Memorandum 92-37

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

Attached Draft

Attached to this memorandum is a draft of the administrative adjudication statute. It is a combined draft of the various parts the Commission has worked on over the past year and a half. Dates on the sections indicate the last time the section was revised, either by staff or pursuant to Commission direction. The staff has done some reorganization and renumbering in the process of assembling a complete draft.

Staff notes following some of the provisions raise issues for Commission resolution or point out noteworthy aspects of the draft. We plan to begin review of the draft with the second half, commencing with Section 645.110 (discovery) at page 55, in order to cover provisions that may not have previously been considered in detail. After completing review of the second half, we will go back and pick up the first half. Due to reorganization of the draft, there is some relatively new material in the first half as well as in the second half.

The Uniformity and Accessibility Issue

A recurring theme in the staff notes in the draft is the problem of achieving a uniform administrative procedure statute applicable to all state agencies. This is the Commission's stated goal, but it became clear early on that this goal could not be achieved because of the variety of types of cases, case loads, time constraints, and other matters that affect the different administrative agencies. To solve this problem, the draft statute provides basic default rules that should be satisfactory for most agencies, and allows others (generally those that employ their own administrative law judges rather than using hearing personnel supplied by the Office of Administrative Hearings) to modify or eliminate the basic rules by regulation.

There are several problems with this approach:

(1) It imposes a cost on some agencies to promulgate regulations merely to maintain the status quo.

(2) It proliferates the number of sources people must consult when dealing with some agencies--basic Administrative Procedure Act, plus agency regulations, plus OAH regulations, plus special statutes--and makes the governing law less accessible since regulations are less accessible than statutes.

The Commission has asked for a catalog of the provisions of the draft that allow agencies to provide a different rule by regulation. These include:

Waiver of procedural rights (§ 612.170)
Declaratory decisions (§ 641.210)
All provisions relating to commencement of the proceeding, including applications for agency action, pleadings and amendment of pleadings, and time and place of hearing (§ 642.110)
Disqualification of presiding officer (§ 643.230)
Separation of functions (§ 643.310)
All aspects of discovery and enforcement of discovery (§ 645.110)
Prehearing conferences (§ 646.110)
Conference adjudicative hearings (§ 647.110)
Alternative dispute resolution (§ 647.210)
All aspects of conduct of the hearing, including consolidation and severance, default, open hearings, electronic communications, report of proceedings, testimony and witnesses, evidence, and enforcement of orders and sanctions (§ 648.110)
Note: Rules on interpreters and ex parte communications should be revised to avoid the possibility of elimination by agency regulation.
Various aspects of issuance of decision, including time for issuance (§§ 649.110-.150) and correction of mistakes (§ 649.170)
Various aspects of administrative review, including availability (§ 649.210) and time (649.220-.240).

What Remains To Be Done?

The major task remaining to be done on administrative adjudication is to review the special statutes governing the administrative procedure of every state agency for possible amendment or repeal. This is an overwhelming task, and will require far more work than the effort expended so far to develop a basic administrative adjudication statute. Every statute must be located and a determination made

whether it needlessly varies from the basic act or whether there is a good reason for the variance. Often special rules are enacted by the Legislature purposely to curb an abuse. It will not be easy to tell such provisions apart.

As we review the statutes governing each agency, we should also consider any request from the agency that it be exempt from the basic act in favor of its own statute. The Commission has deferred this decision until it has completed work on the general statute.

We could expedite this task by sending a copy of the completed draft to all affected agencies. They would be informed that the draft is designed to allow flexibility for each agency to function efficiently. Any agency that has made an exemption request would be asked to reconsider the request in light of the completed draft; if the agency renews its exemption request it should give specifics concerning the problem areas in the completed draft.

Schedule for Completion of Work

Assuming we can have a finished draft of the administrative adjudication basic statute ready to go for September, we would need to give the agencies several months for review and comment. During this time the staff could begin the process of compiling and reviewing all the special agency statutes. This will be quite time-consuming, particularly with reduced staff resources. (As of the date of writing this memorandum, it is not clear what the outcome of the budget process will be for the 1992-93 fiscal year. We expect to receive about a 15% reduction from the 1991-92 fiscal year, which is already very tight.)

The Commission has indicated an interest in packaging the administrative adjudication statute with a revision of the judicial review statute as a unit for the Legislature. Professor Asimow's background study on judicial review will not be ready until December 1992. If we begin work on it immediately, we should be able to complete the judicial review portion of the project during 1993, at the same time we are working on special agency adjudication statutes. We would expect to have legislation on the package ready for introduction

in the 1994 legislative session. We have built into the current draft an assumption of legislation for the 1994 session, with a one year deferred operative date, the statute to be effective January 1, 1996.

If the Commission wanted to push the administrative adjudication legislation along without waiting for the judicial review material, we could aim for the 1993 session. We would need to circulate our tentative recommendation this fall to practitioners and interested entities and organizations as well as to state agencies. We would need to pull staff resources off other projects such as the Family Code to digest the mass of special adjudication statutes.

The staff's judgment is that the 1994 schedule makes more sense than the 1993 schedule. The limitations on staff resources are real, and completing the Family Code effort is clearly the highest priority for staff resources. In addition, the adjudication/judicial review combined package makes political sense. We expect there to be tradeoffs for all sides that will make the whole more palatable than either part alone. The additional time may also take some of the budgetary pressure off the state agencies; in our view this is the biggest obstacle at present to enactment of the Commission's proposal. The combined project also makes good legal sense, since the adjudication provisions cannot be properly evaluated without the corresponding judicial review provisions. And the timing works well; both projects would be completed simultaneously in time for the 1994 session.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

CHAPTER 2. APPLICATION OF DIVISION

CHAPTER 3. PROCEDURAL PROVISIONS

CHAPTER 4. CONVERSION OF PROCEEDING

CHAPTER 5. OFFICE OF ADMINISTRATIVE HEARINGS

****

PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

CHAPTER 2. COMMENCEMENT OF PROCEEDING

CHAPTER 3. PRESIDING OFFICER

CHAPTER 4. INTERVENTION

CHAPTER 5. DISCOVERY

CHAPTER 7. PREHEARING AND SETTLEMENT CONFERENCES

CHAPTER 7. HEARING ALTERNATIVES

CHAPTER 8. CONDUCT OF HEARING

ADMINISTRATIVE PROCEDURE ACT

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

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

Article 1. Short Title

§ 600. Short title 4/27/90

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

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

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a regulation to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

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

Staff Note. *This section is drafted in a complex way because we anticipate that the new administrative procedure act will be drafted and enacted in separate phases, beginning with administrative adjudication and judicial review.*

Article 2. Definitions

§ 610.010. Application of definitions 4/27/90

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

Comment. Section 610.010 restates the introductory portion of former Section 11500.

§ 610.190. Agency 4/27/90

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

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

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

§ 610.250. Agency head 11/30/90

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

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

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.220 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member 11/30/90

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

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

§ 610.310. Decision 4/11/91

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

(b) Nothing in this section limits the precedential effect of a decision.

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

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

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain utility company or a certain licensee, are decisions subject to the adjudication provisions of this statute. Cf. Federal APA § 551(4), defining all rate making as rulemaking. On the other hand, rate making and licensing actions of

general application, addressed to all members of a described class of providers or licensees, are regulations under this statute, subject to its rulemaking provisions. See the Comment to Section 610.660.

§ 610.350. Initial pleading 4/1/92

610.350. "Initial pleading" commencing an adjudicative proceeding includes an accusation, statement of issues, and order instituting investigation. The term also includes an amended or supplemental initial pleading as the context requires.

Comment. Section 610.350 supersedes former Section 11504.5 and portions of the first sentences of former Sections 11503 and 11504.

§ 610.360. License 6/1/92

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

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

§ 610.370. Local agency 4/27/90

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

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

§ 610.460. Party 6/14/91

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

Comment. Section 610.460 restates former Section 11500(b); see also 1981 Model State APA § 1-102(6). Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. This section is not intended to address the question whether a person is entitled to judicial review. This division deals with standing to seek judicial review in Section [to be drafted]. "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

§ 610.520. Person 4/27/90

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

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

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

§ 610.660. Regulation 4/11/91

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

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

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

Staff Note. We have not reviewed the substance of the regulation definition in Section 11342 for now, since we are dealing with regulations only indirectly. When we do review it, we will replace this cross reference with a full definition.

§ 610.670. Respondent 2/24/92

610.670. "Respondent" means a person named as a party in an adjudicative proceeding whose legal right, duty, privilege, immunity, or other legal interest is determined in the proceeding.

Comment. Section 610.670 supersedes former Section 11500(c).

§ 610.672. Responsive pleading 4/1/92

610.672. "Responsive pleading" to an initial pleading includes a notice of defense. The term also includes an amended or supplemental responsive pleading as the context requires.

Comment. Section 610.672 supersedes a portion of former Section 11506.

§ 610.680. Reviewing authority 11/30/90

610.680. "Reviewing authority" means the agency head and includes the person or body to which the agency head has delegated its review authority pursuant to Section 649.220 (initiation of review).

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

§ 610.770. State 4/27/90

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

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

Staff Note. This definition will be deleted in reliance on Section 18 (defining "state") if it is not further refined or elaborated.

Article 3. Transitional Provisions

§ 610.910. Operative date 6/1/92

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

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

Staff Note. This provision assumes a combined administrative adjudication-judicial review bill introduced and enacted at the 1994 legislative session, with the operative date deferred from January 1, 1995, to January 1, 1996.

§ 610.920. Pending proceedings 6/1/92

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

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

Staff Note. Probably this transitional phase will be relatively short, so there will be little confusion. We could apply a rule that the new statute governs to the extent practicable, also without too much confusion.

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

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

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

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

CHAPTER 2. APPLICATION OF DIVISION

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

612.110. Except as otherwise expressly provided by statute:

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

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

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

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

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

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

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

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

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

Staff Note. The exemptions for the judicial branch and the Governor's office have not yet been reviewed to determine whether they are appropriately extended beyond the courts and the Governor for purposes of administrative rulemaking.

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

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

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

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

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

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

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

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

§ 612.130. Application of division notwithstanding exemption 4/11/91

612.130. An exemption of an agency or an agency's functions from application of this division is subject to any other general statute that makes an agency action of a particular type subject to this division.

Comment. Section 612.130 is new. Even though some agencies and agency functions may be declared exempt from application of the Administrative Procedure Act, the exemption is not unqualified. If a general statute governs an agency action and the Administrative Procedure Act is applicable under the statute, the agency's action is subject to the Administrative Procedure Act notwithstanding the apparent exemption of the agency or its functions. Thus, such agency actions as *[list to be compiled, e.g., discharge of employees]* are subject to the Administrative Procedure Act notwithstanding a general exemption of the agency or its functions from the act.

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

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

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

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

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

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

Staff Note. This section puts a premium on ferreting out and eliminating contrary statutes intended to be overruled by the general statute.

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

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

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

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

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

Staff Note. This looks like a useful provision to include in the California administrative procedure act.

§ 612.170. Waiver of provision 6/1/92

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

Comment. Section 612.170 is drawn from 1981 Model State APA § 1-105. It embodies the standard notion of waiver. A right under this division is subject to waiver in the same way that a right under any other civil statute is normally subject to waiver.

CHAPTER 3. PROCEDURAL PROVISIONS

Article 1. Miscellaneous Provisions

§ 613.110. Voting by agency member 5/1/92

613.110. Agency members qualified to vote on a matter may vote by mail.

Comment. Section 613.110 restates former Section 11526. See also Section 610.280 ("agency member" defined).

Staff Note. This provision of existing law apparently is intended to add flexibility, but it may inadvertently limit flexibility by failing to mention telecommunication. This provision is most likely made unnecessary by general Government Code provisions on agency action. If staff research shows this to be the case, we will eliminate this section.

