairness of state agency hearing procedures, and modernizing and adding greater flexibility to state agency hearing procedures.

However, a major factor in the formulation of recommendations to achieve these goals is a concern to avoid unnecessary imposition of costs on an agency. In the state's current fiscal situation, the resources of most agencies to perform their statutory tasks are reduced. The Commission has carefully considered procedural changes that could have the effect of increasing the burden on agencies, and has built in mitigating factors in each case.

Of particular concern to agencies has been (1) the cost of reviewing existing procedures and regulations and adopting new ones, and (2) the cost of providing separation of functions in agency hearings. Examples of techniques the proposed law uses to address these concerns are:

(1) Existing basic procedural rules of agencies are allowed to stand. The regulation adoption process is simplified. Ample time is allowed for the transitional process.²⁰

(2) Existing agency lay hearing officer structures are maintained. Neutral staff assistance to the presiding officer is recognized. The separation requirement is waived where circumstances compel it.²¹

19 For a more detailed discussion, see "Modernization of 1945 California APA" *infra*.

20. See, e.g., discussion of "Transitional Provisions" *supra*.

21. The overwhelming volume of drivers license cases, for example, requires an exemption from separation of functions. Other exemptions are provided. See discussion of "Separation of Functions" *infra*.

It may be argued that the proposed changes in procedural law could result in temporary implementation costs. The Commission believes the proposed law will generate offsetting savings that far outweigh any short term costs. Examples of cost saving measures include:

- An informal hearing process is provided as an alternative to the lengthy and costly formal hearing process required by existing law.
- Agency emergency decision procedures are provided as an alternative to currently required court proceedings.
- Inexpensive alternative dispute resolution techniques are facilitated.
- Discovery disputes under the 1945 California APA are resolved administratively rather than judicially.
- Telephonic hearings and conferences, electronic recording of proceedings, and other cost-saving innovations are made available to agencies under the 1945 California APA.
- The presiding officer is given greater authority under the 1945 California APA to efficiently manage the conduct of proceedings, for example by limiting cumulative evidence or imposing sanctions.
- Summary administrative review options under the 1945 California APA are expanded.

The Commission also contemplates long term savings for the administrative dispute resolution process. If the public believes it has received a fair administrative hearing, it is likely to abide by the decision in the case rather than challenge it by administrative or judicial review. The proposed law will help achieve fundamental fairness in the administrative adjudication process and will foster greater confidence of the public in the system, to the ultimate benefit of both the public and state government.

The state will benefit substantially over the years from a revision of the California administrative adjudication that modernizes and increases the uniformity of procedures, and that provides a sound structure for future development.

APPLICATION OF STATUTE

Application to Hearings Required by Constitution or Statute

Governmental agencies make many decisions that impact the rights and interests of citizens. However, most of these decisions are informal in character, and it would be inappropriate as well as a practical impossibility to burden those decisions with the hearing formalities of administrative adjudication. It is only where a decision affects a right or interest of a type entitled to due process protection under the state or federal constitution, or where the Legislature by statute has expressly extended such protection, that the decision should be made through the statutory hearing procedures.

The proposed law would provide procedures to govern all state agency decisions for which an evidentiary hearing for determination of facts is required by the federal or state constitution or by statute. For this purpose, a “decision” is an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Thus the proposed law does not apply to rulemaking since rules are of general rather than particular applicability. And since the proposed law governs only statutorily or constitutionally required hearings, it does not cover a large area of informal adjudication where agencies may choose to provide hearings even though no hearing is legally required.

Definition of “State Agency”

The proposed law applies to state agency, as opposed to local agency, administrative adjudication.²² 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 proposed law. The proposed law 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 proposed law applies.²³

(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 proposed law.²⁴

The proposed law also authorizes local agencies voluntarily to adopt the provisions of the proposed law. 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 proposed law 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.²⁵

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,²⁶ determination of ethics violations of

22. This recommendation is limited to state agencies. Extension of the hearing provisions of the Administrative Procedure Act to local agencies is beyond the scope of the present study.

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

24. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501 with respect to certificated employees. See also Educ. Code §§ 44944, 44948.5, 87679.

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

26. Cal. Const. Art. IV, § 5.

members,²⁷ impeachment of state officers and judges,²⁸ and confirmation of gubernatorial appointments.²⁹ 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 proposed law would not frustrate the objective of a body of administrative procedural law applicable to all state agencies, since the adjudicative 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,³⁰ the Judicial Council,³¹ the Commission on Judicial Appointments,³² the Commission on Judicial Performance,³³ and the Judicial Criminal Justice Planning Committee.³⁴

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

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

(2) The Commission on Judicial Appointments conducts hearings to make judicial appointment confirmation decisions that are vested in the discretion of the commission. The administrative adjudication provisions of the proposed law 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 commission.³⁵

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

Since the judicial branch agencies either do not conduct constitutionally or statutorily required administrative hearings, or the hearings they do conduct are or should be constitutionally exempt, the proposed law 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

27. Gov't Code §§ 8940-8956 (Joint Legislative Ethics Committee).

28. Cal. Const. Art. 4, § 18.

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

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

31. Cal. Const. Art. VI, § 6.

32. Cal. Const. Art. VI, § 7.

33. Cal. Const. Art. VI, § 8.

34. Penal Code § 13830.

35. Cal. Const. Art. VI, § 18(i).

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 proposed law maintains the independence of the Governor and Governor's office by exempting it from application of the act.³⁶

University of California

Article 9, Section 9 of the California Constitution makes the University of California independent and free of legislative control.³⁷ Although the Commission's fundamental recommendation is that the proposed administrative procedures should apply to all agencies of the state, it does not appear that the University may be subjected to the proposed law under this provision.³⁸

Basic due process constraints apply to rulemaking and adjudicative 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 proposed law.

Nonetheless, the proposed law is reasonable, flexible, and satisfies basic due process constraints. The Commission believes the proposed law is suitable for the University of California's adjudicative proceedings. The proposed law should make clear that the University may voluntarily adopt the procedures. Adoption of the procedures 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 state government.

Executive Branch Agencies

Although the Administrative Procedure Act is designed specifically for hearings by executive branch agencies, some hearings are so uncharacteristic and require such special treatment that exemption from proposed law is appropriate. However, constitutional due process requirements would still apply to those hearings.

Hearings the Commission recommends be exempted from the proposed law are:

36. 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.").

37. 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.

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

Agricultural Labor Relations Board: election certification. The collective bargaining election certification provisions administered by the Agricultural Labor Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.³⁹

Alcoholic Beverage Control Appeals Board: appeals from ABC decisions. The Alcoholic Beverage Control Appeals Board is a review tribunal for appeals from decisions of the Department of Alcoholic Beverage Control. The Constitution provides procedural rules for these appeals that cannot be altered by statute.⁴⁰

Department of Corrections, Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Evaluation Authority: parole hearings. Fundamental principles of the proposed law, such as open hearings, are irrelevant in parole hearings. In addition, the interplay of due process principles and the likelihood that any fundamental change in procedures will generate extensive litigation in this area make application of the proposed law inadvisable.

Military Department: hearings under Military & Veterans Code. California Military Department hearings under the Military and Veterans Code and pursuant to federal regulation are a hybrid of federal and special state provisions that are unique and involve primarily matters of military classification and discipline. The only workable approach is to exempt these hearings completely.

Public Employment Relations Board: election certification. The collective bargaining election certification provisions administered by the Public Employment Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.⁴¹

Public Utilities Commission: hearings under the Public Utilities Act. The Public Utilities Commission is a constitutional agency that is authorized to establish its own procedures, subject to statute and due process.⁴² In addition to special constitutional provisions, there is an extensive body of special statutory rules governing hearings under the Public Utilities Act. As a practical matter, application of the proposed law in this legal context would have little effect other than to add complexity to the law.

Commission on State Mandates: resolution of disputes over state mandated local programs. The Commission on State Mandates hears and decides applications from local government for reimbursement from the State for state-mandated programs that impose costs on local government.⁴³ This is an intergovernmental relations matter that has little in common with ordinary administrative hearings and does not affect the public.

39. See, e.g., Lab. Code §§ 1156-1159.

40. Cal. Const. Art. XX, § 22.

41. See, e.g., Gov't Code §§ 3520-3595.

42. Cal. Const. Art. XII, § 2.

43. See Gov't Code §§ 17525-17571.

All other statutorily or constitutionally required hearings of executive branch agencies should generally remain subject to the proposed law. However, there are special statutes applicable to particular decisions of agencies and these special provisions should ordinarily be preserved in conforming changes as reflective of a conscious policy determination.

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 employed by the Office of Administrative Hearings in the Department of General Services.⁴⁴ However, most of the major state agencies employ their own administrative law judges and hearing officers.⁴⁵ 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.⁴⁶ The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert

44. Gov't Code §§ 11501, 11502. The Office of Administrative Hearings has identified 95 state and miscellaneous agencies for which it currently conducts some or all adjudicative hearings.

45. 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.

46. Judicial Council of California, Tenth Biennial Report 11 (Dec. 31, 1944).

in a number of fields, yet who would not have a potential conflict of interest with 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 could 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.”⁴⁷

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.

No Expansion of California Central Panel Proposed

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 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.⁴⁸

47. *Id.* at 14.

48. 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.

First, there does not appear to be a compelling case for a general removal of hearing officers to the central panel. The Commission's investigation disclosed some concern among private practitioners about fairness, and the appearance of fairness, where the hearing is conducted by an employee of the agency prosecuting the matter. However, the concern was directed to a few problem areas, insufficient to warrant a fundamental change in the existing hearing officer structure for all agencies and all proceedings.

Second, the various agencies are generally satisfied with their present in-house hearing personnel. They have tailored their systems to their particular needs and the hearing personnel appear to be functioning appropriately.

Third, most of the agencies that employ a significant number of in-house judges are themselves purely adjudicating agencies rather than agencies with a mixture of prosecutory and adjudicative functions. Therefore, there is much less need to make their judges independent. This is true, for example, of the Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, the State Personnel Board, and the Department of Social Services when it adjudicates welfare disputes between counties and welfare recipients.

Fourth, 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.⁴⁹ 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.

(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 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.

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

Fifth, 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.

Sixth, each agency, and 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.

Finally, the benefits of an independent hearing officer can be achieved without disruption of existing personnel structures by ensuring fairness and due process through the basic requirement of impartiality of the decisionmaker. The proposed law codifies fundamental elements of impartiality for all state agency hearings: the decision should be based exclusively on the record in the proceeding, credibility determinations made by the presiding officer should be given great weight on review, the decisionmaker should be free of bias, *ex parte* communications to the decisionmaker should be prohibited, adversarial functions should be separated from decisionmaking functions within the agency, and decisionmaking functions should be insulated from adversarial command influence within the agency.⁵⁰

ADMINISTRATIVE ADJUDICATION BILL OF RIGHTS

The proposed law includes an "administrative adjudication bill of rights" that prescribes fundamental due process and public policy protections for persons involved in administrative adjudication by state agencies. These provisions are described below.

Notice and an Opportunity to be Heard

Notice to the person that is the subject of agency proceeding and an opportunity for the person to be heard are fundamentals of due process of law. The proposed law codifies this principle and makes clear that the opportunity to be heard includes the right of the person to present and rebut evidence.

Accessibility of Procedures

A major defect of the existing California law governing administrative adjudication by state agencies is that the law as to the hearing procedures applicable in an individual agency may be relatively inaccessible. It is common 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

50. See discussion of "Administrative Adjudication Bill of Rights" *infra*.

unwritten practices followed by the agency.⁵¹ 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 state administrative adjudication procedures is to make the law governing the procedures of an agency more readily accessible to those having business before the agency. The proposed law would require an agency to make available a copy of its procedure to parties appearing before it.

Open Hearings

Existing California law is generally 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.⁵² The proposed law makes clear that a state agency hearing is generally open to the public, subject to special statutes such as those protecting trade secrets or other confidential or privileged matters, or those protecting child victims and witnesses.

Neutrality of Presiding Officer

Existing California statute and case law on separation of the adjudicative function from other functions within the agency is unclear.⁵³ To avoid prejudgment, the decisionmaker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. The proposed law codifies this principle.

As a practical matter, the separation of functions requirement could cripple an agency in a number of situations, due to staffing limitations.⁵⁴ The proposed law addresses these situations specifically:

(1) Agency personnel may confer in making preliminary determinations such as whether probable cause exists to commence a proceeding. The proposed law makes clear that this sort of involvement does not render a person unable ultimately to decide the case.

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

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

52. See Asimow, *The Adjudication Process* 109 (Oct. 1991).

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

54. 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 most recent annual statistics (1993) show 325,000 DMV actions against drivers resulting in 157,716 hearings, including 4,259 hearings involving commercial drivers. 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. The special certificate hearings are a relatively small portion of the total, and they are all occupational in character. There were 211 special certificate hearings in 1993, at a total cost of \$19,783. Requiring separation of functions in this limited class will provide useful experience on the actual cost and benefit of the separation of functions requirement.

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

Bias

The 1945 California APA makes clear that a decisionmaker may be disqualified if unable to “accord a fair and impartial hearing or consideration.”⁵⁵ The proposed law recodifies this standard in the more concrete traditional terms of “bias, prejudice, or interest,” and imports from the Code of Civil Procedure a few key criteria of particular relevance to administrative adjudication.⁵⁶ The disqualification provisions would apply to any agency decisionmaker, not just hearing personnel under the 1945 California APA.

Exclusivity of Record

Existing California case law requires that the decision be based on the factual record produced at the hearing.⁵⁷ Both the Federal APA⁵⁸ and the 1981 Model State APA⁵⁹ codify this aspect of due process, and the proposed law does the same for California.

However, some agencies rely on the special factual knowledge and expertise of the decisionmaker 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, in addition to officially noticeable matters provided for by existing law,⁶⁰ other supplemental evidence not produced at the hearing, provided

55. Gov't Code § 11512(c). Notwithstanding actual bias, the 1945 California APA adopts a “rule of necessity” that if disqualification of the decisionmaker would prevent the agency from acting (e.g., causing lack of a quorum), the decisionmaker may nonetheless participate. The proposed law addresses this problem with a provision drawn from the 1981 Model State APA that disqualifies the decisionmaker and provides for substitution of another person by the appointing authority. See 1981 Model State APA § 4-202(e)-(f).

56. The 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 presented in the proceeding, and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2.

57. 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).

58. 5 U.S.C. § 556(e).

59. 1981 Model State APA § 4-215(d).

60. Gov't Code § 11515.

the evidence is made a part of the record and all parties are given an opportunity to comment on it.

Findings and Basis of Decision

The 1945 California APA requires the decision to contain findings of fact and a determination of issues, together with the penalty if any.⁶¹ The statute is supplemented by the case law requirement that the decision contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts.⁶² The proposed law augments this recitation with the requirement that the factual and legal basis for the decision be stated as to each of the principal controverted issues. This will force the decisionmaker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

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 should be identified in the decision, and thereafter should be entitled to great weight on judicial review.⁶³

It is common agency practice to use guidelines for imposition of penalties in agency proceedings. The Administrative Procedure Act precludes enforcement of these guidelines unless adopted and publicly-available as agency regulations.⁶⁴ The proposed law includes a specific application of this principle: the decisionmaker may not impose a penalty based on a disciplinary guideline that has not been promulgated as required by law.

Precedent Decisions

The proposed law provides for agency designation of a decision as precedential if the decision contains a significant legal or policy determination that is likely to recur. The agency must maintain an index of determinations made in precedent decisions. An agency's designation of, or failure to designate, a decision as precedential is not judicially reviewable, but a decision that is not designated as precedential may not be cited as precedent.

The precedent decision provision recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although

61. Gov't Code § 11518.

62. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 (1974).

63. 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 APA); *Garza v. Workmen's Compensation Appeals Board*, 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (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); Lab. Code § 1148 (Agricultural Labor Relations Board).

64. Gov't Code § 11340.5(a) ("underground regulations").

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.⁶⁵

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.

Ex Parte Communications

The 1945 California APA and statutes governing a few other agencies are clear that factual inputs to the decisionmaker must be on the record, but the rule as to other agency proceedings is not clear. Moreover, it is not clear whether ex parte contacts concerning law or policy are permissible.⁶⁶ 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 ex parte communications to agency heads and to communications to any decisionmaker in the great majority of administrative adjudications in California that do not fall under the 1945 California APA. In some state agencies ex parte contacts are tolerated or encouraged.⁶⁷

Fundamental fairness in decisionmaking demands both that factual inputs and arguments to the decisionmaker on law and policy be made openly and be subject to argument by all parties. The proposed law prohibits ex parte communications with the decisionmaker in all state agency proceedings, subject to several qualifications necessary to facilitate the decision-making process:

- (1) Discussion of noncontroversial matters of practice or procedure is permissible.
- (2) The decisionmaker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise

65. 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 Office of Administrative Law has determined that an agency's designation of a decision as precedential violates Government Code Section 11340.5 [formerly Section 11347.5] unless the designation is made pursuant to rulemaking procedures, except where pursuant to Section 11346 the designation is expressly exempted by statute. 1993 OAL Determination No. 1. 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 pursuant to express statutory authority, but only a designation by the Unemployment Insurance Appeals Board or the State Personnel Board is expressly exempted by statute from rulemaking procedures. The proposed law expressly exempts agency designation of precedent decisions from rulemaking procedures.

66. See generally Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1132-33 (1992).

67. 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.

realistically available to the decisionmaker is from personnel within the agency that is a party to the proceeding. The decisionmaker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.

(3) Agency personnel, including prosecutorial personnel, must be able to advise the decisionmaker concerning aspects of a settlement proposed by the prosecution. The proposed law recognizes this situation.

(4) The ban on *ex parte* communications would not apply in a nonprosecutorial proceeding that involves necessary technical advice or a decision by a specified land use agency. Although these nonprosecutorial proceedings are trial-like, they involve a substantial element of policy determination where it may be important that the decisionmaker consult more broadly than the immediate parties to the proceeding. The proposed law would allow policy advice to be given in these proceedings, provided it is summarized in the record and made available to all parties.

Where an improper *ex parte* contact has been made, the proposed law provides several protective and curative devices. A decisionmaker 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 decisionmaker, the *ex parte* communication could be grounds for disqualification of the decisionmaker. In such a case, the record of the communication would be sealed by protective order of the disqualified decisionmaker.

Language Assistance

Existing provisions require interpreters for language-disabled parties⁶⁸ in proceedings before specified agencies. The proposed law preserves this requirement and extends it to language-disabled witnesses.

FLEXIBILITY IN HEARING PROCEDURES

In addition to the mandatory provisions of the administrative adjudication bill of rights, the proposed law includes a number of optional provisions that will add flexibility to and help modernize and expedite state agency hearing procedures, whether conducted under the 1945 California APA or under an agency's other hearing procedures. The major optional provisions are described below.

Telephonic Hearings

The 1945 California APA and other agency hearing procedures contemplate a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical

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

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.⁶⁹

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 telephonic hearing may not be used if a party objects.

Subpoenas

Under the 1945 California APA an agency has broad subpoena authority.⁷⁰ The proposed law continues this authority and extends it to the other state agencies, as well as to attorneys of the parties as in civil practice; the proposed law 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. To protect against hardship, the proposed law permits a custodian of subpoenaed documents to satisfy the subpoena by delivery of a copy or by making the documents available for inspection and copying, in the manner allowed in court proceedings.

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.⁷¹ This authority is extended in the proposed law to all state agency adjudicative proceedings.

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,⁷² 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.

Settlement

An agency has implied power to settle a case.⁷³ The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a

69. See Asimow, *The Adjudication Process* 106-07 (Oct. 1991).

70. See Gov't Code § 11510.

71. Gov't Code § 11525.

72. Code Civ. Proc. § 128.5.

73. *Rich Vision Centers, Inc. v. Board of Medic. Exam.*, 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455 (1983).

settlement.⁷⁴ This resolves the difficulty 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 settlement may be made before or after commencement of the proceeding, except in an occupational licensing case. An occupational licensing case may be settled only after commencement of the proceeding in order to ensure that the disciplinary action is a matter of public record.

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,⁷⁵ and in 1990 Congress amended the Federal APA to require agencies to explore and use alternative dispute resolution techniques in all agency functions.⁷⁶ Existing California law is generally silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.⁷⁷ 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. Mediation communications are kept confidential just as such communications remain confidential in civil proceedings,⁷⁸ and reference to nonbinding arbitration activities is inadmissible in a subsequent *de novo* proceeding; the presiding officer, mediator, or arbitrator cannot be compelled to testify in subsequent proceedings concerning the alternative dispute resolution activities.⁷⁹ 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

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

75. See Asimow, *The Adjudication Process* 45-47 (Oct. 1991).

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

77. See Asimow, *The Adjudication Process* 44-45 (Oct. 1991).

78. Evid. Code § 1152.5.

79. *Cf.* Evid. Code § 703.5.

provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

Informal Hearing Procedure

The standard formal adjudicative hearing procedure under the 1945 California APA and other procedural statutes 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.⁸⁰

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 an informal adjudicative hearing process, drawn from the 1981 Model State APA.⁸¹ This process would also be available to an agency that specifies classes of cases where it would be appropriate, provided use of the informal process would not violate due process requirements for those cases.

The informal hearing may be particularly useful in a number of situations:⁸²

- 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.

A justification for providing a less formal alternate procedure is that without it, many agencies will either obtain enactment of special hearing procedures, or will proceed “informally” in a manner not spelled out by any statute or regulation. As a consequence, wide variations in procedure will occur from one 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. This pattern is already apparent, to a considerable extent, at both the state and federal levels.

The proposed informal 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. An informal hearing should only be used in a case that is susceptible of determination without the need for substantial cross-examination, since cross-examination will ordinarily be limited. The

80. See Asimow, *The Adjudication Process* 87-91 (Oct. 1991).

81. 1981 Model State APA §§ 4-401 to 4-403. Alternate adjudicative procedures are 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).

82. See Asimow, *The Adjudication Process* 94-97 (Oct. 1991).

impartiality requirements and fundamental public policy and due process guarantees of the formal hearing procedure would continue to apply.

An informal hearing procedure is essentially “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).”⁸³

Emergency Decision Procedure

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. Emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation, and this remedy has proved to be unsatisfactory in professional licensing cases where interim suspension is urgently needed to protect public safety.⁸⁴

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.⁸⁵ Absent a specific authorization for emergency procedure, existing administrative procedure statutes mandate full proceedings, which could thwart an agency in dealing with an emergency situation. 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 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.

83. Asimow, *The Adjudication Process* 93 (Oct. 1991).

84. See Asimow, *The Adjudication Process* 100 (Oct. 1991).

85. Existing emergency procedures include Bus. & Prof. Code §§ 6007(c) (attorney), 10086(a) (real estate licensee); Gov't Code § 11529 (medical licensee); Health & Safety Code §§ 1550 (last ¶), 1569.50, 1596.886 (health facilities and day care centers); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV license suspension).

Declaratory Decision Procedure

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 APA provides for declaratory orders,⁸⁶ as do modern state statutes.⁸⁷ However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

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 often will be 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.

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 an informal 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.

There are no provisions in the California statutes for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.⁸⁸ 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.

86. Federal APA § 554(e).

87. *Cf.* 1981 Model State APA § 2-103.

88. 1981 Model State APA § 1-107.

MODERNIZATION OF 1945 CALIFORNIA APA

The proposed law makes a number of modernizations and improvements in the 1945 California APA to reflect experience over the past 50 years. Significant changes from existing law are outlined below.

Prehearing Procedures

Consolidation and Severance. The 1945 California APA contains no provisions allowing consolidation of related cases or severance of 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,⁸⁹ which have worked well in practice in civil cases. Control of consolidation and severance issues is vested in the presiding officer.

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. In some types of proceedings intervention may be inappropriate or unduly complicate matters; the proposed law enables an agency by regulation to limit or preclude intervention practice.

Discovery. The 1945 California APA provides for limited discovery in administrative adjudications.⁹⁰ 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 changes.⁹¹

Under the 1945 California APA, 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.

89. Code Civ. Proc. § 1048.

90. 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).

91. 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 allowing the presiding officer, if one has been appointed, to order a deposition.

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

(3) The conference should offer the opportunity for alternative dispute resolution, and where appropriate be converted into an informal 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. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

Hearing Record

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 the presiding officer to require electronic reporting; a party could require stenographic reporting at the party's own expense.

Evidence

Technical Rules of Evidence. The proposed law codifies a few key exceptions to the general rule that any relevant evidence is admissible in an administrative adjudication if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.⁹² Existing law permits the presiding officer to exclude irrelevant and unduly repetitious evidence.⁹³ 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.

Hearsay. Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in

92. Gov't Code § 11513(c).

93. Gov't Code § 11513(c).

itself to support a finding.⁹⁴ This provision, known as 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 makes clear that the residuum rule can be raised for the first time on judicial review. Existing law is unclear on this matter.⁹⁵ 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.

Review of Evidentiary Rulings. 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.⁹⁶ The proposed law makes clear that the agency head may review evidentiary determinations of the presiding officer. The adjudicative authority is vested in the agency head, and the agency head should be the ultimate administrative decisionmaker.

Decision

Voting by Agency Members. The 1945 California APA permits voting by agency members by mail.⁹⁷ The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

Correction of Decision. In order to avoid unnecessary review procedures, the proposed law provides expeditious means of correcting mistakes and technical errors in the decision.

Review of Decision

Administrative Review. The proposed law continues the requirement that administrative review of a proposed decision be on the record, but adds a provision drawn from appellate practice enabling a record based on an agreed statement of the parties.⁹⁸ The proposed law also expands the ability of an agency head to adopt summarily a proposed decision without full administrative review. Under the proposed law, the agency head may summarily adopt the proposed decision with clarifying changes that do not affect the factual or legal basis of the decision. In addition, the agency head may summarily adopt the proposed decision with a change of legal basis, after offering the parties an opportunity to comment on the change.

Judicial Review. The proposed law generally leaves unchanged existing provisions governing judicial review.⁹⁹ This should not be taken as Law Revision Commission approval of the law. The Commission is currently studying the law

94. Gov't Code § 11513(c).

95. See Asimow, *The Adjudication Process* 71-73 (Oct. 1991).

96. See Asimow, *The Adjudication Process* 66-67 (Oct. 1991).

97. Gov't Code § 11526.

98. Cal. R. Ct. 6 (agreed statement).

99. See Gov't Code § 11523.

governing judicial review of agency action and will make a separate recommendation concerning it. The present recommendation does not address the matter.

ADMINISTRATIVE ADJUDICATION

General Outline

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Title 2. Government of the State of California

Division 3. Executive Department

Part 1. State Departments and Agencies

ADMINISTRATIVE PROCEDURE ACT

Chapter 3.5. Office of Administrative Law

Chapter 4. Office of Administrative Hearings

Chapter 4.5. Administrative Adjudication: General Provisions

Chapter 5. Administrative Adjudication: Formal Hearing

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1 ADMINISTRATIVE PROCEDURE ACT

2 CHAPTER 3.5. OFFICE OF ADMINISTRATIVE LAW

3 **Gov't Code § 11340.4 (added). Study of administrative rulemaking**

4 Section 11340.4 is added to the Government Code, to read:

5 11340.4. (a) The office is authorized and directed to:

6 (1) Study the subject of administrative rulemaking in all its aspects.

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

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

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

16 **Comment.** Section 11340.4 transfers to the Office of Administrative Law authority
17 formerly found in Section 11370.5 relating to the study of "administrative law" by the
18 Office of Administrative Hearings, to the extent that authority related to administrative
19 rulemaking.

20 CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

21 **Gov't Code §§ 11370-11370.5 (article heading). General provisions**

22 An article heading is added immediately preceding Section 11370 of the
23 Government Code, to read:

24 Article 1. General Provisions

25 **Comment.** Chapter 4 (commencing with Section 11370) is divided into articles for
26 organizational purposes.

27 **Gov't Code § 11370 (amended). Administrative Procedure Act**

28 Section 11370 of the Government Code is amended to read:

29 11370. Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing
30 with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter
31 5 (commencing with Section 11500) constitute, and may be cited as, the
32 Administrative Procedure Act.

33 **Comment.** Section 11370 is amended to recognize the addition of Sections 11400-
34 11470.50. The administrative adjudication provisions of the Administrative Procedure Act are
35 found in Chapters 4.5 (administrative adjudication: general provisions) and 5 (administrative
36 adjudication: formal hearing). Section 11400 (administrative adjudication provisions of
37 Administrative Procedure Act).

1 **Gov't Code § 11370.3 (amended). Personnel**

2 Section 11370.3 of the Government Code is amended to read:

3 11370.3. The director shall appoint and maintain a staff of full-time, and may
 4 appoint pro tempore part-time, administrative law judges qualified under Section
 5 11502 which is sufficient to fill the needs of the various state agencies. The
 6 director shall also appoint ~~hearing officers, shorthand reporters, and~~ such other
 7 technical and clerical personnel as may be required to perform the duties of the
 8 office. The director shall assign an administrative law judge for any proceeding
 9 arising under Chapter 5 (commencing with Section 11500) and, upon request
 10 from any agency, may assign an administrative law judge ~~or a hearing officer~~ to
 11 conduct other administrative proceedings not arising under that chapter and shall
 12 assign hearing reporters as required. ~~The director shall assign an administrative~~
 13 ~~law judge for any proceeding arising pursuant to Chapter 20 (commencing with~~
 14 ~~Section 22450) of Division 8 of the Business and Professions Code upon the~~
 15 ~~request of a public prosecutor.~~ Any administrative law judge, ~~hearing officer,~~ or
 16 other employee so assigned shall be deemed an employee of the office and not of
 17 the agency to which he or she is assigned. When not engaged in hearing cases,
 18 administrative law judges ~~and hearing officers~~ may be assigned by the director to
 19 perform other duties vested in or required of the office, including those provided
 20 for in Section 11370.5.

21 **Comment.** The references in Section 11370.3 to hearing officers and shorthand reporters
 22 are deleted to reflect current practice. The fourth sentence is deleted as unnecessary. See Bus.
 23 & Prof. Code § 22460.5.

24 **Gov't Code § 11370.5 (amended). Administrative law and procedure**

25 Section 11370.5 of the Government Code is amended to read:

26 11370.5. The office is authorized and directed to study the subject of
 27 ~~administrative law and procedure~~ adjudication in all its aspects; to submit its
 28 suggestions to the various agencies in the interests of fairness, uniformity and the
 29 expedition of business; and to report its recommendations to the Governor and
 30 Legislature at the commencement of each general session. All departments,
 31 agencies, officers and employees of the State shall give the office ready access to
 32 their records and full information and reasonable assistance in any matter of
 33 research requiring recourse to them or to data within their knowledge or control.
 34 Nothing in this section authorizes an agency to give access to records required
 35 by statute to be kept confidential.

36 **Comment.** Section 11370.5 is amended to limit the authority of the Office of
 37 Administrative Hearings to administrative adjudication. For authority of the Office of
 38 Administrative Law to study administrative rulemaking, see Section 11340.4. Section 11370.5
 39 is also amended to add language protecting confidentiality of records.

40 **Gov't Code §§ 11371-11373.3 (article heading). Medical Quality Hearing Panel**

41 An article heading is added immediately preceding Section 11371 of the
 42 Government Code, to read:

1 Article 2. Medical Quality Hearing Panel

2 **Comment.** Chapter 4 (commencing with Section 11370) is divided into articles for
3 organizational purposes.

4 **Gov't Code § 11380 (added). State Agency Reports and Forms Appeals**

5 Article 3 (commencing with Section 11380) is added to Chapter 4 of Part 1 of
6 Division 3 of Title 2 of the Government Code, to read:

7 Article 3. State Agency Reports and Forms Appeals

8 **§ 11380. State agency reports and forms appeals**

9 11380. (a)(1) The office shall hear and render a decision on any appeal filed by a
10 business, pursuant to subdivision (c) of Section 14775, in the event the business
11 contests the certification by a state agency head that reporting requirements meet
12 established criteria and shall not be eliminated.

13 (2) Before a business may file an appeal with the office pursuant to subdivision
14 (c) of Section 14775, the business shall file a challenge to a form or report
15 required by a state agency with that state agency. Within 60 days of filing the
16 challenge with a state agency, the state agency shall either eliminate the form or
17 report or provide written justification for its continued use.

18 (3) A business may appeal a state agency's written justification for the
19 continued use of a form or report with the office.

20 (4) If a state agency fails to respond within 60 days of the filing of a challenge
21 pursuant to paragraph (2), the business shall have an immediate right to file an
22 appeal with the office.

23 (b) No later than January 1, 1996, the office shall adopt procedures governing
24 the filing, hearing, and disposition of appeals. The procedures shall include, but
25 shall not be limited to, provisions that assure that appeals are heard and decisions
26 rendered by the office in a fair, impartial, and timely fashion.

27 (c) The office may charge appellants a reasonable fee to pay for costs it incurs in
28 complying with this section.

29 **Comment.** Section 11380 continues former Section 11530 without change.

1 **CHAPTER 4.5. ADMINISTRATIVE ADJUDICATION:**
2 **GENERAL PROVISIONS**

3 **Gov't Code § 11400-11470.50 (added). Administrative adjudication: general provisions**

4 Chapter 4.5 (commencing with Section 11400) is added to Part 1 of Division 3
5 of Title 2 of the Government Code, to read:

6 **CHAPTER 4.5. ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS**

7 **Article 1. Preliminary Provisions**

8 **§ 11400. Administrative adjudication provisions of Administrative Procedure Act**

9 11400. (a) This chapter and Chapter 5 (commencing with Section 11500)
10 constitute the administrative adjudication provisions of the Administrative
11 Procedure Act.

12 (b) A reference in any other statute or in a rule of court, executive order, or
13 regulation, to a provision formerly found in Chapter 5 that is superseded by a
14 provision of this chapter, means the applicable provision of this chapter.

15 **Comment.** Section 11400 makes clear that references to the administrative adjudication
16 provisions of the Administrative Procedure Act include both this chapter (general provisions)
17 and Chapter 5 (formal hearing). The formal hearing provisions of Chapter 5 apply to an
18 adjudicative proceeding as determined by the statutes relating to the proceeding. Section
19 11501. The general provisions of this chapter apply to all statutorily and constitutionally
20 required state agency adjudicative proceedings, including proceedings under Chapter 5. See
21 Section 11410.10 and sections following.

22 References in section Comments in this chapter and Chapter 5 to the "1981 Model State
23 APA" mean the Model State Administrative Procedure Act (1981) promulgated by the
24 National Conference of Commissioners on Uniform State Laws. References to the "Federal
25 APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305,
26 3105, 3344, 5372, 7521 (1988) (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat.
27 237), from which a number of the administrative adjudication provisions of the
28 Administrative Procedure Act are drawn.

29 **§ 11400.10. Operative date**

30 11400.10. (a) This chapter is operative on July 1, 1997.

31 (b) This chapter is applicable to an adjudicative proceeding commenced on or
32 after the operative date.

33 (c) This chapter is not applicable to an adjudicative proceeding commenced
34 before the operative date, except an adjudicative proceeding conducted on a
35 remand from a court or another agency after the operative date.

36 **Comment.** Section 11400.10 provides a deferred operative date to enable state agencies to
37 make any necessary preparations for operation under this chapter.

