Second Supplement to Memorandum 94-19

Administrative Adjudication: Comments on Tentative Recommendation

This Supplement addresses comments on the Tentative Recommendation in the Attorney General's letter of May 11, 1994, attached as an Exhibit to this Supplement, and questions raised by the Commission at the May meeting. Points the staff intends to raise at the meeting are preceded by a dot [•].

§ 614.040. Procedure after conversion [§ 614.140 in the TR]

• The Attorney General is concerned the provisions permitting conversion of a proceeding from one type to another (e.g., from formal to informal or from adjudication to rule-making) might permit on-the-spot conversion that does not afford time to prepare for the new type of proceeding. The Attorney General notes Section 614.010 permits conversion "only on notice to all parties," but wants clearer language to address the problem. We would do this by adding the following to Section 614.040:

> 614.040. 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) Allow the parties a reasonable time to prepare for the new proceeding.
>
> . . . .

§ 632.020. When informal hearing may be used [§ 647.110 in TR]

• The Attorney General suggests the informal hearing procedure be expressly authorized for hearings involving land use planning or environmental decisions. Professor Asimow made a similar suggestion. See Asimow, *The Adjudication Process* 94-97 (Oct. 1991). The staff thinks this is a good suggestion. Although under Section 632.020, agencies may authorize informal hearings by regulation, adding an express provision would obviate the need for regulations. We would add the following to Section 632.020:

632.020. An informal hearing procedure may be used in any of the following proceedings:

. . .

(d) Hearings of the California Coastal Commission, San Francisco Bay Conservation and Development Commission, and Water Resources Control Board, that involve land use planning or environmental matters.

If there are other agencies that should be included in this list, we can add them as they are identified.

• At the May meeting, the Commission considered a suggestion from the Attorney General that the informal hearing procedure should be authorized for a hearing not required by statute, but being held to satisfy a possible due process requirement. The Commission asked the staff to confer with the Attorney General's Office to draft language and report back. The staff conferred with Dan Siegel of the Attorney General's Office in arriving at the following language to be added to Section 632.020:

632.020. An informal hearing procedure may be used in any of the following proceedings:

. . .

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

§ 632.030. Procedure for informal hearing [§ 647.120 in TR]

Section 632.020 says that, in an informal hearing, the presiding officer may "limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument." The Comment says the "informal hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties." The Attorney General wants to codify what is in the Comment by saying in the statute that the presiding officer may preclude prehearing conferences, discovery, and nonparty testimony. We might do this by revising the section to say the presiding officer may:

limit ~~pleadings, intervention, discovery, prehearing conferences,~~ witnesses, testimony, and evidence, and may limit or entirely preclude pleadings, intervention, discovery, prehearing conferences, rebuttal, and argument.

• The staff recommends against doing this. There should be some flexibility in the statute so as not to limit the discretion of the presiding officer too severely. Perhaps the presiding officer should have discretion to preclude oral testimony, for example. The staff thinks the existing draft of Section 632.030 and Comment afford a desirable flexibility.

§ 632.040. Cross-examination [§ 647.130 in TR]

• Section 632.040 permits the presiding officer to preclude an informal hearing and convert it to a formal hearing if it appears cross-examination of witnesses is necessary to a proper determination. The Attorney General says this could result in arguments that cross-examination is needed in hearings such as land use proceedings where cross-examination is inappropriate. The AG would authorize agencies by regulation to specify categories of cases in which cross-examination is not necessary to make clear the informal hearing may be used. This seems like a good suggestion. The staff would add the following to Section 632.040:

> (c) An agency may by regulation specify categories of cases in which cross-examination is deemed not necessary for proper determination of the matter.

In connection with this revision, an introductory clause should be added to subdivision (a) to say "Subject to subdivision (c) . . . ."

§ 634.010. Agency regulation required [§ 641.310 in TR]

• The Attorney General supports the emergency decision provisions, with one suggestion. Section 634.010 permits agency regulations applying the emergency decision provisions of the draft statute for temporary, interim relief, and says the section does not apply to an emergency decision issued under other express statutory authority. The Attorney General wants to make clear that "other express statutory authority" includes cease and desist orders authorized by other statutes. The staff agrees, and would modify subdivision (c) of Section 634.010 as follows:

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

§ 634.060. Agency record [§ 641.360 in TR]

• At the May meeting, the Commission considered the staff recommendation to delete subdivision (b) of Section 634.060, which says the agency record need not constitute the exclusive basis for an emergency decision or for administrative or judicial review of an emergency decision. This provision came from the 1981 Model State APA. The Commission was inclined to delete it, but asked the staff to discuss the reason for this provision with Professor Asimow and to report back. Professor Asimow thinks this may have been included in the Model APA to protect the agency against gaps in the record where the agency is acting under time pressure. He thought the provision was not crucial and could be deleted from our statute. The staff recommends we delete it.

§ 635.010. Declaratory decision permissive [§ 641.220 in TR]

The Attorney General supports the declaratory decision provisions, with one suggestion. Section 635.010 permits a person to apply to an agency for a declaratory decision. Subdivision (c) says "[a]n application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review." The Attorney General is concerned this might authorize an application for a declaratory decision by a court, even though administrative remedies have not been exhausted. This is not the intent of the section. We would clarify this by adding the following to subdivision (c) of Section 635.010:

> (c) An application for a declaratory decision <u>under this chapter</u> is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review.

§ 642.240. Time for agency action

Section 642.240 requires that, within 30 days after receipt of an application for an agency decision, the agency shall provide certain information to the applicant. Within 90 days of the application, the agency shall either approve or deny the application or commence an adjudicative proceeding. The Attorney General wants to ensure these time limits are realistic, especially for agencies that handle a large volume of cases. In Memorandum 94-19, we discuss similar concerns raised by agencies that have different time periods established in specific statutes applicable to those agencies. The time limits of Section 642.240 are expressly

subject to time limits established by another statute. Memorandum 94-19 says we will preserve these existing statutes.

§ 642.310. Proceeding commenced by notice of commencement of proceeding

As decided by the Commission at the May meeting, the draft attached to Memorandum 94-26 changes "agency pleading" to "notice of commencement of proceeding" in Section 642.310.

§ 642.420. Continuances

• Section 642.420 does not continue the provision in Government Code Section 11524 for immediate superior court review of administrative denial of a request for a continuance. Memorandum 94-19 points out that the Department of Insurance and State Bar Committee on Administration of Justice want to preserve immediate judicial review of denial of a continuance. The Attorney General takes the same view. The narrative in the Tentative Recommendation justifies the proposed new rule by saying denial of a continuance is no more prejudicial than any other adverse decision, and, in the interest of judicial economy, should not require early and separate judicial review. "Judicial proceedings are more efficient if piecemeal review can be avoided." Asimow, *Judicial Review: Standing and Timing* 33 (Sep. 1992). The staff still thinks it would be better practice to have one appeal at the end of the administrative adjudication process to resolve all issues, but recognizes there is considerable support for the present rule of immediate review. We could implement the view of the Attorney General, Department of Insurance, and State Bar Committee on Administration of Justice by adding a new subdivision (c) to Section 642.420:

> (c) If the presiding officer denies a party's application for a continuance, within 15 calendar days after the denial that party shall apply to the superior court for appropriate judicial relief or be barred from judicial relief from the denial as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may either be oral at the time of the denial or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.
>
> **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.~~

§ 642.430. Venue

The Attorney General wants an administrative decision granting or denying a motion for change of venue to be subject to immediate judicial review, the same as existing law on review of denial of a continuance. The existing venue provision of the APA (Gov't Code § 11508) is silent on when judicial review is available. But under case law, venue decisions may be immediately reviewable by writ of mandate in appropriate cases. The Attorney General says that, although in theory immediate judicial review can be disruptive, in practice it is not:

> Challenges are uncommon. Moreover, when successful, they allow an immediate rectification of the problem. In contrast, postponing these challenges will promote delay. Long after a hearing and administrative review have concluded, a court may order a new hearing due to a procedural error. It would be far preferable to resolve these matters at the time of the hearing.