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

613.120. In a proceeding under this division an agency, agency member, secretary of an agency, hearing reporter, or presiding officer has power to administer oaths and affirmations and to certify to official acts.

Comment. Section 613.120 restates former Section 11528.

Article 2. Notice

§ 613.210. Service 6/1/92

613.210. (a) If this division requires that an order or other writing be served on or notice given to a person, the writing or notice shall be delivered personally or sent by mail to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.

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

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

Staff Note. We have not incorporated in this statute general provisions of the Code of Civil Procedure relating to notice and other procedural details. This leaves unspecified miscellaneous matters such as proof of service.

§ 613.220. Mail 6/1/92

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

Comment. Section 613.220 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail).

Staff Note. *Failure of a person to receive notice of a hearing sent by first class mail might be treated as the Unemployment Insurance Appeals Board does: The allegation is usually taken as prima facie evidence of good cause for failure to attend the hearing, in which case reopening is granted.*

§ 613.230. Extension of time 6/1/92

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

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

Staff Note. We received correspondence from Stephen Kruger of San Pedro noting a defect in Vehicle Code §§ 14105 and 14105.5. These provisions allow DMV to specify a time between 4 and 15 days for a decision to become effective and an appeal to be taken. Mr. Kruger notes that DMV invariably specifies 4 days. "The hardship is compounded when a notice is mailed on a Wednesday, Thursday or Friday. Assuming two days for delivery, the motorist has no time in which to react. The weekend eats up the time, because the DMV is not subject to a 5-day hold for mailing purposes." Mr. Kruger suggests a flat 15 day period would be better and unobjectionable. An alternative might be to broaden the 5-day extension to apply outside the Administrative Procedure Act. The staff will make a proposal on this in the context of considering conforming revisions.

Article 3. Representation of Parties

§ 613.310. Self representation 5/1/92

613.310. A party may represent itself without legal counsel.

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

§ 613.320. Representation by attorney 5/21/92

613.320. A party may be represented by an attorney at the party's own expense. A party is not entitled to appointment of an attorney to represent the party at public expense.

Comment. Section 613.320 generalizes a provision of former Sections 11500(f)(3) and 11509.

§ 613.330. Lay representation 6/1/92

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

(b) An agency may adopt regulations that impose qualification and disciplinary standards for representation under this section.

Comment. Subdivision (a) of Section 613.330 recognizes the practice of some agencies to permit lay representation. See, e.g., Labor Code § 5700 (Workers Compensation Appeals Board); Unemp. Ins. Code § 1957 (Unemployment Insurance Appeals Board); 18 CCR § 5056 (State Board of Equalization).

Under subdivision (b) an agency may regulate such matters as standards of competency and character for lay representatives, standards of conduct (including confidentiality) and disciplinary control, and procedures to bar representatives guilty of violating the standards from future representation before the agency.

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

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

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

CHAPTER 4. CONVERSION OF PROCEEDING

§ 614.110. Conversion authorized 5/21/92

614.110. (a) Subject to any applicable regulation adopted under Section 614.150, at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

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

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

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

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

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

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

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

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

Within the limits of this section, an agency should be authorized to use those procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency that desirable flexibility. For example, an agency that wants to convert a formal adjudicative hearing into a conference hearing, or a conference hearing into a formal adjudicative hearing, may do so under this provision if the conversion is appropriate, in the public interest, adequate notice is given, and the rights of no party are substantially prejudiced.

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

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

§ 614.120. Presiding officer 5/1/92

614.120. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the officer or official shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

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

§ 614.130. Agency record 5/1/92

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

Comment. Section 614.130 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the Administrative Procedure Act.

§ 614.140. Procedure after conversion 6/1/92

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

(a) Give additional notice to parties or other persons necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

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

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

Comment. Section 614.140 is drawn from 1981 Model State APA § 1-107(e).

§ 614.150. Agency regulations 5/21/92

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

Comment. Section 614.150 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

CHAPTER 5. OFFICE OF ADMINISTRATIVE HEARINGS

§ 615.110. Definitions 4/11/91

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

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

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

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

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

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

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

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

Comment. Section 615.120 restates former Section 11370.2.

§ 615.130. Administrative law judges 10/31/91

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

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

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

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

§ 615.140. Hearing personnel 11/30/90

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Staff Note. Conforming changes will be needed in other statutes that now require hearings under the Administrative Procedure Act: they will be revised to require hearings by OAH personnel.

§ 615.160. Regulations 6/1/92

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

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

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

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

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

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

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

§ 615.170. Cost of operation 11/30/90

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

Comment. Section 615.170 restates former Section 11370.4.

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

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

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

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

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

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

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

****

PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

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

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

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

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

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

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

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

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

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

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

Staff Note. Subdivision (d) is added, drawn from existing Government Code Section 11500(f).

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

The Commission deferred decision on the issue of extending this part to all state agency actions that affect individual rights, whether or not a hearing is required by another statute or the constitution. The concept is that a very summary procedure would be used for these informal decisions. The 1981 Model State APA provides a "summary adjudicative proceeding". Under this procedure each party is informed of the agency's view of the matter and given a brief written statement of decision; administrative review is available on short notice, involving an opportunity for each party to explain its views.

The advantage of this type of provision is that it regularizes the procedure for the myriad of small agency decisions that do not require compliance with due process standards. The disadvantage is that it imposes requirements on agencies that could substantially increase their operational costs. In the staff's opinion the disadvantages far outweigh the advantages; the staff would reaffirm the Commission's initial decision to limit the scope of the Administrative Procedure Act.

§ 641.120. When adjudicative proceeding not required 2/24/92

641.120. An agency need not conduct a proceeding under this part as the process for formulating and issuing a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

Comment. Section 641.120 is drawn from 1981 Model State APA § 4-101(a). The provision lists the situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court. Likewise, an agency may issue an initial pleading under this part without first conducting a proceeding to decide whether to issue the pleading. See, e.g., Sections 642.210 (initiation by agency) and 610.350 ("initial pleading" defined).

§ 641.130. Modification or inapplicability of statute by regulation 6/1/92

641.130. (a) Except as otherwise provided in this section, if a provision of this part authorizes an agency to modify this part or make this part inapplicable by regulation, the agency may, to that extent, adopt a regulation pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, that modifies this part or makes this part inapplicable, and the regulation so adopted, and not this part, governs the matter.

(b) A provision described in subdivision (a) does not apply to an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, unless the provision states expressly that this part may be modified or made inapplicable by regulation in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(c) A provision described in subdivision (a) is subject to an express statute that governs the matter.

(d) Nothing in this section limits the authority of an agency to adopt implementing regulations consistent with a provision of this part to the extent directed or permitted by this part.

Comment. Section 641.130 recognizes that a number of the provisions of this part may be modified or made inapplicable by an agency to suit the circumstances of the particular type of adjudication administered by it. The modification or inapplicability may occur only by regulation duly adopted and promulgated under the Administrative Procedure Act. The modification may alter, or make inapplicable to the agency's adjudicative proceedings, the particular provision as to which modification or inapplicability is permitted.

In the interest of uniformity of procedure, the opportunity for modification or inapplicability is restricted in cases being heard by Office of Administrative Hearings personnel. These cases historically have been subject to a uniform procedure under the former Administrative Procedure Act. A number of provisions expressly authorize modification or inapplicability in an Office of Administrative Hearings case. See, e.g., Sections 641.210 (regulations governing declaratory decision), 647.210 (regulations making alternative dispute resolution inapplicable), 648.310 (burden of proof).

Staff Note. We have added subdivision (d) by way of clarification. This raises the issue whether an agency may as a general rule adopt implementing regulations to govern procedural detail, or whether express authority should be required for this. On the one hand, it would be useful to have procedural details spelled out

in the agency's regulations. On the other hand, to the extent implementing regulations are authorized, tremendous variation will be built into the procedures of the different agencies, covering everything from the size of paper and type for pleadings an notices, to time limitations for oral argument. One possibility is to have model practice rules promulgated by the Office of Administrative Hearings.

The 1981 Model State APA requires each agency to "adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency". 1981 Model State APA § 2-104(2).

Article 2. Declaratory Decision

Comment. Article 2 (commencing with Section 641.210) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

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

§ 641.210. Regulations governing declaratory decision 4/23/92

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

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

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

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

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

(4) The disposition of an application.

(c) An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern declaratory decisions of the agency.

Comment. Section 641.210 is drawn from 1981 Model State APA § 2-103(b). This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. An agency may choose to preclude declaratory decisions altogether. Cf. Section 641.130 (modification or inapplicability of statute by regulation).

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

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

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

Staff Note. The Commission has discussed whether this and similar sections, which provide for model regulations by OAH that could be adopted by the agencies, should be revised to provide that the model regulations apply automatically unless the agency provides otherwise. This could save many agencies a lot of time, trouble, and expense of adopting regulations. But it would lead to a proliferation of sources of administrative procedure law--the APA, the agency's governing statute, the agency's regulations, and OAH model regulations.

The proliferation problem is mitigated by the possibility that an agency may publish in one pamphlet its governing laws and regulations. Some agencies would find it useful to do this, since it would inform people dealing with the agency and minimize the number of inquiries the agency would have to respond to. Other agencies would find compilation of its governing rules to be an unnecessary expense. These agencies would most likely resist a statutory requirement for such a publication.

§ 641.220. Declaratory decision permissive 4/23/92

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

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

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

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

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

Comment. Subdivisions (a) and (b) of Section 641.220 are drawn from 1981 Model State APA § 2-103(a); subdivision (c) is new. Unlike the model act, Section 641.220 is applicable only to cases involving an actual controversy, and issuance of a declaratory decision is discretionary with, rather than mandatory for, the agency.

This section prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be indispensable--that is a "necessary"--party, and who does not consent to the determination of the matter by a declaratory decision proceeding. Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicative proceeding to which the person would be entitled.

§ 641.230. Notice of application 5/21/92

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

Comment. Section 641.230 is drawn from 1981 Model State APA § 2-103(c).

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

641.240. (a) The provisions of this part other than this article do not apply to an agency proceeding for a declaratory decision except to the extent the agency so provides by regulation or order.

(b) Notwithstanding subdivision (a), a person who qualifies under Chapter 4 (commencing with Section 644.110) (intervention) and files a timely motion for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.

Comment. Section 641.240 is drawn from 1981 Model State APA § 2-103(d). It makes clear that persons must be allowed to intervene in a declaratory decision proceeding to the same extent they are allowed to intervene in other adjudicative proceedings under this part. It also makes clear that all the other specific procedural requirements for adjudications imposed by this part on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 641.210. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

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

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

A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions.

§ 641.250. Action of agency 4/23/92

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

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

(2) Set the matter for specified proceedings.

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

(4) Decline to issue a declaratory decision, stating the reasons for its action.

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

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

Comment. Subdivision (a) of Section 641.250 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail to the respondent's last known address. Sections 613.210 (service) and 613.220 (mail).

Under subdivision (a)(4), when the agency declines to issue a declaratory decision it must also include a statement of the precise grounds for the disposition. The statement of reasons will help to ensure that the agency carefully considers the propriety of the denial of a declaratory decision in the circumstances.

§ 641.260. Declaratory decision 3/12/92

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

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

Comment. Section 641.260 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

Note that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued.

Note also that the requirement in this section that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and other persons interested in the decision because of its possible precedential effect.

Article 3. Emergency Decision

Staff Note. Existing emergency procedures available to various agencies will be reviewed to determine whether the statutes provide useful authority that should be retained or whether they may be superseded by the general procedure without loss. Existing emergency procedures include Section 11529 (medical licensee), Bus. & Prof. Code § 6007(c) (attorney), Bus. & Prof. Code § 10086(a) (real estate licensee), Health & Saf. Code §§ 1550 (last ¶), 1569.50, 1596.886 (health facilities and day care centers), Pub. Util. Code § 1070.5 (trucking license), and Veh. Code § 11706 (DMV license suspension).