1 **§ 11400.20. Adoption of regulations**

2 11400.20. (a) Before, on, or after the operative date of this chapter an agency
3 may adopt interim or permanent regulations to govern an adjudicative proceeding
4 under this chapter.

5 (b) Subject to Section 11351:

6 (1) Interim regulations need not comply with Article 5 (commencing with
7 Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5, but
8 are governed by Chapter 3.5 in all other respects.

9 (2) Interim regulations expire on December 31, 1998, unless earlier terminated or
10 replaced by or readopted as permanent regulations in compliance with paragraph
11 (3). If on December 31, 1998, an agency has completed proceedings to replace or
12 readopt interim regulations and has submitted permanent regulations for review
13 by the Office of Administrative Law, but permanent regulations have not yet
14 been filed with the Secretary of State, the interim regulations are extended until
15 the earlier of the date permanent regulations are filed with the Secretary of State
16 or March 31, 1999.

17 (3) Permanent regulations are subject to all the provisions of Chapter 3.5
18 (commencing with Section 11340), except that if by December 31, 1998, an
19 agency has submitted the regulations for review by the Office of Administrative
20 Law, the regulations are not subject to review for necessity under Section
21 11349.1 or 11350.

22 **Comment.** Subdivision (a) of Section 11400.20 makes clear that an agency may act to
23 adopt regulations under this division after enactment but before the division becomes
24 operative. This will enable the agency to have any necessary regulations in place on the
25 operative date.

26 Under subdivision (b), an agency may adopt interim procedural regulations without the
27 normal notice and hearing and Office of Administrative Law review processes of the
28 Administrative Procedure Act. However, this does not excuse compliance with the other
29 provisions of the Administrative Procedure Act, including but not limited to the requirements
30 that (1) regulations be consistent and not in conflict with statute and reasonably necessary to
31 effectuate the purpose of the statute (Section 11342.2), (2) regulations be filed and published
32 (Sections 11343-11344), and (3) regulations are subject to judicial review (Section 11350).
33 Compliance with these provisions is not required for agencies exempted by statute. See
34 Section 11351.

35 Interim regulations are only valid through December 31, 1998. They may be replaced by
36 or readopted as permanent regulations before then, through the standard administrative
37 rulemaking process. In case permanent regulations are pending on December 31, 1998,
38 interim regulations may be extended up to three months.

39 Subdivision (b)(3) makes clear that permanent regulations governing administrative
40 adjudication are subject to normal rulemaking procedures, other than review for necessity
41 under Section 11349.1 (Office of Administrative Law) or 11350 (declaratory relief) in the
42 case of permanent regulations promulgated during the transitional period.

1 Article 2. Definitions

2 **§ 11405.10. Application of definitions**

3 11405.10. Unless the provision or context requires otherwise, the definitions in
4 this article govern the construction of this chapter.

5 **Comment.** Section 11405.10 limits these definitions to the general provisions on
6 administrative adjudication. For definitions governing the formal hearing procedure under
7 Chapter 5, see Section 11500.

8 **§ 11405.20. Adjudicative proceeding**

9 11405.20. “Adjudicative proceeding” means an evidentiary hearing for
10 determination of facts pursuant to which an agency formulates and issues a
11 decision.

12 **Comment.** Section 11405.20 is intended for drafting convenience.

13 **§ 11405.30. Agency**

14 11405.30. “Agency” means a board, bureau, commission, department, division,
15 office, officer, or other administrative unit, including the agency head, and one or
16 more members of the agency head or agency employees or other persons directly
17 or indirectly purporting to act on behalf of or under the authority of the agency
18 head. To the extent it purports to exercise authority pursuant to this chapter, an
19 administrative unit otherwise qualifying as an agency shall be treated as a
20 separate agency even if the unit is located within or subordinate to another
21 agency.

22 **Comment.** Section 11405.30 is drawn from 1981 Model State APA § 1-102(1). It
23 supplements Section 11000. See also Section 11500(a). The intent of the definition is to
24 subject as many governmental units as possible to this chapter. The definition explicitly
25 includes the agency head and those others who act for an agency, so as to effect the broadest
26 possible coverage. The definition also would include a committee or council.

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

32 An administrative unit of an agency that has no authority to issue decisions or take other
33 action on behalf of the agency is not an “agency” within the meaning of this section.

34 **§ 11405.40. Agency head**

35 11405.40. “Agency head” means a person or body in which the ultimate legal
36 authority of an agency is vested, and includes a person or body to which the
37 power to act is delegated pursuant to authority to delegate the agency’s power
38 to hear and decide.

39 **Comment.** The first portion of Section 11405.40 is drawn from 1981 Model State APA §
40 1-102(3). The definition of agency head is included to differentiate for some purposes
41 between the agency as an organic entity that includes all of its employees, and those particular
42 persons in which the final legal authority over its operations is vested.

1 The last portion is drawn from Section 11500(a), relating to use of the term “agency
2 itself” to refer to a nondelegable power to act. An agency may delegate review authority.
3 Section 11440.10.

4 **§ 11405.50. Decision**

5 11405.50. (a) “Decision” means an agency action of specific application that
6 determines a legal right, duty, privilege, immunity, or other legal interest of a
7 particular person.

8 (b) Nothing in this section limits:

9 (1) The precedential effect of a decision under Section 11425.60.

10 (2) The authority of an agency to make a declaratory decision pursuant to
11 Article 14 (commencing with Section 11465.10).

12 **Comment.** Section 11405.50 is drawn from 1981 Model State APA § 1-102(5). The
13 definition of “decision” makes clear that it includes only legal determinations made by an
14 agency that are of specific applicability because they are addressed to particular or named
15 persons. More than one identified person may be the subject of a decision. See Section 13
16 (singular includes plural). “Person” includes legal entity and governmental subdivision.
17 Section 11405.70 (“person” defined); see also Section 17 (“person” defined).

18 A decision includes every agency action that determines any of the legal rights, duties,
19 privileges, or immunities of a specific, identified individual or individuals. This is to be
20 compared to a regulation, which is an agency action of general application, applicable to all
21 members of a described class. See Section 11342 (“regulation” defined). This section is not
22 intended to expand the types of cases in which an adjudicative proceeding is required; an
23 adjudicative proceeding under this chapter is required only where another statute or the
24 constitution requires one. Section 11410.10 (application to constitutionally and statutorily
25 required hearings).

26 Consistent with the definition in this section, rate making and licensing determinations of
27 specific application, addressed to named or particular parties such as a certain power
28 company or a certain licensee, are decisions subject to this chapter. *Cf.* Federal APA § 551(4)
29 (defining all rate making as rulemaking). On the other hand, rate making and licensing
30 actions of general application, addressed to all members of a described class of providers or
31 licensees, are regulations under the Administrative Procedure Act. Section 11342
32 (“regulation” defined). However, some decisions may have precedential effect pursuant to
33 Section 11425.60 (precedent decisions).

34 **§ 11405.60. Party**

35 11405.60. “Party” includes the agency that is taking action, the person to
36 which the agency action is directed, and any other person named as a party or
37 allowed to appear or intervene in the proceeding. If the agency that is taking
38 action and the agency that is conducting the adjudicative proceeding are
39 separate agencies, the agency that is taking action is a party and the agency that
40 is conducting the adjudicative proceeding is not a party.

41 **Comment.** The first sentence of Section 11405.60 is drawn from subdivision (b) of Section
42 11500; see also 1981 Model State APA § 1-102(6). The second sentence is new.

43 “Person” includes legal entity and governmental subdivision. Section 11405.70
44 (“person” defined); see also Section 17 (“person” defined).

45 Under this definition, if an officer or employee of an agency appears in an official
46 capacity, the agency and not the person is a party. A staff division authorized to act on behalf

1 of the agency may be a party under this chapter. See Section 11405.30 & Comment
 2 (“agency” defined).

3 This section is not intended to address the question of whether a person is entitled to
 4 judicial review. Standing to seek judicial review is dealt with in other law.

5 **§ 11405.70. Person**

6 11405.70. “Person” includes an individual, partnership, corporation,
 7 governmental subdivision or unit of a governmental subdivision, or public or
 8 private organization or entity of any character.

9 **Comment.** Section 11405.70 supplements the definition of “person” in Section 17
 10 (“person” defined). It is drawn from 1981 Model State APA § 1-102(8). It would include
 11 the trustee of a trust or other fiduciary.

12 The definition is broader than Section 17 in its application to a governmental subdivision
 13 or unit; this would include an agency other than the agency against which rights under this
 14 chapter are asserted by the person. Inclusion of such agencies and units of government
 15 insures, therefore, that other agencies or other governmental bodies can, for example, apply to
 16 an agency for a decision, and will be accorded all the other rights that a person has under this
 17 chapter.

18 **§ 11405.80. Presiding officer**

19 11405.80. “Presiding officer” means the agency head, member of the agency
 20 head, administrative law judge, hearing officer, or other person who presides in an
 21 adjudicative proceeding.

22 **Comment.** Section 11405.80 is intended for drafting convenience.

23 **Article 3. Application of Chapter**

24 **§ 11410.10. Application to constitutionally and statutorily required hearings**

25 11410.10. This chapter applies to a decision by an agency if, under the federal
 26 or state constitution or a federal or state statute, an evidentiary hearing for
 27 determination of facts is required for formulation and issuance of the decision.

28 **Comment.** Section 11410.10 limits application of this chapter to constitutionally and
 29 statutorily required hearings of state agencies. See Section 11410.20 (application to state).
 30 The provisions do not govern local agency hearings except to the extent expressly made
 31 applicable by another statute. Section 11410.30 (application to local agencies).

32 Section 11410.10 states the general principle that an agency must conduct an appropriate
 33 adjudicative proceeding before issuing a decision where a statute or the due process clause of
 34 the federal or state constitutions necessitates an evidentiary hearing for determination of facts.
 35 Such a hearing is a process in which a neutral decision maker makes a decision based
 36 exclusively on evidence contained in a record made at the hearing or on matters officially
 37 noticed. The hearing must at least permit a party to introduce evidence, make an argument to
 38 the presiding officer, and rebut opposing evidence.

39 The coverage of this chapter is the same as coverage by the existing provision for
 40 administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section
 41 applies only where an agency has issued a final decision “as the result of a proceeding in
 42 which by law a hearing is required to be given, evidence is required to be taken, and
 43 discretion in the determination of facts is vested in the [agency].” Numerous cases have
 44 applied Code of Civil Procedure Section 1094.5(a) broadly to administrative proceedings in
 45 which a statute requires an “administrative appeal” or some other functional equivalent of an

1 evidentiary hearing for determination of facts — an on-the-record or trial-type hearing. See,
 2 e.g., *Eureka Teachers Ass'n v. Board of Educ. of Eureka City Schools*, 199 Cal. App. 3d 353,
 3 244 Cal. Rptr. 240 (1988) (teacher's right to appeal grade change was right to hearing —
 4 Code Civ. Proc. § 1094.5 applies); *Chavez v. Civil Serv. Comm'n of Sacramento County*, 86
 5 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of "appeal" means hearing required —
 6 Code Civ. Proc. § 1094.5 available).

7 In many cases, statutes or the constitution call for administrative proceedings that do not
 8 rise to the level of an evidentiary hearing as defined in this section. For example, the
 9 constitution or a statute might require only a consultation or a decision that is not based on an
 10 exclusive record or a purely written procedure or an opportunity for the general public to
 11 make statements. In some cases, the agency has discretion to provide or not provide the
 12 procedure. This chapter does not apply in such cases. Examples of cases in which the
 13 required procedure does not meet the standard of an evidentiary hearing for determination of
 14 facts are: *Goss v. Lopez*, 419 U.S. 565 (1975) (informal consultation between student and
 15 disciplinarian before brief suspension from school); *Hewitt v. Helms*, 459 U.S. 460 (1983)
 16 (informal nonadversary review of decision to place prisoner in administrative segregation —
 17 prisoner has right to file written statement); *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 539
 18 P. 2d 774, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond orally or
 19 in writing to charges of misconduct prior to removal from government job); *Wasko v.*
 20 *Department of Corrections*, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989)
 21 (prisoner's right to appeal decision does not require a hearing — Code Civ. Proc. § 1094.5
 22 inapplicable); *Marina County Water Dist. v. State Water Resources Control Bd.*, 163 Cal. App.
 23 3d 132, 209 Cal. Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc.
 24 § 1094.5 inapplicable).

25 Agency action pursuant to statutes that do not require evidentiary hearings are not subject
 26 to this chapter. Such statutes include the California Environmental Quality Act (Pub. Res.
 27 Code §§ 21000-21178.1), the Bagley-Keene Open Meeting Act (Gov't Code §§ 11120-
 28 11132), and the California Public Records Act (Gov't Code §§ 6250-6268).

29 This chapter applies only to proceedings for issuing a "decision." A decision is an agency
 30 action of specific application that determines a legal right, duty, privilege, immunity or other
 31 legal interest of a particular person. Section 11405.50(a) ("decision" defined). Therefore
 32 this chapter does not apply to agency actions that do not determine a person's legal interests
 33 and does not apply to rulemaking, which is agency action of general applicability.

34 This chapter does not apply where agency regulations, rather than a statute or the
 35 constitution, call for a hearing. Agencies are encouraged to provide procedural protections by
 36 regulation even though not required to do so by statute or the constitution. An agency may
 37 provide any appropriate procedure for a decision for which an adjudicative proceeding is not
 38 required. Section 11415.50 (when adjudicative proceeding not required).

39 This section does not specify what type of adjudicative proceeding should be conducted. If
 40 an adjudicative proceeding is required by this section, the proceeding may be a formal
 41 hearing procedure under Chapter 5 (commencing with Section 11500), or may be a special
 42 hearing procedure provided by a statute applicable to the particular proceeding. This chapter
 43 also makes available the alternatives of an informal hearing, an emergency decision, or a
 44 declaratory decision, where appropriate under the circumstances. See Articles 9 (commencing
 45 with Section 11440.10), 12 (commencing with Section 11455.10), and 13 (commencing with
 46 Section 11460.10).

47 This section does not preclude the waiver of any procedure, or the settlement of any case
 48 without use of all available proceedings, under the general waiver and settlement provisions of
 49 Sections 11415.40 (waiver of provisions) and 11415.60 (settlement).

50 § 11410.20. Application to state

51 11410.20. Except as otherwise expressly provided by statute:

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

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

3 **Comment.** Section 11410.20 applies this chapter to all state agencies unless specifically
4 excepted. The intent of this statute is to apply the provisions to as many state governmental
5 units as possible.

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

7 Subdivision (b) is drawn from 1981 Model State APA § 1-102(1). Exemptions from this
8 chapter are to be construed narrowly.

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

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

18 This chapter is not applicable to specified proceedings of the following state agencies:

19 Alcoholic Beverage Control Appeals Board (Bus. & Prof. Code § 23083)

20 University of California (Educ. Code § 92001)

21 Public Employment Relations Board (Gov't Code §§ 3541.3, 3563)

22 Commission on State Mandates (Gov't Code § 17533)

23 Agricultural Labor Relations Board (Lab. Code § 1144.5)

24 Military Department (Mil. & Vet. Code § 105)

25 Department of Corrections, Board of Prison Terms, Youth Authority, Youthful Offender

26 Parole Board, and Narcotic Evaluation Authority (Pen. Code § 3066; Welf. & Inst.

27 Code §§ 1788, 3158)

28 Public Utilities Commission (Pub. Util. Code § 1701)

29 This chapter is not applicable to the State Bar of California. Bus. & Prof. Code § 6001.

30 **§ 11410.30. Application to local agencies**

31 11410.30. (a) As used in this section, "local agency" means a county, city,
32 district, public authority, public agency, or other political subdivision or public
33 corporation in the State of California other than the state.

34 (b) This chapter does not apply to a local agency except to the extent the
35 provisions are made applicable by statute.

36 (c) This chapter applies to an agency created or appointed by joint or concerted
37 action of the state and one or more local agencies.

38 **Comment.** Section 11410.30 is drawn from 1981 Model State APA § 1-102(1). Local
39 agencies are excluded because of the very different circumstances of local government units
40 when compared to state agencies. The section explicitly includes joint state and local bodies,
41 so as to effect the broadest possible coverage.

42 The administrative adjudication provisions of the Administrative Procedure Act are made
43 applicable by statute to local agencies in a number of instances, including:

44 Suspension or dismissal of permanent employee by school district. Educ. Code §
45 44944.

46 Nonreemployment of probationary employee by school district. Educ. Code §
47 44948.5.

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

1 See also Sections 11410.40 (application where formal hearing procedure required), 11501
2 (application of chapter).

3 **§ 11410.40. Application where formal hearing procedure required**

4 11410.40. This chapter applies to an adjudicative proceeding required to be
5 conducted under Chapter 5 (commencing with Section 11500), unless the
6 statutes relating to the proceeding provide otherwise.

7 **Comment.** Section 11410.40 makes clear that the provisions of this chapter supplement the
8 formal hearing provisions of Chapter 5. See also Section 11501(a)(1) (application of
9 chapter). Thus if an agency is required by statute to conduct a hearing under Chapter 5, the
10 agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or
11 the informal hearing procedure or other appropriate provisions of this chapter. Likewise, the
12 general provisions of this chapter restricting ex parte communications, regulating precedent
13 decisions, and the like, apply to a hearing under Chapter 5.

14 **Article 4. Governing Procedure**

15 **§ 11415.10. Applicable procedure**

16 11415.10. (a) The governing procedure by which an agency conducts an
17 adjudicative proceeding is determined by the statutes and regulations applicable
18 to that proceeding. If no other governing procedure is provided by statutes or
19 regulations, an agency may conduct an adjudicative proceeding under the
20 administrative adjudication provisions of the Administrative Procedure Act.

21 (b) This chapter supplements the governing procedure by which an agency
22 conducts an adjudicative proceeding.

23 **Comment.** The first sentence of subdivision (a) of Section 11415.10 is drawn from Section
24 11501(a) (formal hearing procedure applies to agency as determined by statutes relating to
25 agency). The second sentence enables an agency to use the procedures provided in this
26 chapter and Chapter 5 without further action in a case where there is no other applicable
27 governing procedure. See Section 11400 (administrative adjudication provisions of
28 Administrative Procedure Act).

29 Subdivision (b) makes clear that the provisions of this chapter supplement the applicable
30 hearing procedure. Some provisions of this chapter are optional, e.g., the informal hearing
31 procedure (Article 10 (commencing with Section 11445.10)), the emergency decision
32 procedure (Article 13 (commencing with Section 11460.10)), and the declaratory decision
33 procedure (Article 14 (commencing with Section 11465.10)). The agency determines
34 whether to use any of the optional provisions.

35 Other provisions of this chapter are mandatory. See, e.g., Section 11425.10 (administrative
36 adjudication bill of rights). The provisions govern any adjudicative proceeding to which this
37 chapter is applicable, and supplement the governing procedure by which an agency conducts
38 an adjudicative proceeding, subject to a contrary statute applicable to the particular agency or
39 proceeding. Section 11415.20 (conflicting or inconsistent statute controls).

40 **§ 11415.20. Conflicting or inconsistent statute controls**

41 11415.20. A state statute or a federal statute or regulation applicable to a
42 particular agency or decision prevails over a conflicting or inconsistent provision
43 of this chapter.

1 **Comment.** Section 11415.20 makes clear that the provisions of this chapter are not
 2 intended to override a conflicting or inconsistent statute or applicable federal law that governs
 3 a particular matter. It should also be noted that if application of a provision of this chapter
 4 would cause loss or delay of federal funds, the Governor may suspend the provision. Section
 5 11415.30.

6 **§ 11415.30. Suspension of statute when necessary to avoid loss or delay of federal funds or**
 7 **services**

8 11415.30. (a) To the extent necessary to avoid a loss or delay of funds or
 9 services from the United States that would otherwise be available to the state, the
 10 Governor may by executive order:

11 (1) Suspend, in whole or in part, any administrative adjudication provision of
 12 the Administrative Procedure Act.

13 (2) Adopt a rule of procedure that will avoid the loss or delay.

14 (b) The Governor shall declare the termination of an executive order issued
 15 under this section as soon as it is no longer necessary to prevent the loss or delay
 16 of funds or services from the United States.

17 (c) If an administrative adjudication provision is suspended or rule of procedure
 18 adopted pursuant to this section, the Governor shall promptly report the
 19 suspension or adoption to the Legislature. The report shall include
 20 recommendations concerning any legislation that may be necessary to conform
 21 the provision to federal law.

22 **Comment.** Section 11415.30 is drawn from 1981 Model State APA § 1-104. *Cf.* Section
 23 8571 (power of Governor to suspend statute in emergency). It is extended to include a delay
 24 in receipt as well as to a loss of federal funds, and actions that may be taken include provision
 25 of an alternate procedure as well as suspension of an existing procedure. The administrative
 26 adjudication provisions of the Administrative Procedure Act are found in this chapter and in
 27 Chapter 5. See Section 11400 (administrative adjudication provisions of Administrative
 28 Procedure Act).

29 This section permits specific functions of agencies to be exempted from applicable
 30 administrative adjudication provisions of the Administrative Procedure Act only to the extent
 31 necessary to prevent the loss or delay of federal funds or services. The test to be met is simply
 32 whether, as a matter of fact, there will actually be a loss or delay of federal funds or services if
 33 there is no suspension or adoption of an alternate procedure. And the suspension or adoption
 34 is effective only so long as and to the extent necessary to avoid the contemplated loss or
 35 delay.

36 The Governor cannot issue an executive order merely on the receipt of a federal agency
 37 certification that a suspension or adoption of an alternate procedure is necessary. The
 38 suspension or adoption must be actually necessary. That is, the Governor must first decide
 39 that the federal agency is correct in its assertion that federal funds may *lawfully* be delayed or
 40 withheld from the state agency if that agency complies with certain administrative
 41 adjudication provisions of the Administrative Procedure Act, and that the federal agency
 42 intends to exercise its authority to withhold or delay those funds if certain administrative
 43 adjudication provisions of the Administrative Procedure Act are followed. However, if these
 44 two requirements are met, the Governor may suspend the provision or adopt an alternate
 45 procedure.

1 **§ 11415.40. Waiver of provisions**

2 11415.40. Except to the extent precluded by another statute or regulation, a
3 person may waive a right conferred on the person by the administrative
4 adjudication provisions of the Administrative Procedure Act.

5 **Comment.** Section 11415.40 is drawn from 1981 Model State APA § 1-105. It embodies
6 the standard notion of waiver, which requires an intentional relinquishment of a known right.
7 This section applies to all affected persons, whether or not parties.

8 A right under the administrative adjudication provisions of the Administrative Procedure
9 Act is subject to waiver in the same way that a right under any other civil statute is normally
10 subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily
11 preferable. A waiver by inaction may be the procedural result of a failure to act. See, e.g.,
12 Section 11506 (failure to file notice of defense a waiver of right to hearing).

13 The administrative adjudication provisions of the Administrative Procedure Act are found
14 in this chapter and in Chapter 5. See Section 11400 (administrative adjudication provisions of
15 Administrative Procedure Act).

16 **§ 11415.50. When adjudicative proceeding not required**

17 11415.50. (a) An agency may provide any appropriate procedure for a decision
18 for which an adjudicative proceeding is not required.

19 (b) An adjudicative proceeding is not required for informal factfinding or an
20 informal investigatory hearing, or a decision to initiate or not to initiate an
21 investigation, prosecution, or other proceeding before the agency, another
22 agency, or a court, whether in response to an application for an agency decision
23 or otherwise.

24 **Comment.** Subdivision (a) of Section 11415.50 is subject to statutory specification of the
25 applicable procedure for decisions not governed by this chapter. See Section 11415.20
26 (conflicting or inconsistent statute controls).

27 Subdivision (b) is drawn in part from 1981 Model State APA § 4-101(a). The provision
28 lists situations in which an agency may issue a decision without first conducting an
29 adjudicative proceeding. For example, a law enforcement officer may, without first
30 conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before
31 an agency or court. Likewise, an agency may commence an adjudicative proceeding without
32 first conducting a proceeding to decide whether to issue the pleading. Nothing in this
33 subdivision implies that this chapter applies in a proceeding in which a hearing is not
34 statutorily or constitutionally required. Section 11410.10 (application to constitutionally and
35 statutorily required hearings).

36 **§ 11415.60. Settlement**

37 11415.60. (a) An agency may formulate and issue a decision by settlement,
38 pursuant to an agreement of the parties, without conducting an adjudicative
39 proceeding. Subject to subdivision (c), the settlement may be on any terms the
40 parties determine are appropriate. Notwithstanding any other statute, no evidence
41 of an offer of compromise or settlement made in settlement negotiations is
42 admissible in an adjudicative proceeding or civil action, whether as affirmative
43 evidence, by way of impeachment, or for any other purpose.

44 (b) A settlement may made before or after issuance of an agency pleading,
45 except that in an adjudicative proceeding to determine whether an occupational

1 license should be revoked, suspended, limited, or conditioned, a settlement may
2 not be made before issuance of the agency pleading.

3 (c) A settlement is subject to any necessary agency approval. An agency head
4 may delegate the power to approve a settlement. The terms of a settlement may
5 not be contrary to statute or regulation, except that the settlement may include
6 sanctions the agency would otherwise lack power to impose.

7 **Comment.** Subdivision (a) of Section 11415.60 codifies the rule in *Rich Vision Centers,*
8 *Inc. v. Board of Medical Examiners*, 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983).

9 Subdivision (a) is analogous to Section 11420.30 (confidentiality of communications in
10 alternative dispute resolution). The parties are, of course, free to make a stipulation
11 concerning confidentiality of offers of compromise or settlement that goes beyond or
12 otherwise varies the protection of this section.

13 Section 11415.60 is subject to a specific statute to the contrary governing the matter.
14 Section 11415.20 (conflicting or inconsistent statute controls). See, e.g., Gov't Code § 18681
15 (authority of State Personnel Board to approve settlements), Lab. Code § 5001 (approval of
16 workers' compensation settlement required).

17 **Article 5. Alternative Dispute Resolution**

18 **§ 11420.10. ADR authorized**

19 11420.10. (a) An agency may, with the consent of all the parties, refer a dispute
20 that is the subject of an adjudicative proceeding for resolution by any of the
21 following means:

22 (1) Mediation by a neutral mediator.

23 (2) Binding arbitration by a neutral arbitrator. An award in a binding arbitration
24 is subject to judicial review in the manner provided in Chapter 4 (commencing
25 with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

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

33 (b) This section is subject to a statute that requires mediation or arbitration in an
34 adjudicative proceeding.

35 (c) By regulation an agency may make this section inapplicable.

36 **Comment.** Under subdivision (a)(1) of Section 11420.10, the mediator may use any
37 mediation technique.

38 Subdivision (a)(2) authorizes delegation of the agency's authority to decide, with the
39 consent of all parties.

40 Subdivision (a)(3) parallels the procedure applicable in judicial arbitration. See Code Civ.
41 Proc. §§ 1141.20-1141.21. The costs and fees specified in Section 1141.21 for a civil
42 proceeding may not all be applicable in an adjudicative proceeding, but subdivision (a)(3)
43 requires such costs and fees to be assessed to the extent they are applicable.

44 Subdivision (b) recognizes that some statutes require alternative dispute resolution
45 techniques.

1 If there is no statute requiring the agency to use mediation or arbitration, this section
2 applies unless the agency makes it inapplicable by regulation under subdivision (c).

3 **§ 11420.20. Regulations governing ADR**

4 11420.20. (a) The Office of Administrative Hearings shall adopt and promulgate
5 model regulations for alternative dispute resolution under this article. The model
6 regulations govern alternative dispute resolution by an agency under this article,
7 unless by regulation the agency modifies the model regulations or makes the
8 model regulations inapplicable.

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

12 **Comment.** Section 11420.20 does not require each agency to adopt regulations. The
13 model regulations developed by the Office of Administrative Hearings will automatically
14 govern mediation or arbitration for an agency, unless the agency provides otherwise. The
15 agency may choose to preclude mediation or arbitration altogether. Section 11420.10
16 (application of article).

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

19 **§ 11420.30. Confidentiality and admissibility of ADR communications**

20 11420.30. Notwithstanding any other statute, a communication made in
21 alternative dispute resolution under this article is protected to the following
22 extent:

23 (a) Anything said, any admission made, and any document prepared in the
24 course of or pursuant to mediation under this article is a confidential
25 communication, and a party to the mediation has a privilege to refuse to disclose
26 and to prevent another from disclosing the communication, whether in an
27 adjudicative proceeding, civil action, or otherwise. This subdivision does not limit
28 the admissibility of evidence if all parties to the proceedings consent.

29 (b) No reference to nonbinding arbitration proceedings or an award under this
30 article or the evidence produced or any other aspect of the arbitration may be
31 made in an adjudicative proceeding or civil action, whether as affirmative
32 evidence, by way of impeachment, or for any other purpose.

33 (c) No mediator or arbitrator is competent to testify in a subsequent
34 administrative or civil proceeding as to a statement, conduct, decision, or order
35 occurring at or in conjunction with the alternative dispute resolution.

36 **Comment.** Subdivision (a) of Section 11420.30 is analogous to Evidence Code Section
37 1152.5(a) (mediation). Subdivision (b) is drawn from Code of Civil Procedure Section
38 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (c) is
39 drawn from Evidence Code Section 703.5.

1 Article 6. Administrative Adjudication Bill of Rights

2 **§ 11425.10. Administrative adjudication bill of rights**

3 11425.10. (a) The governing procedure by which an agency conducts an
4 adjudicative proceeding is subject to all of the following requirements:

5 (1) The agency shall give the person to which the agency action is directed
6 notice and an opportunity to be heard, including the opportunity to present and
7 rebut evidence.

8 (2) The agency shall make available to the person to which the agency action is
9 directed a copy of the governing procedure, including a statement whether the
10 Chapter 5 (commencing with Section 11500) (formal hearing) is applicable to the
11 proceeding.

12 (3) The hearing shall be open to public observation as provided in Section
13 11425.20 (open hearings).

14 (4) The adjudicative function shall be separated from the investigative,
15 prosecutorial, and advocacy functions within the agency as provided in Section
16 11425.30 (neutrality of presiding officer).

17 (5) The presiding officer is subject to disqualification for bias, prejudice, or
18 interest as provided in Section 11425.40 (disqualification of presiding officer for
19 bias, prejudice, or interest).

20 (6) The decision shall be in writing, be based on the record, and include a
21 statement of the factual and legal basis of the decision as provided in Section
22 11425.50 (decision).

23 (7) A decision may not be relied on as precedent unless the agency designates
24 and indexes the decision as precedent as provided in Section 11425.60
25 (precedent decisions).

26 (8) Ex parte communications shall be restricted as provided in Article 7
27 (commencing with Section 11430.10) (ex parte communications).

28 (9) Language assistance shall be made available as provided in Article 8
29 (commencing with Section 11435.05) (language assistance) by an agency
30 described in Section 11018 or 11435.15.

31 (b) The governing procedure by which an agency conducts an adjudicative
32 proceeding may include procedures equivalent to, or more protective of the rights
33 of person to which the agency action is directed than, the requirements of this
34 section.

35 **Comment.** Section 11425.10 specifies the minimum due process and public interest
36 requirements that must be satisfied in a hearing that is subject to this chapter, including a
37 hearing under Chapter 5 (formal hearing). See Sections 11410.40 (application where formal
38 hearing procedure required) and 11501 (application of chapter). Nothing in this section
39 precludes the agency from adopting additional or more extensive requirements than those
40 prescribed by this section. Subdivision (b).

41 Subdivision (a)(2) requires only that the agency “make available” a copy of the applicable
42 hearing procedure. This requirement is subject to a rule of reasonableness in the
43 circumstances and does not necessarily require the agency routinely to provide a copy to a

1 person each time agency action is directed to the person. The requirement may be satisfied,
2 for example, by the agency's offer to provide a copy on request.

3 Subdivision (a)(9), relating to language assistance, is limited to agencies listed in Sections
4 11018 (state agency not subject to Chapter 5) and 11435.15 (application of language
5 assistance provisions).

6 It should be noted that any special statutes expressly applicable to a hearing by an agency
7 prevail over conflicting provisions of this section. Section 11415.20 (conflicting or
8 inconsistent statute controls).

9 **§ 11425.20. Open hearings**

10 11425.20. (a) A hearing shall be open to public observation except to the
11 extent:

12 (1) A closed hearing is required in whole or in part by statute or by the federal
13 or state constitution.

14 (2) The presiding officer determines it is necessary to close the hearing in whole
15 or in part to ensure a fair hearing in the circumstances of the particular case. The
16 presiding officer may conduct the hearing, including the manner of examining
17 witnesses and closing the hearing, in a way that is appropriate to protect a minor
18 witness or a witness with a developmental disability as defined in Section 4512 of
19 the Welfare and Institutions Code from intimidation or other harm, taking into
20 account the rights of all persons.

21 (b) To the extent a hearing is conducted by telephone, television, or other
22 electronic means, this section is satisfied if members of the public have an
23 opportunity both (1) at reasonable times, to hear or inspect the agency's record,
24 and to inspect any transcript obtained by the agency, and (2) to be physically
25 present at the place where the presiding officer is conducting the hearing.

26 (c) This section does not apply to a prehearing conference or settlement
27 conference, or proceedings for alternative dispute resolution.

28 **Comment.** Section 11425.20 supplements the Bagley-Keene Open Meeting Act,
29 Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent
30 necessary under this section, taking into account the substantial public interest in open
31 proceedings. It should be noted that under the open meeting law deliberations on a decision
32 to be reached based on evidence introduced in an adjudicative proceeding may be made in
33 closed session. Section 11126(d). And under the open meeting law, a settlement proposal
34 may be considered by the agency in closed session if it sustains its substantial burden of
35 showing the prejudice to be suffered from conducting an open meeting. Section 11126(d),
36 (q).

37 Subdivision (a) codifies existing practice. See 1 G. Ogden, California Public Agency
38 Practice § 37.03 (1994).

39 Statutory protection of trade secrets and other confidential or privileged information is
40 covered by subdivision (a)(1). See, e.g., Evid. Code §§ 1060-1063.

41 Subdivision (a)(2) codifies and broadens an aspect of *Seering v. Department of Social*
42 *Serv.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). It should be noted that the rights of
43 persons to be taken into account includes the right of the parties to observe the proceedings
44 in an appropriate manner.

45 Subdivision (b) is drawn in part from 1981 Model State APA § 4-211(6). The right of the
46 public to be present where a hearing is being conducted telephonically does not include the

1 right to participate, and the right of the public to inspect the record does not impose a duty
2 on the agency to provide a copy independent of the California Public Records Act.

3 **§ 11425.30. Neutrality of presiding officer**

4 11425.30. (a) A person may not serve as presiding officer in an adjudicative
5 proceeding in any of the following circumstances:

6 (1) The person has served as investigator, prosecutor, or advocate in the
7 proceeding or its pre-adjudicative stage.

8 (2) The person is subject to the authority, direction, or discretion of a person
9 who has served as investigator, prosecutor, or advocate in the proceeding or its
10 pre-adjudicative stage.