The CEB treatise says:

> Logically, a party should be able to obtain judicial review of denial or refusal of the agency to move the hearing before the hearing on the merits. But see *McPheeters v. Board of Medical Examiners* (1947) 82 CA2d 709, 717, 187 P2d 116, 120.

California Administrative Hearing Practice § 2.53, at 92 (Cal. Cont. Ed. Bar 1984). In the *McPheeters* case cited in the treatise, the court stated the policy argument against immediate review of venue rulings:

> It will be noted that the writ of mandate is sought for the purpose of reviewing an intermediate step in the administrative process, and was sought before the statewide administrative board had acted on the merits. The attorney general contends that such writ cannot be used to review administrative action until the board has acted on the merits. Certainly, each step in the administrative proceeding cannot be reviewed separately, any more than each ruling in the trial of a civil action may be separately reviewed by a separate appeal.

But a case under Labor Code provisions governing the Occupational Safety and Health Appeals Board suggests immediate judicial review of a venue

decision may be available. See Keller Industries, Inc. v. Occupational Safety & Health Appeals Board, 124 Cal. App. 3d 469, 177 Cal. Rptr. 136 (1981). Some APA provisions apply to OSHAB hearings, but not the APA venue provision. See Lab. Code § 6603. Both the APA venue provision (Gov't Code § 11508) and the Labor Code are silent on judicial review of venue decisions.

In the *Keller* case, OSHAB denied respondent's motion for change of venue. Respondent sought immediate superior court review by writ of mandate. The superior court denied relief, and respondent appealed. The Court of Appeal held it was not an abuse of discretion to deny the motion for change of venue, but did not address the question of whether immediate review should be available. The implication of the court's opinion is that immediate review by writ of mandate may be available in appropriate cases.

• For now, the staff would preserve case law by leaving Section 642.430 (venue) silent on timing of judicial review of venue decisions. Timing of judicial review is the subject of a separate study by Professor Asimow, and should be considered with other judicial review questions when we reach them.

§ 643.110. OAH administrative law judge as presiding officer [§ 643.120 in TR]

Existing law lists agencies that are subject to the APA. Gov't Code § 11501. The draft statute reverses this presumption: Section 643.110 requires agencies not exempted by statute to use OAH ALJ's. We did this so statutory hearings created in the future will be conducted by OAH ALJ's unless a conscious decision is made to exempt them. In conforming revisions yet to be completed, we will by statute exempt all present non-APA hearings from the requirement in Section 643.110 that they be conducted by OAH ALJ's.

• The Attorney General wants to keep the existing scheme under which the agencies to which the APA applies are listed. Except for the possibility the conforming revisions may inadvertently fail to exempt a statutorily required hearing, this would be purely a drafting question. An advantage of covering all hearings except those expressly exempted is that we may expect energetic help from agencies in identifying all hearings that should be exempted. The staff would keep the scheme of the draft.

§ 643.320. When separation required

At the May meeting, the Commission reaffirmed its previous decision to exempt from the separation of functions requirement the issuance, denial, revocation, or suspension of a driver's license pursuant to Division 6

(commencing with Section 12500) of the Vehicle Code. The Commission noted this would not exempt school bus driver certificates, ambulance certificates, and license endorsements pursuant to other parts of the Vehicle Code. The Department of Motor Vehicles representative agreed to provide cost estimates of what it might cost to require separation of functions for hearings on school bus driver and ambulance certificates and other license endorsements. We have not yet received this cost information, but we expect it before the June meeting.

§ 643.330. When separation not required

The Attorney General wants the separation of functions requirement modified for land use and environmental decisions, saying staff of the California Coastal Commission and regional water quality control boards that have reviewed permit applications "frequently provide valuable technical and policy advice to board members during review of applications at public hearings." For technical advice, this is addressed by the provision in Section 643.330 that:

> 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 comment on the advice.

• But this does not permit policy advice from a staff investigator or advocate. Should we permit such advice in proceedings of the California Coastal Commission, Bay Conservation and Development Commission, and regional water quality control boards? At the February meeting, the Commission deferred deciding whether the Coastal Commission and Bay Conservation and Development Commission should receive a blanket exemption from the new APA. If these agencies are not given a blanket exemption, we could implement the Attorney Generals' suggestion by adding the following to Section 643.330(a):

> (6) A person who has served as investigator or advocate in an adjudicative proceeding of the California Coastal Commission, Bay Conservation and Development Commission, or a regional water quality control board may give advice to the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character,

provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice.

• The Attorney General also wants an exemption saying the prohibition against advice to the presiding officer by a staff investigator, prosecutor, or advocate would not apply to advice given in a public proceeding not presided over by an ALJ from OAH — e.g., in a special hearing procedure. But Professor Asimow's law review article cites many cases holding that separation of functions is an essential element of due process, including a case holding it was improper for the same attorney to prosecute a medical license revocation and then to advise the board. Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1166 n.338 (1992). For this reason, the staff recommends against this proposed change.

§ 643.340. Staff assistance for presiding officer

The Attorney General is concerned about the provision in Section 643.340 that a presiding officer may receive assistance from a staff assistant if the assistant does not receive ex parte communications of a type that the presiding officer would be prohibited from receiving. The AG says this prohibition would be "very burdensome and unnecessary" for agencies that use staff to receive communications while informally gathering facts. The AG notes the Coastal Commission has an exception to the prohibition against ex parte communication. This is in Public Resources Code Section 30322(b)(1), which says any "communication between a staff member acting in his or her official capacity and any commission member or interested person" is not prohibited. We propose to keep this special provision for the Coastal Commission.

• The Attorney General suggests non-OAH agencies should be able to modify Section 643.340 by regulation, so "staff who are directly subject to agency control and supervision can receive ex parte communications." But Section 643.340 does not prohibit staff from receiving ex parte communications. It only prohibits staff who receive ex parte communications from then assisting a presiding officer in an adjudicative proceeding. The staff is reluctant to delete this provision, because to do so would provide a gaping hole for evasion of the prohibition against ex parte communication with a presiding officer. The staff thinks a better solution is to preserve the special statute of the Coastal Commission, if the Coastal Commission is ultimately made subject to the new APA. Perhaps also we should provide similar statutes for agencies such as the Bay Conservation and

Development Commission and regional water quality control boards. If BCDC is ultimately made subject to the new APA, we could add a provision to its statute (Gov't Code §§ 66600-66682) to say "Section 643.340 does not apply to hearings of the commission under this title."

The Attorney General is concerned the language in Section 643.340 prohibiting staff from furnishing, augmenting, diminishing, or modifying evidence in the record might prohibit much-needed staff analysis of evidence for the presiding officer. This not the intent of this language. We would add the following to the Comment:

> The prohibition in Section 643.340 against the staff furnishing, augmenting, diminishing, or modifying evidence in the record does not prohibit the staff from analyzing evidence in the record for the benefit of the presiding officer.

§ 644.110. Intervention

• Section 644.110 permits a non-party whose interests may be substantially affected to intervene as a party. The Attorney General says the section is unnecessary, and is likely to result in the intervenor trying to introduce extraneous evidence and argument, causing confusion and delay. This concern is largely addressed by Section 644.120, which permits the presiding officer to limit the issues addressed by the intervenor, and to limit discovery and cross-examination by the intervenor.

The intervention provisions come from the 1981 Model State APA. Moreover, as the Attorney General's letter notes (Exhibit p.5, n.3), under present California law a non-party whose property rights would be substantially affected by the proceeding has a constitutional right to notice and an opportunity to be heard. Horn v. County of Ventura, 24 Cal. 3d 605, 616, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (approval of tentative subdivision map). It seems desirable to provide procedures for the assertion of this constitutional right. Perhaps we could lessen the concern that this provision will open the floodgates the potential intervenors by revising subdivision (c) of Section 644.110 as follows:

> 644.110. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:
>
> . . .
>
> (c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities ~~may~~ will be

substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

§ 645.130. Depositions

• Section 645.130 permits the presiding officer to order the deposition of a witness to obtain testimony for use at the hearing if the witness will be unable or cannot be compelled to attend the hearing. Under existing law, the agency has this authority, not the presiding officer. The Attorney General wants this authority to remain with the agency, and not be shifted to the presiding officer. The AG is concerned that allowing the presiding officer to make these orders will result in excessive use of depositions in administrative proceedings. The staff would not make this change. The deposition provision is consistent with the scheme of the proposed statute to give the presiding officer complete authority over discovery proceedings, including enforcement of discovery orders which are now enforced by the superior court.