§ 641.310. Agency regulation required 5/21/92

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

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

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

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

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

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

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

Staff Note. The Commission has discussed, but not resolved, the issue whether, absent an express statute, an authorizing regulation is necessary for an agency to use the emergency procedure.

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

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

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

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

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

§ 641.330. Emergency decision procedure 5/1/92

641.330. (a) Before issuing an emergency decision under this article, the agency shall, if practicable, give the respondent notice and an opportunity to be heard.

(b) Notice and hearing under this section may be oral or written, including notice and hearing by telephone, facsimile transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as a conference adjudicative hearing.

Comment. Section 641.330 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For the conduct of a hearing in the manner of a conference adjudicative hearing, see Section 647.120 (procedure for conference adjudicative hearing).

The agency may by regulation prescribe the emergency notice and hearing procedure. See, e.g., State Bar Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective to the respondent than the provisions of this article. Section 641.310 (agency regulation required).

§ 641.340. Emergency decision 5/1/92

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

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

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

§ 641.350. Completion of proceedings 5/21/92

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

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

Comment. Section 641.350 is drawn from 1981 Model State APA § 5-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances.

§ 641.360. Agency record 5/01/92

641.360. (a) The agency record consists of any documents concerning the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(b) Unless otherwise required by regulation, statute, or federal or state constitution, the agency record need not constitute the exclusive basis for an emergency decision or for administrative or judicial review of an emergency decision under this article.

Comment. Section 641.360 is drawn from 1981 Model State APA § 4-501(f)-(g). Under this section the agency has flexibility to act on the basis of nonrecord information if necessary to cope with the emergency.

§ 641.370. Agency review 5/21/92

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

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

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

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

§ 641.380. Judicial review 5/21/92

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

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

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

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

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

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

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

If the emergency decision is issued orally, a person seeking judicial review of the emergency decision must set forth in the petition for review a summary or brief description of the agency action; see Section [to be drafted]. See also Sections [to be drafted] on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

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

CHAPTER 2. COMMENCEMENT OF PROCEEDING

Article 1. General Provisions

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

642.110. An agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable by regulation.

Comment. Section 642.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

Article 2. Initiation

§ 642.210. Initiation by agency 2/24/92

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

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

§ 642.220. Application for decision 2/24/92

642.220. (a) Any person may make an application for an agency decision.

(b) An application for an agency decision includes an application for the agency to initiate an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding.

Comment. Section 642.220 is drawn from 1981 Model State APA § 4-102(c). It ensures that a person who requests an agency to issue a decision, but does not expressly request the agency to conduct an adjudicative proceeding, will not on that account be regarded as having waived the right to any available adjudicative proceeding. See Section 648.130 (default). This assurance may be especially important to protect unrepresented parties. In addition, this provision clarifies that the term "application", as used in this part, may refer either to the request for the agency to issue a decision, or to the request for the agency to conduct an appropriate adjudicative proceeding, or both, as the context suggests. Similarly, the term "applicant" may be used with either or both meanings.

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

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

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

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

(c) A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding and, in the exercise of discretion, the agency has determined not to conduct an adjudicative proceeding.

(d) Resolution of the matter does not require the agency to issue a decision that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

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

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

Comment. Section 642.230 is drawn from 1981 Model State APA § 4-102(b). It requires an agency to initiate an adjudicative proceeding on application of any person for an agency decision within the scope of this part. If the agency determines that any of the exceptions provided in this section is applicable, the agency may deny the application without commencing an adjudicative proceeding, or the agency may, in its discretion under Section 642.210, commence an adjudicative proceeding although under no compulsion to do so. For the time within which an agency must act with respect to an application, see Section 642.240 (time for agency action). In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to initiate an adjudicative proceeding.

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

Subdivision (b) relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion to initiate or not to initiate an investigation, prosecution, adjudicative proceeding, or other proceeding before the agency or another agency or a court. For example, a person who submits a complaint about a licensee cannot compel the licensing agency to commence an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to commence or not to commence an adjudicative proceeding in each case. The agency's decision whether or not to commence an adjudicative proceeding need not itself be preceded by an adjudicative proceeding. Section 641.120 (when adjudicative proceeding not required).

Subdivision (c) does not and could not authorize an agency to deprive any person of procedural rights guaranteed by the constitution. If a statute purporting to authorize an agency to dispense with an adjudicative proceeding conflicts with constitutional guarantees, the agency may exercise its discretion under Section 642.210 to conduct an adjudicative proceeding even though the statute does not require it or, if the agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give appropriate relief.

Subdivision (d) closely relates to the definition of "decision" in Section 610.310 as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person". If the applicant does not request agency action that would fit within the definition of a "decision", the agency need not commence an adjudicative proceeding. For example, if a person asks the agency to commence an adjudicative proceeding for the purpose of adopting a rule, or of carrying out a housekeeping function that affects nobody's legal rights, the request would be subject to denial because the requested agency action would not be a "decision". Subdivision (d) provides that an agency need not commence an adjudicative proceeding unless the applicant's legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested decision. Interpretation of these terms, ultimately a matter for the courts, will clarify the range of situations in which this part entitles a person to require an agency to initiate an adjudicative proceeding. The availability of various types of

adjudicative proceedings may persuade courts to develop a more hospitable approach toward applicants than would have been feasible or practicable if the only available type of adjudicative proceeding were a trial-type, formal hearing.

§ 642.240. Time for agency action 3/12/92

642.240. (a) An agency may modify the provisions of this section or make the provisions of this section inapplicable by regulation. The time limits in this section apply except to the extent they are inconsistent with limits established by another statute for any stage of the proceeding or with limits established by the agency by regulation.

(b) Within 30 days after receipt of an application for an agency decision, the agency shall examine the application, notify the applicant of any apparent error or omission, request any additional information from the applicant or another source that the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of an agency member or employee who may be contacted regarding the application. Nothing in this subdivision limits the authority of the agency to request additional information more than 30 days after receipt of an application for an agency decision, but such a request and any response to the request do not extend the time provided in subdivision (c).

(c) Within 90 days after the later of (i) receipt of an application for an agency decision or (ii) receipt of the response to a timely request made by the agency under subdivision (b), the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part. The agency shall serve on the applicant a written notice of any denial, which shall include a brief statement of the agency's reasons and of any administrative review available to the applicant.

(2) Commence an adjudicative proceeding.

Comment. Section 642.240 is drawn from 1981 Model State APA § 4-104(a). See also Bus. & Prof. Code §§ 485, 487 (procedure on denial of license application). It establishes time limits and notification requirements for agency action on applications for decisions other than declaratory decisions. The effect of this section, when combined with Section 641.120, is that this part imposes no procedures on the agency

when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of denial, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this part, are subject to judicial review as a final agency action under Section [to be drafted].

Failure of an agency to meet the time limits provided in this section does not entitle the applicant to issuance of a license or other action sought in the application. The applicant's remedy for the agency's failure is judicial action by writ of mandate to compel appropriate agency action.

An agency may by regulation modify the provisions of this section or make the provisions of this section inapplicable to tailor the procedures to suit its individual needs. The agency may, for example, provide shorter times for emergencies, and the like. The right of an agency to modify these provisions or make these provisions inapplicable does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

It should be noted that the time limits provided in this section are subject to contrary statutes that govern particular proceedings. See, e.g., Bus. & Prof. Code §§ 10086 (hearing must commence within 30 days after request to Real Estate Commissioner); 11019 (hearing must commence within 15 days after request to Real Estate Commissioner).

Article 3. Pleadings

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

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

Comment. Section 642.310 supersedes portions of the first sentences of former Sections 11503 and 11504. See also Section 610.350 ("initial pleading" includes accusation and statement of issues). Included among the issues that may be adjudicated are whether a right, authority, license, or privilege should be granted, issued, or renewed on application of a person, or revoked, suspended, limited, or conditioned on initiation of an agency. Sections 642.210-642.240 (initiation of proceeding).

It should be noted that an agency may by regulation require preparation of the initial pleading by another party or may permit a denied application to serve as the initial pleading. In such a case, verification is required unless the agency provides otherwise by regulation. Section 642.320 (contents of initial pleading).

Nothing in this part requires an agency to commence a proceeding on demand of a third party. Such a right might have been implied under former Sections 11503 and 11504. There may, however, be specific statutes that provide initiation rights to third parties. See, e.g., Bus. & Prof. Code § 24203 (accusations against liquor licensees filed by various public officials).

§ 642.320. Contents of initial pleading 5/21/92

642.320. (a) The initial pleading shall be in writing and shall include all of the following:

(1) A statement that sets forth in ordinary and concise language the issues to be determined in the adjudicative proceeding, including any acts or omissions with which the respondent is charged and any particular matters that have come to the attention of the agency and that would authorize a denial of the application. The statement shall be sufficient to enable the respondent to prepare a case.

(2) A specification of the statutes and regulations that are at issue in the adjudicative proceeding, including any the respondent is alleged to have violated or with which the respondent must show compliance by producing proof at the hearing. The specification shall not consist merely of issues or charges phrased in the language of the statutes and regulations.

(3) The remedy sought.

(b) The initial pleading shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. Section 642.320 supersedes portions of former Sections 11503 and 11504. The verification requirement would apply where an agency permits preparation of the initial pleading by another party, unless the requirement is modified or made inapplicable by regulation. Cf. Comment to Section 642.310 (proceeding commenced by initial pleading).

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

642.330. (a) On issuance of the initial pleading, the issuing agency shall serve on the respondent all of the following:

(1) A copy of the initial pleading.

(2) A statement to the respondent in the form provided in subdivision (b).

(3) A form of responsive pleading that acknowledges service of the initial pleading and constitutes a responsive pleading under Section 642.350.

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

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

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

> You may request a hearing on this matter. If you do not request a hearing, [here insert name of agency] may proceed on the initial pleading without a hearing. Your failure to request a hearing does not preclude you from serving on [here insert name of agency] a statement by way of mitigation.
>
> In order to request a hearing, you or a person acting on your behalf must sign either the enclosed form entitled Responsive Pleading or your own form of responsive pleading as provided in Section 642.350 of the Government Code, and deliver or mail it to: [here insert name and address of agency]. You must deliver or mail the responsive pleading within 15 days after the initial pleading was personally served on you, or within 20 days after the initial pleading was mailed to you.
>
> You may, but need not, be represented by an attorney or other authorized representative at any or all stages of this proceeding.
>
> To request the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 645.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

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

Comment. Section 642.330 is drawn from former Sections 11504 and 11505. Service is made by personal delivery or mail to the respondent's last known address. Sections 613.210 (service) and 613.220 (mail). Service under this section is limited to personal service or registered or certified mail; first class mail is not permissible except in cases before an appeals board such as the Unemployment Insurance Appeals Board, where the respondent has previous involvement in the controversy and initial service provisions are therefore unnecessary.

For purposes of service, the respondent's last known address is the address maintained with the agency, if the respondent is required to maintain an address with the agency. Section 613.210(b).

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

The form of responsive pleading may be a post card or other form provided by the agency. Signing and returning the form by the respondent acknowledges service of the initial pleading and constitutes a responsive pleading under Section 642.350.

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

§ 642.340. Jurisdiction over respondent 2/24/92

642.340. The agency shall make no decision adversely affecting the rights of the respondent unless the respondent has been served as provided in this article or has responded or otherwise appeared.

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

§ 642.350. Responsive pleading 3/12/92

642.350. (a) Within 15 days after service of the initial pleading, or a later time that the agency in its discretion permits, the respondent may serve a responsive pleading on the agency.

(b) A responsive pleading shall be in writing signed by the respondent and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(c) A responsive pleading may do one or more of the following:

(1) Request a hearing.

