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Memorandum 91-74

Subject: Study N-106 - Administrative Adjudication: Impartiality of Decision Maker (Staff Draft)

At the July 1991 meeting the Commission reviewed Professor Asimow's background study on impartiality of the decision maker (bias, ex parte communications, separation of functions, exclusivity of record, command influence). The Commission made policy decisions on the issues raised in the study.

Attached to this memorandum is a staff draft to implement the decisions. The draft is preceded by a short description of the changes proposed in existing law. Staff notes following individual sections of the draft statute raise a few issues concerning policy and drafting.

Our objective is to approve draft language on the impartiality of the decision maker for incorporation in the administrative adjudication statute.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Staff Draft

TENTATIVE RECOMMENDATION
relating to
ADMINISTRATIVE ADJUDICATION:

Impartiality of Decision Maker[1]

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

EXCLUSIVITY OF RECORD

Existing California case law requires that the decision be based on the factual record produced at the hearing.[2] Both the federal[3] administrative procedure and the model state[4] administrative procedure statutes codify this aspect of due process, and the proposed legislation does the same for California.

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1. This discussion is drawn largely from Asimow, Impartial Adjudicators: Bias, Ex Parte Contacts and Separation of Powers (January 1991), a background study prepared for use of the Law Revision Commission in its study of administrative adjudication.

2. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow, op. cit., at 4-5.

3. 5 U.S.C. § 556(e).

4. 1981 Model State APA § 4-215(d).

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

EX PARTE COMMUNICATIONS

While existing California law is clear that factual inputs to the decision maker must be on the record, it is not clear whether ex parte contacts concerning law or policy are permissible.[5] Existing Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of Administrative Hearings, but is silent as to the majority of administrative adjudications in California that do not fall under it. In many state agencies ex parte contacts are tolerated or encouraged.[6]

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

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

(2) The decision maker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decision maker is from personnel within the agency that is a party to the proceeding.

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5. See Asimow, op. cit., at 8-9.

6. See Asimow, op. cit., at 10-11.

However, the decision maker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.[7]

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

BIAS

The existing California Administrative Procedure Act makes clear that a decision maker may be disqualified if unable to "accord a fair and impartial hearing or consideration".[8] The proposed law would recodify this standard in the more concrete traditional terms of "bias, prejudice, interest".[9]

Case law apart from the Administrative Procedure Act makes clear that an appearance of bias is not a sufficient ground for disqualification; there must be a showing of actual bias.[10] This requirement makes bias difficult to prove, even though in a particular case it may seem apparent. To address this problem, the proposed law would add as grounds for disqualification, that "a person aware of the facts might reasonably entertain a doubt that the decision maker would be able to be impartial". This is the standard applicable

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7. See discussion of "Separation of Functions", below.

8. Gov't Code § 11512(c).

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

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

to judges in civil proceedings in California[11], and it has proved workable in practice.[12] It fosters the concept that administrative adjudication should be fair in appearance as well as in fact.

Notwithstanding actual bias, existing law adopts a "rule of necessity" that if disqualification of the decision maker would prevent the agency from acting (e.g., causing lack of a quorum), the decision maker may nonetheless participate. The proposed law addresses this problem with a provision drawn from the Model State Administrative Procedure Act that disqualifies the decision maker and provides for substitution of another person by the appointing authority.[13]

SEPARATION OF FUNCTIONS

Existing California statute and case law on separation of functions is unclear.[14] To avoid prejudgment, the decision maker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. Nor should a person assisting or advising the decisionmaker have served in that capacity. The proposed law codifies these principles.

As a practical matter, the separation of functions requirement could cripple an agency in an individualized ratemaking case, which may continue for years while agency personnel transfer from one type of function to another within the agency. To address this problem, the proposed law allows violation of the separation of functions principle where the contrary function occurred more than one year before the decision making.

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11. Code Civ. Proc. § 170.1(a)(6)(C).

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

13. 1981 Model State APA § 4-202(e)-(f).