The Attorney General says the leadline, "Depositions," is misleading because it implies depositions are for discovery. He would revise the leadline to make clear depositions are to preserve testimony. The staff thinks this is a good suggestion, and would revise the leadline to read "Preservation of testimony by deposition."

§ 645.210. Time and manner of discovery

• The Attorney General supports the new provision for continuing discovery. In Memorandum 94-19, the staff recommends limiting continuing discovery to names and addresses of witnesses the other party intends to call at the hearing, witness' statements, and all writings the party proposes to offer in evidence. This revision would eliminate continuing discovery of "any other writing or thing that is relevant." Perhaps we should also permit continuing discovery of an investigative report to the extent it "reflects matters perceived by the investigator in the course of the investigation." See Section 645.230(b)(4).

§ 645.320. Motion to compel discovery

The Attorney General supports having motions to compel discovery brought before the presiding officer in the administrative proceeding, rather than in the superior court, but would permit immediate judicial review, the same as for rulings on continuances and changes of venue. The question of the timing of

judicial review will be taken up when we consider Professor Asimow's study of that topic.

§ 645.410. Subpoena authority

• The Attorney General takes the same view as the Department of Insurance discussed in Memorandum 94-19, opposing the provision permitting a subpoena duces tecum to require production of documents "at any reasonable time and place," not merely at the hearing as under existing law. The AG thinks the new provision will cause unnecessary delay and be costly. In Memorandum 94-19, the staff opposed the suggestion of the Department of Insurance to limit production of documents to the hearing itself. The staff thought it was desirable to be able to use a subpoena duces tecum for discovery before the hearing, and not merely to obtain evidence for introduction at the hearing, the same as in civil proceedings generally. See Code Civ. Proc. § 1985. The good cause requirement for a subpoena duces tecum is some protection against abuse. Although cost is a major concern and will be key political factor, the staff is inclined to keep the provision for production of documents at any reasonable time and place.

§ 645.420. Issuance of subpoena

The Attorney General supports Section 645.420, making clear an attorney may issue a subpoena.

§ 646.120. Conduct of prehearing conference

The Attorney General supports the new authority to conduct prehearing conferences by telephone or television.

§ 646.210. Settlement

• The Attorney General supports Section 646.210 codifying agency authority to settle cases, with revisions. The AG would make clear agencies may disapprove settlements, especially where the settlement is contrary to law, e.g., a settlement between an employee and an agency that would contravene State Personnel Board regulations. The staff would add a provision to Section 646.210 prohibiting a settlement contrary to statute or regulation. In Memorandum 94-19, we wanted to preserve the existing rule that settlement may include sanctions the agency otherwise lacks power to impose. We would also add that to Section 646.210:

646.210. (a) ~~The~~ Subject to subdivision (b), the parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. . . .

(b) The parties may not settle a matter where the settlement is contrary to statute or regulation, except that the parties may agree to sanctions the agency would otherwise lack power to impose.

(c) This section is subject to any ~~necessary~~ agency approval required by statute or regulation. An agency head may delegate the power to approve a settlement.

§ 646.220. Mandatory settlement conference

See Attorney General's comments under Section 648.130, *infra*, on default for nonappearance at a mandatory settlement conference.

§ 647.220. ADR authorized

The Attorney General supports the provisions for alternative dispute resolution.

§ 648.120. Consolidation and severance

The Attorney General supports the provision for consolidation or severance of proceedings.

§ 648.130. Default

Sections 646.120 and 646.220 permit the presiding officer to order a prehearing conference or a mandatory settlement conference. These sections and Section 648.130 permit (but do not require) a nonattending party to be held in default. The notice of the prehearing or settlement conference informs the parties that nonattendance may result in a default. These default provisions are new and are drawn from the 1981 Model State APA. The Attorney General thinks the default sanction is too drastic, especially for a party without counsel.

• Section 648.130 permits an agency to hold a hearing on notice to the parties notwithstanding a default, or to set aside a default for good cause, including mistake, inadvertence, surprise, or excusable neglect. Public policy favors relief from default and holding an administrative hearing on the merits. See California Administrative Hearing Practice, *supra*, § 2.41, at 82. These protections seem sufficient. The default sanction as an ultimate weapon appears necessary to assure attendance of parties at mandatory hearings. The staff would not delete the default provision. We could authorize monetary sanctions as an alternative to default:

(c) Notwithstanding the default of the person to which the agency action is directed, 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. The presiding officer may order the defaulting party, or 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 the defaulting party's failure to appear at a prehearing conference or settlement conference or at the hearing.

§ 648.140. Open hearings

The Attorney General supports the provision for the presiding officer to close the hearing to ensure a fair hearing.

§ 648.310. Burden of proof

Section 648.310 requires clear and convincing proof for revocation or suspension of an occupational license, "unless by regulation the agency provides a different burden." The Attorney General agrees with the staff recommendation in Memorandum 94-19 to delete the authority for agencies to vary the clear and convincing proof standard by regulation.

The Attorney General would also change the terminology to say "clear and convincing evidence," rather than "clear and convincing proof." The staff would keep "clear and convincing proof" because it is consistent with the Evidence Code. See Evid. Code § 502. *Accord,* California Administrative Hearing Practice, *supra,* § 3.59, at 202 ("clear and convincing proof" required for revocation or suspension of professional license). *But see* 1 G. Ogden, California Public Agency Practice § 39.04(2) (1993).

§ 648.450. Hearsay evidence and the residuum rule

Section 648.450 permits a party on judicial review to object to a finding supported only by hearsay evidence, whether or not the objection was previously made at the administrative hearing. Existing law is unclear. The Attorney General says this is unfair, and that objection should be required at the hearing to permit the defect to be remedied.

• The narrative part of the Tentative Recommendation justifies the new rule by saying it "may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence." This seems sound because it is the finding, not the hearsay, that is objected to on review. Professor Asimow thought an objection should be required at the

hearing, but softened this by observing that unrepresented persons might not understand the hearsay and residuum rules and would probably fail to object, and it might slow down the hearing to require objections below. Asimow, *The Adjudication Process* 71-73 (Oct. 1991). Perhaps a satisfactory intermediate solution would be to require an objection to a finding supported only by hearsay evidence to be raised on administrative review. Failure to do so would preclude raising the objection on judicial review:

> (b) 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~~ only if the objection was previously raised in the adjudicative proceeding, or, if the proceeding is subject to administrative review, on administrative review.

§ 648.460. Unreliable scientific evidence

Section 648.460 codifies California case law on administrative hearings that evidence based on a new scientific method of proof is admissible only if "generally accepted as reliable in the scientific community." In Memorandum 94-19, the staff recommends deleting Section 648.460 because of a 1993 U. S. Supreme Court case loosening the standard in federal courts by admitting scientific evidence if grounded "in the methods and procedures of science." The staff recommendation would leave California case law intact, but would permit California courts later to adopt the looser federal rule.

• The Attorney General would make the exclusionary rule of Section 648.460 permissive rather than mandatory by saying scientific evidence not generally accepted as reliable "may" be excluded. The problem with a permissive rule is that one presiding officer will exclude such evidence and another will admit it, leading to nonuniform application of evidentiary rules. The staff prefers either to delete the section as recommended in Memorandum 94-19, or to codify the new federal rule that scientific evidence is admissible if grounded in the methods and procedures of science. The staff prefers to delete Section 648.460 so the rule in administrative proceedings will be the same as in civil proceedings.