(2) Object to the initial pleading on the ground that it does not state an act or omission or other ground on which the agency may proceed.

(3) Object to the form of the initial pleading on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a case. Unless objection is taken under this paragraph, all further objections to the form of the initial pleading are considered waived.

(4) Admit the initial pleading in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the initial pleading on the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation adopted by another agency affecting substantive rights.

(7) Raise such other matter as may be appropriate.

(c) The respondent is entitled to a hearing on the merits if the respondent serves a responsive pleading on the agency under subdivision (a). A responsive pleading is considered a specific denial of all parts of the initial pleading not expressly admitted.

(d) Failure to serve a responsive pleading on the agency under subdivision (a) is a default subject to the right of the respondent to serve a statement by way of mitigation under Section 648.130 (default).

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

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

§ 642.360. Amended and supplemental pleadings 3/12/92

642.360. (a) At any time before commencement of the hearing a party may amend or supplement a pleading. After commencement of the hearing a party may amend or supplement a pleading in the discretion of the presiding officer.

(b) An amended or supplemental pleading shall be served on all parties.

(c) If an amended or supplemental pleading presents a new issue, the opposing party shall be given a reasonable opportunity to prepare a case. Any new matter is considered controverted without further pleading, and any objection to the amended or supplemental pleading may be made orally and shall be noted in the record.

Comment. Section 642.360 supersedes former Sections 11507 and Section 11516. It is broadened to permit amendment of responsive pleadings as well as initial pleadings, but is narrowed to subject amendments to the presiding officer's discretion after commencement of the hearing.

Article 4. Setting Matter for Hearing

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

642.410. (a) The agency conducting the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be before expiration of the time within which the respondent is entitled to respond.

(b) If the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the agency shall consult the office and the time and place of hearing are subject to the availability of its staff.

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

642.420. Continuances 5/21/92

642.420. (a) The presiding officer may grant a continuance for good cause.

(b) A party shall apply for a continuance within 15 days after the party discovered or reasonably should have discovered the event or occurrence that establishes good cause for the continuance. A continuance may be granted for good cause after the 15 days have elapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

Comment. Section 642.420 supersedes former Section 11524. The section vests continuance decisions in the presiding officer, whether or not employed by the Office of Administrative Hearings, and revises the times from 10 working days to 15 calendar days. The section eliminates the provision for special judicial review of denial of a continuance request; this matter is subject to judicial review at the same time and in the same manner as other disputed matters. Section [to be drafted].

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

642.430. (a) The hearing shall be held in the following location:

(1) City and County of San Francisco, if the transaction occurred or the respondent resides or is located within the First or Sixth Appellate District.

(2) County of Los Angeles, if the transaction occurred or the respondent resides or is located within the Second Appellate District or within the Fourth Appellate District other than the County of Imperial or San Diego.

(3) County of Sacramento, if the transaction occurred or the respondent resides or is located within the Third or Fifth Appellate District.

(4) County of San Diego, if the transaction occurred or the respondent resides or is located within the Fourth Appellate District in the County of Imperial or San Diego.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence or location, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides or is located.

(3) The parties may select any place within the state by agreement.

(c) The respondent may move for, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing.

Comment. Section 642.330 is drawn from former Section 11508. An agency may modify the provisions of this section or make the provisions of this section inapplicable by regulation (Section 642.110) unless the hearing is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

Subdivision (a)(4) recognizes creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) is new. It codifies practice authorizing a motion for change of venue. See 1 Ogden, Cal. Public Agency Prac. § 33.02[4][d] (1991).

§ 642.440. Notice of hearing 5/21/92

642.440. (a) The agency shall serve a notice of hearing on all parties at least 10 days before the hearing.

(b) The notice of hearing shall be substantially in the following form and may include other information:

A hearing will be held before [here insert name of agency] at [here insert place of hearing] on [here insert date of hearing], at the hour of _____, on the charges made or issues stated in the initial pleading served on you.

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the presiding officer within 15 days after you discover the good cause. Failure to notify the presiding officer within 15 days will deprive you of a postponement.

You may be present at the hearing. You have the right to be represented by an attorney or other authorized representative at your own expense. You are not entitled to the appointment of an attorney or other authorized representative to represent you at public expense. You are entitled to represent yourself without legal or other counsel.

Unless the hearing is a conference adjudicative hearing: You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to [here insert appropriate office of agency].

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

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

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

CHAPTER 3. PRESIDING OFFICER

Article 1. Designation of Presiding Officer

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

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

(a) The agency head.

(b) An agency member.

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

(d) Another person designated by the agency head.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 643.130. Substitution of presiding officer 1/24/92

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

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

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

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

Article 2. Disqualification

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

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

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

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

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

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

(c) An agency may by regulation provide for peremptory challenge of the presiding officer.

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

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

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue

in the proceeding does not in itself disqualify the presiding officer under Section 643.210, disqualification in such a situation might occur under Section 643.320 (separation of functions).

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

§ 643.220. Self disqualification 1/24/92

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

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

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

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

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

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

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

regulation provide for determination of a disqualification request by a person other than the presiding officer whose disqualification is requested.

(c) The determination of the disqualification request shall state facts and reasons for the determination. Unless the agency provides by regulation for administrative review at an earlier time, the determination is subject to administrative and judicial review at the same time, in the same manner, and to the same extent as other determinations of the presiding officer in the proceeding.

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

Article 3. Separation of Functions

§ 643.310. Adoption of stricter limitations 3/12/92

643.310. Nothing in this article limits the authority of an agency by regulation to adopt limitations in addition to or greater than the limitations in this article.

Comment. Section 643.310 allows an agency to expand but not to diminish separation of functions requirements.

Staff Note. The staff sees no harm in allowing this provision to apply to agencies using OAH hearing personnel. The drafting of this section will be coordinated with the final version of Section 641.130 (modification of statute by regulation).

§ 643.320. When separation required 3/12/92

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

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

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

(b) This section does not apply to issuance, denial, revocation, or suspension of a driver's license.

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

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

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

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

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

Subdivision (b) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Although subdivision (b) makes separation of powers requirements inapplicable in drivers' licensing cases, the separation of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus operation certificate hearings.

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

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

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

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

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

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

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

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

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

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

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

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

§ 643.340. Staff assistance for presiding officer 3/12/92

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

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

CHAPTER 4. INTERVENTION

§ 644.110. Intervention 4/23/92

644.110. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(a) The motion is submitted in writing to the presiding officer, with copies served on all parties named in the notice of the hearing.

(b) The motion is made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference.

(c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities may be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

(d) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

Comment. Section 644.110 is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (c) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities may be substantially affected by the proceeding". However, subdivision (d) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings on the legal rights, etc. of the applicant for intervention (subdivision (c)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (d)).

§ 644.120. Conditions on intervention 3/12/92

644.120. If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include the following:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(b) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

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

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

Comment. Section 644.120 is drawn from 1981 Model State APA § 4-209(c). This section, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceedings, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceedings to unreasonably burdensome or repetitious presentations.

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

644.130. (a) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying each motion for intervention, specifying any conditions, and briefly stating the reasons for the order.

(b) The presiding officer may modify the order at any time, stating the reasons for the modification.

(c) The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant for intervention and to all parties.

Comment. Section 644.130 is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this section is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding. If the order was unfavorable, the applicant may not seek judicial review on an expedited basis before the hearing commences or otherwise. Section 644.140 (intervention determination nonreviewable).

§ 644.140. Intervention determination nonreviewable 2/24/92

644.140. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's sole discretion based on the knowledge and judgment of the presiding officer at that time, and the presiding officer's determination is not subject to administrative or judicial review.

Comment. Section 644.140 is new.

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

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

Comment. Section 644.150 recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the

addition of more parties. Agency regulations may provide for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

CHAPTER 5. DISCOVERY

Article 1. General provisions

§ 645.110. Application of chapter 4/23/92

645.110. (a) Subject to subdivision (b), the provisions of this chapter provide the exclusive right to and method of discovery in a proceeding governed by this part.

(b) An agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable by regulation.

Comment. Subdivision (a) of Section 645.110 supersedes former Section 11507.5 and broadens it to apply to all adjudicative proceedings covered by this part. Under subdivision (a), the civil discovery provisions of the Code of Civil Procedure are inapplicable to this part.

Subdivision (b) does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, or where there is a specifically applicable statute that governs the matter such as in the case of workers' compensation or Insurance Commission ratemaking. Section 641.130 (modification or inapplicability of statute by regulation). Regulations adopted by an agency under authority of subdivision (b) could provide for such matters as protection of confidential information or other privileges, or could eliminate the right of discovery completely.

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

645.120. (a) This section is intended only to limit the scope of discovery. It is not intended to affect the methods of discovery allowed under this chapter.

(b) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under Section 648.470 (evidence of sexual conduct).

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

§ 645.130. Depositions 4/23/92

645.130. (a) A party may, by petition as provided in this section, request an order that the testimony of a material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions.

(b) The petition shall be verified, shall request an order that the witness appear and testify before an officer named in the petition for that purpose, and shall state all of the following:

(1) The nature of the pending proceeding.

(2) The name and address of the witness whose testimony is requested.

(3) A showing of the materiality of the testimony of the witness.

(4) A showing that the witness will be unable or can not be compelled to attend.

(c) The applicant shall serve notice of hearing and a copy of the petition on the other parties to the proceeding at least 10 days before the hearing.

(d) If the witness resides within the state, the petition shall be made to, and an order may be issued by, the presiding officer or, if a presiding officer has not been appointed, the agency. If the witness resides without the state, the petition shall be made to, and an order may be issued by, the superior court in Sacramento County.

Comment. Section 645.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition, and requires the moving party to obtain a court order where necessary. The section also requires notice to the other parties of the hearing on the petition.

Article 2. Discovery

§ 645.210. Time and manner of discovery 2/24/92

645.210. After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after service on the party of the initial pleading or within 15 days after service on the party of an additional or supplemental initial pleading, is entitled to discovery to the extent provided in this article.

Comment. Section 645.210 supersedes the introductory portion of the first paragraph of former Section 11507.6.

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

645.220. A party requesting discovery under this article is entitled to obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

Comment. Section 645.220 supersedes clause (1) of the first paragraph of former Section 11507.6.

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

645.230. (a) As used in this section, "statement" includes all of the following:

(1) A written statement by a person signed or otherwise authenticated by the person.

(2) A stenographic, mechanical, electrical, or other recording or transcript of an oral statement by a person.

(3) A written report or summary of an oral statement by a person.

(b) A party requesting discovery under this article is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of another party:

(1) A statement of a person, other than the respondent, named in the initial pleading, when it is alleged that the act or omission of the respondent as to the person is the basis for the adjudicative proceeding.

(2) A statement pertaining to the subject matter of the proceeding made by a party to another party or person.

(3) A statement of a witness then proposed to be called by the party and of any other person having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, not included in paragraph (1) or (2).

(4) All writings, including, but not limited to, reports of mental, physical, and blood examinations, and things that the party then proposes to offer in evidence.

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

(6) An investigative report made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report (i) contains the names and addresses of witnesses or of

persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, or (ii) reflects matters perceived by the investigator in the course of the investigation, or (iii) contains or includes by attachment any statement or writing or summary of a statement or writing described in this section.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Comment. Section 645.230 supersedes clause (2) of the first paragraph, subdivisions (a)-(f), and the second and third paragraphs of former Section 11507.6. See also Section 610.350 ("initial pleading" defined).

§ 645.240. Continuing duty to disclose 5/1/92

645.240. Notwithstanding a party's compliance with a request for discovery under this article, the party has a continuing duty to disclose and make available to the requesting party any supplemental matter within the scope of the request for discovery immediately on obtaining knowledge, possession, custody, or control of the matter.

Comment. Section 645.240 is new.

