Memorandum 94-34

Administrative Adjudication: Comments on Tentative Recommendation

The Commission reviewed comments on the Tentative Recommendation on administrative adjudication at the September 1993 meeting and February, May, and June 1994 meetings. This Memorandum picks up where we left off. It consolidates pertinent parts of Memorandum 94-19 and Second Supplement, omits the letters attached as Exhibits to those memoranda, and omits most citations. For the letters or citations, please refer to those memoranda. Points the staff intends to raise at the meeting are preceded by a bullet [•]. If you disagree with the staff proposal on an unbulleted item, you should raise it at the meeting. Otherwise, we will deem the staff proposal approved.

§ 642.310. Proceeding commenced by agency pleading

At the June meeting, the Commission considered draft language to codify the rule that an agency may dismiss a proceeding without prejudice at any time before the hearing. The Commission asked the staff to give more thought to this. The Commission was concerned about how this might affect a proceeding initiated by a person outside the agency, and that an agency might dismiss a proceeding merely to avoid making a decision. The Commission suggested either that dismissal be only at the request of the person or agency initiating the proceeding, or that we not codify anything on this point.

The staff believes it would be a mistake to rigidify these rules. If we leave it to case law development, we are likely get a reasonable solution. **The staff would not codify the dismissal rule, and would rely instead on case law.**

§ 642.420. Continuances

• Section 642.420 does not continue immediate superior court review of administrative denial of a request for continuance in hearings conducted by an administrative law judge from the Office of Administrative Hearings. The Department of Insurance, State Bar Committee on Administration of Justice, and Attorney General want to keep immediate judicial review in these hearings. At the June meeting, the Commission considered the staff recommendation not to have immediate judicial review. Professor Asimow supported the staff

recommendation. The Commission was divided, and asked the staff to bring this back at the next meeting. **In view of support for immediate judicial review from the agencies and private bar, the staff recommends we keep immediate judicial review of a denial of a continuance in formal (but not informal) hearings, and revisit the question when we take up judicial review:**

§ 642.425. Judicial review of denial of continuance

642.425. (a) If an application for a continuance by a party is denied by an administrative law judge employed by the Office of Administrative Hearings, within 10 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.

(b) 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.

(c) This section does not apply to the Department of Alcoholic Beverage Control.

Comment. Section 642.425 continues the substance of former Section 11524(c).

§ 632.030. Procedure for informal hearing

632.030. (a) Except as provided in ~~subdivision~~ subdivisions (b) and (c), the provisions of Part 4 (commencing with Section 641.110) apply to an informal hearing.

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

(c) Section 642.425 does not apply in an informal hearing. There is no right to judicial relief from a denial of a continuance until after the informal hearing is concluded.

§ 642.430. Venue

At the June meeting, the Commission decided to require an objection to venue to be made within 10 days after service of the notice of hearing. Failure to object within that time would waive the objection. The notice of hearing should advise the respondent that an objection to venue must be made within the specified time. The Commission asked the staff to draft language and to bring it

back. The staff has done this in Memorandum 94-33 and attached draft of a revised Tentative Recommendation.

§ 643.320. When separation required

The Commission has decided to keep the exemption from the separation of functions requirement for driver's license hearings, including administrative per se hearings on summary suspension for driving under the influence of alcohol, but to require separation of functions for hearings on school bus driver and ambulance driver certificates and other special certificates. The separation of functions requirement also applies to seizure and sale hearings for delinquent registration under Vehicle Code Section 9801.

In Memorandum 94-19, the staff thought it might be a reasonable tradeoff to apply the separation of functions requirement to administrative per se hearings (not now applied in the draft statute), but to exempt seizure and sale hearings (now subject to separation of functions in the draft statute). The Department of Motor Vehicles estimates the cost of applying the separation of functions requirement to administrative per se hearings at about $31,000 annually. No cost estimate was provided for seizure and sale hearings, but there would be cost savings by exempting them. The Commission did not address this tradeoff question at the June meeting. Does the Commission wish to consider a tradeoff?

§ 643.330. When separation not required

• The State Bar Committee on Administration of Justice and State Bar Litigation Section would delete the exception to the separation of functions requirement in subdivision (a)(1) permitting a "person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding" to "serve as presiding officer or assist or advise the presiding officer in the same proceeding." They say this creates the appearance and likelihood of bias. This provision is in the 1981 Model State APA, and actual bias is a ground to disqualify the presiding officer. It is not a ground to disqualify a judge in a civil proceeding that the judge has "in any capacity expressed a view on a legal or factual issue presented in the proceeding," except that the trial judge may not participate in appellate review of that proceeding, and the appellate court may direct that further proceedings be had before a trial judge other than the one whose judgment was reviewed. Thus, for example, there is no general prohibition against a judge who issues a

temporary restraining order or denies a summary judgment motion or a demurrer from later hearing the case on the merits, although a judge who expresses an opinion on the merits before hearing all the evidence may be disqualified for bias. **The staff recommends keeping subdivision (a)(1) permitting an ALJ who makes a preliminary determination to hear the case on the merits.**

• An exception in Section 643.330(a)(4) permits a person who has served as investigator or advocate in an adjudicative proceeding to supervise, assist, or advise the presiding officer later in the same proceeding if it is "nonprosecutorial," the service, assistance, or advice occurred more than one year after the person served as investigator or advocate, the advice is disclosed on the record, and all parties have an opportunity to comment. The State Bar Committee on Administration of Justice says this creates a likelihood of bias and should be deleted. The Department of Health Services says "nonprosecutorial" is unclear and should be defined. DHS asks whether a proceeding to grant a license over objection from public advocates is nonprosecutorial. And, "What about a proceeding to determine whether a nonpunitive transfer of a state employee was lawful?" The Comment gives individualized ratemaking and power plant siting decisions as examples of what is nonprosecutorial. The Comment says this exception "recognizes 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." Section 643.330 is in the 1981 Model State APA, but the exception in subdivision (a)(4) was our own innovation. It was included for the Public Utilities Commission and California Energy Commission. We tentatively exempted the PUC from the new APA, but not the Energy Commission. **The staff recommends deleting subdivision (a)(4) from Section 643.330, and including a similar provision in the Energy Commission statute applicable to that agency only:**

> **Gov't Code § 643.330. When separation not required**
>
> 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, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.~~

~~(5)~~ (4) 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.