§ 648.520. Ex parte communications prohibited

The Attorney General supports the provision on ex parte communications, with revisions.

Section 648.520(a) says "while the proceeding is pending there shall be no communication, direct or indirect," between the presiding officer and specified persons without notice and an opportunity for all parties to participate. Because "communication" is not limited, it appears there may be no communication on any subject, not merely concerning the proceeding. This provision is from the 1981 Model State APA, but is broader: The Model APA only prohibits communications "regarding any issue in the proceeding." Professor Asimow recommended the Model APA provision:

> The statute should specify the matters that cannot be the subject of an ex parte communication; it cannot and should not prohibit all contacts between outsiders and agency adjudicators. Realistically, there will always be chance or social encounters; as long as issues in the pending proceeding are not discussed, such contacts are harmless. More importantly, an agency may well have other matters underway with respect to which such contacts are perfectly proper. . . .
>
> The MSAPA seems to adequately identify prohibited contacts. It forbids communications "regarding any issue in the proceeding." This provision allows communications concerning other agency business or social encounters, but prohibits communications too closely tied to the specific issues to be adjudicated.

Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1139 (1992).

• The Attorney General takes the same position as Professor Asimow by urging we preserve existing law prohibiting ex parte communications on the "merits of a contested matter while the proceeding is pending." The staff agrees with this policy, and would include the omitted language from the Model State APA:

> 648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, between the following persons without notice an opportunity for all parties to participate in the communication:

The Attorney General would keep the language of subdivisions (a) and (b) of Government Code Section 11513.5, rather than using Model APA language. With the amendment to Section 648.520 proposed above, there would be little substantive difference between existing law on ex parte communication and the

draft section, except that existing law prohibits ex parte communication with "any person who presided at a previous stage of the proceeding," while Section 648.520 does not. Professor Asimow recommended deleting this provision because of its obstructive effect on complex, lengthy, nonaccusatory cases. Asimow, *supra*, at 1180. The staff agrees, and would not restore this language.

The Attorney General would permit ex parte communication on administrative review "for the purpose of assistance and advice to the reviewing authority by the presiding officer," subject to separation of functions provisions. This is discussed under Section 649.230 (review procedure), *infra*.

§ 648.610. Misconduct in proceeding

The Attorney General supports the authority to impose the contempt sanction for violating the prohibition against ex parte communications.

§ 648.620. Contempt

The Attorney General supports giving the presiding officer authority to certify facts regarding contempt to the superior court, as Section 648.620 does.

§ 648.630. Monetary sanctions for bad faith actions or tactics

• Section 648.630 permits the presiding officer or agency to impose monetary sanctions for frivolous or dilatory tactics. The order is included in the decision and is reviewable in the same manner as agency decisions generally. This was suggested by two senior administrative law judges — James Wolpman and Stuart Wein. The Attorney General would limit this authority to the presiding officer, and not permit the agency to impose sanctions after the fact. This seems like a good suggestion, and could be implemented as follows:

> 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.

• The Attorney General would delete sanctions for bad faith "actions," saying parties without counsel might "request hearings even though they have no legal grounds." The problem with this is that "actions or tactics" as used in Section 648.630 is defined in Section 128.5 of the Code of Civil Procedure. To delete "actions" from Section 648.630 would create a disparity between the language of

Section 648.630 and Section 128.5. The staff thinks the assumed difference between "actions" and "tactics" is not so clear, and that there is adequate protection in the requirement that, in either case, they be taken in bad faith. The staff would not make this change.

§ 649.120. Form and contents of decision

Subdivision (a) of Section 649.120 requires a decision to state "the factual and legal basis for the decision as to each of the principal controverted issues." Existing law requires the decision to contain "findings of fact" and "a determination of the issues presented." Gov't Code § 11518. The Attorney General says this change of language will cause unnecessary litigation.

The narrative part of the recommendation says the new requirement that the legal basis for the decision be stated "will force the decision maker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise." The Comment says the requirement

> is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision, . . . and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings.

The staff thinks the requirement that the decision state its legal basis is needed, and would not delete it.

Should we change "factual . . . basis for the decision" back to "findings of fact"? Under existing law, findings of fact in administrative proceedings need not be stated with the formality required in judicial proceedings, and may be general if they make intelligent review by the courts possible and apprise the parties of the basis for administrative action. Swars v. Council of Vallejo, 33 Cal. 2d 867, 872-73, 206 P.2d 355 (1949); see also Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); California Administrative Hearing Practice, *supra*, § 4.29, at 235. Thus "factual basis for the decision" appears to be a more accurate statement of existing law than "findings of fact." We would add the following to the Comment:

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

Subdivision (c) of Section 649.120 says "[e]vidence of record may include facts known to the presiding officer . . , provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it." The Comment says this provision "codifies existing practice in some agencies." The Attorney General is concerned about this provision. The provision is not in the 1981 Model State APA, nor was it recommended in Professor Asimow's study. It was proposed by the Water Resources Control Board in a letter of March 22, 1991, considered at the July 1991 meeting. The Board thought an adjudicator ought to be able to rely in part on prior knowledge about the matter before it:

> State and Regional Board members are appointed in part upon their expertise in water resource matters. . . . These experts often rely on their technical expertise in making decisions. While the Model State Administrative Procedure Act . . . recognizes that this expertise may be utilized in evaluating evidence, it is practical reality that this expertise includes factual knowledge itself. In a similar vein, Board members may possess knowledge of facts pertaining to a case before them. For example, they may have visited a waste discharge facility at a time prior to a specified proceeding about the facility.

• Under existing law, official notice may be taken of matters within the expertise of board members, e.g., the ingredients of a drug and whether it constitutes a dangerous drug under the statute, and in such a case, the expertise can substitute for expert testimony. 1 Ogden, California Public Agency Practice § 38.10[2] (1993); California Administrative Hearing Practice, *supra,* § 3.35, at 182. But it is considerably more far-reaching to permit a presiding officer, in effect, to give testimony based on his or her personal knowledge merely by including in it in the record and giving parties an opportunity to comment. Will the presiding officer be subject to cross-examination? Is this tactically feasible? The staff is concerned about this provision, and is inclined to delete it:

(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~~ used in evaluating evidence.

§ 649.140. Adoption of proposed decision

The Attorney General supports the provision permitting reviewing authorities to make technical changes in a proposed decision.

§ 649.160. Service of final decision on parties

Section 649.160 requires a final decision to be accompanied by a statement of the time within which judicial review may be initiated. Failure to do so extends the time to six months after service of the decision. The Attorney General asks what the normal time limit is.

The draft statute does not include judicial review provisions. This is the subject of a separate study by our consultant. The time for judicial review under the APA is governed by Section 11523 of the Government Code, which has not yet been disposed of. The time for judicial review of non-APA proceedings is governed by statutes applicable to the particular agency. California Administrative Mandamus §§ 7.1-7.2, at 240 (Cal. Cont. Ed. Bar, 2d ed. 1989). We will address these questions in the future. The staff would delete the last sentence of subdivision (a) of Section 649.160, and take it up when we consider judicial review:

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. The final decision shall state its effective date and shall be accompanied by a statement of the time within which judicial review of the decision may be initiated. ~~Failure to state the time within which judicial review may be initiated extends the time to six months after the time the decision is issued.~~

§ 649.210. Availability and scope of review

The Attorney General has the same problem with the term "final" decision as does the Department of Health Services and State Personnel Board. This is

discussed in Memorandum 94-19, where the staff recommends adding clarifying language to the Comment.

§ 649.230. Review procedure

The Attorney General would permit ex parte communication during administrative review "for the purpose of assistance and advice to the reviewing authority by the presiding officer," subject to separation of functions provisions. Professor Asimow had concerns, but was generally supportive of this idea, at least in complex, lengthy, nonaccusatory proceedings:

> PUC proceedings are so lengthy and the records so massive that the judge (who may have lived with the case for months or years) may be the only person who really knows what is in the record. As a result, the judge's participation can be very helpful in crafting a final decision that is faithful to the record. Yet the judge is neutral as between the parties; therefore, his or her participation in the final opinion-writing process creates a relatively small risk of error. Other agencies besides the PUC may also have a similar need to involve their judges in the final decision process. I favor allowing this practice.