Article 3. Compelling Discovery

Staff Note. The procedures for compelling discovery, under the existing administrative procedure act, are before the superior court. The Commission at the April 1992 meeting decided to provide for administrative, rather than judicial enforcement, of discovery.

In this draft, we have taken the existing court enforcement procedures and converted them to administrative enforcement procedures. The draft presents a number of issues.

(1) Under the draft, the person resolving the dispute is the presiding officer. This may be the agency head in cases where a separate hearing officer is not designated. Even in cases where a separate hearing officer is designated, this may mean that no action can be taken on the discovery dispute until such a time as the designation of the presiding officer occurs.

(2) For administrative resolution, the procedures in this draft may be somewhat elaborate, including such matters as orders to show cause, stays, and in camera review of disputed material. However, we have preserved them on the theory that they are designed to provide a fair resolution of the discovery dispute, regardless of whether it is the superior court or the presiding officer that is attempting to resolve the dispute.

(3) Review of the presiding officer's resolution is directly in the superior court, omitting the agency head. This is intended to expedite dispute resolution, as well as to alleviate the possibility of prejudicing the ultimate decision maker in the case.

(4) Existing law allows the court to impose monetary sanctions for abuse of discovery. This draft gives the authority to the presiding officer, although this matter is subject to judicial review. Perhaps monetary sanctions should be left to general provisions on the matter. Cf. Section 648.630 (monetary sanctions for bad faith actions or tactics).

(5) A court can enforce its orders by its contempt power, but the presiding officer does not have contempt power; the agency may certify a matter to the superior court for enforcement by the contempt sanction. This parallels the general provisions for enforcement of orders in the administrative adjudication process.

§ 645.310. Motion to compel discovery 5/1/92

645.310. (a) A party claiming that a request for discovery under this chapter has not been complied with may make a motion to the presiding officer to compel discovery, naming as opposing party the person refusing or failing to comply with the request.

(b) The motion shall state facts showing the opposing party failed or refused to comply with the request, a description of the matters sought to be discovered, the reason why the matter is discoverable under this chapter, and the ground of the opposing party's refusal so far as known to the moving party.

Comment. Section 645.310 supersedes subdivision (a) of former Section 11507.7. See also Sections 613.340 (authority of attorney or other representative of party) and 613.210 (service). Under this article proceedings to compel discovery are before the presiding officer rather than the superior court. A reference in this article to a matter or order includes part of a matter or order.

§ 645.320. Time for motion 5/1/92

645.320. (a) Subject to subdivision (b), the motion shall be made and served on the opposing party within 15 days after the opposing party first evidenced failure or refusal to comply with the request, or within 30 days after the request was made and the party has failed to reply to the request, whichever period is longer.

(b) No motion may be filed within 15 days of the date set for commencement of the hearing except on order of the presiding officer after motion and notice and for good cause shown. In acting on the motion, the presiding officer shall consider the necessity and reasons

for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the hearing on the date set, and the possible prejudice to any party.

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

§ 645.330. Order to show cause 5/1/92

645.330. (a) If from a reading of the petition the presiding officer is satisfied that the motion sets forth good cause for relief, the presiding officer shall issue an order to show cause directed to the opposing party; otherwise the presiding officer shall enter an order denying the motion.

(b) The order to show cause shall be served on the opposing party and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the making of the motion.

(c) The opposing party has the right to make and serve a written response to the motion and order to show cause.

Comment. Section 645.330 supersedes subdivision (c) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.340. Stay of proceedings 5/1/92

645.340. The presiding officer may in its discretion order the adjudicative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter, to give the parties time to comply with the presiding officer's order.

Comment. Section 645.340 supersedes subdivision (d) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

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

645.350. Where the matter sought to be discovered is under the custody or control of the opposing party and the opposing party asserts that the matter is not a discoverable matter or is privileged against disclosure under this chapter, the presiding officer may order lodged with it matters provided in, and examine the matters in accordance with the provisions of, subdivision (b) of Section 915 of the Evidence Code.

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

§ 645.360. Presiding officer's order 5/1/92

645.360. (a) The presiding officer shall decide the case on the matters examined by the presiding officer in camera, the papers filed by the parties, and oral argument and additional evidence the presiding officer allows.

(b) Unless otherwise stipulated by the parties, the presiding officer shall no later than 30 days after the motion make its order denying or granting the petition. The presiding officer may on its own motion for good cause extend the time an additional 30 days.

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

(d) The presiding officer shall serve the order on the parties. Where the order grants the motion in whole or in part, the order does not become effective until 10 days after the date the order is served on the opposing party. Where the order denies relief to the petitioning party, the order is effective on the date it is served on the petitioning party.

Comment. Section 645.360 supersedes subdivisions (f) and (g) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.370. Review of presiding officer's order 5/1/92

645.370. (a) The order of the presiding officer is subject to judicial review by petition for writ of mandate.

(b) A party aggrieved by the presiding officer's order may within 15 days after service of the order petition for a writ of mandate in the superior court for the county in which the hearing will be held.

(c) Where judicial review is sought from an order granting discovery, the order of the presiding officer and the adjudicative proceeding shall be stayed on the filing of the petition for writ of mandate, provided, however, the superior court may dissolve or modify the stay thereafter if it is in the public interest to do so. Where

judicial review is sought from a denial of discovery, neither the presiding officer's order nor the administrative proceeding shall be stayed by the superior court except on a clear showing of probable error.

Comment. Section 645.370 supersedes subdivision (h) of former Section 11507.7.

§ 645.380. Sanctions 6/1/92

645.380. If the presiding officer finds that a party or the party's attorney or other authorized representative, without substantial justification, failed or refused to comply with the request for discovery, or, without substantial justification, filed a petition to compel discovery under this article, or, without substantial justification, failed to comply with an order of the presiding officer made under this article, the presiding officer may order appropriate relief, including but not limited to any of the following:

(a) Awarding costs and reasonable attorney fees to the opposing party.

(b) Refusing to receive testimony or exhibits, striking evidence received, or dismissing claims or defenses.

(c) Certifying the matter for the contempt sanction.

Comment. Section 645.380 supersedes subdivision (i) of former Section 11507.7. See also Section 613.340 (authority of attorney or other representative of party).

Subdivision (b) is drawn from Cal. Code Regs., tit. 8, § 20238(b) (Agricultural Labor Relations Board).

Under this article proceedings to compel discovery are before the presiding officer rather than the superior court. Subdivision (c) for that reason revises former Section 11507.7(i), which related to the power of the court to compel obedience by contempt proceedings, to provide for certification by the presiding officer for the court-imposed contempt sanction. See Section 648.620 (contempt).

Staff Note. Subdivision (b) broadens the sanctions available to enforce discovery. This codifies a regulation of the Agricultural Labor Relations board, at the suggestion of ALRB Chief ALJ Jim Wolpman.

Article 4. Subpoenas

§ 645.410. Subpoena authority 6/1/92

645.410. (a) The agency or the presiding officer shall, on motion of a party, issue subpoenas for attendance at the hearing and subpoenas duces tecum for production of documents at any reasonable time and place or at the hearing.

(b) Any objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, shall be resolved by the presiding officer. A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

Comment. Section 645.410 supersedes a portion of former Section 11510. It gives all adjudicating agencies subpoena power. The Coastal Commission previously lacked statutory subpoena power.

An agency, other than an agency whose hearings are required to be conducted by Office of Administrative Hearings personnel, may modify the subpoena provisions or make the subpoena provisions inapplicable by regulation. Section 645.110. Regulations might provide, for example, that a subpoena will not issue unless the party seeking it first establishes the relevance of the evidence sought; or the regulation could provide different standards for subpeonas compelling the attendance of witnesses and subpoenas duces tecum.

Subdivision (a) broadens former law to allow a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

The first sentence of subdivision (b) adopts a procedure applicable in proceedings before the Public Utilities Commission. See 20 Cal. Code Regs. § 61. The second sentence clarifies the law on a previously unresolved issue.

§ 645.420. Issuance of subpoena 6/1/92

645.420. (a) Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure, except that a subpoena duces tecum may not be issued unless at least 10 days before the hearing the applicant has served notice of hearing and a copy of the petition on the other parties to the proceeding and on the person to whom the subpoena is directed.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure.

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

Comment. Section 645.420 restates a portion of former Section 11510. For enforcement of a subpoena, see Section 645.440.

§ 645.430. Witness fees 6/1/92

645.430. A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the appearance the following mileage and fees, to be paid by the party on whose motion the witness is subpoenaed:

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

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

Comment. Section 645.430 restates a portion of former Section 11510. Its coverage is extended to a subpoena duces tecum as well as a subpoena, and is conformed to the mileage and fees applicable in civil cases. See Sections 68093-68098 (mileage and fees in civil cases).

§ 645.440. Refusal to respond to subpoena 6/1/92

645.440. If a person refuses to respond to a subpoena, a party may certify that fact to the superior court in and for the county where the proceeding is conducted. If it appears to the court that the subpoena was regularly issued, the court shall order the person to appear before the officer named in the subpoena at the time and place fixed in the order and to testify or produce the required papers. On failure to obey the order, the person is subject to the contempt sanction.

Comment. Section 645.440 restates a portion of former Section 11525 and is drawn from the third and fourth sentences of Government Code Section 11188.

CHAPTER 7. PREHEARING AND SETTLEMENT CONFERENCES

Article 1. Prehearing Conference

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

646.110. An agency may modify the provisions of this article or make the provisions of this article inapplicable by regulation.

Comment. Section 646.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation). In other hearings, an agency may dispense with or change the provisions of this article relating to prehearing conferences by regulation.

Staff Note. The Commission has decided that in the interest of uniformity an agency that uses OAH hearing personnel may not adopt modifying regulations. However, it may be desirable in OAH-conducted proceedings to depart from the statute in some matters of detail. This could be handled by OAH adopting regulations that modify the statute, applicable in all hearings by OAH personnel. The staff believes a provision authorizing this would be useful, particularly if the applicable OAH regulations are published by the individual agencies along with their other procedural rules. See discussion in the Staff Note to Sections 641.130 and 641.210.

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

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

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

(c) The presiding officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(d) At the prehearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing for disposition of the matter as provided in this part. The notice of the prehearing conference shall so inform the parties.

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

Comment. Subdivisions (a) and (b) of Section 646.120 supersede former Section 11511.5(a).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii).

Subdivision (e) is drawn from 1981 Model State APA § 4-204(3)(viii). For default procedures, see Section 648.130.

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

646.130. A prehearing conference may deal with one or more of the following matters:

(a) Exploration of settlement possibilities.

(b) Preparation of stipulations.

(c) Clarification of issues.

(d) Rulings on identity and limitation of the number of witnesses.

(e) Objections to proffers of evidence.

(f) Order of presentation of evidence and cross-examination.

(g) Rulings regarding issuance of subpoenas and protective orders.

(h) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(i) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

(j) Motions for intervention.

(k) Any other matters that promote the orderly and prompt conduct of the hearing.

Comment. Section 646.130 supersedes former Section 11511.5(b). Subdivision (i) is new. If a party has not availed itself of discovery within the time periods provided by Chapter 5 (commencing with Section 645.110), it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing.

Subdivision (j) implements Section 644.110 (intervention).

§ 646.140. Prehearing order 2/24/92

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

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

Article 2. Settlement Conference

§ 646.210. Settlement 4/23/92

646.210. (a) The parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. This subdivision applies:

(1) After issuance of an initial pleading in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned.

(2) Before or after issuance of an initial pleading in a case other than a case described in paragraph (1).