11 (b) Notwithstanding subdivision (a):

12 (1) A person may serve as presiding officer at successive stages of an
13 adjudicative proceeding.

14 (2) A person who has participated as decisionmaker in a determination of
15 probable cause or other equivalent preliminary determination in an adjudicative
16 proceeding or its pre-adjudicative stage may serve as presiding officer in the
17 proceeding.

18 (c) The provisions of this section governing separation of functions as to the
19 presiding officer also govern separation of functions as to the agency head or
20 other person or body to which the power to hear or decide in the proceeding is
21 delegated.

22 **Comment.** Subdivision (a) of Section 11425.30 is drawn from 1981 Model State APA § 4-
23 214(a)-(b). See also Vehicle Code Section 14112 (exemption for drivers' licensing
24 proceedings).

25 Under this provision, a person has "served" in any of the capacities mentioned if the
26 person has personally carried out the function, and not merely supervised or been
27 organizationally connected with a person who has personally carried out the function. The
28 separation of functions requirements are intended to apply to substantial involvement in a
29 case by a person, and not merely marginal or trivial participation. The sort of participation
30 intended to be disqualifying is meaningful participation that is likely to affect an individual
31 with a commitment to a particular result in the case.

32 Subdivision (b) is drawn from 1981 Model State APA § 4-214(c)-(d). This provision,
33 dealing with the extent to which a person may serve as presiding officer at different stages of
34 the same proceeding, should be distinguished from Section 11430.10, which prohibits certain
35 ex parte communications. The policy issues in Section 11430.10 regarding ex parte
36 communication between two persons differ from the policy issues in subdivision (b)
37 regarding the participation by one individual in two stages of the same proceeding. There
38 may be other grounds for disqualification, however, in the event of improper ex parte
39 communications. See Sections 11430.60 (disqualification of presiding officer), 11425.40
40 (disqualification of presiding officer for bias, prejudice, or interest).

41 **§ 11425.40. Disqualification of presiding officer for bias, prejudice, or interest**

42 11425.40. (a) The presiding officer is subject to disqualification for bias,
43 prejudice, or interest in the proceeding.

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

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

3 (2) Has experience, technical competence, or specialized knowledge of or has in
4 any capacity expressed a view on a legal, factual, or policy issue presented in the
5 proceeding.

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

9 (c) The provisions of this section governing disqualification of the presiding
10 officer also govern disqualification of the agency head or other person or body to
11 which the power to hear or decide in the proceeding is delegated.

12 **Comment.** Section 11425.40 applies in all administrative adjudications subject to this
13 chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.40
14 (application where formal hearing procedure required) and 11501 (application of chapter). It
15 supersedes a provision formerly found in Section 11512(c) (formal hearing). Section
16 11425.40 applies whether the presiding officer serves alone or with others. For separation of
17 functions requirements, see Section 11425.30.

18 Subdivision (a) is drawn from 1981 Model State APA § 4-202(b).

19 Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of
20 judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or
21 policy issue in the proceeding is not in itself bias, prejudice, or interest under Section
22 11425.40, disqualification in such a situation might occur under Section 11425.30 (neutrality
23 of presiding officer).

24 § 11425.50. Decision

25 11425.50. (a) The decision shall be in writing and shall include a statement of
26 the factual and legal basis for the decision as to each of the principal controverted
27 issues.

28 (b) The statement of the factual basis for the decision may be in the language of,
29 or by reference to, the pleadings. If the statement is no more than mere repetition
30 or paraphrase of the relevant statute or regulation, the statement shall be
31 accompanied by a concise and explicit statement of the underlying facts of record
32 that support the decision. If the factual basis for the decision includes a
33 determination based substantially on the credibility of a witness, the statement
34 shall identify any specific evidence of the observed demeanor, manner, or attitude
35 of the witness that supports the determination, and on judicial review the court
36 shall give great weight to the determination to the extent the determination
37 identifies the observed demeanor, manner, or attitude of the witness that supports
38 it.

39 (c) The statement of the factual basis for the decision shall be based exclusively
40 on the evidence of record in the proceeding and on matters officially noticed in
41 the proceeding. Evidence of record may include supplements to the record that
42 are made after the hearing, provided that all parties are given an opportunity to
43 comment on it. The presiding officer's experience, technical competence, and
44 specialized knowledge may be used in evaluating evidence.

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

3 (e) A penalty may not be based on a guideline, criterion, bulletin, manual,
4 instruction, order, standard of general application or other rule unless it has been
5 adopted as a regulation pursuant to Chapter 3.5 (commencing with Section
6 11340).

7 **Comment.** Section 11425.50 supersedes the first two sentences of Section 11518. See also
8 former subdivision (f)(4) of Section 11500.

9 Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The
10 decision must be supported by findings that link the evidence in the proceeding to the
11 ultimate decision. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.
12 3d 506, 522 P. 2d 12, 113 Cal. Rptr. 836 (1974). The requirement that the decision must
13 include a statement of the basis for the decision is particularly significant when an agency
14 develops new policy through the adjudication of specific cases rather than through
15 rulemaking. Articulation of the basis for the agency's decision facilitates administrative and
16 judicial review, helps clarify the effect of any precedential decision (see Section 11425.60),
17 and focuses attention on questions that the agency should address in subsequent rulemaking
18 to supersede the policy that has been developed through adjudicative proceedings. The
19 decision must only explain its actual basis. It need not eliminate other possible bases that
20 could have been, but were not, relied upon as the basis for the decision. Thus, for example, if
21 the decision imposes terms and conditions, it need not explain why other terms and
22 conditions were not imposed.

23 Subdivision (a) requires the decision to contain a statement of the "factual . . . basis for the
24 decision," while former Section 11518 required the decision to contain "findings of fact."
25 The new language more accurately reflects case law, and is not a substantive change. See
26 *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, *supra*; *Swars v. Council*
27 *of the City of Vallejo*, 33 Cal. 2d 867, 872-73, 206 P.2d 355 (1949).

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

31 Subdivision (b) adopts the rule of *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474
32 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact
33 (the presiding officer in an administrative adjudication) based on observation of witnesses
34 than findings based on other evidence. This generalizes the standard of review used by a
35 number of California agencies. See, e.g., *Garza v. Workmen's Compensation Appeals Board*,
36 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (*Workers' Compensation*
37 *Appeals Board*); *Millen v. Swoap*, 58 Cal. App. 3d 943, 947-48, 130 Cal. Rptr. 387 (1976)
38 (*Department of Social Services*); *Apte v. Regents of Univ. of Calif.*, 198 Cal. App. 3d 1084,
39 1092, 244 Cal. Rptr. 312 (1988) (*University of California*); *Unemp. Ins. App. Bd.*, *Precedent*
40 *Decisions P-B-10, P-T-13, P-B-57*; *Lab. Code § 1148* (*Agricultural Labor Relations Board*).
41 It reverses the existing practice under the administrative procedure act and other California
42 administrative procedures that gives no weight to the findings of the presiding officer at the
43 hearing. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication*
44 *Fundamentals*, 39 UCLA L. Rev. 1067, 1114 (1992).

45 Findings based substantially on credibility of a witness must be identified by the presiding
46 officer in the decision made in the adjudicative proceeding. This requirement is derived from
47 Washington law. See Wash. Rev. Code Ann. §§ 34.05.461(3), 34.05.464(4). However, the
48 presiding officer's identification of such findings is not binding on the agency or the courts,
49 which may make their own determinations whether a particular finding is based substantially
50 on credibility of a witness. Even though the presiding officer's determination is based
51 substantially on credibility of a witness, the determination is entitled to great weight only to
52 the extent the determination derives from the presiding officer's observation of the

1 demeanor, manner, or attitude of the witness. Nothing in subdivision (b) precludes the agency
 2 head or court from overturning a credibility determination of the presiding officer, after
 3 giving the observational elements of the credibility determination great weight, whether on the
 4 basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor
 5 does it preclude the agency head from overturning a factual finding based on the presiding
 6 officer's assessment of expert witness testimony.

7 The first sentence of subdivision (c) codifies existing California case law. *See, e.g.,*
 8 *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn
 9 from the first sentence of 1981 Model State APA § 4-215(d). The second sentence codifies
 10 existing practice in some agencies. Official notice of some matters may be taken by the
 11 presiding officer. See Section 11515 (official notice). The third sentence is drawn from 1981
 12 Model State APA § 4-215(d).

13 Subdivision (e) is consistent with the rulemaking provisions of the Administrative
 14 Procedure Act. See Section 11340.5 ("underground regulations"). A penalty based on a
 15 precedent decision does not violate subdivision (e). Section 11425.60 (precedent decisions).

16 **§ 11425.60. Precedent decisions**

17 11425.60. (a) A decision may not be expressly relied on as precedent unless it is
 18 designated as a precedent decision by the agency.

19 (b) An agency may designate as a precedent decision a decision or part of a
 20 decision that contains a significant legal or policy determination of general
 21 application that is likely to recur. Designation of a decision or part of a decision as
 22 a precedent decision is not rulemaking and need not be done under Chapter 3.5
 23 (commencing with Section 11340), relating to rulemaking. An agency's
 24 designation of a decision or part of a decision, or failure to designate a decision or
 25 part of a decision, as a precedent decision is not subject to judicial review.

26 (c) An agency shall maintain an index of significant legal and policy
 27 determinations made in precedent decisions. The index shall be updated not less
 28 frequently than annually, unless no precedent decision has been designated since
 29 the last preceding update. The index shall be made available to the public by
 30 subscription, and its availability shall be publicized annually in the California
 31 Regulatory Notice Register.

32 (d) This section applies to decisions issued on or after July 1, 1997. Nothing in
 33 this section precludes an agency from designating as a precedent decision a
 34 decision issued before July 1, 1997.

35 **Comment.** Section 11425.60 limits the authority of an agency to rely on previous decisions
 36 unless the decisions have been publicly announced as precedential.

37 The first sentence of subdivision (b) recognizes the need of agencies to be able to make law
 38 and policy through adjudication as well as through rulemaking. It codifies the practice of a
 39 number of agencies to designate important decisions as precedential. See Sections 12935(h)
 40 (Fair Employment and Housing Commission), 19582.5 (State Personnel Board); Unemp. Ins.
 41 Code § 409 (Unemployment Insurance Appeals Board). Section 11425.60 is intended to
 42 encourage agencies to articulate what they are doing when they make new law or policy in an
 43 adjudicative decision.

44 Under the second sentence of subdivision (b), this section applies notwithstanding Section
 45 11340.5 ("underground regulations"). See 1993 OAL Det. No. 1 (determination by Office
 46 of Administrative Law that agency designation of decision as precedential violates former
 47 Government Code Section 11347.5 [now 11340.5] unless made pursuant to rulemaking

1 procedures). The provision is drawn from Government Code Section 19582.5 (expressly
2 exempting the State Personnel Board's precedent decision designations from rulemaking
3 procedures). See also Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board).
4 Nonetheless, agencies are encouraged to express precedent decisions in the form of
5 regulations, to the extent practicable.

6 The index required by subdivision (c) is a public record, available for public inspection and
7 copying.

8 Subdivision (d) minimizes the potential burden on agencies by making the precedent
9 decision requirements prospective only.

10 Article 7. Ex Parte Communications

11 § 11430.10. Ex parte communications prohibited

12 11430.10. (a) While the proceeding is pending there shall be no communication,
13 direct or indirect, regarding any issue in the proceeding, to the presiding officer
14 from an employee or representative of an agency that is a party or from an
15 interested person outside the agency, without notice and opportunity for all
16 parties to participate in the communication.

17 (b) Nothing in this section precludes a communication, including a
18 communication from an employee or representative of an agency that is a party,
19 made on the record at the hearing.

20 (c) For the purpose of this section, a proceeding is pending from the issuance of
21 the agency's pleading, or from an application for an agency decision, whichever
22 is earlier.

23 **Comment.** Section 11430.10 is drawn from former Section 11513.5(a) and (b). See also
24 1981 Model State APA § 4-213(a), (c). This provision also applies to the agency head, or
25 other person or body to which the power to hear or decide is delegated. See Section
26 11430.70 (application of provisions to agency head or other person). For exceptions to this
27 section, see Sections 11430.20 (permissible ex parte communications generally) and
28 11430.30 (permissible ex parte communications from agency personnel).

29 The reference to an "interested person outside the agency" replaces the former reference
30 to a "person who has a direct or indirect interest in the outcome of the proceeding," and is
31 drawn from federal law. See Federal APA § 557(d)(1)(A); see also *Professional Air Traffic*
32 *Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547, 562 (D.C. Cir.
33 1982) (construing the federal standard to include person with an interest beyond that of a
34 member of the general public).

35 Where the agency conducting the hearing is not a party to the proceeding, the presiding
36 officer may consult with other agency personnel. The ex parte communications prohibition
37 only applies as between the presiding officer and parties and other interested persons, not as
38 between the presiding officer and disinterested personnel of a non-party agency conducting
39 the hearing. However, the presiding officer may not consult with the agency head. Section
40 11430.80 (communications between presiding officer and agency head).

41 While this section precludes an adversary from communicating with the presiding officer, it
42 does not preclude the presiding officer from communicating with an adversary. This reverses
43 a provision of former Section 11513.5(a). Thus it would not prohibit an agency head from
44 communicating to an adversary that a particular case should be settled or dismissed. However,
45 a presiding officer should give assistance or advice with caution, since there may be an
46 appearance of unfairness if assistance or advice is given to some parties but not others.

47 Nothing in this section limits the authority of the presiding officer to conduct an in camera
48 examination of proffered evidence. Cf. Section 11507.7(d)-(e).

1 Subdivision (c) defines the pendency of a proceeding to include any period between the
 2 time an application for a hearing is made and the time the agency's pleading is issued.
 3 Treatment of communications made to a person during pendency of the proceeding but
 4 before the person becomes presiding officer is dealt with in Section 11430.40 (prior ex parte
 5 communication).

6 This section does not address the matter of a party providing information to the decision
 7 maker after submission of the case for a decision. Such additional information is treated not
 8 as an ex parte communication but as a supplement to the record, which may serve as a basis
 9 for a decision if all parties are given an opportunity to comment on it. Section 11425.50
 10 (decision).

11 **§ 11430.20. Permissible ex parte communications generally**

12 11430.20. A communication otherwise prohibited by Section 11430.10 is
 13 permissible in any of the following circumstances:

14 (a) The communication is required for disposition of an ex parte matter
 15 specifically authorized by statute.

16 (b) The communication concerns a matter of procedure or practice, including a
 17 request for a continuance, that is not in controversy.

18 **Comment.** Subdivision (a) of Section 11430.20 is drawn from former Section 11513.5(a)
 19 and (b). This provision also applies to the agency head, or other person or body to which the
 20 power to hear or decide is delegated. See Section 11430.70 (application of provisions to
 21 agency head or other person).

22 This article is not intended to preclude communications made to a presiding officer or staff
 23 assistant regarding noncontroversial matters of procedure and practice, such as the format of
 24 pleadings, number of copies required, manner of service, and calendaring and status
 25 discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided
 26 they appear to be noncontroversial in context of the specific case.

27 **§ 11430.30. Permissible ex parte communications from agency personnel**

28 11430.30. A communication otherwise prohibited by Section 11430.10 from an
 29 employee or representative of an agency that is a party to the presiding officer is
 30 permissible in any of the following circumstances:

31 (a) The communication is for the purpose of assistance and advice to the
 32 presiding officer from a person who has not served as investigator, prosecutor, or
 33 advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor
 34 shall not furnish, augment, diminish, or modify the evidence in the record.

35 (b) The communication is for the purpose of advising the presiding officer
 36 concerning a settlement proposal advocated by the advisor.

37 (c) The communication is for the purpose of advising the presiding officer
 38 concerning any of the following matters in an adjudicative proceeding that is
 39 nonprosecutorial in character, provided the content of the advice is disclosed on
 40 the record and all parties are given an opportunity to comment on it in the manner
 41 provided in Section 11430.50 (disclosure of ex parte communication):

42 (1) The advice involves a technical issue in the proceeding and the advice is
 43 necessary for, and is not otherwise reasonably available to, the presiding officer.

44 (2) The advice involves an issue in a proceeding of the California Coastal
 45 Commission, San Francisco Bay Conservation and Development Commission,

1 California Tahoe Regional Planning Agency, Delta Protection Commission, Water
2 Resources Control Board, or a regional water quality control board.

3 **Comment.** Section 11430.30's exceptions to the prohibition on ex parte communications
4 are most likely to be useful in hearings where the presiding officer is employed by an agency
5 that is a party. This provision also applies to the agency head, or other person or body to
6 which the power to hear or decide is delegated. See Section 11430.70 (application of
7 provisions to agency head or other person).

8 This article does not limit on-the-record communications between agency personnel and
9 the presiding officer. Section 11430.10(b). Only advice or assistance given outside the
10 hearing is prohibited.

11 The first sentence of subdivision (a) is drawn from 1981 Model State APA § 4-214(a)-(b).
12 The second sentence is drawn from 1981 Model State APA § 4-213(b). Under this provision,
13 a person has "served" in any of the capacities mentioned if the person has personally carried
14 out the function, and not merely supervised or been organizationally connected with a person
15 who has personally carried out the function. The limitation is intended to apply to substantial
16 involvement in a case by a person, and not merely marginal or trivial participation. The sort
17 of participation intended to be disqualifying is meaningful participation that is likely to affect
18 an individual with a commitment to a particular result in the case. Thus a person who merely
19 participated in a preliminary determination in an adjudicative proceeding or its pre-
20 adjudicative stage would ordinarily be able to assist or advise the presiding officer in the
21 proceeding. Cf. Section 11425.30 (neutrality of presiding officer). For this reason also, a staff
22 member who plays a meaningful but neutral role without becoming an adversary would not
23 be barred by this section.

24 This provision is not limited to agency personnel, but includes participants in the
25 proceeding not employed by the agency. A deputy attorney general who prosecuted the case
26 at the administrative trial level, for example, would be precluded from advising the agency
27 head or other person delegated the power to hear or decide at the final decision level, except
28 with respect to settlement matters. Subdivision (b).

29 Subdivision (b), permitting an investigator, prosecutor, or advocate to advise the presiding
30 officer regarding a settlement proposal, is limited to advice in support of the proposed
31 settlement; the insider may not use the opportunity to argue against a previously agreed-to
32 settlement. Cf. Alhambra Teachers Ass'n CTA/NEA v. Alhambra City and High School
33 Districts (1986) PERB Decision No. 560. Insider access is permitted here in furtherance of
34 public policy favoring settlement, and because of the consonance of interest of the parties in
35 this situation.

36 Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as
37 power plant siting and land use decisions. The provision recognizes that the length and
38 complexity of many cases of this type may as a practical matter make it impossible for an
39 agency to adhere to the restrictions of this article, given limited staffing and personnel.
40 Subdivision (c)(1) recognizes such an adjudication may require advice from a person with
41 special technical knowledge whose advice would not otherwise be available to the presiding
42 officer under standard doctrine. Subdivision (c)(2) recognizes the need for policy advice
43 from planning staff in proceedings such as land use and environmental matters.

44 § 11430.40. Prior ex parte communication

45 11430.40. If, while the proceeding is pending but before serving as presiding
46 officer, a person receives a communication of a type that would be in violation of
47 this article if received while serving as presiding officer, the person, promptly after
48 starting to serve, shall disclose the content of the communication on the record
49 and give all parties an opportunity to comment on it in the manner provided in
50 Section 11430.50 (disclosure of ex parte communication).

1 **Comment.** Section 11430.40 is drawn from former Section 11513.5(c), but is limited to
 2 communications received during pendency of the proceeding. See also 1981 Model State
 3 APA § 4-213(d). This provision also applies to the agency head, or other person or body to
 4 which the power to hear or decide is delegated. See Section 11430.70 (application of
 5 provisions to agency head or other person). For the purpose of this section, a proceeding is
 6 pending on the earlier of issuance of an agency pleading or submission of an application for
 7 an agency decision. Section 11430.10(c) (ex parte communications prohibited).

8 **§ 11430.50. Disclosure of ex parte communication**

9 11430.50. (a) If a presiding officer receives a communication in violation of this
 10 article, the presiding officer shall make all of the following a part of the record in
 11 the proceeding:

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

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

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

21 **Comment.** Section 11430.50 is drawn from former Section 11513.5(d). This provision also
 22 applies to the agency head, or other person or body to which the power to hear or decide is
 23 delegated. See Section 11430.70 (application of provisions to agency head or other person).
 24 See also Section 11440.20 (notice).

25 **§ 11430.60. Disqualification of presiding officer**

26 11430.60. Receipt by the presiding officer of a communication in violation of
 27 this article may provide grounds for disqualification of the presiding officer. If the
 28 presiding officer is disqualified, the portion of the record pertaining to the ex
 29 parte communication may be sealed by protective order of the disqualified
 30 presiding officer.

31 **Comment.** Section 11430.60 is drawn from former Section 11513.5(e). This provision also
 32 applies to the agency head, or other person or body to which the power to hear or decide is
 33 delegated. See Section 11430.70 (application of provisions to agency head or other person).

34 Section 11430.60 permits the disqualification of a presiding officer if necessary to
 35 eliminate the effect of an ex parte communication.

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

42 **§ 11430.70. Application of provisions to agency head or other person**

43 11430.70. The provisions of this article governing ex parte communications to
 44 the presiding officer also govern ex parte communications to the agency head or

1 other person or body to which the power to hear or decide in the proceeding is
2 delegated.

3 **Comment.** Under Section 11430.70, this article is applicable to the agency head or other
4 person or body to which the power to act is delegated. For an additional limitation on
5 communications between the presiding officer and agency head, see Section 11430.80.

6 **§ 11430.80. Communications between presiding officer and agency head**

7 11430.80. (a) There shall be no communication, direct or indirect, regarding any
8 issue in the proceeding, between the presiding officer and the agency head or
9 other person or body to which the power to hear or decide in the proceeding is
10 delegated.

11 (b) This section does not apply where the agency head or other person or body
12 to which the power to hear or decide in the proceeding is delegated serves as
13 both presiding officer and agency head.

14 **Comment.** Section 11430.80 is a special application of a provision of former Section
15 11513.5(a), which precluded a presiding officer from communicating with a person who
16 presided in an earlier phase of the proceeding. Section 11430.80 extends the ex parte
17 communications limitation of Section 11430.70 (application of provisions to agency head or
18 other person) to include communications with an agency or non-agency presiding officer as
19 well.

20 This section enforces the general principle that the presiding officer should not be an
21 advocate for the proposed decision to the agency head, including a person or body to which
22 the power to act is delegated. See Section 11405.40 (“agency head” defined). The decision
23 of the agency head should be based on the record and not on off-the-record discussions from
24 which the parties are excluded. Nothing in this section restricts on-the-record
25 communications in between the presiding officer and the agency head. Section 11430.10(b).

26 This section does not address the matter of additional information provided to the decision
27 maker after submission of the case for a decision. Such additional information is treated not
28 as an ex parte communication but as a supplement to the record, which may serve as a basis
29 for a decision if all parties are given an opportunity to comment on it. Section 11425.50
30 (decision).

31 **Article 8. Language Assistance**

32 **§ 11435.05. “Language assistance”**

33 11435.05. As used in this article, “language assistance” means oral
34 interpretation or written translation into English of a language other than English
35 or of English into another language for a party or witness who cannot speak or
36 understand English or who can do so only with difficulty.

37 **Comment.** Section 11435.05 supersedes former subdivision (g) of Section 11500. It
38 extends this article to language translation for witnesses.

39 **§ 11435.10. Interpretation for hearing-impaired person**

40 11435.10. Nothing in this article limits the application or effect of Section 754
41 of the Evidence Code to interpretation for a deaf or hard-of-hearing party or
42 witness in an adjudicative proceeding.

1 **Comment.** Section 11435.10 makes clear that the language assistance provisions of this
2 article are not intended to limit the application of Evidence Code Section 754 in adjudicative
3 proceedings.

4 **§ 11435.15. Application of article**

5 11435.15. (a) The following state agencies shall provide language assistance in
6 adjudicative proceedings to the extent provided in this article:

7 Agricultural Labor Relations Board
8 State Department of Alcohol and Drug Abuse
9 Athletic Commission
10 California Unemployment Insurance Appeals Board
11 Board of Prison Terms
12 State Board of Barbering and Cosmetology
13 State Department of Developmental Services
14 Public Employment Relations Board
15 Franchise Tax Board
16 State Department of Health Services
17 Department of Housing and Community Development
18 Department of Industrial Relations
19 State Department of Mental Health
20 Department of Motor Vehicles
21 Notary Public Section, Office of the Secretary of State
22 Public Utilities Commission
23 Office of Statewide Health Planning and Development
24 State Department of Social Services
25 Workers' Compensation Appeals Board
26 Department of the Youth Authority
27 Youthful Offender Parole Board
28 Bureau of Employment Agencies
29 Department of Insurance
30 State Personnel Board
31 Board of Podiatric Medicine
32 Board of Psychology

33 (b) Nothing in this section prevents an agency other than an agency listed in
34 subdivision (a) from electing to adopt any of the procedures in this article,
35 provided that any selection of an interpreter is subject to Section 11435.30.

36 (c) Nothing in this section prohibits an agency from providing an interpreter
37 during a proceeding to which this chapter does not apply, including an informal
38 factfinding or informal investigatory hearing.

39 (d) This article applies to an agency listed in subdivision (a) notwithstanding a
40 general provision that this chapter does not apply to some or all of an agency's
41 adjudicative proceedings.

42 **Comment.** Subdivisions (a) and (b) of Section 11435.15 restate former Section 11501.5.
43 Subdivision (c) restates a portion of former subdivision (f) of Section 11500. Subdivision (d)

1 is added to make clear that even though his chapter does not otherwise apply to a hearing, the
2 hearing is not exempt from the requirements of this article if the agency is listed in this
3 section.

4 The application of this article is limited to adjudicative proceedings in which, under the
5 federal or state constitution or a federal or state statute, an evidentiary hearing for
6 determination of facts is required for formulation and issuance of a decision. Section
7 11410.10. This continues the general effect of the first paragraph of former subdivision (f)
8 of Section 11500 (“adjudicatory hearing” defined).

9 In addition to the proceedings listed in this section, language assistance is also required of
10 state agencies whose hearings are not governed by Chapter 5. Section 11018.

11 **§ 11435.20. Provision for interpreter**

12 11435.20. (a) The hearing, or any medical examination conducted for the
13 purpose of determining compensation or monetary award, shall be conducted in
14 the English language.

15 (b) If a party or the party’s witness does not proficiently speak or understand
16 the English language and before commencement of the hearing or medical
17 examination requests language assistance, an agency subject to the language
18 assistance requirement of this article shall provide the party or witness an
19 interpreter.

20 (c) Except as provided in Section 11435.55:

21 (1) An interpreter used in a hearing shall be certified pursuant to Section
22 11435.30.

23 (2) An interpreter used in a medical examination shall be certified pursuant to
24 Section 11435.35.

25 **Comment.** Section 11435.20 continues the first three sentences of former subdivision (d)
26 of Section 11513 and extends it to witnesses as well as parties. See Section 11435.05
27 (“language assistance” defined).

28 **§ 11435.25. Cost of interpreter**

29 11435.25. The cost of providing an interpreter under this article shall be paid by
30 the agency having jurisdiction over the matter if the presiding officer so directs,
31 otherwise by the party at whose request the interpreter is provided.

32 (b) The presiding officer’s decision to direct payment shall be based upon an
33 equitable consideration of all the circumstances in each case, such as the ability of
34 the party in need of the interpreter to pay.

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

42 **Comment.** Section 11435.25 continues the fourth sentence and the second paragraph of
43 former subdivision (d) of Section 11513 without substantive change.

1 **§ 11435.30. Certification of hearing interpreters**

2 11435.30. (a) The State Personnel Board shall establish, maintain, administer,
3 and publish annually an updated list of certified administrative hearing
4 interpreters it has determined meet the minimum standards in interpreting skills
5 and linguistic abilities in languages designated pursuant to Section 11435.40.
6 Any interpreter so listed may be examined by each employing agency to
7 determine the interpreter's knowledge of the employing agency's technical
8 program terminology and procedures.

9 (b) Court interpreters certified pursuant to Section 68562, and interpreters listed
10 on the State Personnel Board's recommended lists of court and administrative
11 hearing interpreters before July 1, 1993, shall be deemed certified for purposes of
12 this section.

13 **Comment.** Section 11435.30 continues former subdivision (e) of Section 11513 without
14 substantive change.

15 **§ 11435.35. Certification of medical examination interpreters**

16 11435.35. (a) The State Personnel Board shall establish, maintain, administer,
17 and publish annually, an updated list of certified medical examination interpreters
18 it has determined meet the minimum standards in interpreting skills and linguistic
19 abilities in languages designated pursuant to Section 11435.40.

20 (b) Court interpreters certified pursuant to Section 68562 and administrative
21 hearing interpreters certified pursuant to Section 11435.30 shall be deemed
22 certified for purposes of this section.

23 **Comment.** Section 11435.35 continues former Section 11513(f) without substantive
24 change.

25 **§ 11435.40. Designation of languages for certification**

26 11435.40. (a) The State Personnel Board shall designate the languages for
27 which certification shall be established under Sections 11435.30 and 11435.35.
28 The languages designated shall include, but not be limited to, Spanish, Tagalog,
29 Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State
30 Personnel Board finds that there is an insufficient need for interpreting assistance
31 in these languages.

32 (b) The language designations shall be based on the following:

33 (1) The language needs of non-English-speaking persons appearing before the
34 administrative agencies, as determined by consultation with the agencies.

35 (2) The cost of developing a language examination.

36 (3) The availability of experts needed to develop a language examination.

37 (4) Other information the board deems relevant.

38 **Comment.** Section 11435.40 continues former subdivision (g) of Section 11513 without
39 substantive change.

1 **§ 11435.45. Certification fees**

2 11435.45. (a) The State Personnel Board shall establish and charge fees for
3 applications to take interpreter examinations and for renewal of certifications. The
4 purpose of these fees is to cover the annual projected costs of carrying out this
5 article. The fees may be adjusted each fiscal year by a percent that is equal to or
6 less than the percent change in the California Necessities Index prepared by the
7 Commission on State Finance.

8 (b) Each certified administrative hearing interpreter and each certified medical
9 examination interpreter shall pay a fee, due on July 1 of each year, for the renewal
10 of the certification. Court interpreters certified under Section 68562 shall not pay
11 any fees required by this section.

12 (c) If the amount of money collected in fees is not sufficient to cover the costs
13 of carrying out this article, the board shall charge and be reimbursed a pro rata
14 share of the additional costs by the state agencies that conduct administrative
15 hearings.

16 **Comment.** Section 11435.45 continues former subdivisions (h) and (i) of Section 11513
17 without substantive change.

18 **§ 11435.50. Decertification**

19 11435.50. The State Personnel Board may remove the name of a person from
20 the list of certified interpreters if any of the following conditions occurs:

21 (a) The person is deceased.

22 (b) The person notifies the board that the person is unavailable for work.

23 (c) The person does not submit a renewal fee as required by Section 11435.45.

24 **Comment.** Section 11435.50 continues former subdivision (j) of Section 11513 without
25 substantive change.

26 **§ 11435.55. Unavailability of certified interpreter**

27 11435.55. (a) If an interpreter certified pursuant to Section 11435.30 cannot be
28 present at the hearing, the hearing agency shall have discretionary authority to
29 provisionally qualify and use another interpreter.

30 (b) If an interpreter certified pursuant to Section 11435.35 cannot be present at
31 the medical examination, the physician provisionally may use another interpreter
32 if that fact is noted in the record of the medical evaluation.

33 **Comment.** Section 11435.55 continues former subdivision (k) of Section 11513 without
34 substantive change.

35 **§ 11435.60. Duty to advise party of right to interpreter**

36 11435.60. Every agency subject to the language assistance requirement of this
37 article shall advise each party of the right to an interpreter at the same time that
38 each party is advised of the hearing date or medical examination. Each party in
39 need of an interpreter shall also be encouraged to give timely notice to the
40 agency conducting the hearing or medical examination so that appropriate
41 arrangements can be made.

1 **Comment.** Section 11435.60 continues former subdivision (l) of Section 11513 without
2 substantive change.

3 **§ 11435.65. Confidentiality and impartiality of interpreter**

4 11435.65. (a) The rules of confidentiality of the agency, if any, that apply in an
5 adjudicative proceeding shall apply to any interpreter in the hearing or medical
6 examination, whether or not the rules so state.

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

9 **Comment.** Section 11435.65 continues former subdivisions (m) and (n) of Section 11513
10 without substantive change.

11 **Article 9. General Procedural Provisions**

12 **§ 11440.10. Delegation of review authority**

13 11440.10. (a) The agency head may do any of the following with respect to a
14 decision of the presiding officer or the agency:

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

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

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

19 (b) By regulation an agency may mandate review, or may preclude or limit
20 review, of a decision of the presiding officer or the agency.

21 **Comment.** Section 11440.10 is drawn from Section 11500(a) (power to act may be
22 delegated by agency) and 1981 Model State APA § 4-216(a)(1)-(2). This section is subject to
23 a contrary statute that may, for example, require the agency head itself to hear and decide a
24 specific issue. Section 11415.20 (conflicting or inconsistent statute controls). See, e.g., Greer
25 v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather
26 than hearing officer, formerly required to determine issues under Educ. Code § 13443). See
27 also Section 11500(a) (power to act may not be delegated where action required by “agency
28 itself” under formal hearing procedure).

29 **§ 11440.20. Notice**

30 11440.20. Service of a writing on, or giving of a notice to, a person in a
31 procedure provided in this chapter is subject to the following provisions:

32 (a) The writing or notice shall be delivered personally or sent by mail or other
33 means to the person at the person’s last known address or, if the person is a party
34 with an attorney or other authorized representative of record in the proceeding,
35 to the party’s attorney or other authorized representative. If a party is required by
36 statute or regulation to maintain an address with an agency, the party’s last
37 known address is the address maintained with the agency.

38 (b) Unless a provision specifies the form of mail, service or notice by mail may be
39 by first class mail, registered mail, or certified mail, by mail delivery service, by
40 facsimile transmission if complete and without error, or by other electronic means
41 as provided by regulation, in the discretion of the sender.

1 **Comment.** The application of Section 11440.20 is limited to the procedures in this chapter.
 2 It does not apply to Chapter 5 (formal hearing), which includes its own notice and service
 3 provisions. See Section 11505.

4 Subdivision (b) authorizes delivery by a commercial delivery service as well as by the
 5 United States Postal Service. Proof of service under subdivision (b) may be made by any
 6 appropriate method, including proof in the manner provided for civil actions and
 7 proceedings. See Code Civ. Proc. § 1013a; Cal. R. Ct. 2008(e) (proof of service by facsimile
 8 transmission).

9 **§ 11440.30. Hearing by electronic means**

10 11440.30. (a) The presiding officer may conduct all or part of a hearing by
 11 telephone, television, or other electronic means if each participant in the hearing
 12 has an opportunity to participate in and to hear the entire proceeding while it is
 13 taking place and to observe exhibits.

14 (b) The presiding officer may not conduct all or part of a hearing by telephone,
 15 television, or other electronic means if a party objects.

