Memorandum 94-50

Administrative Adjudication:
Choice of Drafts for Recommendation to Legislature

The first part of this memorandum presents for Commission decision a choice of drafts for the Commission's recommendation to the Legislature on administrative adjudication. The second part discusses specific issues in administrative adjudication that have been raised concerning the drafts. The third part discusses matters that concern only the existing Administrative Procedure Act (which would be preserved intact as part of the proposed alternate draft).

CHOICE OF DRAFTS

Attached to this memorandum are the two drafts:

(1) A **comprehensive revision** based on the Commission's July 1994 revised tentative recommendation, incorporating decisions made at the Commission's September meeting. The comprehensive revision provides default rules to govern administrative adjudication by all state agencies. A state agency could adopt a special hearing procedure for its adjudicative proceedings (except where the proceeding is conducted by the Office of Administrative Hearings). Adoption of a special hearing procedure would be by regulation and the procedure would be subject to fundamental due process and public policy requirements such as separation of functions and prohibition of ex parte communications.

(2) An **alternate draft** that is more narrowly focused, leaving existing state agency hearing procedures fundamentally unaltered. The more narrow approach is drawn from the revised tentative recommendation, along the lines suggested by the Attorney General. It modernizes the formal hearing procedure (existing Administrative Procedure Act) in a number of respects, it makes available added flexibility for the hearings of all state agencies (e.g., alternative dispute resolution), and it superimposes fundamental due process and public policy requirements on all agency proceedings in the form of an "administrative adjudication bill of rights".

Development of Alternate Draft

Probably two-thirds of the comprehensive revision survives intact in the alternate draft. Such matters as application of the statute, alternative dispute resolution, ex parte communications, separation of functions, precedent decisions, language assistance, informal hearing procedure, subpoenas, enforcement of orders and sanctions, emergency decision procedure, declaratory decision procedure, and conversion of proceedings are preserved wholesale in the alternate draft. It is the procedural detail of pleadings, discovery, prehearing conference, evidence, initial decision, agency review, and the like, that is omitted from the draft, leaving an agency's basic hearing procedures in place.

In deriving the alternate draft from the comprehensive revision, the staff made a number of close judgment calls as to which provisions were strictly procedural and should be omitted or limited to the formal hearing procedure and which provisions were of such magnitude that they ought to be applied across the board to all state agency adjudicative proceedings. The staff's bias in close cases ordinarily was to omit the provision or limit its application, consistent with the purpose of the alternate draft to provide minimal impact on existing state adjudicative procedures. For example, the material on representation of parties is absent from the alternate draft, along with most of the evidentiary rules.

The alternate draft also presented an organizational challenge, since one object of the alternate draft is to leave existing procedures (including section numbers) untouched to the extent practical. We have done this by leaving the existing administrative adjudication chapter in place (the "formal hearing procedure"), and adding immediately before it a chapter of general provisions applicable to all agency hearings. This structure lacks the organizational flexibility we need for the most logical groupings of provisions, but the staff believes it is manageable.

In putting together the alternate draft, the staff fixed a few inconsistencies and ambiguities carried over from the comprehensive revision. If the Commission decides to go with the comprehensive revision rather than the alternate draft, we will need to ferret out the corrections and improvements made in the alternate draft and incorporate them in the comprehensive revision.

A few specifics the staff would like to note about the alternate draft:

(1) The administrative adjudication bill of rights eliminates the "right to present and rebut evidence", since this is inherent in the concept of an evidentiary hearing. Observe that "notice and an opportunity to be heard" also is not expressly stated, even though this is fundamental to due process of law.

(2) The requirement that the agency make available a copy of its hearing procedure is elevated to the bill of rights.

(3) The "great weight" requirement for credibility determinations of the presiding officer has been relocated from Code of Civil Procedure Section 1094.5 to the bill of rights.

(4) Previous versions of the statute have stated that a contrary express statute applicable to an agency's proceeding controls over the general provisions of the Administrative Procedure Act. Consistent with the objective to leave agency procedures basically unimpaired, this concept has been softened in the alternate draft to provide that "conflicting or inconsistent" express agency procedure provisions prevail. This eases substantially the conforming revision problem discussed below.

(5) The alternate draft makes clear that an agency's basic procedure controls, but where there is no procedure provided, it may use the adjudication provisions of the Administrative Procedure Act. No implementing regulations are necessary.

Commentary on the Choice Between Drafts

The reason the Commission decided to develop an alternate draft is that the comprehensive revision, while it addresses the substantive concerns of most of the agencies, continues to arouse substantial opposition due to the implementation costs. Under the comprehensive revision agencies would have to review the new law and their existing procedures. If an agency wishes to preserve its existing procedure (and it is apparent that most will), it must go through a rulemaking process to do so. The agencies indicate that it will be a substantial burden on them, particularly with their limited resources due to budget reductions, to go through this exercise merely to end up exactly where they are now in terms of their adjudicatory procedures.

In the staff's opinion, the best case that can be made for the comprehensive revision approach was set out in the letter from Frederic Woocher of Santa Monica, distributed at the last Commission meeting.

We are writing to express our support for the tentative recommendation for Administrative Procedure Reform currently circulated by the Law Revision Commission. Our law firm practices extensively in the area of administrative law. Although we have represented both state administrative agencies themselves and clients appearing before various agencies, we write to you today purely on our own behalf and as private attorneys knowledgeable in this field of the law.

We firmly believe that the statute presently proposed would constitute a real advance in administrative justice. We are aware that the Attorney General and many agencies have expressed opposition to the recommendation, but we believe that the private Bar also should be heard from. We believe this proposal provides a historic opportunity to modernize California's administrative law.

To our knowledge, all other states and the federal government have an APA that applies to all agency adjudication. California's APA is antiquated and applies only to a small percentage of agency adjudications.

The Commission's tentative recommendation would impose minimal due process standards, such as separation of functions and a prohibition against ex parte contacts. It would make alternate dispute resolution available at every agency. It would permit informal procedures instead of unnecessary formal procedures in every case. It would provide for many economies in adjudication, such as improved use of electronic communication, and greater delegation to ALJs, and resolution of discovery disputes at the agency level instead of in court. It would make precedential decisions publicly available. And it would ensure that the procedures of every agency would be set forth in generally accessible regulations instead of the present situation in which the procedures are often known only to that agency's staff and to a handful of specialists.

The only serious objections that have been raised to the new law are that it would require agencies to go through a rulemaking proceeding in order to adopt special hearing procedures that depart from the default provisions in the Act. This would concededly impose a one-time cost on many agencies experiencing budget problems. But the tentative draft takes numerous steps to simplify this rulemaking process and gives agencies a long period of time in which to adopt regulations. We believe that this modest, one-time-only investment in rulemaking would be well worth the cost. All transitions have costs; if we thought only of the costs of change, we would never make any advances.

> I hope the Commission will consider our views seriously. The tentative recommendations are too valuable in the long run to be jettisoned now. Thank you very much for the opportunity to submit our comments.

Despite the power of this argument, the staff does not believe it is sufficiently powerful to overcome the substantial agency opposition that will be vigorously advocated in the Legislature and the Governor's office. The agency opposition, based on the transitional costs (including litigation costs in clarifying the meaning and application of new rules, as well as initial implementation costs), will be effective. Unless very strong private sector support and advocacy for the comprehensive revision is forthcoming, in the staff's opinion it will be difficult to obtain enactment of it.

The Commission decided at the September meeting to test whether or not strong private sector support will be forthcoming. Steps taken to alert private sector representatives to the decision on this matter and to determine the extent of private sector support include, in addition to the press releases and notices in the California Notice Register that have appeared periodically:

(1) *Interest groups*. The staff has given talks on this project at various administrative law forums, encouraging private sector input. Professor Asimow has published a short article in the California Notice Register alerting readers to the decision on this issue. And persons and agencies involved in this project have alerted their contacts and constituents about it. As a result of these contacts we have received inquiries from a number of sources, including organizations of peace officers, consulting engineers, physicians and dentists, state employees, legal services, and automobile association.

(2) *Private bar*. The staff has met with local and state bar groups and informed them of the issues. Groups known to be looking at this include the Los Angeles County Bar Governmental Law Section, the State Bar Litigation Section, and the State Bar Committee on Administration of Justice.

(3) *Legislative activity*. The staff has taken steps to obtain a preprint bill of the comprehensive revision, to make available the text of the Commission's report on the comprehensive revision in the legislative data base, and to obtain an interim or informational hearing on the comprehensive revision. Unfortunately, things are moving slowly on the legislative front due to a number of factors, including legislative member and staff involvement in the

electoral process, and we may not generate much input through these sources before the matter comes before the Commission.

We will supplement this memorandum with any correspondence received on the issue. It is quite possible, however, that the interests of the major trade associations and lobbying groups will be aligned with the agencies on this matter. If the members of an interest group appear regularly before a particular agency and are familiar and comfortable with the details and quirks of that agency's procedure, there will be little inclination to tamper with the basic procedure in what is essentially a specialty area. The main impetus for uniformity is likely to come from lawyers in general practice or administrative practice generally.

Staff Opinion

The staff believes the alternate draft is preferable to the comprehensive revision. The alternate draft preserves all the most important substantive changes from the comprehensive draft, including not only the "administrative adjudication bill of rights" applicable to all proceedings but also the flexibility enhancing options such as alternative dispute resolution and informal hearing procedure. What the alternate draft lacks is a basic detailed default hearing procedure that would apply unless an agency adopts a special hearing procedure.

The staff believes that this is not a great loss. In theory the existence of a default procedure, and the disincentive of an agency having to adopt a regulation to preserve its special hearing procedure, should provide a gentle impetus towards our desired goal of uniformity of hearing procedure. But the substantial resistance to any change displayed by the agencies leads the staff to conclude that any substantial movement towards uniformity is illusory. If the comprehensive revision is adopted, as a practical matter most if not all agencies will adopt a regulation preserving their existing special hearing procedures rather than learning to live with a new procedure. The perceived benefits of requiring agencies to reconfirm their existing procedures through the rulemaking process will be rather intangible compared to the burden imposed on all agencies to go through the process only to end up exactly where they are now.

The comprehensive revision does not offer the special hearing procedure option to agencies currently governed by the Administrative Procedure Act.

Granted, the comprehensive revision is based on the existing APA. However, it uses new terminology, changes some time limits, alters some procedures, etc., in the effort to provide a broad-based universal statute that can work for all agencies (but that in fact will be little used by the other agencies). So, while the other agencies opt out, existing APA agencies will have to cope with new provisions, including disputes over interpretation, for no real reason.

This, to the staff, argues for leaving existing basic hearing procedures intact, and simply imposing on them the fundamental due process and public policy requirements of the bill of rights and liberalizing them by offering the options of alternative dispute resolution, informal hearing procedures, and the like. In other words, this argues for the alternate draft.

There are other reasons, both legal and political, the staff favors the alternate draft over the comprehensive revision.

From a legal perspective, the staff believes the alternate draft is cleaner and clearer in its operation. It superimposes the many policy provisions on existing hearing procedures in a way that does not basically alter the procedures. The comprehensive revision seeks to provide a new hearing procedure that, because it attempts to make one size fit all, contains ambiguities and is confusing at points.

The most significant legal problem presented by the comprehensive revision is one the staff is still grappling with and the Commission has yet to deal with — the problem of conforming revisions. Under the comprehensive revision the basic hearing procedures apply to all agency hearings except to the extent a special statute applicable to an agency provides a different rule. The number of special statutes applicable to agencies is huge, and in many cases it is not clear whether the special statute is contradictory and, if so, how the general hearing procedure is to be modified to accommodate the special statute. The staff believes that if we proceed with the comprehensive revision, we will need to address this problem rather than leave it to the courts to figure out. We are still in the process of reviewing the hundreds of statutes that present issues of this sort.

The alternate draft does not create these legal problems, since it leaves the existing hearing procedures intact and does not try to fundamentally alter them. There may be a few instances where there are inconsistencies created by the alternate draft (e.g., the alternate draft includes ex parte prohibitions whereas a special statute applicable to the agency has a somewhat different ex

parte prohibition), but these are minimal compared to the monumental problems created by the comprehensive revision. Consistent with the thrust of the alternate draft to keep existing hearing procedures intact, we have designed the alternate draft so that it is subordinate to "conflicting or inconsistent" provisions (rather than "contrary" provisions) in the few cases where a conflict or inconsistency exists.

There are also political advantages to the alternate draft. It eliminates the main argument against the comprehensive revision — the transitional cost of implementation — since it leaves existing procedures in place. This does not necessarily mean that agencies opposed to the comprehensive revision will support the alternate draft, although it is possible some will. But it should reduce the opposition.

In addition, the alternate draft cleanly and clearly indicates the changes being made in adjudicative procedure. The issues are crystallized and not buried in details of procedural change. Legislative committees will be able to understand the issues better and react to opposition on the basis of the issues presented.

The alternate draft will reduce agency opposition without, the staff believes, losing the little private sector support that has been expressed for the comprehensive revision. While we have made a concerted effort to stimulate commentary from the private sector, the response so far has been disappointing. Whether our recent efforts will generate a groundswell of popular support for the comprehensive revision remains to be seen.

In any case, the staff believes the alternate draft is preferable to the comprehensive revision on a number of other grounds, and it would take unusual and overwhelming private sector input to convince us otherwise. **The staff suggests that the Commission recommend the alternate draft, rather than the comprehensive revision, to the Governor and Legislature.**

SPECIFIC ISSUES IN ADMINISTRATIVE ADJUDICATION

This part of the memorandum discusses specific issues in administrative adjudication that have been raised by Commissioners or staff, or that have been raised in communications to the Commission or staff. Attached to the memorandum are letters from J. Anne Rawlins of Sacramento (Exhibit pp. 1-3), Casey L. Young of the state Department of Industrial Relations, Division of

Workers' Compensation (Exhibit pp. 4-10), and Karl Engeman of the Office of Administrative Hearings (Exhibit pp. 11-17).

The issues discussed in this part apply to both the comprehensive revision and the alternate draft. Issues that relate only to proceedings under the existing Administrative Procedure Act (which would be preserved in the alternate draft) are discussed in a later part of this memorandum.

The staff plans to raise only bulleted [•] items at the meeting. A Commissioner or interested person who wishes to discuss an unbulleted item should plan to raise the issue at the meeting.

• Exemption Requests

The Commission has received new exemption requests from the following agencies:

Department of Industrial Relations, Division of Workers' Compensation (Exhibit pp. 4-10)
State Personnel Board (Memorandum 94-45)

The Commission has also received renewed exemption requests from the following agencies:

Agricultural Labor Relations Board (Memorandum 94-45)
Public Employment Relations Board (Memorandum 94-45)
Occupational Safety and Health Appeals Board (Memorandum 94-45)

Each of these requests is based upon the fact that the agency is a neutral body hearing disputes to which it not a party (making irrelevant much of the proposed law designed to ensure neutrality of the hearing officer), that the agency's hearings already are governed by a complete and comprehensive statutory and regulatory hearing procedure, that the procedure already satisfies most or all of the due process and public policy requirements the Commission's recommendation would mandate, that the agency would have to expend valuable resources going through the exercise of adopting a special hearing procedure with the net result that it ends up with exactly what it has now, and that the major lasting effect of subjecting the agency to the proposed law will be continuing uncertainty and ongoing litigation over whether the agency's procedure precisely satisfies all the specifics of the due process and public policy requirements of the proposed law.

It was concerns such as these that prompted the Commission to explore the alternate draft that leaves agency procedures alone, giving agencies the option of using some of the flexibility-enhancing provisions of the proposed law and subjecting the agencies only to the "administrative adjudication bill of rights" provisions. The alternate approach addresses most of the concerns of the agencies, although there still might be a question of whether an agency's statutory procedure is consistent with the bill of rights. But we have dealt with this problem in the alternate draft by providing that, to the extent an agency's statutory procedure conflicts or is inconsistent with the proposed law, the agency's statute prevails.

To further allay these concerns, **the staff suggests the Commission consider adding a rule of substantial compliance**. This could be along the following lines:

> **§ 11425.10. Administrative adjudication bill of rights**
>
> 11425.10. (a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:
>
> (1) The agency shall make available a copy of the governing procedure to the person to which the agency action is directed.
>
> (2) The hearing shall be open to public observation as provided in Section 11425.20 (open hearings).
>
> (3) The adjudicatory function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30 (separation of functions).
>
> (4) The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in Section 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).
>
> (5) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in Section 11425.50 (decision).
>
> (6) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent as provided in Section 11425.60 (precedent decisions).
>
> (7) Ex parte communications shall be restricted as provided in Article 7 (commencing with Section 11430.10) (ex parte communications).
>
> (8) The agency shall make available language assistance as provided in Section 11018 or in Article 8 (commencing with Section 11435.05) (language assistance).
>
> (b) The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to,

or more protective of the rights of parties than, the requirements of this section.

(c) The governing procedure by which an agency conducts an adjudicative proceeding may include provisions less protective of the rights of the parties than the requirements of this section if the provisions (i) are in effect on the operative date of this section, (ii) serve the same functions as the requirements of this section, and (iii) substantially protect the rights of the parties intended to be protected by the requirements of this section.

Comment. Subdivision (c) adds a rule of substantial compliance for existing agency procedures. It should be noted that the requirements of this section may be overridden by a conflicting or inconsistent statute. Section 11415.20 (conflicting express statute controls).

Statute of Limitations for Commencing Administrative Proceeding

Ms. Rawlins suggests that there be a limitation period after a complaint is filed during which an agency must initiate proceedings against a licensee. She notes that investigations may continue for years. "I have found administrative law judges exceedingly reluctant to dismiss on the grounds of laches or to accept a corresponding statute of limitations applicable in a civil proceeding." Exhibit p. 2.

The Commission has considered such a suggestion before and declined to act on it. Statutes of limitations are substantive in nature and a study of them would go far beyond the scope of this study relating to the administrative hearing process.

Responsive Pleading (Comp. Rev. § 642.250; Alt. Draft § 11506)

The time for filing a response to the agency's initial pleading under both existing law and the proposed revision is 15 days. Ms. Rawlins believes this should be increased to 30 days corresponding with civil practice. "It has been my experience that 15 days limitation may result in the respondent being unable to obtain legal advice within this time frame." Exhibit p. 2. She points out the added difficulty where the respondent is located outside California.

With respect to the outside of California problem, the Commission's draft extends time for service by mail. With respect to the general 15 day limitation, the Commission has considered this matter and concluded that to lengthen the response time will create problems for many agencies where a quick

resolution is mandated by state law or federal funding. **The staff recommends no change in the responsive pleading time.**

• Consolidation and Severance (Comp. Rev. § 648.120; Alt. Draft § 11507.3)

This provision would allow the agency or the administrative law judge to order consolidation or severance. In case of conflicting orders, the agency's order controls.

OAH is concerned that "the agency might consolidate a case and thereafter (which has occurred in our cases), one of the parties persuades the ALJ that prejudice to his or her right to a fair trial outweighs the economies achieved through consolidation." Exhibit p. 14.

The staff thinks this is a good point. **We would revise the provision** to read: "The administrative law judge may reverse an order of the agency or judge under this section on a determination that the consolidation or severance will substantially prejudice the rights of a party."

Change of Venue (Comp. Rev. § 642.350; Alt. Draft § 11508)

OAH would like to see statutory standards for change of venue that "focus on a necessary balance between convenience of the parties against the cost to the agency of relocating the site." Exhibit p. 14.

The Comment mentions the convenience of witnesses and ends of justice. The staff is concerned about codifying specific standards when there may be other relevant considerations that should enter a decision on change of venue. **The staff would add the factors suggested by OAH in the Comment**:

> This section codifies practice authorizing a motion for change of venue. See 1 Ogden, California Public Agency Practice § 33.02[4][d] (1991). Grounds for change of venue include selection of an improper county and promotion of convenience of witnesses and ends of justice. *Cf.* Code Civ. Proc. § 397. In making a change of venue determination the administrative law judge may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing.

• Prehearing Conference (Comp. Rev. § 646.110; Alt. Draft § 11511.5)

The revision of the prehearing conference procedure authorizes the presiding officer to convert the hearing to an informal hearing at the

conference. This is strongly opposed by OAH. "There is no practical way the parties can prepare for this possibility without needless expenditure of time and money to prepare an informal case for each prehearing conference." Exhibit p. 14.

The staff believes OAH has put its finger on an internal inconsistency in the draft. On the one hand, the draft implies that the prehearing conference can be converted into an informal hearing; this is consistent with the origin of this provision in the 1981 Model State APA. On the other hand, the draft suggests that the prehearing conference merely determines that an informal hearing is appropriate for the dispute, and the actual hearing will occur sometime in the future.

The staff believes the prehearing conference is not an appropriate forum for an informal hearing absent the consent of the parties and would revise the draft consistent with this approach:

> 11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and shall give reasonable written notice to all parties. ~~The notice shall inform the parties that at the prehearing conference the proceeding may be converted into an informal hearing for disposition of the matter.~~
>
> (b) The prehearing conference may deal with one or more of the following matters:
>
> (1) Exploration of settlement possibilities.
>
> (2) Preparation of stipulations.
>
> (3) Clarification of issues.
>
> (4) Rulings on identity and limitation of the number of witnesses.
>
> (5) Objections to proffers of evidence.
>
> (6) Order of presentation of evidence and cross-examination.
>
> (7) Rulings regarding issuance of subpoenas and protective orders.
>
> (8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.
>
> (9) Objections to use of <u>the</u> informal hearing procedure.
>
> (10) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.
>
> (11) Motions for intervention.
>
> (12) Exploration of the possibility of using <u>the informal hearing procedure provided in Article 10 (commencing with</u>

Section 11445.10) of, or alternative dispute resolution provided in Article 5 (commencing with Section 11420.10) of , Chapter 4.5.

(13) Any other matters as shall promote the orderly and prompt conduct of the hearing.

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

(d) At the prehearing conference the proceeding may be converted into either of the following with the consent of the parties :

(1) An informal hearing for disposition of the matter provided in Article 10 (commencing with Section 11445.10) of Chapter 4.5. ~~The notice of the informal hearing shall state the date of the hearing~~.

(2) A proceeding for alternative dispute resolution provided in Article 5 (commencing with Section 11420.10) of Chapter 4.5.

(e) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Permissible Ex Parte Communications Generally (Comp. Rev. § 643.420; Alt. Draft § 11430.20)

The prohibition on ex parte communications does not extend to a matter of procedure or practice that is not in controversy. OAH is concerned that it is not sufficiently clear that this exception extends to a continuance request. Under existing law OAH "can deal separately with the requestor of a continuance and then call the opponent and elicit his or her response without the hassle of setting up a conference call which is difficult in the proverbial 11th hour when these requests are typically received." Exhibit p. 12.

The staff would make this matter clear by revising the draft to provide that an ex parte communication is permissible if the communication "concerns a matter of procedure or practice , including a request for a continuance, that is not in controversy."

• **Permissible Ex Parte Communications From Agency Personnel (Comp. Rev. § 643.430; Alt. Draft § 11430.30)**

At the September meeting the Commission made the following change:

> A communication otherwise prohibited by [statute] from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:
>
> (a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor shall not ~~receive ex parte communications of a type the presiding officer would be prohibited from receiving, or~~ furnish, augment, diminish, or modify the evidence in the record.

The Commission asked that this matter be returned for review before submission to the Legislature.

This change was prompted by concern that the provision could impair the hearing operations of a small agency. In many agencies the chief counsel must make prosecution decisions, may receive ex parte communications, and must also supervise the presiding officer.

• Ex Parte Communications Between Presiding Officer and Agency Head (Comp. Rev. § 649.260; Alt. Draft § 11430.80)

The Commission requested further study of the issue of communications between the presiding officer and agency head. The considerations may vary depending on the organizational relationship between the presiding officer and agency head. The staff sees three functionally different but common situations: (1) the presiding officer is employed by the prosecuting agency, the head of which makes the final decision (non-OAH hearings); (2) the presiding officer is employed by a nonprosecuting agency, the head of which makes the final decision (appeals board hearings); and (3) the presiding officer is employed by a nonprosecuting agency, the final decision being made by the head of the prosecuting agency (OAH hearings).

The risk of improper communications between the presiding officer and the agency head is probably least in scenario (2), where both actors are neutral, and greatest in scenario (3) where the agency head has no control over the presiding officer. It can also be argued that, regardless of the risk of the agency head attempting to influence the presiding officer, the presiding officer should at least be allowed to explain the context of the decision to the agency head. I.e., it may be desirable to restrict communications from the agency head

to the presiding officer but allow them from the presiding officer to the agency head.

The staff believes ex parte communications should be prohibited both directions, and in all scenarios. The agency head should not be instructing the presiding officer how to rule even in the case where the hearing agency is a neutral appeals board; even an appeals board may have an agenda it is pushing or may have received communications and improperly seeks to pass them on to the presiding officer. And to allow the presiding officer to supplement the proposed decision for the benefit of the agency head, in any scenario, destroys the concept of a decision based on the record. The decision of the agency head should be based on the record and not on off-the-record discussions from which the parties are excluded:

> (a) There shall be no communication, direct or indirect, regarding any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.
>
> (b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head.

• **Hearing by Electronic Means (Comp. Rev. § 648.150; Alt. Draft § 11440.30)**

The draft permits the presiding officer to conduct the hearing telephonically or by other electronic means, provided the participants have an opportunity to hear the proceeding, observe exhibits, and participate. The presiding officer may not conduct the hearing by electronic means if the determination will be based substantially on credibility of a witness and the electronic proceeding will impair a proper determination of credibility.

OAH sees this as a major change in the traditional right of confrontation absent a waiver. Moreover, it requires a subjective determination of the presiding officer made *before* the case is heard. OAH would prefer that a waiver be obtained in cases conducted by it.

This concern may be more apt for the types of formal prosecutorial hearings conducted by OAH than for other types of hearings. **We could add a provision to Section 11512(d) (formal hearing)** that "Notwithstanding Section 11440.30 (hearing by electronic means), the hearing may not be conducted by telephone, television, or other electronic means if a party objects."

Testimony of Respondent (Comp. Rev. § 648.320; Alt. Draft § 11513)

Existing law provides that, "If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination." This provision has been interpreted to mean that the agency must rest its case temporarily to allow the respondent to present its case and, if the respondent does not testify, the agency may reopen its case and call the respondent as a witness.

OAH states that this provision, which precludes the agency from calling the respondent in its case in chief, is "archaic, inefficient, and may encourage the presentation of false testimony." Exhibit p. 15. **The Commission has previously decided to preserve this provision.** The staff is not suggesting reconsideration but thinks the Commission should be aware of this concern.

Admissibility of Evidence (Comp. Rev. § 648.410; Alt. Draft § 11513)

OAH suggests the basic admissibility rules be clarified, presumably along the following lines:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted ~~if~~ . If a common law or statutory rule would make improper the admission of the evidence over objection in a civil action, the evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs ~~, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions~~ . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

In other words, the limitation of "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" would be a substitute standard where a technical rule of evidence would otherwise apply, but would not be a general limitation on the admissibility of evidence. OAH notes that this question of interpretation has long been a source of confusion among lawyers.

The staff's admittedly perfunctory research into this issue indicates a legislative intent to make "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" a general limitation on admissibility of evidence in administrative proceedings, and not an alternate standard where a technical rule of evidence would otherwise apply. The Judicial Council report on the original drafting of this provision states:

> Some of the court rules relating to the admissibility of evidence are retained or modified; the others are eliminated. Thus the rules of privilege are retained, and hearsay alone is made insufficient to support a finding although it may be used to supplement and explain direct evidence. Evidence may not be received if it is irrelevant or unduly repetitious or not of the sort on which reasonable persons are accustomed to rely in the conduct of serious affairs. The latter limitation furnishes a flexible standard of reasonableness and reliability. It was first expressed in a Federal court opinion of Judge Learned Hand and has been made part of several statutes dealing with administrative procedure. In general the Council hopes by means of the proposed section to preserve the rules of evidence which promote honesty and fairness, and to eliminate those which are designed to exclude relevant evidence because the person hearing it may evaluate it incorrectly.
> Judicial Council of California, *Tenth Biennial Report* 22 (1944).

Based on this reading of legislative intent, **the staff does not propose to amend the statute as suggested by OAH**. This position is also supported by the practical consideration that the OAH revision would require parties to administrative proceedings, many of whom are unrepresented by counsel, to become familiar with the technical rules of evidence; this is something the original Judicial Council draft seeks to avoid.

• **Form and Contents of Decision (Comp. Rev. § 649.120; Alt. Draft § 11425.50)**

The provision on the form and contents of the decision attempts to codify the rule in *Topanga* — the decision must state the factual and legal basis for the decision as to each of the principal controverted issues. A recent addition to the Administrative Procedure Act includes a different formulation of the rule — a decision must include "findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached". Gov't Code § 11529(g).

There has been concern expressed that the statutory formulation developed by the Commission could generate further litigation over its meaning. Since an alternate statutory formulation has been adopted that achieves the same purpose, **the staff proposes that the Commission replace its *Topanga* language with existing statutory language requiring an articulation of the connection between the evidence and the decision**.

• Disciplinary Guidelines

Ms. Rawlins suggests that "steps be taken to curtail the practice of licensing boards 'suggesting' the administrative law judge base his or her decision on the proposed guidelines for discipline enacted by the agency, unless these have been formally adopted by the agency as regulations under the California Code of Regulations." Exhibit p. 2.

This is a common complaint we have heard during the course of this study. Guidelines of this type would be considered "underground regulations" and are illegal. A regulation is defined by the Administrative Procedure Act as a rule, regulation, order, or standard of general application adopted by an agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. Gov't Code § 11342(b). The APA further provides that:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
> Gov't Code § 11347.5(a)

The APA also provides an enforcement mechanism in the Office of Administrative Law.

The staff would refer Ms. Rawlins to these existing provisions. In addition, because this has been a complaint the Commission has heard frequently during this study, it may be worth adding a cross-reference in the administrative adjudication provisions — something like:

> 11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the

penalty, if any. The penalty may be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule if it has been adopted as a regulation and filed with the Secretary of State pursuant to Chapter 3.5 (commencing with Section 11340). The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. Section 11518 is amended consistent with the rulemaking provisions of the Administrative Procedure Act. See Section 11347.5 ("underground regulations").

• **Restitution (Comp. Rev. § 649.430; Alt. Draft § 11519)**

OAH suggests the following expansion of this provision:

> [S]pecified terms of probation may include an order of restitution which requires the party ~~or parties to a contract~~ against whom the decision is rendered to compensate the ~~other party or parties to a contract~~ persons damaged ~~as a result of a breach of contract~~ by the party against whom the decision is rendered. In such case, the decision ~~shall include findings that a breach of contract has occurred and~~ shall specify the amount of actual damages sustained ~~as a result of such breach~~ . Where restitution is ordered and paid pursuant to the provisions of this subdivision, ~~such~~ the amount paid shall be credited to any subsequent judgment in a civil action based on the same ~~breach of contract~~ damage .

OAH believes restitution should be allowed to injured consumers regardless of whether the injury occurred as a result of a breach of contract. "Restitution would appeal appropriate whenever the evidence establishes a quantifiable injury as the result of unprofessional conduct." Exhibit p. 16.