Asimow, *supra*, at 1180.

- This suggests we should revise Section 649.230 as follows:

> (d) ~~The~~ Except as provided in subdivision (e), the reviewing authority is subject to the same provisions governing qualifications, separation of functions, ex parte communications, and substitution that would apply to the presiding officer in the hearing.
>
> (e) A communication otherwise prohibited is permissible if the communication is for the purpose of assistance and advice to the reviewing authority by the presiding officer.

- Section 649.230 permits the reviewing authority to decide the case on the record, including a "summary of evidence." Existing law requires the reviewing authority to decide the case on the record, "including the transcript." Gov't Code § 11517(c). The Attorney General says it is better policy to require a more thorough review of the record than a summary affords. In both APA and non-APA proceedings, due process does not require that the agency read the evidence put before the hearing officer before making its decision; it is sufficient if the agency relies on a report or synopsis by the hearing officer. California Administrative Hearing Practice, *supra*, § 4.6, at 219, § 4.21, at 230. There is no

provision in the 1981 Model State APA for deciding the case on a summary of evidence. On the other hand, under Section 649.210, administrative review is discretionary. If administrative review may be denied entirely, it does not seem objectionable to permit review using a summary of evidence. The staff is inclined to keep the provision for review using a summary of evidence.

• Under Section 649.230, the reviewing authority may take additional evidence only if, in the exercise of reasonable diligence, the evidence could not have been produced at the hearing. Alternatively, the agency may remand the case for further proceedings before the hearing officer who heard the case. Under existing law, the reviewing authority may take additional evidence whether or not it could have been produced at the hearing. See Gov't Code § 11517; California Administrative Hearing Practice, *supra*, § 4.22, at 230. The Attorney General says this change "unnecessarily diminishes agency authority." This limitation is comparable to the limitation on judicial review. See Code Civ. Proc. § 1094.5(e). The Attorney General says the limitation on judicial review grows out of "the deference which courts generally give to agency authority and expertise." But it also grows out of the need to economize by not relitigating the same factual issues at various levels of review, and compels presentation of the complete case before the presiding officer. On the other hand, the limitation is not in the 1981 Model State APA. We could delete it by revising subdivision (a) as follows:

> 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~~.

§ 649.240. Decision or remand

The Attorney General supports the authority in Section 649.240 to remand the case to a different presiding officer if the one who made the decision is not available.

§ 649.250. Procedure on remand

The Attorney General supports the provision permitting the reviewing authority to order appropriate temporary relief on remand.

§ 649.320. Designation of precedent decision

The Attorney General supports the provisions on precedent decisions, but says designation of precedent decisions should be permissive, since judicial review is precluded. The Commission decided to do this at the May meeting. Accordingly, Section 649.320 in the restructured draft attached to Memorandum 94-26 makes this change.

Code Civ. Proc. § 1094.5 (amended). Administrative mandamus

• The draft statute would amend Section 1094.5 of the Code of Civil Procedure to require that great weight be given to a determination of the presiding officer based substantially on the credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness. This is drawn from workers' compensation law, where credibility determinations of a Workers' Compensation Judge are entitled to great weight. Asimow, *Appeals Within the Agency: The Relationship Between Agency Heads and ALJs*, at 26 (Aug. 1990). The Attorney General would not make this change because of empirical evidence that a credibility determination based on a transcript is at least as reliable as those based on observation. Professor Asimow concluded that, although any assessment of whether an individual is telling the truth is relatively unreliable, probably an ALJ's assessment is less unreliable than that of someone who makes the decision from a cold record. Asimow, *supra*, at 25 n.49. Although the staff is inclined to agree with Professor Asimow, we could adopt the Attorney General's position by not including Section 1094.5 in the draft statute, thus preserving existing law.

Respectfully submitted,

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Staff Counsel

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

May 11, 1994

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

RE: Commission's May 1993 Tentative Recommendation:
Administrative Adjudication by State Agencies

Dear Commission Members:

Earlier this year, senior members of my office had the pleasure of discussing with Professor Michael Asimow the work of the California Law Revision Commission in drafting the May 1993 tentative recommendation for legislative revision of administrative adjudication by state agencies. The discussion included what I believe was a candid exchange of views concerning the prospect of a revision of current practice under the existing Administrative Procedure Act, and exploration of a number of the specific changes embodied in the Commission's tentative recommendation. The recommendation significantly expands upon the existing APA, which applies primarily to trial-type proceedings, by bringing all state agencies within coverage of a single act. In the interest of flexibility it allows agencies to adopt regulations altering its provisions for hearings which are not required by other statutes to be heard by administrative law judges (ALJs) of the Office of Administrative Hearings (OAH).

I have serious concerns about the Commission's recommendation that California's existing APA should be substantially changed in order to expand its coverage. The proposed massive expansion and revision of California's administrative law will be very costly. It should therefore only be done if it will result in significant benefits to the people of the State. At this point, I do not believe that sufficient benefits have been identified to justify most proposed changes.

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In particular, a need to overhaul the existing APA has not been documented. The current system, honed by 45 years of legislative and judicial input, is fundamentally sound. The system in its present form has consistently been upheld as meeting due process standards and there is, therefore, no need to alter the current system for due process purposes. As the recommendation proposes to replace an existing statute which has proved workable over time, with supplanting provisions which in many cases may specifically be modified by newly-covered agencies to conform to their perceived needs, it appears doubtful that the stated objective of greater uniformity of process is likely to be served in a manner that justifies substantial displacement of existing procedures among agencies already covered by the current APA.

While I am certainly not opposed to the concept of a uniform system of administrative adjudication, I do not believe that there is adequate documentation of a need to extend the coverage of the APA in the manner proposed by the recommendation. Although the Commission's consultant has identified a handful of relatively benign differences among various hearing proceedings currently conducted by statewide agencies, (see Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals* (1992) 39 UCLA L. Rev. 1067, 1078, fn. 26), these can be addressed, if necessary, through individual legislative acts. Many agencies not presently covered by the APA employ effective, relatively uncomplicated hearing processes that feature easy access by the public and provide an adequate basis for the agency to reach fair and legally correct decisions with minimal cost and expenditure of resources. It appears that the changes proposed by the Commission would add substantially to the costs of government agencies -- including those agencies already covered by the APA in its current form -- without necessarily promoting greater efficiency, at a time when virtually all governmental agencies are trying to hold down costs because of inadequate funding.

For example, substantial agency resources will be required to draft and process the modifying regulations contemplated by the recommmendation. Attorney and other technical staff will need to analyze and draft new regulations for promulgation by the affected agencies. Public comment will be required for that purpose as well, and review by the Office of Administrative Law of all regulations will likewise be necessary. Even agencies which decide not to propose new regulations will be required to expend considerable resources to analyze the new statutory requirements and modify current procedures to conform to them. Further, given the breadth of proposed inclusivity, bringing

hundreds of new hearing categories within the extended coverage of the modified APA, a fair amount of litigation arising from these procedural changes must realistically be anticipated and added to the exertions of agency counsel, the services of this office as the State's lawyer, and and the efforts of public law practitioners, in calculating the public costs of compliance with revisions to established procedures. Although these costs would be a concern during any economic period, they are particularly troubling given currently-severe budgetary constraints. I am unconvinced of the need to so radically alter the status quo under these circumstances.

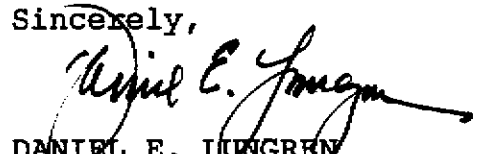
I therefore suggest that the Commission reconsider its recommendation, and instead adopt an approach recommending specific solutions to problems specifically identified in the course of the Commission's work. In Attachment A, I identify specific problems which may constructively be addressed by the Commission through solutions now enmeshed in the proposal for revision. I support the Commission's proposed solutions identified in Attachment A, and would urge their retention and inclusion in a more focused recommendation by the Commission.