16 **Comment.** Subdivision (a) of Section 11440.30 is drawn from 1981 Model State APA § 4-
 17 211(4), allowing the presiding officer to conduct all or part of the hearing by telephone,
 18 television, or other electronic means, such as a conference telephone call. While subdivision
 19 (a) permits the conduct of proceedings by telephone, television, or other electronic means, the
 20 presiding officer may of course conduct the proceeding in the physical presence of all
 21 participants.

22 **§ 11440.40. Evidence of sexual conduct**

23 11440.40. (a) As used in this section “complainant” means a person claiming to
 24 have been subjected to conduct that constitutes sexual harassment, sexual
 25 assault, or sexual battery.

26 (b) In any proceeding under subdivision (h) or (i) of Section 12940, or Section
 27 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual
 28 assault, or sexual battery, evidence of specific instances of a complainant’s sexual
 29 conduct with individuals other than the alleged perpetrator:

30 (1) Is not discoverable unless it is to be offered at a hearing to attack the
 31 credibility of the complainant as provided for under subdivision (c). This
 32 paragraph is intended only to limit the scope of discovery; it is not intended to
 33 affect the methods of discovery allowed by statute.

34 (2) Is not admissible at the hearing unless offered to attack the credibility of the
 35 complainant as provided for under subdivision (c). Reputation or opinion
 36 evidence regarding the sexual behavior of the complainant is not admissible for
 37 any purpose.

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

43 **Comment.** Section 11440.40 expands the application of provisions formerly limited to
 44 proceedings under Chapter 5 (commencing with Section 11500) to apply in all cases covered

1 by this chapter. Subdivision (a) restates former subdivision (p) of Section 11513. Subdivision
2 (b) restates former subdivision (g) of Section 11507.6 and the unnumbered paragraph
3 formerly located between subdivisions (c) and (d) of Section 11513, correcting the reference
4 to Section 12940(h) and (i). Subdivision (c) restates former subdivision (o) of Section 11513.

5 **Article 10. Informal Hearing**

6 **§ 11445.10. Purpose of informal hearing procedure**

7 11445.10. Subject to the limitations in this article, an agency may conduct an
8 adjudicative proceeding under the informal hearing procedure provided in this
9 article. The informal hearing procedure is intended to satisfy due process and
10 public policy requirements in a manner that is simpler and more expeditious than
11 hearing procedures otherwise required by statute, for use in appropriate
12 circumstances. The informal hearing procedure provides a forum in the nature of a
13 conference in which a party has an opportunity to be heard by the presiding
14 officer. The procedure also provides a forum that may accommodate a hearing
15 where by regulation or statute a member of the public may participate without
16 appearing or intervening as a party.

17 **Comment.** Section 11445.10 states the policy that underlies the informal hearing
18 procedure. The circumstances where the simplified procedure is appropriate are provided in
19 Section 11445.20 (when informal hearing may be used). The simplified procedures are
20 outlined in Section 11445.40 (procedure for informal hearing).

21 Basic due process and public policy protections of the administrative adjudication bill of
22 rights are preserved in the informal hearing. Sections 11445.40(a) (procedure for informal
23 hearing), 11425.10 (administrative adjudication bill of rights). Thus, for example, the
24 presiding officer must be free of bias, prejudice, and interest; the presiding officer must be
25 neutral, the adjudicative function being separated from the investigative, prosecutorial, and
26 advocacy functions within the agency; the hearing must be open to public observation; the
27 agency must make available language assistance; ex parte communications are restricted; the
28 decision must be in writing, be based on the record, and include a statement of the factual and
29 legal basis of the decision; and the agency must designate and index significant decisions as
30 precedent.

31 Reference in this article to the "presiding officer" is not intended to imply unnecessary
32 formality in the proceeding. The presiding officer may be the agency head, an agency
33 member, an administrative law judge, or another person who presides over the hearing.
34 Section 11405.80 ("presiding officer" defined).

35 **§ 11445.20. When informal hearing may be used**

36 11445.20. An informal hearing procedure may be used in any of the following
37 proceedings, if in the circumstances its use does not violate a statute or the federal
38 or state constitution:

39 (a) A proceeding where there is no disputed issue of material fact.

40 (b) A proceeding where there is a disputed issue of material fact, if the matter
41 involves only:

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

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

1 (3) A disciplinary sanction against an employee that does not involve discharge
2 from employment, demotion, or suspension for more than 5 days.

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

5 (c) A proceeding where, by regulation, the agency has authorized use of an
6 informal hearing.

7 (d) A proceeding where an evidentiary hearing for determination of facts is not
8 required by statute but where the agency determines the federal or state
9 constitution may require a hearing.

10 **Comment.** Subdivision (a) of Section 11445.20 permits the informal hearing to be used,
11 regardless of the type or amount at issue, if no disputed issue of material fact has appeared,
12 e.g., a power plant siting proceeding in which the power company and the Energy
13 Commission have agreed on all material facts. However, if consumers intervene and dispute
14 material facts, the proceeding may be subject to conversion from an informal hearing
15 procedure to a formal or other type of hearing procedure in accordance with Sections
16 11470.10-11470.50.

17 Subdivision (b) permits the informal hearing to be used, even if a disputed issue of material
18 fact has appeared or if the amount or other stake involved is relatively minor. The reference
19 to a "licensee" in subdivision (b)(4) includes a certificate holder.

20 Subdivision (c) imposes no limits on the authority of the agency to adopt the informal
21 hearing by regulation, other than the general limitation that use of the informal hearing
22 procedure is subject to statutory and constitutional due process requirements. Thus, an
23 agency by regulation may authorize use of the informal hearing procedure in a case where
24 the amount in issue or sanction exceeds the amount provided in subdivision (b), so long as
25 use of the informal hearing procedure would not contravene other statutes or due process of
26 law.

27 It should be noted that the following agencies may use the informal hearing procedure in
28 decisions that involve land use planning or environmental matters: California Coastal
29 Commission, Division of Oil and Gas, San Francisco Bay Conservation and Development
30 Commission, or State Water Resources Control Board, Delta Protection, Tahoe Regional
31 Protection.

32 Nothing in this section implies that this procedure is required in a proceeding in which a
33 hearing is not statutorily or constitutionally required, including an agency's authority in
34 minor disciplinary matters to make an investigation with or without a hearing as it deems
35 necessary. Sections 11410.10 (application to constitutionally and statutorily required
36 hearings), 11415.50 (when adjudicative proceeding not required).

37 **§ 11445.30. Selection of informal hearing**

38 11445.30. (a) The agency's pleading shall state the agency's selection of the
39 informal hearing procedure.

40 (b) Any objection of a party to use of the informal hearing procedure shall be
41 made in the party's pleading.

42 (c) An objection to use of the informal hearing procedure shall be resolved by
43 the presiding officer before the hearing on the basis of the pleadings and any
44 written submissions in support of the pleadings.

45 **Comment.** Section 11445.30 provides a procedure for resolving objections to use of the
46 informal hearing procedure in advance of the hearing. However, conversion to a formal
47 hearing or other type of hearing may be appropriate if during the course of the hearing

1 circumstances indicate the need for it. See Sections 11445.50 (cross-examination), 11445.60
2 (proposed proof).

3 **§ 11445.40. Procedure for informal hearing**

4 11445.40. (a) Except as provided in this article, the hearing procedures
5 otherwise required by statute for an adjudicative proceeding apply to an informal
6 hearing.

7 (b) In an informal hearing the presiding officer shall regulate the course of the
8 proceeding. The presiding officer shall permit the parties and may permit others to
9 offer written or oral comments on the issues. The presiding officer may limit
10 witnesses, testimony, evidence, and argument, and may limit or entirely preclude
11 pleadings, intervention, discovery, prehearing conferences, and rebuttal.

12 **Comment.** Section 11445.40 is drawn from 1981 Model State APA § 4-402. The section
13 indicates that the informal hearing is a simplified version of a formal hearing. The informal
14 hearing need not have a prehearing conference, discovery, or testimony of anyone other than
15 the parties. However, it is intended to permit agencies to allow public participation where
16 appropriate. Section 11445.10 (purpose of informal hearing procedure).

17 **§ 11445.50. Cross-examination**

18 11445.50. (a) The presiding officer may preclude use of the informal hearing, or
19 may convert an informal hearing to a formal hearing after an informal hearing is
20 commenced, if it appears to the presiding officer that cross-examination is
21 necessary for proper determination of the matter and that the delay, burden, or
22 complication due to allowing cross-examination in the informal hearing will be
23 more than minimal.

24 (b) An agency may by regulation specify categories of cases in which cross-
25 examination is deemed not necessary for proper determination of the matter under
26 the informal hearing procedure. The presiding officer may allow cross-
27 examination of witnesses in an informal hearing notwithstanding an agency
28 regulation if it appears to the presiding officer that in the circumstances cross-
29 examination is necessary for proper determination of the matter.

30 (c) The actions of the presiding officer under this section are not subject to
31 judicial review.

32 **Comment.** Subdivision (a) of Section 11445.50 gives the presiding officer discretion to
33 limit availability of the informal hearing in situations where it appears that substantial cross-
34 examination will be necessary. For provisions on conversion, see Sections 11470.10-
35 11470.50.

36 Subdivision (b) permits an agency to specify types of informal hearings in which cross-
37 examination will be precluded. In recognition of the possibility that on occasion a case may
38 demand cross-examination for proper determination of a matter, the presiding officer has
39 limited authority to depart from the general procedure for cases of that type.

40 **§ 11445.60. Proposed proof**

41 11445.60. (a) If the presiding officer has reason to believe that material facts are
42 in dispute, the presiding officer may require a party to state the identity of the
43 witnesses or other sources through which the party would propose to present

1 proof if the proceeding were converted to a formal or other applicable hearing
 2 procedure. If disclosure of a fact, allegation, or source is privileged or expressly
 3 prohibited by a regulation, statute, or federal or state constitution, the presiding
 4 officer may require the party to indicate that confidential facts, allegations, or
 5 sources are involved, but not to disclose the confidential facts, allegations, or
 6 sources.

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

12 **Comment.** Section 11445.60 is drawn from 1981 Model State APA § 4-403. For
 13 conversion of proceedings, see Sections 11470.10-11470.50.

14 Article 11. Subpoenas

15 **§ 11450.10. Subpoena authority**

16 11450.10. (a) Subpoenas and subpoenas duces tecum may be issued for
 17 attendance at a hearing and for production of documents at any reasonable time
 18 and place or at a hearing.

19 (b) The custodian of documents that are the subject of a subpoena duces tecum
 20 may satisfy the subpoena by delivery of the documents or a copy of the
 21 documents, or by making the documents available for inspection or copying,
 22 together with an affidavit in compliance with Section 1561 of the Evidence Code,

23 **Comment.** Subdivision (a) of Section 11450.10 supersedes a portion of former Section
 24 11510(a). This article gives subpoena power to all adjudicating agencies, presiding officers,
 25 and attorneys for parties. See Section 11450.20 (issuance of subpoena). The Coastal
 26 Commission previously lacked statutory subpoena power. This section also makes clear that a
 27 subpoena duces tecum may be issued to provide documents at any reasonable time and place
 28 as well as at the hearing.

29 Subdivision (b) provides an alternative means of satisfying a subpoena duces tecum without
 30 the custodian's appearance. This is analogous to the procedure available in court
 31 proceedings. See Code Civ. Proc. § 2020. A custodian of subpoenaed documents who fails to
 32 comply with the subpoena may be compelled to appear and produce the documents. See
 33 Section 11455.10 (misconduct in proceeding).

34 This article incorporates privacy protections from civil practice. Section 11450.20(a).

35 **§ 11450.20. Issuance of subpoena**

36 11450.20. (a) Subpoenas and subpoenas duces tecum shall be issued by the
 37 agency or presiding officer at the request of a party, or by the attorney of record
 38 for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of
 39 Civil Procedure.

40 (b) The process extends to all parts of the state and shall be served in
 41 accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A
 42 subpoena or subpoena duces tecum may also be delivered by certified mail return
 43 receipt requested or by messenger. Service by messenger shall be effected when

1 the witness acknowledges receipt of the subpoena to the sender, by telephone,
 2 by mail, or in person, and identifies himself or herself either by reference to date of
 3 birth and driver's license number or Department of Motor Vehicles identification
 4 number, or the sender may verify receipt of the subpoena by obtaining other
 5 identifying information from the recipient. The sender shall make a written
 6 notation of the acknowledgment. A subpoena issued and acknowledged
 7 pursuant to this section has the same force and effect as a subpoena personally
 8 served. Failure to comply with a subpoena issued and acknowledged pursuant to
 9 this section may be punished as a contempt and the subpoena may so state. A
 10 party requesting a continuance based upon the failure of a witness to appear in
 11 court at the time and place required for the appearance or testimony pursuant to a
 12 subpoena, shall prove to the court that the party has complied with this section.
 13 The continuance shall only be granted for a period of time that would allow
 14 personal service of the subpoena and in no event longer than that allowed by
 15 law.

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

18 **Comment.** Section 11450.20 restates a portion of former Section 11510(a)-(b), and
 19 expands it to include issuance by an attorney and to incorporate civil practice privacy
 20 protections. See Code Civ. Proc. §§ 1985-1985.4. See also *Sehlmeyer v. Department of Gen.*
 21 *Serv.*, 17 Cal. App. 4th 1072, 21 Cal. Rptr. 2d 840 (1993). For enforcement of a subpoena,
 22 see Sections 11455.10-11455.20.

23 Subdivision (a) requires a subpoena or subpoena duces tecum to be issued in accordance
 24 with Sections 1985-1985.4 of the Code of Civil Procedure. For a subpoena duces tecum, this
 25 includes the requirement of an affidavit showing good cause for production of the matters
 26 and things described in the subpoena. Code Civ. Proc. § 1985.

27 § 11450.30. Motion to quash

28 11450.30. (a) A person served with a subpoena or a subpoena duces tecum may
 29 object to its terms by a motion for a protective order, including a motion to quash.

30 (b) The objection shall be resolved by the presiding officer on terms and
 31 conditions that the presiding officer declares. The presiding officer may make
 32 another order that is appropriate to protect the parties or the witness from
 33 unreasonable or oppressive demands, including violations of the right to privacy.

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

36 **Comment.** Section 11450.30 addresses matters not previously covered by statute but
 37 covered by regulation in some agencies. See, e.g., Cal. Code Regs. tit. 20, § 61 (Public
 38 Utilities Commission).

39 § 11450.40. Witness fees

40 11450.40. A witness appearing pursuant to a subpoena or a subpoena duces
 41 tecum, other than a party, shall receive for the appearance the following mileage
 42 and fees, to be paid by the party at whose request the witness is subpoenaed:

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

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

4 **Comment.** Section 11450.40 supersedes former Section 11510. Its coverage is extended to
5 a subpoena duces tecum and is conformed to the mileage and fees applicable in civil cases.
6 See Sections 68092.5-68093 (mileage and fees in civil cases); see also Sections 68096.1-
7 68097.10 (witness fees of public officers and employees).

8 Article 12. Enforcement of Orders and Sanctions

9 **§ 11455.10. Misconduct in proceeding**

10 11455.10. A person is subject to the contempt sanction for any of the following
11 in an adjudicative proceeding before an agency:

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

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

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

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

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

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

21 (d) Violation of the prohibition of ex parte communications under Article 7
22 (commencing with Section 11430.10).

23 (e) Failure or refusal, without substantial justification, to comply with a
24 deposition order, discovery request, subpoena, or other order of the presiding
25 officer, or moving, without substantial justification, to compel discovery.

26 **Comment.** Section 11455.10 restates the substance of a portion of former Section 11525.
27 Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209
28 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section
29 11507.7(i).

30 **§ 11455.20. Contempt**

31 11455.20. (a) The presiding officer or agency head may certify the facts that
32 justify the contempt sanction against a person to the superior court in and for the
33 county where the proceeding is conducted. The court shall thereupon issue an
34 order directing the person to appear before the court at a specified time and place,
35 and then and there to show cause why the person should not be punished for
36 contempt. The order and a copy of the certified statement shall be served on the
37 person. Thereafter the court has jurisdiction of the matter.

38 (b) The same proceedings shall be had, the same penalties may be imposed, and
39 the person charged may purge the contempt in the same way, as in the case of a
40 person who has committed a contempt in the trial of a civil action before a
41 superior court.

1 **Comment.** Section 11455.20 restates a portion of former Section 11525, but vests
2 certification authority in the presiding officer or agency head. For monetary sanctions for
3 bad faith actions or tactics, see Section 11455.30.

4 **§ 11455.30. Monetary sanctions for bad faith actions or tactics**

5 11455.30. (a) The presiding officer may order a party, the party's attorney or
6 other authorized representative, or both, to pay reasonable expenses, including
7 attorney's fees, incurred by another party as a result of bad faith actions or tactics
8 that are frivolous or solely intended to cause unnecessary delay as defined in
9 Section 128.5 of the Code of Civil Procedure.

10 (b) The order, or denial of an order, is subject to judicial review in the same
11 manner as a decision in the proceeding. The order is enforceable in the same
12 manner as a money judgment or by the contempt sanction.

13 **Comment.** Section 11455.30 permits monetary sanctions against a party (including the
14 agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or
15 refusal to comply with a deposition order, discovery request, subpoena, or other order of the
16 presiding officer in discovery, or moving to compel discovery, frivolously or solely intended
17 to cause delay. A person who requests a hearing without legal grounds would not be subject
18 to sanctions under this section unless the request was made in bad faith and frivolous or solely
19 intended to cause unnecessary delay. An order imposing sanctions (or denial of such an
20 order) is reviewable in the same manner as administrative decisions generally.

21 For authority to seek the contempt sanction, see Section 11455.20.

22 **Article 13. Emergency Decision**

23 **§ 11460.10. Application of article**

24 11460.10. Subject to the limitations in this article, an agency may conduct an
25 adjudicative proceeding under the emergency decision procedure provided in
26 this article.

27 **Comment.** Section 11460.10 makes available an emergency decision procedure for
28 decisions in which an adjudicative proceeding is required. See Section 11410.10 (application
29 to constitutionally and statutorily required hearings). The emergency decision procedure
30 does not apply to an agency decision to seek injunctive relief. See Section 11415.50 (when
31 adjudicative proceeding not required). The decision whether to use the emergency procedure,
32 if available, is in the discretion of the agency.

33 **§ 11460.20. Agency regulation required**

34 11460.20. (a) An agency may issue an emergency decision for temporary,
35 interim relief under this article if the agency has adopted a regulation that makes
36 this article applicable.

37 (b) The regulation shall elaborate the application of the provisions of this article
38 to an emergency decision by the agency, including all of the following:

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

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

1 (3) Prescribe the procedures that will be available before and after issuance of
 2 an emergency decision under this article. The procedures may be more protective
 3 of the person to which the agency action is directed than those provided in this
 4 article.

5 (c) This article does not apply to an emergency decision, including a cease and
 6 desist order or temporary suspension order, issued pursuant to other express
 7 statutory authority.

8 **Comment.** Section 11460.20 requires specificity in agency regulations that adopt an
 9 emergency decision procedure. Notwithstanding this article, a statute on emergency decisions,
 10 including cease and desist orders and temporary suspension orders, applicable to a particular
 11 agency or proceeding prevails over the provisions of this article. Section 11415.20
 12 (conflicting or inconsistent statute controls).

13 **§ 11460.30. When emergency decision available**

14 11460.30. (a) An agency may issue an emergency decision under this article in a
 15 situation involving an immediate danger to the public health, safety, or welfare
 16 that requires immediate agency action.

17 (b) An agency may only take action under this article that is necessary to
 18 prevent or avoid the immediate danger to the public health, safety, or welfare that
 19 justifies issuance of an emergency decision.

20 (c) An emergency decision issued under this article is limited to temporary,
 21 interim relief. The temporary, interim relief is subject to judicial review under
 22 Section 11460.80, and the underlying issue giving rise to the temporary, interim
 23 relief is subject to an adjudicative proceeding pursuant to Section 11460.60.

24 **Comment.** Section 11460.30 is drawn from 1981 Model State APA § 4-501(a)-(b). The
 25 emergency decision procedure is available only if the agency has adopted an authorizing
 26 regulation. Section 11460.20.

27 The authority for an emergency decision to avoid immediate danger to the public health,
 28 safety, or welfare includes avoiding adverse effects on the environment, such as to fish and
 29 wildlife.

30 **§ 11460.40. Emergency decision procedure**

31 11460.40. (a) Before issuing an emergency decision under this article, the
 32 agency shall, if practicable, give the person to which the agency action is directed
 33 notice and an opportunity to be heard.

34 (b) Notice and hearing under this section may be oral or written, including
 35 notice and hearing by telephone, facsimile transmission, or other electronic means,
 36 as the circumstances permit. The hearing may be conducted in the same manner as
 37 an informal hearing.

38 **Comment.** Section 11460.40 applies to the extent practicable in the circumstances of the
 39 particular emergency situation. The agency must use its discretion to determine the extent of
 40 the practicability, and give appropriate notice and opportunity to be heard accordingly. For
 41 the conduct of a hearing in the manner of an informal hearing, see Section 11445.40
 42 (procedure for informal hearing).

43 By regulation the agency may prescribe the emergency notice and hearing procedure. *Cf.*
 44 Transitional Rules of Procedure of the State Bar, Rules 789-798 (proceedings re involuntary

1 transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat
2 of harm to the public or the attorney's clients). The regulation may be more protective of the
3 person to which the agency action is directed than the provisions of this article. Section
4 11460.20 (agency regulation required).

5 **§ 11460.50. Emergency decision**

6 11460.50. (a) The agency shall issue an emergency decision, including a brief
7 explanation of the factual and legal basis and reasons for the emergency decision,
8 to justify the determination of an immediate danger and the agency's emergency
9 decision to take the specific action.

10 (b) The agency shall give notice to the extent practicable to the person to
11 which the agency action is directed. The emergency decision is effective when
12 issued or as provided in the decision.

13 **Comment.** Section 11460.50 is drawn from 1981 Model State APA § 4-501(c)-(d). Under
14 this section the agency has flexibility to issue its emergency decision orally, if necessary to
15 cope with the emergency.

16 **§ 11460.60. Completion of proceedings**

17 11460.60. (a) After issuing an emergency decision under this article for
18 temporary, interim relief, the agency shall conduct an adjudicative proceeding
19 under a formal, informal, or other applicable hearing procedure to resolve the
20 underlying issues giving rise to the temporary, interim relief.

21 (b) The agency shall commence an adjudicative proceeding under another
22 procedure within 10 days after issuing an emergency decision under this article,
23 notwithstanding the pendency of proceedings for judicial review of the
24 emergency decision.

25 **Comment.** Section 11460.60 is drawn from 1981 Model State APA § 4-501(e). If the
26 emergency proceedings have rendered the matter completely moot, this section does not
27 direct the agency to conduct useless follow-up proceedings, since these would not be required
28 in the circumstances.

29 **§ 11460.70. Agency record**

30 11460.70. The agency record consists of any documents concerning the matter
31 that were considered or prepared by the agency. The agency shall maintain these
32 documents as its official record.

33 **Comment.** Section 11460.70 is drawn from 1981 Model State APA § 4-501(f).

34 **§ 11460.80. Judicial review**

35 11460.80. (a) On issuance of an emergency decision under this article, the
36 person to which the agency action is directed may obtain judicial review of the
37 decision in the manner provided in this section without exhaustion of
38 administrative remedies.

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

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

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

6 (3) A party, on written request to another party, before the proceedings for
7 review and within 10 days after issuance of the emergency decision, is entitled to
8 appropriate discovery.

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

11 **Comment.** Section 11460.80 is drawn from Section 11529(h) (interim suspension of
12 medical care professional).

13 Article 14. Declaratory Decision

14 § 11465.10. Application of article

15 11465.10. Subject to the limitations in this article, an agency may conduct an
16 adjudicative proceeding under the declaratory decision procedure provided in
17 this article.

18 **Comment.** Article 14 (commencing with Section 11465.10) creates, and establishes all of
19 the requirements for, a special proceeding to be known as a “declaratory decision”
20 proceeding. The purpose of the proceeding is to provide an inexpensive and generally
21 available means by which a person may obtain fully reliable information as to the
22 applicability of agency administered law to the person’s particular circumstances.

23 It should be noted that an agency not governed by this chapter nonetheless has general
24 power to issue a declaratory decision. This power is derived from the power to adjudicate.
25 See, e.g., M. Asimow, *Advice to the Public from Federal Administrative Agencies* 121-22
26 (1973).

27 The declaratory decision procedure provided in this article applies only to decisions subject
28 to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.40
29 (application where formal hearing procedure required), 11501 (application of chapter). See
30 also Section 11410.10 (application to constitutionally and statutorily required hearings).

31 § 11465.20. Declaratory decision permissive

32 11465.20. (a) In case of an actual controversy, a person may apply to an agency
33 for a declaratory decision as to the applicability to specified circumstances of a
34 statute, regulation, or decision within the primary jurisdiction of the agency.

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

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

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

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

3 **Comment.** Subdivisions (a) and (b) of Section 11465.20 are drawn from 1981 Model State
 4 APA § 2-103(a). For the procedure by which an interested person may petition requesting
 5 adoption, amendment, or repeal of a regulation, see Sections 11347-11347.1. Unlike the
 6 model act, Section 11465.20 is applicable only to cases involving an actual controversy, and
 7 issuance of a declaratory decision is discretionary with the agency, rather than mandatory.

8 Under subdivision (a), a declaratory decision may determine whether the subject of the
 9 proceeding is or is not within the agency's primary jurisdiction. See *Abelleira v. District*
 10 *Court of Appeal*, 17 Cal. 2d 280, 302-03, 109 P.2d 942 (1941); *United Ins. Co. of Chicago,*
 11 *Illinois v. Maloney*, 127 Cal. App. 2d 155, 157-58, 273 P.2d 579 (1954).

12 Subdivision (b) prohibits an agency from issuing a declaratory decision that would
 13 substantially prejudice the rights of a person who would be a necessary party, and who does
 14 not consent to the determination of the matter by a declaratory decision proceeding. A
 15 necessary party is one that is constitutionally entitled to notice and an opportunity to be heard
 16 — a flexible concept depending on the nature of the competing interests involved. *Horn v.*
 17 *County of Ventura*, 24 Cal. 3d 605, 612, 617, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).
 18 Such a person may refuse to give consent because in a declaratory decision proceeding the
 19 person might not have all of the same procedural rights the person would have in another
 20 type of adjudicative proceeding to which the person would be entitled.

21 Subdivision (c) makes clear that application for a declaratory decision is not a necessary
 22 part of the administrative process. A person may seek judicial review of an agency action
 23 after other administrative remedies have been exhausted; the person is not required to seek
 24 declaratory relief as well. Nothing in this subdivision authorizes judicial review without
 25 exhaustion of other applicable administrative remedies.

26 **§ 11465.30. Notice of application**

27 11465.30. Within 30 days after receipt of an application for a declaratory
 28 decision, an agency shall give notice of the application to all persons to which
 29 notice of an adjudicative proceeding is otherwise required, and may give notice
 30 to any other person.

31 **Comment.** Section 11465.30 is drawn from 1981 Model State APA § 2-103(c). See also
 32 Section 11440.20 (notice).

33 **§ 11465.40. Applicability of rules governing administrative adjudication**

34 11465.40. The provisions of a formal, informal, or other applicable hearing
 35 procedure do not apply to an agency proceeding for a declaratory decision
 36 except to the extent provided in this article or to the extent the agency so
 37 provides by regulation or order.

38 **Comment.** Section 11465.40 is drawn from 1981 Model State APA § 2-103(d). It makes
 39 clear that the specific procedural requirements for adjudications imposed by the formal
 40 hearing procedure or other applicable hearing procedure on an agency when it conducts an
 41 adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the
 42 agency elects to make some or all of them applicable.

43 Regulations specifying precise procedures available in a declaratory proceeding may be
 44 adopted under Section 11465.70. The reason for exempting a declaratory decision from
 45 usual procedural requirements for adjudications is to encourage an agency to issue a decision
 46 by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions
 47 have no applicability. For example, cross-examination is unnecessary since the application

1 establishes the facts on which the agency should rule. Oral argument could also be dispensed
2 with.

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

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

10 A declaratory decision is, of course, subject to provisions governing judicial review of
11 agency decisions and for public inspection and indexing of agency decisions. See, e.g.,
12 Sections 6250-6268 (California Public Records Act). A declaratory decision may be given
13 precedential effect, subject to the provisions governing precedent decisions. See Section
14 11425.60 (precedent decisions).

15 **§ 11465.50. Action of agency**

16 11465.50. (a) Within 60 days after receipt of an application for a declaratory
17 decision, an agency shall do one of the following, in writing:

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

20 (2) Set the matter for specified proceedings.

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

22 (4) Decline to issue a declaratory decision, stating in writing the reasons for its
23 action. Agency action under this paragraph is not subject to judicial review.

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

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

29 **Comment.** Subdivision (a) of Section 11465.50 is drawn from 1981 Model State APA § 2-
30 103(e). The requirement that an agency dispose of an application within 60 days ensures a
31 timely agency response to a declaratory decision application, thereby facilitating planning by
32 affected parties.

33 Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the
34 agency communicate to the applicant and to any other parties any action it takes in response
35 to an application for a declaratory decision. This includes each of the types of actions listed
36 in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail or other
37 means to the last known address of the person to which the agency action is directed. Section
38 11440.20 (notice).

39 The decision by an agency not to issue a declaratory decision is within the absolute
40 discretion of the agency and is therefore not reviewable. Subdivision (a)(4).

41 **§ 11465.60. Declaratory decision**

42 11465.60. (a) A declaratory decision shall contain the names of all parties to the
43 proceeding, the particular facts on which it is based, and the reasons for its
44 conclusion.

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

1 **Comment.** Section 11465.60 is drawn from 1981 Model State APA § 2-103(g). A
 2 declaratory decision issued by an agency is judicially reviewable; is binding on the applicant,
 3 other parties to that declaratory proceeding, and the agency, unless reversed or modified on
 4 judicial review; and has the same precedential effect as other agency adjudications.

5 A declaratory decision, like other decisions, only determines the legal rights of the
 6 particular parties to the proceeding in which it was issued.

7 The requirement in subdivision (a) that each declaratory decision issued contain the facts
 8 on which it is based and the reasons for its conclusion will facilitate any subsequent judicial
 9 review of the decision's legality. It also ensures a clear record of what occurred for the parties
 10 and for persons interested in the decision because of its possible precedential effect.

11 **§ 11465.70. Regulations governing declaratory decision**

12 11465.70. (a) The Office of Administrative Hearings shall adopt and promulgate
 13 model regulations under this article that are consistent with the public interest
 14 and with the general policy of this article to facilitate and encourage agency
 15 issuance of reliable advice. The model regulations shall provide for all of the
 16 following:

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

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

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

21 (4) The disposition of an application.

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

25 (c) By regulation an agency may modify the provisions of this article or make
 26 the provisions of this article inapplicable.

27 **Comment.** Section 11465.70 is drawn from 1981 Model State APA § 2-103(b). An agency
 28 may choose to preclude declaratory decisions altogether.

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

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

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

1 Article 15. Conversion of Proceeding

2 § 11470.10. Conversion authorized

3 11470.10. (a) Subject to any applicable regulation adopted under Section
4 11470.50, at any point in an agency proceeding the presiding officer or other
5 agency official responsible for the proceeding:

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

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

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

13 **Comment.** Section 11470.10 is drawn from 1981 Model State APA § 1-107(a)-(b). A
14 reference in this section to a “party,” in the case of an adjudicative proceeding means
15 “party” as defined in Section 11405.60, and in the case of a rulemaking proceeding means
16 an active participant in the proceeding or one primarily interested in its outcome. Agency
17 proceedings covered by this article include a rulemaking proceeding as well as an
18 adjudicative proceeding. The conversion provisions may be irrelevant to some types of
19 proceedings by some agencies, and in that case this article would be inapplicable.

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

24 The further limitation in subdivision (a)(1) — that the conversion may not substantially
25 prejudice the rights of a party — must also be satisfied. The courts will have to decide on a
26 case-by-case basis what constitutes substantial prejudice. The concept includes both the right
27 to an appropriate procedure that enables a party to protect its interests, and freedom of the
28 party from great inconvenience caused by the conversion in terms of time, cost, availability of
29 witnesses, necessity of continuances and other delays, and other practical consequences of the
30 conversion. Of course, even if the rights of a party are substantially prejudiced by a
31 conversion, the party may voluntarily waive them.

32 It should be noted that the substantial-prejudice-to-the-rights-of-a-party limitation on
33 discretionary conversion of an agency proceeding from one type to another is not intended
34 to disturb an existing body of law. In certain situations an agency may lawfully deny an
35 individual an adjudicative proceeding to which the individual otherwise would be entitled by
36 conducting a rulemaking proceeding that determines for an entire class an issue that
37 otherwise would be the subject of a necessary adjudicative proceeding. See Note, *The Use of*
38 *Agency Rulemaking To Deny Adjudications Apparently Required by Statute*, 54 Iowa L. Rev.
39 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the
40 existing body of law allowing an agency, in certain situations, to make a determination
41 through an adjudicative proceeding that has the effect of denying a person an opportunity
42 the person might otherwise be afforded if a rulemaking proceeding were used instead.

43 Subdivision (a)(2) makes clear that an agency must convert a proceeding of one type to a
44 proceeding of another type when required by regulation or statute, even if a nonconsenting
45 party is prejudiced thereby. Under subdivision (b), however, both a discretionary and a
46 mandatory conversion must be accompanied by notice to all parties to the original
47 proceeding so that they will have a fully adequate opportunity to protect their interests.

48 Within the limits of this section, an agency should be authorized to use procedures in a
49 proceeding that are most likely to be effective and efficient under the particular

1 circumstances. Subdivision (a) allows an agency this flexibility. For example, an agency that
 2 wants to convert a formal hearing into an informal hearing, or an informal hearing into a
 3 formal hearing, may do so under this provision if the conversion is appropriate and in the
 4 public interest, if adequate notice is given, and if the rights of the parties are not substantially
 5 prejudiced.

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

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

18 § 11470.20. Presiding officer

19 11470.20. If the presiding officer or other agency official responsible for the
 20 original proceeding would not have authority over the new proceeding to which
 21 it is to be converted, the agency head shall appoint a successor to preside over or
 22 be responsible for the new proceeding.

23 **Comment.** Section 11470.20 is drawn from 1981 Model State APA § 1-107(c). It deals
 24 with the mechanics of transition from one type of proceeding to another.

25 § 11470.30. Agency record

26 11470.30. To the extent practicable and consistent with the rights of parties
 27 and the requirements of this article relating to the new proceeding, the record of
 28 the original agency proceeding shall be used in the new agency proceeding.

29 **Comment.** Section 11470.30 is drawn from 1981 Model State APA § 1-107(d). It seeks to
 30 avoid unnecessary duplication of proceedings by requiring the use of as much of the agency
 31 record in the first proceeding as is possible in the second proceeding, consistent with the
 32 rights of the parties and the requirements of the applicable statute governing the hearing
 33 procedure.