This revision would address the concern of Ms. Rawlins that a licensee may not only have to make a payment to the complainant as a result of a disciplinary proceeding, but may also have to defend on the same set of facts in a civil proceeding brought by the same complainant, particularly in contractor licensing disputes.

The staff is reluctant to become involved in an issue of this kind, which goes more to proper sanctions than to hearing procedures.

• **Hearing Costs and Attorney Fees**

Ms. Rawlins draws the Commission's attention to Business and Professions Code Section 125.3. That section provides that in a licensing

disciplinary hearing, if the licensee is found to have violated the licensing act, the administrative law judge must award the reasonable costs of investigation and enforcement on request of the agency. Ms. Rawlins notes that costs include attorney fees which can amount to thousands of dollars, but there is no reciprocal provision for the licensee to recoup costs or attorney fees should the licensee prevail at the administrative hearing. "Licentiates in disciplinary proceedings are at a severe disadvantage because they are forced to defend themselves against an agency where costs of litigation are of no consequence." Exhibit p. 1.

The staff disagrees that the costs of litigation are of no consequence to the licensing agency. State agencies generally are under severe budgetary pressure and must be selective in their enforcement processes. The staff agrees the cost provision gives the licensing agency an advantage and may create a greater inducement for the licensee to settle a case that the licensee might otherwise contest. There is some reciprocity, as Ms. Rawlins notes, in statutes that allow the licensee to recover limited costs and attorney fees where, on judicial review, the court determines that the action of the agency was undertaken without substantial justification (Code of Civil Procedure Section 1028.5) or was arbitrary and capricious (Government Code Section 800).

The Business and Professions Code provision was enacted in 1992, when major state agency budget slashing began. Undoubtedly, the Legislature enacted the provision to preserve funding for the licensing disciplinary process by requiring disciplined licensees to bear the cost of enforcement. The weaker reciprocal provisions have both been revised by the Legislature in recent years, and have certainly been the subject of intense political activity. **The staff believes the current state of the law on this matter represents a political compromise and recommends against the Commission getting involved in it.**

• Judicial Review Costs and Attorney Fees

The discussion above relates to costs and attorney fees involved in the administrative adjudication process. A related but distinguishable matter is the costs and attorney fees involved in judicial review, after an agency decision has been issued.

Senator Campbell suggests that the Commission consider whether a party that seeks judicial review of an agency decision but does not prevail should be

required to pay the agency's costs and attorney fees of the review. There are other policy concerns involved in this proposal, including the standard of review and the impetus to reduce court congestion. The question of reciprocity is also relevant here, including the existing limited statutory provisions for awards against the agency outlined above. **The staff believes the Commission should consider this matter in the context of its other decisions on judicial review of agency action, which we hope to wrap up during the coming year, and would so inform the Senator.**

ISSUES INVOLVING FORMAL HEARING PROCEDURE

The structure of the alternate draft leaves in place the hearing procedures of the various agencies, including the existing formal hearing procedure administered by the Office of Administrative Hearings. These provisions are found at Government Code Sections 11500 to 11529. As part of the alternate draft we propose specific improvements in the existing formal hearing statute in place.

Our general philosophy in the alternate draft is to leave existing procedures basically unchanged, so that the focus will be on the major policy changes of administrative adjudication bill of rights and the flexibility-enhancing additions. But if the need for a procedural reform or correction is clear, and there are no objections to it, the staff would go ahead and clean up the statute.

Many of the comments we have received from OAH address issues that relate only to the existing formal hearing statute and proposed revisions of it. We have implemented technical suggestions in the alternate draft. The remainder of this memorandum analyzes OAH points the staff believes need Commission review. Again, the staff plans to raise only bulleted [•] items at the meeting.

• § 11501. Application of chapter

Section 11501 contains a listing of 64 entities and an implication that the hearings of those entities are conducted under the formal hearing procedure. In fact, however, the listing is meaningless since (1) this listing is not complete, (2) not all hearings of listed agencies are governed by the procedure, and (3) whether or not a hearing is governed by the procedure is determined

by the statutes relating to that hearing. The listing is confusing and misleading.

OAH suggests that the listing be repealed. They note that if someone thinks a list should be prepared, it could be included in a publication such as the APA pamphlet OAH prepares specifying which types of hearings are covered by the pamphlet procedures. **The staff agrees with this suggestion and would make the following amendments**:

> 11500. In this chapter unless the context or subject matter otherwise requires:
>
> (a) "Agency" includes the state boards, commissions, and officers ~~enumerated in Section 11501 and those~~ to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.
>
> **Comment**. Subdivision (a) of Section 11500 is amended to reflect the deletion of the enumeration of agencies in Section 11501. The application of this chapter to the hearings of an agency is determined by the statutes relating to the agency. Section 11501.

> 11501. ~~(a)~~ This chapter applies to any agency as determined by the statutes relating to that agency.
>
> ~~(b) The enumerated agencies referred to in Section 11500 are:~~
> ~~Accountancy, State Board of~~
> ~~Air Resources Board, State~~
> ~~Alcohol and Drug Programs, State Department of~~
> ~~Alcoholic Beverage Control, Department of~~
> ~~Architectural Examiners, California Board of~~
> ~~Attorney General~~
> ~~Auctioneer Commission, Board of Governors of~~
> ~~Automotive Repair, Bureau of~~
> ~~Barbering and Cosmetology, State Board of~~
> ~~Behavioral Science Examiners, Board of~~
> ~~Boating and Waterways, Department of~~
> ~~Cancer Advisory Council~~
> ~~Cemetery Board~~
> ~~Chiropractic Examiners, Board of~~
> ~~Security and Investigative Services, Bureau of~~
> ~~Community Colleges, Board of Governors of the California~~
> ~~Conservation, Department of~~

~~Consumer Affairs, Department of~~
~~Contractors, State License Board~~
~~Corporations, Commissioner of~~
~~Court Reporters, Board of California~~
~~Dental Examiners of California, Board of~~
~~Education, State Department of~~
~~Electronic and Appliance Repair, Bureau of~~
~~Engineers and Land Surveyors, State Board of Registration for Professional~~
~~Fair Political Practices Commission~~
~~Fire Marshal, State~~
~~Food and Agriculture, Director of~~
~~Forestry and Fire Protection, Department of~~
~~Funeral Directors and Embalmers, State Board of~~
~~Geologists and Geophysicists, State Board of Registration for~~
~~Guide Dogs for the Blind, State Board of~~
~~Health Services, State Department of~~
~~Highway Patrol, Department of the California~~
~~Home Furnishings and Thermal Insulation, Bureau of~~
~~Horse Racing Board, California~~
~~Housing and Community Development, Department of~~
~~Insurance Commissioner~~
~~Labor Commissioner~~
~~Landscape Architects, State Board of~~
~~Medical Board of California, Medical Quality Review Committees and Examining Committees~~
~~Motor Vehicles, Department of~~
~~Nursing, Board of Registered~~
~~Nursing Home Administrators, Board of Examiners of~~
~~Optometry, State Board of~~
~~Osteopathic Medical Board of California~~
~~Pharmacy, California State Board of~~
~~Podiatric Medicine, Board of~~
~~Psychology, Board of~~
~~Public Employees' Retirement System, Board of Administration of the~~
~~Real Estate, Department of~~
~~San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of~~
~~Savings and Loan Commissioner~~
~~School Districts~~
~~Secretary of State, Office of~~
~~Social Services, State Department of~~
~~Statewide Health Planning and Development, Office of~~
~~Structural Pest Control Board~~
~~Tax Preparers Program~~

~~Teacher Credentialing, Commission on~~
~~Teachers' Retirement System, State~~
~~Transportation, Department of, acting pursuant to the State Aeronautics Act~~
~~Veterinary Medicine, Board of Examiners in~~
~~Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of~~

Comment. The enumeration of agencies in subdivision (b) of Section 11501 is deleted as obsolete. The application of this chapter to the hearings of an agency is determined by the statutes relating to the agency. See also Section 11500(a) ("agency" defined).

§ 11506. Statement by way of mitigation

Existing law provides that the respondent may file a statement by way of mitigation even if the respondent does not file a notice of defense. OAH states that this provision should be deleted. No one uses the provision, which is an anachronism. "Either the case is contested, includ[ing] the intent to submit evidence of mitigation to avoid or reduce the penalty, or it is not." Exhibit p. 14.

The Commission omitted this provision in the comprehensive revision, and **the staff agrees it should likewise be omitted from the alternate draft**:

11506. (a) Within 15 days after service ~~upon him~~ of the accusation the respondent may file with the agency a notice of defense in which ~~he~~ the respondent may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that ~~he~~ the respondent cannot identify the transaction or prepare ~~his~~ a defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

(b) Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

~~(b)~~ (c) The respondent shall be entitled to a hearing on the merits if ~~he~~ the respondent files a notice of defense, and any

such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

~~(c)~~ (d) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state ~~his~~ the respondent's mailing address. It need not be verified or follow any particular form.

~~(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.~~

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Comment. Section 11506 is amended to delete the statement by way of mitigation. A default may be cured pursuant to Section 11520, and evidence in favor of mitigation may be made as a defense.

Conforming changes should be made in the default provisions:

11520. (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) ~~Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.~~

~~(c)~~ Notwithstanding the default of the respondent, the agency or the administrative law judge in its discretion may, before a proposed decision is issued, grant a hearing on reasonable notice to the parties. The administrative law judge may order the respondent, or the respondent'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 respondent's failure to appear at the hearing.

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

good cause ~~, including a hearing on the remedy based on a showing by way of mitigation~~ . As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the person to receive notice sent pursuant to Section 11505.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Comment. Former subdivision (b), relating to the right of a defaulting respondent to make a showing by way of mitigation, is superseded by the procedures to cure a default in subdivisions (b) and (c). The respondent may make a showing by way of mitigation as a defense in the hearing.

• § 11512. Presiding officer

Subdivision (d) would provide for electronic reporting of proceedings, in the discretion of the agency. The administrative law judge can require stenographic reporting if electronic reporting will not provide an adequate record; a party may require stenographic reporting at the party's own expense.

OAH believes that the determination of the method of maintaining the record should be made by OAH. "This would allow OAH to decide as a policy matter which method is preferable, taking into account all the relevant factors including appearance fees for reporters and ER monitors, equipment costs for recording equipment, cost and speed of transcript preparation, and the reliability of the record. Ultimately, OAH is responsible for the preparation of a record which is adequate for judicial review." Exhibit p. 15.

The staff agrees. Leaving the decision to the agency makes sense when this provision is applied to agencies that conduct their own hearings. But when the provision is limited to OAH hearings, as it is under the alternate draft, OAH should control this matter. **We would revise the proposed provision to read**:

(d) The proceedings at the hearing shall be reported by a stenographic reporter or electronically, ~~in the discretion of the agency. If an agency elects~~ as determined by the administrative law judge. If the administrative law judge selects electronic reporting of proceedings, ~~(i) the administrative law judge may require stenographic reporting if the judge determines electronic reporting will not provide an adequate record of the proceedings, or (ii)~~ a party may at the party's own expense require stenographic reporting.

• **§ 11516. Amendment of accusation after submission of case for decision**

Existing Section 11516 provides that an agency may order amendment of the accusation after submission of the case for decision, with an opportunity for the parties to present additional evidence if they would be prejudiced by the amendment. The Commission continued this provision in the comprehensive statute.

If the alternate draft is adopted, leaving existing agency procedures in place, this section would apply only in OAH hearings. OAH indicates that it is an "anachronism that is rarely, if ever, used and should be deleted." Exhibit p. 15. Based on this information, **the staff suggests that the Commission consider repeal of Section 11516**.

• **§ 11517. Decision in contested cases**

OAH suggests a revision of Section 11517 along the following lines:

> The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time (i) the agency notifies the parties that the proposed decision is not adopted as provided in subdivision (b) and commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or (ii) the agency refers the case to the administrative law judge to take additional evidence.

This suggestion is prompted by the concern that the statute is sufficiently ambiguous to allow an agency to delay making a decision by the simple device of ordering a partial transcript within the 100 day period even though it has no intention of deciding the case on the record. The amendment would make clear that the agency must either adopt or non-adopt within 100 days. **The staff has no problem with this revision**, absent knowledge of concerns of affected agencies. It is consistent with the approach taken by the Commission in the comprehensive revision.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

LAW OFFICES OF

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Law Revision Commission
RECEIVED

September 27, 1994

File: _____

Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

It was a pleasure to meet with you last week at the Sacramento County Bar luncheon. Thank you for sending me a copy of the tentative recommendations which unfortunately, I have not yet had time to thoroughly review.

In your speech you noted a lack of input from members of the private sector. As a consequence the revisions contemplated by your commission have been generated by state agencies. This revelation led me to be somewhat alarmed at the thought of a multitude of agencies promoting their own particular agendas. Frankly I think your commission should give serious thought to terminating as many agencies as possible, even though it would seriously affect my legal practice.

As a follow up to our discussion, the code section authorizing boards to collect their costs of investigation and enforcement in disciplinary proceedings is Business and Professions Code Section 125.3 enacted in 1992. The statute includes collection of costs in any stipulated settlement. Costs include attorney fees which can amount to thousands of dollars.

There is no reciprocal provision for the licensee to recoup costs or attorney fees should he or she prevail at the administrative hearing. At present recoupment of legal fees are only available if the action comes within Code of Civil Procedure Section 1028.5, which requires a finding the agency acted without substantial justification and limits reimbursement to $7,500.00; Code of Civil Procedure Section 1021.5 which pertains to enforcement of an important public right; or when an administrative decision is overruled, Government Code Section 800 provides reimbursement up to $7,500.00 but requires a finding of arbitrary or capricious action by the agency.

Licentiates in disciplinary proceedings are at a severe disadvantage because they are forced to defend themselves against an agency where costs of litigation are of no consequence. Moreover, particularly in cases involving the Contractors State

License Board, the licensee not only has to defend against the agency in a disciplinary proceeding which may result in payment of money to the complainant, (see Business and Professions Code Section 7099) but may also find it necessary to defend on the same set of facts, in a civil proceeding brought by the same complainant. When an agency proceeding results in payment of monies, the complainant should be prohibited from filing civil proceedings as a condition of acceptance.

As a member of the private bar I would request the time for filing accusations by a board be strictly limited. In many cases investigations continue for years before the accusation is finally filed. A time limit from the date of receipt of a complaint should be imposed especially in cases where the board does not have a specific statute of limitations (See Board of Nursing - Business and Professions Code 2750.) In my opinion all licensing agencies should be bound by a statute of limitations. I have found administrative law judges exceedingly reluctant to dismiss on the grounds of laches or to accept a corresponding statute of limitations applicable in a civil proceeding.

I note you emphasized the Commission's desire to ensure the impartiality of hearing officers and administrative law judges. To this end I would suggest steps be taken to curtail the practice of licensing boards "suggesting" the administrative law judge base his or her decision on the proposed guidelines for discipline enacted by the agency, unless these have been formally adopted by the agency as regulations under California Code of Regulations.

As a final comment I would recommend the time limit under proposed Section 642.250 be increased from 15 days to 30 days to correspond with the time limit required to answer a civil complaint. It has been my experience that 15 days limitation may result in the respondent being unable to obtain legal advice within this time frame. This may affect the respondent's rights if he or she has not sought legal advice before filing a response, especially if service has not been made in accordance with the statute and may prevent the respondent from raising other objections. Also a problem arises when the last known address is outside the United States or the State of California. I would suggest the time limit be further extended in these situations.

I hope my comments are helpful and at least represent some response from the private sector.

Yours very truly,

J. ANNE RAWLINS
Attorney at Law

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Law Revision Commission
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STATE OF CALIFORNIA Division of Workers' Compensation
DEPARTMENT OF INDUSTRIAL RELATIONS
455 Golden Gate Avenue Room 5182
San Francisco, CA 94102

File:

MEMORANDUM

Date: September 29, 1994

To: CALIFORNIA LAW REVISION COMMISSION

From: CASEY L. YOUNG
Administrative Director
Division of ~~Workers'~~ Compensation

Subject: CALIFORNIA LAW REVISION COMMISSION
TENTATIVE RECOMMENDATION - JULY 1994
ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

I appreciate the opportunity to comment upon the California Law Revision Commission's Tentative Recommendation for unifying the procedures applicable to administrative adjudication by state agencies in California. I support the goals of the proposal: making agency procedures more accessible and fair, increasing flexibility of agency procedures, and maximizing efficient use of state resources. However, I believe these goals can only be served by exempting the Division of Workers' Compensation and the Workers' Compensation Appeals Board from the Administrative Procedure Act. Inclusion of workers' compensation proceedings would undermine the Constitutional mandate to provide "substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character ..." California Constitution Article XIV, Section 4.

THE UNIQUE CONSTITUTIONAL NATURE OF THE WORKERS' COMPENSATION SYSTEM NECESSITATES EXEMPTION OF THE DIVISION OF WORKERS' COMPENSATION AND THE WORKERS' COMPENSATION APPEALS BOARD FROM THE ADMINISTRATIVE PROCEDURE ACT

The proposed statute exempts hearings of the Public Utilities Commission from the APA. Page 10 of the textual material prefacing the proposed amendments to the Government Code states that the Public Utilities Commission is exempted because it is a constitutional agency authorized to establish its own procedures, subject to statute and due process. The DWC/WCAB is also a constitutionally authorized agency. While the Legislature is given some latitude in providing an adjudicatory system, the Legislature is

instructed that it may combine into one statute all the provisions for a complete system of workers' compensation.

The California Constitution, Article XIV, Section 4 expressly vests the Legislature with "...plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability....The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by other, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate court of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined." The Constitution describes "a complete system of workers' compensation" to include "adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury ... incurred ... in the course of their employment ...; full provision for such medical, surgical hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage...; full provision for regulating such insurance coverage in all its aspects...; ... full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute...." California Constitution, Article XIV, Section 4.

The justification for excluding the Public Utilities Commission from the proposed Administrative Procedure Act applies with equal force to the DWC/WCAB. Like the Public Utilities Commission, the workers' compensation system is mandated by provisions of the State Constitution. The Legislature has created the DWC and WCAB, and has adopted numerous provisions in the Labor Code to create and enforce a complete system of workers' compensation.

Workers' compensation has been the subject of intense legislative interest in recent years and there have been many statutory changes adopted to reform the system. Major reform bills were passed in 1989 and 1993. The legislation effected many procedural as well as substantive changes in workers' compensation law. For example, the procedure used to "commence proceedings before the WCAB" was changed in 1989, and changed again in 1993. Labor Code §5401. The time at which the parties may undertake discovery was changed in 1989 and 1993. Labor Code §5401. The parameters for admissibility of medical opinion evidence were substantially changed. Labor Code §4060, 4061, 4062. A rebuttable presumption of compensability was created for claims that are not denied within 90 days. Labor Code §5402. A mandatory settlement conference procedure and discovery cut-off date were instituted. Labor Code §5502. Mandatory and voluntary arbitration were authorized. Labor Code §5270 et seq. These statutory provisions are all part of the complete system of workers' compensation that the legislature has created in the Labor Code pursuant to the constitutional directive. The legislature needs to maintain maximum ability to revise workers' compensation procedures to carry out its constitutional obligation to provide a complete system. Subjecting the workers' compensation system to the Government Code's APA provisions would substantially interfere with the ability to craft workers' compensation procedures to the unique needs of the system.

The DWC/WCAB is not just another state agency. It has a special constitutional mandate which calls for special procedures. The many regulatory and decision making functions of the Division of Workers' Compensation need to be integrated into a "complete system." The Legislature has set forth its intent in Labor Code §3201 as follows: "This division [4] and Division 5 (commencing with Section 6300) [statutes relating to workers' compensation] are an expression of the police power and are intended to make effective and apply to a complete system of workers' compensation the provisions of Section 4 of Article XIV of the California Constitution." Subjecting the workers' compensation adjudication system to the Administrative Procedure Act would frustrate the efforts to maintain a complete integrated system to provide for injured workers. Workers' compensation is vitally important to workers in California and to the economy as a whole due to its impact on the cost of doing business in the State. The Legislature should not restrict the flexibility to shape special workers' compensation provisions by making the APA applicable.

DWC recommends that proposed APA §612.110 be revised to include the following language:

"(d) This division does not apply to the Division of Workers' Compensation or the Workers' Compensation Appeals Board."

THE WORKERS' COMPENSATION SYSTEM INVOLVES A SPECIALIZED AND INSULAR BODY OF LAW THAT IS MOST APPROPRIATELY SEGREGATED FROM ADMINISTRATIVE ADJUDICATION PROCEDURES APPLICABLE TO EXECUTIVE BRANCH AGENCIES

Clearly one of the main purposes of the proposal is to establish uniformity of administrative procedure so advocates appearing before various agencies do not have to be burdened and disadvantaged by having to identify and comply with a multitude of different procedures. The explanatory text notes that some agencies have poorly developed or unwritten procedures which are not generally available to non-specialists. This justification for unification of administrative procedure is not applicable to matters before the DWC and WCAB. Procedures of the DWC and WCAB are promulgated in accordance with Labor Code §§5307, 5307.3, 5307.4, and are codified in Title 8, California Code of Regulations. They are easily accessible to all attorneys and parties who appear before the WCAB.

Workers' compensation is a very specialized area of law. Generally attorneys who come before the WCAB and DWC practice exclusively in the workers' compensation field and are thoroughly familiar with the procedures that govern the proceedings. It is particularly noteworthy that the State Bar recognizes workers' compensation as an area of specialty certification for attorneys.

The Labor Code and interpretive regulations constitute an integrated system of substantive rights and dispute resolution mechanisms that have been unhampered by provisions of other codes. There is a long history of workers' compensation as a creature of the Labor Code, and a large body of appellate case law exists. Workers' compensation is not like most other administrative systems that may handle only a few score or few hundred administrative hearings per year. In 1993, over 320,000 hearings were conducted by the WCAB. The procedures for hearings by the DWC/WCAB have evolved over a very long period to cope with the volume and complexity of matters to be resolved. Breaking the integrity of workers' compensation as a creature of the Labor Code would wreak havoc with the system.

THE AVAILABILITY OF THE SPECIAL HEARING PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURE ACT IS NOT ADEQUATE FOR THE DWC AND WCAB BECAUSE APPLICABILITY OF THE APA WOULD ENGENDER CONFUSION AND LITIGATION AND WOULD NOT RESULT IN ANY ADDITIONAL PROCEDURAL PROTECTIONS

The prefatory text of the proposed APA acknowledges that "there will be some cases where the general procedure is not appropriate, and there are situations where it is clear that the provisions of the statute will not work for the circumstances of a particular agency or type of hearing". There are a multitude of Labor Code and regulation provisions setting adjudication procedures that conflict with the proposed APA. Section 612.140 specifies that "a statute applicable to a particular agency or decision prevails over a contrary provision of this division". If a special hearing procedure were not adopted to supersede the APA procedures, it would be horrendously burdensome for parties to determine where the Labor Code and APA overlapped or conflicted. As a practical matter, it would be absolutely critical that the WCAB and DWC adopt special hearing procedures so that all parties would know the applicable procedure. Most likely the DWC and WCAB would adopt the "existing regulations" pursuant to §633.040, since these comprehensive regulations have been specially tailored over time to the needs of the workers' compensation system.

The question thus arises, of what use is it to have the APA applicable to DWC/WCAB if the current Labor Code and DWC/WCAB regulations will continue to govern the compensation proceedings? None whatsoever. It will only create confusion to have the APA "apply" to DWC/WCAB and yet have all of the proceedings be governed by rules of the Labor Code and DWC/WCAB regulations. I recognize that for certain agencies the APA's provision of specified requirements for adoption of special hearing procedure will in effect establish due process constraints that the agency rules might otherwise lack. This rationale does not apply to workers' compensation as the practice and procedure of the DWC and WCAB already substantially comply with the "requirements for special hearing procedure" set forth in §633.030.

Section 633.030(a)(1) requiring the presiding officer to be free of "bias, prejudice, and interest" has its parallel in Labor Code §5311 which allows a party to object to a workers' compensation judge on the grounds specified in Code of Civil Procedure §641 (applicable to objections to a referee.)

Section 633.030(a)(2) requires that the adjudicatory function be separated from the investigative, prosecutorial, and advocacy functions within the agency. Many of the separation of functions concerns are not relevant to the WCAB and DWC which serve almost exclusively as neutral agencies to resolve disputes between private parties. The WCAB is more akin to a court than to an administrative agency that investigates and then prosecutes a person for regulatory violations. Neither workers' compensation judges nor the WCAB itself have any prosecutory or advocacy functions, and are disinterested in the substantive outcome of the case.

Within the DWC, employees in the Rehabilitation Unit called "Rehabilitation Consultants" conduct some informal administrative proceedings to resolve disputes between private litigants. Labor Code §4645. It is unclear whether any of these proceedings would be subject to the proposed APA. Even if the proceedings were subject to the APA, there would not be any separation of functions problems. The Consultants are disinterested in the outcome of the case and do not serve any prosecutorial or advocacy role. They serve as neutral hearing officers for disputes between private parties.

The only function of the DWC/WCAB in which the DWC acts as prosecutor is the audit function. Under Labor Code §§ 129 and 129.5 the Administrative Director of the DWC is charged with auditing insurers, self-insured employers, and third-party administrators to determine if the entities are complying with their workers' compensation obligations. Section 129.5 provides that the Administrative Director shall assess administrative penalties where violations are found. Labor Code §129.5(e) provides that an insurer, self-insured employer, or third-party administrator may request a "conference" with the administrative director after the assessment of penalties. By regulation, this conference is a hearing where the agency and the audit subject may present evidence to support or rebut the alleged violations. The Labor Code does not separate the functions of auditing and reviewing a challenge to the audit findings, but allows the agency head, the administrative director of DWC, to act in both functions. In practice, there is a complete separation of the audit unit staff from the Administrative Director and his hearing officer. The administrative director has delegated authority to the audit unit to conduct audits of workers' compensation claims files, and to assess administrative penalties in a "Notice of Penalty Assessment". The administrative director delegates to a hearing officer the authority to hold a hearing, and issues a decision after review of the entire record. The hearing officer who presides over the hearing is not a part of the audit unit staff and ex parte contact between audit unit staff and the hearing officer and administrative director is scrupulously avoided.

Section 633.030(a)(3) requires that ex parte communications be restricted. Title 8, California Code of Regulations §10324 precludes written or oral ex parte communications with the WCAB or a workers' compensation judge.

Section 633.030(a)(4) requires the hearing to be open to public observation. The Labor Code makes reference to "open hearings" in §5703 and §5704. In practice, WCAB hearings are open to the public unless they involve sensitive issues requiring privacy, such as HIV infection of a worker.

Section 633.030(a)(5) requires language assistance be made available, and §648.245(c) specifically states that, for workers' compensation matters, the costs of interpreters are to be paid in accordance with regulations of the DWC and WCAB. Labor Code Section 5811 provides for interpreters at hearings, depositions, and other settings necessary to ascertain the validity or extent of injury. It also provides that interpreters fees may be allowed as costs. The DWC rules at Title 8, California Code of Regulations §9795.1 through 9795.4 set forth a fee schedule, require notice to injured workers of the right to an interpreter, and describe the circumstances in which an interpreter would be provided.

Section 633.030(a)(6) requires that each party have the right to present and rebut evidence. Labor Code §5700 states that "Ether party may be present at any hearing, in person, by attorney, or by any other agent, and may present testimony pertinent under the pleadings." In addition to testimony, a party is permitted to present other kinds of evidence in support of its case and in rebuttal to its opponent's case. Labor Code §5703 states that "The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (a) Reports of attending or examining physicians...(b) Reports of special investigators..., (c) Reports of employers, containing copies of time sheets, book accounts, reports, and other records properly authenticated, (d) Properly authenticated copies of hospital records..., (e) All publications of the Division of Industrial Accidents, (f) All official publications of state and United States governments, (g) Excerpts from expert testimony received by the appeals board...."

Labor Code §5704 states that "...matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce evidence in explanation or rebuttal thereof before decision is rendered." See also WCAB Rules providing right to cross-examine a physician and allowing continuance of hearing for rebuttal testimony where medical testimony is allowed at hearing. Title 8, California Code of Regulations §§10606, 10610.

Section 633.030(a)(7) requires the decision to be in writing, based on the record, and include a statement of the factual and legal basis of the decision. Labor Code §5313 states that "the appeals board or the workers' compensation judge shall...make and file findings upon all facts involved in t he controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision order, or award there shall be served ... a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

Section 633.030(a)(8) states that a decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent. Although the agency itself does not designate and index precedent decisions, Matthew Bender publishes a case reporter, California Compensation Cases, that includes significant WCAB decisions. The existence of this reporter is universally known to workers' compensation practitioners. The California Compensation Cases would be available to the general public at law libraries. The expense to the agency of generating and maintaining an index does not appear justified when such a service is presently available to the public through commercial sources.

The structure of the DWC and WCAB already substantially complies with the proposed separation of functions prerequisites for adoption of special hearing procedures. Thus, application of those prerequisites serves no useful purpose. The DWC and WCAB would likely adopt the existing regulations as the special hearing procedures. Inclusion of DWC and WCAB within the APA will just lead to confusion and possible litigation over the applicable procedures.

CONCLUSION

Workers' compensation is a specialized and insular body of law which has developed its own procedures over time. The constitutional directive to create a complete system of workers' compensation is best carried out by exempting the DWC and WCAB from the APA. The legislature should maintain maximum flexibility to reform the workers' compensation system by exempting the DWC and WCAB from the APA provisions of the Government Code. DWC suggests the following revisions to the proposed APA:

§612.110

"(d) This division does not apply to the Division of Workers' Compensation or the Workers' Compensation Appeals Board."

§648.230

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

[***]

Department of Industrial Relations (Except the Workers' Compensation Appeals Board and the Division of Workers' Compensation)

[***]

~~Workers' Compensation Appeals Board~~

[***]"

§648.245

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

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY

PETE WILSON, *Governor*

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Law Revision Commission
RECEIVED
1994
File:

October 28, 1994

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: *ADMINISTRATIVE ADJUDICATION NARROW-FOCUS DRAFT*

Dear Nat:

As I told you during our recent telephone conversation, I have reviewed the draft of the latest version of the Administrative Procedure Act and I do not feel any of the revisions previously included which improved the procedures which specifically relate to our cases have been omitted.

As promised, here follows a number of comments about other provisions which remain:

Chapter 4

Section 11370.3. Delete "hearing" and "reporters, and" on line 34 as we now contract for such services.

Section 11420.10. Wording "is subject to" is confusing and awkward. I suppose the article applies to any adjudicative proceeding for which mediation or arbitration are required (or encouraged?).

Section 11420.20. I have concerns about whether this section allows a regulatory agency (in licensing matters) to delegate its authority to an arbitrator whose decision is binding.

Section 11425.10(a)(8) seems to conflict with Article 8 which limits the agencies which must provide language assistance notwithstanding the inclusion of the "right" among the so-called "Bill of Rights".

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Section 11425.20. I wonder if the Seering protections ought to be included here rather than a later section in the formal hearing chapter.

Section 11430.10. I would like to continue treating continuance requests as outside the ex parte rules. At present, with the provision of the APA limiting the application of ex parte rules to communications about the merits of a case, we can deal separately with the requestor of a continuance and then call the opponent and elicit his or her response without the hassle of setting up a conference call which is difficult in the proverbial 11th hour when these requests are typically received.