14. See discussion in Asimow, op. cit., at 22-23.

COMMAND INFLUENCE

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

The command influence prohibition may pose difficulties for a small agency that has insufficient personnel to avoid using a subordinate as a hearing officer. The proposed law makes clear that in such a case the agency head may go outside the agency, for example to the Office of Administrative Hearings, for an alternate hearing officer.

IMPARTIALITY OF DECISION MAKER

Staff Draft

DEFINITIONS

§ 610.320. Decision maker NEW

610.320. "Decision maker", in an adjudicative proceeding, means presiding officer or reviewing authority.

Comment. Section 610.320 is intended for drafting convenience. See also Section 610.680 ("reviewing authority" defined).

Staff Note. The provisions relating to impartiality of the decision maker--bias, separation of functions, exclusivity of record, and ex parte communications--presumptively apply both to the presiding officer and to any administrative reviewing authority. If for some reason we wish to limit a particular provision to the presiding officer, we will need to do that expressly.

§ 642.240. Grounds for disqualification of decision maker NEW

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

(b) It is not grounds for disqualification that the decision maker:

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

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

(3) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the decision maker believes that the prior involvement was so well known as to raise a reasonable doubt in the public mind as to the decision maker's capacity to be impartial.

(c) An agency may by regulation provide for peremptory challenge of the decision maker.

Comment. Section 642.240 supersedes subdivision (c) of former Section 11512. Section 642.240 applies whether the decision maker serves alone or with others. Other causes of disqualification provided in this part include receipt of ex parte communications. Section 642.850 (disqualification of decision maker). For separation of functions restrictions, see Section 642.270.

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

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges).

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

§ 642.250. Voluntary disqualification

642.250. (a) The decision maker shall voluntarily disqualify and withdraw from a case in which there are grounds for disqualification.

(b) The parties may waive voluntary disqualification by a writing that recites the basis for disqualification. The waiver is effective when signed by all parties and their attorneys and filed in the record.

Comment. Section 642.250 is drawn from the first sentence of subdivision (c) of former Section 11512 and from Code of Civil Procedure Section 170.3(b)(1).

§ 642.260. Procedure for disqualification of decision maker NEW

642.260. (a) A party may request disqualification of the decision maker by filing an affidavit promptly after receipt of notice of the identity of the decision maker or promptly on discovering facts establishing grounds for disqualification, whichever is later. The affidavit shall state with particularity the grounds upon which it is claimed that the decision maker is disqualified.

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

(c) The determination of the disqualification request shall state facts and reasons for the determination. The determination is subject to administrative and judicial review at the same time and manner and to the same extent as other determinations of the decision maker in the proceeding.

Comment. Section 642.260 supersedes subdivision (c) of former Section 11512. It is drawn from 1981 Model State APA § 4-202 (c)-(d).

§ 642.270. Separation of functions

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

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

(c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as decision maker or assist or advise the decision maker in the same proceeding, unless a party demonstrates other statutory grounds for disqualification.

(d) A person may serve as decision maker at successive stages of the same proceeding, unless a party demonstrates other statutory grounds for disqualification.

(e) A person may serve as decision maker or assist or advise the decision maker in an individualized ratemaking proceeding notwithstanding the applicability of a limitation in this section if the person's service, advice, or assistance occurs more than one year after the time of the activity that would otherwise make the limitation in this section applicable.

(f) Nothing in this section limits the authority of an agency by regulation to adopt limitations in addition to or greater than the limitations in this section.

(g) Nothing in this section limits the authority of an agency to request assignment of an administrative law judge under Section 642.230 (voluntary temporary assignment of hearing personnel) as decision maker whether or not that appears reasonably necessary as a result of application of the limitations in this section.

Comment. Section 642.270 is drawn from 1981 Model State APA § 4-214. It should be noted that the separation of functions required by this section applies only in formal proceedings under this chapter. In informal adjudications under Chapter [to be drafted] the separation of functions requirement does not apply.

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

While this section precludes adversaries from assisting or advising decision makers, it does not preclude decisionmakers from assisting or advising adversaries. Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed.