34 § 11470.40. Procedure after conversion

35 11470.40. After a proceeding is converted from one type to another, the
 36 presiding officer or other agency official responsible for the new proceeding shall
 37 do all of the following:

38 (a) Give additional notice to parties or other persons necessary to satisfy the
 39 statutory requirements relating to the new proceeding.

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

43 (c) Conduct or cause to be conducted any additional proceedings necessary to
 44 satisfy the statutory requirements relating to the new proceeding, and allow the
 45 parties a reasonable time to prepare for the new proceeding.

1 **Comment.** Section 11470.40 is drawn from 1981 Model State APA § 1-107(e).

2 **§ 11470.50. Agency regulations**

3 11470.50. An agency may adopt regulations to govern the conversion of one
4 type of proceeding to another. The regulations may include an enumeration of
5 the factors to be considered in determining whether and under what
6 circumstances one type of proceeding will be converted to another.

7 **Comment.** Section 11470.50 is drawn from 1981 Model State APA § 1-107(f). Adoption
8 of regulations is permissive, rather than mandatory.

1 CHAPTER 5. ADMINISTRATIVE ADJUDICATION: FORMAL
2 HEARING

3 Gov't Code § 11500-11530 (chapter heading). Administrative adjudication: formal
4 hearing

5 The heading of Chapter 5 (commencing with Section 11500) of Part 1 of
6 Division 3 of Title 2 of the Government Code is amended to read:

7 CHAPTER 5. ADMINISTRATIVE ADJUDICATION : FORMAL HEARING

8 § 11500 (amended). Definitions

9 Section 11500 of the Government Code is amended to read:

10 11500. In this chapter unless the context or subject matter otherwise requires:

11 (a) "Agency" includes the state boards, commissions, and officers enumerated
12 in Section 11501 and those to which this chapter is made applicable by law,
13 except that wherever the word "agency" alone is used the power to act may be
14 delegated by the agency, and wherever the words "agency itself" are used the
15 power to act shall not be delegated unless the statutes relating to the particular
16 agency authorize the delegation of the agency's power to hear and decide.

17 (b) "Party" includes the agency, the respondent, and any person, other than an
18 officer or an employee of the agency in his or her official capacity, who has been
19 allowed to appear or participate in the proceeding.

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

23 (d) "Administrative law judge" means an individual qualified under Section
24 11502.

25 (e) "Agency member" means any person who is a member of any agency to
26 which this chapter is applicable and includes any person who himself or herself
27 constitutes an agency.

28 (f) ~~"Adjudicatory hearing" means a state agency hearing which involves~~
29 ~~personal or property rights of an individual, the granting or revocation of an~~
30 ~~individual's license, or the resolution of an issue pertaining to an individual.~~
31 ~~However, the procedures governing such a hearing shall include, but not be~~
32 ~~limited to, all of the following:~~

33 (1) ~~Testimony under oath.~~

34 (2) ~~The right to cross-examination and to confront adversary witnesses.~~

35 (3) ~~The right to representation.~~

36 (4) ~~The issuance of a formal decision.~~

37 ~~For purposes of this subdivision, an "adjudicatory hearing" shall not be~~
38 ~~required to include any informal factfinding or informal investigatory hearing.~~
39 ~~However, nothing in this subdivision shall be construed to prohibit an agency~~
40 ~~from providing an interpreter during any such informal hearing.~~

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

5 **Comment.** Subdivision (a) of Section 11500 is amended to reflect the deletion of the
 6 enumeration of agencies formerly found in Section 11501. The application of this chapter to
 7 the hearings of an agency is determined by the statutes relating to the agency. Section 11501.

8 Former subdivision (f) is superseded by Sections 11410.10 (application to constitutionally
 9 and statutorily required hearings), 11410.20 (application to state), 11405.50 (“decision”
 10 defined), 11425.50 (decision), and 11435.15 (language assistance).

11 Former subdivision (g) is superseded by Section 11435.05 (“language assistance”
 12 defined).

13 **§ 11501 (amended). Application of chapter**

14 Section 11501 of the Government Code is amended to read:

15 11501. (a) This chapter applies to any agency as determined by the statutes
 16 relating to that agency.

17 (b) ~~The enumerated agencies referred to in Section 11500 are:~~

- 18 ~~Accountancy, State Board of~~
- 19 ~~Air Resources Board, State~~
- 20 ~~Alcohol and Drug Programs, State Department of~~
- 21 ~~Architectural Examiners, California Board of~~
- 22 ~~Attorney General~~
- 23 ~~Auctioneer Commission, Board of Governors of~~
- 24 ~~Automotive Repair, Bureau of~~
- 25 ~~Barbering and Cosmetology, State Board of~~
- 26 ~~Behavioral Science Examiners, Board of~~
- 27 ~~Boating and Waterways, Department of~~
- 28 ~~Cancer Advisory Council~~
- 29 ~~Cemetery Board~~
- 30 ~~Chiropractic Examiners, Board of~~
- 31 ~~Security and Investigative Services, Bureau of~~
- 32 ~~Community Colleges, Board of Governors of the California~~
- 33 ~~Conservation, Department of~~
- 34 ~~Consumer Affairs, Department of~~
- 35 ~~Contractors’ State License Board~~
- 36 ~~Corporations, Commissioner of~~
- 37 ~~Court Reporters Board of California~~
- 38 ~~Dental Examiners of California, Board of~~
- 39 ~~Education, State Department of~~
- 40 ~~Electronic and Appliance Repair, Bureau of~~
- 41 ~~Engineers and Land Surveyors, State Board of Registration for~~
- 42 ~~Professional~~
- 43 ~~Fair Political Practices Commission~~
- 44 ~~Fire Marshal, State~~

1 ~~Food and Agriculture, Director of~~
2 ~~Forestry and Fire Protection, Department of~~
3 ~~Funeral Directors and Embalmers, State Board of~~
4 ~~Geologists and Geophysicists, State Board of Registration for~~
5 ~~Guide Dogs for the Blind, State Board of~~
6 ~~Health Services, State Department of~~
7 ~~Highway Patrol, Department of the California~~
8 ~~Home Furnishings and Thermal Insulation, Bureau of~~
9 ~~Horse Racing Board, California~~
10 ~~Housing and Community Development, Department of~~
11 ~~Insurance Commissioner~~
12 ~~Labor Commissioner~~
13 ~~Landscape Architects, State Board of~~
14 ~~Medical Board of California, Medical Quality Review Committees and~~
15 ~~Examining Committees~~
16 ~~Motor Vehicles, Department of~~
17 ~~Nursing, Board of Registered~~
18 ~~Nursing Home Administrators, Board of Examiners of~~
19 ~~Optometry, State Board of~~
20 ~~Osteopathic Medical Board of California~~
21 ~~Pharmacy, California State Board of~~
22 ~~Podiatric Medicine, Board of~~
23 ~~Psychology, Board of~~
24 ~~Public Employees' Retirement System, Board of Administration of the~~
25 ~~Real Estate, Department of~~
26 ~~San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for~~
27 ~~the Bays of~~
28 ~~Savings and Loan Commissioner~~
29 ~~School Districts~~
30 ~~Secretary of State, Office of~~
31 ~~Social Services, State Department of~~
32 ~~Statewide Health Planning and Development, Office of~~
33 ~~Structural Pest Control Board~~
34 ~~Tax Preparers Program~~
35 ~~Teacher Credentialing, Commission on~~
36 ~~Teachers' Retirement System, State~~
37 ~~Transportation, Department of, acting pursuant to the State Aeronautics~~
38 ~~Act~~
39 ~~Veterinary Medicine, Board of Examiners in~~
40 ~~Vocational Nurse and Psychiatric Technician Examiners of the State of~~
41 ~~California, Board of~~

1 This chapter applies to an adjudicative proceeding of an agency created on or
 2 after July 1, 1997, unless the statutes relating to the proceeding provide
 3 otherwise.

4 (c) Chapter 4.5 (commencing with Section 11400) applies to an adjudicative
 5 proceeding required to be conducted under this chapter, unless the statutes
 6 relating to the proceeding provide otherwise.

7 **Comment.** Section 11501 is amended to make this chapter the default procedure, absent a
 8 contrary statute, for agencies created after the operative date of the amendment.

9 This chapter is supplemented by the general provisions on administrative adjudication
 10 found in Chapter 4.5 (commencing with Section 11400), which apply to proceedings under
 11 this chapter. See also Section 11410.40 (application where formal hearing procedure
 12 required). Thus if an agency is required by statute to conduct a hearing under this chapter,
 13 the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution
 14 or the informal hearing procedure or other appropriate provisions of Chapter 4.5. Likewise,
 15 the general provisions of Chapter 4.5 restricting ex parte communications, regulating
 16 precedent decisions, and the like, apply to a hearing under this chapter. See also Section
 17 11502 (use of administrative law judges under Chapter 4.5).

18 The enumeration of agencies formerly found in subdivision (b) is deleted as obsolete. The
 19 application of this chapter to the hearings of an agency is determined by the statutes relating
 20 to the agency. See also Section 11500(a) ("agency" defined).

21 **§ 11501.5 (repealed). Language assistance; provision by state agencies**

22 Section 11501.5 of the Government Code is repealed.

23 ~~11501.5. (a) The following state agencies shall provide language assistance at~~
 24 ~~adjudicatory hearings pursuant to subdivision (d) of Section 11513:~~

- 25 ~~Agricultural Labor Relations Board~~
- 26 ~~State Department of Alcohol and Drug Abuse~~
- 27 ~~Athletic Commission~~
- 28 ~~California Unemployment Insurance Appeals Board~~
- 29 ~~Board of Prison Terms~~
- 30 ~~State Board of Barbering and Cosmetology~~
- 31 ~~State Department of Developmental Services~~
- 32 ~~Public Employment Relations Board~~
- 33 ~~Franchise Tax Board~~
- 34 ~~State Department of Health Services~~
- 35 ~~Department of Housing and Community Development~~
- 36 ~~Department of Industrial Relations~~
- 37 ~~State Department of Mental Health~~
- 38 ~~Department of Motor Vehicles~~
- 39 ~~Notary Public Section, office of the Secretary of State~~
- 40 ~~Public Utilities Commission~~
- 41 ~~Office of Statewide Health Planning and Development~~
- 42 ~~State Department of Social Services~~
- 43 ~~Workers' Compensation Appeals Board~~
- 44 ~~Department of the Youth Authority~~
- 45 ~~Youthful Offender Parole Board~~

1 Bureau of Employment Agencies
2 Department of Insurance
3 State Personnel Board
4 Board of Podiatric Medicine
5 Board of Psychology

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

12 **Comment.** Former Section 11501.5 is restated in Section 11435.15 (application of article).

13 **§ 11502 (amended). Administrative law judges**

14 Section 11502 of the Government Code is amended to read:

15 11502. (a) All hearings of state agencies required to be conducted under this
16 chapter shall be conducted by administrative law judges on the staff of the Office
17 of Administrative Hearings. This subdivision applies to a hearing required to be
18 conducted under this chapter that is conducted under the informal hearing or
19 emergency decision procedure provided in Chapter 4.5 (commencing with
20 Section 11400).

21 (b) The Director of the Office of Administrative Hearings has power to appoint a
22 staff of administrative law judges for the office as provided in Section 11370.3 of
23 the Government Code . Each administrative law judge shall have been admitted
24 to practice law in this state for at least five years immediately preceding his or her
25 appointment and shall possess any additional qualifications established by the
26 State Personnel Board for the particular class of position involved.

27 **Comment.** Section 11502 is amended to make clear that where use of an administrative law
28 judge employed by the Office of Administrative Hearings is required for an adjudicative
29 proceeding under this chapter, such use is also required in informal and emergency
30 proceedings under Chapter 4.5 (administrative adjudication: general provisions). An
31 administrative law judge employed by the Office of Administrative Hearings is not required
32 for a declaratory decision or alternative dispute resolution under Chapter 4.5.

33 **§ 11502.1 (repealed). Health planning unit**

34 Section 11502.1 of the Government Code is repealed.

35 ~~11502.1. There is hereby established in the Office of Administrative Hearings a~~
36 ~~unit of administrative law judges who shall preside over hearings conducted~~
37 ~~pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health~~
38 ~~and Safety Code. In addition to meeting the qualifications of administrative law~~
39 ~~judges as prescribed in Section 11502, the administrative law judges in this unit~~
40 ~~shall have a demonstrated knowledge of health planning and certificate-of-need~~
41 ~~matters. As many administrative law judges as are necessary to handle the~~
42 ~~caseload shall be permanently assigned to this unit. In the event there are no~~

1 ~~pending certificate of need of health planning matters, administrative law judges~~
2 ~~in this unit may be assigned to other matters pending before the Office of~~
3 ~~Administrative Hearings. Health planning matters shall be given priority on the~~
4 ~~calendar of administrative law judges assigned to this unit.~~

5 **Comment.** Section 11502.1 is not continued. The requirement that health facilities and
6 specialty clinics apply for and obtain certificates of need or certificates of exemption is
7 indefinitely suspended. Health & Safety Code § 439.7 (1984 Cal. Stat. ch. 1745, § 14).

8 **§ 11503 (no change). Accusation**

9 11503. A hearing to determine whether a right, authority, license or privilege
10 should be revoked, suspended, limited or conditioned shall be initiated by filing
11 an accusation. The accusation shall be a written statement of charges which shall
12 set forth in ordinary and concise language the acts or omissions with which the
13 respondent is charged, to the end that the respondent will be able to prepare his
14 defense. It shall specify the statutes and rules which the respondent is alleged to
15 have violated, but shall not consist merely of charges phrased in the language of
16 such statutes and rules. The accusation shall be verified unless made by a public
17 officer acting in his official capacity or by an employee of the agency before
18 which the proceeding is to be held. The verification may be on information and
19 belief.

20 **Note.** No change is recommended in Section 11503. It is set out here for completeness.

21 **§ 11504 (no change). Statement of issues**

22 11504. A hearing to determine whether a right, authority, license or privilege
23 should be granted, issued or renewed shall be initiated by filing a statement of
24 issues. The statement of issues shall be a written statement specifying the statutes
25 and rules with which the respondent must show compliance by producing proof
26 at the hearing, and in addition any particular matters which have come to the
27 attention of the initiating party and which would authorize a denial of the agency
28 action sought. The statement of issues shall be verified unless made by a public
29 officer acting in his official capacity or by an employee of the agency before
30 which the proceeding is to be held. The verification may be on information and
31 belief. The statement of issues shall be served in the same manner as an
32 accusation; provided, that, if the hearing is held at the request of the respondent,
33 the provisions of Sections 11505 and 11506 shall not apply and the statement of
34 issues together with the notice of hearing shall be delivered or mailed to the
35 parties as provided in Section 11509. Unless a statement to respondent is served
36 pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and
37 the name and address of the person to whom requests permitted by Section
38 11505 may be made, shall be served with the statement of issues.

39 **Note.** No change is recommended in Section 11504. It is set out here for completeness.

1 **§ 11504.5 (no change). References to accusations include statements of issues**

2 11504.5. In the following sections of this chapter, all references to accusations
3 shall be deemed to be applicable to statements of issues except in those cases
4 mentioned in subdivision (a) of Section 11505 and Section 11506 where
5 compliance is not required.

6 **Note.** No change is recommended in Section 11504.5. It is set out here for completeness.

7 **§ 11505 (amended). Service on respondent**

8 Section 11505 of the Government Code is amended to read:

9 11505. (a) Upon the filing of the accusation the agency shall serve a copy
10 thereof on the respondent as provided in subdivision (c). The agency may include
11 with the accusation any information which it deems appropriate, but it shall
12 include a post card or other form entitled Notice of Defense which, when signed
13 by or on behalf of the respondent and returned to the agency, will acknowledge
14 service of the accusation and constitute a notice of defense under Section 11506.
15 The copy of the accusation shall include or be accompanied by (1) a statement
16 that respondent may request a hearing by filing a notice of defense as provided in
17 Section 11506 within 15 days after service upon ~~him~~ the respondent of the
18 accusation, and that failure to do so will constitute a waiver of his the
19 respondent's right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and
20 11507.7.

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

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

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

35 The hearing may be postponed for good cause. If you have good cause, you are
36 obliged to notify the agency or, if an administrative law judge has been assigned
37 to the hearing, the Office of Administrative Hearings, within 10 working days
38 after you discover the good cause. Failure to ~~notify the agency~~ give notice within
39 10 days will deprive you of a postponement.

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

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

9 **Comment.** Section 11505 is amended to correct the portion of the statement to the
 10 respondent relating to postponement of the hearing. See Section 11524 (continuances).

11 **§ 11506 (amended). Notice of defense**

12 Section 11506 of the Government Code is amended to read:

13 11506. (a) Within 15 days after service ~~upon him~~ of the accusation the
 14 respondent may file with the agency a notice of defense in which ~~he~~ the
 15 respondent may:

16 (1) Request a hearing.

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

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

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

23 (5) Present new matter by way of defense.

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

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

31 ~~(b)~~ (c) The respondent shall be entitled to a hearing on the merits if ~~he~~ the
 32 respondent files a notice of defense, and any such notice shall be deemed a
 33 specific denial of all parts of the accusation not expressly admitted. Failure to file
 34 such notice shall constitute a waiver of respondent's right to a hearing, but the
 35 agency in its discretion may nevertheless grant a hearing. Unless objection is
 36 taken as provided in paragraph (3) of subdivision (a), all objections to the form of
 37 the accusation shall be deemed waived.

38 ~~(e)~~ (d) The notice of defense shall be in writing signed by or on behalf of the
 39 respondent and shall state ~~his~~ the respondent's mailing address. It need not be
 40 verified or follow any particular form.

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

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

3 **Comment.** Section 11506 is amended to delete the statement by way of mitigation. A
4 default may be cured pursuant to Section 11520, and evidence in favor of mitigation may be
5 made as a defense.

6 **§ 11507 (no change). Amended accusation**

7 11507. At any time before the matter is submitted for decision the agency may
8 file or permit the filing of an amended or supplemental accusation. All parties shall
9 be notified thereof. If the amended or supplemental accusation presents new
10 charges the agency shall afford respondent a reasonable opportunity to prepare
11 his defense thereto, but he shall not be entitled to file a further pleading unless the
12 agency in its discretion so orders. Any new charges shall be deemed
13 controverted, and any objections to the amended or supplemental accusation may
14 be made orally and shall be noted in the record.

15 **Note.** No change is recommended in Section 11507. It is set out here for completeness.

16 **§ 11507.2 (added). Intervention**

17 Section 11507.2 is added to the Government Code to read:

18 11507.2. (a) By regulation an agency may modify the provisions of this section
19 or make the provisions of this section inapplicable.

20 (b) The administrative law judge shall grant a motion for intervention if all of the
21 following conditions are satisfied:

22 (1) The motion is submitted in writing, with copies served on all parties named in
23 the accusation.

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

27 (3) The motion states facts demonstrating that the applicant’s legal rights,
28 duties, privileges, or immunities will be substantially affected by the proceeding or
29 that the applicant qualifies as an intervenor under a statute or regulation.

30 (4) The administrative law judge determines that the interests of justice and the
31 orderly and prompt conduct of the proceeding will not be impaired by allowing
32 the intervention.

33 (c) If an applicant qualifies for intervention, the administrative law judge may
34 impose conditions on the intervenor’s participation in the proceeding, either at
35 the time that intervention is granted or at a subsequent time. Conditions may
36 include the following:

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

39 (2) Limiting or excluding the use of discovery, cross-examination, and other
40 procedures involving the intervenor so as to promote the orderly and prompt
41 conduct of the proceeding.

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

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

6 (d) As early as practicable in advance of the hearing the administrative law
7 judge shall issue an order granting or denying the motion for intervention,
8 specifying any conditions, and briefly stating the reasons for the order. The
9 administrative law judge may modify the order at any time, stating the reasons for
10 the modification. The administrative law judge shall promptly give notice of an
11 order granting, denying, or modifying intervention to the applicant and to all
12 parties.

13 (e) Whether the interests of justice and the orderly and prompt conduct of the
14 proceedings will be impaired by allowing intervention is a determination to be
15 made under this section by the administrative law judge in the administrative law
16 judge's sole discretion based on the knowledge and judgment of the
17 administrative law judge at that time, and the administrative law judge's
18 determination is not subject to administrative or judicial review.

19 (f) Nothing in this section precludes an agency from adopting a regulation that
20 permits participation by a person short of intervention as a party, subject to
21 Article 7 (commencing with Section 11430.10) of Chapter 4.5 (ex parte
22 communications).

23 **Comment.** Subdivision (a) of Section 11507.2 makes clear that an agency may limit or
24 preclude intervention in a proceeding.

25 Subdivision (b)(1) is drawn from 1981 Model State APA § 4-209(a). It provides that the
26 administrative law judge must grant the motion to intervene if a party satisfies the standards of
27 the section. Subdivision (b)(3) confers standing on an applicant to intervene on
28 demonstrating that the applicant's "legal rights, duties, privileges, or immunities will be
29 substantially affected by the proceeding." Cf. *Horn v. County of Ventura*, 24 Cal. 3d 605,
30 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (right to notice and hearing if agency action will
31 constitute substantial deprivation of property rights). However, subdivision (b)(4) imposes the
32 further limitation that the administrative law judge may grant the motion for intervention only
33 on determining that "the interests of justice and the orderly and prompt conduct of the
34 proceeding will not be impaired by allowing the intervention." The administrative law judge
35 is thus required to weigh the impact that the proceeding will have on the legal rights of the
36 applicant for intervention (subdivision (b)(3)) against the interests of justice and the need for
37 orderly and prompt proceedings (subdivision (b)(4)).

38 Subdivision (c) is drawn from 1981 Model State APA § 4-209(c). This provision,
39 authorizing the administrative law judge to impose conditions on the intervenor's
40 participation in the proceeding, is intended to permit the administrative law judge to facilitate
41 reasonable involvement of intervenors without subjecting the proceeding to unreasonably
42 burdensome or repetitious presentations.

43 Subdivision (d) is drawn from 1981 Model State APA § 4-209(d). By requiring advance
44 notice of the administrative law judge's order granting, denying, or modifying intervention,
45 this provision is intended to give the parties and the applicants for intervention an opportunity
46 to prepare for the adjudicative proceeding.

47 Subdivision (f) recognizes that there are ways whereby an interested person can have an
48 impact on an ongoing adjudication without assuming the substantial litigation costs of

1 becoming a party and without unnecessarily complicating the proceeding through the
2 addition of more parties. Agency regulations may provide, for example, for filing of amicus
3 briefs, testifying as a witness, or contributing to the fees of a party.

4 **§ 11507.3 (added). Consolidation and severance**

5 Section 11507.3 is added to the Government Code to read:

6 11507.3. (a) When proceedings that involve a common question of law or fact
7 are pending, the administrative law judge on its own motion or on motion of a
8 party may order a joint hearing of any or all the matters at issue in the
9 proceedings. The administrative law judge may order all the proceedings
10 consolidated and may make orders concerning the procedure that may tend to
11 avoid unnecessary costs or delay.

12 (b) The administrative law judge on its own motion or on motion of a party, in
13 furtherance of convenience or to avoid prejudice or when separate hearings will
14 be conducive to expedition and economy, may order a separate hearing of any
15 issue, including an issue raised in the notice of defense, or of any number of
16 issues.

17 **Comment.** Section 11507.3 is drawn from Code of Civil Procedure Section 1048.
18 Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to
19 be consolidated in a single proceeding. See also Section 13 (singular includes plural).

20 **§ 11507.5 (no change). Discovery provisions exclusive**

21 11507.5. The provisions of Section 11507.6 provide the exclusive right to and
22 method of discovery as to any proceeding governed by this chapter.

23 **Note.** No change is recommended in Section 11507.5. It is set out here for completeness.

24 **§ 11507.6 (amended). Discovery**

25 Section 11507.6 of the Government Code is amended to read:

26 11507.6. After initiation of a proceeding in which a respondent or other party is
27 entitled to a hearing on the merits, a party, upon written request made to another
28 party, prior to the hearing and within 30 days after service by the agency of the
29 initial pleading or within 15 days after such service of an additional pleading, is
30 entitled to (1) obtain the names and addresses of witnesses to the extent known
31 to the other party, including, but not limited to, those intended to be called to
32 testify at the hearing, and (2) inspect and make a copy of any of the following in
33 the possession or custody or under the control of the other party:

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

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

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

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

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

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

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

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

23 ~~(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section~~
 24 ~~19572 or 19702, alleging conduct which constitutes sexual harassment, sexual~~
 25 ~~assault, or sexual battery, evidence of specific instances of a complainant's sexual~~
 26 ~~conduct with individuals other than the alleged perpetrator is not discoverable~~
 27 ~~unless it is to be offered at a hearing to attack the credibility of the complainant as~~
 28 ~~provided for under subdivision (j) of Section 11513. This subdivision is intended~~
 29 ~~only to limit the scope of discovery; it is not intended to affect the methods of~~
 30 ~~discovery allowed under this section.~~

31 **Comment.** Former subdivision (g) of Section 11507.6 is restated in Section 11440.40
 32 (evidence of sexual conduct).

33 **§ 11507.7 (amended). Motion to compel discovery**

34 Section 11507.7 of the Government Code is amended to read:

35 11507.7. (a) Any party claiming his the party's request for discovery pursuant
 36 to Section 11507.6 has not been complied with may serve and file a ~~verified~~
 37 ~~petition with the administrative law judge~~ a motion to compel discovery in the
 38 ~~superior court for the county in which the administrative hearing will be held~~ ,
 39 naming as respondent the party refusing or failing to comply with Section
 40 11507.6. The ~~petition~~ motion shall state facts showing the respondent party failed
 41 or refused to comply with Section 11507.6, a description of the matters sought to
 42 be discovered, the reason or reasons why ~~such~~ the matter is discoverable under

1 ~~this~~ that section, that a reasonable and good faith attempt to contact the
 2 respondent for an informal resolution of the issue has been made, and the ground
 3 or grounds of respondent's refusal so far as known to ~~petitioner~~ moving party .

4 (b) ~~The petition motion~~ shall be served upon respondent party and filed within
 5 15 days after the respondent party first evidenced his failure or refusal to comply
 6 with Section 11507.6 or within 30 days after request was made and the party has
 7 failed to reply to the request, or within another time provided by stipulation,
 8 whichever period is longer. ~~However, no petition may be filed within 15 days of~~
 9 ~~the date set for commencement of the administrative hearing except upon order~~
 10 ~~of the court after motion and notice and for good cause shown. In acting upon~~
 11 ~~such motion, the court shall consider the necessity and reasons for such~~
 12 ~~discovery, the diligence or lack of diligence of the moving party, whether the~~
 13 ~~granting of the motion will delay the commencement of the administrative hearing~~
 14 ~~on the date set, and the possible prejudice of such action to any party.~~

15 (c) ~~If from a reading of the petition the court is satisfied that the petition sets~~
 16 ~~forth good cause for relief, the court shall issue an order to show cause directed to~~
 17 ~~the respondent party; otherwise the court shall enter an order denying the~~
 18 ~~petition. The order to show cause shall be served upon the respondent and his~~
 19 ~~attorney of record in the administrative proceeding by personal delivery or~~
 20 ~~certified mail and shall be returnable no earlier than 10 days from its issuance nor~~
 21 ~~later than 30 days after the filing of the petition. The hearing on the motion to~~
 22 compel discovery shall be within 15 days after the motion is made, or a later time
 23 that the administrative law judge may on its own motion for good cause
 24 determine. The respondent party shall have the right to serve and file a written
 25 answer or other response to the ~~petition and order to show cause~~ motion before
 26 or at the time of the hearing .

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

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

37 (f) ~~The court~~ (e) The administrative law judge shall decide the case on the
 38 matters examined by the court in camera, the papers filed by the parties, and such
 39 oral argument and additional evidence as the court administrative law judge may
 40 allow.

41 (g) (f) Unless otherwise stipulated by the parties, the court administrative law
 42 judge shall no later than 30 15 days after the filing of the petition file hearing
 43 make its order denying or granting the ~~petition~~ , provided, however, the court

1 ~~may on its own motion for good cause extend such time an additional 30 days~~
 2 ~~motion.~~ The order of the court shall be in writing setting forth the matters or parts
 3 thereof ~~the petitioner~~ the moving party is entitled to discover under Section
 4 11507.6. A copy of the order shall forthwith be served by mail by the clerk
 5 administrative law judge upon the parties. Where the order grants the petition
 6 motion in whole or in part, such the order shall not become effective until 10 days
 7 after the date the order is served by ~~the clerk~~. Where the order denies relief to the
 8 petitioning moving party, the order shall be effective on the date it is served by
 9 ~~the clerk~~.

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

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

30 **Comment.** Section 11507.7 is amended to provide for proceedings to compel discovery
 31 before the administrative law judge rather than the superior court. An order of the
 32 administrative law judge compelling discovery is enforceable by certification to the superior
 33 court of facts to justify the contempt sanction. Sections 11455.10-11455.20. A court
 34 judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The
 35 administrative law judge may also impose monetary sanctions for bad faith tactics, which are
 36 reviewable in the same manner as the decision in the proceeding. Section 11455.30.

37 § 11508 (amended). Time and place of hearing

38 Section 11508 of the Government Code is amended to read:

39 11508. (a) The agency shall consult the office, and subject to the availability of
 40 its staff, shall determine the time and place of hearing. The hearing shall be held in
 41 San Francisco if the transaction occurred or the respondent resides within the
 42 First or Sixth Appellate District, in the County of Los Angeles if the transaction
 43 occurred or the respondent resides within the Second or Fourth Appellate District

1 ~~, and other than the County of Imperial or San Diego,~~ in the County of
2 Sacramento if the transaction occurred or the respondent resides within the Third
3 or Fifth Appellate District ~~, and in the County of San Diego if the transaction~~
4 ~~occurred or the respondent resides within the Fourth Appellate District in the~~
5 ~~County of Imperial or San Diego .~~

6 (b) Notwithstanding subdivision (a):

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

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

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

12 (c) The respondent may move for, and the administrative law judge in its
13 discretion may grant or deny, a change in the place of the hearing. A motion for a
14 change in the place of the hearing shall be made within 10 days after service of
15 the notice of hearing on the respondent.

16 **Comment.** Subdivision (a) of Section 11508 is amended to recognize creation of a branch
17 of the Office of Administrative Hearings in San Diego.

18 Subdivision (c) codifies practice authorizing a motion for change of venue. See 1 G.
19 Ogden, California Public Agency Practice § 33.02[4][d] (1994). Grounds for change of
20 venue include selection of an improper county and promotion of the convenience of
21 witnesses and ends of justice. Cf. Code Civ. Proc. § 397. In making a change of venue
22 determination the administrative law judge may weigh the detriment to the moving party of
23 the initial location against the cost to the agency and other parties of relocating the site.
24 Failure to move for a change in the place of the hearing within the 10 day period waives the
25 right to object to the place of the hearing.

26 **§ 11509 (amended). Notice of hearing**

27 Section 11509 of the Government Code is amended to read:

28 11509. The agency shall deliver or mail a notice of hearing to all parties at least
29 10 days prior to the hearing. The hearing shall not be prior to the expiration of the
30 time within which the respondent is entitled to file a notice of defense.

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

33 You are hereby notified that a hearing will be held before [here insert name of
34 agency] at [here insert place of hearing] on the ___ day of , 19___, at the hour of
35 ___, upon the charges made in the accusation served upon you. If you object to
36 the place of hearing, you must notify the presiding officer within 10 days after
37 this notice is served on you. Failure to notify the presiding officer within 10 days
38 will deprive you of a change in the place of hearing. You may be present at the
39 hearing. You have the right to be represented by an attorney at your own
40 expense. You are not entitled to the appointment of an attorney to represent you
41 at public expense. You are entitled to represent yourself without legal counsel.
42 You may present any relevant evidence, and will be given full opportunity to
43 cross-examine all witnesses testifying against you. You are entitled to the
44 issuance of subpoenas to compel the attendance of witnesses and the production

1 of books, documents or other things by applying to [here insert appropriate office
2 of agency].

3 **Comment.** Section 11509 is amended to include notification of the right to seek change of
4 venue. See Section 11508 (time and place of hearing).

5 **§ 11510 (repealed). Subpoenas**

6 Section 11510 of the Government Code is repealed.

7 ~~11510. (a) Before the hearing has commenced, the agency or the assigned
8 administrative law judge shall issue subpoenas and subpoenas duces tecum at the
9 request of any party for attendance or production of documents. Subpoenas and
10 subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1,
11 1985.2, and 1985.3 of the Code of Civil Procedure. After the hearing has
12 commenced, the agency itself hearing a case or an administrative law judge sitting
13 alone may issue subpoenas and subpoenas duces tecum.~~

14 ~~(b) The process issued pursuant to subdivision (a) shall be extended to all parts
15 of the state and may be served in person in accordance with Sections 1987 and
16 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may
17 also be delivered by certified mail return receipt requested or by messenger.
18 Service by messenger shall be effected when the witness acknowledges receipt of
19 the subpoena to the sender, by telephone, by mail, or in person, and identifies
20 himself or herself either by reference to his or her date of birth and his or her
21 driver's license number or Department of Motor Vehicles identification number,
22 or, the sender may verify receipt of the subpoena by obtaining other identifying
23 information from the recipient. The sender shall make a written notation of the
24 acknowledgment. A subpoena issued and acknowledged pursuant to this section
25 shall have the same force and effect as a subpoena personally served. Failure to
26 comply with a subpoena issued and acknowledged pursuant to this section may
27 be punished as a contempt and the subpoena may so state. A party requesting a
28 continuance based upon the failure of a witness to appear in court at the time and
29 place required for his or her appearance or testimony pursuant to a subpoena,
30 shall prove to the court that the party has complied with this section. The
31 continuance shall only be granted for a period of time that would allow personal
32 service of the subpoena and in no event longer than that allowed by law. No
33 witness shall be obliged to attend unless the witness is a resident of the state at
34 the time of service.~~

35 ~~(c) All witnesses appearing pursuant to subpoena, other than the parties or
36 officers or employees of the state or any political subdivision thereof, shall receive
37 fees, and all witnesses appearing pursuant to subpoena, except the parties, shall
38 receive mileage in the same amount and under the same circumstances as
39 prescribed by law for witnesses in civil actions in a superior court. Witnesses
40 appearing pursuant to subpoena, except the parties, who attend hearings at
41 points so far removed from their residences as to prohibit return thereto from day
42 to day, shall be entitled, in addition to fees and mileage, to a per diem~~

1 ~~compensation of three dollars (\$3) for expenses of subsistence for each day of~~
2 ~~actual attendance and for each day necessarily occupied in traveling to and from~~
3 ~~the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party~~
4 ~~at whose request the witness is subpoenaed.~~

5 **Comment.** Former Section 11510 is superseded by Sections 11450.10-11450.40
6 (subpoenas).