Section 11430.20 does not seem to resolve my concern even though "calendaring" is mentioned in the notes.

Section 11435.15. I missed the last meeting at which the Commission resolved not to expand the language assistance requirement to all adjudicative proceedings. I wonder why.

Section 11440.10. Again, the delegation issue as it relates to a regulatory agency established to protect the public. Does this section allow (as a ludicrous example) the California Medical Board to delegate its power to the California Medical Association, a "body". Perhaps some qualifying language is necessary.

Section 11440.20. I'm confused about the interplay of this provision and section 11505 if Chapter 4 provisions are designed to augment formal hearing provisions. I understand that section 11415.20 is designed to resolve some of these inconsistencies, but I'm not sure it does in this case.

Section 11440.30 is a huge change in the traditional right of confrontation absent a waiver. I would prefer that a waiver be obtained in our cases rather that the subjective determination by the Presiding Officer, before the case is heard, that the issues will not depend on the assessment of credibility of "a witness" and that electronic alternatives will not "impair a proper determination of credibility."

Section 11440.40. Even though this language is substantially the same as the present APA provision, the Commission may want to expand the protection to anyone who complains of inappropriate sexual behavior whether or not it rises to the level of harassment, assault or battery as these terms are specifically defined in employment law and criminal case law and statutes.

Section 11450.10, Subsection (b) refers to an affidavit "of authenticity" . The affidavit does not "authenticate" the records but provides the foundational information by which the documents may be received under the business records exception to the hearsay rule (without the necessity of calling the custodian to appear personally) in accordance with section 1561 of the Evidence Code. Section 2020 deals with depositions even though it does mention Evidence Code section 1561.

Section 11450.20. I support the liberalization of the requirements for serving a subpoena but I believe this section goes much too far in the opposite direction. The telephonic acknowledgement in particular seems inadvisable. I can't imagine many of our judges feeling comfortable pursuing a contempt citation based on this kind of "acknowledgement" (but maybe I'm just being old fashioned).

Section 11450.30 Subdivision (a) can be reworded to simply authorize a motion to quash or protective order by any person or entity served with a subpoena. It is not unusual for non-parties to resist subpoenas such as a hospital whose patient records are sought. The words "reasonably made" are ambiguous.

Section 11450.40. A witness is not subpoenaed on a "motion" so this should be changed to read that the person who subpoenaed the witness pays the fees.

Section 11455.10. I think the word "the" preceding "contempt" should be changed to "a".

Sections 11460.20 et seq. I am confused by this series of statutes dealing with emergency decisions. 11460.20 requires agencies to adopt regulations dealing with a number of things (such as the circumstances in which emergency relief may be issued) and subsequent statutes seem to deal with many of these areas e.g. section 11460.30 (b).

Chapter 5.

With the changes in section 11501(a), the meaning of that section, read in conjunction with section 11500, is even more confusing than is now the case. These two sections would seem to require all hearings held by the enumerated agencies to comply with the entirety of the APA. At present, only the adjudicative functions of agencies, whether listed or not, to which the APA is made applicable by statutes relating to that agency, are covered by the APA. For example, some of

the DMV cases are covered strictly APA hearings; some are not. The same is true for the Office of the Attorney General and others. The solution, in part, may be to eliminate the list altogether and if someone thinks a list should be prepared, it could be included in some publication like the APA pamphlet my office prepares specifying which types of hearings are covered by the pamphlet provisions.

Section 11505 should be amended to read that a continuance request should be directed to OAH once the matter is filed with us.

Section 11506(d) should be deleted. No one uses this provision which is an anachronistic section from the original Act I'm sure. Either the case is contested, included the intent to submit evidence of mitigation to avoid or reduce the penalty, or it is not.

Section 11507.3

Just a suggested wording change in lines 34 and 35, I'd word it, "... concerning the procedure to avoid unnecessary costs or delay."

I don't like (c) because the agency might consolidate a case and thereafter (which has occurred in our cases), one of the parties persuades the ALJ that prejudice to his or her right to a fair trial outweighs the economies achieved through consolidation.

Section 11507.6. Typo in line 29. First word should be "Investigative."

Section 11508. I like the added authority of the ALJ to change venue but I think standards should be added which focus on a necessary balance between convenience of the parties against the cost to the agency of relocating the site.

Section 11511.5 should be changed to reflect current practice by which OAH notifies the parties of the time and place for the prehearing conference. I strongly oppose the right of the ALJ to convert a prehearing conference to an informal hearing. There is no practical way the parties can prepare for this possibility without needless expenditure of time and money to prepare an informal case for each prehearing conference. Of course, the ALJ does have the right to try to settle the case which generally involves a discussion of the issues and respective contentions.

Section 11511.7 should probably allow the parties to stipulate to the same judge at trial if they so desire. OAH should notice the settlement conference.

Section 11512 should probably reference in the statute (rather than the note) the statute setting out the grounds for disqualification: section 11425.40.

In subdivision (d), I believe OAH should determine the method of maintaining the record. This would allow OAH to decide as a policy matter which method is preferable, taking into account all the relevant factors including appearance fees for reporters and ER monitors, equipment costs for recording equipment, cost and speed of transcript preparation, and the reliability of the record. Ultimately, OAH is responsible for the preparation of a record which is adequate for judicial review.

Section 11513 I renew my observation that the provision which precludes the agency from calling the respondent in its case in chief is archaic, inefficient, and may encourage the presentation of false testimony.

Subdivision (c) has long been the source of confusion with some lawyers interpreting it (erroneously in my opinion) as limiting the introduction of otherwise relevant evidence if it does not also meet the standard of "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs...". Perhaps this can be clarified.

Section 11516. I believe this to be another anachronism that is rarely, if ever, used and should be deleted.

Section 11517. Within section (c), I'm not sure what is intended by language allowing "authorized and appropriate relief". Presumably, with the non-adoption of the PD, no sanction has been imposed.

Within subdivision (d), there is an opportunity to clarify a present ambiguity within the first sentence. I believe the sentence should be changed to require the agency to either adopt, with or without appropriate modifications, or non-adopt the PD within 100 days. We have had at least one case in which a partial transcript was

ordered to determine whether to adopt and the 100 days ran. The question became whether the agency has "commenced proceedings" to decide the case upon the record.

Section 11519. I believe this should be rewritten to separately deal with stays which are imposed by the agency to delay the execution of a particular sanction and the more common situation in which the penalty is "stayed" and the respondent concurrently placed on probation with the threat to lift the stayed sanction if a violation occurs. One is a procedural issue. The other simply an enabling provision dealing with disciplinary options. The same holds true for the enabling language relating to probationary conditions. Perhaps these should be placed in a separate provision.

Subdivision (d) should be rewritten to allow restitution to injured consumers regardless of whether the injury occurred as the result of a breach of contract. Restitution would appear appropriate whenever the evidence establishes a quantifiable injury as the result of unprofessional conduct.

Subdivision (e) is unduly burdensome. If the respondent is lawfully served with the accusation and notice of hearing and appears or defaults, it seems he or she should be subject to sanctions imposed if there have been reasonable attempts to serve him or her at his or her address of record. Or does the phrase "is served with" include such "constructive" service by virtue of another generic section?

Section 11520 is another section which should be clarified. The addition of the word "either" before the word "fails" would clarify that a respondent must both file a notice of defense and appear to avoid a default.

Within subdivision (d), I would delete the language, "including a hearing on the remedy based on a showing by way of mitigation."

Section 11524 should be changed to reflect the present title Presiding Judge, formerly Administrative Law Judge in Charge.

I realize that many of the sections to which I recommend changes are either existing provisions within the APA or sections which have been part of the Draft

October 28, 1994

APA for some time. I apologize for my failure to voice many of the suggested changes previously. I was, I'm afraid, caught up in what seemed the larger policy considerations taken up by the Law Revision Commission. I should also add that the suggestions are based on a fairly quick review of the newest draft and some no doubt reflect my lack of familiarity with the whole statutory scheme and the interrelationship between parts.

Very truly yours,

KARL S. ENGEMAN
Director

KSE:sw

Alternate Draft

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

SUMMARY OF RECOMMENDATION

Purpose of Revision

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

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

Effect on Existing Procedures

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

Administrative Adjudication Bill of Rights

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

- The agency must make available a copy of its hearing procedure.
- The hearing is open to public observation.
- The adjudicatory function must be separated from the investigative, prosecutorial, and advocacy functions within the agency.
- The presiding officer must be free of bias, prejudice, and interest.
- The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. Credibility determinations made by the presiding officer are entitled to great weight on review.
- The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.
- Ex parte communications to the presiding officer are prohibited.
- The agency must make available language assistance to the extent required by existing law.

Optional Provisions that Add Flexibility

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

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

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

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

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

Modernization of 1945 California APA

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

Costs

The proposed law is designed to limit transitional costs by minimizing and simplifying adoption of implementing regulations. The proposed law may generate

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

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

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ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

BACKGROUND

Introduction

The Legislature in 1987 authorized the California Law Revision Commission to make a study of whether there should be changes to administrative law.[1] The Commission has divided the study into four phases, in the following order of priority: (1) administrative adjudication, (2) judicial review, (3) rulemaking, (4) non-judicial oversight.

This is the first in a series of reports on the administrative law study. It presents the Commission's recommendations concerning administrative adjudication by state agencies.

History of Project

The Commission initiated this project by retaining Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare a background study. The Commission also collected and made extensive use of materials from other jurisdictions, including the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws,[2] and the Federal Administrative Procedure Act.[3]

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

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

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1. 1987 Cal. Stat. res. ch. 47; see *Annual Report*, 19 Cal. L. Revision Comm'n Reports 501, 517 (1988).

2. Referred to in this report as the "1981 Model State APA."

3. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1976), originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. The federal statute is referred to in this report as the "Federal APA."

4. The consultants are Richard Turner, Robert Sullivan, Gene Livingston, and James Mattesich, all of Sacramento; Mark Levin of Los Angeles; and Professor Preble Stolz of Berkeley.

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

EXISTING CALIFORNIA LAW GOVERNING ADMINISTRATIVE ADJUDICATION[5]

California's Administrative Procedure Act[6] was enacted in 1945[7] in response to a study and recommendations by the Judicial Council.[8] The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.[9] The decision to limit coverage to licensing agencies was not based on a principled decision that an Administrative Procedure Act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other agencies were needed, but it was not prepared to make recommendations with respect to them.[10]

The Judicial Council's report and the resulting legislation was a pioneering effort. The creation of a central panel of hearing officers, for example, was an idea that was far ahead of its time. There were no comparable Administrative Procedure Acts at that time and the idea of an administrative procedure code applicable to agencies in general was untried and controversial. The Judicial Council and the Legislature moved cautiously, but the Administrative Procedure Act was well conceived and has served well in the 50 years since it was enacted.

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

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5. The description of existing California law governing administrative adjudication is drawn from the report on the matter prepared for the Commission by its consultant. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals,* 39 UCLA L. Rev. 1067, 1071-73 (1992).

6. The Administrative Procedure Act appears at Government Code Sections 11340-11528. Adjudication is governed by Sections 11500-11528. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11370.5. The California statute is referred to in this report as "1945 California APA".

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

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

9. The Judicial Council recommended a scheme of judicial review applicable to all administrative adjudications, not just those of licensing agencies. See Judicial Council of California, Tenth Biennial Report 26 (Dec. 31, 1944). This statute was the precursor of present Code of Civil Procedure Section 1094.5.

10. Judicial Council of California, Tenth Biennial Report 10, 28 (Dec. 31, 1944). The Judicial Council expressed hope that its work would be adapted to nonlicensing agencies such as tax, workers' compensation, public utilities, and benefit adjudications. These agencies were not covered because of practical limitations on the resources of the Judicial Council. See Kleps, *California's Approach to the Improvement of Administrative Procedure,* 32 Cal. L. Rev. 416 (1944).

11. The Administrative Procedure Act now covers a few agencies engaged in prosecutory functions that are not concerned with occupational licensing, such as the Fair Political Practices Commission. Also the act has been amended to include provisions for interpreters and to ban ex parte contacts with administrative law judges. Gov't Code §§ 11500(g), 11501.5, 11513(d)-(i), 11513.5.

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

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

The 1945 California APA prescribes a single and unvarying mode of formal, trial-type adjudicatory procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.[12] The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.[13] There is little or no flexibility in the system to accommodate the many differing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only specified named agencies, and it covers only those functions required by the agency's organic statute.[14] Many important California agencies are wholly or largely uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, the Unemployment Insurance Appeals Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.[15]

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings. The only unifying theme is that adjudication in these agencies is not conducted by an administrative law judge assigned by the Office of Administrative Hearings. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.[16]

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12. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. Government Code § 11504.

13. Gov't Code § 11517(b),(c). Thus the final decision rests with the agency heads who are also responsible for rulemaking and law enforcement. With very few exceptions (the only known exception is the Alcoholic Beverage Control Appeals Board), adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act.

14. Government Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovals. Bus. & Prof. Code §§ 485, 495. A list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice (Cal. Cont. Ed. Bar, Supp. 1994).

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

16. In some agencies (such as the Coastal Commission), there is no initial decision; the agency head or heads hear the evidence and argument themselves and their initial decision is also the final decision.

PROPOSED REVISION OF ADMINISTRATIVE ADJUDICATION

Basic Hearing Procedures Unchanged

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

The Commission recommends instead enactment of a more narrowly focused revision of the California administrative adjudication statutes. The revision would leave in place the existing hearing procedures, which are familiar to the agencies and persons appearing before them, but would supplement the existing procedures with provisions that take into account the many developments in administrative procedure that have occurred over the past 50 years. This period has seen an explosive growth of our knowledge and experience in administrative adjudication, including development of well-articulated statutes in other states and at the federal level, as well as promulgation of several generations of model State Administrative Procedure Acts. The Commission's proposals are designed to achieve important improvements in state administrative procedure without imposing substantial costs on state agencies.

Administrative Adjudication Bill of Rights[17]

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

- An accessible hearing procedure.
- A presiding officer free of bias, prejudice, and interest.
- Separation of adjudicatory from investigative, prosecutorial, and advocacy functions within an agency.
- Prohibition of ex parte communications.
- Open hearings.
- Language assistance.

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

- A written decision based on the record, including a statement of its factual and legal basis. Credibility determinations made by the presiding officer are given great weight on review.
- Designation and indexing of precedent decisions.

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

Flexibility in Hearing Procedures[18]

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

- *The Agency's Existing Hearing Procedure.* The proposed law does not affect an agency's existing hearing procedure, which remains the default procedure applicable to the hearing unless one of the other options is available and selected.
- *The Informal Hearing Procedure.* The informal hearing procedure is intended for small cases and is useful in other situations such as for taking public testimony. It is more in the nature of a conference than a trial, with the presiding officer authorized to limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument.
- *Emergency Decision Procedure.* An agency may need to act immediately in an emergency situation, and the agency's existing hearing procedure may be inadequate for this purpose. A few statutes provide authority for an agency to take immediate action for certain types of decisions, but there is no general provision to this effect. The proposed law provides an emergency decision framework for any agency that adopts a regulation specifying the parameters of the procedure.
- *Declaratory Decision Procedure.* It may be important that an agency issue advice on the application of statutes or regulations it administers. The proposed law provides a declaratory decision structure in which agencies may do this. Other hearing procedures do not apply in this situation, since the declaratory decision is based on stipulated facts.

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

Modernization of 1945 California APA[19]

In addition to the administrative adjudication bill of rights and the added flexibility in hearing procedures that would be applicable to all agencies, the

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

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

proposed law includes modernization of the 1945 California APA. For example, provisions are added for intervention, consolidation and severance, resolution of discovery disputes, settlement conferences, correction of mistakes in decisions, and electronic voting by agency members.

Transitional Provisions

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

Cost Considerations

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

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

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

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

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

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

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

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

• An informal hearing process is provided as an alternative to the lengthy and costly formal hearing process required by existing law.

• Agency emergency decision procedures are provided as an alternative to currently required court proceedings.

• Inexpensive alternative dispute resolution techniques are facilitated.

• Discovery disputes under the 1945 California APA are resolved administratively rather than judicially.

• Telephonic hearings and conferences, electronic recording of proceedings, and other cost-saving innovations are made available to agencies under the 1945 California APA.

• The presiding officer is given greater authority under the 1945 California APA to efficiently manage the conduct of proceedings, for example by limiting cumulative evidence or imposing sanctions.

• Summary administrative review options under the 1945 California APA are expanded.

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

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

APPLICATION OF STATUTE

Application to Hearings Required by Constitution or Statute

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

The proposed law would provide procedures to govern all state agency decisions for which an evidentiary hearing for determination of facts is required by the federal or state constitution or by statute. For this purpose, a "decision" is an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Thus the proposed law

does not apply to rulemaking since rules are of general rather than particular applicability. And since the proposed law governs only statutorily or constitutionally required hearings, it does not cover a large area of informal adjudication where agencies may choose to provide hearings even though no hearing is legally required.

Definition of "State Agency"

The proposed law applies to state agency, as opposed to local agency, administrative adjudication.[22] As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the result that it is unclear whether their administrative adjudications are to be governed by the proposed law. The proposed law deals with these situations so as to effect the broadest possible coverage:

(1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the proposed law applies.[23]

(2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the proposed law.[24]

The proposed law also authorizes local agencies voluntarily to adopt the provisions of the proposed law. This may be useful for a local agency that needs administrative adjudication rules but does not have the resources or desire to formulate its own procedural code. Adoption of the proposed law will ensure the local agency of workable procedures that satisfy due process of law.

Separation of Powers

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs.[25]

The Legislature. The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its members and expulsion of members,[26] determination of ethics violations of members,[27] impeachment of state officers and judges,[28] and confirmation of gubernatorial appointments.[29] These judgments are politically sensitive in nature,

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

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

24. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501 with respect to certificated employees.

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

26. Cal. Const. Art. IV, § 5.

27. Gov't Code §§ 8940-8955 (Joint Legislative Ethics Committee).

28. Cal. Const. Art. 4, § 18.

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

and the procedure for arriving at them is not susceptible to formalization but must be left to the political judgment of the Legislature based on its determination of the propriety of the procedure for each of these decisions.

Exclusion of the Legislature from coverage of the proposed law would not frustrate the objective of a body of administrative procedural law applicable to all state agencies, since the adjudicative decisions made by the Legislature are not the type that impact the relations between the average citizen and the state bureaucracy.

The Judicial Branch. The judicial branch of state government includes, besides the court system,[30] the Judicial Council,[31] the Commission on Judicial Appointments,[32] the Commission on Judicial Performance,[33] and the Judicial Criminal Justice Planning Committee.[34]

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

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

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

(3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the Judicial Council.[35]

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

Since the judicial branch agencies either do not conduct constitutionally or statutorily required administrative hearings, or the hearings they do conduct are or should be constitutionally exempt, the proposed law has been drafted to exempt the entire judicial branch (not just the courts) from its application.

The Governor's Office. Although the Administrative Procedure Act is designed primarily for executive branch agencies, the head of the executive branch — the Governor and the Governor's executive office — must be able to make the kinds of political decisions necessary to run the executive branch effectively, free of Administrative Procedure Act formalities in a way that appears appropriate to the

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

31. Cal. Const. Art. VI, § 6.

32. Cal. Const. Art. VI, § 7.

33. Cal. Const. Art. VI, § 7.

34. Penal Code § 13830.

35. Cal. Const. Art. VI, § 18(h) ("The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."). The Judicial Council Rules of Court provide procedures at Rules 901-922.

Governor. The proposed law maintains the integrity of the Governor and Governor's office by exempting it from application of the act.[36]

University of California

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

Basic due process constraints apply to rulemaking and adjudicatory proceedings by the University of California as they do to all other state agencies. The Commission's inquiry reveals that the University has developed well-articulated notice and hearing procedures. Given the constitutional independence of the University, the Commission recommends that the Legislature not mandate that the University of California be subject to the proposed law.

Nonetheless, the proposed law is reasonable, flexible, and satisfies basic due process constraints. The Commission believes the proposed law is suitable for the University of California's adjudicatory proceedings. The proposed law should make clear that the University may voluntarily adopt the procedures. Adoption of the procedures by the University would promote the important objective of a uniform body of law applicable throughout the state. It would also make consistent the University's internal governance with the procedures the University must follow in its external relations with the rest of state government.

Executive Branch Agencies

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

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

Agricultural Labor Relations Board: election certification. The collective bargaining election certification provisions administered by the Agricultural Labor

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36. There are a few exceptions to this general rule. See, e.g., Bus. & Prof. Code § 106.5 ("The proceedings for removal [of specified board members] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

37. Subdivision (a) of the section provides in relevant part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

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

Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.[39]

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

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

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

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

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

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

All other statutorily or constitutionally required hearings of executive branch agencies should generally remain subject to the proposed law. However, there are

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

40. Cal. Const. Art. XX, § 22.

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

42. Cal. Const. Art. XII, § 2.

43. See Gov't Code §§ 17525-17571.

special statutes applicable to particular decisions of agencies and these special provisions should ordinarily be preserved in conforming changes as reflective of a conscious policy determination.

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

Background

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges and hearing officers employed by the Office of Administrative Hearings in the Department of General Services.[44] However, most of the major state agencies employ their own administrative law judges and hearing officers.[45] The Law Revision Commission estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings. And this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

The Law Revision Commission has devoted substantial resources to consideration of whether independent administrative law judges, employed by the Office of Administrative Hearings or by a successor central panel, should play a greater role in the California administrative adjudication process. The Commission's conclusion, for the reasons outlined below, is that there should not be a general removal of state agency hearing personnel and functions to a central panel. Any transfer of an agency's hearing functions to the central panel should be specific to that agency and its functions and should be based on a showing of the need for the particular transfer.

History of Central Panel in California

California was the first, and for many years the only, jurisdiction in the United States to adopt the concept of a central panel of hearing officers who would hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.[46] The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert in a number of fields, yet who would not have a potential conflict of interest with the agency for which they conducted hearings and would impart an appearance of

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

45. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Unemployment Insurance Appeals Board, Department of Industrial Relations, Workers Compensation Appeals Board, Public Utilities Commission, Department of Social Services.

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

fairness to hearings. The Judicial Council also foresaw some organizational efficiency in this arrangement.

Although the Judicial Council considered the possibility that hearing officers could be drawn from the central panel for all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise."[47]

The California system is generally considered a success. It has been copied elsewhere and central panels are now in place in Colorado, Florida, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, Washington, and Wisconsin. Proposals for adoption of the central panel system have recently been or are currently being considered in four other states of which the Law Revision Commission is aware—Hawaii, New York, North Dakota, and Oregon. Legislation is also pending in Congress for a central federal panel.

No Expansion of California Central Panel Proposed

With this favorable experience, a logical conclusion might be that the central panel system should be expanded in California to cover all administrative hearings. The main argument in favor of broader use of the central panel is that central panel administrative law judges are independent of the agency and therefore are able to hold hearings that are fair both in appearance and in fact. Other benefits of centralization are felt to be economy, efficiency, and improved working conditions for administrative law judges.

The Law Revision Commission's study of the operation of the central panel system in California and in the other jurisdictions that have adopted it, including review of California's major administrative agencies not presently covered by the central panel, indicates that despite these potential benefits, there are a number of serious objections to expansion of the central panel beyond its present scope in California.[48]

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47. *Id.* at 14.

48. Among the concerns with expansion of the central panel that have been expressed by various state agencies, the following are common:

(1) The agency deals in a specialized area for which special knowledge and expertise is necessary, which could not be maintained in a central panel setting.

(2) The agency has a high volume operation that must deal with cases in a way far different from the typical central panel administrative law judge hearing.

(3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.

(4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.

(5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.

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

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

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

Fourth, further centralization is unlikely to generate savings for the state and it could increase costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges and concluded it was not clear any savings would result.[49] There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law judges serve several functions, acting as legal advisors as well as hearing officers; loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fifth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of

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(6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.

(7) The agency's hearing procedure is constitutionally exempt from legislative control.

(8) The purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.

(9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.

(10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.

(11) The agency conducts informal hearings; it would be inappropriate to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

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

hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency.

Sixth, each agency, its mission and needs, is unique. The Commission has found that it is not possible to generalize with respect to the central panel issue and the propriety of the central panel for all agencies. Any recommendation for transfer of an agency's functions should be specific, based on a review of the individual agency and its operations.

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

ADJUDICATION BILL OF RIGHTS

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

Accessibility of Procedures

A major defect of the existing California law governing administrative adjudication by state agencies is that the law as to the hearing procedures applicable in an individual agency may be relatively inaccessible. It is common to find an agency's procedure governed by a combination of general procedural statutes, special statutes applicable to the particular agency, regulations adopted by the agency, rules of procedure that have not been adopted by regulation, and unwritten practices followed by the agency.[51] This situation makes it difficult in many cases for a person having to deal with the administrative procedures of an agency to know exactly what to expect and how to proceed.

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

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

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

Open Hearings

Existing California law is generally silent on the issue whether an administrative hearing is open to the public. The general assumption is that hearings are open, and there is authority that this is a matter of due process.[52] The proposed law makes clear that a state agency hearing is generally open to the public, subject to special statutes such as those protecting trade secrets or other confidential or privileged matters, or those protecting child victims and witnesses.

Separation of Functions

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

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

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

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

Command Influence

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

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

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

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

54. Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would gridlock the system. The most recent annual statistics (1993) show 325,000 DMV actions against drivers resulting in 157,716 hearings, including 4,259 hearings involving commercial drivers. The proposed law exempts drivers' licensing cases from the separation of functions requirements. The exemption is limited in scope and would not extend to other types of operators' certificates, such as schoolbus driver certificates. The special certificate hearings are a relatively small portion of the total, and they are all occupational in character. There were 211 special certificate hearings in 1993, at a total cost of $19,783. Requiring separation of functions in this limited class will provide useful experience on the actual cost and benefit of the separation of functions requirement.

Bias

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

Exclusivity of Record

Existing California case law requires that the decision be based on the factual record produced at the hearing.[57] Both the Federal APA[58] and the 1981 Model State APA[59] codify this aspect of due process, and the proposed law does the same for California.

However, some agencies rely on the special factual knowledge and expertise of the decisionmaker in the area, and in fact agency members may be appointed for just this purpose. The proposed law addresses this situation by permitting evidence of record to include, in addition to officially noticeable matters provided for by existing law,[60] other supplemental evidence not produced at the hearing, provided the evidence is made a part of the record and all parties are given an opportunity to comment on it.

Findings and Basis of Decision.

The 1945 California APA requires the decision to contain findings of fact and a determination of issues, together with the penalty if any.[61] The statute is supplemented by the case law requirement that the decision contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts.[62] The proposed law augments this recitation with the requirement that the factual and legal basis for the decision be stated as to each of the principal controverted issues.

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

56. The bias standard is circumscribed by a specification of characteristics that do not constitute bias, including cultural factors affecting the judge, prior expressions of the judge on legal and factual issues that arise in the proceeding, and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2.

57. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals,* 39 UCLA L. Rev. 1067, 1126 (1992).

58. 5 U.S.C. § 556(e).

59. 1981 Model State APA § 4-215(d).

60. Gov't Code § 11515.

61. Gov't Code § 11518.

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

This will force the decisionmaker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

Since the presiding officer at the hearing has had the opportunity to observe the witnesses, the presiding officer's credibility determinations based on observation of demeanor and the like should be identified in the decision, and thereafter should be entitled to great weight on judicial review.[63]

Precedent Decisions

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

The precedent decision provision recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although agency decisions are public records, they are inaccessible to the public except in the case of the few existing agencies that publish their decisions or designate precedent decisions.[64]

Extension of the precedent decision requirement to all agencies would make the decisions generally available and would benefit everyone, including counsel for both the agency and the parties and the presiding officers and agency heads who make the decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in an administrative adjudication. And it is more efficient to cite an existing decision than to reconstruct the policy or even decide inconsistently without knowing or acknowledging that this has occurred.

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63. The great weight requirement for credibility determinations would be applied only indirectly, as a factor in any judicial review of the administrative decision. This requirement would codify in California the general rule applied in federal cases, as well as in a number of state agencies. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) (Federal APA); Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Lab. Code § 1148 (Agricultural Labor Relations Board).

64. Agencies that routinely publish all their decisions include the Agricultural Labor Relations Board, Public Utilities Commission, Public Employment Relations Board, and Workers Compensation Appeals Board.

The Office of Administrative Law has determined that an agency's designation of a decision as precedential violates Government Code Section 11347.5 unless the designation is made pursuant to rulemaking procedures, except where pursuant to Section 11346 the designation is expressly exempted by statute. 1993 OAL Det. No. 1. The Fair Employment and Housing Commission (Gov't Code § 12935(h)), the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409), and the State Personnel Board (Gov't Code § 19582.5) designate and publish precedent decisions pursuant to express statutory authority, but only a designation by the State Personnel Board is expressly exempted by statute from rulemaking procedures. The Law Revision Commission is aware of at least one superior court ruling that precedent decisions designated by the Unemployment Insurance Appeals Board without compliance with rulemaking procedures are invalid. Bacon v. CUIAB, Butte County No. 114071 (June 29, 1994) (ruling on respondent's motion for summary judgment and summary adjudication). The proposed law expressly exempts agency designation of precedent decisions from rulemaking procedures.

Ex Parte Communications

The 1945 California APA and statutes governing a few other agencies are clear that factual inputs to the decisionmaker must be on the record, but the rule as to other agency proceedings is not clear. Moreover, it is not clear whether ex parte contacts concerning law or policy are permissible.[65] Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of Administrative Hearings, but is silent as to ex parte communications to agency heads and to communications to any decisionmaker in the great majority of administrative adjudications in California that do not fall under the 1945 California APA. In some state agencies ex parte contacts are tolerated or encouraged.[66]

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

(1) Discussion of noncontroversial matters of practice or procedure is permissible.

(2) The decisionmaker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decisionmaker is from personnel within the agency that is a party to the proceeding. The decisionmaker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.

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

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

Where an improper ex parte contact has been made, the proposed law provides several protective and curative devices. A decisionmaker who receives an improper ex parte communication must place it on the record of the proceeding

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65. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1128 (1992).

66. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1130 (1992). Some, such as the California Public Utilities Commission, have developed elaborate ex parte prohibitions tailored to their specific needs.

and advise the parties of it, and the parties are allowed an opportunity to respond. To rectify cases where the ex parte communication would unduly prejudice the decisionmaker, the ex parte communication could be grounds for disqualification of the decisionmaker. In such a case, the record of the communication would be sealed by protective order of the disqualified decisionmaker.

Language Assistance

Existing provisions require interpreters for language-disabled parties[67] in proceedings before specified agencies. The proposed law preserves this requirement and extends it to language-disabled witnesses.

FLEXIBILITY IN HEARING PROCEDURES

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

Telephonic Hearings

The 1945 California APA and other agency hearing procedures contemplate a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical attendance at the hearing difficult. Moreover, an in-person hearing may require parties or witnesses to sit and wait for long periods of time. In such situations, it makes sense to take testimony telephonically. The Unemployment Insurance Appeals Board makes use of telephone hearings with a great amount of success.[68]

The proposed law permits a hearing to be conducted by conference telephone call, video-conferencing, or other appropriate telecommunications technology, provided all participants are audible to each other. A party may object to a telephonic hearing on a showing that a credibility determination is important to the case and that the telephone hearing will impair a proper determination of credibility.