(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.

Pub. Res. Code § 25513.3 (added). When separation of functions not required

25513.3. Notwithstanding Article 3 (commencing with Section 643.310) of Chapter 3 of Part 4 of Division 3.3 of the Government Code, unless a party demonstrates other statutory grounds for disqualification, a person who has served as investigator or advocate in an adjudicative proceeding of the commission under this code may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.

• The Department of Health Services wants procedural detail in Section 643.330(a)(5) (advice on technical issue). **The staff recommends applying procedures for disclosure and comment on ex parte communications:**

~~(5)~~ (4) 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, in the same manner as provided in Section 648.540 for an ex parte communication.

• The State Water Resources Control Board is concerned about applying separation of functions provisions where staff acts more as impartial adjudicator than prosecutor, e.g., where the contest is between parties outside the agency. There appears to be no problem in applying the prohibition to a person who has acted as prosecutor or advocate. But an investigator may possibly act impartially. **The staff recommends adding the following language to Section 643.330:**

A person who has served as an impartial investigator in a proceeding where the contest is between parties outside the agency and the person has not advocated a particular position or result may assist or advise the presiding officer in the same proceeding.

• The State Water Resources Control Board would not apply separation of functions provisions to informal hearings. The staff opposes this. The informal hearing procedure has no prehearing conference or discovery. But informality does not diminish the need for the fairness of an impartial decisionmaker. There are already exceptions to the separation of functions requirement for large, complex cases — for nonprosecutorial cases where the conflicting function occurred more than one year before the decision is being made, or where the advice is on a technical issue. There is also an exception for DMV licensing cases. **The staff would not exempt informal hearings from the separation of functions provisions.**

• 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." Technical advice is already permitted in Section 643.330. We could also permit

policy advice in proceedings of the California Coastal Commission, San Francisco Bay Conservation and Development Commission, Water Resources Control Board, and regional water quality control boards. **The staff recommends 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, San Francisco Bay Conservation and Development Commission, Water Resources Control Board, 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 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 — for example, in a special hearing procedure. But Professor Asimow 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. **The staff recommends against exempting advice from a prosecutor from the separation of functions provision.**

§ 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 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 will keep this special provision for the Coastal Commission.**

• The Attorney General says that, for non-OAH hearings, 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. **The staff recommends against permitting agencies to modify Section 643.340 by regulation.** It would provide a gaping hole for evasion of the prohibition against ex parte communication. A better solution is to preserve the special statute of the Coastal Commission, referred to above. Perhaps we should also provide similar statutes for agencies such as the Bay Conservation and Development Commission and regional water quality control boards.

§ 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 issues addressed by the intervenor, and to limit discovery and cross-examination by the intervenor. Under existing 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. We should provide procedures for assertion of this constitutional right. **To lessen concern that this provision will open the floodgates to potential intervenors, the staff recommends changing "may" to "will" in subdivision (c):**

> 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.

This revision is consistent with Horn v. County of Ventura, 24 Cal. 3d 605, 616, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (right to notice and hearing if approval of tentative subdivision map "will constitute" substantial deprivation of property rights).

§ 644.150. Participation short of intervention

• Section 644.150 permits agency regulations to authorize participation by a person in a formal hearing short of intervention. The Comment says regulations

"may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party." The State Water Resources Control Board, Department of Social Services, and Public Utilities Commission want broader authority to adopt regulations to modify or make inapplicable the intervention provisions. Although the Commission decided to exempt the PUC from the new statute, and with few exceptions hearings of the Water Board and DSS will be under the special hearing procedure, the point being made is of general application. The Water Board says intervention provisions are more restrictive than its current procedures. DSS says welfare hearings are confidential so intervention is inappropriate, and there are costs and delays associated with intervention. The PUC is concerned the intervention provisions are more restrictive than PUC regulations permitting a person to show up at a hearing and intervene after making a few simple disclosures. The California Energy Commission thinks the requirement in Section 644.110 that the motion to intervene be made before the prehearing conference is too strict — persons affected by alternate power plant siting proposals may not learn of the project until after the first prehearing conference, and it would be an unfair denial of due process not to allow intervention at that point. CEC would permit an agency by regulation to allow intervention after the prehearing conference if the applicant shows he or she could not have known before the prehearing conference that his or her rights would be affected. We adopted a contrary policy in the declaratory decision provisions, taken from the 1981 Model State APA: Section 635.030 says the formal hearing provisions do not apply to declaratory decision proceedings except to the extent the agency so provides, but the agency may not preclude intervention. If we permit agencies by regulation to modify or make inapplicable the intervention provisions, we should permit agencies to do so in declaratory decision proceedings — this may encourage agencies to issue declaratory decisions by eliminating potentially onerous requirements. **The staff recommends permitting agencies to modify the intervention provisions by regulation as follows:**

> 635.030. ~~(a)~~ The provisions of Part 4 (commencing with Section 641.110) do not apply to an agency proceeding for a declaratory decision except to the extent provided in this chapter or 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 641.110) of Part 4 (intervention) and files a timely motion for intervention in~~

~~accordance with agency regulations may intervene in a proceeding for a declaratory decision.~~

644.150. (a) 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) of Chapter 8 (ex parte communications).

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

§ 645.130. Preservation of testimony by deposition

• The Attorney General wants the authority to order deposition of a witness to remain with the agency, not be shifted to the presiding officer. The AG fears that allowing the presiding officer to make these orders will result in excessive use of depositions in administrative proceedings. But a deposition may not be obtained without showing the materiality of the testimony and that the witness will be unable or cannot be compelled to attend the hearing. **The staff recommends keeping the authority to order depositions with the presiding officer as in the draft statute.** The deposition provision is consistent with the scheme of the proposed statute to give the presiding officer complete authority over the proceedings, including enforcement of discovery orders which are now enforced by the superior court.