In the event that the Commission decides to pursue its current approach, however, I believe that a number of specific modifications to the current recommendation are needed. In Attachment B, I specify a number of provisions of the recommendation which in the view of this office should be deleted or substantially changed in order to meet the practical needs of administrative litigation.

Once again, I want to emphasize my concern that the proposed overhaul and expansion of the APA do not appear to be justified by demonstrable benefits. Although some modifications to the current system would be beneficial, the recommendation's wholesale approach will be very costly to implement, and the need for it has not been demonstrated. I therefore suggest that the APA not be expanded, and that specific modifications only be pursued with circumspection.

My staff and I look forward to working with you in future phases of this important project.

Sincerely,



DANIEL E. LUNGREN
Attorney General of the
State of California

Attachments

ATTACHMENT A

SPECIFIC PROPOSALS SUPPORTED BY ATTORNEY GENERAL

Declaratory Decisions. Declaratory decisions have proved to be very useful in judicial proceedings. The proposal to make this procedure available in administrative hearings should similarly be useful. (See section 641.210 et seq.) Please see Attachment "B," however, concerning a technical modification which is believed needed.

Emergency Decisions. The proposal to authorize agencies to pass regulations which allow temporary relief aimed at preventing immediate danger to the public health, safety or welfare, is believed to be a beneficial addition to existing law. (See section 641.310)

Continuing Duty to Disclose. The proposal to require a continuing duty to disclose and make available "any supplemental matter" in the course of discovery will facilitate the disclosure of evidence. (See section 645.210.)

Motion to Compel. Allowing parties to bring motions to compel discovery before the presiding officer would promote fair and orderly hearings. (See section 645.320.)

Issuance of Subpoena. Under existing APA practice, attorneys are allowed to issue subpoenas. This practice works well. Codification of this practice would be beneficial. (See section 645.420.) It would both provide clear authorization for the practice and promote public awareness of the procedure.

Telephonic Hearings. The provision allowing prehearing conferences by telephone, television or other electronic means is a good idea which would make these proceedings more accessible to the parties. (See section 646.120.)

Alternative Dispute Resolution. ADR should be advocated in appropriate cases. ADR techniques can lead to creative solutions which are more advantageous to the parties than the win/loss outcomes of most adjudications. ADR can also significantly reduce the high costs to the parties and to the public of most adjudications. The Recommendation's explicit ADR authorization represents a useful addition to current law. (See section 647.210, et seq.)

Settlements. The Recommendation's codification of agency authority to settle cases (see section 646.210.) will facilitate appropriate settlements, and is therefore a positive step. Addition of two provisions would, however, be appropriate. The first is language stating that agencies with authority over a matter have the right to disapprove settlements. This will insure that agencies have the right to disapprove settlements which are contrary to that agency's laws. (For example, in a

dispute before the State Personnel Board, the Board should have the right to disapprove a settlement between an employee and a state agency which would contravene State Personnel Board regulations.) The second suggestion is that language be added to specify that the statute does not authorize any settlement which is inconsistent with an agency's governing statute or regulations. This is to prevent abuses in which settlement is used as a means of avoiding statutory and regulatory requirements.

Consolidation/Severance. Although consolidation and severance currently occurs for hearings now covered by the APA, there are no statutes or regulations notifying parties that these procedures are available. A provision such as that contained in section 648.130 would have two positive aspects: it would notify parties that these procedures are available, and it would provide explicit authority for the procedures.

Closing Hearings. Codification of the existing practice, under which presiding officers may close hearings where required by the circumstances of the particular case, is a good and useful idea. (See section 648.140(a).) Closed hearings can be beneficial in some situations such as where a child witness is testifying. Codification notifies the parties that this procedure is available.

Ex Parte Contacts. Prohibiting material ex parte contacts for all administrative hearings, not only those currently under the APA, is an excellent idea. Ex parte contacts concerning issues material to the proceeding are unfair. Extension of such a prohibition to the reviewing authority is likewise desirable. See Attachment B, however, for modifications of section 648.510 which are believed needed.

Misconduct In Proceedings. Expanding grounds for contempt to included prohibited ex parte communications is a positive step. (See section 648.610.)

Contempt. Extension of authority to presiding officers, to certify the facts to the superior court which justify the contempt sanction, is a useful change. (See section 648.620.) Presiding officers are frequently in the best position to evaluate hearing misconduct.

Technical Changes to Decision. Authorizing reviewing authorities to make technical changes to decisions is a sound idea that will promote efficiency without sacrificing fairness. (See section 649.140(a)(2).)

Remand to Different Presiding Officer. Permitting reviewing authorities to remand cases to a different presiding officer where remand to the same officer is impractical adds useful flexibility to the hearing process. (See section 649.240.)

Temporary Relief When Ordering Remand. Allowing reviewing authorities to order temporary relief is a positive recommendation. (See section 649.250.) It permits the tailoring of relief to a case's particular facts.

Precedent Decisions. The Recommendation adds a new APA provision which allows both current APA agencies, and agencies not now covered by the APA, to designate significant decisions as precedent decisions. (See section 649.320.) This authority is useful to state agencies (although, as outlined in Attachment B, one minor modification is needed). This would add to the agency's ability to elucidate its interpretation and implementation of the law it administers through its operation upon specific factual situations, as well as through the more abstract context of its rulemaking authority.

ATTACHMENT B

PROVISIONS IN RECOMMENDATION REQUIRING MODIFICATION

Conversion of Proceedings. A proceeding, such as an informal hearing, should not be instantaneously converted into a different proceeding, such as a formal hearing, absent sufficient time to prepare for the new proceeding. Although section 614.110(b) appears to prohibit on the spot conversions, since "notice" is required, clearer language to this effect is needed. The same clarification is needed under the sections for each particular proceeding which may be converted.

Declaratory Decisions. Section 641.220(c) states that applicants need not apply for a declaratory decision in order to exhaust their administrative remedies. This could be interpreted as allowing one who disagrees with an agency's action, but who failed to seek the timely administrative or judicial review of that action, to nevertheless seek a declaratory judgment in court. To prevent this abuse, section 641.220(c) should be modified to provide that it does not permit an applicant to seek a declaratory judgment concerning an adverse agency decision where the applicant failed to seek timely administrative or judicial review of that decision.

Time for Agency Action. Although the concept of the 30 and 90 day time limits in section 642.240 is positive, the Commission should insure that the time limits are realistic. They may be particularly difficult for agencies which handle large volumes of applications or cases, and for agencies whose matters tend to arise during a limited time of the year.

Judicial Review of Procedural Decisions. Procedural determinations by the presiding officers are either explicitly or implicitly reviewed by the courts after the agency issues its final decision.[1/] In contrast, the current Administrative Procedure Act (APA) generally requires an immediate judicial challenge. (See, for example, Government Code section 11524.) Both private practitioners and agency representatives have indicated that they prefer the current approach. So do I.

The current approach works smoothly. Although in theory it can be disruptive, in practice it is not. Challenges are uncommon. Moreover, when successful, they allow an immediate rectification of the problem. In contrast, postponing these challenges will promote delay. Long after a hearing and administrative review have concluded, a court may order a new

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1. Under section 642.420, for example, continuance decisions are explicitly challenged at the judicial review stage. Venue decisions under section 642.430 are implicitly challenged at that stage.

hearing due to a procedural error. It would be far preferable to resolve these matters at the time of the hearing.

Customizing Provisions. A technical change in the Recommendation's customizing provisions is needed. These provisions are intended to apply to all current non-APA proceedings. (See the note at the top of page 109, which explicitly states this intention.) As currently worded, however, the Recommendation fails to carry out this intention. This is because the Recommendation's customizing language generally allows for changes by regulation "in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings [OAH/ALJ]." (See, for example, § 645.110 [emphasis added].) Many proceedings, however, are not currently exempt by statute. Rather, they are exempt because they involve agencies that are not enumerated in Government Code section 11501. (In contrast, where an agency is enumerated, the exemption must be by statute - see, for example, Welfare and Institutions Code § 10953, which exempts welfare hearings.)