Subpoenas

Under the 1945 California APA an agency has broad subpoena authority.[69] The proposed law continues this authority and extends it to the other state agencies, as well as to attorneys of the parties as in civil practice; the proposed law adds provisions clarifying procedures for quashing a subpoena once issued. In addition, the proposed law permits the respondent to request issuance of a subpoena duces

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

68. See discussion in Asimow, *The Adjudication Process* 106-07 (Oct. 1991).

69. Gov't Code § 11510.

tecum for production of a document at any reasonable time and place, rather than only at the hearing. This will enable the respondent adequate time to prepare and help avoid the need for a continuance. To protect against hardship, the proposed law permits a custodian of subpoenaed documents to satisfy the subpoena by delivery of a copy or by making the documents available for inspection and copying, in the manner allowed in court proceedings.

Enforcement of Orders and Sanctions

The 1945 California APA provides that disobedience of orders or obstructive or contumacious behavior in an administrative adjudication proceeding may be certified to the superior court for contempt proceedings.[70] This authority is extended in the proposed law to all state agency proceedings.

The proposed law also seeks to curb bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. These are addressed in civil actions by monetary sanctions,[71] where experience has been favorable. The proposed law extends to the presiding officer or agency in an adjudicative proceeding the right to order monetary sanctions for such behavior. The order is subject to administrative and judicial review to the same extent as other orders in the adjudicative proceeding.

Settlement

An agency has implied power to settle a case.[72] The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a settlement.[73] This resolves the difficulty that the agency head is required to approve a settlement but in many cases the agency head is a body of part-time appointees unable to meet and consider the settlement for a considerable period of time. The proposed law also makes clear that a settlement may be made before or after issuance of the notice of commencement of proceeding, except in an occupational licensing case. An occupational licensing case may be settled only after issuance of the notice of commencement of proceeding in order to ensure that the disciplinary action is a matter of public record.

Alternative Dispute Resolution

Alternative dispute resolution techniques, such as mediation and arbitration, offer the potential of substantial savings of time and money in administrative adjudication. Federal administrative procedure in recent years has made effective use of alternative dispute resolution,[74] and in 1990 Congress amended the Federal

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70. Gov't Code § 11525.

71. Code Civ. Proc. § 128.5.

72. Rich Vision Centers, Inc. v. Bd. of Medic. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983).

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

74. See discussion in Asimow, *The Adjudication Process* 45-47 (Oct. 1991).

APA to require agencies to explore and utilize alternative dispute resolution techniques in all agency functions.[75] Existing California law is generally silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.[76] A negotiated outcome is preferable in most situations to the costly, time-consuming, and difficult process of adjudication and judicial review. The Law Revision Commission recommends that alternative dispute resolution be fostered in California administrative adjudication by statutorily recognizing these techniques and encouraging agencies to put in place feasible mechanisms to facilitate them.

The proposed law makes clear that all agencies have authority to refer cases, with the consent of the parties, for mediation or for binding or nonbinding arbitration by neutral dispute resolution personnel. Mediation communications are kept confidential just as such communications remain confidential in civil proceedings,[77] and reference to nonbinding arbitration activities is inadmissible in a subsequent de novo proceeding; the presiding officer, mediator, or arbitrator cannot be compelled to testify in subsequent proceedings concerning the alternative dispute resolution activities.[78] The Office of Administrative Hearings is charged with responsibility to develop model regulations for alternative dispute resolution proceedings that govern disputes referred to alternative dispute resolution unless modified by the agency. The Commission believes these provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

Informal Hearing Procedure

The standard formal adjudicatory hearing procedure under the 1945 California APA and other procedural statutes may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process.[79]

To address this concern, the proposed law permits agencies to resolve matters involving only a minor sanction or matters in which there is no factual dispute by means of an informal adjudicative hearing process, drawn from the 1981 Model State APA.[80] This process would also be available to an agency that specifies

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

76. See discussion in Asimow, *The Adjudication Process* 44-45 (Oct. 1991).

77. Evid. Code § 1152.5.

78. *Cf.* Evid. Code § 703.5.

79. See discussion in Asimow, *The Adjudication Process* 87-91 (Oct. 1991).

80. 1981 Model State APA §§ 4-401-3. The notion of establishing alternate adjudicative procedures is found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Admin. L. Rev. 31, 47 (1979).

classes of cases where it would be appropriate, provided use of the informal process would not violate due process requirements for those cases.

The informal hearing may be particularly useful in a number of situations:[81]

- Where there is no disputed issue of fact but only a question of law, policy, or discretion.
- A decision to deny a discretionary permit, grant, or license where a hearing is required by statute or due process of law.
- Various land use planning and environmental decisions.
- An individualized ratemaking case.
- Tax adjudications conducted by the State Board of Equalization.

A justification for providing a less formal alternate procedure is that without it, many agencies will either obtain enactment of special hearing procedures, or will proceed "informally" in a manner not spelled out by any statute or regulation. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel, and reviewing courts, as well as for lawyers. This pattern is already apparent, to a considerable extent, at both the state and federal levels.

The proposed informal hearing process is a simplified administrative adjudication, involving no prehearing conference or discovery. At the hearing the presiding officer regulates the course of proceedings and limits witnesses, testimony, evidence, rebuttal, and argument. An informal hearing should only be used in a case that is susceptible of determination without the need for substantial cross-examination, since cross-examination will ordinarily be limited. The impartiality requirements and fundamental public policy and due process guarantees of the formal hearing procedure would continue to apply.

An informal hearing procedure is essentially "a conference that lacks courtroom drama but nevertheless provides assurance that the issues will be aired, an unbiased decisionmaker will make a decision based exclusively on the record of the proceedings, the decision will be explained, and it will be reviewed by a higher-level decisionmaker (such as the agency heads)."[82]

Emergency Decision Procedure

In some circumstances there is a need for an agency to take immediate action for the protection of the public. If there is serious abuse that causes immediate and irreparable physical or emotional injury to a ward in a child or elder care facility, for example, an agency may need to act quickly to remove the ward or close the facility or temporarily suspend its license. Emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional

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81. See discussion in Asimow, *The Adjudication Process* 94-97 (Oct. 1991).

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

licensee who is jeopardizing the public. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation, and this remedy has proved to be unsatisfactory in professional licensing cases where interim suspension is urgently needed to protect public safety.[83]

The 1945 California APA does not recognize the need of an agency to make a quick decision in an emergency situation, although a few special statutes provide individual agencies the ability to act quickly in cases of necessity.[84] Absent a specific authorization for emergency procedure, existing administrative procedure statutes mandate full proceedings, which could thwart an agency in dealing with an emergency situation. All agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

The proposed law permits an agency to adopt a regulation authorizing emergency action where there is immediate danger to the public health, safety, or welfare. Under the emergency proceeding the affected person is given notice and an opportunity to be heard before the agency acts, if this is feasible. The notice and hearing may be telephonic or by other electronic means.

The emergency decision is limited to interim, temporary relief, and is subject to immediate judicial review. Issuance of the emergency relief does not resolve the underlying issue, and the agency must proceed promptly to determine the basic dispute by standard administrative adjudication processes.

Declaratory Decision Procedure

Declaratory relief may be a useful means by which a person may obtain fully reliable information concerning application of agency regulations to the person's particular circumstances. The Federal APA provides for declaratory orders,[85] as do modern state statutes.[86] However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

The proposed law creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. Its purpose is to provide an inexpensive and generally available avenue for obtaining advice from an administrative agency. Issuance of a declaratory decision is discretionary with the agency. Procedural details may be provided by agency regulation. The Office of Administrative Hearings is charged with promulgation of model regulations that are applicable unless different rules are adopted by an agency. The agency may choose to preclude a declaratory decision by regulation if it appears that a declaratory decision is inappropriate for the matters administered by it.

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83. See discussion in Asimow, *The Adjudication Process* 100 (Oct. 1991).

84. Existing emergency procedures include Section 11529 (medical licensee); Bus. & Prof. Code §§ 6007(c) (attorney), 10086(a) (real estate licensee); Health & Safety Code §§ 1550 (last ¶), 1569.50, 1596.886 (health facilities and day care centers); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV license suspension).

85. Federal APA § 554(e).

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

Under the proposed law a declaratory decision is available only in case of an actual controversy, and issuance of a declaratory decision is discretionary with the agency. The general rules of administrative hearing practice are inapplicable, since there often will be no fact-finding involved — only application of laws or regulations to a prescribed set of facts. A declaratory decision has the same status and binding effect as to those facts as any other agency decision.

Conversion of Proceedings

It may become apparent in an adjudicative proceeding that the issues are such that a formal hearing is unnecessary and the matter can be resolved by an informal hearing. Or, the agency may conclude that the matter should be resolved not by an individual decision but by adoption of general regulations. These and other circumstances indicate the desirability of a procedure permitting conversion of administrative proceedings from one type to another appropriate type.

There are no provisions in the California statutes for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.[87] Under this procedure, the presiding officer or other agency official responsible for the proceeding may convert it to another type if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party. Notice to affected parties is required.

MODERNIZATION OF 1945 CALIFORNIA APA

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

Prehearing Procedures

Consolidation and Severance. The 1945 California APA contains no provisions allowing agencies to consolidate related cases or to sever issues in a case that could be more economically handled in several parts. The proposed law follows the consolidation and severance procedures of the Code of Civil Procedure,[88] which have worked well in practice in civil cases. Control of consolidation and severance issues is vested in the presiding officer or administering agency.

Intervention. The 1945 California APA is not clear on the right of a third party to intervene in an administrative adjudication. Yet situations do arise when an administrative adjudication will affect the legal rights, duties, privileges, or immunities of a person who has not been made a party to the proceeding. In such a situation, the proposed law would permit intervention by the affected party if the intervention will not impair the interests of justice and the orderly and prompt

87. 1981 Model State APA § 1-107.

88. Code Civ. Proc. § 1048.

conduct of the proceedings. This determination is vested in the presiding officer, and the presiding officer's decision is final and nonreviewable. The presiding officer may impose appropriate conditions on intervention, such as limiting the issues addressed by the intervenor, regulating discovery and cross-examination by the intervenor, and limiting the intervenor's involvement in settlement negotiations. In some types of proceedings intervention may be inappropriate or unduly complicate matters; the proposed law enables an agency by regulation to limit or preclude intervention practice.

Discovery. The 1945 California APA provides for limited discovery in administrative adjudications.[89] The Commission believes the extensive discovery available in civil proceedings is inappropriate for administrative adjudications, which should be simple, quick, and inexpensive. For this reason the proposed law continues the limited discovery approach of existing law, subject to a number of minor changes.[90]

Under the 1945 California APA, discovery disputes between the parties are referred to the superior court for resolution and enforcement. To expedite the discovery process, the proposed law vests this matter in the presiding officer.

Prehearing Conference. The proposed law adds the following features designed to enhance the effectiveness of the prehearing process:

(1) The conference may be conducted by telephone or other electronic means.

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

(3) The conference should offer the opportunity for alternative dispute resolution, and where appropriate be converted into an informal hearing.

The prehearing conference is conducted by the presiding officer who will preside at the hearing. Settlement possibilities may be explored at the prehearing conference. If it appears that there is a possibility of settlement, the proposed law allows the presiding officer to order a separate mandatory settlement conference, to be held before a different settlement judge, if one is available. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

Hearing Record

The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improvement of the quality of electronic recording, and with the use of multi-track recorders, monitors, and trained hearing officers,

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89. Gov't Code §§ 11507.5, 11507.6, 11507.7, 11511; State of California v. Superior Court, 16 Cal. App. 3d 87, 93 Cal. Rptr. 663 (1971).

90. For example, a recent case has questioned the fairness and constitutionality of the existing provision that the agency can refuse to authorize the respondent to depose an unavailable witness. Gov't Code § 11511; Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986). The proposed law addresses this point by allowing the presiding officer, if one has been appointed, to order a deposition.

the problems of electronic recording are minimized, and the cost saving may be substantial. For these reasons the proposed law permits an agency to provide electronic recording of proceedings in all cases. The presiding officer would have authority to require stenographic reporting in an appropriate situation, and a party could require it at the party's own expense.

Evidence

Technical Rules of Evidence. The proposed law codifies a few key exceptions to the general rule that any relevant evidence is admissible in an administrative adjudication if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.[91] Existing law permits the presiding officer to exclude irrelevant and unduly repetitious evidence.[92] This authority should be broadened so that the presiding officer also has discretion to exclude evidence that contributes little to the result but promotes delay and confusion. The proposed law adopts the standard of Evidence Code Section 352, which provides for exclusion of evidence whose probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Hearsay. Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding.[93] This provision, known as the residuum rule, is desirable as a general matter because it forces the use of reliable evidence, which may be particularly important in an administrative adjudication in which the sanction is severe, such as a license revocation. The proposed law makes clear that the residuum rule can be raised for the first time on judicial review. Existing law is unclear on this matter.[94] It may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence.

Review of Evidentiary Rulings. It is not clear whether the evidentiary rulings of the presiding officer are subject to administrative review. An argument can be made that the rulings are conclusive.[95] The proposed law makes clear that the agency head may review evidentiary determinations of the presiding officer. The adjudicatory authority is vested in the agency head, and the agency head should be the ultimate administrative decisionmaker.

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91. Gov't Code § 11513(c).

92. Gov't Code § 11513(c).

93. Gov't Code § 11513(c).

94. See discussion in Asimow, *The Adjudication Process* 71-73 (1991).

95. See discussion in Asimow, *The Adjudication Process* 66-67 (Oct. 1991).

Decision

Voting by Agency Members. The 1945 California APA permits voting by agency members by mail.[96] The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

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

Review of Decision

Administrative Review. The proposed law continues the requirement that administrative review of a proposed decision be on the record, but adds a provision drawn from appellate practice enabling a record based on an agreed statement of the parties.[97] The proposed law also expands the ability of an agency head to adopt summarily a proposed decision without full administrative review. Under the proposed law, the agency head may summarily adopt the proposed decision with clarifying changes that do not affect the factual or legal basis of the decision. In addition, the agency head may summarily adopt the proposed decision with a change of legal basis, after offering the parties an opportunity to comment on the change.

Judicial Review. The proposed law generally leaves unchanged existing provisions governing judicial review.[98] This should not be taken as Law Revision Commission approval of the law. The Commission is currently studying the law governing judicial review of agency action and will make a separate recommendation concerning it. The present recommendation does not address the matter.

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96. Gov't Code § 11526.

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

98. See Gov't Code § 11523.

ADMINISTRATIVE ADJUDICATION

General Outline

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Division 3. Executive Department

Part 1. State Departments and Agencies

ADMINISTRATIVE PROCEDURE ACT

Chapter 3.5. Office of Administrative Law

Chapter 4. Office of Administrative Hearings

Chapter 4.5. Administrative Adjudication: General Provisions

Chapter 5. Administrative Adjudication: Formal Hearing

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ADMINISTRATIVE PROCEDURE ACT

CHAPTER 3.5. OFFICE OF ADMINISTRATIVE LAW

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

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

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

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

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

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

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

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

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

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

Section 11370 of the Government Code is amended to read:

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

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

Gov't Code § 11370.3 (amended). Personnel

Section 11370.3 of the Government Code is amended to read:

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint ~~hearing officers, shorthand reporters, and~~ such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding

arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge ~~or a hearing officer~~ to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. ~~The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor.~~ Any administrative law judge ~~, hearing officer,~~ or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges ~~and hearing officers~~ may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

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

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

Section 11370.5 of the Government Code is amended to read:

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

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

CHAPTER 4.5. ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS

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

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

CHAPTER 4.5. ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 11400. Administrative adjudication provisions of Administrative Procedure Act

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

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

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

References in section Comments in this chapter and Chapter 5 to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, and to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3344, 5362, 7521 (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237), from which a number of the administrative adjudication provisions of the Administrative Procedure Act are drawn.

§ 11400.10. Operative date

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

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

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

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

§ 11400.20. Adoption of regulations

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

(b) Subject to Section 11351:

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

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

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

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

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

Interim regulations are only valid up to 18 months, through December 31, 1998. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process. In case permanent regulations are pending on December 31, 1998, interim regulations may be extended up to three months.

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

Article 2. Definitions

§ 11405.10. Application of definitions

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

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

§ 11405.20. Adjudicative proceeding

11405.20. "Adjudicative proceeding" means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.

Comment. Section 11405.20 is intended for drafting convenience.

§ 11405.30. Agency

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

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

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

It should be noted that an administrative unit of an agency that has no authority to issue decisions or take other action on behalf of the agency would not be an "agency" within the meaning of this section.

§ 11405.40. Agency head

11405.40. "Agency head" means a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide.

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

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

§ 11405.50. Decision

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

(b) Nothing in this section limits:

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

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

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

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

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

§ 11405.60. Party

11405.60. "Party" includes the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate agencies, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party.

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

"Person" includes legal entity and governmental subdivision. Section 11405.70 ("person" defined); see also Section 17 ("person" defined).

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

of the agency may be a party under this chapter. See Section 11405.30 & Comment ("agency" defined).

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

§ 11405.70. Person

11405.70. "Person" includes an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

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

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

§ 11405.80. Presiding officer

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

Comment. Section 11405.80 is intended for drafting convenience.

Article 3. Application of Chapter

§ 11410.10. Application to constitutionally and statutorily required hearings

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

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

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

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

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

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

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

This chapter applies only to proceedings for issuing a "decision." A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Section 11405.50(a) ("decision" defined). Therefore this chapter does not apply to agency actions that do not determine a person's legal interests nor to rulemaking which is agency action of general applicability.

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

This section does not specify what type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing procedure under Chapter 5 (commencing with Section 11500), or may be a special hearing procedure provided by a statute applicable to the particular proceeding. This chapter also makes available the alternatives of an informal hearing, an emergency decision, or a declaratory decision, where appropriate under the circumstances. See Articles 9 (commencing with Section 11445.10), 12 (commencing with Section 11460.10), and 13 (commencing with Section 11465.10).

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

§ 11410.20. Application to state

11410.20. Except as otherwise expressly provided by statute:

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

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

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

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

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

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

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

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

- Alcoholic Beverage Control Appeals Board (Bus. & Prof. Code § 23083)
- University of California (Educ. Code § 92001)
- Public Employment Relations Board (Gov't Code §§ 3541.3, 3563)
- Commission on State Mandates (Gov't Code § 17533)
- Agricultural Labor Relations Board (Lab. Code § 1144.5)
- Military Department (Mil. & Vet. Code § 105)
- Department of Corrections & Related Entities (Pen. Code § 3066; Welf. & Inst. Code §§ 1788, 3158)
- Public Utilities Commission (Pub. Util. Code § 1701)

§ 11410.30. Application to local agencies

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

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

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

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

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

- Suspension or dismissal of permanent employee by school district. Educ. Code § 44944.
- Nonreemployment of probationary employee by school district. Educ. Code § 44948.5.
- Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Educ. Code § 87679.

See Sections 11410.40 (application where formal hearing procedure required) and 11501 (application of Chapter 5).

§ 11410.40. Application where formal hearing procedure required

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

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

Article 4. Governing Procedure

§ 11415.10. Applicable procedure

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

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

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

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

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

§ 11415.20. Conflicting or inconsistent express statute controls

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

Comment. Section 11415.20 makes clear that the provisions of this chapter are not intended to override a conflicting or inconsistent statute or applicable federal law that governs a particular matter. It should also be noted that if application of a provision of this chapter

would cause loss or delay of federal funds, the Governor may suspend the provision. Section 11415.30.

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

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

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

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

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

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

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

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

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

§ 11415.40. Waiver of provisions

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

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

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

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

§ 11415.50. When adjudicative proceeding not required

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

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

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

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

§ 11415.60. Settlement

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

(b) A settlement may made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned a settlement may not be made before issuance of the agency pleading.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. 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.

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

The first sentence of subdivision (a) is drawn from Evidence Code Section 1152 (compromise and settlement offers). Cf. Section 11420.30 & Comment (confidentiality of communications in alternative dispute resolution). 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.

Section 11415.60 is subject to a specific statute to the contrary governing the matter. Section 11415.20 (conflicting or inconsistent express statute controls). See, e.g., Gov't Code § 18681 (authority of State Personnel Board to approve settlements), Lab. Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

Article 5. Alternative Dispute Resolution

§ 11420.10. ADR authorized

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

(1) Mediation by a neutral mediator.

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

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

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

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

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

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

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

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

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

§ 11420.20. Regulations governing ADR

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

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

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

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

§ 11420.30. Confidentiality and admissibility of ADR communications

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

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

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

(c) No mediator or arbitrator 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 alternative dispute resolution.

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

Article 6. Administrative Adjudication Bill of Rights

§ 11425.10. Administrative adjudication bill of rights

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

(1) The agency shall make available a copy of the governing procedure to the person to which the agency action is directed.

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

(3) The adjudicatory function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30 (separation of functions).

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

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

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

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

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

(b) The governing procedure by which an agency conducts an adjudicative proceeding may include procedures equivalent to, or more protective of the rights of parties than, the requirements of this section.

Comment. Section 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.40 (application where formal hearing procedure required) and 11501 (application of Chapter 5). Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section. Subdivision (b). Of course, there are other fundamental due process elements inherent in a "hearing" that are not itemized in this section, such as notice to the affected parties and an opportunity to be heard by the presiding officer, including the right to present and rebut evidence.

Subdivision (a)(8), relating to language assistance, is limited to agencies listed in Sections 11018 (state agency not subject to Chapter 5) and 11435.15 (application of language assistance provisions).

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

§ 11425.20. Open hearings

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

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

(2) The presiding officer determines it is necessary to close the hearing in whole or in part to ensure a fair hearing in the circumstances of the particular case. 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 minor 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.

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

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

Comment. Section 11425.20 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 it sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting. Section 11126(d), (q).

Subdivision (a) codifies existing practice. See discussion in 1 G. Ogden, California Public Agency Practice § 37.03 (1991).

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

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

Subdivision (b) is drawn in part from 1981 Model State APA § 4-211(6). The right of the public to be present where a hearing is being conducted telephonically does not include the right to participate, and the right of the public to inspect the record does not impose a duty on the agency to provide a copy independent of the public records act.

§ 11425.30. Separation of functions

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

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

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

(b) Notwithstanding subdivision (a):

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment. Section 11425.40 applies in all administrative adjudications subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.40 (application where formal hearing procedure required) and 11501 (application of Chapter 5). It supersedes a provision formerly found in Section 11512(c) (formal hearing). Section

11425.40 applies whether the presiding officer serves alone or with others. For separation of functions requirements, see Section 11425.30.

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

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

§ 11425.50. Decision

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

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

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

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

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

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 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 Section 11425.60), 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 (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 requirement in subdivision (b) that a mere repetition or paraphrase of the relevant statute or regulation be accompanied by a statement of the underlying facts is drawn from the second sentence of 1981 Model APA § 4-215(c).

Subdivision (b) adopts the rule of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Lamb v. Workmen's Compensation Appeals Bd., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Unemp. Ins. App. Bd., Precedent Decisions P-B-10, P-T-13, P-B-57; Lab. Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1114 (1992).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. This requirement is derived from Washington law. See Wash. Rev. Code Ann. §§ 34.05.461(3), 34.05.464(4). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness. Even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (b) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

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

§ 11425.60. Precedent decisions

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

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5

(commencing with Section 11340), relating to rulemaking. An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

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

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

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

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

Under the second sentence of subdivision (b), this section applies notwithstanding Section 11347.5 ("underground regulations"). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates Government Code Section 11347.5 unless made pursuant to rulemaking procedures). The provision is drawn from Government Code Section 19582.5 (express exemption of precedent decision designation by State Personnel Board from rulemaking procedures). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

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

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

Article 7. Ex Parte Communications

§ 11430.10. Ex parte communications prohibited

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

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

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

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

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

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

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

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

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

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

§ 11430.20. Permissible ex parte communications generally

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

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

(b) The communication concerns a matter of procedure or practice that is not in controversy.

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

This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status

discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

§ 11430.30. Permissible ex parte communications from agency personnel

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

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

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

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

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

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

Comment. Section 11430.30 is most useful in hearings where the presiding officer is employed by an agency that is a party. This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person).

It should be noted that this article does not limit on-the-record communications between agency personnel and the presiding officer. Section 11430.10(b) (ex parte communications prohibited). Only advice or assistance given outside the hearing is prohibited.

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

This provision is not limited to agency personnel, but includes participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the agency

head or other person delegated the power to hear or decide at the final decision level, except with respect to settlement matters. Subdivision (b).

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

Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as power plant siting and land use decisions. The provision 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 restrictions of this article, given limited staffing and personnel. Subdivision (c)(1) recognizes such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer under standard doctrine. Subdivision (c)(2) recognizes the need for policy advice from planning staff in proceedings such as land use and environmental matters.

§ 11430.40. Prior ex parte communication

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

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

§ 11430.50. Disclosure of ex parte communication

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

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

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

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

Comment. Section 11430.50 is drawn from former Section 11513.5(d). This provision also applies to the agency head, or other person or body to which the power to hear or decide is

delegated. See Section 11430.70 (application of provisions to agency head or other person). See also Section 11440.20 (notice).

§ 11430.60. Disqualification of presiding officer

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

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

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

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

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

11430.70. The provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

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

§ 11430.80. Communications between presiding officer and agency head

11430.80. (a) Notwithstanding any other provision of this article, there shall be no communication, direct or indirect, regarding any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

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

Comment. Section 11430.80 is a special application of a provision of former Section 11513.5(a), which precluded a presiding officer from communicating with a person who presided in an earlier phase of the proceeding. Section 11430.80 extends the ex parte communications limitation of Section 11430.70 (application of provisions to agency head or other person) to include communications with an agency or non-agency presiding officer as well. This section enforces the general principle that the presiding officer should not be an advocate for the proposed decision to the agency head, including a person or body to which the power to act is delegated See Section 11405.40 ("agency head" defined), The decision of the agency head should be based on the record and not on off-the-record discussions from which the parties are excluded.

Article 8. Language Assistance

§ 11435.05. "Language assistance"

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

Comment. Section 11435.05 supersedes former Section 11500(g). It extends this article to language translation for witnesses.

§ 11435.10. Interpretation for hearing-impaired person

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

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

§ 11435.15. Application of article

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

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

State Personnel Board
Board of Podiatric Medicine
Board of Psychology

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

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

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

Comment. Subdivisions (a) and (b) of Section 11435.15 restate former Section 11501.5. Subdivision (c) restates a portion of former Section 11500(f). Subdivision (d) is added to make clear that even though his chapter does not otherwise apply to a hearing, the hearing is not exempt from the requirements of this article if the agency is listed in this section.

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

It should be noted that, in addition to the proceedings listed in this section, language assistance is also required of state agencies whose hearings not governed by Chapter 5. Section 11018.

§ 11435.20. Provision for interpreter

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

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

(c) Except as provided in Section 11435.55:

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

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

Comment. Section 11435.20 continues the first three sentences of former Section 11513(d) and extends it to witnesses as well as parties. See Section 11435.05 ("language assistance" defined).

§ 11435.25. Cost of interpreter

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

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

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

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

§ 11435.30. Certification of hearing interpreters

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

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

Comment. Section 11435.30 continues former Section 11513(e) without substantive change.

§ 11435.35. Certification of medical examination interpreters

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

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

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

§ 11435.40. Designation of languages for certification

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

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

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

(2) The cost of developing a language examination.

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

(4) Other information the board deems relevant.

Comment. Section 11435.40 continues former Section 11513(g) without substantive change.

§ 11435.45. Certification fees

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

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

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

Comment. Section 11435.45 continues former Section 11513(h) and (i) without substantive change.

§ 11435.50. Decertification

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

(a) The person is deceased.

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

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

Comment. Section 11435.50 continues former Section 11513(j) without substantive change.

§ 11435.55. Unavailability of certified interpreter

11435.55. (a) In the event an interpreter certified pursuant to Section 11435.30 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize another interpreter.

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

Comment. Section 11435.55 continues former Section 11513(k) without substantive change.

§ 11435.60. Duty to advise party of right to interpreter

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

Comment. Section 11435.60 continues former Section 11513(*l*) without substantive change.

§ 11435.65. Confidentiality and impartiality of interpreter

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

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

Comment. Section 11435.65 continues former Section 11513(m) and (n) without substantive change.

Article 9. General Procedural Provisions

§ 11440.10. Delegation of review authority

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

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

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

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

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

Comment. Section 11440.10 is drawn from Section 11500(a) (power to act may be delegated by agency) and 1981 Model State APA § 4-216(a)(1)-(2). This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. Section 11415.20 (conflicting or inconsistent express statute controls). See, e.g., Greer v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school

board, rather than hearing officer, formerly required to determine issues under Educ. Code § 13443). See also Section 11500(a) (power to act may not be delegated where action required by "agency itself" under formal hearing procedure).

§ 11440.20. Notice

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

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

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

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

Proof of service under subdivision (b) may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a; Cal. R. Ct. 2008(e) (proof of service by facsimile transmission).

§ 11440.30. Hearing by electronic means

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

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

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

§ 11440.40. Evidence of sexual conduct

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

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

(1) Is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under paragraph (2). This paragraph is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed by statute.

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

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

Comment. Section 11440.40 expands the application of provisions formerly limited to proceedings under Chapter 5 (commencing with Section 11500) to apply in all cases covered by this chapter. Subdivision (a) restates former Section 11513(p). Subdivision (b) restates former subdivision (g) of Section 11507.6 and the unnumbered paragraph formerly located between subdivisions (c) and (d) of Section 11513. Subdivision (c) restates former Section 11513(o).

Article 10. Informal Hearing

§ 11445.10. Purpose of informal hearing procedure

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

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

Basic due process and public policy protections of the administrative adjudication bill of rights are preserved in the informal hearing. Sections 11445.40(a) (procedure for informal hearing), 11425.10 (administrative adjudication bill of rights). Thus, for example, the presiding officer must be free of bias, prejudice, and interest; the adjudicatory function must be separated from the investigative, prosecutorial, and advocacy functions within the agency;

the hearing must be open to public observation; the agency must make available language assistance; ex parte communications are restricted; the decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and the agency must designate and index significant decisions as precedent.

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

§ 11445.20. When informal hearing may be used

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

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

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

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

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

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

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

(c) An adjudicative proceeding of the California Coastal Commission, Division of Oil and Gas, San Francisco Bay Conservation and Development Commission, or State Water Resources Control Board, that involves land use planning or environmental matters.

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

(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.

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

Subdivision (b) permits the informal hearing to be used, even if a disputed issue of material fact has appeared or if the amount or other stake involved is relatively minor. The reference to a "licensee" in subdivision (b)(5) includes a certificate holder.

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

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

§ 11445.30. Selection of informal hearing

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

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

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

Comment. Section 11445.30 provides a procedure for resolving objections to use of the informal hearing procedure in advance of the hearing. However, conversion to a formal hearing or other type of hearing may be appropriate if during the course of the hearing circumstances indicate the need for it. See Sections 11445.50 (cross-examination), 11445.60 (proposed proof).

§ 11445.40. Procedure for informal hearing

11445.40. (a) Except as provided in this article, the hearing procedures otherwise required by statute for an adjudicative proceeding 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. The presiding officer may limit witnesses, testimony, evidence, and argument, and may limit or entirely preclude pleadings, intervention, discovery, prehearing conferences, and rebuttal.