The staff revised the leadline to read as shown above, as suggested by the Attorney General.

§ 645.210. Time and manner of discovery

• The Department of Health Services wants to permit discovery in connection with judicial or administrative review of an emergency decision, where additional evidence may be taken. **The staff agrees, and recommends a new subdivision (b) (redesignating existing subdivision (b) as subdivision (c)):**

(b) If a party seeks administrative or judicial review of an emergency decision, a party, on written request to another party, before the proceedings for review and within 10 days after issuance of the emergency decision, is entitled to discovery to the extent provided in this article.

• DHS objects to subdivision (b), imposing continuing duty on a party to disclose supplemental matter within the scope of a discovery request. Administrative discovery under the draft statute is limited to witness lists,

statements, writings, and reports. Continuing interrogatories are prohibited under California and federal civil practice, but a different rule applies to civil discovery of witness lists: A party who has exchanged an expert witness list may move to add a later-retained expert, and the court may permit it if it will not prejudice the opposing party. **The staff would follow this approach in limiting continuing administrative discovery**:

> (b) ~~Notwithstanding~~ Subject to subdivision (c) of Section 645.230, 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~~ the following supplemental matter within the scope of the request for discovery immediately on obtaining knowledge, possession, custody, or control of the matter ~~:~~ ;
>
> (1) The names and addresses of witnesses the party intends to call to testify at the hearing.
>
> (2) A statement of a witness then proposed to be called by the party, including a party or the complainant, having personal knowledge of the acts, omissions, or events that are the basis for the proceeding.
>
> (3) 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.
>
> (4) All investigative reports made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report reflects matters perceived by the investigator in the course of the investigation.

§ 645.230. Discovery of statements, writings, reports

The Department of Social Services suggests explaining in the Comment why we omitted the requirement of existing law that, to be discoverable, a writing or thing must be admissible in evidence. **The staff recommends adding the following to the third paragraph of the Comment**:

> Subdivision (b)(3) does not continue the provision in former Section 11507.6 that, to be discoverable, the writing or thing must be admissible in evidence. This is because all relevant evidence is admissible in administrative proceedings. Section 648.410(b).

• **The staff would not go further and limit discovery to matter that would be admissible in evidence.** Civil discovery is limited to matter "itself admissible in evidence" or "reasonably calculated to lead to the discovery of admissible

evidence". The relevancy requirement seems sufficient, because it is likely that any relevant matter may lead to discovery of admissible evidence.

§ 645.310. Time for response to discovery request

Section 645.310 allows 20 days to respond to a discovery request. If a party fails to respond in that time, a motion to compel must be made within 15 days after expiration of the 20-day period. The California Public Employees' Retirement System fears a party subject to discovery may still be trying to comply at the end of the 20-day period and need more time, and would either (1) say in the statute that the time may be extended by stipulation, or (2) would extend the time for discovery to a specified time before the hearing. **The staff prefers the first of these:**

> 645.310. A party shall respond to a request for discovery within 20 days after service of the request , or within such other time as may be provided by stipulation.

The Comment would note that, although other time periods may be varied by stipulation, an express provision is included here because under Section 645.320 the time within which a motion must be made to compel discovery commences to run from expiration of the time provided in this section.

§ 645.350. Order compelling discovery

The Department of Health Services is concerned this article says nothing about review of discovery orders. Under existing law, discovery orders are made by the superior court and are not appealable, but are reviewable by petition to the court of appeal for a writ of mandamus. The draft statute makes refusal to obey a lawful agency order punishable for contempt by the superior court, which is not appealable. The draft statute also permits imposition of monetary sanctions for delaying tactics, subject to administrative and judicial review in the same manner as the ultimate decision in the proceeding. **The staff would clarify this by putting the following in the Comment:**

> An order of the presiding officer compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 648.610-648.620. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The presiding officer may also impose monetary sanctions for bad faith tactics, which is reviewable in the same manner as the decision in the proceeding. Section 648.630.

§ 645.410. Subpoena authority

• The Attorney General and Department of Insurance oppose 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. They say the new provision will cause unnecessary delay and be costly. It may be desirable to be able to use a subpoena duces tecum for discovery before the hearing, and the good cause requirement is some protection against abuse. But cost is a major concern, and will be key political factor. **For this reason, the staff recommends revising Section 645.410 as follows:**

> 645.410. Subpoenas and subpoenas duces tecum may be issued under this article for attendance at the hearing and for production of documents ~~at any reasonable time and place or~~ at the hearing.

The Department of Social Services wants immediate judicial review of a refusal to quash a subpoena duces tecum, because the subpoena may seek protected information where the damage cannot be undone later. But Section 648.620 provides immediate judicial review, because a subpoena may only be enforced by contempt proceedings in superior court. If there was no justification for refusing to comply with the subpoena, the court will find the party in contempt, but almost always will permit the party to purge the contempt by complying with the order.

§ 645.420. Issuance of subpoena

The Pacific Gas and Electric Company would require an affidavit showing good cause for issuance of a subpoena. This is already required by the provision that a subpoena duces tecum must be issued in accordance with Sections 1985 to 1985.4 of the Code of Civil Procedure. Section 1985 of the Code of Civil Procedure requires an affidavit showing good cause for a subpoena duces tecum. **The staff would make this clear by adding the following to the Comment:**

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

§ 645.440. Witness fees

Section 645.440 continues existing law that a subpoenaed witness receives the same fees as a witness in a civil case, but this does not apply to an officer or employee of the state or a political subdivision of the state. The Comment cites the civil witness provisions in Government Code Sections 68093 to 68098. Government Code Section 68097.2 requires tendering $150 per day to a subpoenaed public employee, subject to later adjustment for actual expenses, including prorated salary. The Department of Health Services says some agencies apply this provision in administrative hearings and others do not. DHS suggests the actual cost provision be limited to upper level management, where a subpoena may be used as a harassment device. DHS would create a limited exception to the actual cost provision for necessary exculpatory witnesses in personnel hearings. But the staff thinks existing law is clear that the actual cost provisions do not apply to "officers or employees of the state or any political subdivision thereof." **The staff would not change existing law to require tendering actual costs of a subpoenaed public employee.** If a subpoena is used for harassment, monetary sanctions may be imposed under Section 648.630 for frivolous bad faith tactics.