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

Subdivisions (c) and (d), dealing with the extent to which a person may serve as decision maker at different stages of the same proceeding, should be distinguished from Section 642.820, which prohibits certain ex parte communications, including those between a decision maker and another person who has served as decision maker at a previous stage of the same proceeding. The policy issues in Section 642.820, regarding ex parte communication between two persons differ from the policy issues in subdivisions (c) and (d) regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications. Section 642.850. See also Section 642.240 (grounds for disqualification of decision maker).

Subdivision (e) recognizes that the length of some cases, particularly those involving individualized ratemaking, may as a practical matter make it impossible for an agency to adhere to the separation of functions requirements of this section, given limited staffing and personnel. Subdivision (e) excuses compliance with the separation of functions requirements in such a case if more than one year has elapsed between the contrary functions.

Staff Note. The Commission decided that the separation of functions prohibitions should not apply "in lengthy individualized ratemaking cases". The staff has defined "lengthy" in subdivision (e) as being at least a year between contrary functions in the same case.

When the Commission drafts the informal adjudication procedure, it will review the issue of whether the agency may elect to use the informal procedure in all cases or whether a formal procedure will be required in some cases.

§ 642.280. Substitution of decision maker NEW

642.280. (a) If a substitute is required for a decision maker who is disqualified or becomes unavailable for any other reason, the substitute shall be appointed by:

(1) The governor, if the disqualified or unavailable decision maker is an elected official.

(2) The appointing authority, if the disqualified or unavailable decision maker is an appointed official.

(b) An action taken by a duly-appointed substitute for a disqualified or unavailable decision maker is as effective as if taken by an original decision maker.

Comment. Section 642.280 is drawn from 1981 Model State APA § 4-202(e)-(f).

§ 642.720. Form and contents of decision NEW

642.720. (a)(1) ... The statement explaining the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include factual knowledge of the decision maker and supplements to the record that are made after the hearing, provided that the evidence is made a part of the record and that all interested persons are given an opportunity to comment on it.

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

CHAPTER 8. EX PARTE COMMUNICATIONS

§ 642.810. Scope of chapter NEW

642.810. Nothing in this chapter limits the authority of an agency by regulation to impose greater restrictions on ex parte communications than are provided in this chapter.

Comment. Section 642.810 makes clear that ex parte communications restrictions provided in this chapter are a minimum, and an agency may adopt more stringent requirements if appropriate to its hearings.

§ 642.820. Ex parte communications prohibited NEW

642.820. (a) Except as provided in section, while the proceeding is pending there shall be no communication, direct or indirect, upon the merits of a contested matter between the following persons without notice and opportunity for all parties to participate in the communication:

(1) Between the decision maker and any party, including an employee of the agency that filed the accusation.

(2) Between the decision maker and any interested person outside the agency.

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

(1) The communication is for the purpose of advice and assistance to the decision maker by an employee of the agency that filed the accusation, provided that the assistance or advice does not violate Section 642.270 (separation of functions).

(2) The proceeding involves individualized ratemaking or an initial licensing decision, provided that the communication is disclosed on the record and all parties have an opportunity to address the communication.

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

Comment. Subdivision (a) of Section 642.820 is drawn from subdivisions (a) and (b) of former Section 11513.5. See also 1981 Model State APA § 4-213(a), (c). Subdivision (a) applies to communications initiated by the decision maker as well as communications initiated by others.

Subdivision (a) is not intended to apply to communications made to or by a decision maker or staff assistant, regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service; such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

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

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

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

Staff Note. We have substituted the federal standard for prohibited contacts--"interested person outside the agency"--for the 1981 Model State APA standard--"person who has a direct or indirect interest in the outcome of the proceeding". The reference to an indirect interest is too ambiguous, and there is case law interpreting the federal standard, referred to in the Comment.

We have also deleted the prohibition on receiving ex parte communications from a person who presided at a previous stage of the proceeding. Professor Asimow's report points out that this provision precludes the agency head decision maker from communicating with the administrative law judge presiding officer--some agencies need to involve the neutral presiding officer because of the complexity of the cases.