(b) An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 646.210 codifies the rule in Rich Vision Centers, Inc. v. Bd. of Med. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983). It also makes clear that an agency can settle a case without filing an initial pleading, except in a licensing disciplinary case. This provision is subject to a specific statute to the contrary governing the matter. See, e.g., Labor Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

Staff Note. In response to concerns from licensing agencies that disciplinary proceedings should remain a matter of public record, the Commission limited the settlement provision to instances where an initial pleading has been issued. Since this can unnecessarily impede the settlement process in other cases, the staff has drafted the limitation so it only applies in licensing disciplinary cases.

§ 646.220. Mandatory settlement conference 5/1/92

646.220. (a) The presiding officer may order the parties to attend and participate in a settlement conference. The settlement conference shall be separate from the prehearing conference, if any.

(b) If the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference shall be different from the presiding officer at the hearing. If the adjudicative proceeding is not required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference may, but need not, be different from the presiding officer at the hearing.

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

(d) The presiding officer may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

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

Comment. Section 646.220 provides a settlement conference separate from the prehearing conference, even though exploration of settlement issues may occur in the prehearing conference and the conduct of the settlement conference parallels that of the prehearing conference. See Sections 646.120, 646.130 and Comments (prehearing conference).

Attendance and participation in the settlement conference is mandatory. For default procedures, see Section 648.130.

An agency may, but is not required to, put in place a system of settlement judges, whereby a judge of comparable status to the presiding officer who will hear the case is assigned to help mediate a settlement. Separate settlement judges are required in settlement conferences before the Office of Administrative Hearings.

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

646.230. Notwithstanding any other statute, settlement negotiations under this article are subject to the same protection for confidentiality of communications as is provided for communications in alternative dispute resolution by Section 647.240.

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

CHAPTER 7. HEARING ALTERNATIVES

Article 1. Conference Adjudicative Hearing

§ 647.110. When conference hearing may be used 5/21/92

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

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

(b) There is a disputed issue of material fact, if the matter involves only:

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

(2) A disciplinary sanction against a prisoner.

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

(4) A disciplinary sanction against a public employee that does not involve discharge from employment or suspension for more than 10 days.

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

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

Comment. Section 647.110 reverses 1981 Model State APA § 4-401.

Subdivision (a) permits the conference hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared. An example might be a utility rate proceeding in which the utility company and the Public Utilities Commission have agreed on all material facts. If, however, consumers intervene and raise material fact disputes, the proceeding will be subject to conversion from the conference adjudicative hearing to the formal adjudicative hearing in accordance with Sections 614.110-614.150.

Subdivision (b) permits the conference adjudicative hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner.

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

Staff Note. The issue has been raised whether subdivision (b)(4) might violate due process protections for public employees in light of the lack of a full evidentiary hearing.

The staff's research on this issue indicates the conference hearing would satisfy constitutional requirements for suspension for 10 days or less. Skelly v. State Personnel Bd., 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P. 2d 774 (1975), states that a public employee has a right to an evidentiary hearing except in cases involving minor disciplinary matters, which would include suspension without pay for 10 days or less. 15 Cal. 3d at 203, fn. 16. For a minor disciplinary matter, due process requires only that the employee be apprised of the proposed action and the reasons therefor and be given the right to respond either orally or in writing to the disciplining authority,

either before or after the discipline is imposed. Civil Service Assn. v. City and County of San Francisco, 22 Cal. 3d 552, 150 Cal. Rptr. 129, 586 P. 2d 162 (1978). The Tobriner dissent in this case would require these to be done before the discipline is imposed: "The due process clause does not mandate that the employer permit workers to retain counsel, call witnesses or confront and cross-examine their accusers prior to suspension. But employers should be required to inform employees of the charges against them and give them a chance to respond informally, either orally or in writing, to the accusations." 22 Cal. 3d at 571. These cases are reviewed in Taylor v. State Personnel Bd., 101 Cal. App. 3d 498, 161 Cal. Rptr. 677 (1980), which likewise concludes that due process does not require a full evidentiary hearing for a suspension without pay for 10 days.

It should be noted in this connection that the United States Supreme Court has held that in the case of suspension of a student from school for 10 days or less, due process requires oral or written notice of charges and an opportunity to respond prior to removal. Goss v. Lopez, 419 U.S. 565 (1975). The conference hearing would likewise satisfy this requirement.

§ 647.120. Procedure for conference adjudicative hearing 5/21/92

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

(b) Chapter 5 (commencing with Section 645.110) (discovery) does not apply to a conference adjudicative hearing.

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

Comment. Section 647.120 is drawn from 1981 Model State APA § 4-402. The section indicates that the conference adjudicative hearing is a "peeled down" version of the formal adjudicative hearing. The conference adjudicative hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties.

§ 647.130. Cross-examination 5/21/92

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

(b) ALTERNATIVE 1. The presiding officer shall not permit cross-examination of a witness.

ALTERNATIVE 2. The presiding officer shall not permit cross-examination of a witness unless it appears to the presiding officer that any delay, burden, or complication due to the cross-examination will be minimal in the circumstances and the cross-examination will contribute substantially to the proper determination of the matter.

(c) If after a conference adjudicative hearing is commenced it appears that cross-examination of a witness will be necessary for property determination of the matter and the cross-examination is not permitted under subdivision (b), the conference adjudicative hearing may be converted to a formal adjudicative hearing.

Comment. Section 647.140 strictly limits availability of cross-examination in a conference adjudicative hearing.

Staff Note. The Commission asked to see the two alternative approaches to cross-examination set out in subdivision (b).

§ 647.140. Proposed proof 5/1/92

647.140. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or federal or state constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

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

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

Article 2. Alternative Dispute Resolution

§ 647.210. Application of article 5/21/92

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

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

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

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

§ 647.220. ADR authorized 5/21/92

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

(a) Mediation by a neutral mediator. The mediator may use any mediation technique.

(b) Binding arbitration by a neutral arbitrator.

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration shall be the basis of settlement of the dispute, unless the arbitrator's decision is rejected by a party. If the arbitrator's decision is rejected by a party, the adjudicative proceeding shall proceed.

Comment. Section 647.220 is new.

§ 647.230. Regulations governing ADR 5/21/94

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

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

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

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

§ 647.240. Confidentiality of ADR communications 4/23/92

647.240. (a) Notwithstanding any other statute, in a proceeding for dispute resolution under this article:

(1) Evidence of anything said or of any admission made in the course of the proceeding is not admissible in evidence, and disclosure of the evidence shall not be compelled, in any adjudicative proceeding or civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document provides otherwise, no document prepared for the purpose of, in the course of, or pursuant to, the proceeding, or copy of the document, is admissible in evidence, and disclosure of the document shall not be compelled, in any adjudicative proceeding or civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the dispute resolution under this article consent to its disclosure.

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

Staff Note. The Commission asked whether the reference to "persons" in subdivision (b) should be limited to "parties". The staff advises against this since the definition of "party" in Section 610.460 apparently would include an agency mediator or arbitrator but impliedly excludes an outside mediator or arbitrator.

CHAPTER 8. CONDUCT OF HEARING

Article 1. General Provisions

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

648.110. An agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable by regulation.

Comment. Section 648.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

§ 648.120. Consolidation and severance 2/24/92

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

(b) An agency, in furtherance of convenience or to avoid prejudice, or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the responsive pleading, or of any number of issues.

Comment. Section 648.120 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding, and to enable an agency to employ class action procedures in the agency's discretion. See also Section 13 (singular includes plural).

§ 648.130. Default 4/23/92

648.130. (a) If the respondent fails to serve a responsive pleading or to appear at a prehearing conference or settlement conference or at the hearing:

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

(2) Notwithstanding the default, the respondent may serve a statement and make a showing by way of mitigation.

(3) The agency may take action based on the respondent's express admissions or on other evidence. Affidavits may be used as evidence without notice to the respondent.

(4) Where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

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

(c) Within 7 days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing.

Comment. Subdivisions (a) and (b) of Section 648.130 are drawn from subdivisions (b) and (d) of former Section 11506, with the addition of the provision enabling the presiding officer to waive a default and requiring reasonable notice, and from former Section 11520. Subdivision (c) is new.

§ 648.140. Open hearings 5/1/92

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

(1) All parties agree to a closed hearing.

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

(3) The presiding officer determines that a closed hearing is necessary to ensure a fair hearing in the circumstances of the particular case.

(b) To the extent that a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

Comment. Section 648.140 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Subdivision (a) codifies existing practice. See discussion in 1 G. Ogden, Cal. Public Agency Prac. § 37.03 (1991). Discretion of the presiding officer under subdivision (a)(3) could include such matters as protection of a child witness. Cf. Section 648.350 (protection of child witnesses). Subdivision (b) is drawn from 1981 Model State APA § 4-211(6).

§ 648.150. Hearing by electronic means 5/1/92

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

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party shows that a determination in the proceeding will be based substantially on the credibility of a witness and that a hearing by telephone, television, or other electronic means will impair a proper determination of credibility.

Comment. Subdivision (a) of Section 648.150 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants.

§ 648.160. Report of proceedings 5/1/92

648.160. (a) Except as provided in subdivision (b), the proceedings at the hearing shall be reported by a phonographic reporter or electronically, in the discretion of the agency.

(b) Notwithstanding an agency's election of electronic reporting of proceedings:

(1) The presiding officer may in the presiding officer's discretion require phonographic reporting.

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

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

Article 2. Language Assistance

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

648.210. As used in this article, "language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

Comment. Section 648.210 supersedes former Section 11500(g). It extends this article to language translation for witnesses as well as for parties.

Staff Note. The effect of the additions to this section is to impose added duties on agencies that have interpreter responsibilities.

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

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

Comment. Section 648.220 makes clear that the language assistance provisions of this article are not intended to limit the application to adjudicative proceedings of the provisions of Evidence Code Section 754.

Staff Note. Professor Asimow's study recommends that the language assistance provisions of this article be extended to hearing-impaired persons. It appears to the staff that this would limit the very broad application of Evidence Code Section 754, so we have instead added this section to make cross-reference to the Evidence Code. Section 754 provides in part:

> *In any civil or criminal action, including any action involving a traffic or other infraction or any juvenile court proceeding, or any proceeding to determine the mental competency of a person, or any administrative hearing, where a party or witness is a deaf or hard-of-hearing person and the deaf or hard-of-hearing person is present and participating, the proceedings shall be interpreted in a language that the deaf or hard-of-hearing person understands by a qualified interpreter appointed by the court, tribunal, hearing officer, or other appropriate authority, or as agreed upon by the parties.*

§ 648.230. Application of article 5/1/92

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

Agricultural Labor Relations Board
State Department of Alcohol and Drug Abuse
Athletic Commission
California Unemployment Insurance Appeals Board
Board of Prison Terms
Board of Cosmetology
State Department of Developmental Services
Public Employment Relations Board
Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development
Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Workers' Compensation Appeals Board
Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
Board of Barber Examiners
Department of Insurance
State Personnel Board

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 648.260.

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

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

§ 648.240. Provision for interpreter 5/1/92

648.240. (a) The hearing shall be conducted in the English language.

(b) If a party or the party's witness does not proficiently speak or understand the English language and the party requests language assistance, the party or witness shall be provided an interpreter approved by the presiding officer.

Comment. Section 648.240 restates the first sentence of former Section 11513(d) and extends it to witnesses as well as parties. See Section 648.210 ("language assistance" defined).

§ 648.250. Cost of interpreter 5/1/92

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

(b) The presiding officer's decision to direct payment shall be based on equitable consideration of all the circumstances in the case, such as the ability of the party in need of the interpreter to pay.

(c) Notwithstanding any other provision of this section, in a hearing before the Workers' Compensation Appeals Board or the Division of Industrial Accidents relating to workers' compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Industrial Accidents, as appropriate.

Comment. Section 648.250 restates the third, fourth, and fifth sentences of former Section 11513(d).

§ 648.260. Selection of interpreter 5/1/92

648.260. (a) An interpreter shall be selected under this article pursuant to regulations issued by both of the following:

(1) The State Personnel Board, which shall establish criteria for an interpreter's proficiency in both English and the language in which the person will testify.