§ 646.120. Conduct of prehearing conference

The State Water Resources Control Board wants this section modified to codify its practice of using agency employees other than the presiding officer to conduct prehearing conferences. **The staff agrees, and would revise subdivision (a) as follows:**

> (a) On motion of a party or by order of the presiding officer, the presiding officer or a different presiding officer designated by the agency head may conduct a prehearing conference.

• Subdivision (d) permits the proceeding to be converted at the prehearing conference into an informal hearing. The State Bar Committee on Administration of Justice says a prehearing conference should "not be converted into an adjudicatory hearing and ADR should be considered where possible." **The staff recommends making clear a proceeding may be converted at the prehearing conference into alternative dispute resolution:**

> (d) At the prehearing conference the proceeding may be converted into ~~an~~ either of the following:

(1) An informal hearing for disposition of the matter as provided in this part. The notice of the informal hearing shall state the date of the hearing.

(2) A proceeding for dispute resolution provided in Chapter 7 (commencing with Section 647.210).

§ 646.130. Subject of prehearing conference

• The State Bar Litigation Section would add the possibility of alternative dispute resolution to matters authorized at a prehearing conference. **The staff agrees, and recommends adding a new subdivision to Section 646.130:**

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

. . . .

( ) Exploration of the possibility of using dispute resolution provided in Chapter 7 (commencing with Section 647.210).

Subdivision (i) of Section 646.130 permits a prehearing conference to deal with "[e]xchange of witness lists and of exhibits or documents to be offered in evidence at the hearing." The Comment says a party who has not engaged in discovery "should not be permitted to use the prehearing conference as a substitute" for discovery. "The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing." The Department of Insurance says it is unclear whether this permits a party who has not engaged in discovery to get the actual exhibits or documents to be used as evidence, or merely a list of them. The draft statute provides for exchange of the exhibits or documents themselves. **The staff would modify the Comment to say that, under subdivision (i):**

The prehearing conference is limited to an exchange of ~~information concerning evidence~~ witness lists and of exhibits or documents to be offered in evidence at the hearing.

§ 646.210. Settlement

Section 646.210 authorizes settlement at any time for most cases, but only after issuance of an agency pleading in a proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned. The Department of Health Services asks what "occupational license" means, and whether it includes teachers, health facilities administrators, certified nurse assistants, radiation technologists, laboratory technologists, and realtors, or

whether it is limited to licensees under the jurisdiction of the Department of Consumer Affairs. The Tentative Recommendation explains an occupational licensing case may be settled only after the agency pleading "to ensure that the disciplinary action is a matter of public record." Therefore "occupational license" should be construed broadly to include all the categories mentioned by DHS, and not be limited to licenses issued by the Department of Consumer Affairs. Under Section 648.310, *infra*, the staff recommends adding a section to define "occupational license." **The staff recommends adding the following to the Comment to Section 646.210:**

> "Occupational license" refers to one issued by any agency, not merely those issued by agencies under the jurisdiction of the Department of Consumer Affairs. See Section 610.430 ("occupational license" defined).

The State Water Resources Control Board says the provisions authorizing settlement, and authorizing the presiding officer to order the parties to participate in a settlement conference, should be subject to modification by agency regulation. **The staff recommends against this change.** Even without a statute, agencies have implied power to settle a case. Some agencies encourage settlements and others do not. Under existing law, agencies may use the prehearing conference to explore settlement possibilities. The staff is reluctant to see these useful pro-settlement provisions weakened. The Water Resources Control Board will be able to use the agency hearing procedure, and so will likely be unaffected by this provision.

The Attorney General 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 Water Resources Control Board made a similar point. **The staff recommends prohibiting a settlement contrary to statute or regulation, but would preserve the existing rule that settlement may include sanctions the agency otherwise lacks power to impose:**

> 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 terms of a settlement may not be contrary to statute or regulation, except that the settlement may include 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.

The State Personnel Board asks us to preserve its authority under Government Code Section 18681 to approve settlements. **The staff will do this.**

§ 646.220. Mandatory settlement conference

• Subdivision (b) requires the presiding officer at the settlement conference to be different from the presiding officer at the hearing, if the proceeding is conducted by an ALJ from OAH. For non-OAH proceedings, one presiding officer may conduct both the settlement conference and the hearing. The State Bar Committee on Administration of Justice would require different presiding officers both for OAH and non-OAH proceedings. The argument for CAJ's position is that, since evidence of settlement negotiations is not admissible at the hearing, the officer who will preside at the hearing should not be informed about the negotiations. The argument against CAJ's position is that to require a separate cadre of settlement judges for non-OAH proceedings will increase costs. **The staff recommends against implementing this.**

Subdivision (d) says the presiding officer "may" conduct the settlement conference by telephone. CAJ would "require use of telephonic conferences when available." But including the words "when available" would undercut the attempt to make the provision mandatory, making it precatory only and therefore without teeth. **In any event, the staff thinks it is better to keep the discretionary aspect of this provision.**

§ 646.230. Confidentiality of settlement communications

Section 646.230 protects confidentiality of settlement negotiations by making evidence of them inadmissible. The Pacific Gas and Electric Company wants to permit parties to make a nondisclosure agreement that goes beyond the admissibility question. But the use of stipulations in administrative proceedings is well-established, and stipulations are usually binding on judicial review. The staff is reluctant to codify one limited application of a stipulation, and a general statute on stipulations seems unnecessary. But we could put it in the Comment.

The staff recommends we add the following to the Comment:

> The parties are, of course, free to make a stipulation concerning confidentiality of offers of compromise or settlement that goes beyond or otherwise varies the protection of this section.