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

§ 11445.50. Cross-examination

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

(b) An agency may by regulation specify categories of cases in which cross-examination is deemed not necessary for proper determination of the matter under the informal hearing procedure. The presiding officer may allow cross-examination of witnesses in an informal hearing notwithstanding an agency

regulation if it appears to the presiding officer that in the circumstances cross-examination is necessary for proper determination of the matter.

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

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

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

§ 11445.60. Proposed proof

11445.60. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present proof if the proceeding were converted to a formal or other applicable hearing procedure. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or federal or state constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

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

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

Article 11. Subpoenas

§ 11450.10. Subpoena authority

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

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

Comment. Subdivision (a) of Section 11450.10 supersedes a portion of former Section 11510. This article gives subpoena power to all adjudicating agencies and attorneys for parties. See Section 11450.20 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also broadens former law to allow a subpoena

duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

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

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

§ 11450.20. Issuance of subpoena

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

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and diver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

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

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

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.

§ 11450.30. Motion to quash

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

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

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

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

§ 11450.40. Witness fees

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

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

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

Comment. Section 11450.40 restates a portion of former Section 11510. Its coverage is extended to a subpoena duces tecum and is conformed to the mileage and fees applicable in civil cases. See Sections 68093-68098 (mileage and fees in civil cases).

Article 12. Enforcement of Orders and Sanctions

§ 11455.10. Misconduct in proceeding

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

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

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

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

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

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

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

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

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

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

§ 11455.20. Contempt

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

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

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

§ 11455.30. Monetary sanctions for bad faith actions or tactics

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

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

Comment. Section 11455.30 permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. A person 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. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

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

Article 13. Emergency Decision

§ 11460.10. Application of article

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

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

§ 11460.20. Agency regulation required

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

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

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

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

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

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

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

§ 11460.30. When emergency decision available

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

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

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

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

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

§ 11460.40. Emergency decision procedure

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

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

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

By regulation the agency may prescribe the emergency notice and hearing procedure. Cf. State Bar Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective to the person to which the agency action is directed than the provisions of this article. Section 11460.20 (agency regulation required).

§ 11460.50. Emergency decision

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

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

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

§ 11460.60. Completion of proceedings

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

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

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

§ 11460.70. Agency record

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

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

§ 11460.80. Judicial review

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

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

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

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

(3) 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 appropriate discovery.

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

Comment. Section 11460.80 is drawn from Section 11529(h) (interim suspension of medical care professional), with the addition of paragraph (3) providing for discovery.

Article 14. Declaratory Decision

§ 11465.10. Application of article

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

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

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

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

§ 11465.20. Declaratory decision permissive

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

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

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

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

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

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

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

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

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

§ 11465.30. Notice of application

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

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

§ 11465.40. Applicability of rules governing administrative adjudication

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

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

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 11465.70. The reason for exempting a declaratory decision from usual procedural requirements for adjudications is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

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

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

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

§ 11465.50. Action of agency

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

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

(2) Set the matter for specified proceedings.

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

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

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

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

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

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

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

§ 11465.60. Declaratory decision

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

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

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

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

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

§ 11465.70. Regulations governing declaratory decision

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

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

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

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

(4) The disposition of an application.

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

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

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

Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the application; when, how, and

where an application is to be filed; whether an applicant has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like.

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

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

Article 15. Conversion of Proceeding

§ 11470.10. Conversion authorized

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

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

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

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

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

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

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

It should be noted that the substantial-prejudice-to-the-rights-of-a-party limitation on discretionary conversion of an agency proceeding from one type to another is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual otherwise would be entitled by

conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding. See Note, *The Use of Agency Rule-Making To Deny Adjudications Apparently Required by Statute,* 54 Iowa L. Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing an agency, in certain situations, to make a determination through an adjudicative proceeding that has the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding were used instead.

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

Within the limits of this section, an agency should be authorized to use procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency this flexibility. For example, an agency that wants to convert a formal hearing into an informal hearing, or an informal hearing into a formal hearing, may do so under this provision if the conversion is appropriate and in the public interest, if adequate notice is given, and if the rights of the parties are not substantially prejudiced.

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

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

§ 11470.20. Presiding officer

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

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

§ 11470.30. Agency record

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

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

§ 11470.40. Procedure after conversion

11470.40. 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 statutory requirements relating to the new proceeding.

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

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

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

§ 11470.50. Agency regulations

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

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

CHAPTER 5. ADMINISTRATIVE ADJUDICATION: FORMAL HEARING

Gov't Code § 11500-11529 (chapter heading). Administrative adjudication: formal hearing

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

CHAPTER 5. ADMINISTRATIVE ADJUDICATION ; FORMAL HEARING

§ 11500 (amended). Definitions

Section 11500 of the Government Code is amended to read:

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

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

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

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

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

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

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

~~(1) Testimony under oath.~~

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

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

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

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

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

Comment. Former subdivision (f) of Section 11500 is superseded by Sections 11410.20 (application to state), 11405.50 ("decision" defined), 11425.50 (decision), 11410.10 (application to constitutionally and statutorily required hearings), and 11435.15 (language assistance).

Former subdivision (g) is superseded by Section 11435.05 ("language assistance" defined).

§ 11501 (amended). Application of chapter

Section 11501 of the Government Code is amended to read:

11501. (a) This chapter applies to ~~any~~ all of the following:

(1) Any agency as determined by the statutes relating to that agency. Chapter 4.5 (commencing with Section 11400) applies to an adjudicative proceeding required to be conducted under this chapter, unless the statutes relating to the proceeding provide otherwise.

(2) An agency created on or after July 1, 1997, unless the statutes relating to that agency provide otherwise.

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

Accountancy, State Board of
Air Resources Board, State
Alcohol and Drug Programs, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California Board of
Attorney General
Auctioneer Commission, Board of Governors of
Automotive Repair, Bureau of
Barbering and Cosmetology, State Board of
Behavioral Science Examiners, Board of
Boating and Waterways, Department of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Security and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Department of
Contractors, State License Board
Corporations, Commissioner of
Court Reporters, Board of California
Dental Examiners of California, Board of
Education, State Department of

Electronic and Appliance Repair, Bureau of
Engineers and Land Surveyors, State Board of Registration for Professional
Fair Political Practices Commission
Fire Marshal, State
Food and Agriculture, Director of
Forestry and Fire Protection, Department of
Funeral Directors and Embalmers, State Board of
Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of
Health Services, State Department of
Highway Patrol, Department of the California
Home Furnishings and Thermal Insulation, Bureau of
Horse Racing Board, California
Housing and Community Development, Department of
Insurance Commissioner
Labor Commissioner
Landscape Architects, State Board of
Medical Board of California, Medical Quality Review Committees and Examining Committees
Motor Vehicles, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Medical Board of California
Pharmacy, California State Board of
Podiatric Medicine, Board of
Psychology, Board of
Public Employees' Retirement System, Board of Administration of the
Real Estate, Department of
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of
Savings and Loan Commissioner
School Districts
Secretary of State, Office of
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparers Program
Teacher Credentialing, Commission on
Teachers' Retirement System, State
Transportation, Department of, acting pursuant to the State Aeronautics Act

Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of

Comment. Section 11501 is amended to make this chapter the default procedure, absent a contrary statute, for agencies created after the operative date of the amendment.

This chapter is supplemented by the general provisions on administrative adjudication found in Chapter 4.5 (commencing with Section 11400), which apply to proceedings under this chapter. See also Section 11410.40 (application where formal hearing procedure required). Thus if an agency is required by statute to conduct a hearing under this chapter, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of Chapter 4.5. Likewise, the general provisions of Chapter 4.5 restricting ex parte communications, regulating precedent decisions, and the like, apply to a hearing under this chapter. Cf. Section 11502 (use of administrative law judges under Chapter 4.5).

§ 11501.5 (repealed). Language assistance; provision by state agencies

Section 11501.5 of the Government Code is repealed.

~~11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:~~

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

~~(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.~~

Comment. Former Section 11501.5 is restated in Section 11435.15 (application of article).

§ 11502 (amended). Administrative law judges

Section 11502 of the Government Code is amended to read:

11502. (a) All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. This subdivision applies to a hearing required to be conducted under this chapter that is conducted under the informal hearing or emergency decision procedure provided in Chapter 4.5 (commencing with Section 11400).

(b) The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 ~~of the Government Code~~ . Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Section 11502 is amended to make clear that where use of an administrative law judge employed by the Office of Administrative Hearings is required for an adjudicative proceeding under this chapter, such use is also required in informal and emergency proceedings under Chapter 4.5 (administrative adjudication: general provisions). An administrative law judge employed by the Office of Administrative Hearings is not required for a declaratory decision or alternative dispute resolution under Chapter 4.5.

§ 11502.1 (repealed). Health planning unit

Section 11502.1 of the Government Code is repealed.

~~11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.~~

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Safety Code § 439.7 (1984 Cal. Stat. ch. 1745, § 14).

§ 11503 (no change). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Note. No change is recommended in Section 11503. It is set out here for completeness.

§ 11504 (no change). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Note. No change is recommended in Section 11504. It is set out here for completeness.

§ 11504.5 (no change). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Note. No change is recommended in Section 11504.5. It is set out here for completeness.

§ 11505 (amended). Service on respondent

Section 11505 of the Government Code is amended to read:

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon ~~him~~ the respondent of the accusation, and that failure to do so will constitute a waiver of ~~his~~ the respondent's right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

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

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency or, if an administrative law judge has been assigned to the hearing, the Office of Administrative Hearings, within 10 working days after you discover the good cause. Failure to ~~notify the agency~~ give notice within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file ~~his~~ the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying

material is mailed, addressed to respondent at the latest address on file with the agency.

Comment. Section 11505 is amended to correct the portion of the statement to the respondent relating to postponement of the hearing. See Section 11524 (continuances).

§ 11506 (no change). Notice of defense

11506. (a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Note. No change is recommended in Section 11506. It is set out here for completeness.

§ 11507 (no change). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare

his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Note. No change is recommended in Section 11507. It is set out here for completeness.

§ 11507.2 (added). Intervention

Section 11507.2 is added to the Government Code to read:

11507.2. (a) By regulation an agency may modify the provisions of this section or make the provisions of this section inapplicable.

(b) The administrative law judge shall grant a motion for intervention if all of the following conditions are satisfied:

(1) The motion is submitted in writing, with copies served on all parties named in the accusation.

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

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

(4) The administrative law judge determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(c) If an applicant qualifies for intervention, the administrative law judge may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:

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

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

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

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

(d) As early as practicable in advance of the hearing the administrative law judge shall issue an order granting or denying the motion for intervention, specifying any conditions, and briefly stating the reasons for the order. The administrative law judge may modify the order at any time, stating the reasons for the modification. The administrative law judge shall promptly give notice of an

order granting, denying, or modifying intervention to the applicant and to all parties.

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

(f) Nothing in this section precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 7 (commencing with Section 11430.10) of Chapter 4.5 (ex parte communications).

Comment. Subdivision (a) of Section 11507.2 makes clear that an agency may limit or preclude intervention in a proceeding.

Subdivision (b)(1) is drawn from 1981 Model State APA § 4-209(a). It provides that the administrative law judge must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (b)(3) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities will be substantially affected by the proceeding." Cf. Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (right to notice and hearing if agency action will constitute substantial deprivation of property rights). However, subdivision (b)(4) imposes the further limitation that the administrative law judge may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The administrative law judge is thus required to weigh the impact of the proceedings on the legal rights, etc., of the applicant for intervention (subdivision (b)(3)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (b)(4)).

Subdivision (c) is drawn from 1981 Model State APA § 4-209(c). This provision, authorizing the administrative law judge to impose conditions on the intervenor's participation in the proceeding, is intended to permit the administrative law judge to facilitate reasonable involvement of intervenors without subjecting the proceeding to unreasonably burdensome or repetitious presentations.

Subdivision (d) is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the administrative law judge's order granting, denying, or modifying intervention, this provision is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding.

Subdivision (f) recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

§ 11507.3 (added). Consolidation and severance

Section 11507.3 is added to the Government Code to read:

11507.3. (a) When proceedings that involve a common question of law or fact are pending, the agency or administrative law judge on its own motion or on motion of a party may order a joint hearing of any or all the matters at issue in the proceedings. The agency or administrative law judge may order all the

proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) The agency or administrative law judge on its own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

(c) If the agency and administrative law judge make conflicting orders under this section, the agency's order controls.

Comment. Section 11507.3 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding. See also Section 13 (singular includes plural).

§ 11507.5 (no change). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Note. No change is recommended in Section 11507.5. It is set out here for completeness.

§ 11507.6 (amended). Discovery

Section 11507.6 of the Government Code is amended to read:

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

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

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports

(1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

~~(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.~~

Comment. Subdivision (g) of Section 11507.6 is restated in Section 11440.40 (evidence of sexual conduct).

§ 11507.7 (amended). Motion to compel discovery

Section 11507.7 of the Government Code is amended to read:

11507.7. (a) Any party claiming ~~his~~ the party's request for discovery pursuant to Section 11507.6 has not been complied with may serve and file ~~a verified petition~~ with the administrative law judge a motion to compel discovery ~~in the superior court for the county in which the administrative hearing will be held~~ , naming as respondent the party refusing or failing to comply with Section 11507.6. The ~~petition~~ motion shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why ~~such~~ the matter is discoverable under this section, that a reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made, and the ground or grounds of respondent's refusal so far as known to ~~petitioner~~ moving party .

(b) The ~~petition~~ motion shall be served upon respondent party and filed within 15 days after the respondent party first evidenced ~~his~~ failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, whichever period is longer. ~~However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the~~

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

(c) ~~If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition.~~ The hearing on the motion to compel discovery shall be within 15 days after the motion is made, or a later time that the administrative law judge may on its own motion for good cause determine. The respondent party shall have the right to serve and file a written answer or other response to the ~~petition and order to show cause~~ motion before or at the time of the hearing .

(d) ~~The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.~~

~~(e)~~ Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that ~~such~~ the matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under ~~such~~ those provisions, the ~~court~~ administrative law judge may order lodged with it ~~such~~ matters ~~as are~~ provided in subdivision (b) of Section 915 of the Evidence Code and examine ~~such~~ the matters in accordance with ~~the~~ its provisions ~~thereof~~ .

~~(f) The court~~ (e) The administrative law judge shall decide the case on the matters examined ~~by the court~~ in camera, the papers filed by the parties, and ~~such~~ oral argument and additional evidence as the ~~court~~ administrative law judge may allow.

~~(g)~~ (f) Unless otherwise stipulated by the parties, the ~~court~~ administrative law judge shall no later than ~~30~~ 15 days after the ~~filing of the petition file~~ hearing make its order denying or granting the ~~petition , provided, however, the court may on its own motion for good cause extend such time an additional 30 days~~ motion. The order ~~of the court~~ shall be in writing setting forth the matters ~~or parts thereof the petitioner~~ the moving party is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the ~~clerk~~ administrative law judge upon the parties. Where the order grants the ~~petition~~ motion in whole or in part, ~~such~~ the order shall not become effective until 10 days after the date the order is served ~~by the clerk~~ . Where the order denies relief to the ~~petitioning~~ moving party, the order shall be effective on the date it is served ~~by the clerk~~ .

~~(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.~~

~~(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.~~

Comment. Section 11507.7 is amended to provide for proceedings to compel discovery before the administrative law judge rather than the superior court. An order of the administrative law judge compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 11455.10-11455.20. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The administrative law judge may also impose monetary sanctions for bad faith tactics, which is reviewable in the same manner as the decision in the proceeding. Section 11455.30.

§ 11508 (amended). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or fifth Appellate District.

(b) Notwithstanding subdivision (a):

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

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

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

(c) The respondent may move for, and the administrative law judge in its discretion may grant or deny, a change in the place of the hearing. A motion for a

change in the place of the hearing shall be made with 10 days after service of the notice of hearing on the respondent.

Comment. Subdivision (c) of Section 11508 codifies practice authorizing a motion for change of venue. See 1 Ogden, California Public Agency Practice § 33.02[4][d] (1991). Grounds for change of venue include selection of an improper county and promotion of convenience of witness and ends of justice. *Cf.* Code Civ. Proc. § 397. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing.

§ 11509 (amended). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the day of , 19_, at the hour of , upon the charges made in the accusation served upon you. If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of hearing. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency].

Comment. Section 11509 is amended to include notification of the right to seek change of venue. See Section 11508 (time and place of hearing).

§ 11510 (repealed). Subpoenas

Section 11510 of the Government Code is repealed.

~~11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge, shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.~~

~~(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by~~

~~messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to his or her date of birth and his or her diver's license number or Department of Motor Vehicles identification number, or, the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section shall have the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for his or her appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.~~

~~(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.~~

Comment. Former Section 11510 is superseded by Sections 11450.10-11450.40 (subpoenas).

§ 11511 (amended). Depositions

Section 11511 of the Government Code is amended to read:

11511. On verified petition of any party, an <u>administrative law judge or, if an administrative law judge has not been appointed, an</u> agency may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. <u>The petitioner shall serve</u>

notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing. Where the witness resides outside the State and where the administrative law judge or agency has ordered the taking of ~~his~~ the testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

Comment. Section 11511 is amended to extend to the administrative law judge the authority to order a deposition, and to provide for notice of the petition.

§ 11511.5 (amended). Prehearing conference

Section 11511.5 of the Government Code is amended to read:

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and ~~the agency~~ shall give reasonable written notice to all parties. The notice shall inform the parties that at the prehearing conference the proceeding may be converted into an informal hearing for disposition of the matter.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

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

(5) Objections to proffers of evidence.

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

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

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

(9) Objections to use of informal hearing procedure.

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

(11) Motions for intervention.

(12) Exploration of the possibility of using alternative dispute resolution provided in Article 5 (commencing with Section 11420.10) of Chapter 4.5.

(13) Any other matters as shall promote the orderly and prompt conduct of the hearing.

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

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

(1) An informal hearing for disposition of the matter provided in Article 10 (commencing with Section 11445.10) of Chapter 4.5. The notice of the informal hearing shall state the date of the hearing.

(2) A proceeding for alternative dispute resolution provided in Article 5 (commencing with Section 11420.10) of Chapter 4.5.

(e) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Comment. Subdivision (a) of Section 11511.5 is amended to reflect the practice of the administrative law judge, rather than the agency, giving the required notice.

Subdivision (b)(10) is not intended to provide a new discovery procedure. If a party has not availed itself of discovery within the time periods provided by Section 11507.6, it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

Subdivision (b)(11) implements Section 11507.2 (intervention).

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

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii), expanded to include alternative dispute resolution.

§ 11511.7 (added). Settlement conference

Section 11511.7 is added to the Government Code to read:

11511.7. (a) The administrative law judge may order the parties to attend and participate in a settlement conference. The administrative law judge shall set the time and place for the settlement conference, and shall give reasonable written notice to all parties.

(b) The administrative law judge at the settlement conference shall be different from the administrative law judge at the hearing unless otherwise stipulated by the parties. The administrative law judge may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

Comment. Under Section 11511.7 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur).

Attendance and participation in the settlement conference is mandatory. Communications made in settlement negotiations are protected. Section 11415.60 (settlement).

§ 11512 (amended). Presiding officer

Section 11512 of the Government Code is amended to read:

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the

administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing. A ruling of the administrative law judge admitting or excluding evidence is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding.

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which ~~he or she cannot accord a fair and impartial hearing or consideration~~ there are grounds for disqualification, including disqualification under Section 11425.40 (bias, prejudice, or interest). The parties may waive the disqualification by a writing that recites the grounds for disqualification; the waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record . Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that ~~a fair and impartial hearing cannot be accorded~~ that the administrative law judge or agency member is disqualified . Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case , except that a substitute qualified to act may be appointed by the appointing authority .

(d) The proceedings at the hearing shall be reported by a ~~phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.~~ stenographic reporter or electronically, in the discretion of the agency. If an agency elects electronic reporting of proceedings, (i) the administrative law judge may require stenographic reporting if the judge determines electronic reporting will not provide an adequate record of the proceedings, or (ii) a party may at the party's own expense require stenographic reporting.

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall

render a proposed decision in accordance with subdivision (b) of Section 11517 ~~of the Government Code~~.

Comment. Subdivision (b) of Section 11512 is amended to overrule any contrary implication that might be drawn from the language of subdivision (b).

Grounds for disqualification under subdivision (c) include bias, prejudice, or interest of presiding officer (Section 11425.40) and receipt of ex parte communications (Section 11430.60). A waiver of disqualification is a voluntary relinquishment of rights by the parties. The administrative law judge need not accept a waiver; the waiver is effective only if accepted by the administrative law judge. The provision for appointment of a substitute for an agency member is drawn from 1981 Model State APA § 4-202(e)-(f). In cases where there is no appointing authority, e.g., the agency member is an elected official, the "rule of necessity" still applies and the agency member shall not withdraw or be disqualified.

Subdivision (d) is amended to liberalize use of electronic reporting.

§ 11513 (amended). Evidence

Section 11513 of the Government Code is amended to read:

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of this subdivision, whether or not the objection was previously raised in the adjudicative proceeding.

(e) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and ~~irrelevant and unduly repetitious evidence shall be excluded~~ the presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. ~~In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing~~

~~unless offered to attack the credibility of the complainant, as provided for under subdivision (o) . Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.~~

~~(d) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter. Except as provided in subdivision (k), interpreters utilized in hearings shall be certified pursuant to subdivision (e). Except as provided in subdivision (k), interpreters utilized in medical examinations shall be certified pursuant to subdivision (f). The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.~~

~~The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except with respect to hearings before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to worker's compensation claims. With respect to these hearings, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.~~

~~(e) The State Personnel Board which shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures. Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this subdivision.~~

~~(f) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to subdivision (e) shall be deemed certified for purposes of this subdivision.~~

~~(g) The State Personnel Board shall designate the languages for which certification shall be established under subdivisions (e) and (f). The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State~~

~~Personnel Board finds that there is an insufficient need for interpreting assistance in these languages. The language designations shall be based on the following:~~

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

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

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

~~(4) Other information the board deems relevant.~~

~~(h) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of his or her certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.~~

~~(i) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this section. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance. If the amount of money collected in fees is not sufficient to cover the costs of carrying out this section, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.~~

~~(j) The State Personnel Board may remove the names of people form the list of certified interpreters if the following conditions occur:~~

~~(1) A person on the list is deceased.~~

~~(2) A person on the list notifies the board that he or she is unavailable for work.~~

~~(3) A person on the list does not submit a renewal fee as required by subdivision (h).~~

~~(k) In the event that interpreters certified pursuant to subdivision (e) cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters. In the event that interpreters certified pursuant to subdivision (f) cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.~~

~~(l) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.~~

~~(m) The rules of confidentiality of the agency, if any, that may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing, whether or not the rules so state.~~

~~(n) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.~~

~~As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.~~

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

~~(p) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.~~

~~(q) This section becomes operative on July 1, 1995.~~

Comment. The second sentence of subdivision (d) of Section 11513 provides an exception to the general requirement of exhaustion of administrative remedies on judicial review.

The "irrelevant and unduly repetitious" standard formerly found in this section is replaced in subdivision (e) by the general standard of Evidence Code Section 352.

The unnumbered paragraph formerly located between subdivisions (c) and (d) is restated in Section 11440.40(b).

Subdivisions (d)-(n) are restated in Sections 11435.20-11435.65.

Subdivision (o) is restated in Section 11440.40(c).

Subdivision (p) is restated in Section 11440.40(a).

Subdivision (q) is deleted as obsolete.

§ 11513.5 (repealed). Ex parte communications

Section 11513.5 of the Government Code is repealed.

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

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

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

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

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

Comment. Subdivisions (a) and (b) of former Section 11513.5 are restated in Section 11430.10 (ex parte communications prohibited), omitting the prohibition on the presiding officer communicating with others. The limitation on communications with a person who presided at a previous stage of the proceeding is applied as between the presiding officer and agency head in Section 11430.80. Subdivision (c) is restated in Section 11430.40 (prior ex parte communication) but is limited to communications received during the pendency of the proceeding. Subdivision (d) is restated in Section 11430.50 (disclosure of ex parte communication). Subdivision (e) is restated in Section 11430.60 (disqualification of presiding officer).

§ 11514 (no change). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on

or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Note. No change is recommended in Section 11514. It is set out here for completeness.

§ 11515 (no change). Official notice

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Note. No change is recommended in Section 11515. It is set out here for completeness.

§ 11516 (no change). Amendment of accusation after submission of case

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Note. No change is recommended in Section 11516. It is set out here for completeness.

§ 11517 (amended). Decision in contested cases

Section 11517 of the Government Code is amended to read:

11517. (a) If a contested case is heard before an agency itself, the administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. ~~The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.~~ Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney ; the filing and service is not an adoption of a proposed decision by the agency. The agency itself may do any of the following:

(1) Adopt the proposed decision in its entirety.

(2) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(3) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(4) Change the legal basis of the proposed decision and adopt the proposed decision with that change as the decision. Before acting under this paragraph the agency shall provide the parties an opportunity to comment on the proposed change in legal basis.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, or an agreed statement of the parties, with or without taking additional evidence, or may refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. 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. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Comment. Section 11517 is amended to add in subdivision (b) authority to adopt "with changes." This supplements the general authority of the agency under Section 11518.5 (correction of mistakes and clerical errors in the decision). Mitigation of a proposed remedy under subdivision (a)(3) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity. The authority in subdivision (b)(4) to adopt with change of the legal basis is subject to the proviso that the parties be afforded an opportunity to comment on the proposed change. The agency head may specify the time and manner of comment, e.g. written comment within 10 days.

Subdivision (b) is also amended to make clear that the agency is not accountable for the administrative law judge's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a decision.

The addition of the provision for an agreed statement of the parties in subdivision (c) is drawn from Rule 6 of the Rules of Court (agreed statement). Remand under subdivision (c) is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person. Subdivision (c) 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.

§ 11518 (amended). Decision

Section 11518 of the Government Code is amended to read:

11518. ~~The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto.~~ Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. The first two sentences of Section 11518 are superseded by Section 11425.50 (contents of decision).

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

§ 11518.5 (added). Correction of mistakes and clerical errors in decision

SEC. Section 11518.5 is added to the Government Code, to read:

11518.5. (a) Within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the agency for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking judicial review.

(b) The agency may refer the application to the administrative law judge who formulated the proposed decision or may delegate its authority under this section to one or more persons.

(c) The agency may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The

application is considered denied if the agency does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency, on its own motion or on motion of the administrative law judge, from modifying the decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the decision.

(e) The agency shall, within 15 days after correction of a mistake or clerical error in the decision, serve a copy of the correction on each party on which a copy of the decision was previously served.

Comment. Section 11518.5 is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 11500(b) ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the decision without the need for judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the decision. This supplements the authority in 11517 of the agency head to adopt a proposed decision with technical or other minor changes.

§ 11519 (amended). Effective date of decision; stay of execution; notification; restitution

Section 11519 of the Government Code is amended to read:

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; provided, however, that the terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to such officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution which requires the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged as a result of a breach of contract by the party against whom the decision is rendered. In such case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of such breach. Where restitution is ordered and paid pursuant to the provisions of this subdivision, such amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

(e) The person to which the agency action is directed may not be required to comply with a decision unless the person has been served in the manner provided in Section 11505 with, or has actual knowledge of, the decision.

(f) A nonparty may not be required to comply with a decision unless the agency has made the decision available for public inspection and copying or the nonparty has actual knowledge of the decision.

(g) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Article 13 (commencing with Section 11460.10) of Chapter 4.5 (emergency decision).

Comment. Subdivisions (e)-(g) are drawn from 1981 Model State APA § 4-220(c)-(d). They distinguish between the effective date of a decision and the time when it can be enforced.

The requirement of "actual knowledge" in subdivisions (e) and (f) is intended to include not only knowledge that a decision has been issued, but also knowledge of the general contents of the decision insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of a decision, this must be resolved in the manner that other fact questions are resolved.

The binding effect of a decision on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues a decision revoking the license of a particular dealer, this decision is binding on any wholesaler who has actual knowledge of it, even before the decision is made available for public inspection and copying; the decision binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 11520 (amended). Defaults

Section 11520 of the Government Code is amended to read:

11520. (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that ~~he~~ the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

(c) Notwithstanding the default of the respondent, the agency or the administrative law judge in its discretion may, before a proposed decision is issued, grant a hearing on reasonable notice to the parties. The administrative law judge may order the respondent, or the respondent'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 respondent's failure to appear at the hearing.

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

cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the person to receive notice sent pursuant to Section 11505.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Comment. Subdivision (a) of Section 11520 is amended to make clear that either failure to respond or to appear is a default. Procedures to cure a default are added in subdivisions (c) and (d).

Subdivision (c) parallels Section 11506(b), with the addition of the provision enabling the administrative law judge to waive a default and impose costs, and requiring reasonable notice.

Subdivision (d) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

§ 11521 (no change). Reconsideration

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

Note. No change is recommended in Section 11521. It is set out here for completeness.

§ 11522 (no change). Reinstatement of license or reduction of penalty

11522. 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. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This

section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Note. No change is recommended in Section 11522. It is set out here for completeness.

§ 11523 (no change). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or the parts thereof as are designated by the petitioner, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days, which time shall be extended for good cause shown, after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Note. No change is recommended in Section 11523. It is set out here for completeness.

§ 11524 (amended). Continuances; grant time; good cause; denial; notice review

Section 11524 of the Government Code is amended to read:

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the ~~administrative law judge in charge~~ presiding judge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof 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 be either oral at the time of the denial of application for a continuance 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 11524 is amended to reflect current practice.

§ 11525 (repealed). Contempt

Section 11525 of the Government Code is repealed.

~~11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.~~

Comment. Former Section 11525 is restated in Sections 11455.10-11455.30 (enforcement of orders and sanctions).

§ 11526 (amended). Voting by agency member

Section 11526 of the Government Code is amended to read;

11526. The members of an agency qualified to vote on any question may vote by mail or otherwise .

Comment. Section 11526 is broadened to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote when a contested case is heard before the agency itself if the agency member did not hear the evidence. Section 11517(a).

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).

§ 11527 (no change). Charge against funds of agency

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

Note. No change is recommended in Section 11527. It is set out here for completeness.

§ 11528 (no change). Oaths

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

Note. No change is recommended in Section 11528. It is set out here for completeness.

§ 11529 (amended). Interim orders

Section 11529 of the Government Code is amended to read:

11529. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 11371 may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

(1) To be represented by counsel.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.

(3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a superior court judge to permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the ~~court~~ administrative law judge shall grant the interim order where, in the exercise of ~~its~~ discretion, ~~it~~ the administrative law judge concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and an accusation is not filed and served pursuant to Sections 11503 and 11505 within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the accusation the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in this chapter. If the licensee requests a hearing on the accusation, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the division for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by this chapter, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing on the accusation.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.

Comment. Section 11529 is amended to substitute the administrative law judge for the court in subdivision (e).

OPERATIVE DATE

Uncodified. Operative date

This act becomes operative on July 1, 1997.