(2) The employing agency, which shall establish materials and examinations for an interpreter's understanding of its technical program terminology and procedures.

(b) The State Personnel Board shall compile and publish a list of interpreters it has determined to be proficient in various languages and any interpreter so listed shall be eligible to be examined by each employing agency relating to its technical program terminology and procedures. Any interpreter whose language proficiency and knowledge of the terminology and procedures has been satisfactorily determined by the employing agency shall be considered to be approved by a presiding officer of the agency.

(c) In the event that interpreters on the approved list cannot be present at the hearing, or if there is no interpreter on the approved list for a particular language, the hearing agency has discretionary authority to provisionally qualify and utilize another interpreter.

Comment. Section 648.260 restates the last portion of subdivision (d), and subdivisions (e) and (f) of former Section 11513.

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

648.270. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing so that appropriate arrangements can be made.

Comment. Section 648.270 restates former Section 11513(g).

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

648.280. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding, apply to any interpreter in the hearing, whether or not the rules so state.

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

Comment. Subdivision (a) of Section 648.280 restates former Section 11513(h).

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

Article 3. Testimony and Witnesses

§ 648.310. Burden of proof 2/24/92

648.310. (a) The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter. Except as provided in subdivision (b), the burden of proof is a preponderance of the evidence.

(b) In an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, the burden of proof is clear and convincing proof unless the agency provides a different burden by regulation. Notwithstanding Section 641.130, an agency may provide a different burden by regulation in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 648.310 generally codifies case law concerning the burden of proof in adjudicative proceedings. See discussion in 1 G. Ogden, California Public Agency Practice § 39 (1991).

It should be noted that an agency whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings may provide a different burden of proof by regulation than that provided in subdivision (b) despite the general rule of Section 641.130 (modification or inapplicability of statute by regulation). See also Section 648.110 (provisions may be modified or made inapplicable by regulation).

This section is also subject to specific statutes to the contrary. See Section 612.150 (contrary express statute controls).

If a party defaults in a case where the party has the burden of proof, the agency may act without taking evidence. Section 648.130 (default).

§ 648.320. Presentation of testimony 2/24/92

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

(1) Call and examine witnesses.

(2) Introduce exhibits.

(3) Cross-examine and confront opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.

(4) Impeach a witness regardless of which party first called the witness to testify.

(5) Rebut the evidence against the party.

(b) If the respondent does not testify in the respondent's own behalf, the respondent may be called and examined as if under cross-examination.

Comment. Section 648.320 restates former Sections 11500(f)(2) and 11513(b).

§ 648.330. Oral and written testimony 5/1/92

648.330. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Any part of the evidence may be received in written form if to do so will expedite the hearing without substantial prejudice to the interests of a party.

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original if available.

Comment. Subdivision (a) of Section 648.330 restates former Sections 11500(f)(1) and 11513(a).

Subdivision (b) is drawn from 1981 Model State APA § 4-212(d).

Subdivision (c) is drawn from 1981 Model State APA § 4-212(e). It requires that parties be given an opportunity to compare a copy with the original, "if available". If the original is not available, the copy may still be received in evidence, but its probative effect is likely to be weaker than if the original were available.

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

§ 648.340. Affidavits 2/24/92

648.340. (a) At any time 30 or more days before a hearing or a continued hearing, a party may serve on the opposing party a copy of an affidavit the party proposes to introduce in evidence, together with a notice substantially in the following form:

The accompanying affidavit of [here insert name of affiant] will be introduced as evidence at the hearing in [here insert title of proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question the affiant unless you notify [here insert name of proponent or proponent's attorney or authorized representative] at [here insert address] that you wish to cross-examine the affiant.

To be effective your request must be mailed or delivered to [here insert name of proponent or proponent's attorney or authorized representative] on or before [here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party].

(b) Unless the opposing party, within ten days after service, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally.

(c) If an opportunity to cross-examine an affiant is not given after request to cross-examine is made as provided in this section, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

Comment. Section 648.340 restates former Section 11514, except the notice must be served at least 30, rather than ten, days before the hearing, and the opposing party has ten, rather than seven, days to request cross-examination.

§ 648.350. Protection of child witnesses 2/24/92

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses, in a way that is appropriate to protect a child witness from intimidation or other harm, taking into account the rights of all persons.

Comment. Section 648.350 codifies an aspect of Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987).

§ 648.360. Official notice 5/1/92

648.360. (a) Official notice may be taken of any of the following:

(1) A generally accepted technical or scientific matter within the agency's special field.

(2) A fact that may be judicially noticed by the courts of this state.

(b) Official notice may be taken before or after submission of the case for decision. The matters of which official notice is taken shall be noted in, referred to in, or appended to, the record.

(c) All parties present at the hearing shall be notified at the hearing, or before issuance of an initial or final decision, of the matters of which official notice is taken. A party shall have a reasonable opportunity on request to rebut the officially noticed matters by evidence or by written or oral presentation of authority, the manner of rebuttal to be determined by the agency.

Comment. Section 648.360 supersedes former Section 11515. For matters subject to judicial notice by the courts, see Evidence Code §§ 451-52.

An agency may limit the matters subject to official notice. Section 648.110 (provisions may be modified or made inapplicable by regulation). See, e.g., 18 CCR 5006, 20 CCR 73 (limitation to judicially noticeable matters in State Board of Equalization and Public Utilities Commission).

Section 648.360 makes clear that all parties have an opportunity to rebut an officially noticed matter, including the agency that is a party to the adjudicative proceeding. Contrast Harris v. ABC App. Bd., 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965).

Article 4. Evidence

§ 648.410. Technical rules of evidence inapplicable 2/24/92

648.410. (a) Except as provided in this chapter, the hearing need not be conducted in accordance with technical rules relating to evidence and witnesses.

(b) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil action.

Comment. Section 648.410 restates the first two sentences of former Section 11513(c). The intent of Section 648.410 is to make available to the fact finder evidence that might not be admissible under evidentiary limitations of civil or criminal cases. Thus, for example, the Evidence Code rules relating to excludability of evidence about prior convictions should not apply automatically in the administrative setting. Contrast Coburn v. State Personnel Board, 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (1978).

An agency may make the Evidence Code applicable in the agency's administrative hearings notwithstanding this section. Section 648.110. An agency may not modify the rules in this chapter or make the rules in this chapter inapplicable for hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification or inapplicability of statute by regulation).

§ 648.420. Discretion of presiding officer to exclude evidence 2/24/92

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Comment. Section 648.420 supersedes the last clause of the first paragraph of former Section 11513(c) (exclusion of irrelevant and unduly repetitious evidence). It is drawn from Evidence Code Section 352.

§ 648.430. Review of presiding officer evidentiary rulings 2/24/92

648.430. A ruling of the presiding officer admitting or excluding evidence is subject to administrative review in the same manner and to the same extent as the presiding officer's proposed decision in the proceeding.

Comment. Section 648.430 is new. It overrules any contrary implication that might be drawn from former Section 11512(b).

§ 648.440. Privilege 2/24/92

648.440. The rules of privilege are effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Comment. Section 648.440 restates the first portion of the last sentence of the first paragraph of former Section 11513(c).

§ 648.450. Hearsay evidence and the residuum rule 2/24/92

648.450. (a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

ALTERNATIVE (b1) On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of subdivision (a), whether or not the objection was previously raised in the adjudicative proceeding.

ALTERNATIVE (b2) On judicial review of the decision in the proceeding, a party may not object to a finding supported only by hearsay evidence in violation of subdivision (a), unless an objection was previously raised in the adjudicative proceeding, either during the hearing or on administrative review. This subdivision applies only if administrative review of the decision after the hearing was available.

Comment. Subdivision (a) of Section 648.450 restates the third sentence of former Section 11513(c).

It should be noted that an agency, other than one whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, may provide a different rule by regulation than the one provided in this section. See Section 648.110 (provisions may be modified or made inapplicable by regulation) and Comment. See also Section 641.130 (modification or inapplicability of statute by regulation).

Staff Note. The Commission asked to see two alternative drafts concerning the right to raise the residuum rule for the first time on judicial review. These are set out as (b1) and (b2).

§ 648.460. Unreliable scientific evidence 2/24/92

648.460. Notwithstanding any other provision of this chapter, evidence based on methods of proof that are not generally accepted as reliable in the scientific community shall be excluded.

Comment. Section 648.460 codifies case law applicable to administrative hearings. Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). This section applies notwithstanding agency rules to the contrary.

Staff Note. The introductory clause of this section would preclude an agency from overriding it by regulation.

§ 648.470. Evidence of sexual conduct 2/24/92

648.470. (a) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

(b) Notwithstanding any other provision of this chapter:

(1) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at the hearing unless offered to attack the credibility of the complainant, as provided for under paragraph (2). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

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

Comment. Subdivision (a) of Section 648.470 restates former Section 11513(k). Paragraph (b)(1) restates the second paragraph of former Section 11513(c). Paragraph (b)(2) restates former Section 11513(j). This section applies notwithstanding agency rules to the contrary.

Article 5. Ex Parte Communications

§ 648.510. Scope of article 3/12/92

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

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

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

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

Nothing in this article limits the authority of the presiding officer to conduct an in camera examination of proffered evidence. Cf. Section 645.350 (lodging discovery matters with court).

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

§ 648.520. Ex parte communications prohibited 3/12/92

648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, on 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 presiding officer and a party or the attorney or other authorized representative of a party, including an employee of an agency that is a party.

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

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

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

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

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

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

Subdivision (a) is not intended to apply to communications made to or by a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings,

number of copies required, or manner of service; such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case. However, it should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.340 (staff assistance for presiding officer).

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

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

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

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

Staff Note. We do not 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).

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

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

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

§ 648.540. Disclosure of ex parte communication received 1/24/92

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

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

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

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

Comment. Section 648.540 is drawn from former Section 11513.5(d). See also 1981 Model State APA § 4-213(e). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

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

§ 648.550. Disqualification of presiding officer

10/7/91

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

Comment. Section 648.550 is drawn from former Section 11513.5(e). See also 1981 Model State APA § 4-213(f). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Section 648.550 permits the disqualification of a presiding officer if necessary to eliminate the effect of an ex parte communication. In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review.

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

Article 6. Enforcement of Orders and Sanctions

Staff Note. The State Bar Conference of Delegates in 1990 approved Resolution 9-12, which would require an administrative agency to award to the prevailing party (other than the agency itself) fees and other expenses incurred by the party, unless the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. The conference resolution included an elaborate draft that attempts to define many of these terms and provide implementing procedures. The proposal is apparently modeled after Federal APA § 504.

A copy of the resolution was forwarded to the Commission by its proponent, the Los Angeles County Bar Association, with the suggestion that the Commission might want to consider the proposal or support the State Bar when the proposal is introduced in legislation. The State Bar has tried for two sessions to find a legislative author, without success. They will be making a decision this summer on how to proceed with the matter--either increase their efforts or refer it back to the proponent.

The staff suggests that we continue to monitor the Bar's activities on this matter. It is our sense is that, regardless of the merits of the proposal, it has serious problems in the present political climate that would make it impossible to enact.

§ 648.610. Misconduct in proceeding 6/1/92

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

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

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

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

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

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

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

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

§ 648.620. Contempt 6/1/92

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

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

Comment. Section 648.620 restates a portion of former Section 11525 of the Government Code. For monetary sanctions for bad faith tactics, see Section 648.630. For enforcement of discovery orders, see Sections 645.310-645.380.

§ 648.630. Monetary sanctions for bad faith actions or tactics 6/1/92

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

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

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

For authority to seek the contempt sanction, see Section 648.620. For enforcement of discovery orders, see Sections 645.310-645.380.