§ 647.210. Application of article

The Department of Health Services thinks subdivision (b) is unclear. It says, "By regulation an agency may make this article inapplicable." **The staff recommends amplifying this subdivision by adding the following to the Comment:**

> If there is no statute requiring the agency to use mediation or arbitration, this article applies unless the agency makes it inapplicable by regulation under subdivision (b). Subdivision (b) only permits an agency to make this article inapplicable, not to modify it. But, under Section 647.230, an agency that does not make this article inapplicable may modify model regulations promulgated by the Office of Administrative Hearings.

The State Bar Committee on Administration of Justice "questions why an agency should be able to pass ADR and recommends that the section be eliminated." Perhaps CAJ means only to eliminate subdivision (b), the opt-out provision. But eliminating subdivision (b) will not make use of ADR mandatory. Section 647.220, the substantive section, is permissive: An agency "may, with the consent of all the parties," refer a dispute to mediation or arbitration. **The staff recommends no change.**

§ 647.220. ADR authorized

• The State Bar Litigation Section is concerned subdivision (b), which permits the parties to agree to binding arbitration, "may be constitutionally indefensible" because the state gives up its statutory decision-making authority to "unspecified private decision makers." In civil proceedings, an arbitration agreement is a consent of the parties to the jurisdiction of the courts to enforce the agreement, and this has been uniformly upheld by the courts. But it is not clear what would happen after a binding arbitration award in an administrative proceeding. Would it preclude administrative review? Would this encroach on the statutory authority of the agency? Under Government Code Section 7, whenever a power is granted to, or a duty is imposed on, a public officer, the power may be exercised or the duty performed by a person authorized by the officer pursuant

to law. This seems to say a statute, such as Section 647.220, may provide for delegation to an arbitrator of power to decide. **The staff recommends no change.**

§ 647.240. Confidentiality and admissibility of ADR communications

• The State Bar Committee on Administration of Justice likes this section, but is concerned "the immunity provision is unnecessarily limited to mediators and arbitrators." CAJ may be referring to subdivision (c), which prevents later testimony about ADR. We could add "or other person" to subdivision (c):

> (c) No presiding officer, arbitrator, ~~or~~ mediator , or other person is competent to testify in a subsequent administrative or civil proceeding as to a statement, conduct, decision, or order occurring at or in conjunction with the dispute resolution.

The State Bar Litigation Section is concerned about subdivision (a), which creates a privilege for statements, admissions, and documents used in mediation. The Section opposes keeping agency action from public scrutiny. But this provision is consistent with the general rule of confidentiality in mediation. It is only a "communication" made in mediation that is protected, not the fact of agency action. There will be an agency pleading and other steps in the proceeding before mediation. Although public policy favors open hearings, California law has many exceptions permitting closed hearings, especially for matters in litigation. All privileges in the Evidence Code apply to administrative hearings. **The staff would keep the mediation privilege in the draft statute.**

§ 648.120. Consolidation and severance

The **State Bar Litigation Section** approves Section 648.120, but is concerned about the statement in the Comment that the section is broad enough "to enable an agency to employ class action procedures." The Section "vigorously opposes" any such suggestion. In the absence of an express statutory provision affording class relief, class relief is not available in administrative proceedings. The staff agrees that this statement in the Comment may be troublesome. **We would delete it.**

§ 648.130. Default

Subdivision (c) permits the agency or presiding officer to grant a hearing despite a default. The California Public Employees' Retirement System is

concerned about the possibility of conflicting orders, one by the agency and another by the presiding officer. PERS would say the agency's order controls as under Section 648.120 (consolidation and severance). But since the order is made without a motion, the possibility of conflicting orders seems remote. **The staff would not change this provision, thus validating the order granting relief from default without regard to who makes it, consistent with a strong policy favoring such relief.**

Subdivision (d) permits relief from default on motion for "good cause," which includes failure to receive notice, and "mistake, inadvertence, surprise, or excusable neglect." The Department of Social Services is concerned that the express reference to "mistake, inadvertence, surprise, or excusable neglect" will take away agency discretion in such cases, and require relief from default in every such case. The staff does not agree. The statute is clear that the "agency in its discretion may" grant relief. The "mistake, inadvertence, surprise, or excusable neglect" language is identical to Code of Civil Procedure Section 473. The remedial provisions of Section 473 are highly favored and liberally applied, but the court still has discretion to deny relief. **The staff would not change this provision.**

The Department of Social Services says existing law is unclear on how an agency takes a person's default. Under Section 648.130, a default is a waiver of the defaulting person's right to a hearing, the agency may take action based on the person's express admissions or on other evidence, and affidavits may be used as evidence without notice to the person. If the burden of proof is on the agency, e.g., in disciplinary hearings, the agency must base its action on some type of evidence. If the burden of proof is on the defaulting person, the agency may act without taking any evidence. Section 648.130. **The staff thinks these provisions are satisfactory.**

• Sections 646.120 and 646.220 permit the presiding officer to order a prehearing conference or mandatory settlement conference. These sections and Section 648.130 permit (but do not require) a nonattending party to be held in default. Notice of the prehearing or settlement conference informs the parties that nonattendance may result in a default. The Attorney General thinks the default sanction is too drastic, especially for a party without counsel. But Section 648.130 permits an agency to hold a hearing 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. These protections seem sufficient. The default sanction as an ultimate weapon appears necessary to assure attendance of parties at mandatory hearings. **The staff recommends against deleting the default provision, but would authorize monetary sanctions as an alternative:**

> (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 State Personnel Board is concerned about how the open hearing rule affects exclusion of witnesses where credibility is in issue. There is no case law on exclusion of witnesses in administrative proceedings. The CEB treatise recommends following the rule for court actions, where the court may exclude witnesses other than parties. **The staff recommends codifying this rule for administrative proceedings by adding a section drawn from Evidence Code Section 777:**

> 648.355. (a) Subject to subdivisions (b) and (c), the presiding officer may exclude from the hearing any witness not at the time under examination so that the witness cannot hear the testimony of other witnesses.
>
> (b) A party to the proceeding cannot be excluded under this section.
>
> (c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

The State Water Resources Control Board says the statute should address the question of when proceedings may be closed to the public to consider a settlement proposal, citing Funeral Security Plans, Inc. v. State Board of Funeral Directors, 21 Cal. Rptr. 2d 92, *Supreme Court review granted*, 24 Cal. Rptr. 2d 73 (1993). This case construed the Bagley-Keene Open Meeting Act which permits a closed session to "confer with legal counsel regarding pending litigation." This question is not governed by the open hearing requirement of Section 648.140,

because an agency's deliberation on settlement is not an adjudicative "hearing." **The staff would not revise the Open Meeting Act as part of our APA recommendation, but would revise the first paragraph of the Comment to Section 648.140 as follows:**

> Section 648.140 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. It should be noted that under the Open Meeting Law, deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). And under the Open Meeting Law, a settlement proposal may be considered by the agency in closed session if sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting. Section 11126(d), (q).