Section 643.120 should therefore list all proceedings which are not exempt from the OAH/ALJ requirement, and the customizing sections should state that their provisions apply to proceedings other than those listed in section 643.120. (Please note that under the staff's suggested "template" approach, the customizing language which will need to be modified is in section 633.020.)

Separation of Functions. If the proposed prohibition on investigators/advocates giving advice to a presiding officer (see § 643.310, et seq.) is pursued, it should, at minimum, be modified for some proceedings, such as those involving land use and environmental matters. Staff of the California Coastal Commission and regional water quality control boards, for example, frequently review permit applications, and recommend that their governing bodies take specified actions. These staff might therefore be deemed "investigators" or "advocates." These persons, however, frequently provide valuable technical and policy advice to board members during the review of applications at public hearings. Prohibiting these communications in all proceedings is unnecessary, and would unduly hamper these hearings.[2]

For proceedings which are exempted from the requirement that they be heard by an OAH/ALJ, the advice prohibition should not apply to advice given in a public proceeding.

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[2] The section 643.330(a)(5) exception for advice concerning technical issues where the advice is necessary for and not otherwise reasonably available to the presiding officer is too narrow. It would not cover policy input, and would be very inhibiting and difficult to administer, given the "necessary" and "not otherwise reasonably available" requirements.

Moreover, section 643.340 prohibits all staff from aiding a presiding officer if the staff have received an ex parte communication which the officer could not have received. Again, given the nature of certain agencies' staff activities (which often involve numerous informal fact gathering communications), this prohibition would be very burdensome and unnecessary. The Legislature has recognized this. (See, for example, Public Resources Code § 30322(b)(1), which excludes staff members from the California Coastal Commission's ex parte communications restrictions.)

Therefore, agencies should be allowed to modify this section, by regulation, for proceedings which are exempt from the OAH/ALJ requirement, such that staff who are directly subject to agency control and supervision can receive ex parte communications. Given the broad range of proceedings which would be covered by the recommended APA, agencies should be given some flexibility in determining the exact type of disclosure to be required.

Finally, the section 643.340 prohibition of staff assistant input which could "furnish, augment, diminish, or modify the evidence in the record" is too broad. The quoted language should be replaced with a phrase such as: "add evidence outside of the record." The Recommendation's language would appear to prohibit the type of communication which a law clerk would routinely have with a judge. A law clerk's analysis of evidence presented at a hearing might be negative, and thereby arguably "diminish ... the evidence in the record." This type of communication, however, is both proper and highly desirable. A phrase should be used which only prohibits the presentation of evidence to the presiding officer which the parties never had an opportunity to comment on.

Intervention. Section 644.110, which allows for intervention in the administrative proceeding, is unnecessary, and is likely to be highly disruptive for many hearings, such as those currently covered by the APA. In these hearings, the issues are generally framed in the pleadings by the agency and the licensee. Intervention will likely lead to attempts to introduce, or the actual introduction, of extraneous evidence and arguments, resulting in significant confusion and delay.

Depositions. Although section 645.130, pertaining to depositions, is included under a chapter entitled "Discovery", it really concerns preservation of testimony. To avoid confusion, this section should be retitled (possibly to "preservation of testimony through depositions"). In addition, authority to order the taking of this testimony should remain with the agency. (See Government Code section 11511.) Section 645.130 transfers this authority to the presiding officer. The change is likely to result in the excessive and therefore costly use of this process.

Motions to Compel or to Quash Subpoena. Authorization of motions to compel and quash subpoenas before the presiding officer is a useful concept. (See 645.320; 645.430.) As

indicated above under Judicial Review of Procedural Decisions," however, parties challenging the presiding officer's ruling on the motion should be required to do so immediately after the ruling is made.

Subpoena Authority. Section 645.410 expands current law by creating the right to subpoena documents "at any reasonable time and place." Under the current law (Government Code section 11510), production may only be required at the hearing. The proposed extension of the production requirement is unnecessary, and will be costly. The current approach works smoothly. The proposed expansion will be time consuming and could cause unnecessary delays.

Holding Party in Default. The Recommendation includes provisions that parties may be held in default for failing to attend a prehearing or mandatory settlement conference. (See §§ 646.120(e), 646.220(e) and 648.130(a).) Allowing a party's default to be taken is too drastic a remedy for failing to attend these intermediate proceedings. Parties to administrative hearings frequently appear without representation. Although they would be provided notice of the default potential, many may nevertheless not realize the consequences of failing to attend a prehearing or mandatory settlement conference. The availability of lesser sanctions should suffice.

Conference Hearings. If the APA is expanded, a critical component for some agencies will be the informal conference hearing. (See § 647.110.) For example, most land use and environmental hearings are not covered by the current APA and are informal. This process works to the advantage of all involved. Applicants benefit because they can present their positions without being hampered by numerous formalities. The public benefits because these hearings allow for broad public input. Finally, everyone benefits because these proceedings are conducted without undue delays.

Any expanded APA should therefore ensure that these important informal proceedings continue. To do so, the following modifications would be needed:

1. Most land use and environmental matters would not fall within subsections 647.110(a) or (b), which allow agencies to hold conference hearings where specified conditions exist (e.g., there is no disputed issue of material fact, or there is such a dispute, but the matter involves less than $1,000). As pointed out on pages 23 and 24 of the Recommendation's overview, however, informal hearings are particularly appropriate for land use and environmental cases. A provision should be added which will clearly allow the use of informal hearings for these matters.

2. The above suggestion will not accommodate the relatively rare hearing which is not required by statute, but which is being held to meet due process requirements. Since these hearings can be difficult to anticipate in advance,

agencies may not be aware of the need to adopt a conference hearing regulation covering them. It should therefore be specified that an agency holding a hearing which is not required by statute, but which is being held to meet due process requirements, may use a conference hearing if the agency states, in its hearing notice, that such a hearing will be consistent with due process requirements.

3. Section 647.120(b), which essentially defines these proceedings, requires clarification. Although the comment to that section states that conference hearings do not require prehearing conferences, discovery or non-party testimony, the draft statute is ambiguous. (It states, "The presiding officer shall regulate the course of the proceeding and may limit witnesses, testimony, evidence, rebuttal, and argument . . .") It should explicitly state that the presiding officer's authority to regulate the course of proceedings includes the authority to preclude prehearing conferences, discovery and non-party testimony.[3]

4. Section 647.130 prohibits conference hearings unless the presiding officer determines that cross-examination of witnesses is not necessary, or that it would not significantly disrupt proceedings. This provision could lead parties or others to argue that cross-examination is required even at hearings, such as land use proceedings which involve broad public input, in which cross-examination is clearly inappropriate. To avoid unnecessary, time-consuming deliberations at numerous proceedings regarding the propriety of cross-examination, section 647.130(a)(1) should be modified to state that agencies may adopt regulations specifying categories of matters for which cross-examination is not necessary.

Emergency Decisions. The emergency decision section does not apply to an emergency decision "issued pursuant to another express statutory authority." (See § 647.310(c).) Although this appears to include cease and desist orders (see, for example, Public Resources Code §§ 30809 and 30810, regarding the California Coastal Commission), language specifically stating this would avoid any confusion.

Burden of Proof. Section 648.310(b), pertaining to burden of proof, is objectionable for two reasons. First, occupational licencing agencies should not be allowed to alter the burden of proof by regulation. Authorization of different burdens of proof

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[3] The exclusion of non-party testimony should not create due process problems so long as persons with sufficient interest in a proceeding are deemed "parties." See *Horn* v. *County of Ventura* (1979) 24 Cal. 3d 605, 614, 615. (Neighbors are entitled to procedural due process regarding the proposed approval of a subdivision.) Similarly, any evidence limitations must be consistent with the due process requirement that parties be given an adequate opportunity to be heard.

for license discipline, at the discretion of the licensing agencies for the various professions is inequitable. Second, "clear and convincing proof" is nonstandard nomenclature in the law of administrative burden of proof. This phrase should be changed to "clear and convincing evidence."