Comprehensive Revision

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

SUMMARY OF RECOMMENDATION

Purpose of Revision

This recommendation proposes to replace the hearing provisions of the existing California Administrative Procedure Act with a new statute. The new statute would govern all state proceedings where an evidentiary hearing for determination of facts is statutorily or constitutionally required. The purpose of the revision is to:

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

Choice of Procedures

The new statute would allow a state agency to select any of five procedures for an administrative adjudication that it conducts under this act:

(1) A formal hearing procedure.
(2) An informal hearing procedure.
(3) A special hearing procedure provided by agency regulation.
(4) An emergency decision procedure.
(5) A declaratory decision procedure.

Formal Hearing Procedure

The formal hearing procedure is based on the existing California Administrative Procedure Act, with numerous improvements and modernizations drawn from the Federal Administrative Procedure Act and the Model State Administrative Procedure Act. Revisions also accommodate hearings by a broader range of state agencies.

Important changes proposed in the formal hearing procedure include:

- *Separation of Functions.* Prosecutory and adjudicative functions must be separated within the agency. This is accomplished by isolating the presiding officer and agency head from prosecutorial involvement (including assistance, advice, and supervision by prosecutorial staff).
- *Alternative Dispute Resolution.* The statute encourages use of alternative dispute resolution techniques such as mediation and arbitration, in addition to settlement, by expressly authorizing these techniques and protecting communications.

• *Precedent Decision.* The statute expressly authorizes designation and indexing of important agency decisions as precedent for guidance of agency personnel and the public.

• *Procedural Improvements.* The statute makes numerous improvements in hearing procedures, including provision for consolidation and severance, intervention, resolution of discovery disputes by the presiding officer rather than superior court, open hearings, telephonic conduct of hearings and prehearing conferences, electronic recording of proceedings, and clarification of burden of proof.

Informal Hearing Procedure

The informal hearing procedure is intended as an adjudicative proceeding that satisfies due process and public policy requirements in a manner that is simpler and more expeditious than the formal hearing procedure, for use in appropriate circumstances. The procedure provides an informal forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer. The procedure also provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without intervening as a party.

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

Special Hearing Procedure

An agency may by regulation prescribe its own special hearing procedure for an adjudicative proceeding. This option is available only for a hearing that is not required to be conducted by the Office of Administrative Hearings. The only limitation on the special hearing procedure is that it is subject to a few fundamental due process and public policy requirements:

(1) The presiding officer must be free of bias, prejudice, and interest.

(2) The adjudicatory function must be separated from the investigative, prosecutorial, and advocacy functions within the agency.

(3) Ex parte communications to the presiding officer are restricted.

(4) The hearing is open to public observation.

(5) The agency must make available language assistance to the extent required by existing law.

(6) Each party has the right to present and rebut evidence.

(7) The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision.

(8) The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.

The agency may adopt a special hearing procedure simply by specifying existing regulations as the procedure, or may, during the transitional period, adopt a new procedure without review for necessity by the Office of Administrative Law. The agency must provide a copy of the special hearing procedure to the parties to the proceeding.

Emergency Decision Procedure

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

Declaratory Decision Procedure

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

Conforming Revisions and Repeals

The statute provides default rules that govern absent a contrary statute applicable to the matter. Conforming revisions and repeals will correct cross-references and preserve the existing role of the Office of Administrative Hearings, but will not generally affect contrary statutory procedures. The text of the conforming revisions and repeals is available on request.

Costs

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

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

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PROPOSED LAW:
ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

BACKGROUND

Introduction

The Legislature in 1987 authorized the California Law Revision Commission to make a study of whether there should be changes to administrative law.[1] The Commission has divided the study into four phases, in the following order of priority: (1) administrative adjudication, (2) judicial review, (3) rulemaking, (4) non-judicial oversight.

This is the first in a series of reports on the administrative law study. It presents the Commission's recommendations concerning administrative adjudication.

History of Project

The Commission initiated this project by retaining Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare a background study. The Commission also collected and made extensive use of materials from other jurisdictions, including the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws,[2] and the Federal Administrative Procedure Act.[3]

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

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

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1. 1987 Cal. Stat. res. ch. 47; see *Annual Report,* 19 Cal. L. Revision Comm'n Reports 501, 517 (1988).

2. Referred to in this report as the "1981 Model State APA."

3. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1976), originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. The federal statute is referred to in this report as the "Federal APA."

4. The consultants are Richard Turner, Robert Sullivan, Gene Livingston, and James Mattesich, all of Sacramento; Mark Levin of Los Angeles; and Professor Preble Stolz of Berkeley.

EXISTING CALIFORNIA LAW GOVERNING ADMINISTRATIVE ADJUDICATION[5]

California's Administrative Procedure Act[6] was enacted in 1945[7] in response to a study and recommendations by the Judicial Council.[8] The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.[9] The decision to limit coverage to licensing agencies was not based on a principled decision that an Administrative Procedure Act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other agencies were needed, but it was not prepared to make recommendations with respect to them.[10]

The Judicial Council's report and the resulting legislation was a pioneering effort. The creation of a central panel of hearing officers, for example, was an idea that was far ahead of its time. There were no comparable Administrative Procedure Acts at that time and the idea of an administrative procedure code applicable to agencies in general was untried and controversial. The Judicial Council and the Legislature moved cautiously, but the Administrative Procedure Act was well conceived and has served well in the 50 years since it was enacted.

During that time, the provisions of the Administrative Procedure Act relating to adjudication have been little changed.[11] Yet the regulatory and social welfare responsibilities of state government have broadened in ways unforeseen in 1945 and the scope of administrative adjudication is vastly greater now.

The 1945 California APA prescribes a single and unvarying mode of formal, trial-type adjudicatory procedure conducted by an independent hearing officer

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5. The description of existing California law governing administrative adjudication is drawn from the report on the matter prepared for the Commission by its consultant. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1071-73 (1992).

6. The Administrative Procedure Act appears at Government Code Sections 11340-11528." Adjudication is governed by Sections 11500-11528. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11370.5. The California statute is referred to in this report as "1945 California APA

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

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

9. The Judicial Council recommended a scheme of judicial review applicable to all administrative adjudications, not just those of licensing agencies. See Judicial Council of California, Tenth Biennial Report 26 (Dec. 31, 1944). This statute was the precursor of present Code of Civil Procedure Section 1094.5.

10. Judicial Council of California, Tenth Biennial Report 10, 28 (Dec. 31, 1944). The Judicial Council expressed hope that its work would be adapted to nonlicensing agencies such as tax, workers' compensation, public utilities, and benefit adjudications. These agencies were not covered because of practical limitations on the resources of the Judicial Council. See Kleps, *California's Approach to the Improvement of Administrative Procedure*, 32 Cal. L. Rev. 416 (1944).

11. The Administrative Procedure Act now covers a few agencies engaged in prosecutory functions that are not concerned with occupational licensing, such as the Fair Political Practices Commission. Also the act has been amended to include provisions for interpreters and to ban ex parte contacts with administrative law judges. Gov't Code §§ 11500(g), 11501.5, 11513(d)-(i), 11513.5.

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

(administrative law judge) assigned by the Office of Administrative Hearings.[12] The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.[13] There is little or no flexibility in the system to accommodate the many differing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only specified named agencies, and it covers only those functions required by the agency's organic statute.[14] Many important California agencies are wholly or largely uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, the Unemployment Insurance Appeals Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.[15]

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings. The only unifying theme is that adjudication in these agencies is not conducted by an administrative law judge assigned by the Office of Administrative Hearings. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.[16]

PROPOSED REVISION OF ADMINISTRATIVE PROCEDURE ACT

Comprehensive Statutory Revision

The Law Revision Commission recommends enactment of a new California administrative adjudication statute. The new statute builds on the 1945 California APA, but takes into account the many developments that have occurred in the 50 years since enactment of California's groundbreaking law. This period has seen an

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12. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. Government Code § 11504.

13. Gov't Code § 11517(b),(c). Thus the final decision rests with the agency heads who are also responsible for rulemaking and law enforcement. With very few exceptions (the only known exception is the Alcoholic Beverage Control Appeals Board), adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act.

14. Government Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovals. Bus. & Prof. Code §§ 485, 495. A list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice (Cal. Cont. Ed. Bar, Supp. 1994).

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

16. In some agencies (such as the Coastal Commission), there is no initial decision; the agency head or heads hear the evidence and argument themselves and their initial decision is also the final decision.

explosive growth of our knowledge and experience in administrative law and procedure, including development of well-articulated statutes in other states and at the federal level, as well as promulgation of several generations of model State Administrative Procedure Acts.

Comprehensive revision of the administrative procedure statute will enable California to take full advantage of these major developments in the law. It will enable complete and thorough procedural reform that could not easily be achieved on a piecemeal basis. And it will enable development of a broad and flexible statute that has the potential to be applied to a wider range of agencies and functions than are now governed by the Administrative Procedure Act.

Consolidation of Law Governing Administrative Adjudication

A major defect of the existing California law governing administrative adjudication by agencies is that the law as to the hearing procedures applicable in an individual agency may be relatively inaccessible. It is common to find an agency's procedure governed by a combination of general procedural statutes, special statutes applicable to the particular agency, regulations adopted by the agency, rules of procedure that have not been adopted by regulation, and unwritten practices followed by the agency.[17] This situation makes it difficult in many cases for a person having to deal with the administrative procedures of an agency to know exactly what to expect and how to proceed.

One objective of the proposed revision of the 1945 California APA is to consolidate the law governing the procedures of an agency so that it is readily accessible to those having business before the agency. The law should be largely stated in the general Administrative Procedure Act. Any variants of the law necessary for proceedings before a particular agency should be stated in the body of regulations adopted by that agency. This will ensure that a person having business before that agency will be able readily to find the governing administrative procedure.

Variety of Procedures

A significant limitation of the 1945 California APA is that it provides a single type of relatively formal adjudicative proceeding. But a less formal procedure is needed for many types of agency decisions, and an expedited process may be required for others. Some agency decisions are unique and unsuited to the standard hearing process; a special hearing procedure may be necessary. The proposed law expands the opportunity for an agency to select the type of procedure that is most appropriate for a particular decision.[18]

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

18. See discussion of "Choice of Procedures" *infra*.

Transitional Provisions

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

APPLICATION OF STATUTE

Application to Hearings Required by Constitution or Statute

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

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

Application to All State Agencies

The existing scheme of having different rules of administrative procedure applicable to different agencies, or in some cases having different rules applicable to the same agency depending on the type of proceeding, makes it difficult for the public and for practitioners who must deal with administrative agencies. The situation is aggravated by the fact that although the Administrative Procedure Act is readily accessible, other applicable rules of administrative procedure may not be. It is often the case that the most important elements of an agency's procedural code are not written.[19]

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

> Nowhere is it written that outsider ex parte contacts with the agency heads are tolerated, yet they are in some agencies. The extent to which agency functions are internally separated remains obscure, as does the process whereby agency heads reconsider ALJ decisions. Alternatively, the regulations may provide for procedures that are in fact never used. Nowhere are the rules about discovery stated. The factors that an

The present system confers an advantage on agency staff and specialists who often deal with the agency or are former staff members or agency heads. They are familiar with the unwritten procedures and precedents and traditional ways of resolving issues. They know about the unwritten exceptions and ways of avoiding obstacles. Such a system seriously disfavors inexperienced advocates and the clients they represent, particularly community or public interest organizations that do not have access to the few experts in the procedure of a particular agency.

Uncodified procedures may be arbitrarily or unevenly applied because staff members may adhere to them or make exceptions to them as they feel is proper. In many cases, staff members would like to improve agency procedure, but agency heads resist changes or ignore established procedure. Since no one is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

When each agency has its own procedural law, the quality of judicial review is also degraded. For example, when a court engages in judicial review of agency action and a procedural issue is drawn into question, the court has recourse only to precedents relating to that agency, if there are any. Even though the same problem is clearly dealt with by the Administrative Procedure Act and there is a well developed scheme of precedents relating to that problem, the court must reinvent an appropriate independent result.

For these reasons the Law Revision Commission recommends expansion of the Administrative Procedure Act to govern the hearing procedures of all state agencies,[20] subject to special cases where a limited exception is warranted or a special procedure is necessary. These cases are noted below, but they constitute the exception rather than the rule.

Definition of "State Agency"

As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the result that it is unclear whether their administrative adjudications are to be governed by the new Administrative Procedure Act. The new act deals with these situations so as to effect the broadest possible coverage:

(1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the new act applies.[21]

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agency uses to make particular kinds of decisions are seldom reduced to regulations or guidelines or made available through a system of adjudicatory precedents. Essentially, a great deal of the substantive law and procedure of the non-APA agencies is accessible only through the institutional memory of the staff.

It should be noted, however, that the procedural codes of many agencies are written. For example, the State Personnel Board has written rules, and the Occupational Safety and Health Appeals Board publishes a compendium of its rules.

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

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

(2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the new act.[22]

The new act also authorizes local agencies voluntarily to adopt the provisions of the new act. This may be useful for a local agency that needs administrative adjudication rules but does not have the resources or desire to formulate its own procedural code. Adoption of the new act will ensure the local agency of workable procedures that satisfy due process of law.

Separation of Powers

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs.[23]

The Legislature. The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its members and expulsion of members,[24] determination of ethics violations of members,[25] impeachment of state officers and judges,[26] and confirmation of gubernatorial appointments.[27] These judgments are politically sensitive in nature, and the procedure for arriving at them is not susceptible to formalization but must be left to the political judgment of the Legislature based on its determination of the propriety of the procedure for each of these decisions.

Exclusion of the Legislature from coverage of the new act would not frustrate the objective of a uniform body of administrative procedural law applicable to all state agencies, since the adjudicative decisions made by the Legislature are not the type that impact the relations between the average citizen and the state bureaucracy.

The Judicial Branch. The judicial branch of state government includes, besides the court system,[28] the Judicial Council,[29] the Commission on Judicial Appointments,[30] the Commission on Judicial Performance,[31] and the Judicial Criminal Justice Planning Committee.[32]

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22. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501 with respect to certificated employees.

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

24. Cal. Const. Art. IV, § 5.

25. Gov't Code §§ 8940-8955 (Joint Legislative Ethics Committee).

26. Cal. Const. Art. 4, § 18.

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

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

29. Cal. Const. Art. VI, § 6.

30. Cal. Const. Art. VI, § 7.

31. Cal. Const. Art. VI, § 7.

32. Penal Code § 13830.

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

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

(2) The Commission on Judicial Appointments conducts hearings to make judicial appointment confirmation decisions that are vested in the discretion of the commission. The administrative adjudication provisions of the new act would be inappropriately applied to them.

(3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the Judicial Council.[33]

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

Since the judicial branch agencies either do not conduct constitutionally or statutorily required administrative hearings, or the hearings they do conduct are or should be constitutionally exempt, the new Administrative Procedure Act has been drafted to exempt the entire judicial branch (not just the courts) from its application.

The Governor's Office. Although the Administrative Procedure Act is designed primarily for executive branch agencies, the head of the executive branch — the Governor and the Governor's executive office — must be able to make the kinds of political decisions necessary to run the executive branch effectively, free of Administrative Procedure Act formalities in a way that appears appropriate to the Governor. The Administrative Procedure Act maintains the integrity of the Governor and Governor's office by exempting it from application of the act.[34]

University of California

Article 9, Section 9 of the California Constitution makes the University of California independent and free of legislative control.[35] Although the Commission's fundamental recommendation is that the new Administrative Procedure Act should apply to all agencies of the state, it does not appear that the University may be subjected to the new act under this provision.[36]

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33. Cal. Const. Art. VI, § 18(h) ("The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."). The Judicial Council Rules of Court provide procedures at Rules 901-922.

34. There are a few exceptions to this general rule. See, e.g., Bus. & Prof. Code § 106.5 ("The proceedings for removal [of specified board members] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

35. Subdivision (a) of the section provides in relevant part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

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

Basic due process constraints apply to rulemaking and adjudicatory proceedings by the University of California as they do to all other state agencies. The Commission's inquiry reveals that the University has developed well-articulated notice and hearing procedures. Given the constitutional independence of the University, the Commission recommends that the Legislature not mandate that the University of California be subject to the Administrative Procedure Act.

Nonetheless, the procedures provided in the new Administrative Procedure Act are reasonable, flexible, and satisfy basic due process constraints. The Commission believes the procedures provided in the new act are suitable for the University of California's adjudicatory proceedings. The statute should make clear that the University may voluntarily adopt the Administrative Procedure Act. Adoption of the act by the University would promote the important objective of a uniform body of law applicable throughout the state. It would also make consistent the University's internal governance with the procedures the University must follow in its external relations with the rest of state government.

Executive Branch Agencies

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

Hearings the Commission recommends be exempted from the Administrative Procedure Act are:

Agricultural Labor Relations Board: election certification. The collective bargaining election certification provisions administered by the Agricultural Labor Relations Board are modeled after federal procedures and are unique and inconsistent with the Administrative Procedure Act.[37]

Alcoholic Beverage Control Appeals Board: appeals from ABC decisions. The Alcoholic Beverage Control Appeals Board is a review tribunal for appeals from decisions of the Department of Alcoholic Beverage Control. The Constitution provides procedural rules for these appeals that cannot be altered by statute.[38]

Department of Corrections and Related Entities (Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Evaluation Authority): parole hearings. Fundamental principles of the Administrative Procedure Act are irrelevant in parole hearings, including right to counsel, open hearings, choice of venue, pleadings, and relevant time periods. In addition, the interplay of due process principles and the likelihood that any fundamental change in procedure will generate extensive litigation in this area make application of the Administrative Procedure Act inadvisable.

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

38. Cal. Const. Art. XX, § 22.

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

Public Employment Relations Board: election certification. The collective bargaining election certification provisions administered by the Public Employment Relations Board are modeled after federal procedures and are unique and inconsistent with the Administrative Procedure Act.[39]

Public Utilities Commission: hearings under the Public Utilities Act. The Public Utilities Commission is a constitutional agency that is authorized to establish its own procedures, subject to statute and due process.[40] In addition to special constitutional provisions, there is an extensive body of special statutory rules governing hearings under the Public Utilities Act. As a practical matter, application of the Administrative Procedure Act in this legal context would have little effect other than to add complexity to the law.

Commission on State Mandates: resolution of disputes over state mandated local programs. The Commission on State Mandates hears and decides applications from local government for reimbursement from the State for state-mandated programs that impose costs on local government.[41] This is an intergovernmental relations matter that has little in common with ordinary administrative hearings and does not affect the public.

All other statutorily or constitutionally required hearings of executive branch agencies should generally remain subject to the Administrative Procedure Act. However, there are special statutes applicable to particular decisions of agencies — for example expedited time requirements for resolution of certain disputes — and these special provisions should ordinarily be preserved in conforming changes to the Administrative Procedure Act as reflective of a conscious policy determination.

CHOICE OF PROCEDURES

The proposed law expands the procedural options available to an agency, in recognition of the fact that simpler and quicker procedures may be needed for many types of agency decisions. Other decisions may be unique and require a special hearing procedure. The proposed law offers the following choices:

• *The Formal Hearing Procedure.* This is the default hearing procedure, based on the existing Administrative Procedure Act, that governs an agency decision unless one of the other options is selected and available. The formal hearing

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

40. Cal. Const. Art. XII, § 2.

41. See Gov't Code §§ 17525-17571.

procedure is not identical to the existing statute, however. It includes a number of modernizations, as well as improvements that make it more usable for a wider range of agencies.[42]

• *The Informal Hearing Procedure.* The informal hearing procedure is intended for smaller cases and is useful in other situations such as for taking public testimony. It is more in the nature of a conference than a trial, with the presiding officer authorized to limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument.[43]

• *A Special Hearing Procedure.* An agency may find it necessary to craft special procedures for certain decisions. The proposed law allows this, provided the decision is not one that is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Special hearing procedures are subject to basic public policy and due process limitations.[44]

• *Emergency Decision Procedure.* An agency may need to act immediately in an emergency situation, and the formal procedure is inadequate for this purpose. A few statutes provide authority for an agency to take immediate action for certain types of decisions, but there is no general provision to this effect. The proposed law provides an emergency decision framework for any agency that adopts a regulation specifying the parameters of the procedure.[45]

• *Declaratory Decision Procedure.* It may be important that an agency issue advice on the application of statutes or regulations it administers. The proposed law provides a declaratory decision structure in which agencies may do this.[46] Other hearing procedures do not apply in this situation, since the declaratory decision is based on stipulated facts.

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

Background

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges and hearing officers employed by the Office of Administrative Hearings in the Department of General Services.[47] However, most of the major state agencies employ their own administrative law judges and hearing officers.[48] The Law Revision Commission

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42. See discussion of "Formal Hearing Procedure" *infra*.

43. See discussion of "Informal Hearing Procedure" *infra*.

44. See discussion of "Special Hearing Procedure" *infra*.

45. See discussion of "Emergency Decision Procedure" *infra*.

46. See discussion of "Declaratory Decision Procedure" *infra*.

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

48. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Unemployment Insurance Appeals Board, Department of Industrial Relations, Workers Compensation Appeals Board, Public Utilities Commission, Department of Social Services.

estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings. And this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

The Law Revision Commission has devoted substantial resources to consideration of whether independent administrative law judges, employed by the Office of Administrative Hearings or by a successor central panel, should play a greater role in the California administrative adjudication process. The Commission's conclusion, for the reasons outlined below, is that there should not be a general removal of state agency hearing personnel and functions to a central panel. Any transfer of an agency's hearing functions to the central panel should be specific to that agency and its functions and should be based on a showing of the need for the particular transfer.

History of Central Panel in California

California was the first, and for many years the only, jurisdiction in the United States to adopt the concept of a central panel of hearing officers who would hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.[49] The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert in a number of fields, yet who would not have a potential conflict of interest with the agency for which they conducted hearings and would impart an appearance of fairness to hearings. The Judicial Council also foresaw some organizational efficiency in this arrangement.

Although the Judicial Council considered the possibility that hearing officers could be drawn from the central panel for all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise."[50]

The California system is generally considered a success. It has been copied elsewhere and central panels are now in place in Colorado, Florida, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, Washington, and Wisconsin. Proposals for adoption of the central panel system have recently been or are currently being considered in four other states of which

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49. Judicial Council of California, Tenth Biennial Report 11 (1944).

50. *Id.* at 14.

the Law Revision Commission is aware—Hawaii, New York, North Dakota, and Oregon. Legislation is also pending in Congress for a central federal panel.

Expansion of California Central Panel

With this favorable experience, a logical conclusion might be that the central panel system should be expanded in California to cover all administrative hearings. The main argument in favor of broader use of the central panel is that central panel administrative law judges are independent of the agency and therefore are able to hold hearings that are fair both in appearance and in fact. Other benefits of centralization are felt to be economy, efficiency, and improved working conditions for administrative law judges.

The Law Revision Commission's study of the operation of the central panel system in California and in the other jurisdictions that have adopted it, including review of California's major administrative agencies not presently covered by the central panel, indicates that despite these potential benefits, there are a number of serious objections to expansion of the central panel beyond its present scope in California.[51]

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

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51. Among the concerns with expansion of the central panel that have been expressed by various state agencies, the following are common:

(1) The agency deals in a specialized area for which special knowledge and expertise is necessary, which could not be maintained in a central panel setting.

(2) The agency has a high volume operation that must deal with cases in a way far different from the typical central panel administrative law judge hearing.

(3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.

(4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.

(5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.

(6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.

(7) The agency's hearing procedure is constitutionally exempt from legislative control.

(8) The purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.

(9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.

(10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.

(11) The agency conducts informal hearings; it would be inappropriate to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

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

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

Fourth, further centralization is unlikely to generate savings for the state and it could increase costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges and concluded it was not clear any savings would result.[52] There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law judges serve several functions, acting as legal advisors as well as hearing officers; loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fifth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency.

Sixth, each agency, its mission and needs, is unique. The Commission has found that it is not possible to generalize with respect to the central panel issue and the propriety of the central panel for all agencies. Any recommendation for transfer of an agency's functions should be specific, based on a review of the individual agency and its operations.

Finally, the benefits of an independent hearing officer can be achieved without disruption of existing personnel structures by requiring separation of adjudicative from prosecutorial functions within an agency and by limiting ex parte communications between the hearing officer and agency prosecutorial personnel. The proposed law includes fundamental separation of functions requirements and ex parte communication limitations for all adjudications under the Administrative Procedure Act.[53]

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

53. See discussion of "Separation of Functions" and "Command Influence" *infra*.

IMPARTIALITY OF DECISIONMAKER

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

Exclusivity of Record

Existing California case law requires that the decision be based on the factual record produced at the hearing.[54] Both the Federal APA[55] and the 1981 Model State APA[56] codify this aspect of due process, and the proposed legislation does the same for California.

However, some agencies rely on the special factual knowledge and expertise of the decisionmaker in the area, and in fact agency members may be appointed for just this purpose. The proposed law addresses this situation by permitting evidence of record to include, in addition to officially noticeable matters provided for by existing law,[57] other supplemental evidence not produced at the hearing, provided the evidence is made a part of the record and all parties are given an opportunity to comment on it.

Bias

The 1945 California APA makes clear that a decisionmaker may be disqualified if unable to "accord a fair and impartial hearing or consideration."[58] The proposed law would recodify this standard in the more concrete traditional terms of "bias, prejudice, interest," and imports from the Code of Civil Procedure a few key criteria of particular relevance to administrative adjudication.[59]

Notwithstanding actual bias, existing law adopts a "rule of necessity" that if disqualification of the decisionmaker would prevent the agency from acting (e.g., causing lack of a quorum), the decisionmaker may nonetheless participate. The

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54. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1126 (1992).

55. 5 U.S.C. § 556(e).

56. 1981 Model State APA § 4-215(d).

57. Gov't Code § 11515.

58. Gov't Code § 11512(c).

59. The bias standard is circumscribed by a specification of characteristics that do not constitute bias, including cultural factors affecting the judge, prior expressions of the judge on legal and factual issues that arise in the proceeding, and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2.

proposed law addresses this problem with a provision drawn from the 1981 Model State APA that disqualifies the decisionmaker and provides for substitution of another person by the appointing authority.[60]

Ex Parte Communications

While existing California law is clear that factual inputs to the decisionmaker must be on the record, it is not clear whether ex parte contacts concerning law or policy are permissible.[61] Existing Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of Administrative Hearings, but is silent as to ex parte communications to agency heads and to communications to any decisionmaker in the great majority of administrative adjudications in California that do not fall under the existing Administrative Procedure Act. In some state agencies ex parte contacts are tolerated or encouraged.[62]

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

(1) Discussion of noncontroversial matters of practice or procedure is permissible.

(2) The decisionmaker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decisionmaker is from personnel within the agency that is a party to the proceeding. The decisionmaker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.

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

(4) The ban on ex parte communications would not apply in a nonprosecutorial proceeding, such as an initial licensing decision. Although nonprosecutorial proceedings are trial-like, they involve a substantial element of policy determination where it may be important that the decisionmaker consult more broadly than the immediate parties to the proceeding. The proposed law would allow policy advice to be given in nonprosecutorial proceedings, provided it is summarized in the record and made available to all parties.

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60. 1981 Model State APA § 4-202(e)-(f).

61. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1128 (1992).

62. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1130 (1992). Some, such as the California Public Utilities Commission, have developed elaborate ex parte prohibitions tailored to their specific needs.

[**Note.** The Commission particularly solicits comment on a more narrow alternative that would preclude ex parte communications from an agency investigator or advocate in a nonprosecutorial proceeding unless the communication involves necessary technical advice or a specified land use agency. See draft of proposed Section 643.430(c) (permissible ex parte communications from agency personnel).]

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

Separation of Functions

Existing California statute and case law on separation of functions is unclear.[63] To avoid prejudgment, the decisionmaker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. The proposed law codifies this principle.

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

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

(2) Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would gridlock the system.[64] The proposed law exempts drivers' licensing cases from the separation of functions requirements. The exemption is limited in scope and would not extend to other types of operators' certificates, such as schoolbus driver certificates. The special certificate hearings are a relatively small portion of the total,[65] and they are all occupational in character. Requiring separation of functions in this limited class will provide useful experience on the actual cost and benefit of the separation of functions requirement.

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

64. The most recent annual statistics (1993) show 325,000 DMV actions against drivers resulting in 157,716 hearings, including 4,259 hearings involving commercial drivers.

65. There were 211 special certificate hearings in 1993, at a total cost of $19,783.

Command Influence

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

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

FORMAL HEARING PROCEDURE

The formal hearing procedure is based on the 1945 California APA. The proposed law makes a number of modernizations and improvements in the procedure, both to make it more usable and to broaden the range of hearings to which it can be applied. Significant changes from existing law are outlined below.

Notice and Pleadings

Terminology. Existing administrative procedures in California employ a wide variety of terminology to describe the parties and their pleadings, and tend to be based on an accusatory or prosecutorial hearing model, e.g., "accusation," "statement of issues," "order initiating investigation," "notice of defense," "appeal," "notice of adverse action," and "petition for hearing." The proposed law standardizes terminology. The parties to an administrative adjudication are the agency and the person to which the agency action is directed; their pleadings are the notice of commencement of proceeding and the response. These and other terms are made neutral to reflect the expanded application of the proposed law.

Initiation of proceedings. The proposed law makes clear that a proceeding is initiated by the agency taking jurisdiction over the matter, either on its own motion or in response to an application from a person. To encourage agency responsiveness to applications for agency action, the proposed law requires the agency within 30 days to acknowledge receipt of the application and provide contact information, and within 90 days to act on the application, either by granting or denying it or by commencing an adjudicative proceeding in response. The proposed law makes clear that a third party does not have a right to compel an agency to prosecute a case. An agency is permitted to modify these requirements by regulation, and a special statute may provide a different rule for a specific situation.[66]

Service. First class mail is generally permitted for notices, and the proposed law adds flexibility by authorizing other means of notification such as delivery service

66. E.g., Bus. & Prof. Code §§ 10086 (hearing must commence within 30 days after request to Real Estate Commissioner), 11019 (hearing must commence within 15 days after request to Real Estate Commissioner).

and facsimile transmission. However, service of the notice of commencement of proceeding must be by registered or certified mail or personal service. This requirement would not apply where the respondent has previously appeared in the same or a related proceeding; service in a proceeding before an appeals board, for example, could be by first class mail or other means.

Amendment of pleadings. The 1945 California APA allows amendment of the initial pleading.[67] The law is silent concerning amendment of responsive pleadings, and there is doubt about the propriety of amendment of pleadings outside of the 1945 California APA.[68] The proposed law makes clear that both the notice of commencement of proceeding and the response may be amended or supplemented at will before commencement of the hearing, subject to the right of the other party to prepare a case in response. After commencement of the hearing, amendments are discretionary with the presiding officer.

Role of Administrative Law Judge

The 1945 California APA is based on a model of fact-finding by an administrative law judge employed by the Office of Administrative Hearings.[69] In general, the administrative law judge holds a hearing, formulates a proposed decision, and transmits it to the agency for which the hearing is held; the agency head may either adopt the proposed decision as its final decision, or reject the decision and decide the case itself on the record.[70]

This procedural format of the division of responsibilities between the administrative law judge and the agency head is modified in the proposed law to adapt it for use by all agencies and for all types of cases. This includes agencies that employ their own administrative law judges, agencies where the agency head is both the finder of fact and the decisionmaker, and agencies that have lengthy hearings as well as those whose hearings are brief.