§ 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." Robert Hughes objects to permitting agencies to provide by regulation for a burden of proof other than "clear and convincing" in occupational licensing cases. The staff agrees. The "clear and convincing proof" standard in proceedings for revocation or suspension of a professional license is from case law. The reason clear and convincing proof is required in professional license cases is that vested rights are involved. The clear and convincing proof standard has not been extended to lesser forms of discipline, such as public reproval or termination of a particular employment. **The staff recommends deleting authority for agencies to change the "clear and convincing" standard, and would limit that standard to proceedings for revocation or suspension of a license, and not apply it to lesser forms of discipline.** The Attorney General agrees:

> (b) In an adjudicative proceeding to determine whether an occupational license should be revoked ~~,~~ or suspended, ~~limited, or conditioned,~~ the burden of proof is clear and convincing proof ~~unless by regulation the agency provides a different burden.~~

• The Department of Health Services, Alcoholic Beverage Control Appeals Board, and Department of Social Services ask what "occupational license" means

in subdivision (b). See also discussion under Section 646.210, *supra*. Does it apply to a license from DSS to operate a community care facility? Health and Safety Code Section 1551 requires a preponderance of evidence to revoke or suspend a license to operate a community care facility. These licenses appear to permit operation of a particular facility. Suspension of a license to operate a particular community care facility is analogous to dismissal of a teacher from a particular employment, not analogous to revocation of a teaching credential which deprives the teacher from pursuing his or her profession, and therefore a preponderance of evidence standard should apply. **The staff recommends adding a section defining "occupational license":**

> **§ 610.430. Occupational license**
>
> 610.430. "Occupational license" means a license without which the licensee would be unable to pursue the licensee's profession.
>
> **Comment.** Section 610.430 codifies the definition of "occupational license" used in Gardner v. Commission on Professional Competence, 164 Cal. App. 3d 1035, 1039-40, 210 Cal. Rptr. 795 (1985), and Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 857, 185 Cal. Rptr. 601 (1982). "Occupational license" is used in Section 648.310 (burden of proof). "Occupational license" does not include a license to operate a community care facility under the Health and Safety Code, because the license is to operate a particular facility, and suspension or revocation of the license would not deprive the licensee of the right to pursue his or her profession.

The Attorney General would say "clear and convincing evidence," not "clear and convincing proof." **The staff would keep "clear and convincing proof" because it is consistent with the Evidence Code.**

§ 648.320. Presentation of testimony

Subdivision (b) of Section 648.320 permits a party or person identified with a party to be called at any time and examined as if under cross-examination. The Department of Health Services says it may be unfair to permit the agency to call respondent as an adverse witness during the agency's case-in-chief. DHS says most ALJ's disfavor this practice so the respondent can tell a cohesive story on direct examination first before being subjected to cross-examination. In administrative hearings as in civil practice generally, the order of proof is largely within the discretion of the trier of fact. But subdivision (b) is virtually identical to the civil practice rule under Evidence Code Section 776, which apparently makes calling an adverse witness during the proponent's case-in-chief a matter of right, not subject to court discretion to regulate the order of proof. The staff

thinks it is better policy to depart from civil practice and make clear the presiding officer does have discretion to regulate this practice. **The staff recommends revising subdivision (b) as follows:**

> (b) ~~A~~ Subject to the discretion of the presiding officer to regulate the order of proof, a party or person identified with a party may be called and examined as if under cross-examination by an adverse party at any time during the presentation of evidence by the party calling the witness.

§ 648.330. Oral and written testimony

The Department of Insurance asks what portion of subdivision (c) the words "if available" modify. **The staff recommends revising subdivision (c) as follows:**

> (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, and to compare an excerpt with the complete text if available.

The Department of Insurance also asks what "if available" means. Does this mean available by subpoena or by more informal means? This language comes from the 1981 Model State APA, and appears to mean available by any means. Under civil practice, a copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by "other available means." Section 648.330 appears to be to the same effect. **The staff recommends adding the following to the Comment:**

> As used in subdivision (c), "if available" means if the original or complete text is procurable by process, such as a subpoena duces tecum, or by any other available means.

§ 648.340. Affidavits

Subdivision (d) of Section 648.340 says "affidavit" includes declaration under penalty of perjury as used in this section. The Comment says this is a specific application of the general rule in Code of Civil Procedure Section 2015.5. The Department of Social Services is concerned this provision may cast doubt on whether "affidavit" as used elsewhere in the Government Code includes declaration. The staff thinks this is a good point. **The staff would delete**

subdivision (d) and put it in the Comment, citing Code of Civil Procedure Section 2015.5.

§ 648.350. Protection of child witness

Section 648.350 permits the presiding officer to conduct the hearing in such a way as to protect a child witness from intimidation. This has been applied to exclude a party from the hearing room while a child testified, but the excluded party was permitted to view the testimony on closed-circuit television and to confer with counsel before cross-examination of the child. This was held not to violate the right of the excluded party to confront the witness.