7 **§ 11511 (amended). Depositions**

8 Section 11511 of the Government Code is amended to read:

9 11511. On verified petition of any party, an administrative law judge or, if an
10 administrative law judge has not been appointed, an agency may order that the
11 testimony of any material witness residing within or without the State be taken
12 by deposition in the manner prescribed by law for depositions in civil actions. The
13 petition shall set forth the nature of the pending proceeding; the name and
14 address of the witness whose testimony is desired; a showing of the materiality of
15 his the testimony; a showing that the witness will be unable or can not be
16 compelled to attend; and shall request an order requiring the witness to appear
17 and testify before an officer named in the petition for that purpose. The petitioner
18 shall serve notice of hearing and a copy of the petition on the other parties at
19 least 10 days before the hearing. Where the witness resides outside the State and
20 where the administrative law judge or agency has ordered the taking of his the
21 testimony by deposition, the agency shall obtain an order of court to that effect
22 by filing a petition therefor in the superior court in Sacramento County. The
23 proceedings thereon shall be in accordance with the provisions of Section 11189
24 of the Government Code.

25 **Comment.** Section 11511 is amended to extend to the administrative law judge the
26 authority to order a deposition, and to provide for notice of the petition.

27 **§ 11511.5 (amended). Prehearing conference**

28 Section 11511.5 of the Government Code is amended to read:

29 11511.5. (a) On motion of a party or by order of an administrative law judge, the
30 administrative law judge may conduct a prehearing conference. The
31 administrative law judge shall set the time and place for the prehearing
32 conference, and ~~the agency~~ shall give reasonable written notice to all parties.

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

- 35 (1) Exploration of settlement possibilities.
- 36 (2) Preparation of stipulations.
- 37 (3) Clarification of issues.
- 38 (4) Rulings on identity and limitation of the number of witnesses.
- 39 (5) Objections to proffers of evidence.
- 40 (6) Order of presentation of evidence and cross-examination.
- 41 (7) Rulings regarding issuance of subpoenas and protective orders.

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

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

5 (10) Motions for intervention.

6 (11) Exploration of the possibility of using alternative dispute resolution
7 provided in Article 5 (commencing with Section 11420.10) of, or the informal
8 hearing procedure provided in Article 10 (commencing with Section 11445.10) of,
9 Chapter 4.5.

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

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

16 (d) With the consent of the parties the prehearing conference may be converted
17 immediately into alternative dispute resolution or an informal hearing. With the
18 consent of the parties the proceeding may be converted into alternative dispute
19 resolution to be conducted at another time. With the consent of the agency the
20 proceeding may be converted into an informal hearing to be conducted at
21 another time subject to the right of a party to object to use of the informal hearing
22 procedure as provided in Section 11445.30.

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

26 **Comment.** Subdivision (a) of Section 11511.5 is amended to reflect the practice of the
27 administrative law judge, rather than the agency, giving the required notice.

28 Subdivision (b)(9) is not intended to provide a new discovery procedure. If a party has not
29 availed itself of discovery within the time periods provided by Section 11507.6, it should not
30 be permitted to use the prehearing conference as a substitute for statutory discovery. The
31 prehearing conference is limited to an exchange of witness lists and of exhibits or documents
32 to be offered in evidence at the hearing.

33 Subdivision (b)(10) implements Section 11507.2 (intervention).

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

40 Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii), expanded to include
41 alternative dispute resolution.

42 **§ 11511.7 (added). Settlement conference**

43 Section 11511.7 is added to the Government Code to read:

44 11511.7. (a) The administrative law judge may order the parties to attend and
45 participate in a settlement conference. The administrative law judge shall set the

1 time and place for the settlement conference, and shall give reasonable written
2 notice to all parties.

3 (b) The administrative law judge at the settlement conference shall be different
4 from the administrative law judge at the hearing unless otherwise stipulated by
5 the parties. The administrative law judge may conduct all or part of the settlement
6 conference by telephone, television, or other electronic means if each participant
7 in the conference has an opportunity to participate in and to hear the entire
8 proceeding while it is taking place.

9 **Comment.** Under Section 11511.7 a settlement conference may, but need not, be separate
10 from the prehearing conference (at which exploration of settlement issues may occur).

11 Attendance and participation in the settlement conference is mandatory. Communications
12 made in settlement negotiations are protected. Section 11415.60 (settlement).

13 **§ 11512 (amended). Presiding officer**

14 Section 11512 of the Government Code is amended to read:

15 11512. (a) Every hearing in a contested case shall be presided over by an
16 administrative law judge. The agency itself shall determine whether the
17 administrative law judge is to hear the case alone or whether the agency itself is
18 to hear the case with the administrative law judge.

19 (b) When the agency itself hears the case, the administrative law judge shall
20 preside at the hearing, rule on the admission and exclusion of evidence, and
21 advise the agency on matters of law; the agency itself shall exercise all other
22 powers relating to the conduct of the hearing but may delegate any or all of them
23 to the administrative law judge. When the administrative law judge alone hears a
24 case, he or she shall exercise all powers relating to the conduct of the hearing. A
25 ruling of the administrative law judge admitting or excluding evidence is subject
26 to review in the same manner and to the same extent as the administrative law
27 judge's proposed decision in the proceeding.

28 (c) An administrative law judge or agency member shall voluntarily disqualify
29 himself or herself and withdraw from any case in which ~~he or she cannot accord a~~
30 ~~fair and impartial hearing or consideration~~ there are grounds for disqualification,
31 including disqualification under Section 11425.40 (bias, prejudice, or interest).
32 The parties may waive the disqualification by a writing that recites the grounds
33 for disqualification; the waiver is effective only when signed by all parties,
34 accepted by the administrative law judge or agency member, and included in the
35 record . Any party may request the disqualification of any administrative law
36 judge or agency member by filing an affidavit, prior to the taking of evidence at a
37 hearing, stating with particularity the grounds upon which it is claimed that ~~a fair~~
38 ~~and impartial hearing cannot be accorded~~ that the administrative law judge or
39 agency member is disqualified . Where the request concerns an agency member,
40 the issue shall be determined by the other members of the agency. Where the
41 request concerns the administrative law judge, the issue shall be determined by
42 the agency itself if the agency itself hears the case with the administrative law
43 judge, otherwise the issue shall be determined by the administrative law judge. No

1 agency member shall withdraw voluntarily or be subject to disqualification if his
 2 or her disqualification would prevent the existence of a quorum qualified to act in
 3 the particular case, except that a substitute qualified to act may be appointed by
 4 the appointing authority .

5 (d) The proceedings at the hearing shall be reported by a ~~phonographic~~
 6 ~~reporter. However, upon the consent of all the parties, the proceedings may be~~
 7 ~~reported electronically.~~ stenographic reporter or electronically, as determined by
 8 the administrative law judge. If the administrative law judge selects electronic
 9 reporting of proceedings, a party may at the party's own expense require
 10 stenographic reporting.

11 (e) Whenever, after the agency itself has commenced to hear the case with an
 12 administrative law judge presiding, a quorum no longer exists, the administrative
 13 law judge who is presiding shall complete the hearing as if sitting alone and shall
 14 render a proposed decision in accordance with subdivision (b) of Section 11517
 15 ~~of the Government Code~~ .

16 **Comment.** Subdivision (b) of Section 11512 is amended to overrule any contrary
 17 implication that might be drawn from the language of subdivision (b).

18 Grounds for disqualification under subdivision (c) include bias, prejudice, or interest of
 19 presiding officer (Section 11425.40) and receipt of ex parte communications (Section
 20 11430.60). A waiver of disqualification is a voluntary relinquishment of rights by the parties.
 21 The administrative law judge need not accept a waiver; the waiver is effective only if accepted
 22 by the administrative law judge. The provision for appointment of a substitute for an agency
 23 member is drawn from 1981 Model State APA § 4-202(e). In cases where there is no
 24 appointing authority, e.g., the agency member is an elected official, the "rule of necessity"
 25 still applies and the agency member shall not withdraw or be disqualified. See 1 G. Ogden,
 26 California Public Agency Practice § 36.14 (1994).

27 Subdivision (d) is amended to liberalize use of electronic reporting.

28 § 11513 (amended). Evidence

29 Section 11513 of the Government Code is amended to read:

30 11513. (a) Oral evidence shall be taken only on oath or affirmation.

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

38 (c) The hearing need not be conducted according to technical rules relating to
 39 evidence and witnesses, except as hereinafter provided. Any relevant evidence
 40 shall be admitted if it is the sort of evidence on which responsible persons are
 41 accustomed to rely in the conduct of serious affairs, regardless of the existence of
 42 any common law or statutory rule which might make improper the admission of
 43 the evidence over objection in civil actions.

1 (d) Hearsay evidence may be used for the purpose of supplementing or
 2 explaining other evidence but shall not be sufficient in itself to support a finding
 3 unless it would be admissible over objection in civil actions. On judicial review of
 4 the decision in the proceeding, a party may object to a finding supported only by
 5 hearsay evidence in violation of this subdivision, whether or not the objection
 6 was previously raised in the adjudicative proceeding.

7 (e) The rules of privilege shall be effective to the extent that they are otherwise
 8 required by statute to be recognized at the hearing, and irrelevant and unduly
 9 repetitive evidence shall be excluded the presiding officer in its discretion may
 10 exclude evidence if its probative value is substantially outweighed by the
 11 probability that its admission will necessitate undue consumption of time .

12 ~~In any proceeding under subdivision (i) or (j) of Section 12940, or Section~~
 13 ~~19572 or 19702, alleging conduct which constitutes sexual harassment, sexual~~
 14 ~~assault, or sexual battery, evidence of specific instances of a complainant's sexual~~
 15 ~~conduct with individuals other than the alleged perpetrator is not admissible at~~
 16 ~~hearing unless offered to attack the credibility of the complainant, as provided for~~
 17 ~~under subdivision (o). Reputation or opinion evidence regarding the sexual~~
 18 ~~behavior of the complainant is not admissible for any purpose.~~

19 ~~(d) The hearing, or any medical examination conducted for the purpose of~~
 20 ~~determining compensation or monetary award, shall be conducted in the English~~
 21 ~~language, except that a party who does not proficiently speak or understand the~~
 22 ~~English language and who requests language assistance shall be provided an~~
 23 ~~interpreter. Except as provided in subdivision (k), interpreters utilized in hearings~~
 24 ~~shall be certified pursuant to subdivision (e). Except as provided in subdivision~~
 25 ~~(k), interpreters utilized in medical examinations shall be certified pursuant to~~
 26 ~~subdivision (f). The cost of providing the interpreter shall be paid by the agency~~
 27 ~~having jurisdiction over the matter if the administrative law judge or hearing~~
 28 ~~officer so directs, otherwise the party for whom the interpreter is provided.~~

29 ~~The administrative law judge's or hearing officer's decision to direct payment~~
 30 ~~shall be based upon an equitable consideration of all the circumstances in each~~
 31 ~~case, such as the ability of the party in need of the interpreter to pay, except with~~
 32 ~~respect to hearings before the Workers' Compensation Appeals Board or the~~
 33 ~~Division of Workers' Compensation relating to workers' compensation claims.~~
 34 ~~With respect to these hearings, the payment of the costs of providing an~~
 35 ~~interpreter shall be governed by the rules and regulations promulgated by the~~
 36 ~~Workers' Compensation Appeals Board or the Administrative Director of the~~
 37 ~~Division of Workers' Compensation, as appropriate.~~

38 ~~(e) The State Personnel Board which shall establish, maintain, administer, and~~
 39 ~~publish annually an updated list of certified administrative hearing interpreters it~~
 40 ~~has determined meet the minimum standards in interpreting skills and linguistic~~
 41 ~~abilities in languages designated pursuant to subdivision (g). Any interpreter so~~
 42 ~~listed may be examined by each employing agency to determine the interpreter's~~
 43 ~~knowledge of the employing agency's technical program terminology and~~

1 ~~procedures. Court interpreters certified pursuant to Section 68562, and~~
 2 ~~interpreters listed on the State Personnel Board's recommended lists of court and~~
 3 ~~administrative hearing interpreters prior to July 1, 1993, shall be deemed certified~~
 4 ~~for purposes of this subdivision.~~

5 ~~(f) The State Personnel Board shall establish, maintain, administer, and publish~~
 6 ~~annually, an updated list of certified medical examination interpreters it has~~
 7 ~~determined meet the minimum standards in interpreting skills and linguistic~~
 8 ~~abilities in languages designated pursuant to subdivision (g). Court interpreters~~
 9 ~~certified pursuant to Section 68562 and administrative hearing interpreters~~
 10 ~~certified pursuant to subdivision (e) shall be deemed certified for purposes of this~~
 11 ~~subdivision.~~

12 ~~(g) The State Personnel Board shall designate the languages for which~~
 13 ~~certification shall be established under subdivisions (e) and (f). The languages~~
 14 ~~designated shall include, but not be limited to, Spanish, Tagalog, Arabic,~~
 15 ~~Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State~~
 16 ~~Personnel Board finds that there is an insufficient need for interpreting assistance~~
 17 ~~in these languages. The language designations shall be based on the following:~~

18 ~~(1) The language needs of non-English-speaking persons appearing before the~~
 19 ~~administrative agencies, as determined by consultation with the agencies.~~

20 ~~(2) The cost of developing a language examination.~~

21 ~~(3) The availability of experts needed to develop a language examination.~~

22 ~~(4) Other information the board deems relevant.~~

23 ~~(h) Each certified administrative hearing interpreter and each certified medical~~
 24 ~~examination interpreter shall pay a fee, due on July 1 of each year, for the renewal~~
 25 ~~of his or her certification. Court interpreters certified under Section 68562 shall~~
 26 ~~not pay any fees required by this section.~~

27 ~~(i) The State Personnel Board shall establish and charge fees for applications to~~
 28 ~~take interpreter examinations and for renewal of certifications. The purpose of~~
 29 ~~these fees is to cover the annual projected costs of carrying out this section. The~~
 30 ~~fees may be adjusted each fiscal year by a percent that is equal to or less than the~~
 31 ~~percent change in the California Necessities Index prepared by the Commission~~
 32 ~~on State Finance. If the amount of money collected in fees is not sufficient to~~
 33 ~~cover the costs of carrying out this section, the board shall charge and be~~
 34 ~~reimbursed a pro rata share of the additional costs by the state agencies that~~
 35 ~~conduct administrative hearings.~~

36 ~~(j) The State Personnel Board may remove the names of people from the list of~~
 37 ~~certified interpreters if the following conditions occur:~~

38 ~~(1) A person on the list is deceased.~~

39 ~~(2) A person on the list notifies the board that he or she is unavailable for work.~~

40 ~~(3) A person on the list does not submit a renewal fee as required by~~
 41 ~~subdivision (h).~~

42 ~~(k) In the event that interpreters certified pursuant to subdivision (e) cannot be~~
 43 ~~present at the hearing, the hearing agency shall have discretionary authority to~~

1 ~~provisionally qualify and utilize other interpreters. In the event that interpreters~~
 2 ~~certified pursuant to subdivision (f) cannot be present at the medical examination,~~
 3 ~~the physician provisionally may utilize another interpreter if that fact is noted in~~
 4 ~~the record of the medical evaluation.~~

5 ~~(l) Every state agency affected by this section shall advise each party of their~~
 6 ~~right to an interpreter at the same time that each party is advised of the hearing~~
 7 ~~date or medical examination. Each party in need of an interpreter shall also be~~
 8 ~~encouraged to give timely notice to the agency conducting the hearing or~~
 9 ~~medical examination so that appropriate arrangements can be made.~~

10 ~~(m) The rules of confidentiality of the agency, if any, that may apply in an~~
 11 ~~adjudicatory hearing, shall apply to any interpreter in the hearing or medical~~
 12 ~~examination, whether or not the rules so state.~~

13 ~~(n) The interpreter shall not have had any involvement in the issues of the case~~
 14 ~~prior to the hearing.~~

15 ~~As used in subdivisions (d) and (e), the terms “administrative law judge” and~~
 16 ~~“hearing officer” shall not be construed to require the use of an Office of~~
 17 ~~Administrative Hearings’ administrative law judge or hearing officer.~~

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

23 ~~(p) For purposes of this section “complainant” means any person claiming to~~
 24 ~~have been subjected to conduct which constitutes sexual harassment, sexual~~
 25 ~~assault, or sexual battery.~~

26 ~~(q) This section shall become operative on July 1, 1995.~~

27 **Comment.** The second sentence of subdivision (d) of Section 11513 provides an exception
 28 to the general requirement of exhaustion of administrative remedies on judicial review.

29 The “irrelevant and unduly repetitious” standard formerly found in this section is replaced
 30 in subdivision (e) by the general standard of Evidence Code Section 352.

31 The unnumbered paragraph formerly located between subdivisions (c) and (d) is restated in
 32 Section 11440.40(b).

33 Former subdivisions (d)-(n) are restated in Sections 11435.20-11435.65.

34 Former subdivision (o) is restated in Section 11440.40(c).

35 Former subdivision (p) is restated in Section 11440.40(a).

36 Former subdivision (q) is deleted as obsolete.

37 **§ 11513.5 (repealed). Ex parte communications**

38 Section 11513.5 of the Government Code is repealed.

39 ~~11513.5. (a) Except as required for the disposition of ex parte matters~~
 40 ~~specifically authorized by statute, a presiding officer serving in an adjudicative~~
 41 ~~proceeding may not communicate, directly or indirectly, upon the merits of a~~
 42 ~~contested matter while the proceeding is pending, with any party, including~~
 43 ~~employees of the agency that filed the accusation, with any person who has a~~
 44 ~~direct or indirect interest in the outcome of the proceeding, or with any person~~

1 who presided at a previous stage of the proceeding, without notice and
2 opportunity for all parties to participate in the communication.

3 (b) ~~Unless required for the disposition of ex parte matters specifically authorized~~
4 ~~by statute, no party to an adjudicative proceeding, including employees of the~~
5 ~~agency that filed the accusation, and no person who has a direct or indirect~~
6 ~~interest in the outcome of the proceeding or who presided at a previous stage of~~
7 ~~the proceeding, may communicate directly or indirectly, upon the merits of a~~
8 ~~contested matter while the proceeding is pending, with any person serving as~~
9 ~~administrative law judge, without notice and opportunity for all parties to~~
10 ~~participate in the communication.~~

11 (c) ~~If, before serving as administrative law judge in an adjudicative proceeding,~~
12 ~~a person receives an ex parte communication of a type that could not properly be~~
13 ~~received while serving, the person, promptly after starting to serve, shall disclose~~
14 ~~the communication in the manner prescribed in subdivision (d).~~

15 (d) ~~An administrative law judge who receives an ex parte communication in~~
16 ~~violation of this section shall place on the record of the pending matter all written~~
17 ~~communications received, all written responses to the communications, and a~~
18 ~~memorandum stating the substance of all oral communications received, all~~
19 ~~responses made, and the identity of each person from whom the presiding officer~~
20 ~~received an ex parte communication, and shall advise all parties that these matters~~
21 ~~have been placed on the record. Any person desiring to rebut the ex parte~~
22 ~~communication shall be allowed to do so, upon requesting the opportunity for~~
23 ~~rebuttal within 10 days after notice of the communication.~~

24 (e) ~~The receipt by an administrative law judge of an ex parte communication in~~
25 ~~violation of this section may provide the basis for disqualification of that~~
26 ~~administrative law judge pursuant to subdivision (c) of Section 11512. If the~~
27 ~~administrative law judge is disqualified, the portion of the record pertaining to the~~
28 ~~ex parte communication may be sealed by protective order by the disqualified~~
29 ~~administrative law judge.~~

30 **Comment.** Subdivisions (a) and (b) of former Section 11513.5 are restated in Section
31 11430.10 (ex parte communications prohibited), omitting the prohibition on the presiding
32 officer communicating with others. The limitation on communications with a person who
33 presided at a previous stage of the proceeding is applied as between the presiding officer and
34 agency head in Section 11430.80. Subdivision (c) is restated in Section 11430.40 (prior ex
35 parte communication) but is limited to communications received during the pendency of the
36 proceeding. Subdivision (d) is restated in Section 11430.50 (disclosure of ex parte
37 communication). Subdivision (e) is restated in Section 11430.60 (disqualification of
38 presiding officer).

39 **§ 11514 (no change). Affidavits**

40 11514. (a) At any time 10 or more days prior to a hearing or a continued hearing,
41 any party may mail or deliver to the opposing party a copy of any affidavit which
42 he proposes to introduce in evidence, together with a notice as provided in
43 subdivision (b). Unless the opposing party, within seven days after such mailing
44 or delivery, mails or delivers to the proponent a request to cross-examine an

1 affiant, his right to cross-examine such affiant is waived and the affidavit, if
2 introduced in evidence, shall be given the same effect as if the affiant had testified
3 orally. If an opportunity to cross-examine an affiant is not afforded after request
4 therefor is made as herein provided, the affidavit may be introduced in evidence,
5 but shall be given only the same effect as other hearsay evidence.

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

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

16 **Note.** No change is recommended in Section 11514. It is set out here for completeness.

17 **§ 11515 (no change). Official notice**

18 11515. In reaching a decision official notice may be taken, either before or after
19 submission of the case for decision, of any generally accepted technical or
20 scientific matter within the agency's special field, and of any fact which may be
21 judicially noticed by the courts of this State. Parties present at the hearing shall be
22 informed of the matters to be noticed, and those matters shall be noted in the
23 record, referred to therein, or appended thereto. Any such party shall be given a
24 reasonable opportunity on request to refute the officially noticed matters by
25 evidence or by written or oral presentation of authority, the manner of such
26 refutation to be determined by the agency.

27 **Note.** No change is recommended in Section 11515. It is set out here for completeness.

28 **§ 11516 (no change). Amendment of accusation after submission of case**

29 11516. The agency may order amendment of the accusation after submission of
30 the case for decision. Each party shall be given notice of the intended amendment
31 and opportunity to show that he will be prejudiced thereby unless the case is
32 reopened to permit the introduction of additional evidence in his behalf. If such
33 prejudice is shown the agency shall reopen the case to permit the introduction of
34 additional evidence.

35 **Note.** No change is recommended in Section 11516. It is set out here for completeness.

36 **§ 11517 (amended). Decision in contested cases**

37 Section 11517 of the Government Code is amended to read:

38 11517. (a) If a contested case is heard before an agency itself, ~~the~~ all of the
39 following provisions apply:

1 (1) The administrative law judge who presided at the hearing shall be present
2 during the consideration of the case and, if requested, shall assist and advise the
3 agency. ~~Where a contested case is heard before an agency itself, no~~

4 (2) No member thereof who did not hear the evidence shall vote on the
5 decision.

6 (3) The agency shall issue its decision within 100 days of submission of the
7 case.

8 (b) If a contested case is heard by an administrative law judge alone, he or she
9 shall prepare within 30 days after the case is submitted a proposed decision in
10 such form that it may be adopted as the decision in the case. ~~The agency itself~~
11 ~~may adopt the proposed decision in its entirety, or may reduce the proposed~~
12 ~~penalty and adopt the balance of the proposed decision.~~

13 Thirty

14 Failure of the administrative law judge to deliver a proposed decision within the
15 time required does not prejudice the rights of the agency in the case. Thirty
16 days after receipt of the proposed decision, a copy of the proposed decision shall be
17 filed by the agency as a public record and a copy shall be served by the agency
18 on each party and his or her attorney ; the filing and service is not an adoption of
19 a proposed decision by the agency. The agency itself may do any of the
20 following:

21 (1) Adopt the proposed decision in its entirety.

22 (2) Reduce or otherwise mitigate the proposed penalty and adopt the balance
23 of the proposed decision.

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

28 (4) Change the legal basis of the proposed decision and adopt the proposed
29 decision with that change as the decision. Before acting under this paragraph the
30 agency shall provide the parties an opportunity to comment on the proposed
31 change in legal basis.

32 (c) If the proposed decision is not adopted as provided in subdivision (b), the
33 agency itself may decide the case upon the record, including the transcript, or an
34 agreed statement of the parties, with or without taking additional evidence, or
35 may refer the case to the same administrative law judge if reasonably available,
36 otherwise to another administrative law judge, to take additional evidence. A
37 copy of the record shall be made available to the parties. The agency may require
38 payment of fees covering direct costs of making the copy. By stipulation of the
39 parties, the agency may decide the case upon the record without including the
40 transcript. If the case is assigned to an administrative law judge he or she shall
41 prepare a proposed decision as provided in subdivision (b) upon the additional
42 evidence and the transcript and other papers which are part of the record of the
43 prior hearing. A copy of the proposed decision shall be furnished to each party

1 and his or her attorney as prescribed in subdivision (b). The agency itself shall
 2 decide no case provided for in this subdivision without affording the parties the
 3 opportunity to present either oral or written argument before the agency itself. If
 4 additional oral evidence is introduced before the agency itself, no agency member
 5 may vote unless the member heard the additional oral evidence. The authority of
 6 the agency itself to decide the case under this subdivision includes authority to
 7 decide some but not all issues in the case.

8 (d) The proposed decision shall be deemed adopted by the agency 100 days
 9 after delivery to the agency by the Office of Administrative Hearings, unless
 10 within that time (i) the agency notifies the parties that the proposed decision is
 11 not adopted as provided in subdivision (b) and commences proceedings to decide
 12 the case upon the record, including the transcript, or without the transcript where
 13 the parties have so stipulated, or (ii) the agency refers the case to the
 14 administrative law judge to take additional evidence. ~~In a case where the agency~~
 15 ~~itself hears the case, the agency shall issue its decision within 100 days of~~
 16 ~~submission of the case.~~ In a case where the agency commences proceedings to
 17 decide the case upon the record and has ordered a transcript of the proceedings,
 18 the 100-day period shall begin upon delivery of the transcript. If the agency finds
 19 that a further delay is required by special circumstances, it shall issue an order
 20 delaying the decision for no more than 30 days and specifying the reasons
 21 therefor. The order shall be subject to judicial review pursuant to Section 11523.

22 (e) The decision of the agency shall be filed immediately by the agency as a
 23 public record and a copy shall be served by the agency on each party and his or
 24 her attorney.

25 **Comment.** Subdivision (a) of Section 11517 is amended to add a provision formerly
 26 located in subdivision (d).

27 Subdivision (b) is amended to add authority to adopt with changes. This supplements the
 28 general authority of the agency under Section 11518.5 (correction of mistakes and clerical
 29 errors in the decision). Mitigation of a proposed remedy under subdivision (b)(2) includes
 30 adoption of a different sanction, as well as reduction in amount, so long as the sanction
 31 adopted is not of increased severity. The authority in subdivision (b)(4) to adopt with change
 32 of the legal basis is subject to the proviso that the parties be afforded an opportunity to
 33 comment on the proposed change. The agency head may specify the time and manner of
 34 comment, e.g. written comment within 10 days.

35 Subdivision (b) is also amended to make clear that the agency is not accountable for the
 36 administrative law judge's failure to meet required deadlines. Nothing in subdivision (b) is
 37 intended to limit the authority of an agency to use its own internal procedures, including
 38 internal review processes, in the development of a decision.

39 Subdivision (c) requires only that the record be made available to the parties. The cost of
 40 providing a copy of the record is a matter left to the discretion of each agency as appropriate
 41 for its situation. The addition of the provision for an agreed statement of the parties in
 42 subdivision (c) is drawn from Rule 6 of the California Rules of Court (agreed statement).

43 Remand under subdivision (c) is required to the presiding officer who issued the proposed
 44 decision only if "reasonably" available. Thus if workloads make remand to the same
 45 presiding officer impractical, the officer would not be reasonably available, and remand need
 46 not be made to that particular person.

1 The authority in subdivision (c) for the agency itself to elect to decide some but not all
 2 issues in the case is drawn from 1981 Model State APA § 4-216(a)(2)(i).

3 Subdivision (d) is amended to require affirmative notice of nonadoption of a proposed
 4 decision with the 100-day period. The provision formerly found in subdivision (d) giving an
 5 agency 100 days in which to issue a decision where the case is heard by the agency itself is
 6 relocated to subdivision (a) for clarity.

7 **§ 11518 (amended). Decision**

8 Section 11518 of the Government Code is amended to read:

9 ~~11518. The decision shall be in writing and shall contain findings of fact, a~~
 10 ~~determination of the issues presented and the penalty, if any. The findings may be~~
 11 ~~stated in the language of the pleadings or by reference thereto. Copies of the~~
 12 decision shall be delivered to the parties personally or sent to them by registered
 13 mail.

14 **Comment.** The first two sentences of Section 11518 are superseded by Section 11425.50
 15 (contents of decision).

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

19 **§ 11518.5 (added). Correction of mistakes and clerical errors in decision**

20 Section 11518.5 is added to the Government Code, to read:

21 11518.5. (a) Within 15 days after service of a copy of the decision on a party,
 22 but not later than the effective date of the decision, the party may apply to the
 23 agency for correction of a mistake or clerical error in the decision, stating the
 24 specific ground on which the application is made. Notice of the application shall
 25 be given to the other parties to the proceeding. The application is not a
 26 prerequisite for seeking judicial review.

27 (b) The agency may refer the application to the administrative law judge who
 28 formulated the proposed decision or may delegate its authority under this section
 29 to one or more persons.

30 (c) The agency may deny the application, grant the application and modify the
 31 decision, or grant the application and set the matter for further proceedings. The
 32 application is considered denied if the agency does not dispose of it within 15
 33 days after it is made or such longer time as the agency provides by regulation.

34 (d) Nothing in this section precludes the agency, on its own motion or on
 35 motion of the administrative law judge, from modifying the decision to correct a
 36 mistake or clerical error. A modification under this subdivision shall be made
 37 within 15 days after issuance of the decision.

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

41 **Comment.** Section 11518.5 is drawn from 1981 Model State APA § 4-218. "Party"
 42 includes the agency that is a party to the proceedings. Section 11500(b) ("party" defined).

43 The section is intended to provide parties a limited right to remedy mistakes in the decision
 44 without the need for judicial review. Instances where this procedure is intended to apply

1 include correction of factual or legal errors in the decision. This supplements the authority in
 2 11517 of the agency head to adopt a proposed decision with technical or other minor
 3 changes.

4 **§ 11519 (amended). Effective date of decision; stay of execution; notification; restitution**

5 Section 11519 of the Government Code is amended to read:

6 11519. (a) The decision shall become effective 30 days after it is delivered or
 7 mailed to respondent unless: A reconsideration is ordered within that time, or the
 8 agency itself orders that the decision shall become effective sooner, or a stay of
 9 execution is granted.

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

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

19 (d) As used in subdivision (b), specified terms of probation may include an order
 20 of restitution ~~which requires the party or parties to a contract against whom the~~
 21 ~~decision is rendered to compensate the other party or parties to a contract~~
 22 ~~damaged as a result of a breach of contract by the party against whom the~~
 23 ~~decision is rendered. In such case, the decision shall include findings that a breach~~
 24 ~~of contract has occurred and shall specify the amount of actual damages~~
 25 ~~sustained as a result of such breach . Where restitution is ordered and paid~~
 26 ~~pursuant to the provisions of this subdivision, such the amount paid shall be~~
 27 ~~credited to any subsequent judgment in a civil action based on the same breach~~
 28 ~~of contract .~~

29 (e) The person to which the agency action is directed may not be required to
 30 comply with a decision unless the person has been served in the manner provided
 31 in Section 11505 with, or has actual knowledge of, the decision.

32 (f) A nonparty may not be required to comply with a decision unless the agency
 33 has made the decision available for public inspection and copying or the
 34 nonparty has actual knowledge of the decision.

35 (g) This section does not preclude an agency from taking immediate action to
 36 protect the public interest in accordance with Article 13 (commencing with
 37 Section 11460.10) of Chapter 4.5 (emergency decision).

38 **Comment.** Subdivision (d) of Section 11519 is amended to simplify and broaden the
 39 application of the restitution provisions.

40 Subdivisions (e)-(g) are drawn from 1981 Model State APA § 4-220(c)-(d). They
 41 distinguish between the effective date of a decision and the time when it can be enforced.

42 The requirement of "actual knowledge" in subdivisions (e) and (f) is intended to include
 43 not only knowledge that a decision has been issued, but also knowledge of the general
 44 contents of the decision insofar as it pertains to the person who is required to comply with it.

1 If a question arises whether a particular person had actual knowledge of a decision, this must
 2 be resolved in the same manner as other fact questions.

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

10 **§ 11520 (amended). Defaults**

11 Section 11520 of the Government Code is amended to read:

12 11520. (a) If the respondent either fails to file a notice of defense or to appear at
 13 the hearing, the agency may take action based upon the respondent's express
 14 admissions or upon other evidence and affidavits may be used as evidence
 15 without any notice to respondent; and where the burden of proof is on the
 16 respondent to establish that ~~he~~ the respondent is entitled to the agency action
 17 sought, the agency may act without taking evidence.

18 ~~(b) Nothing herein shall be construed to deprive the respondent of the right to~~
 19 ~~make any showing by way of mitigation. Notwithstanding the default of the~~
 20 ~~respondent, the agency or the administrative law judge in its discretion may,~~
 21 ~~before a proposed decision is issued, grant a hearing on reasonable notice to the~~
 22 ~~parties. If the agency and administrative law judge make conflicting orders under~~
 23 ~~this subdivision, the agency's order controls. The administrative law judge may~~
 24 ~~order the respondent, or the respondent's attorney or other authorized~~
 25 ~~representative, or both, to pay reasonable expenses, including attorney's fees,~~
 26 ~~incurred by another party as a result of the respondent's failure to appear at the~~
 27 ~~hearing.~~

28 (c) Within 7 days after service on the respondent of a decision based on the
 29 respondent's default, the respondent may serve a written motion requesting that
 30 the decision be vacated and stating the grounds relied on. The agency in its
 31 discretion may vacate the decision and grant a hearing on a showing of good
 32 cause. As used in this subdivision, good cause includes but is not limited to:

33 (1) Failure of the person to receive notice served pursuant to Section 11505.

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

35 **Comment.** Subdivision (a) of Section 11520 is amended to make clear that either failure to
 36 respond or to appear is a default.

37 Former subdivision (b), relating to the right of a defaulting respondent to make a showing
 38 by way of mitigation, is superseded by the procedures to cure a default in subdivisions (b)
 39 and (c). The respondent may make a showing by way of mitigation as a defense in the
 40 hearing.

41 Subdivision (b) parallels Section 11506(b), with the addition of the provision enabling the
 42 administrative law judge to waive a default and impose costs, and requiring reasonable notice.

43 Subdivision (c) is drawn in part from procedures used by the Unemployment Insurance
 44 Appeals Board.

1 **§ 11521 (no change). Reconsideration**

2 11521. (a) The agency itself may order a reconsideration of all or part of the case
3 on its own motion or on petition of any party. The power to order a
4 reconsideration shall expire 30 days after the delivery or mailing of a decision to
5 respondent, or on the date set by the agency itself as the effective date of the
6 decision if that date occurs prior to the expiration of the 30-day period or at the
7 termination of a stay of not to exceed 30 days which the agency may grant for
8 the purpose of filing an application for reconsideration. If additional time is
9 needed to evaluate a petition for reconsideration filed prior to the expiration of
10 any of the applicable periods, an agency may grant a stay of that expiration for
11 no more than 10 days, solely for the purpose of considering the petition. If no
12 action is taken on a petition within the time allowed for ordering reconsideration,
13 the petition shall be deemed denied.