The proposed law is based on the 1945 California APA, with several concepts drawn from the 1981 Model State APA, and various exceptions to accommodate the existing practices of state agencies not covered by the Administrative Procedure Act. The Commission believes the approach of the proposed law, outlined below, has the necessary flexibility to enable all state agencies to conduct their administrative hearings under the Administrative Procedure Act. In the case of a proceeding for which this model is too constraining, the agency may adopt a special procedure to govern the hearing, subject to the limitations of the statute governing special hearing procedures.[71]

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67. Gov't Code §§ 11507, 11516.

68. See discussion in Asimow, *The Adjudication Process* 16 n.30 (Oct. 1991).

69. For a more detailed description of proceedings under the existing administrative procedure act, see Office of Administrative Hearings, "Outline of Administrative Practice before the Office of Administrative Hearings" (March 1989).

70. Gov't Code § 11517.

71. See discussion of "Special Hearing Procedure" *infra*.

(1) Each agency head decides whether the hearing in an administrative adjudication by that agency will be conducted by an administrative law judge or by the agency head itself. The agency head may, instead of sitting en banc, divide into panels, or delegate the hearing function to a person charged with that responsibility. However, a hearing of a type for which an administrative law judge from outside the agency is presently required by statute would continue to be heard by an independent administrative law judge provided by the Office of Administrative Hearings.

(2) If the agency head conducts the hearing, the agency head issues a final decision within 100 days after the end of the hearing.

(3) If an administrative law judge conducts the hearing, the administrative law judge renders a proposed decision within 30 days after the end of the hearing. The agency head receives the proposed decision and has 100 days within which to act on it—either to adopt it, modify it, or commence review proceedings on it. A proposed decision that is not acted on by the agency within the required period becomes a final decision by operation of law.

(4) Either a proposed decision or a final decision is subject to administrative review in the discretion of the agency. This reverses the general rule under existing law that an appeal to the agency head is available as a matter of right, with its attendant expense. The agency would have authority to review some but not all issues, or to preclude further administrative review outright. Where review is provided, an agency would have authority to delegate the review function to subordinate employees.

In order to avoid unnecessary review procedures, the proposed law provides expeditious means of correcting mistakes and technical errors in the decision, and provides a summary procedure for adoption of the proposed decision with modifications. In the review process, the reviewing authority is limited to a review of the record, but may take additional evidence where necessary, or the review may be made on an agreed statement. This will minimize exposure of the parties to the time and expense of a second formal hearing process. In addition, since the presiding officer at the hearing has had the opportunity to observe the witnesses, the presiding officer's credibility determinations based on observation of demeanor and the like are entitled to great weight on review.[72]

The end result of administrative review is either issuance of a final decision or a remand for further hearings within 100 days.

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72. The great weight requirement for credibility determinations would be applied only indirectly, as a factor in any judicial review of the administrative decision. This requirement would codify in California the general rule applied in federal cases, as well as in a number of state agencies. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) (Federal APA); Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Lab. Code § 1148 (Agricultural Labor Relations Board).

Prehearing Procedures

Intervention. The 1945 California APA is not clear on the right of a third party to intervene in an administrative adjudication. Yet situations do arise when an administrative adjudication will affect the legal rights, duties, privileges, or immunities of a person who has not been made a party to the proceeding. In such a situation, the proposed law would permit intervention by the affected party if the intervention will not impair the interests of justice and the orderly and prompt conduct of the proceedings. This determination is vested in the presiding officer, and the presiding officer's decision is final and nonreviewable. The presiding officer may impose appropriate conditions on intervention, such as limiting the issues addressed by the intervenor, regulating discovery and cross-examination by the intervenor, and limiting the intervenor's involvement in settlement negotiations. In some types of proceedings intervention may be inappropriate or unduly complicate matters; the proposed law enables an agency by regulation to limit or preclude intervention practice.

Discovery and Subpoenas. The 1945 California APA provides for limited discovery in administrative adjudications.[73] The Commission believes the extensive discovery available in civil proceedings is inappropriate for administrative adjudications, which should be simple, quick, and inexpensive. For this reason the proposed law continues the limited discovery approach of existing law, subject to a number of minor changes,[74] and broadens its application to all agencies.

Under the 1945 California APA an agency has broad subpoena authority.[75] The proposed law continues this authority and extends it to the other state agencies, as well as to attorneys of the parties as in civil practice; the proposed law adds provisions clarifying procedures for quashing a subpoena once issued. In addition, the proposed law permits the respondent to request issuance of a subpoena duces tecum for production of a document at any reasonable time and place, rather than only at the hearing. This will enable the respondent adequate time to prepare and help avoid the need for a continuance. To protect against hardship, the proposed law permits a custodian of subpoenaed documents to satisfy the subpoena by delivery of a copy or by making the documents available for inspection and copying, in the manner allowed in court proceedings.

Under existing law, discovery disputes between the parties are referred to the superior court for resolution and enforcement. To expedite the discovery process, the proposed law vests this matter in the presiding officer.

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73. Gov't Code §§ 11507.5, 11507.6, 11507.7, 11511; State of California v. Superior Court, 16 Cal. App. 3d 87, 93 Cal. Rptr. 663 (1971).

74. For example, a recent case has questioned the fairness and constitutionality of the existing provision that the agency can refuse to authorize the respondent to depose an unavailable witness. Gov't Code § 11511; Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986). The proposed law addresses this point by allowing the presiding officer, if one has been appointed, to order a deposition.

75. Gov't Code § 11510.

Prehearing Conference. The proposed law makes the prehearing conference, presently available in proceedings before 1945 California APA agencies, applicable to all state agencies. The proposed law adds the following features designed to enhance the effectiveness of the prehearing process:

(1) The conference may be conducted by telephone or other electronic means.

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

(3) The conference should offer the opportunity for alternative dispute resolution, and where appropriate be converted into an informal hearing.

The prehearing conference is conducted by the presiding officer who will preside at the hearing. Settlement possibilities may be explored at the prehearing conference. If it appears that there is a possibility of settlement, the proposed law allows the presiding officer to order a separate mandatory settlement conference, to be held before a different settlement judge, if one is available. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

Consolidation and Severance. The 1945 California APA contains no provisions allowing agencies to consolidate related cases or to sever issues in a case that could be more economically handled in several parts. The proposed law follows the consolidation and severance procedures of the Code of Civil Procedure,[76] which have worked well in practice in civil cases. Control of consolidation and severance issues is vested in the presiding officer or administering agency.

Resolution Without Hearing

Settlement. An agency has implied power to settle a case.[77] The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a settlement.[78] This resolves the difficulty under the 1945 California APA that the agency head is required to approve a settlement but in many cases the agency head is a body of part-time appointees unable to meet and consider the settlement for a considerable period of time. The proposed law also makes clear that a settlement may be made before or after issuance of the notice of commencement of proceeding, except in an occupational licensing case. An occupational licensing case may be settled only after issuance of the notice of commencement of proceeding in order to ensure that the disciplinary action is a matter of public record.

Alternative Dispute Resolution. Alternative dispute resolution techniques, such as mediation and arbitration, offer the potential of substantial savings of time and money in administrative adjudication. Federal administrative procedure in recent

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76. Code Civ. Proc. § 1048.

77. Rich Vision Centers, Inc. v. Bd. of Medic. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983).

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

years has made effective use of alternative dispute resolution,[79] and in 1990 Congress amended the Federal APA to require agencies to explore and utilize alternative dispute resolution techniques in all agency functions.[80] The 1945 California APA is silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.[81] A negotiated outcome is preferable in most situations to the costly, time-consuming, and difficult process of adjudication and judicial review. The Law Revision Commission recommends that alternative dispute resolution be fostered in California administrative adjudication by statutorily recognizing these techniques and encouraging agencies to put in place feasible mechanisms to facilitate them.

The proposed law makes clear that all agencies have authority to refer cases, with the consent of the parties, for mediation or for binding or nonbinding arbitration by neutral dispute resolution personnel. Mediation communications are kept confidential just as such communications remain confidential in civil proceedings,[82] and reference to nonbinding arbitration activities is inadmissible in a subsequent de novo proceeding; the presiding officer, mediator, or arbitrator cannot be compelled to testify in subsequent proceedings concerning the alternative dispute resolution activities.[83] The Office of Administrative Hearings is charged with responsibility to develop model regulations for alternative dispute resolution proceedings that govern disputes referred to alternative dispute resolution unless modified by the agency. The Commission believes these provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

Hearing Procedures

Open Hearings. The 1945 California APA is silent on the issue whether an administrative hearing is open to the public. The general assumption is that hearings are open, and there is authority that this is a matter of due process.[84] The proposed law makes clear that a hearing is generally open to the public, subject to special statutes such as those protecting trade secrets or other confidential or privileged matters, or those protecting child victims and witnesses.

Present and Rebut Evidence. The Administrative Procedure Act governs decisions where an evidentiary hearing for determination of facts is necessary. Inherent in such a hearing is the ability of affected parties to present and rebut evidence. The proposed law codifies this principle.

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79. See discussion in Asimow, *The Adjudication Process* 45-47 (Oct. 1991).

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

81. See discussion in Asimow, *The Adjudication Process* 44-45 (Oct. 1991).

82. Evid. Code § 1152.5.

83. *Cf.* Evid. Code § 703.5.

84. See discussion in Asimow, *The Adjudication Process* 109 (Oct. 1991).

Telephone Hearings. The 1945 California APA contemplates a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical attendance at the hearing difficult. Moreover, an in-person hearing may require parties or witnesses to sit and wait for long periods of time. In such situations, it makes sense to take testimony telephonically. The Unemployment Insurance Appeals Board makes use of telephone hearings with a great amount of success.[85]

The proposed law permits a hearing to be conducted by conference telephone call, video-conferencing, or other appropriate telecommunications technology, provided all participants are audible to each other. A party may object to a telephonic hearing on a showing that a credibility determination is important to the case and that the telephone hearing will impair a proper determination of credibility.

Language Assistance. Existing provisions require interpreters for language-disabled parties[86] in proceedings before specified agencies. The proposed law preserves this requirement and extends it to include language-disabled witnesses.

Transcripts. The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improvement of the quality of electronic recording, and with the use of multi-track recorders, monitors, and trained hearing officers, the problems of electronic recording are minimized, and the cost saving may be substantial. For these reasons the proposed law permits an agency to provide electronic recording of proceedings in all cases. The presiding officer would have authority to require stenographic reporting in an appropriate situation, and a party could require it at the party's own expense.

Evidence

Technical Rules of Evidence. Under the 1945 California APA technical rules of evidence are inapplicable—any relevant evidence is admissible if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.[87] The reasons for adoption of this rule in 1945 were that many parties are unrepresented by counsel in administrative adjudications, and that the protections of the rules of evidence designed for fact-finding by lay juries are unnecessary in administrative decisionmaking by experts in the field.[88] These reasons are sound to this day, and the proposed law preserves the basic rule of broad admissibility, subject to the right of an agency by regulation to require adherence to technical rules of evidence.

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85. See discussion in Asimow, *The Adjudication Process* 106-07 (Oct. 1991).

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

87. Gov't Code § 11513(c)

88. Judicial Council of California, Tenth Biennial Report 21 (1944).

The proposed law codifies a few key exceptions to the general rule of admissibility. Existing law permits the presiding officer to exclude irrelevant and unduly repetitious evidence.[89] This authority should be broadened so that the presiding officer also has discretion to exclude evidence that contributes little to the result but promotes delay and confusion. The proposed law adopts the standard of Evidence Code Section 352, which provides for exclusion of evidence whose probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Scientific Evidence. California case law[90] applies court standards for admissibility of scientific evidence to administrative adjudication.[91] Federal court standards are now more liberal than state court standards.[92] In order not to restrict development of the law governing admissibility of scientific evidence, the proposed law makes clear that such evidence is admissible if it would be admissible in either state or federal courts.

Affidavits. The 1945 California APA permits use of affidavits as evidence, with notification of the intent to introduce the affidavit at least 10 days before the hearing.[93] The affidavit procedure is useful, and the proposed law extends it to all state agencies, subject to the right of an agency to limit use of affidavits by regulation. The 10-day notice requirement is extended to 15 days, to give the opposing party an adequate opportunity to retain counsel and respond by cross-examination or otherwise.

Hearsay. Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding.[94] The proposed law extends this provision (known as the "residuum rule") to other agencies as well. The residuum rule is desirable as a general matter because it forces the use of reliable evidence, which may be particularly important in an administrative adjudication in which the sanction is severe, such as a license revocation.

The proposed law also makes clear that the residuum rule can be raised for the first time on judicial review. Existing law is unclear on this matter.[95] It may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence.

Review of Evidentiary Rulings. It is not clear whether the evidentiary rulings of the presiding officer are subject to administrative review. An argument can be

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89. Gov't Code § 11513(c).

90. Seering v. Dept. of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987)

91. See discussion in Asimow, *The Adjudicative Process* 61-63 (October 1991).

92. Daubert v. Merrell Dow Pharm., 113 S. Ct. 2786 (1993).

93. Gov't Code § 11514.

94. Gov't Code § 11513(c).

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

made that the rulings are conclusive.[96] The proposed law makes clear that the agency head may review evidentiary determinations of the presiding officer. The adjudicatory authority is vested in the agency head, and the agency head should be the ultimate administrative decisionmaker.

The continuation of existing law on judicial review should not be taken as Law Revision Commission review or approval of the law. The Commission is currently studying the law governing judicial review of agency action and will make a separate recommendation concerning it. The present recommendation does not address the matter, but merely preserves the status quo.

Enforcement of Orders and Sanctions

The 1945 California APA provides that disobedience of orders or obstructive or contumacious behavior in an administrative adjudication proceeding may be certified to the superior court for contempt proceedings.[97] This authority is continued in the proposed law.

The proposed law also seeks to curb bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. These are addressed in civil actions by monetary sanctions,[98] where experience has been favorable. The proposed law extends to the presiding officer or agency in an adjudicative proceeding the right to order monetary sanctions for such behavior. The order is subject to administrative and judicial review to the same extent as other orders in the adjudicative proceeding.

Decision

Burden of Proof. The 1945 California APA is silent on the issue of burden of proof in an administrative hearing, but cases put the burden on the proponent of a decision.[99] The proposed law codifies this rule, and provides generally that the burden is a preponderance of the evidence. In the case of an occupational license, however, because of the potential severity of the sanction, the burden is clear and convincing evidence.

Voting by Agency Members. The 1945 California APA permits voting by agency members by mail.[100] The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

Findings and Basis of Decision. The 1945 California APA requires the decision to contain findings of fact and a determination of issues, together with the penalty if any.[101] The statute is supplemented by the case law requirement that the decision contain whatever necessary sub-findings are needed to link the evidence to the

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

97. Gov't Code § 11525.

98. Code Civ. Proc. § 128.5.

99. See discussion in Asimow, *The Adjudication Process* 73 (Oct. 1991).

100. Gov't Code § 11526.

101. Gov't Code 11518.

ultimate facts.[102] The proposed law augments this recitation with the requirement that the factual and legal basis for the decision be stated as to each of the principal controverted issues. This will force the decisionmaker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

Precedent Decisions

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

The precedent decision provision recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although agency decisions are public records, they are inaccessible to the public except in the case of the few existing agencies that publish their decisions or designate precedent decisions.[103]

Extension of the precedent decision requirement to all agencies would make the decisions generally available and would benefit everyone, including counsel for both the agency and the parties and the presiding officers and agency heads who make the decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in an administrative adjudication. And it is more efficient to cite an existing decision than to reconstruct the policy or even decide inconsistently without knowing or acknowledging that this has occurred.

Administrative Review

The proposed law codifies the requirement that administrative review of a proposed decision be on the record, but adds a provision drawn from appellate practice enabling a record based on an agreed statement of the parties.[104]

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102. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974).

103. Agencies that routinely publish all their decisions include the Agricultural Labor Relations Board, Public Utilities Commission, Public Employment Relations Board, and Workers Compensation Appeals Board.

The Office of Administrative Law has determined that an agency's designation of a decision as precedential violates Government Code Section 11347.5 unless the designation is made pursuant to rulemaking procedures, except where pursuant to Section 11346 the designation is expressly exempted by statute. 1993 OAL Det. No. 1. The Fair Employment and Housing Commission (Gov't Code § 12935(h)), the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409), and the State Personnel Board (Gov't Code § 19582.5) designate and publish precedent decisions pursuant to express statutory authority, but only a designation by the State Personnel Board is expressly exempted by statute from rulemaking procedures. The Law Revision Commission is aware of at least one superior court ruling that precedent decisions designated by the Unemployment Insurance Appeals Board without compliance with rulemaking procedures are invalid. Bacon v. CUIAB, Butte County No. 114071 (June 29, 1994) (ruling on respondent's motion for summary judgment and summary adjudication). The proposed law expressly exempts agency designation of precedent decisions from rulemaking procedures.

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

The proposed law also expands the ability of an agency head to adopt summarily a proposed decision without full administrative review. Under the proposed law, the agency head may summarily adopt the proposed decision with clarifying changes that do not affect the factual or legal basis of the decision. In addition, the agency head may summarily adopt the proposed decision with a change of legal basis, after offering the parties an opportunity to comment on the change.

Judicial Review

Disposition of the existing Administrative Procedure Act requires disposition of Government Code Section 11523, which governs judicial review of decisions under the Administrative Procedure Act.

The proposed law continues this provision without change, making clear its application to decisions required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Other decisions are not addressed by the statute and the law governing judicial review of these decisions is not changed.

INFORMAL HEARING PROCEDURE

The standard formal adjudicatory hearing procedure under the 1945 California APA may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process.[105]

To address this concern, the proposed law permits agencies to resolve matters involving only a minor sanction or matters in which there is no factual dispute by means of an informal adjudicative hearing process, drawn from the 1981 Model State APA.[106] This process would also be available to an agency that specifies classes of cases where it would be appropriate, provided use of the informal process would not violate due process requirements for those cases.

The informal hearing may be particularly useful in a number of situations:[107]

- Where there is no disputed issue of fact but only a question of law, policy, or discretion.
- A decision to deny a discretionary permit, grant, or license where a hearing is required by statute or due process of law.
- Various land use planning and environmental decisions.
- An individualized ratemaking case.

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105. See discussion in Asimow, *The Adjudication Process* 87-91 (Oct. 1991).

106. 1981 Model State APA §§ 4-401-3. The notion of establishing alternate adjudicative procedures is found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Admin. L. Rev. 31, 47 (1979).

107. See discussion in Asimow, *The Adjudication Process* 94-97 (Oct. 1991).

- Tax adjudications conducted by the State Board of Equalization.

A justification for providing a less formal alternate procedure is that without it, many agencies will either adopt or obtain enactment of special hearing procedures, or will proceed "informally" in a manner not spelled out by any statute or regulation. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel, and reviewing courts, as well as for lawyers. This pattern is already apparent, to a considerable extent, at both the state and federal levels.

The proposed informal hearing process is a simplified administrative adjudication, involving no prehearing conference or discovery. At the hearing the presiding officer regulates the course of proceedings and limits witnesses, testimony, evidence, rebuttal, and argument. Cross-examination is ordinarily not permitted, and an informal hearing should only be used in a case that is susceptible of determination without the need for substantial cross-examination. The impartiality requirements and fundamental public policy and due process guarantees of the formal hearing procedure would continue to apply.

An informal hearing procedure is essentially "a conference that lacks courtroom drama but nevertheless provides assurance that the issues will be aired, an unbiased decisionmaker will make a decision based exclusively on the record of the proceedings, the decision will be explained, and it will be reviewed by a higher-level decisionmaker (such as the agency heads)."[108]

SPECIAL HEARING PROCEDURE

The proposed law sets out basic formal and informal procedures for the adjudicative process that are complete in themselves. The procedures build on the 1945 California APA,[109] which is widely applicable in California agencies.[110]

The proposed Administrative Procedure Act is designed to be sufficiently broad to accommodate most hearings of most agencies. However, because of the expanded scope and application of the proposed law, there will be some cases where the general procedure is not appropriate, and there are situations where it is clear that the provisions of the statute will not work for the circumstances of a particular agency or type of hearing. A number of major state agencies with a high volume of administrative hearings currently have well-articulated and smoothly functioning procedures that are generally accessible and satisfactory to all involved in the proceedings. The procedures have been adapted to accommodate the case load, timing requirements, and other special circumstances for hearings of

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

109. Gov't Code §§ 11500-11529.

110. For a current listing of administrative hearings in which the 1945 California APA is applicable, see California Administrative Hearing Practice, Appendix A: Table of State-Level Adjudicatory Activities (Cal. Cont. Ed. Bar, Supp. 1994).

that type. In recognition of this situation, the statute permits the agency by regulation to retain a special hearing procedure to govern the matter.

There are three significant limitations on the ability of an agency to provide a special hearing procedure.

First, a special hearing procedure may not be used in proceedings that are currently governed by the 1945 California APA, or in proceedings by agencies that may be created in the future. The opportunity for a special hearing procedure is not necessary in existing APA proceedings since the proposed law is based upon them. These restrictions will also promote uniformity of administrative procedure among state agencies—one of the chief goals of the proposed law.

Second, adoption of a proposed hearing procedure must be done by regulation through the rulemaking provisions of the Administrative Procedure Act.[111] This process will ensure the opportunity for participation of interested and affected parties in the procedures of the agencies with which they are involved. It will also ensure that any special hearing procedure is embodied in regulations that are accessible to the public. The regulations are, of course, subject to any special statutes applicable to the particular hearing.

Third, the special hearing procedure, while it departs from the procedural detail of the statutory formal or informal administrative procedure, must conform to the fundamental public policy and due process features of the statutory procedure:

- The presiding officer must be free of bias, prejudice, and interest.[112]
- The adjudicatory function must be separated from the investigative, prosecutorial, and advocacy functions within the agency.[113]
- Ex parte communications are restricted.[114]
- The hearing is open to public observation.[115]
- The agency must make available language assistance to the extent required by existing law.[116]
- Each party has the right to present and rebut evidence.[117]
- The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision.[118]
- The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.[119]

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111. Gov't Code §§ 11340-11356.

112. See "Bias" *supra.*

113. See "Separation of Functions" and "Command Influence" *supra.*

114. See "Ex Parte Communications" *supra.*

115. See "Open Hearings" *supra.*

116. See "Language Assistance" *supra.*

117. See "Present and Rebut Evidence" *supra.*

118. See "Exclusivity of Record" and "Findings and Basis of Decision" *supra.*

119. See "Precedent Decisions" *supra.*

The statutes and regulations governing adjudicative proceedings of the major agencies not now governed by the Administrative Procedure Act to a large extent already satisfy these requirements. To minimize the burden on these agencies of adopting regulations, the proposal law includes transitional provisions that will simplify the regulation adopting process and will allow incorporation by reference of existing statutes and regulations.

EMERGENCY DECISION PROCEDURE

In some circumstances there is a need for an agency to take immediate action for the protection of the public. If there is serious abuse that causes immediate and irreparable physical or emotional injury to a ward in a child or elder care facility, for example, an agency may need to act quickly to remove the ward or close the facility or temporarily suspend its license. Emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation, and this remedy has profed to be unsatisfactory in professional licensing cases where interim suspension is urgently needed to protect public safety.[120]

The 1945 California APA does not recognize the need of an agency to make a quick decision in an emergency situation, although a few special statutes provide individual agencies the ability to act quickly in cases of necessity.[121] Absent a specific authorization for emergency procedure, the administrative procedure act would mandate full proceedings, which could thwart an agency in dealing with an emergency situation. All agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

The proposed law permits an agency to adopt a regulation authorizing emergency action where there is immediate danger to the public health, safety, or welfare. Under the emergency proceeding the affected person is given notice and an opportunity to be heard before the agency acts, if this is feasible. The notice and hearing may be telephonic or by other electronic means.

The emergency decision is limited to interim, temporary relief, and is subject to immediate judicial review. Issuance of the emergency relief does not resolve the underlying issue, and the agency must proceed promptly to determine the basic dispute by standard administrative adjudication processes.

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120. See discussion in Asimow, *The Adjudication Process* 100 (Oct. 1991).

121. Existing emergency procedures include Section 11529 (medical licensee); Bus. & Prof. Code §§ 6007(c) (attorney), 10086(a) (real estate licensee); Health & Safety Code §§ 1550 (last ¶), 1569.50, 1596.886 (health facilities and day care centers); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV license suspension).

DECLARATORY DECISION PROCEDURE

Declaratory relief may be a useful means by which a person may obtain fully reliable information concerning application of agency regulations to the person's particular circumstances. The Federal APA provides for declaratory orders,[122] as do modern state statutes.[123] However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

The proposed law creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. Its purpose is to provide an inexpensive and generally available avenue for obtaining advice from an administrative agency. Issuance of a declaratory decision is discretionary with the agency. Procedural details may be provided by agency regulation. The Office of Administrative Hearings is charged with promulgation of model regulations that are applicable unless different rules are adopted by an agency. The agency may choose to preclude a declaratory decision by regulation if it appears that a declaratory decision is inappropriate for the matters administered by it.

Under the proposed law a declaratory decision is available only in case of an actual controversy, and issuance of a declaratory decision is discretionary with the agency. The general rules of administrative hearing practice are inapplicable, since there often will be no fact-finding involved — only application of laws or regulations to a prescribed set of facts. A declaratory decision has the same status and binding effect as to those facts as any other agency decision.

CONVERSION OF PROCEEDINGS

It may become apparent in an adjudicative proceeding that the issues are such that a formal hearing is unnecessary and the matter can be resolved by an informal hearing. Or, the agency may conclude that the matter should be resolved not by an individual decision but by adoption of general regulations. These and other circumstances indicate the desirability of a procedure permitting conversion of administrative proceedings from one type to another appropriate type.

There are no provisions in the 1945 California APA for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.[124] Under this procedure, the presiding officer or other agency official responsible for the proceeding may convert it to another type if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party. Notice to affected parties is required.

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122. Federal APA § 554(e).

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

124. 1981 Model State APA § 1-107.

CONFORMING REVISIONS AND REPEALS

This recommendation sets out selected conforming revisions and repeals. The entire text of conforming revisions and repeals is in preparation and will be available for review and comment on request.

In general, the conforming revisions and repeals will do the following:

(1) A statute that refers to the Administrative Procedure Act or a provision of the Administrative Procedure Act will be converted to a reference to the proposed law.

(2) A statute that requires a hearing under the Administrative Procedure Act will be converted to require a hearing conducted under the proposed law by an administrative law judge employed by the Office of Administrative Hearings.

(3) A statute that provides a rule governing an administrative hearing that differs from the proposed law will not be revised or repealed unless it appears to differ arbitrarily. The principle embodied in the proposed law is that the proposed law provides default rules; contrary express statutes control.

The text of the conforming revisions and repeals affecting a specific agency or type of hearing is available on request from the California Law Revision Commission, 4000 Middlefield Road, Palo Alto, CA 94303. Phone: (415) 494-1335.

COST CONSIDERATIONS

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

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

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

(1) Existing special rules of most agencies are allowed to stand. The regulation adoption process is simplified. Ample time is allowed for the transitional process.[125]

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

(2) Existing agency lay hearing officer structures are maintained. Neutral staff assistance to the presiding officer is recognized. The separation requirement is waived where circumstances compel it.[126]

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

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

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

The state will benefit substantially over the years from a comprehensive revision of the Administrative Procedure Act that modernizes and increases the uniformity of procedures, and that provides a sound structure for future development.

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

ADMINISTRATIVE PROCEDURE ACT

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

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

Article 1. Short Title

§ 600. Short title

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

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

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a regulation to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. This division, as currently drafted, applies only to the administrative adjudication portion of the Administrative Procedure Act. When the division is expanded to include rulemaking, the general provisions will be reviewed for applicability.

References in section Comments in this division to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, and to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3344, 5362, 7521 (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237), from which a number of the provisions of this division are drawn.

Article 2. Definitions

§ 610.010. Application of definitions

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

(b) The definitions in this article apply to grammatical variants of the terms defined.

Comment. Subdivision (a) of Section 610.010 restates the introductory portion of former Section 11500.

Subdivision (b) is new. Under subdivision (b), for example, the definition of the term "license" in Section 610.360 to include "certification" would extend, *mutatis mutandis*, to variant forms such as "licensed," "licensee," and "licensing" ("certified," "certificated," and "certification").

§ 610.190. Agency

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

Comment. Section 610.190 supersedes Section 11000 and former Section 11500(a). It is drawn from 1981 Model State APA § 1-102(1). The intent of the definition is to subject as many governmental units as possible to the provisions of this division. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council.

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

It should be noted that an administrative unit of an agency that has no authority to issue decisions or take other action on behalf of the agency would not be an "agency" within the meaning of this section.

§ 610.250. Agency head

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

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

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.210 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member

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

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

§ 610.310. Decision

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

(b) Nothing in this section limits:

(1) The authority of an agency to make a declaratory decision pursuant to Chapter 5 (commencing with Section 635.070) of Part 3.

(2) The precedential effect of a decision under Article 3 (commencing with Section 649.310) of Chapter 9 of Part 4.

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

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific identified individual or individuals. This is to be compared to a regulation, which is an agency action of general application, that is, applicable to all members of a described class. Sections 610.660 and 11342 ("regulation" defined). The primary operative effect of the definition of decision is in Parts 3 (commencing with Section 631.010) and 4 (commencing with Section 641.110), governing adjudicative proceedings. This section is not intended to expand the types of cases in which an adjudicative proceeding is required; an adjudicative proceeding under this division is required only where another statute or the constitution requires one. Section 631.010 (application to constitutionally and statutorily required hearings).

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a certain licensee, are decisions subject to the adjudication provisions of this statute. *Cf.* Federal APA § 551(4) (defining all rate making as rulemaking). On the other hand, rate making and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations under this statute. See the Comment to Section 610.660. However, some decisions may have precedential effect pursuant to Sections 649.310-649.340 (precedent decisions).

§ 610.360. License

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

Comment. Section 610.360 is drawn from 1981 Model State APA § 1-102(4). For the definition of "occupational license," see Section 610.430.

§ 610.370. Local agency

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

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

§ 610.410. Notice of commencement of proceeding

610.410. "Notice of commencement of proceeding" means an agency action that commences an adjudicative proceeding, whether in the form of a statement of issues, initial determination, accusation, or otherwise.

Comment. Section 610.410 supersedes former Section 11504.5 and portions of the first sentences of former Sections 11503 and 11504.

§ 610.430. Occupational license

610.430. "Occupational license" means a license legally required to practice 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). As used in this section, "license" includes "certification." Section 610.360 ("license" defined).

"Occupational license" is used in Section 646.210. (settlement). "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 the licensee's profession.

§ 610.460. Party

610.460. "Party," in an adjudicative proceeding, includes the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate agencies, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party.

Comment. The first sentence of Section 610.460 restates former Section 11500(b); see also 1981 Model State APA § 1-102(6). The second sentence is new.

"Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17 ("person" defined).

Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. A staff division authorized to act on behalf of the agency may be a party under this division. See Section 610.190 & Comment ("agency" defined).

For provisions on intervention, see Sections 644.110-644.150.

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

§ 610.520. Person

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

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

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

§ 610.550. Pleading

610.550. "Pleading" includes a notice of commencement of proceeding and a response.

Comment. Section 610.550 is intended for drafting convenience. A reference to a notice or response includes an amended or supplemental notice or response. Section 642.260 (amended and supplemental pleadings).