• The Department of Health Services and Department of Social Services would expand Section 648.350 to protect developmentally disabled, and perhaps other medically fragile adults. DSS says it has been successful in getting protection for developmentally disabled adults. The parallel provision in the Penal Code is limited to sexual offenses where the witness is 10 years of age or younger. In criminal cases, there are federal and state constitutional issues affecting the right to a public trial, confront witnesses, and due process. The staff has found no case authorizing televised hearings for a developmentally disabled witness. However, the staff is persuaded by the argument that some presiding officers are now extending this protection to developmentally disabled adults. **The staff recommends including developmentally disabled adults in Section 648.350, but not going so far as to permit application of the section in any case:**

> 648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses and closing the hearing, in a way that is appropriate to protect a child witness, or a witness with a developmental disability as defined in Section 4512 of the Welfare and Institutions Code, from intimidation or other harm, taking into account the rights of all persons.

§ 648.450. Hearsay evidence and the residuum rule

• Section 648.450 permits a party to object on judicial review to a finding supported only by hearsay that would be inadmissible in a civil proceeding, 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 an objection should be required at the hearing to permit the defect to be remedied. 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 an objection. Perhaps a satisfactory intermediate solution would be to permit an objection to a finding supported only by hearsay to be raised for the first time on judicial review unless the hearing is subject to administrative review, in which case the objection would have to be raised on administrative review or be barred. **The staff recommends this solution, and would revise Section 648.450 as follows:**

> 648.450. (a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.
>
> (b) ~~On~~ Except as provided in subdivision (c), 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.
>
> (c) If the proceeding is subject to administrative review, on judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence only if the objection was previously raised on administrative review.

The Department of Social Services would add a provision for admission of hearsay evidence drawn from federal rules. Under the Federal Rules of Evidence, hearsay that does not fall under any exception is admissible where it has equivalent circumstantial guarantees of trustworthiness, is more probative than any other evidence that can be procured through reasonable efforts, and the interests of justice are served by admission of the evidence. By broadening the admissibility of hearsay evidence, DSS' suggestion would make it easier to support a finding based on hearsay. Professor Asimow appears to have taken a neutral position on whether this federal rule should be adopted. **The staff is inclined not to expand reliance on hearsay.**

The Alcoholic Beverage Control Appeals Board asks whether the "other evidence" which hearsay may be used to explain should not be a "cut above " the

type of hearsay evidence that is not sufficient in itself. "Other evidence" refers to non-hearsay evidence. This seems clear enough from the statute, but there is no harm in saying so in the Comment. **The staff recommends adding the following to the Comment:**

> As used in subdivision (a), "other evidence" refers to non-hearsay evidence.

§ 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." 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. In a 1993 U. S. Supreme Court case, the federal rule is now relaxed to say scientific evidence is admissible if grounded "in the methods and procedures of science." California may, in civil proceedings, ultimately follow the federal rule. **The staff recommends deleting Section 648.460, so whatever rule the civil courts ultimately adopt may also be applied in administrative proceedings.**

§ 648.520. Ex parte communications prohibited

• 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, there may be no communication on any subject, not merely concerning the proceeding. The Model APA only prohibits communications "regarding any issue in the proceeding." Professor Asimow recommended the Model APA provision. The Attorney General, State Water Resources Control Board, Department of Health Services, Public Utilities Commission, and California Public Employees' Retirement System agree with Professor Asimow and urge us to preserve existing law prohibiting ex parte communications on the "merits of a contested matter while the proceeding is pending." **The staff agrees, and recommends including 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:

Section 648.520 prohibits ex parte communications "while the proceeding is pending." The quoted language is also used in Section 648.530. An adjudicative proceeding is commenced by issuance of an agency pleading. Section 642.310. The State Water Resources Control Board is concerned this may limit the prohibition against ex parte communications to the case where an agency pleading has been issued, even though an application or complaint has been filed and the agency knows a hearing will be required. The Board says this "makes a sham" of the prohibition. **The staff agrees, and would add a new subdivision (c) to Section 648.520:**

> (c) For the purpose of this article, a proceeding is pending from the issuance of a notice of commencement of proceeding, or from the application for an agency decision, whichever is earlier.

• The State Bar Committee on Administration of Justice and State Bar Litigation Section are concerned about the exception in subdivision (b)(1) permitting a communication assisting and advising the presiding officer by an employee, attorney, or other authorized representative of the agency. The Comment says that without this exception Section 648.520 would "preclude a presiding officer from obtaining advice from expert agency personnel even though not involved in the matter under adjudication." This exception seems necessary to permit staff experts who are not prosecuting the case to provide assistance or advice to the presiding officer. Subdivision (b)(1) says the advice must not violate separation of functions provisions, so it may not be given by an agency prosecutor or advocate. This seems sufficient protection against abuse. **The staff would not change this provision.**

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 limitation recommended above that to be prohibited a communication must concern an issue in the proceeding, there will 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. **The staff agrees with Professor Asimow, and would not restore this language.**

§ 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. **The staff recommends the following revision:**

> 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 recommends against deleting "actions," but would add the following to the Comment:**

> A person unrepresented by counsel who requests a hearing without legal grounds would not be subject to sanctions under this section unless the request was made in bad faith and frivolous or solely intended to cause unnecessary delay.

§ 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." The Attorney General says this change of language will cause unnecessary litigation. The Tentative 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. Thus "factual basis for the decision" appears to be a more accurate statement of existing law than "findings of fact." **The staff recommends adding 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).

The State Water Resources Control Board is concerned the requirement of Section 649.120 that the decision must "include a statement of the factual and legal basis for the decision as to each of the principal controverted issues" could require the agency to explain why it did not take a particular action on an issue, or why the agency did not impose terms and conditions other than those

included in the decision. This requirement of Section 649.120 will also apply to the agency hearing procedure. Section 633.030(a)(7). Existing law requires a decision to contain "findings of fact, a determination of the issues presented and the penalty, if any." **The staff would address this by revising the second paragraph of the Comment as follows:**

> 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 the basis for the decision 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, see Article 3 (commencing with Section 649.310), 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 decision must only explain its actual basis. It need not eliminate other possible bases that could have been, but were not, relied upon as the basis for the decision. Thus, for example, if the decision imposes terms and conditions, it need not explain why other terms and conditions were not imposed.