14 (b) The case may be reconsidered by the agency itself on all the pertinent parts
15 of the record and such additional evidence and argument as may be permitted, or
16 may be assigned to an administrative law judge. A reconsideration assigned to an
17 administrative law judge shall be subject to the procedure provided in Section
18 11517. If oral evidence is introduced before the agency itself, no agency member
19 may vote unless he or she heard the evidence.

20 **Note.** No change is recommended in Section 11521. It is set out here for completeness.

21 **§ 11522 (no change). Reinstatement of license or reduction of penalty**

22 11522. A person whose license has been revoked or suspended may petition
23 the agency for reinstatement or reduction of penalty after a period of not less
24 than one year has elapsed from the effective date of the decision or from the date
25 of the denial of a similar petition. The agency shall give notice to the Attorney
26 General of the filing of the petition and the Attorney General and the petitioner
27 shall be afforded an opportunity to present either oral or written argument before
28 the agency itself. The agency itself shall decide the petition, and the decision shall
29 include the reasons therefor, and any terms and conditions that the agency
30 reasonably deems appropriate to impose as a condition of reinstatement. This
31 section shall not apply if the statutes dealing with the particular agency contain
32 different provisions for reinstatement or reduction of penalty.

33 **Note.** No change is recommended in Section 11522. It is set out here for completeness.

34 **§ 11523 (amended). Judicial review**

35 Section 11523 of the Government Code is amended to read:

36 11523. Judicial review may be had by filing a petition for a writ of mandate in
37 accordance with the provisions of the Code of Civil Procedure, subject, however,
38 to the statutes relating to the particular agency. Except as otherwise provided in
39 this section, the petition shall be filed within 30 days after the last day on which
40 reconsideration can be ordered. The right to petition shall not be affected by the
41 failure to seek reconsideration before the agency. ~~The~~ On request of the

1 petitioner for a record of the proceedings, the complete record of the proceedings,
 2 or the parts thereof as are designated by the petitioner in the request, shall be
 3 prepared by the Office of Administrative Hearings or the agency and shall be
 4 delivered to petitioner, within 30 days after the request, which time shall be
 5 extended for good cause shown, ~~after a request therefor by him or her~~, upon the
 6 payment of the fee specified in Section 69950 ~~as now or hereinafter amended~~ for
 7 the transcript, the cost of preparation of other portions of the record and for
 8 certification thereof. Thereafter, the remaining balance of any costs or charges for
 9 the preparation of the record shall be assessed against the petitioner whenever
 10 the agency prevails on judicial review following trial of the cause. These costs or
 11 charges constitute a debt of the petitioner which is collectible by the agency in
 12 the same manner as in the case of an obligation under a contract, and no license
 13 shall be renewed or reinstated where the petitioner has failed to pay all of these
 14 costs or charges. The complete record includes the pleadings, all notices and
 15 orders issued by the agency, any proposed decision by an administrative law
 16 judge, the final decision, a transcript of all proceedings, the exhibits admitted or
 17 rejected, the written evidence and any other papers in the case. Where petitioner,
 18 within 10 days after the last day on which reconsideration can be ordered,
 19 requests the agency to prepare all or any part of the record the time within which
 20 a petition may be filed shall be extended until 30 days after its delivery to him or
 21 her. The agency may file with the court the original of any document in the
 22 record in lieu of a copy thereof. In the event that the petitioner prevails in
 23 overturning the administrative decision following judicial review, the agency shall
 24 reimburse the petitioner for all costs of transcript preparation, compilation of the
 25 record, and certification.

26 **Comment.** Section 11523 is amended to clarify how long the agency must wait for the
 27 petitioner to designate a part of the record before it may proceed on the assumption that the
 28 complete record is required. This revision is intended to reduce confusion and delay
 29 encountered in the appeal process.

30 **§ 11524 (amended). Continuances; grant time; good cause; denial; notice review**

31 Section 11524 of the Government Code is amended to read:

32 11524. (a) The agency may grant continuances. When an administrative law
 33 judge of the Office of Administrative Hearings has been assigned to the hearing,
 34 no continuance may be granted except by him or her or by the ~~administrative law~~
 35 ~~judge in charge~~ presiding judge of the appropriate regional office of the Office of
 36 Administrative Hearings, for good cause shown.

37 (b) When seeking a continuance, a party shall apply for the continuance within
 38 10 working days following the time the party discovered or reasonably should
 39 have discovered the event or occurrence which establishes the good cause for
 40 the continuance. A continuance may be granted for good cause after the 10
 41 working days have lapsed if the party seeking the continuance is not responsible
 42 for and has made a good faith effort to prevent the condition or event
 43 establishing the good cause.

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

11 **Comment.** Section 11524 is amended to reflect current practice.

12 **§ 11525 (repealed). Contempt**

13 Section 11525 of the Government Code is repealed.

14 ~~11525. If any person in proceedings before an agency disobeys or resists any~~
 15 ~~lawful order or refuses to respond to a subpoena, or refuses to take the oath or~~
 16 ~~affirmation as a witness or thereafter refuses to be examined, or is guilty of~~
 17 ~~misconduct during a hearing or so near the place thereof as to obstruct the~~
 18 ~~proceeding, the agency shall certify the facts to the superior court in and for the~~
 19 ~~county where the proceedings are held. The court shall thereupon issue an order~~
 20 ~~directing the person to appear before the court and show cause why he should~~
 21 ~~not be punished as for contempt. The order and a copy of the certified statement~~
 22 ~~shall be served on the person. Thereafter the court shall have jurisdiction of the~~
 23 ~~matter. The same proceedings shall be had, the same penalties may be imposed~~
 24 ~~and the person charged may purge himself of the contempt in the same way, as in~~
 25 ~~the case of a person who has committed a contempt in the trial of a civil action~~
 26 ~~before a superior court.~~

27 **Comment.** Former Section 11525 is restated in Sections 11455.10 (misconduct in
 28 proceeding) and 11455.20 (contempt).

29 **§ 11526 (amended). Voting by agency member**

30 Section 11526 of the Government Code is amended to read;

31 11526. The members of an agency qualified to vote on any question may vote
 32 by mail or otherwise .

33 **Comment.** Section 11526 is broadened to allow telephonic or other appropriate means of
 34 voting. An agency member is not qualified to vote when a contested case is heard before the
 35 agency itself if the agency member did not hear the evidence. Section 11517(a).

36 Under the open meeting law, deliberations on a decision to be reached based on evidence
 37 introduced in an adjudicative proceeding may be made in closed session. Section 11126(d).

38 **§ 11527 (no change). Charge against funds of agency**

39 11527. Any sums authorized to be expended under this chapter by any agency
 40 shall be a legal charge against the funds of the agency.

41 **Note.** No change is recommended in Section 11527. It is set out here for completeness.

1 **§ 11528 (no change). Oaths**

2 11528. In any proceedings under this chapter any agency, agency member,
3 secretary of an agency, hearing reporter, or administrative law judge has power to
4 administer oaths and affirmations and to certify to official acts.

5 **Note.** No change is recommended in Section 11528. It is set out here for completeness.

6 **§ 11529 (amended). Interim orders**

7 Section 11529 of the Government Code is amended to read:

8 11529. (a) The administrative law judge of the Medical Quality Hearing Panel
9 established pursuant to Section 11371 may issue an interim order suspending a
10 license, or imposing drug testing, continuing education, supervision of
11 procedures, or other license restrictions. Interim orders may be issued only if the
12 affidavits in support of the petition show that the licensee has engaged in, or is
13 about to engage in, acts or omissions constituting a violation of the Medical
14 Practice Act or the appropriate practice act governing each allied health
15 profession, and that permitting the licensee to continue to engage in the
16 profession for which the license was issued will endanger the public health,
17 safety, or welfare.

18 (b) All orders authorized by this section shall be issued only after a hearing
19 conducted pursuant to subdivision (d), unless it appears from the facts shown by
20 affidavit that serious injury would result to the public before the matter can be
21 heard on notice. Except as provided in subdivision (c), the licensee shall receive
22 at least 15 days' prior notice of the hearing, which notice shall include affidavits
23 and all other information in support of the order.

24 (c) If an interim order is issued without notice, the administrative law judge who
25 issued the order without notice shall cause the licensee to be notified of the order,
26 including affidavits and all other information in support of the order by a 24-hour
27 delivery service. That notice shall also include the date of the hearing on the
28 order, which shall be conducted in accordance with the requirement of
29 subdivision (d), not later than 20 days from the date of issuance. The order shall
30 be dissolved unless the requirements of subdivision (a) are satisfied.

31 (d) For the purposes of the hearing conducted pursuant to this section, the
32 licentiate shall, at a minimum, have the following rights:

33 (1) To be represented by counsel.

34 (2) To have a record made of the proceedings, copies of which may be obtained
35 by the licentiate upon payment of any reasonable charges associated with the
36 record.

37 (3) To present written evidence in the form of relevant declarations, affidavits,
38 and documents.

39 The discretion of the administrative law judge to permit testimony at the hearing
40 conducted pursuant to this section shall be identical to the discretion of a
41 superior court judge to permit testimony at a hearing conducted pursuant to
42 Section 527 of the Code of Civil Procedure.

1 (4) To present oral argument.

2 (e) Consistent with the burden and standards of proof applicable to a
3 preliminary injunction entered under Section 527 of the Code of Civil Procedure,
4 the ~~court~~ administrative law judge shall grant the interim order where, in the
5 exercise of its discretion, it the administrative law judge concludes that:

6 (1) There is a reasonable probability that the petitioner will prevail in the
7 underlying action.

8 (2) The likelihood of injury to the public in not issuing the order outweighs the
9 likelihood of injury to the licensee in issuing the order.

10 (f) In all cases where an interim order is issued, and an accusation is not filed
11 and served pursuant to Sections 11503 and 11505 within 15 days of the date in
12 which the parties to the hearing on the interim order have submitted the matter,
13 the order shall be dissolved.

14 Upon service of the accusation the licensee shall have, in addition to the rights
15 granted by this section, all of the rights and privileges available as specified in this
16 chapter. If the licensee requests a hearing on the accusation, the board shall
17 provide the licensee with a hearing within 30 days of the request, unless the
18 licensee stipulates to a later hearing, and a decision within 15 days of the date
19 that matter is submitted, or the board shall nullify the interim order previously
20 issued, unless good cause can be shown by the ~~division~~ Division of Medical
21 Quality of the Medical Board of California for a delay.

22 (g) Where an interim order is issued, a written decision shall be prepared within
23 15 days of the hearing, by the administrative law judge, including findings of fact
24 and a conclusion articulating the connection between the evidence produced at
25 the hearing and the decision reached.

26 (h) Notwithstanding the fact that interim orders issued pursuant to this section
27 are not issued after a hearing as otherwise required by this chapter, interim orders
28 so issued shall be subject to judicial review pursuant to Section 1094.5 of the
29 Code of Civil Procedure. The relief which may be ordered shall be limited to a
30 stay of the interim order. Interim orders issued pursuant to this section are final
31 interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be
32 challenged administratively at the hearing on the accusation.

33 (i) The interim order provided for by this section shall be in addition to, and not
34 a limitation on, the authority to seek injunctive relief provided for in the Business
35 and Professions Code.

36 **Comment.** Section 11529 is amended to substitute the administrative law judge for the
37 court in subdivision (e).

38 **§ 11530 (repealed). Appeal of reports and forms requirements**

39 Section 11530 of the Government Code is repealed.

40 ~~11530. (a)(1) The office shall hear and render a decision on any appeal filed by a~~
41 ~~business, pursuant to subdivision (c) of Section 14775, in the event the business~~

1 ~~contests the certification by a state agency head that reporting requirements meet~~
2 ~~established criteria and shall not be eliminated.~~

3 ~~(2) Before a business may file an appeal with the office pursuant to subdivision~~
4 ~~(c) of Section 14775, the business shall file a challenge to a form or report~~
5 ~~required by a state agency with that state agency. Within 60 days of filing the~~
6 ~~challenge with a state agency, the state agency shall either eliminate the form or~~
7 ~~report or provide written justification for its continued use.~~

8 ~~(3) A business may appeal a state agency's written justification for the~~
9 ~~continued use of a form or report with the office.~~

10 ~~(4) If a state agency fails to respond within 60 days of the filing of a challenge~~
11 ~~pursuant to paragraph (2), the business shall have an immediate right to file an~~
12 ~~appeal with the office.~~

13 ~~(b) No later than January 1, 1996, the office shall adopt procedures governing~~
14 ~~the filing, hearing, and disposition of appeals. The procedures shall include, but~~
15 ~~shall not be limited to, provisions that assure that appeals are heard and decisions~~
16 ~~rendered by the office in a fair, impartial, and timely fashion.~~

17 ~~(c) The office may charge appellants a reasonable fee to pay for costs it incurs in~~
18 ~~complying with this section.~~

19 **Comment.** Former Section 11530 is continued without change in Section 11380 (state
20 agency reports and forms appeals).

1 CONFORMING REVISIONS

2 California State Board of Pharmacy

3 **Bus. & Prof. Code § 4160 (technical amendment). Application of California Hazardous**
4 **Substances Act; enforcement**

5 Section 4160 of the Business and Professions Code is amended to read:

6 4160. (a) The California Hazardous Substances Act, Chapter 13 (commencing
7 with Section 28740) of Division 21 of the Health and Safety Code, applies to
8 pharmacies and pharmacists and any other person or place subject to the
9 jurisdiction of the board.

10 (b) The board may enforce that act when necessary for the protection of the
11 health and safety of the public if prior regulatory notice is given in accordance
12 with the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5
13 (commencing with Section 11340) , Chapter 4 (commencing with Section 11370),
14 and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2
15 of the Government Code , as amended). Board enforcement shall focus on those
16 hazardous substances which relate significantly to or overlap the practice of
17 pharmacy.

18 (c) "Poison," as used elsewhere in this chapter, shall reference a category of
19 hazardous substances defined in Section 28743 of the Health and Safety Code
20 which the board may by regulation make more specific.

21 **Comment.** Section 4160 is amended to delete the former reference to Chapter 4
22 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) of
23 Division 3 of Title 2 of the Government Code. The provisions for regulatory notice are
24 contained in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2
25 of the Government Code.

26 The former reference to the statutory provisions "as amended" is omitted as surplus. See
27 Gov't Code § 9.

28 Real Estate Commissioner

29 **Bus. & Prof. Code § 10175.2 (technical amendment). Monetary penalties**

30 Section 10175.2 of the Business and Professions Code is amended to read:

31 10175.2. (a) If the Real Estate Commissioner determines that the public interest
32 and public welfare will be adequately served by permitting a real estate licensee
33 to pay a monetary penalty to the department in lieu of an actual license
34 suspension, the commissioner may, on the petition of the licensee, stay the
35 execution of all or some part of the suspension on the condition that the licensee
36 pay a monetary penalty and the further condition that the licensee incur no other
37 cause for disciplinary action within a period of time specified by the
38 commissioner.

39 (b) The commissioner may exercise the discretion granted to ~~him~~ under
40 subdivision (a) either with respect to a suspension ordered by a decision after a

1 contested hearing on an accusation against the licensee or by stipulation with the
2 licensee after the filing of an accusation, but prior to the rendering of a decision
3 based upon the accusation. In either case, the terms and conditions of the
4 disciplinary action against the licensee shall be made part of a formal decision of
5 the commissioner which satisfies the requirements of Section ~~11518~~ 11425.50 of
6 the Government Code.

7 (c) If a licensee fails to pay the monetary penalty in accordance with the terms
8 and conditions of the decision of the commissioner, the commissioner may,
9 without a hearing, order the immediate execution of all or any part of the stayed
10 suspension in which event the licensee shall not be entitled to any repayment nor
11 credit, prorated or otherwise, for money paid to the department under the terms of
12 the decision.

13 (d) The amount of the monetary penalty payable under this section shall not
14 exceed two hundred fifty dollars (\$250) for each day of suspension stayed nor a
15 total of ten thousand dollars (\$10,000) per decision regardless of the number of
16 days of suspension stayed under the decision.

17 (e) Any monetary penalty received by the department pursuant to this section
18 shall be credited to the Recovery Account of the Real Estate Fund.

19 **Comment.** Section 10175.2 is amended to correct the reference to provisions of the
20 Administrative Procedure Act.

21 Alcoholic Beverage Control Appeals Board

22 **Bus. & Prof. Code § 23083 (amended). Determination of appeal**

23 Section 23083 of the Business and Professions Code is amended to read:

24 23083. (a) The board shall determine the appeal upon the record of the
25 department and upon any briefs which may be filed by the parties. If any party to
26 the appeal requests the right to appear before the board, the board shall fix a time
27 and place for argument. The board shall not receive any evidence other than that
28 contained in the record of the proceedings of the department.

29 (b) The administrative adjudication provisions of the Administrative Procedure
30 Act, Chapters 4.5 (commencing with Section 11400) and 5 (commencing with
31 Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, do not
32 apply to the determination.

33 **Comment.** Section 23083 makes the administrative adjudication provisions of the
34 Administrative Procedure Act inapplicable to determination of an appeal by the Alcoholic
35 Beverage Control Appeals Board. Exemption of the agency's hearings from the
36 Administrative Procedure Act does not exempt the hearings from the language assistance
37 requirements of that act. Gov't Code § 11435.15(d).

38 Nothing in Section 23083 excuses compliance with procedural protections otherwise
39 required by due process of law.

1 State Board of Education, California Community Colleges, and California State
2 University

3 **Educ. Code § 232 (technical amendment). Issuance of regulations**

4 Section 232 of the Education Code is amended to read:

5 232. The State Board of Education, the Board of Governors of the California
6 Community Colleges, and the Trustees of the California State University shall
7 issue regulations pursuant to Chapter 3.5 (commencing with Section 11340) ~~and~~
8 ~~Chapter 5 (commencing with Section 11500)~~ of Part 1 of Division 3 of Title 2 of
9 the Government Code, commonly referred to as the rulemaking provisions of the
10 Administrative Procedure Act, to implement the provisions of this chapter.

11 The Regents of the University of California may issue regulations to implement
12 the provisions of this chapter. If the Regents of the University of California
13 choose to issue regulations it may issue them pursuant to Chapter 3.5
14 (commencing with Section 11340) ~~and Chapter 5 (commencing with Section~~
15 ~~11500)~~ of Part 1 of Division 3 of Title 2 of the Government Code, commonly
16 referred to as the rulemaking provisions of the Administrative Procedure Act.

17 **Comment.** Section 232 is amended to delete the references to the administrative
18 adjudication portion of the Administrative Procedure Act. Regulations are issued pursuant to
19 Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the
20 Government Code.

21 University of California

22 **Educ. Code § 92001 (added). Adjudication provisions of Administrative Procedure Act**
23 **inapplicable**

24 Section 92001 is added to the Education Code, to read:

25 92001. The administrative adjudication provisions of the Administrative
26 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
27 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
28 Government Code, do not apply to a hearing conducted by the University of
29 California.

30 **Comment.** Section 92001 makes the administrative adjudication provisions of the
31 Administrative Procedure Act inapplicable to hearings of the University of California. The
32 section recognizes that the University of California enjoys a constitutional exemption. See
33 Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government,
34 subject to limited legislative control, and independent in administration of its affairs). Nothing
35 in Section 92001 excuses compliance with procedural protections otherwise required by due
36 process of law. See also Section 232 (Regents may issue regulations pursuant to rulemaking
37 provisions of Administrative Procedure Act).

38 Public Employment Relations Board (election certification)

39 **Gov't Code § 3541.3 (amended). Powers and duties of board**

40 Section 3541.3 of the Government Code is amended to read:

41 3541.3. The board shall have all of the following powers and duties:

1 (a) To determine in disputed cases, or otherwise approve, appropriate units.

2 (b) To determine in disputed cases whether a particular item is within or without
3 the scope of representation.

4 (c) To arrange for and supervise representation elections which shall be
5 conducted by means of secret ballot elections, and to certify the results of the
6 elections.

7 (d) To establish lists of persons broadly representative of the public and
8 qualified by experience to be available to serve as mediators, arbitrators, or
9 factfinders. In no case shall these lists include persons who are on the staff of the
10 board.

11 (e) To establish by regulation appropriate procedures for review of proposals to
12 change unit determinations.

13 (f) Within its discretion, to conduct studies relating to employer-employee
14 relations, including the collection, analysis, and making available of data relating
15 to wages, benefits, and employment practices in public and private employment,
16 and, when it appears necessary in its judgment to the accomplishment of the
17 purposes of this chapter, recommend legislation. The board shall report to the
18 Legislature by October 15 of each year on its activities during the immediately
19 preceding fiscal year. The board may enter into contracts to develop and maintain
20 research and training programs designed to assist public employers and employee
21 organizations in the discharge of their mutual responsibilities under this chapter.

22 (g) To adopt, pursuant to Chapter 3.5 (commencing with Section 11340) of Part
23 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and
24 effectuate the purposes and policies of this chapter.

25 (h) To hold hearings, subpoena witnesses, administer oaths, take the testimony
26 or deposition of any person, and, in connection therewith, to issue subpoenas
27 duces tecum to require the production and examination of any employer's or
28 employee organization's records, books, or papers relating to any matter within
29 its jurisdiction. The administrative adjudication provisions of the Administrative
30 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
31 (commencing with Section 11500) of Part 1 of Division 3 of Title 2, do not apply
32 to a hearing by the board under this chapter, except that Chapter 4.5 applies to a
33 hearing to determine an unfair practice charge.

34 (i) To investigate unfair practice charges or alleged violations of this chapter,
35 and take ~~such~~ the action and make ~~such~~ the determinations in respect of these
36 charges or alleged violations as the board deems necessary to effectuate the
37 policies of this chapter.

38 (j) To bring an action in a court of competent jurisdiction to enforce any of its
39 orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon
40 issuance of a complaint charging that any person has engaged in or is engaging
41 in an unfair practice, the board may petition the court for appropriate temporary
42 relief or restraining order.

1 (k) To delegate its powers to any member of the board or to any person
2 appointed by the board for the performance of its functions, except that no fewer
3 than two board members may participate in the determination of any ruling or
4 decision on the merits of any dispute coming before it, and except that a decision
5 to refuse to issue a complaint shall require the approval of two board members.

6 (l) To decide contested matters involving recognition, certification, or
7 decertification of employee organizations.

8 (m) To consider and decide issues relating to rights, privileges, and duties of an
9 employee organization in the event of a merger, amalgamation, or transfer of
10 jurisdiction between two or more employee organizations.

11 (n) To take such other action as the board deems necessary to discharge its
12 powers and duties and otherwise to effectuate the purposes of this chapter.

13 **Comment.** Section 3541.3 is amended to make the administrative adjudication provisions
14 of the Administrative Procedure Act inapplicable to proceedings by the Public Employment
15 Relations Board under this chapter, except hearings to determine unfair practice charges.
16 Exemption of the agency's hearings from the Administrative Procedure Act does not exempt
17 the hearings from the language assistance requirements of that act. Gov't Code §
18 11435.15(d).

19 Nothing in Section 3541.3 excuses compliance with procedural protections otherwise
20 required by due process of law.

21 **Gov't Code § 3563 (amended). Powers and duties of board**

22 Section 3563 of the Government Code is amended to read:

23 3563. This chapter shall be administered by the Public Employment Relations
24 Board. In administering this chapter the board shall have all of the following
25 rights, powers, duties and responsibilities:

26 (a) To determine in disputed cases, or otherwise approve, appropriate units.

27 (b) To determine in disputed cases whether a particular item is within or without
28 the scope of representation.

29 (c) To arrange for and supervise representation elections which shall be
30 conducted by means of secret ballot elections, and to certify the results of the
31 elections.

32 (d) To establish lists of persons broadly representative of the public and
33 qualified by experience to be available to serve as mediators, arbitrators, or
34 factfinders. In no case shall ~~such~~ the lists include persons who are on the staff of
35 the board.

36 (e) To establish by regulation appropriate procedures for review of proposals to
37 change unit determinations.

38 (f) To adopt, pursuant to Chapter 4.5 3.5 (commencing with Section ~~11371~~
39 11340) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the
40 provisions and effectuate the purposes and policies of this chapter.

41 (g) To hold hearings, subpoena witnesses, administer oaths, take the testimony
42 or deposition of any person, and, in connection therewith, to issue subpoenas
43 duces tecum to require the production and examination of any employer's or

1 employee organization's records, books, or papers relating to any matter within
 2 its jurisdiction, except for those records, books, or papers confidential under
 3 statute. The administrative adjudication provisions of the Administrative
 4 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2, do not apply
 6 to a hearing by the board under this section, except that Chapter 4.5 applies to a
 7 hearing to determine an unfair practice charge.

8 (h) To investigate unfair practice charges or alleged violations of this chapter,
 9 and take such the action and make such the determinations in respect of these
 10 charges or alleged violations as the board deems necessary to effectuate the
 11 policies of this chapter.

12 (i) To bring an action in a court of competent jurisdiction to enforce any of its
 13 orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon
 14 issuance of a complaint charging that any person has engaged in or is engaging
 15 in an unfair practice, the board may petition the court for appropriate temporary
 16 relief or restraining order.

17 (j) To delegate its powers to any member of the board or to any person
 18 appointed by the board for the performance of its functions, except that no fewer
 19 than two board members may participate in the determination of any ruling or
 20 decision on the merits of any dispute coming before it and except that a decision
 21 to refuse to issue a complaint shall require the approval of two board members.

22 (k) To decide contested matters involving recognition, certification, or
 23 decertification of employee organizations.

24 (l) To consider and decide issues relating to rights, privileges, and duties of an
 25 employee organization in the event of a merger, amalgamation, or transfer of
 26 jurisdiction between two or more employee organizations.

27 (m) To take such other action as the board deems necessary to discharge its
 28 powers and duties and otherwise to effectuate the purposes of this chapter.

29 **Comment.** Section 3563 is amended to make the administrative adjudication provisions of
 30 the Administrative Procedure Act inapplicable to proceedings by the Public Employment
 31 Relations Board under this chapter, except hearings to determine unfair practice charges.
 32 Exemption of the agency's hearings from the Administrative Procedure Act does not exempt
 33 the hearings from the language assistance requirements of that act. Gov't Code §
 34 11435.15(d).

35 Nothing in Section 3563 excuses compliance with procedural protections otherwise
 36 required by due process of law.

37 **General Law**

38 **Gov't Code § 11018 (technical amendment). Language assistance in administrative**
 39 **hearings**

40 Section 11018 of the Government Code is amended to read:

41 11018. Every state agency which is authorized by any law to conduct
 42 administrative hearings but is not subject to Chapter 5 (commencing with Section
 43 11500) shall nonetheless comply with ~~subdivision (d) of Section 11513~~ Sections

1 11435.20 and 11435.25 relative to the furnishing of language assistance at ~~any~~
2 ~~such~~ the hearing.

3 **Comment.** Section 11018 is amended to correct references to the Administrative Procedure
4 Act.

5 Commission on State Mandates

6 **Gov't Code § 17533 (added). Administrative adjudication provisions of Administrative**
7 **Procedure Act not applicable**

8 Section 17533 is added to the Government Code, to read:

9 17533. The administrative adjudication provisions of the Administrative
10 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
11 (commencing with Section 11500) of Part 1 of Division 3 of Title 2, do not apply
12 to a hearing by the commission under this part.

13 **Comment.** Section 17533 makes the administrative adjudication provisions of the
14 Administrative Procedure Act inapplicable to hearings by the Commission on State Mandates
15 under this part. Exemption of the agency's hearings from the Administrative Procedure Act
16 does not exempt the hearings from the language assistance requirements of that act. Gov't
17 Code § 11435.15(d).

18 Nothing in Section 17533 excuses compliance with procedural protections otherwise
19 required by due process of law.

20 Office of Statewide Health Planning and Development

21 **Health & Safety Code § 443.37 (technical amendment). Review**

22 Section 443.37 of the Health and Safety Code is amended to read:

23 443.37. Any health facility affected by any determination made under this part
24 by the office may petition the office for review of the decision. This petition shall
25 be filed with the office within 15 business days, or within ~~such~~ a greater time as
26 the office, with the advice of the commission, may allow, and shall specifically
27 describe the matters which are disputed by the petitioner.

28 A hearing shall be commenced within 60 calendar days of the date on which
29 the petition was filed. The hearing shall be held before an employee of the office,
30 ~~a hearing officer~~ an administrative law judge employed by the Office of
31 Administrative Hearings, or a committee of the commission chosen by the
32 chairperson for this purpose. If held before an employee of the office or a
33 committee of the commission, the hearing shall be held in accordance with ~~such~~
34 procedures as the office, with the advice of the commission, shall prescribe. If held
35 before ~~a hearing officer~~ an administrative law judge employed by the Office of
36 Administrative Hearings, the hearing shall be held in accordance with Chapter 5
37 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
38 Government Code. The employee, ~~hearing officer~~ administrative law judge, or
39 committee shall prepare a recommended decision including findings of fact and
40 conclusions of law and present it to the office for its adoption. The decision of the
41 office shall be in writing and shall be final. The decision of the office shall be

1 made within 60 calendar days after the conclusion of the hearing and shall be
2 effective upon filing and service upon the petitioner.

3 Judicial review of any final action, determination, or decision may be had by
4 any party to the proceedings as provided in Section 1094.5 of the Code of Civil
5 Procedure. The decision of the office shall be upheld against a claim that its
6 findings are not supported by the evidence unless the court determines that the
7 findings are not supported by substantial evidence.

8 The employee of the office, the ~~hearing officer~~ administrative law judge
9 employed by the Office of Administrative Hearings, the Office of Administrative
10 Hearings, or the committee of the commission, may issue subpoenas and
11 subpoenas duces tecum in a manner and subject to the conditions established by
12 Section ~~11510~~ Article 11 (commencing with Section 11450.10) of Chapter 4.5 of
13 Part 1 of Division 3 of Title 2 of the Government Code.

14 **Comment.** Section 443.37 is amended to correct references to the Administrative
15 Procedure Act. A hearing held in accordance with Chapter 5 of Part 1 of Division 3 of Title 2
16 of the Government Code is also subject to Chapter 4.5 (administrative adjudication general
17 provisions) of that part, division, and title. Gov't Code §§ 11410.40, 11501.

18 Note. The part in which Section 443.37 appears has a sunset provision, and is repealed on
19 January 1, 1997. See Section 443.46. This is addressed in the operative date provision at the
20 end of these conforming revisions.

21 State Department of Health Services (part 1)

22 **Health & Safety Code § 1551.5 (technical amendment). Witness fees**

23 Section 1551.5 of the Health and Safety Code is amended to read:

24 1551.5. Notwithstanding Section ~~11510~~ 11450.40 of the Government Code,
25 witnesses subpoenaed at the request of the department for a hearing conducted
26 pursuant to this article who attend a hearing may be paid by the department
27 witness fees and mileage as provided by Section 68093 of the Government Code.
28 In addition, the department may pay actual, necessary, and reasonable expenses
29 in an amount not to exceed the per diem allowance payable to a nonrepresented
30 state employee on travel status. The department may pay witness expenses
31 pursuant to this section in advance of the hearing.

32 **Comment.** Section 1551.5 is amended to correct a reference to the Administrative
33 Procedure Act.

34 State Department of Alcohol and Drug Programs

35 **Health & Safety Code § 11834.37 (technical amendment). Conduct of proceedings**

36 Section 11834.37 of the Health and Safety Code is amended to read:

37 11834.37. (a) Proceedings for the suspension, revocation, or denial of a license
38 under this chapter shall be conducted in accordance with the provisions of
39 Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of
40 the Government Code, and the department shall have all the powers granted by

1 those provisions. In the event of conflict between this chapter and the
2 Government Code, the Government Code shall prevail.

3 (b) In all proceedings conducted in accordance with this section, the standard
4 of proof to be applied shall be by the preponderance of the evidence.

5 (c) The department shall commence and process licensure revocations under
6 this chapter in a timely and expeditious manner. ~~Notwithstanding Section~~
7 ~~11502.1 of the Government Code, the~~ The Office of Administrative Hearings shall
8 give priority calendar preference to licensure revocation hearings pursuant to this
9 chapter, particularly revocations where the health and safety of the residents are
10 in question.

11 **Comment.** Section 11834.37 is amended to delete the reference to former Section 11502.1
12 of the Government Code, which has been repealed. A proceeding conducted in accordance
13 with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code is
14 also subject to the provisions of Chapter 4.5 (administrative adjudication general provisions)
15 of that part, division, and title. Gov't Code §§ 11410.40, 11501.

16 **Building Standards Commission**

17 **Health & Safety Code § 18949.6 (technical amendment). Building standards; regulations**

18 Section 18949.6 of the Health and Safety Code is amended to read:

19 18949.6. (a) The commission shall adopt regulations setting forth the procedure
20 for the adoption of building standards and administrative regulations that apply
21 directly to the implementation or enforcement of building standards.

22 (b) Regulatory adoption shall be accomplished so as to facilitate the triennial
23 adoption of the specified model codes pursuant to Section 18928.

24 (c) The regulations shall allow for the distribution of proposed building
25 standards and regulatory changes to the public for review in compliance with the
26 requirements of the rulemaking provisions of the Administrative Procedure Act
27 (Chapter 3.5 (commencing with Section 11340) , ~~Chapter 4 (commencing with~~
28 ~~Section 11370), and Chapter 5 (commencing with Section 11500)~~ of Part 1 of
29 Division 3 of Title 2 of the Government Code) and for the acceptance of
30 responses from the public.

31 **Comment.** Section 18949.6 is amended to correct the reference to the Administrative
32 Procedure Act.

33 **Department of Toxic Substances Control**

34 **Health & Safety Code § 25149 (amended). Endangerment to health and environment**

35 Section 25149 of the Health and Safety Code is amended to read:

36 25149. (a) Notwithstanding any other provision of law, except as provided in
37 Section 25149.5 or 25181 of this code or Section 731 of the Code of Civil
38 Procedure, no city or county, whether chartered or general law, or district may
39 enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law,
40 license, or permit relating to an existing hazardous waste facility so as to prohibit

1 or unreasonably regulate the disposal, treatment, or recovery of resources from
2 hazardous waste or a mix of hazardous and solid wastes at that facility, unless,
3 after public notice and hearing, the director determines that the operation of the
4 facility may present an imminent and substantial endangerment to health and the
5 environment. However, nothing in this section authorizes an operator of that
6 facility to violate any term or condition of a local land use permit or any other
7 provision of law not in conflict with this section.

8 (b) The director shall, pursuant to subdivision (c), conduct the hearing specified
9 in subdivision (a) to determine whether the operation of an existing hazardous
10 waste facility may present an imminent and substantial endangerment to health
11 and the environment whenever any of the following occurs:

12 (1) A state or federal public agency requires any person to evacuate a residence
13 or requires the evacuation of a school, place of employment, commercial
14 establishment, or other facility to which the public has access, because of the
15 release of a hazardous substance from the facility.

16 (2) For more than five days in any month, the air emissions from the facility
17 result in the violation of an emission standard for a hazardous air pollutant
18 established pursuant to Section 7412 of Title 42 of the United States Code or the
19 threshold exposure level for a toxic air contaminant, as defined in Section 39655.

20 (3) A state or federal public agency requires that the use of a source of drinking
21 water be discontinued because of the contamination of the source by a release of
22 hazardous waste, hazardous substances, or leachate from the facility.