Staff Note. Rule 11 of the Federal Rules of Civil Procedure provides a monetary sanction for a pleading, motion, or other paper that is interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in litigation. This would be covered in this section by the reference to Code of Civil Procedure Section 128.5, which includes as bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay "the making or opposing of motions or the filing and service of a complaint or cross-complaint".

It may be necessary to draft some general provisions governing stays pending review.

CHAPTER 9. DECISION

Article 1. Issuance of decision

§ 649.110. Proposed and final decisions 10/31/91

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

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

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

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

The first sentence of subdivision (b) restates the first sentence of former Section 11517(b), with the addition of authority for an agency to provide a different decision period. The second sentence makes clear that the agency is not accountable for the presiding officer's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a proposed decision.

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

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

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

Staff Note. We have not yet examined the concept of when a case is "submitted" for purposes of this section.

Mr. Louis of DSS has agreed to provide the Commission with suggested language addressed to the problem of temporary suspension orders expiring before the agency has time to act on the presiding officer's proposed decision.

§ 649.120. Form and contents of decision 6/1/92

649.120. (a) A proposed decision or final decision shall be in writing and shall include, separately stated, an explanation of the factual and legal basis for the proposed or final decision, and policy reasons for the decision if it is an exercise of the agency's discretion, as to each of the principal controverted issues including the remedy prescribed.

(b) The statement of the factual basis for the proposed or final decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the proposed or final decision. If the factual basis for the proposed or final decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.

(c) The statement of the factual basis for the proposed or final decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include facts known to the presiding officer and supplements to the record that are made after the hearing, provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

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

Comment. Section 649.120 supersedes the first two sentences of former Sections 11500(f)(4) and 11518. Under Section 649.120, the form and contents of a proposed decision and final decision are the same. Cf. former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of policy reasons for the decision, if it is an exercise of the agency's discretion, is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the policy reasons in the agency's decision facilitates administrative and judicial review; clarifies the precedential effect of the decision, see Article 2 (commencing with Section 649.310); and focuses attention on policy questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings.

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

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Rev. Code of Wash. Ann. §§ 34.05.461(3) and 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the observed demeanor, manner, or attitude of the witness that supports the determination. Code Civ. Proc. § 1094.5 (administrative mandamus). The observed manner of a witness includes observed actions of the witness.

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

Staff Note. The Commission has previously worked on this provision as Section 649.120. New material, not seen in previous drafts of this section, appears in the first sentence of subdivision (a)--a requirement that the statement of decision explain the remedy prescribed and include policy reasons for any exercise of discretion. This implements a Commission decision at the April 1992 meeting. The Comment includes a reference to the Topanga case.

New material also appears in subdivision (c), implementing Professor Asimow's suggestion that the presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence. He notes that this provision confirms a well

established distinction in administrative law between (1) receiving evidence through testimony or official notice and (2) evaluating evidence already in the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 649.150. Time proposed decision becomes final 10/31/91

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

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

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

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

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

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

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

Staff Note. Some agencies' administrative procedure statutes contemplate that the agency head will take an affirmative act to issue a final decision rather than allowing the proposed decision to become final by default. E.g., Pub. Util. Code § 311. We anticipate this statute will be conformed to the general scheme. If the agency wishes to review proposed decisions and 100 days is insufficient time to initiate review, the agency may adopt a regulation under this section giving itself more time.

§ 649.160. Service of final decision on parties 10/31/91

649.160. (a) The agency shall serve a copy of the final decision in the proceeding on each party within 10 days after the final decision is issued.

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

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

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

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

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

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

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

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

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

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

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

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

The section is intended to provide parties a limited right to remedy mistakes in the final decision without the need for administrative or judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the

final decision. This supplements the authority in Section 649.140(a)(2) of the agency head to adopt a proposed decision with technical or other minor changes.

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

Article 2. Administrative Review of Decision

§ 649.210. Availability and scope of review 6/14/91

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

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

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

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

(b) An agency may by regulation mandate administrative review, or may preclude or limit administrative review, of a proposed or final decision.

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

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

Staff Note. Is subdivision (b) intended to apply as well to agencies that use OAH hearing personnel? The staff believes this provision should apply broadly, and would add language to make clear that OAH agencies could mandate, preclude, or limit administrative review.

§ 649.220. Initiation of review 10/31/91

649.220. On service of a copy of a proposed or final decision that is subject to review under Section 649.210, but not later than 30 days after service or other time provided by agency regulation:

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

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

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

§ 649.230. Review procedure 6/1/92

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

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

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

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

Comment. Section 649.230 restates the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence (except evidence unavailable at the hearing before the presiding officer). *Cf.* Code

Civ. Proc. § 1094.5(e); see also 1981 Model State APA § 4-216(d)-(f). The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

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

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

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

Staff Note. The Commission has not previously reviewed this section.

§ 649.240. Decision or remand 10/31/91

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

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

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

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

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

(c) A final decision or a remand for further proceedings shall be in writing and shall include, or incorporate by express reference to the original proposed or final decision, all the matters required by Section 649.120 (form and contents of decision). A remand for further proceedings shall specify the ground for remand and shall include precise instructions to the presiding officer of the action required.

(d) The reviewing authority shall cause a copy of the final decision or remand for further proceedings to be served on each party.

Comment. Section 649.240 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j).

Remand is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

Specification of the ground for remand must be precise, but need not include the same details of explanation as a final decision would contain. The specification may include such matters as the need for additional proceedings resulting from newly discovered evidence.

The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.210.

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

§ 692.250. Procedure on remand 6/14/91

692.250. (a) On remand, the reviewing authority may order authorized and appropriate temporary relief.

(b) The presiding officer shall prepare a revised proposed or final decision on remand based on the additional evidence and the record of the prior hearing.

(c) The revised proposed or final decision on remand shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original proposed or final decision.

Comment. Subdivision (a) of Section 692.250 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) restate the third and fourth sentences of former Section 11517(c). For the record in the proceeding, see Section 649.230 (review procedure). For the manner of service, see Section 613.210.

Article 3. Precedent Decisions

Staff Note. The Commission directed the staff to prepare for further Commission review a draft that would implement Professor Asimow's suggestion that agencies be required to designate significant adjudicative decisions as precedential, without subjecting them to the rulemaking process. This draft is solely for the purpose of focusing Commission consideration of this matter; the Commission has made no policy decision for or against precedential decisions.

The staff notes the announcement of a new CEB publication, California State Personnel Board Precedential Decisions Service. The cost of the service is $95 annually. The announcement states that a statute effective January 1, 1989, enables SPB to designate certain of its decisions as precedential. "This was a significant change in administrative law affecting the employee appeals process. Under this new statute, the SPB may give precedential value to the decisions it writes in cases which it has heard after rejecting administrative law judges' proposed decisions and/or granted petitions for rehearing. The SPB may also choose to designate as precedential selected proposed decisions of its administrative law judges. The Government Code also provides that all decisions designated as precedents shall be published, thus the creation of CEB's California State Personnel Board Precedential Decisions Service."

§ 649.310. Application of article 5/1/92

649.310. This article does not apply to an agency that publishes all of its final decisions.

Comment. Section 649.310 recognizes that a number of agencies, including the Agricultural Labor Relations Board, Public Utilities Commission, Public Employment Relations Board, and Workers Compensation Appeals Board, routinely publish all their decisions.

§ 649.320. Precedential effect of decision 5/1/92

649.320. A decision may not be relied on as precedent by an agency to the detriment of any person unless it has been designated as a precedent decision by the agency.

Comment. Section 649.320 provides a sanction for failure of an agency to comply with the mandate of this article.

Staff Note. This section is set out for purposes of discussion only. Professor Asimow does not suggest a sanction for failure of an agency to designate precedent decisions. He notes that he would be satisfied to leave the selection process to the agency heads. "Under that approach, there would be no effective sanction if an agency failed to designate any of its decisions as precedential. However, I would anticipate that the public and perhaps the legislature would criticize an agency's failure to designate any of its decisions as precedential. This sort of criticism should be a sufficiently effective incentive to designate decisions."

§ 649.330. Designation of precedent decision 5/1/92

649.330. (a) An agency shall designate as precedential a final decision that contains a significant legal or policy determination.

(b) Designation of a decision as precedential is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, relating to rulemaking.

Comment. Section 649.330 recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Section 12935(h) (Fair Employment and Housing Commission); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 649.330 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.

§ 649.340. Index of precedent decisions 5/1/92

649.340. An agency shall maintain an index of significant legal and policy determinations made in precedent decisions.

Comment. The index required by Section 649.340 is a public record, available for public inspection and copying.

§ 649.350. Article not retroactive 5/1/92

649.350. (a) This article applies to final decisions issued on or after January 1, 1996.

(b) Nothing in this article precludes an agency from designating as precedential a final decision issued before January 1, 1996.

Comment. Section 649.350 minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

CHAPTER 10. IMPLEMENTATION OF DECISION

§ 650.110. Effective date of decision 5/1/92

650.110. (a) The decision is effective 30 days after it becomes final unless:

(1) The agency head orders that the decision becomes effective sooner.

(2) The agency head orders that enforcement of the decision shall be stayed.

(b) A party may not be required to comply with a final decision unless the party has been served with or has actual knowledge of the final decision.

(c) A nonparty may not be required to comply with a final decision unless the agency has made the final decision available for public inspection and copying or the nonparty has actual knowledge of the final decision.

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Sections 641.310-641.370 (emergency decision).

Comment. Subdivision (a) of Section 650.110 restates subdivision (a) and a portion of the first sentence of subdivision (b) of former Section 11519. The remainder of the section is drawn from 1981 Model State APA § 4-220(c)-(d). The section distinguishes between the effective date of an order and the time when it can be enforced. For provisions on stays, see Section 650.120.

The requirement of "actual knowledge" in subdivisions (b) and (c) is intended to include not only knowledge that an order has been issued, but also knowledge of the general contents of the order insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of an order, this must be resolved in the manner that other fact questions are resolved.

The binding effect of an order on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues an order revoking the license of a particular dealer, this order is binding on any wholesaler who has actual knowledge of it, even before the order is made available for public inspection and copying; the order binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 650.120. Stay 5/1/92

650.120. A stay of enforcement may be included in the decision or may be ordered at any time before the decision becomes effective.

Comment. Section 650.120 restates the first sentence of former Section 11519(b).

§ 650.130. Probation 5/1/92

650.130. (a) A stay of enforcement may be accompanied by an express condition that the respondent comply with specified terms of probation. Specified terms of probation shall be just and reasonable in the light of the findings and decision.

(b) Specified terms of probation may include an order of restitution that requires the respondent to compensate the other party to a contract damaged as a result of a breach of contract by the respondent. In such a case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of the breach. If restitution is ordered and paid under this subdivision, the amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Subdivision (a) of Section 650.130 restates the last sentence of former Section 11519(b). Subdivision (b) restates former Section 11519(d).

§ 650.140. Registration with public officer 5/1/92

650.140. If a person whose license has been revoked or suspended was required to register with a public officer, a notification of the suspension or revocation shall be sent to the officer after the decision has become effective.

Comment. Section 650.140 restates former Section 11519(c).

Staff Note. The staff proposes to relocate this section from the administrative procedure act to an appropriate place in the Business and Professions Code.

650.150. Reinstatement of license or reduction of penalty 5/1/92

650.150. (a) A person whose license has been revoked or suspended may apply to the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.

(b) The agency shall give notice to the Attorney General of the application and the Attorney General and the applicant shall be given an opportunity to present either oral or written argument before the agency head.

(c) The agency head shall decide the application, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably determines are appropriate to impose as a condition of reinstatement.

(d) This section does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Section 650.150 restates former Section 11522.

Staff Note. The staff proposes to relocate this section from the administrative procedure act to an appropriate place in the Business and Professions Code.