• 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. 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. Official notice in administrative proceedings encompasses a broader range of matters than does judicial notice: Official notice may be taken of any fact that may be judicially noticed by a court, and of any generally accepted technical or scientific matter within the agency's special field. 1 Ogden, California Public Agency Practice § 38.10[1] (1993); California Administrative Hearing Practice § 3.35, at 181 (Cal. Cont. Ed. Bar 1984). 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 Department of Health Services would permit the agency head summarily to adopt the proposed decision with a disclaimer disagreeing with erroneous reasoning. This would be useful in cases too small to remand, or which reach the right result for the wrong reason. **The staff agrees, and recommends authorizing the agency head to:**

> (1) Adopt the proposed decision in its entirety as a final decision. For the guidance of the parties and the public in future disputes, the agency head may include an explanation which expresses disagreement with all or part of the decision. The

expression of disagreement does not affect the validity of the 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 time for judicial review under the APA is governed by Section 11523 of the Government Code, proposed to be recodified as Section 660 in Memorandum 94-33. The time for judicial review of non-APA proceedings is governed by statutes applicable to each agency. This is the subject of a separate study by our consultant. We will address these questions in the future.

§ 649.210. Availability and scope of review

The Department of Health Services and State Personnel Board are confused by the authority to review a "final" decision. The Attorney General has a similar problem with the terminology. An agency head may summarily adopt a proposed decision as a final decision (Section 649.140), but this does not preclude administrative review: A party has 30 days after service of the proposed decision to petition for administrative review. A "final" decision must be reviewable, because otherwise the agency could preclude review by summarily adopting the proposed decision. This is a little confusing, because "final" in this context does not have the same meaning as "final" in the context of judicial review. In existing law, the term "final decision" is used only in the context of judicial review. See Gov't Code § 11523. **The staff recommends we use some other term for an agency decision that is subject to administrative review, such as "adopted" decision.** This will require revision of Sections 643.110, 648.360, 649.110-649.220, and 649.240-649.250, and perhaps others.

§ 649.230. Review procedure

• The Department of Health Services and California Energy Commission want statutory language to make clear the cost of making a copy of the record "available to the parties" may be imposed on the party requesting the copy. The Comment says this provision "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." **The staff has no objection to codifying this with language drawn from the Public Records Act:**

> 649.230. (a) The reviewing authority shall decide the case on the record, including a transcript or 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 agency may require payment of fees covering direct costs of making the copy. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

• 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. **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." 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. 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. The Attorney General says this change "unnecessarily diminishes agency authority," and the State Teachers Retirement System made a similar point. This limitation is comparable to the limitation on judicial review, and was recommended by Professor Asimow to strengthen the fact-finding role of the hearing officer by no longer allowing agency heads to reject an ALJ decision and rehear the case themselves. The AG says the limitation on judicial review grows out of the deference courts 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. Arguably, it would be more efficient to permit the reviewing authority to take additional evidence on an issue that was not adequately addressed at the hearing without having to send it back to the presiding officer for presentation of the evidence and then returning it to the reviewing authority for review. But permitting the reviewing authority to take additional evidence without limitation seems to weaken the role of the presiding officer and the importance of the hearing. **The staff would not delete the limitation that the evidence could not reasonably have been produced at the hearing.**

§ 649.320. Designation of precedent decision

Subdivision (b) of Section 649.320 says designation of a decision as precedent is exempt from rule-making provisions of the APA. The Comment says this "applies notwithstanding any contrary implication in Section 11347.5" of the rule-making APA. The Office of Administrative Law objects to the Comment as not reflecting existing law, citing Professor Ogden's treatise. The Ogden treatise says it is an open question whether statutorily created precedent decisions are permissible without express statutory exemption from the rule-making provisions. But that is exactly what subdivision (b) does. The Comment is an accurate statement of the effect of subdivision (b). It is not a statement of general law. **The staff would revise the first sentence of the second paragraph of the Comment as follows:**

~~This~~ Under subdivision (b), this section applies notwithstanding any contrary implication in Section 11347.5 ("underground regulations").

Bus. & Prof. Code § 494.5. Reinstatement of license or reduction of penalty

• Section 494.5 recodifies Section 11522 of the Government Code. The Department of Insurance wants to make sure the section applies to persons licensed under other codes, not just under the Business and Professions Code. **The staff recommends we move Section 494.5 into the APA:**

> **650.140. Reinstatement of license or reduction of penalty**
>
> 650.140. (a) A person whose license has been revoked or suspended may petition 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 filing of the petition. The Attorney General and the petitioner shall be afforded an opportunity to present written argument, or if the agency permits, oral argument, before the agency itself.
>
> (c) The agency itself shall decide the petition. The decision shall include the reasons therefor.
>
> **Comment.** Section 650.140 supersedes the first three sentences of former Section 11522. The last sentence of former Section 11522 is continued in substance in Section 612.150 (contrary express statute controls).

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

• The draft statute would amend Section 1094.5 of the Code of Civil Procedure to require courts in mandamus proceedings to give great weight to a determination of the presiding officer based substantially on the credibility of a witness. This is drawn from federal law and from a number of non-APA proceedings in California, such as workers' compensation. Credibility determinations of a Workers' Compensation Judge are entitled to great weight. 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. The staff agrees with Professor Asimow. **The staff recommends keeping the requirement that courts give great weight to the presiding officer's determinations based on credibility.**

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

Existing law gives OAH authority to study administrative law and procedure. The draft statute splits this into two parts, giving OAH authority to study administrative adjudication (Section 636.180), and giving OAL authority to study administrative rulemaking. Section 11340.4 requires agencies to allow OAL access to agency records, and requires OAL to submit suggestions to agencies and to report biennially to the Governor and Legislature. The Unemployment Insurance Appeals Board and Department of Social Services are concerned this will convert OAL into an investigative agency, and that OAL will use this opportunity to ferret out underground regulations and require them to be adopted as rules. But existing law already permits OAL to determine if an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation for purpose of its review authority. OAL may act whether it is notified of an underground regulation or learns on its own. The proposed new requirement in Section 11340.4 that agencies must give OAL access to their records is consistent with the existing function of OAL to determine whether underground regulations should be subjected to the rulemaking process. **The staff would not change this section.**

Respectfully submitted,

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