We have qualified the provision of existing law that prohibits ex parte communications between a decision maker and employees of the accusatory agency. Professor Asimow criticizes this provision of existing law because it precludes an agency head from conferring with the agency head's own staff. That is because the provision in existing law is directed towards a presiding officer who is an OAH administrative law judge, and not to non-OAH proceedings. This points up one of the problems in trying to make a single administrative procedure statute apply to all proceedings.

The current draft, which precludes ex parte contacts only with a party or interested person would seem to take care of the problem raised by the Attorney General that the Attorney General conducting a prosecution for an accusing agency may need to consult with the agency

head in confidence concerning settlement matters. The Attorney General in this case is neither a party nor an interested person, so presumably the ex parte contact would be permitted.

At this point we do no know whether there are any statutory ex parte proceedings. If we do not find any in the course of this project, we will delete subdivision (b)(3).

§ 642.830. Prior ex parte communication

642.830. If, before serving as decision maker, a person receives a communication of a type that would be in violation of this chapter if received while serving as decision maker, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in Section 642.840.

Comment. Section 642.830 is drawn from former Section 11513.5(c). See also 1981 Model State APA § 4-213(d).

Staff Note. This section is problematical. Although it appears sound in theory, several agencies have noted practical difficulties. While it may work all right in existing law where it is limited to administrative law judges employed by the Office of Administrative Hearings, it would not work well where the decision maker is the agency head or other agency personnel.

To begin with, there may be numerous informal oral and written contacts with persons before the matter ever reaches the level of a formal hearing. Must elaborate records be kept of every contact concerning a matter, in case it eventually goes to a hearing; and how will all the information be retrieved from files? Second, even where it is clear a matter is headed for a formal hearing, a closed off-the-record settlement conference may be very important. This section would destroy that possibility.

For these reasons the staff recommends this section be deleted.

§ 642.840. Disclosure of ex parte communication received

642.840. (a) A decision maker who receives a communication in violation of this chapter shall place on the record of the pending matter, and shall advise all parties that these matters have been placed on the record, all of the following:

(1) Any written communication received and any written response to the communication.

(2) A memorandum stating the substance of any oral communication received, any response made, and the identity of each person from which the decision maker received the communication.

(b) A party desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within ten (10) days after notice of the communication.

Comment. Section 642.840 is drawn from former Section 11513.5(d). See also 1981 Model State APA § 4-213(e). Section 642.840 does not preclude ex parte communications to assistants if disclosed on the record, subject to separation of functions limitations. See Section 642.270. Agency rules may go further and prohibit the participation of a staff adviser who has received ex parte contacts. Section 642.810 (scope of chapter).

§ 642.850. Disqualification of decision maker

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

Comment. Section 642.850 is drawn from former Section 11513.5(e). See also 1981 Model State APA § 4-213(f). It permits the disqualification of a decision maker if necessary to eliminate the effect of an ex parte communication. In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor decision maker, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review.

Issuance of a protective order under this section is permissive, not mandatory, and is therefore within the discretion of a decision maker who has knowledge of the improper communication.

§ 11512. Presiding officer

11512. ... (c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case.

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Comment. The first sentence of subdivision (c) of former Section 11512 is superseded by Section 642.250 (voluntary disqualification). The second, third, and fourth sentences are superseded by Section 642.260 (procedure for disqualification of decision maker). The fifth sentence is not continued: If disqualification would prevent the existence of a quorum qualified to act, a substitute decision maker may be appointed under Section 642.280.

§ 11513.5. Ex parte communications

11513.5. (a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the accusation, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the accusation, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as administrative law judge, without notice and opportunity for all parties to participate in the communication.

(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

Comment. Subdivisions (a) and (b) of former Section 11513.5 are continued in Section 642.820 (ex parte communications prohibited), omitting the limitation on communications with a person who presided at a previous stage of the proceeding. Subdivision (c) is continued in Section 642.830 (prior ex parte communication). Subdivision (d) is

continued in Section 642.840 (disclosure of ex parte communication received). Subdivision (e) is continued in Section 642.850 (disqualification of decision maker).