23 (4) A state agency, or the board of supervisors of the county in which the
24 facility is located, upon recommendation of its local health officer, makes a finding
25 that the public health has been affected by a release of hazardous wastes from the
26 facility. The finding shall be based on statistically significant data developed in a
27 health effects study conducted according to a study design, and using a
28 methodology, which are developed after considering the suggestions on study
29 design and methodology made by interested parties and which are approved by
30 the Epidemiological Studies Section in the Epidemiology and Toxicology Branch
31 of the State Department of Health Services before beginning the study.

32 (5) The owner or operator of the facility is in violation of an order issued
33 pursuant to Section 25187 which requires one or both of the following:

34 (A) The correction of a violation or condition that has resulted, or threatens to
35 result, in an unauthorized release of hazardous waste or a constituent of
36 hazardous waste from the facility into either the onsite or offsite environment.

37 (B) The cleanup of a release of hazardous waste or a constituent of hazardous
38 waste, the abatement of the effects of the release, and any other necessary
39 remedial action.

40 (6) The facility is in violation of an order issued pursuant to Article 1
41 (commencing with Section 13300) of, or Article 2 (commencing with Section
42 13320) of, Chapter 5 of Division 7 of the Water Code or in violation of a
43 temporary restraining order, preliminary injunction, or permanent injunction

1 issued pursuant to Article 4 (commencing with Section 13340) of Chapter 5 of
2 Division 7 of the Water Code.

3 (c) Whenever the director determines that a hearing is required, as specified in
4 subdivision (b), the director shall immediately request the Office of Administrative
5 Hearings to assign a ~~hearing officer~~ an administrative law judge to conduct the
6 hearing, pursuant to this subdivision.

7 (1) After a ~~hearing officer~~ an administrative law judge is assigned by the Office
8 of Administrative Hearings, the director shall transmit to the ~~hearing officer~~
9 administrative law judge and to the operator of the existing hazardous waste
10 facility, all relevant documents, information, and data that were the basis for the
11 director's determination. The director shall also prepare a notice specifying the
12 time and place of the hearing. The notice shall also include a clear statement of
13 the reasons for conducting the hearing, a description of the facts, data,
14 circumstances, or occurrences that are the cause for conducting the hearing, and
15 the issues to be addressed at the hearing. The hearing shall be held as close to the
16 location of the existing hazardous waste facility as is practicable and shall
17 commence no later than 30 days following the director's request to the Office of
18 Administrative Hearings to assign a ~~hearing officer~~ an administrative law judge to
19 the case.

20 (2) The hearing specified in paragraph (1) shall be conducted in accordance
21 with Sections ~~11510~~ 11511 to 11515, inclusive, and ~~Section 11525~~, of the
22 Government Code. The hearing officer's proposed decision shall be transmitted
23 to the director within 30 days after the case is submitted.

24 (3) The director may adopt the proposed decision of the hearing officer in its
25 entirety or may decide the case upon the record, as provided in Section 11517 of
26 the Government Code. The director's decision shall be in writing and shall
27 contain findings of fact and a determination of the issues presented. The decision
28 is subject to judicial review in accordance with Section 11523 of the Government
29 Code.

30 **Comment.** Section 25149 is amended to reflect the repeal of Sections 11510 and 11525 of
31 the Government Code. A number of provisions formerly found in Government Code Sections
32 11510-11515 are now located in general provisions on administrative adjudication, which
33 apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11430.10-11430.80 (ex
34 parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement
35 of orders and sanctions).

36 Local Hospital Districts

37 **Health & Safety Code § 32154 (technical amendment). Subpoenas**

38 Section 32154 of the Health and Safety Code is amended to read:

39 32154. The board or the hearing officer, if one is appointed, shall have the same
40 power with respect to the issuance of subpoenas and subpoenas duces tecum as
41 that granted to any agency or hearing presiding officer pursuant to ~~Section 11510~~
42 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of

1 Division 3 of Title 2 of the Government Code. Any such subpoena or subpoena
2 duces tecum issued pursuant to this section shall have the same force and effect
3 and impose the same obligations upon witnesses as that provided in Section
4 11510 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of
5 Division 3 of Title 2 of the Government Code.

6 **Comment.** Section 32154 is amended to correct references to provisions of the
7 Administrative Procedure Act.

8 Air Resources Board

9 **Health & Safety Code § 40843 (technical amendment). Superior court proceedings**

10 Section 40843 of the Health and Safety Code is amended to read:

11 40843. Upon receipt of a report submitted pursuant to Section 40842, the
12 superior court shall proceed as specified in Section ~~11525~~ 11455.20 of the
13 Government Code.

14 **Comment.** Section 40843 is amended to correct the reference to a provision of the
15 Administrative Procedure Act.

16 Agricultural Labor Relations Board (election certification)

17 **Lab. Code § 1144.5 (added). Adjudication provisions of Administrative Procedure Act**
18 **inapplicable**

19 Section 1144.5 is added to the Labor Code, to read:

20 1144.5. (a) The administrative adjudication provisions of the Administrative
21 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
22 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
23 Government Code, do not apply to a hearing by the board under this part, except
24 that Chapter 4.5 applies to a hearing to determine an unfair labor practice charge.

25 (b) Notwithstanding Sections 11425.30 and 11430.10 of the Government Code,
26 in a hearing to determine an unfair labor practice charge, a person who has
27 participated in a determination of probable cause, injunctive or other pre-hearing
28 relief, or other equivalent preliminary determination in an adjudicative proceeding
29 may serve as presiding officer or as a supervisor of the presiding officer or may
30 assist or advise the presiding officer in the same proceeding.

31 **Comment.** Subdivision (a) of Section 1144.5 makes the administrative adjudication
32 provisions of the Administrative Procedure Act inapplicable to proceedings by the
33 Agricultural Labor Relations Board under this part, except hearings to determine unfair labor
34 practice charges. Nothing in Section 1144.5 excuses compliance with procedural protections
35 otherwise required by due process of law. Exemption of the agency's hearings from the
36 Administrative Procedure Act does not exempt the hearings from the language assistance
37 requirements of that act. Gov't Code § 11435.15(d).

38 Subdivision (b) provides a broader exception for the Agricultural Labor Relations Board
39 than the comparable provisions in the Administrative Procedure Act. See Gov't Code §§
40 11425.30(b) (when separation not required), 11430.10 (ex parte communications
41 prohibited).

1 Division of Workers' Compensation — Workers' Compensation Appeals Board

2 **Lab. Code § 5811 (technical amendment). Hearings and investigations**

3 Section 5811 of the Labor Code is amended to read:

4 5811. (a) No fees shall be charged by the clerk of any court for the performance
5 of any official service required by this division, except for the docketing of
6 awards as judgments and for certified copies of transcripts thereof. In all
7 proceedings under this division before the appeals board, costs as between the
8 parties may be allowed by the appeals board.

9 (b) It shall be the responsibility of any party producing a witness requiring an
10 interpreter to arrange for the presence of a qualified interpreter. A qualified
11 interpreter is a language interpreter who is certified, or deemed certified, pursuant
12 to ~~Section 11513~~ or Article 8 (commencing with Section 11435.05) of Chapter 4.5
13 of Part 1 of Division 3 of Title 2 of, and Section 68566 of, the Government Code.

14 Interpreter fees which are reasonably, actually, and necessarily incurred shall be
15 allowed as cost under this section, provided they are in accordance with the fee
16 schedule set by the administrative director.

17 A qualified interpreter may render services during the following:

18 (1) A deposition.

19 (2) An appeals board hearing.

20 (3) During those settings which the administrative director determines are
21 reasonably necessary to ascertain the validity or extent of injury to an employee
22 who cannot communicate in English.

23 **Comment.** Section 5811 is amended to correct a reference to a provision of the
24 Administrative Procedure Act.

25 Occupational Safety and Health Appeals Board

26 **Lab. Code § 6603 (technical amendment). Rules of practice and procedure**

27 Section 6603 of the Labor Code is amended to read:

28 6603. (a) The rules of practice and procedure adopted by the appeals board
29 shall be consistent with Sections 11507, 11507.6, 11507.7, ~~11510~~, 11513, 11514,
30 11515, ~~11516~~, and ~~11525~~ 11516 of the Government Code, and shall provide
31 affected employees or representatives of affected employees an opportunity to
32 participate as parties to a hearing under Section 6602.

33 (b) The superior courts shall have jurisdiction over contempt proceedings, as
34 provided in ~~Section 11525~~ Article 12 (commencing with Section 11455.10) of
35 Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

36 **Comment.** Section 6603 is amended to correct references to sections in the Administrative
37 Procedure Act. Former Section 11510 of the Government Code is superseded by Sections
38 11450.10-11450.40 of the Government Code (subpoenas). Former Section 11525 of the
39 Government Code is superseded by Sections 11455.10-11455.30 of the Government Code
40 (enforcement of orders and sanctions). Rules of practice and procedure adopted by the
41 appeals board must be consistent with these provisions, and with all other general provisions

1 governing administrative adjudication found in Chapter 4.5 of Part 1 of Division 3 of Title 2
2 of the Government Code.

3 Military Department

4 **Mil. & Vet. Code § 105 (added). Adjudication provisions of Administrative Procedure Act**
5 **inapplicable**

6 Section 105 is added to the Military and Veterans Code, to read:

7 105. The administrative adjudication provisions of the Administrative Procedure
8 Act, Chapters 4.5 (commencing with Section 11400) and 5 (commencing with
9 Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, do not
10 apply to a hearing conducted by the Military Department under this code.

11 **Comment.** Section 105 exempts California Military Department hearings under this code.
12 The hearings are a hybrid of federal and special state provisions that are unique and involve
13 primarily matters of military classification and discipline. Exemption of the agency's
14 hearings from the Administrative Procedure Act does not exempt the hearings from the
15 language assistance requirements of that act. Gov't Code § 11435.15(d).

16 Department of Corrections and related entities (Board of Prison Terms, Youth
17 Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation
18 Authority — part 1)

19 **Pen. Code § 3066 (added). Adjudication provisions of Administrative Procedure Act**
20 **inapplicable**

21 Section 3066 is added to the Penal Code, to read:

22 3066. The administrative adjudication provisions of the Administrative
23 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
24 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
25 Government Code, do not apply to a parole hearing or other adjudication
26 concerning rights of an inmate or parolee conducted by the Department of
27 Corrections or the Board of Prison Terms.

28 **Comment.** Section 3066 makes the administrative adjudication provisions of the
29 Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights
30 of an inmate or parolee conducted by the Department of Corrections or the Board of Prison
31 Terms. Exemption of the agency's hearings from the Administrative Procedure Act does not
32 exempt the hearings from the language assistance requirements of that act. Gov't Code §
33 11435.15(d).

34 Nothing in Section 3066 excuses compliance with procedural protections otherwise
35 required by due process of law.

36 State Energy Resources Conservation and Development Commission

37 **Pub. Res. Code § 25513.3 (added). Permissible assistance or advice**

38 Section 25513.3 is added to the Public Resources Code, to read:

39 25513.3. Notwithstanding Sections 11425.30 and 11430.10 of the Government
40 Code, unless a party demonstrates other statutory grounds for disqualification, a
41 person who has served as investigator or advocate in an adjudicative proceeding

1 of the commission under this code may serve as a supervisor of the presiding
 2 officer or assist or advise the presiding officer in the same proceeding if the
 3 service, assistance, or advice occurs more than one year after the time the person
 4 served as investigator or advocate, provided the content of any advice is
 5 disclosed on the record and all parties have an opportunity to comment on the
 6 advice.

7 **Comment.** Section 25513.3 is added to provide an exception to the separation of functions
 8 and ex parte communications provisions of the Administrative Procedure Act necessary to
 9 ensure efficient operation of the California Energy Commission.

10 **Public Utilities Commission**

11 **Pub. Util. Code § 1701 (amended). Rules of procedure**

12 Section 1701 of the Public Utilities Code is amended to read:

13 1701. (a) All hearings, investigations, and proceedings shall be governed by this
 14 part and by rules of practice and procedure adopted by the commission, and in
 15 the conduct thereof the technical rules of evidence need not be applied. No
 16 informality in any hearing, investigation, or proceeding or in the manner of taking
 17 testimony shall invalidate any order, decision or rule made, approved, or
 18 confirmed by the commission.

19 (b) The administrative adjudication provisions of the Administrative Procedure
 20 Act, Chapters 4.5 (commencing with Section 11400) and 5 (commencing with
 21 Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, do not
 22 apply to a hearing by the commission under this part.

23 **Comment.** Section 1701 is amended to make the administrative adjudication provisions of
 24 the Administrative Procedure Act inapplicable to a hearing by the Public Utilities Commission
 25 under the Public Utilities Act. Exemption of the agency's hearings from the Administrative
 26 Procedure Act does not exempt the hearings from the language assistance requirements of
 27 that act. Gov't Code § 11435.15(d).

28 Nothing in Section 1701 excuses compliance with procedural protections otherwise
 29 required by due process of law.

30 **State Board of Equalization**

31 **Rev. & Tax. Code § 1636 (technical amendment). Hearing officers**

32 Section 1636 of the Revenue and Taxation Code is amended to read:

33 1636. The county board of supervisors may appoint one or more assessment
 34 hearing officers or contract with the Office of Administrative ~~Procedure~~ Hearings
 35 for the services of ~~a hearing officer~~ an administrative law judge pursuant to
 36 Chapter 14 (commencing with Section 27720) of Part 3 of Division 2 of Title 3 of
 37 the Government Code to conduct hearings on any assessment protests filed
 38 under Article 1 (commencing with Section 1601) of this chapter and to make
 39 recommendations to the county board of equalization or assessment appeals
 40 board concerning ~~such~~ the protests. Only persons meeting the qualifications
 41 prescribed by Section 1624 may be appointed as an assessment hearing officer.

1 **Comment.** Section 1636 is amended to correct a reference to the Office of Administrative
2 Hearings. See Gov't Code §§ 11370.2, 27727 (Office of Administrative Hearings).

3 Department of Motor Vehicles

4 **Veh. Code § 14112 (amended). Exemption from separation of functions**

5 Section 14112 of the Vehicle Code is amended to read:

6 14112. (a) All matters in a hearing not covered by this chapter shall be
7 governed, as far as applicable, by Chapter 5 (commencing with Section 11500) of
8 Part 1 of Division 3 of Title 2 of the Government Code.

9 (b) Subdivision (a) of Section 11425.30 of the Government Code does not
10 apply to a proceeding for issuance, denial, revocation, or suspension of a driver's
11 license pursuant to this division. The Department of Motor Vehicles shall study
12 the effect of that subdivision on proceedings involving vehicle operation
13 certificates and shall report to the Legislature by December 31, 1999, with
14 recommendations concerning experience with its application in those
15 proceedings.

16 **Comment.** Subdivision (b) is added to Section 14112 in recognition of the personnel
17 problem faced by the Department of Motor Vehicles due to the large volume of drivers'
18 licensing cases. Subdivision (b) makes separation of functions requirements inapplicable in
19 drivers' licensing cases, including license classifications and endorsements. However, the
20 separation of functions requirements remain applicable in other Department of Motor
21 Vehicle hearings, including schoolbus and ambulance operation certificate hearings, on which
22 the department is required to report.

23 Department of Corrections and related entities (Board of Prison Terms, Youth
24 Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation
25 Authority — part 2)

26 **Welf. & Inst. Code § 1778 (added). Adjudication provisions of Administrative Procedure**
27 **Act inapplicable**

28 Section 1778 is added to the Welfare and Institutions Code, to read:

29 1778. The administrative adjudication provisions of the Administrative
30 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
31 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
32 Government Code, do not apply to a parole hearing or other adjudication
33 concerning rights of a person committed to the control of the Youth Authority
34 conducted by the Youth Authority or the Youthful Offender Parole Board.

35 **Comment.** Section 1778 makes the administrative adjudication provisions of the
36 Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights
37 of a ward conducted by the Youth Authority or the Youthful Offender Parole Board.
38 Exemption of the agency's hearings from the Administrative Procedure Act does not exempt
39 the hearings from the language assistance requirements of that act. Gov't Code §
40 11435.15(d).

41 Nothing in Section 1778 excuses compliance with procedural protections otherwise
42 required by due process of law.

1 **Welf. & Inst. Code § 3158 (added). Adjudication provisions of Administrative Procedure**
2 **Act inapplicable**

3 Section 3158 is added to the Welfare and Institutions Code, to read:

4 3158. The administrative adjudication provisions of the Administrative
5 Procedure Act, Chapters 4.5 (commencing with Section 11400) and 5
6 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
7 Government Code, do not apply to a release hearing or other adjudication
8 concerning rights of a person committed to the custody of the Director of
9 Corrections conducted by the Narcotic Addiction Evaluation Authority.

10 **Comment.** Section 3158 makes adjudicative provisions of the Administrative Procedure Act
11 inapplicable to a parole hearing or other adjudication of rights of a civil addict conducted by
12 the Narcotic Addiction Evaluation Authority. Exemption of the agency's hearings from the
13 Administrative Procedure Act does not exempt the hearings from the language assistance
14 requirements of that act. Gov't Code § 11435.15(d).

15 Nothing in Section 3158 excuses compliance with procedural protections otherwise
16 required by due process of law.

17 State Department of Health Services (part 2) and State Department of Social
18 Services

19 **Welf. & Inst. Code § 11350.6 (technical amendment). Compliance with support order**

20 Section 11350.6 of the Welfare and Institutions Code is amended to read:

21 11350.6. (a) As used in this section:

22 (1) "Applicant" means any person applying for issuance or renewal of a
23 license.

24 (2) "Board" means any entity specified in Section 101 of the Business and
25 Professions Code, the entities referred to in Sections 1000 and 3600 of the
26 Business and Professions Code, the State Bar, the Department of Real Estate, and
27 any other state commission, department, committee, examiner, or agency that
28 issues a license, certificate, credential, or registration authorizing a person to
29 engage in a business, occupation, or profession.

30 (3) "Certified list" means a list provided by the district attorney to the State
31 Department of Social Services in which the district attorney verifies, under
32 penalty of perjury, that the names contained therein are support obligors found to
33 be out of compliance with a judgment or order for support in a case being
34 enforced under Title IV-D of the Social Security Act.

35 (4) "Compliance with a judgment or order for support" means that, as set forth
36 in a judgment or order for child or family support, the obligor is no more than 30
37 calendar days in arrears in making payments in full for current support, in making
38 periodic payments in full, whether court-ordered or by agreement with the district
39 attorney, on a support arrearage, or in making periodic payments in full, whether
40 court-ordered or by agreement with the district attorney, on a judgment for
41 reimbursement for public assistance, or has obtained a judicial finding that
42 equitable estoppel as provided in statute or case law precludes enforcement of
43 the order. The district attorney is authorized to use this section to enforce orders

1 for spousal support only when the district attorney is also enforcing a related
2 child support obligation owed to the obligee parent by the same obligor, pursuant
3 to Sections 11475.1 and 11475.2.

4 (5) "License" includes membership in the State Bar, and a certificate, permit,
5 registration, or any other authorization issued by a board that allows a person to
6 engage in a business, occupation, or profession, or to operate a commercial motor
7 vehicle.

8 (6) "Licensee" means any person holding a license, certificate, permit,
9 registration, or other authorization issued by a board, to engage in a business,
10 occupation, or profession, or a commercial driver's license as defined in Section
11 15210 of the Vehicle Code.

12 (b) The district attorney shall maintain a list of those persons included in a case
13 being enforced under Title IV-D of the Social Security Act against whom a
14 support order or judgment has been rendered by, or registered in, a court of this
15 state and who are not in compliance with that order or judgment. The district
16 attorney shall submit a certified list with the names, social security numbers, and
17 last known addresses of these persons and the name, address, and telephone
18 number of the district attorney who certified the list to the State Department of
19 Social Services. The district attorney shall verify, under penalty of perjury, that
20 the persons listed are subject to an order or judgment for the payment of support
21 and that these persons are not in compliance with the order or judgment. The
22 district attorney shall submit to the State Department of Social Services an
23 updated certified list on a monthly basis.

24 (c) The State Department of Social Services shall consolidate the certified lists
25 received from the district attorneys and, within 30 calendar days of receipt, shall
26 provide a copy of the consolidated list to each board which is responsible for the
27 regulation of licenses, as specified in this section.

28 (d) On or before November 1, 1992, or as soon thereafter as economically
29 feasible, as determined by the State Department of Social Services, all boards
30 subject to this section shall implement procedures to accept and process the list
31 provided by the State Department of Social Services, in accordance with this
32 section.

33 (e)(1) Promptly after receiving the certified consolidated list from the State
34 Department of Social Services, and prior to the issuance or renewal of a license,
35 each board shall determine whether the applicant is on the most recent certified
36 consolidated list provided by the State Department of Social Services. The board
37 shall have the authority to withhold issuance or renewal of the license of any
38 applicant on the list.

39 (2) If an applicant is on the list, the board shall immediately serve notice as
40 specified in subdivision (f) on the applicant of the board's intent to withhold
41 issuance or renewal of the license. The notice shall be made personally or by mail
42 to the applicant's last known mailing address on file with the board. Service by

1 mail shall be complete in accordance with Section 1013 of the Code of Civil
2 Procedure.

3 (A) The board shall issue a temporary license valid for a period of 150 days to
4 any applicant whose name is on the certified list if the applicant is otherwise
5 eligible for a license.

6 (B) The 150-day time period for a temporary license shall not be extended. Only
7 one temporary license shall be issued during a regular license term and it shall
8 coincide with the first 150 days of that license term. As this paragraph applies to
9 commercial driver licenses, "license term" shall be deemed to be 12 months from
10 the date the application fee is received by the Department of Motor Vehicles. A
11 license for the full or remainder of the license term shall be issued or renewed only
12 upon compliance with this section.

13 (C) In the event that a license or application for a license or the renewal of a
14 license is denied pursuant to this section, any funds paid by the applicant or
15 licensee shall not be refunded by the board.

16 (3)(A) The State Department of Social Services may, when it is economically
17 feasible for the department and the boards to do so as determined by the
18 department, in cases where the department is aware that certain child support
19 obligors listed on the certified lists have been out of compliance with a judgment
20 or order for support for more than four months, provide a supplemental list of
21 these obligors to each board with which the department has an interagency
22 agreement to implement this paragraph. Upon request by the department, the
23 licenses of these obligors shall be subject to suspension, provided that the
24 licenses would not otherwise be eligible for renewal within six months from the
25 date of the request by the department. The board shall have the authority to
26 suspend the license of any licensee on this supplemental list.

27 (B) If a licensee is on a supplemental list, the board shall immediately serve
28 notice as specified in subdivision (f) on the licensee that his or her license will be
29 automatically suspended 150 days after notice is served, unless compliance with
30 this section is achieved. The notice shall be made personally or by mail to the
31 licensee's last known mailing address on file with the board. Service by mail shall
32 be complete in accordance with Section 1013 of the Code of Civil Procedure.

33 (C) The 150-day notice period shall not be extended.

34 (D) In the event that any license is suspended pursuant to this section, any
35 funds paid by the licensee shall not be refunded by the board.

36 (E) This paragraph shall not apply to licenses subject to annual renewal or
37 annual fee.

38 (f) Notices shall be developed by each board in accordance with guidelines
39 provided by the State Department of Social Services and subject to approval by
40 the State Department of Social Services. The notice shall include the address and
41 telephone number of the district attorney who submitted the name on the
42 certified list, and shall emphasize the necessity of obtaining a release from that

1 district attorney's office as a condition for the issuance, renewal, or continued
2 valid status of a license or licenses.

3 (1) In the case of applicants not subject to paragraph (3) of subdivision (e), the
4 notice shall inform the applicant that the board shall issue a temporary license, as
5 provided in subparagraph (A) of paragraph (2) of subdivision (e), for 150 calendar
6 days if the applicant is otherwise eligible and that upon expiration of that time
7 period the license will be denied unless the board has received a release from the
8 district attorney who submitted the name on the certified list.

9 (2) In the case of licensees named on a supplemental list, the notice shall inform
10 the licensee that his or her license will continue in its existing status for no more
11 than 150 calendar days from the date of mailing or service of the notice and
12 thereafter will be suspended indefinitely unless, during the 150-day notice period,
13 the board has received a release from the district attorney who submitted the
14 name on the certified list. Additionally, the notice shall inform the licensee that
15 any license suspended under this section will remain so until the expiration of the
16 remaining license term, unless the board receives a release along with applications
17 and fees, if applicable, to reinstate the license during the license term.

18 (3) The notice shall also inform the applicant that if an application is denied or a
19 license is suspended pursuant to this section, any funds paid by the applicant or
20 licensee shall not be refunded by the board. The State Department of Social
21 Services shall also develop a form that the applicant shall use to request a review
22 by the district attorney. A copy of this form shall be included with every notice
23 sent pursuant to this subdivision.

24 (g) Each district attorney shall maintain review procedures consistent with this
25 section to allow an applicant to have the underlying arrearage and any relevant
26 defenses investigated, to provide an applicant information on the process of
27 obtaining a modification of a support order, or to provide an applicant assistance
28 in the establishment of a payment schedule on arrearages if the circumstances so
29 warrant.

30 (h) If the applicant wishes to challenge the submission of his or her name on the
31 certified list, the applicant shall make a timely written request for review on the
32 form specified in subdivision (f) to the district attorney who certified the
33 applicant's name. The district attorney shall, within 75 days of receipt of the
34 written request, inform the applicant in writing of his or her findings upon
35 completion of the review. The district attorney shall immediately send a release to
36 the appropriate board and the applicant, if any of the following conditions are
37 met:

38 (1) The applicant is found to be in compliance or negotiates an agreement with
39 the district attorney for a payment schedule on arrearages or reimbursement.

40 (2) The applicant has submitted a request for review, but the district attorney
41 will be unable to complete the review and send notice of his or her findings to the
42 applicant within 75 days. This paragraph applies only if the delay in completing
43 the review process is not the result of the applicant's failure to act in a reasonable,

1 timely, and diligent manner upon receiving notice from the board that his or her
2 name is on the list.

3 (3) The applicant has filed and served a request for judicial review pursuant to
4 this section, but a resolution of that review will not be made within 150 days of
5 the date of service of notice pursuant to subdivision (f). This paragraph applies
6 only if the delay in completing the judicial review process is not the result of the
7 applicant's failure to act in a reasonable, timely, and diligent manner upon
8 receiving the district attorney's notice of his or her findings.

9 (4) The applicant has obtained a judicial finding of compliance as defined in this
10 section.

11 (i) An applicant is required to act with diligence in responding to notices from
12 the board and the district attorney with the recognition that the temporary license
13 will lapse or the license suspension will go in effect after 150 days and that the
14 district attorney and, where appropriate, the court must have time to act within
15 that period. An applicant's delay in acting, without good cause, which directly
16 results in the inability of the district attorney to complete a review of the
17 applicant's request or the court to hear the request for judicial review within the
18 150-day period shall not constitute the diligence required under this section
19 which would justify the issuance of a release.

20 (j) Except as otherwise provided in this section, the district attorney shall not
21 issue a release if the applicant is not in compliance with the judgment or order for
22 support. The district attorney shall notify the applicant in writing that the
23 applicant may, by filing an order to show cause or notice of motion, request any
24 or all of the following:

25 (1) Judicial review of the district attorney's decision not to issue a release.

26 (2) A judicial determination of compliance.

27 (3) A modification of the support judgment or order. The notice shall also
28 contain the name and address of the court in which the applicant shall file the
29 order to show cause or notice of motion and inform the applicant that his or her
30 name shall remain on the certified list if the applicant does not timely request
31 judicial review. The applicant shall comply with all statutes and rules of court
32 regarding orders to show cause and notices of motion.

33 Nothing in this section shall be deemed to limit an applicant from filing an order
34 to show cause or notice of motion to modify a support judgment or order or to fix
35 a payment schedule on arrearages accruing under a support judgment or order or
36 to obtain a court finding of compliance with a judgment or order for support.

37 (k) The request for judicial review of the district attorney's decision shall state
38 the grounds for which review is requested and judicial review shall be limited to
39 those stated grounds. The court shall hold an evidentiary hearing within 20
40 calendar days of the filing of the request for review. Judicial review of the district
41 attorney's decision shall be limited to a determination of each of the following
42 issues:

1 (1) Whether there is a support judgment, order, or payment schedule on
2 arrearages or reimbursement.

3 (2) Whether the petitioner is the obligor covered by the support judgment or
4 order.

5 (3) Whether the support obligor is or is not in compliance with judgment or
6 order of support.

7 (4) The extent to which the needs of the obligor, taking into account the
8 obligor's payment history and the current circumstances of both the obligor and
9 the obligee, warrant a conditional release as described in this subdivision.

10 The request for judicial review shall be served by the applicant upon the district
11 attorney who submitted the applicant's name on the certified list within seven
12 calendar days of the filing of the petition. The court has the authority to uphold
13 the action, unconditionally release the license, or conditionally release the license.

14 If the judicial review results in a finding by the court that the obligor is in
15 compliance with the judgment or order for support, the district attorney shall
16 immediately send a release in accordance with subdivision (h) to the appropriate
17 board and the applicant. If the judicial review results in a finding by the court that
18 the needs of the obligor warrant a conditional release, the court shall make
19 findings of fact stating the basis for the release and the payment necessary to
20 satisfy the unrestricted issuance or renewal of the license without prejudice to a
21 later judicial determination of the amount of support arrearages, including interest,
22 and shall specify payment terms, compliance with which are necessary to allow
23 the release to remain in effect.

24 (l) The State Department of Social Services shall prescribe release forms for use
25 by district attorneys. When the obligor is in compliance, the district attorney shall
26 mail to the applicant and the appropriate board a release stating that the applicant
27 is in compliance. The receipt of a release shall serve to notify the applicant and
28 the board that, for the purposes of this section, the applicant is in compliance with
29 the judgment or order for support.

30 If the district attorney determines subsequent to the issuance of a release that
31 the applicant is once again not in compliance with a judgment or order for
32 support, or with the terms of repayment as described in this subdivision, the
33 district attorney may notify the board, the obligor, and the State Department of
34 Social Services in a format prescribed by the State Department of Social Services
35 that the obligor is not in compliance.

36 The State Department of Social Services may, when it is economically feasible
37 for the department and the boards to develop an automated process for
38 complying with this subdivision, notify the boards in a manner prescribed by the
39 department, that the obligor is once again not in compliance. Upon receipt of this
40 notice, the board shall immediately notify the obligor on a form prescribed by the
41 department that the obligor's license will be suspended on a specific date, and
42 this date shall be no longer than 30 days from the date the form is mailed. The
43 obligor shall be further notified that the license will remain suspended until such

1 time a new release is issued in accordance with subdivision (h). Nothing in this
 2 section shall be deemed to limit the obligor from seeking judicial review of
 3 suspension pursuant to the procedures specified in this subdivision.

4 (m) The State Department of Social Services may enter into interagency
 5 agreements with the state agencies that have responsibility for the administration
 6 of boards necessary to implement this section, to the extent that it is cost-effective
 7 to implement this section. These agreements shall provide for the receipt by the
 8 other state agencies and boards of federal funds to cover that portion of costs
 9 allowable in federal law and regulation and incurred by the state agencies and
 10 boards in implementing this section. Notwithstanding any other provision of law,
 11 revenue generated by a board or state agency shall be used to fund the
 12 nonfederal share of costs incurred pursuant to this section. These agreements
 13 shall provide that boards shall reimburse the State Department of Social Services
 14 for the nonfederal share of costs incurred by the department in implementing this
 15 section. The boards shall reimburse the State Department of Social Services for
 16 the nonfederal share of costs incurred pursuant to this section from moneys
 17 collected from applicants.

18 (n) Notwithstanding any other provision of law, in order for the boards subject
 19 to this section to be reimbursed for the costs incurred in administering its
 20 provisions, the boards may, with the approval of the appropriate department
 21 director, levy on all licensees and applicants a surcharge on any fee or fees
 22 collected pursuant to law, or, alternatively, with the approval of the appropriate
 23 department director, levy on the applicants or licensees named on a certified list or
 24 supplemental list, a special fee.

25 (o) The process described in subdivision (h) shall constitute the sole
 26 administrative remedy for contesting the issuance of a temporary license or the
 27 denial or suspension of a license under this section. The procedures specified in
 28 the administrative adjudication provisions of the Administrative Procedure Act
 29 (Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with
 30 Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) shall
 31 not apply to the denial, suspension, or failure to issue or renew a license or the
 32 issuance of a temporary license pursuant to this section.

33 (p) In furtherance of the public policy of increasing child support enforcement
 34 and collections, on or before November 1, 1995, the State Department of Social
 35 Services shall make a report to the Legislature and the Governor based on data
 36 collected by the boards and the district attorneys in a format prescribed by the
 37 State Department of Social Services. The report shall contain all of the following:

38 (1) The number of delinquent obligors certified by district attorneys under this
 39 section.

40 (2) The number of support obligors who also were applicants or licensees
 41 subject to this section.

42 (3) The number of new licenses and renewals that were delayed, temporary
 43 licenses issued, and licenses suspended subject to this section and the number of

1 new licenses and renewals granted and licenses reinstated following board
2 receipt of releases as provided by subdivision (h) by May 1, 1995.

3 (4) The costs incurred in the implementation and enforcement of this section.

4 (q) Any board receiving an inquiry as to the licensed status of an applicant who
5 has had a license denied or suspended under this section or has been granted a
6 temporary license under this section shall respond only that the license was
7 denied or suspended or the temporary license was issued pursuant to this section.
8 Information collected pursuant to this section shall be subject to the Information
9 Practices Act (Section 1798.76 of the Civil Code).

10 (r) Any rules and regulations issued pursuant to this section may be adopted as
11 emergency regulations in accordance with the Administrative Procedure Act
12 (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2
13 of the Government Code). The adoption of these regulations shall be deemed an
14 emergency and necessary for the immediate preservation of the public peace,
15 health, and safety, or general welfare. The regulations shall become effective
16 immediately upon filing with the Secretary of State.

17 (s) The State Department of Social Services and boards, as appropriate, shall
18 adopt regulations necessary to implement this section.

19 (t) The Judicial Council shall develop the forms necessary to implement this
20 section, except as provided in subdivisions (f) and (l).

21 (u) The release or other use of information received by a board pursuant to this
22 section, except as authorized by this section, is punishable as a misdemeanor.

23 (v) If any provision of this section or the application thereof to any person or
24 circumstance is held invalid, that invalidity shall not affect other provisions or
25 applications of this section which can be given effect without the invalid
26 provision or application, and to this end the provisions of this section are
27 severable.

28 (w) All rights to administrative and judicial review afforded by this section to an
29 applicant shall also be afforded to a licensee.

30 **Comment.** Section 11350.6, as amended by 1994 Cal. Stat. ch. 906, is amended to correct
31 the reference to the Administrative Procedure Act.

32 OPERATIVE DATE

33 **Uncodified. Operative date**

34 SEC. ____ (a) Except as provided in subdivision (b), this act becomes operative
35 on July 1, 1997.

36 (b) If Section 443.37 of the Health and Safety Code is repealed before the
37 operative date of this act, then Section [] of this act, amending Section 443.37 of
38 the Health and Safety Code, shall not become operative.