Hearsay Evidence. Under section 648.450(b), a party may challenge a decision in court on the ground that a finding is only supported by hearsay evidence even where the party failed to raise a hearsay objection at the hearing. This approach is unfair. An objection at the hearing should be required to give the opposing party an opportunity to remedy any defect. Although the Recommendation's approach might aid some unsophisticated parties who do not understand hearsay rules, it will also encourage some practitioners to "sandbag" opponents by withholding objections at hearings and raising them for the first time in court, upon judicial review. On balance, the interests of justice are served by requiring objections at the hearing before evidence can be challenged on hearsay grounds in court.

Scientific Evidence. The prohibition on scientific evidence which is not generally accepted as reliable should be modified so that such evidence "may" rather than "shall" be excluded. (See § 648.460.) Evidence in some evolving scientific areas may not yet be "generally accepted", yet it may have sufficient probative value to aid the presiding officer in reaching a decision. Allowing this evidence would be similar to the federal approach. (See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, __U.S.__, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).) Moreover, it would be consistent with the current evidentiary standard used in California administrative hearings. (See Government Code section 11513(c).)

Ex Parte Communications. Section 648.520 of the Recommendation defines ex parte communications broadly and then carves out exceptions. The existing Administrative Procedures Act (APA) starts out with a more limited definition (the communication must, *inter alia*, be "upon the merits of a contested matter while the proceeding is pending." (See Government Code section 11513.5(a) and (b).) The current approach is believed preferable.

The current language of Government Code section 11513.5(a) and (b) should be retained, but should be modified to reflect the fact that many non-prosecutorial hearings will be covered. This can be done by replacing the references to "employees of the agency that filed the complaint", with "employees of an agency that is a party."

The concepts embodied in section 648.520 should be enacted through addition of language to the current APA which states, in substance:

> "A communication otherwise prohibited by this article is permissible in any of the following circumstances:

"(1) 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.

"(2) The proceeding is nonprosecutorial in character, and 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, or for the purpose of assistance and advice to the reviewing authority by the presiding officer[4], provided in either case that the assistance or advise does not violate Section 643.320 (separation of functions) or Section 643.340 (staff assistance for presiding officer).

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

Sanctions for Bad Faith Actions or Tactics. Two modifications of section 648.630 are appropriate.

First, the granting of sanctioning authority to agencies is problematic. To the extent that this provision would permit sanctions for proceedings which are or were before the presiding officer, they are inappropriate. The presiding officer has first hand knowledge of any abuse, and should be the person authorized to impose sanctions. Allowing an agency to impose sanctions "after-the-fact," is unfair.

Second, sanctions for frivolous "actions" (as opposed to "tactics") should be deleted. Through inexperience, parties appearing without counsel may request hearings even though they have no legal grounds to support their positions. Allowing sanctions for these actions may chill the important right of citizens to challenge governmental actions.

Form and Content of Decision. With respect to section 649.120, the current Government Code section 11518 requirement that decisions include findings of fact and a determination of the issues presented is preferable to the Recommendation's section 649.120(a). The current language is effective and clearly understood; it has been interpreted by a settled body of case law. The change will unnecessarily promote new litigation.

In addition, section 649.120(b) is opposed for the reasons outlined under "*`Great Weight' to Credibility Decisions on Review,*" below.

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[4] These communications, which would be prohibited under the recommendation, are desirable. They can enable the reviewing authority to efficiently communicate with the presiding officer to clarify apparent ambiguities in the decision under review.

Finally, section 649.120(c) specifies that "evidence of record", upon which the statement of decision is exclusively to be based, "may include facts known to the presiding officer..." The meaning of this provision is uncertain and therefore of concern. It is generally recognized that administrative adjudication entails application of agency expertise to the factual issues raised by the evidence in a given proceeding. This expertise is often embodied in the agency head, or at the agency head's level, though not necessarily in the ALJ serving as presiding officer. Regardless of whether the presiding officer is the agency head or an ALJ, however, the expertise of the agency is presumptive, and the elements of expertise brought to bear in a given case will not necessarily be present in the "evidence of record." To the extent that section 649.120(c) suggests such expertise may be required to be placed on the record as "facts known to the presiding officer", it is inconsistent with current law and practice. Uncertainty in this regard is aggravated by the provision's placement of "facts known to the presiding officer" alongside "supplements to the record made after the hearing, provided the evidence is made part of the record and all parties are given an opportunity to comment on it." The provision requires clarification so as to distinguish, for purposes of "evidence of record", facts which are adjudicative in nature and required to be adduced as evidence, from "facts known to the presiding officer" which inhere in the expertise of the agency.

Final Decisions. The references to "final decision" in sections 649.150, 649.160 and 649.210 are confusing. The last section allows an agency to review "a proposed or final decision." When the agency reviews a final decision, what is the decision that results from that review? Section 649.240 indicates that the new decision may be the final decision. If so, is it the old or the new decision which triggers the judicial review provisions of section 649.160(a)? This confusion needs to be clarified.

Time to Initiate Judicial Review. Section 649.160 states that "Failure to state the time within which judicial review may be initiated extends the time to six months after service of the (final) decision." That sentence implies that a shorter time limit applies when an appropriate statement is contained in the decision. The Recommendation does not, however, specify what that time limit is.

Administrative Review of Decisions.

Section 649.230 permits the reviewing authority to decide the case after only examining "a summary of evidence." Although this may meet minimal due process requirements, it is better policy to require a more thorough review of the record. For that reason, that quoted phrase should be deleted.

The proposed limitation on the taking of new evidence is imprudent. Under the current APA, when an agency decides not to adopt an Administrative Law Judge's (ALJ) decision, the agency may decide the case "with or without taking additional evidence ...." (See Government Code § 11517(c).) Under the proposal, however, this right to take additional evidence would be severely limited; only evidence that could not have reasonably been produced at the hearing would be admissable.

This change unnecessarily diminishes agency authority. Although a similar rule applies to the judicial review of agency decisions, that rule is consistent with the deference which courts generally give to agency authority and expertise. In contrast, the proposal diminishes this respect. Instead, the right of an agency head to reject an ALJ decision (see § 649.240(a)(3)) should not only include the unfettered right to take new evidence; it should also include the explicit right to hold a de novo hearing, or to have such a hearing held before a delegate.

Precedent Decisions. Section 649.320 appears to mandate that agencies designate certain decisions as precedent decisions, since it uses the word "shall." It goes on, however, to state that a failure to designate is not subject to judicial review. Because a decision not to designate a particular decision as a precedent should not be subject to judicial review, the word "shall" should be changed to "may" in order to eliminate this apparent inconsistency.

"Great Weight" to Credibility Decisions on Review. The Recommendation provides that courts are to give "great weight" to certain credibility decisions of presiding officers. (Conforming revision for Code of Civil Procedure section 1094.5.) Where hearings are initially heard and decided by Administrative Law Judges, the provision would significantly diminish the authority of agency heads to review those decisions. Such a provision is imprudent. Agency heads are accountable, since they either derive their authority from the electoral process, or are appointed by elected officials. Given this accountability, their authority should be maintained.

In addition, the "great weight" provisions are premised on the notion that the officer viewing the appearance and demeanor of a witness will have a significantly better ability than agency heads to make credibility determinations. There is, however, substantial empirical evidence indicating that credibility determinations based upon transcripts are at least as effective as those based upon observing witnesses. (See Wellborn, *Demeanor*, 76 Cornell Law Review 1075 (1991), which reaches this conclusion after reviewing numerous controlled experiments.) In view of the doubtfulness of the premise on which this provision is apparently founded, and the undesirability of reducing the authority of agency heads, the "great weight" requirement should be rejected.