§ 610.590. Presiding officer

610.590. "Presiding officer" means the agency head, agency member, administrative law judge, or other person who presides in an adjudicative proceeding.

Comment. Section 610.590 is consistent with Section 643.110 (designation of presiding officer by agency head).

§ 610.660. Regulation

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

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

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

§ 610.680. Reviewing authority

610.680. "Reviewing authority" means the agency head and includes a person or body to which the agency head has delegated its review authority.

Comment. Section 610.680 is new. The agency head may delegate its review authority pursuant to Section 649.210 (availability and scope of review).

§ 610.770. State

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

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

Article 3. Transitional Provisions

§ 610.910. Operative date

610.910. This division becomes operative on July 1, 1997.

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

§ 610.920. Pending proceedings

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

Comment. Section 610.920 speaks in terms of commencement of a proceeding. A proceeding is considered commenced for purposes of this division on issuance of a notice of commencement of proceeding. Section 642.210; see also Section 610.410 ("notice of commencement of proceeding" defined).

§ 610.930. Commencement or remand after operative date

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

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

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

§ 610.940. Adoption of regulations

610.940. (a) Notwithstanding Section 610.910, before, on, or after the operative date of this division an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this division.

(b) Subject to Section 11351:

(1) Interim regulations need not comply with Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2, but are governed by Chapter 3.5 in all other respects.

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

(3) Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, except that if

by December 31, 1998, an agency has submitted the regulations for review by the Office of Administrative Law, the regulations are not subject to review for necessity under Section 11349.1 or 11350.

Comment. Subdivision (a) of Section 610.940 makes clear that an agency may act to adopt regulations under this division after enactment but before the division becomes operative. This will enable the agency to have any necessary regulations in place on the operative date.

Under subdivision (b), an agency may adopt interim procedural regulations without the normal notice and hearing and Office of Administrative Law review processes of the Administrative Procedure Act. However, this does not excuse compliance with the other provisions of the Administrative Procedure Act, including but not limited to the requirements that (1) regulations be consistent and not in conflict with statute and reasonably necessary to effectuate the purpose of the statute (Section 11342.2), (2) regulations be filed and published (Sections 11343-11344), and (3) regulations are subject to judicial review (Section 11350). Compliance with these provisions is not required for agencies exempted by statute. See Section 11351 (exemption of Public Utilities Commission, Division of Industrial Accidents, and Workers' Compensation Appeals Board).

Interim regulations are only valid up to 18 months, through December 31, 1998. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process. In case permanent regulations are pending on December 31, 1998, interim regulations may be extended up to three months.

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

§ 610.950. Reference to prior provisions

610.950. A reference in a statute to a provision of this division that supersedes a previously existing provision relating to the same subject matter shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.

Comment. Section 610.950 is drawn from Family Code Section 2. It makes clear that a statutory reference to the new Administrative Procedure Act includes a reference to the former law from which it is drawn. Cf. Section 600(a) (reference to former provision includes reference to new provision).

CHAPTER 2. APPLICATION OF DIVISION

§ 612.110. Application of division to state

612.110. Except as otherwise expressly provided by statute:

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

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

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

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

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

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

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

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

Subdivision (c) recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, free of legislative control, and independent in administration of its affairs). Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 612.130.

§ 612.120. Application of division to local agencies

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

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

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

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

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

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

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

§ 612.130. Election to apply division

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

Comment. Section 612.130 is new. An agency may elect to apply this division even though the agency would otherwise be exempt or the particular action taken by the agency would otherwise be exempt. See Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies); Section 631.010 (application to constitutionally and statutorily required hearings).

§ 612.140. Contrary express statute controls

612.140. Notwithstanding any other provision of this division, a state statute or a federal statute or regulation applicable to a particular agency or decision prevails over a contrary provision of this division.

Comment. Section 612.140 makes clear that the provisions of the Administrative Procedure Act are not intended to override a contrary statute or applicable federal law that governs a particular matter. It should also be noted that if application of a provision of this division would cause loss or delay of federal funds, the Governor may suspend the conflicting provision. Section 612.150.

§ 612.150. Suspension of statute when necessary to avoid loss or delay of federal funds or services

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

(1) Suspend, in whole or in part, any provision of this division.

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

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

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

Comment. Section 612.150 is drawn from 1981 Model State APA § 1-104. *Cf.* Section 8571 (power of Governor to suspend statute in emergency). It is expanded to extend to a delay in receipt as well as to a loss of federal funds, and actions that may be taken include provision of an alternate procedure as well as suspension of an existing procedure.

This section permits specific functions of agencies to be exempted from applicable provisions of this division only to the extent that is necessary to prevent the loss or delay of federal funds or services. The test to be met is simply whether, as a matter of fact, there will actually be a loss or delay of federal funds or services if there is no suspension or adoption of an alternate procedure. And the suspension or adoption is effective only so long as and to the extent necessary to avoid the contemplated loss or delay.

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

§ 612.160. Waiver of provisions

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

Comment. Section 612.160 is drawn from 1981 Model State APA § 1-105. It embodies the standard notion of waiver, which requires an intentional relinquishment of a known right. This section applies to all affected persons, whether or not parties.

A right under this division is subject to waiver in the same way that a right under any other civil statute is normally subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily preferable. A waiver by inaction may be the procedural result of a

failure to act. See, e.g., Sections 642.250(c)(3) (failure to object in response to form of notice of commencement waives further objections to form); 648.130 (failure to respond or appear a default that waives right to hearing).

CHAPTER 3. PROCEDURAL PROVISIONS

Article 1. Miscellaneous Provisions

§ 613.110. Voting by agency member

613.110. Agency members qualified to vote on a matter may vote by mail or otherwise, without being present at a meeting of the agency.

Comment. Section 613.110 restates and broadens former Section 11526 to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote as a presiding officer in an adjudicative proceeding if the agency member did not hear the evidence. Section 643.110(d)(3). This section is subject to a contrary statute applicable to an agency or proceeding. Section 612.140 (contrary express statute controls). See, e.g., Water Code § 183 (State Water Board in-person vote).

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). See also Section 610.280 ("agency member" defined).

§ 613.120. Oaths, affirmations, and certification of official acts

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

Comment. Section 613.120 restates former Section 11528.

Article 2. Notice

§ 613.210. Service

613.210. (a) If this division requires that a decision or other writing be served on or notice given to a person, the writing or notice shall be delivered personally or sent by mail or other means pursuant to Section 613.220 to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.

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

Comment. Section 613.210 is intended for drafting convenience. It supersedes a provision of former Section 11517(b). For provisions applicable to authorized representatives, see Sections 613.310-613.340 (representation of parties).

§ 613.220. Mail or other delivery

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

mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.

Comment. Section 613.220 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail). Failure of a person to receive notice of a hearing sent under this section is prima facie evidence of good cause for failure to attend the hearing under the formal hearing procedure. Section 648.130(c) (default).

Proof of service may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a; Cal. R. Ct. 2008(e) (proof of service by facsimile transmission).

§ 613.230. Extension of time

613.230. (a) Service or notice pursuant to Section 613.220 extends any prescribed period of notice, and any right or duty to do an act or make a response within a prescribed period after service or notice, by the following times:

(1) Five days, if service or notice is by mail or mail delivery service,

(2) Two days, if service or notice is by facsimile transmission or other electronic means.

(b) This section applies to a period prescribed by this division or by regulation under this division.

Comment. Section 613.230 is drawn from the statutes relating to service of notice by mail within California and from parallel provisions of the California Rules of Court. See Cal. Rules Ct. 2008(b); Code Civ. Proc. § 1013(e). This reverses existing law as to some administrative procedures. See, e.g., Camper v. Workers' Compensation Appeals Board, 12 Cal. Rptr. 2d 101 (1992); Southwest Airlines v. Workers' Compensation Appeals Board, 234 Cal. App. 3d 1421 (1991).

Article 3. Representation of Parties

§ 613.310. Self representation

613.310. A party may represent itself without an attorney. In the case of a party that is an entity, the entity may select any of its members to represent it and is bound by the acts of its authorized representative.

Comment. Section 613.310 generalizes a provision of former Section 11509.

§ 613.320. Representation by attorney

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

Comment. Section 613.320 generalizes provisions of former Sections 11500(f)(3) and 11509. Qualification and discipline of attorneys that practice before administrative agencies is governed by the State Bar of California and not by the agencies. It should be noted, however, that an agency may seek the contempt sanction for misconduct by a participant in a hearing and may impose monetary sanctions on a party or attorney for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Sections 648.510–648.530 (enforcement of orders and sanctions).

§ 613.330. Lay representation

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

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

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

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

§ 613.340. Authority of attorney or other representative of party

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

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

CHAPTER 4. CONVERSION OF PROCEEDING

§ 614.010. Conversion authorized

614.010. (a) Subject to any applicable regulation adopted under Section 614.050, at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

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

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

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

Comment. Section 614.010 is drawn from 1981 Model State APA § 1-107(a)-(b). A reference in this section to a "party," in the case of an adjudicative proceeding means "party" as defined in Section 610.460, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. A reference to a proceeding provided by the Administrative Procedure Act includes a rulemaking proceeding as well as an adjudicative proceeding. Section 600. The conversion provisions may be irrelevant to some types of proceedings by some agencies, and in that case this chapter would be inapplicable.

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

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

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

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

Within the limits of this section, an agency should be authorized to use procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency this flexibility. For example, an agency that wants to convert a formal hearing into an informal hearing, or an informal hearing into a formal hearing, may do so under this provision if the conversion is appropriate and in the public interest, if adequate notice is given, and if the rights of the parties are not substantially prejudiced.

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

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

See also Section 613.230 (extension of time).

§ 614.020. Presiding officer

614.020. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which

it is to be converted, the agency head shall appoint a successor to preside over or be responsible for the new proceeding.

Comment. Section 614.020 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

§ 614.030. Agency record

614.030. To the extent practicable and consistent with the rights of parties and the requirements of this division relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding.

Comment. Section 614.030 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the Administrative Procedure Act.

§ 614.040. Procedure after conversion

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

(c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding, and allow the parties a reasonable time to prepare for the new proceeding.

Comment. Section 614.040 is drawn from 1981 Model State APA § 1-107(e). See also Section 613.230 (extension of time).

§ 614.050. Agency regulations

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

Comment. Section 614.050 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

PART 2. [RESERVED FOR RULEMAKING]

PART 3. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. APPLICABLE HEARING PROCEDURE

§ 631.010 Application to constitutionally and statutorily required hearings

631.010 This division governs a decision by an agency if, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

Comment. Section 631.010 limits application of the adjudicative proceedings provisions of this division to constitutionally and statutorily required hearings of state agencies. See Section 612.110 (application of division to state). It does not govern local agency hearings except to the extent expressly made applicable by another statute. Section 612.120 (application of division to local agencies).

Section 631.010 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision where a statute or the due process clause of the federal or state constitutions necessitates an evidentiary hearing for determination of facts. Such a hearing is a process in which a neutral decision maker makes a decision based exclusively on evidence contained in a record made at the hearing or on matters officially noticed. The hearing must at least permit a party to introduce evidence, make an argument to the presiding officer, and rebut opposing evidence.

The coverage of this division is the same as coverage by the existing provision for administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section applies only where an agency has issued a final decision "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." Numerous cases have applied Code of Civil Procedure Section 1094.5(a) broadly to administrative proceedings in which a statute requires an "administrative appeal" or some other functional equivalent of an evidentiary hearing for determination of facts — an on-the-record or trial-type hearing. See, e.g., Eureka Teachers Ass'n v. Board of Educ., 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher's right to appeal grade change was right to hearing — Code Civ. Proc. § 1094.5 applies); Chavez v. Civil Serv. Comm'n, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (right of "appeal" means required hearing — Code Civ. Proc. § 1094.5 available).

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

Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc. § 1094.5 inapplicable).

Agency action pursuant to statutes that do not require evidentiary hearings are not subject to this division. Such statutes include the California Environmental Quality Act (Pub. Res. Code §§ 21000-21781), the Bagley-Keene Open Meeting Act (Gov't Code §§ 11120-11132), and the California Public Records Act (Gov't Code §§ 6250-6268).

This section applies only to proceedings for issuing a "decision." A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Section 610.310(a) ("decision" defined). Therefore this section does not apply to agency actions that do not determine a person's legal interests nor to rulemaking which is agency action of general applicability.

This division does not apply where agency regulations, rather than a statute or the Constitution, call for a hearing. Agencies are encouraged to provide procedural protections by regulation even though not required to do so by statute or the Constitution. An agency may elect to have the hearing governed by this division. See Section 612.130 (election to apply division).

This section does not specify what type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing, an informal hearing, a special hearing, an emergency decision, or a declaratory decision in accordance with other provisions of this division. Under this division, the formal hearing procedure is standard unless circumstances permit the informal hearing or emergency decision, or the agency has a adopted a special hearing procedure. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 612.160 (waiver of provisions) and 631.030(b) (when adjudicative proceeding not required).

§ 631.020. Applicable procedure

631.020. (a) An agency shall conduct an adjudicative proceeding for formulation and issuance of a decision governed by this division pursuant to one of the following procedures:

(1) The formal hearing procedure. The formal hearing procedure is provided in Part 4 (commencing with Section 640.010).

(2) The informal hearing procedure. The informal hearing procedure is provided in Chapter 2 (commencing with Section 632.010).

(3) A special hearing procedure. Special hearing procedures are authorized in Chapter 3 (commencing with Section 633.010).

(4) The emergency decision procedure. The emergency decision procedure is provided in Chapter 4 (commencing with Section 634.020).

(5) The declaratory decision procedure. The declaratory decision procedure is provided in Chapter 5 (commencing with Section 635.020).

(b) The agency may select the procedure that governs the adjudicative proceeding, subject to any limitations applicable to that procedure.

(c) Nothing in this section limits the authority to convert an adjudicative proceeding under this division to another type of proceeding under this division pursuant to Chapter 4 (commencing with Section 614.010) of Part 1.

Comment. Section 631.020 lists the types of hearing procedures available to an agency in a case where an evidentiary hearing for determination of facts is required for formulation and issuance of the decision. The agency may use any of the available procedures, provided the requirements for use of the particular procedure are satisfied.

The formal hearing procedure is always available. It is elaborated in Part 4 (commencing with Section 640.010). The formal hearing procedure is the default hearing procedure under this division, unless one of the alternatives provided for in this part is applicable. Section 641.110 (application of part).

The informal hearing procedure is available in smaller cases and in cases where there is no disputed issue of material fact. An agency may make the informal hearing procedure applicable in other cases as well, to the extent constitutional and other statutory limitations do not preclude it. Section 632.020 (when informal hearing may be used).

A special hearing procedure is available in an adjudicative proceeding except in an adjudicative proceeding that is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 633.020 (decisions for which special hearing procedure authorized). The special hearing procedure is governed by agency regulation, but must satisfy basic due process and public policy requirements. Section 633.030 (requirements of special hearing procedure).

The emergency decision procedure is available where there is an immediate danger to public health, safety, or welfare. Section 634.030 (when emergency decision available).

The declaratory decision procedure is an inexpensive means to provide reliable agency advice on stipulated facts in case of an actual controversy. Issuance of a declaratory decision is discretionary with the agency. Sections 635.070 (regulations governing declaratory decision), 635.020 (declaratory decision permissive).

The agency determines which procedure to follow. If the agency follows a special hearing procedure, it must provide a copy to the person to whom the decision is directed. Section 633.040(d) (regulations governing special hearing procedure).

§ 631.030. When adjudicative proceeding not required

631.030. (a) An agency may provide any appropriate procedure for a decision that is not required to be conducted under this division.

(b) A proceeding is not required under this division for informal factfinding or an informal investigatory hearing, or for a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

(c) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting a proceeding under this division.

Comment. Subdivision (a) of Section 631.030 is subject to statutory specification of the applicable procedure for decisions not governed by this division. *Cf.* Section 612.140 (contrary express statute controls).

Subdivision (b) is drawn in part from 1981 Model State APA § 4-101(a). The provision lists situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court. Likewise, an agency may issue a notice of commencement of proceeding under this division without first conducting a proceeding to decide whether to issue the pleading. See, e.g., Sections 642.110 (initiation by agency), 610.410 ("notice of commencement of proceeding" defined). Nothing in this subdivision implies that this division applies in a proceeding in which a hearing is not statutorily or constitutionally required. Section 631.010 (application to constitutionally and statutorily required hearings).

Subdivision (c) is subject to Section 646.210 (settlement) in the case of a formal or informal hearing.

§ 631.040. When adjudicative proceeding required to be conducted by administrative law judge employed by OAH

631.040. (a) An adjudicative proceeding is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings in the following circumstances:

(1) A statute expressly so provides.

(2) The proceeding is conducted by an agency created after July 1, 1997, unless a statute provides that the proceeding need not be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) If an adjudicative proceeding is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the requirement applies only to the formal hearing, informal hearing, and emergency decision procedures and does not apply to the declaratory decision procedure.

Comment. Subdivision (a)(1) of Section 631.040 and conforming revisions to other statutes continue existing law with respect to hearings that must be conducted by an administrative law judge from the Office of Administrative Hearings. See, e.g., former Section 11501.

Under subdivision (a)(2), this section applies to agencies created after the operative date of this division unless expressly exempted.

Subdivision (b) limits the effect of a statute that requires an adjudicative proceeding to be conducted by an administrative law judge employed by the Office of Administrative Hearings. It should be noted that a special hearing procedure is not available if the adjudicative proceeding is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 633.020 (decisions for which special hearing procedure not authorized).

CHAPTER 2. INFORMAL HEARING

§ 632.010. Purpose of informal hearing procedure

632.010. If an agency decision is required to be formulated and issued under this division, the agency may select the informal hearing procedure to govern the adjudicative proceeding, subject to the limitations in this chapter. The informal hearing procedure is intended as an adjudicative proceeding that satisfies due process and public policy requirements in a manner that is simpler and more expeditious than the formal hearing procedure, for use in appropriate circumstances. The procedure provides an informal forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer. The procedure also provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without intervening as a party.

Comment. Section 632.010 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure are appropriate are provided in Section 632.020 (when informal hearing may be used). The simplified procedures are outlined in Section 632.040 (procedure for informal hearing).

Basic due process and public policy protections of the formal hearing procedure are preserved in the informal hearing. Section 632.040(a). Thus, for example, the presiding officer must be free of bias, prejudice, and interest; the adjudicatory function must be separated from the investigative, prosecutorial, and advocacy functions within the agency; the hearing must be open to public observation; the agency must make available language assistance; ex parte communications are restricted; the decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and the agency must designate and index significant decisions as precedent.

Reference in this article to the "presiding officer" is not intended to imply unnecessary formality in the proceeding. The presiding officer may be the agency head, an agency member, an administrative law judge, or another person who presides over the hearing. Section 610.590 ("presiding officer" defined).

§ 632.020. When informal hearing may be used

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

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

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

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

(2) A disciplinary sanction against a prisoner.

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

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

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

(c) An adjudicative proceeding of the California Coastal Commission, Division of Oil and Gas, San Francisco Bay Conservation and Development Commission, or State Water Resources Control Board, that involves land use planning or environmental matters.

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

(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.

Comment. Subdivision (a) of Section 632.020 permits the informal hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared. E.g., a power plant siting proceeding in which the power company and the Energy Commission have agreed on all material facts. However, if consumers intervene and dispute material facts, the proceeding may be subject to conversion from the informal hearing to the formal hearing in accordance with Sections 614.010-614.050.

Subdivision (b) permits the informal hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner. The reference to a "licensee" in subdivision (b)(5) includes a certificate holder. Section 610.360 ("license" defined).

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

Nothing in this section implies that this procedure is required in a proceeding in which a hearing is not statutorily or constitutionally required, including an agency's authority in minor disciplinary matters to make an investigation with or without a hearing as it deems necessary. Sections 631.010 (application to constitutionally and statutorily required hearings); 631.030 (when adjudicative proceeding not required).

§ 632.030. Selection of informal hearing

632.030. (a) The notice of commencement of proceeding shall state the agency's selection of the informal hearing procedure.

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

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

Comment. Section 632.030 provides a procedure for resolving objections to use of the informal hearing procedure in advance of the hearing. However, conversion to a formal hearing may be appropriate if during the course of the hearing circumstances indicate the need for it. See Sections 632.050 (cross-examination), 632.060 (proposed proof).

§ 632.040. Procedure for informal hearing

632.040. (a) Except as provided in this chapter, 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. The presiding officer may limit witnesses, testimony, evidence, and argument, and may limit or entirely preclude pleadings, intervention, discovery, prehearing conferences, and rebuttal.

Comment. Section 632.040 is drawn from 1981 Model State APA § 4-402. The section indicates that the informal hearing is a simplified version of the formal hearing. The informal hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties. However, it is intended to permit agencies to allow public participation where appropriate. Section 632.010 (purpose of informal hearing procedure).

§ 632.050. Cross-examination

632.050. (a) An agency may by regulation specify categories of cases in which cross-examination is deemed not necessary for proper determination of the matter under the informal hearing procedure.

(b) Notwithstanding subdivision (a), the presiding officer may allow cross-examination of witnesses in an informal hearing if it appears to the presiding

officer that in the circumstances cross-examination is necessary for proper determination of the matter.

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

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

Comment. Section 632.050 gives the presiding officer discretion to limit availability of the informal hearing in situations where it appears that substantial cross-examination will be necessary. For provisions on conversion, see Sections 614.010-614.050.

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

§ 632.060. Proposed proof

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

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

Comment. Section 632.060 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 614.010-614.050.

CHAPTER 3. SPECIAL HEARING

§ 633.010. Special hearing procedure authorized

633.010. If an agency decision is required to be formulated and issued under this division, the agency may provide a special hearing procedure to govern the adjudicative proceeding, subject to the limitations in this chapter. Part 4 (commencing with Section 641.110) does not apply to a special hearing procedure except to the extent provided in this chapter or in the special hearing procedure.

Comment. Section 633.010 recognizes the authority of an agency to provide different procedures than those provided in this division to the extent authorized in this chapter. This authority does not apply in an adjudicative proceeding that is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 633.020 (decisions for which special hearing procedure not authorized). The procedure must satisfy basic due process and public interest requirements. Section 633.030 (requirements of special hearing procedure). The procedure must be adopted through the regulation process, and must be made available to persons who appear before the agency. Section 633.040 (regulations governing special hearing procedure).

The agency procedure is subject to any statute applicable to the particular agency or proceeding. Section 633.040 (regulations governing special hearing procedure); see also Section 612.140 (contrary express statute controls). Nothing in this section precludes a court from drawing upon a principle or procedure in Part 4 (formal hearing procedure) to resolve an issue in a proceeding governed by a special hearing procedure, to the extent the special hearing procedure is silent on the issue and the principle or procedure is consistent with the purposes of the special hearing procedure.

For expedited adoption of special procedures, including incorporation or readoption of existing regulations, see Section 633.050 (transitional provision for adoption of regulations).

§ 633.020. Decisions for which special hearing procedure not authorized

633.020. An agency may not require a special hearing procedure pursuant to this chapter in an adjudicative proceeding that is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 633.020 limits the matters for which a special hearing procedure may be provided to those in which there is no statutory requirement that the adjudicative proceeding be conducted by an administrative law judge employed by the Office of Administrative Hearings. *Cf.* Section 631.040 (when adjudicative proceeding required to be conducted by administrative law judge employed by OAH).

§ 633.030. Requirements of special hearing procedure

633.030. (a) A special hearing procedure shall provide an evidentiary hearing for determination of facts and is subject to all of the following requirements:

(1) The presiding officer shall be free of bias, prejudice, and interest to the extent provided in Section 643.210 (grounds for disqualification of presiding officer).

(2) The adjudicatory function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency to the extent provided in Article 3 (commencing with Section 643.310) of Chapter 3 of Part 4 (separation of functions).

(3) Ex parte communications shall be restricted to the extent provided in Article 4 (commencing with Section 643.410) of Chapter 3 of Part 4 (ex parte communications).

(4) The hearing shall be open to public observation to the extent provided in Section 648.140 (open hearings).

(5) The agency shall make available language assistance to the extent provided in Article 2 (commencing with Section 648.210) of Chapter 8 of Part 4 (language assistance), if the agency is listed in Section 648.230.

(6) Each party shall have the right to present and rebut evidence.

(7) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision to the extent provided in Section 649.120 (form and contents of decision).

(8) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent to the extent provided in Article 3 (commencing with Section 649.310) of Chapter 9 of Part 4 (precedent decisions).

(b) The special hearing procedure may include provisions equivalent to, or more protective of the rights of parties than, the requirements of subdivision (a).

Comment. Section 633.030 specifies the minimum due process and public interest requirements that must be satisfied by a special hearing procedure elected by an agency. Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section. Of course, there are other fundamental due process elements inherent in a "hearing" that are not itemized in this section, such as notice to the affected parties and an opportunity to be heard by the presiding officer.

The extent of the requirement of subdivision (a)(6) that each party shall have the right to present and rebut evidence is determined by the agency as appropriate for the character of the particular proceeding. Subdivision (a)(6) merely requires that the right be provided in some form.

It should be noted that some of the requirements of this section have limited application. See, e.g., Article 2 (commencing with Section 648.210) of Chapter 8 of Part 4 (language assistance), which applies only to designated agencies.

It should also be noted that any special statutes expressly applicable to a hearing by an agency prevail over contrary provisions of this section. Section 612.140 (contrary express statute controls). See also Section 633.040 (regulations governing special hearing procedure).

§ 633.040. Regulations governing special hearing procedure

633.040. (a) An agency shall provide a special hearing procedure by regulation. The regulation is subject to any other statute that governs the adjudicative proceeding.

(b) A regulation that provides a special hearing procedure may do any of the following:

(1) State the special hearing procedure in a complete and self-sufficient body.

(2) State some provisions of the special hearing procedure explicitly and state other provisions of the special hearing procedure by incorporating by reference provisions of Part 4 (commencing with Section 641.110) (formal hearing) or any other statute that governs the adjudicative proceeding.

(3) Adopt Part 4 (commencing with Section 641.110) (formal hearing) as the special hearing procedure, subject to appropriate exceptions.

(c) The agency shall make available a copy of the special hearing procedure, together with a copy of or reference to any other statute that governs the adjudicative proceeding, to the person to which the agency action is directed.

(d) Notwithstanding Section 11350, a regulation that provides a special hearing procedure is not subject to judicial review on the basis of inconsistency with statute except in an adjudicative proceeding on a showing of prejudice to a party caused by the inconsistency.

Comment. Section 633.040 requires promulgation of a special hearing procedure under the normal rulemaking process, including notice to affected persons and an opportunity to be heard. Simplified transitional adoption procedures are provided in Section 633.040 (adoption of existing regulations as special hearing procedure). The special procedure is subject to a statute applicable to the particular agency or decision. Section 612.140 (contrary express statute controls). This section is intended to make special hearing procedures accessible to persons affected by them.

Under subdivision (d), declaratory relief is not available in a challenge to the consistency with statute of a special hearing procedure. A properly promulgated agency regulation under this chapter is entitled to a rebuttable presumption that the regulation is consistent and not in conflict with statute, and reasonably necessary to effectuate the purpose of the statute. Sections 11342.2, 11343.6. The presumption of validity imposes a substantial burden of proof on a challenger. See discussion in Garcia, *Judicial Review of Rulemaking: Standards of Judicial Review*, in 1 California Public Agency Practice § 22.06 (1993).

§ 633.050. Adoption of existing regulations as special hearing procedure

633.050. (a) As used in this section:

(1) "Existing regulation" means a regulation governing an agency adjudicative proceeding properly adopted and in effect in compliance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 before July 1, 1997.

(2) "New regulation" means a regulation adopted under this chapter that provides a special hearing procedure.

(b) An agency may provide a special hearing procedure by adoption of a new regulation that specifies as the special hearing procedure an existing regulation or part of an existing regulation, or an existing regulation as modified in the new regulation. The following provisions govern adoption of a special hearing procedure under this section:

(1) The existing regulation or part is subject to review by the Office of Administrative Law for consistency with Section 633.030 (requirements of special hearing procedure) but is not subject to further action under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2,

(2) The new regulation, including any modification of the existing regulation, is subject to action under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

(3) Notwithstanding paragraphs (1) and (2), the existing regulation and the new regulation are subject to action under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 only to the extent provided in Section 610.940 (adoption of regulations), if the special hearing procedure is adopted by an interim or permanent regulation within the transitional period provided in Section 610.940.

Comment. Section 633.050 provides a simplified implementation process for adoption of existing regulations as a special hearing procedure. For general provisions on adoption of regulations governing administrative adjudication, see Section 610.940 (adoption of regulations).

CHAPTER 4. EMERGENCY DECISION

§ 634.010. Application of chapter

634.010. If an agency decision is required to be formulated and issued under this division, the agency may select the emergency decision procedure to govern the adjudicative proceeding, subject to the limitations in this chapter.

Comment. Section 634.010 makes clear that the emergency decision procedure provided in this chapter applies only to decisions subject to this division. See Section 631.010 (application to constitutionally and statutorily required hearings). It does not apply, for example, to an agency decision to seek injunctive relief. Section 631.030 (when adjudicative proceeding not required). The decision whether to use the emergency procedure, if available, is in the discretion of the agency. Section 631.020.

§ 634.020. Agency regulation required

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

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

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

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

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

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

Comment. Section 634.020 requires specificity in agency regulations that adopt an emergency decision procedure. Notwithstanding this chapter, a statute on emergency decisions, including cease and desist orders and temporary suspension orders, applicable to a particular agency or proceeding prevails over the provisions of this chapter. Section 612.140 (contrary express statute controls).

§ 634.030. When emergency decision available

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

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

(c) An emergency decision issued under this chapter is limited to temporary, interim relief. The temporary, interim relief is subject to judicial review under Section 634.080, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding pursuant to Section 634.060.

Comment. Section 634.030 is drawn from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is available only if the agency has adopted an authorizing regulation. Section 634.020.

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

§ 634.040. Emergency decision procedure

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

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

Comment. Section 634.040 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For the conduct of a hearing in the manner of an informal hearing, see Section 632.040 (procedure for informal hearing).

By regulation the agency may prescribe the emergency notice and hearing procedure. See, e.g., State Bar Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective to the person to which the agency action is directed than the provisions of this chapter. Section 634.020 (agency regulation required).

See also Section 613.230 (extension of time).

§ 634.050. Emergency decision

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

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

Comment. Section 634.050 is drawn from 1981 Model State APA § 4-501(c)-(d). Under this section the agency has flexibility to issue its emergency decision orally, if necessary to cope with the emergency. See also Section 613.230 (extension of time).

§ 634.060. Completion of proceedings

634.060. (a) After issuing an emergency decision under this chapter for temporary, interim relief, the agency shall conduct an adjudicative proceeding under another procedure provided for in this division to resolve the underlying issues giving rise to the temporary, interim relief.

(b) The agency shall commence an adjudicative proceeding under the formal, informal, or special hearing procedure within 10 days after issuing an emergency

decision under this chapter, notwithstanding the pendency of proceedings for judicial review of the emergency decision.

Comment. Section 634.060 is drawn from 1981 Model State APA § 4-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances.

Subdivision (b) requires an agency to commence an adjudicative proceeding within 10 days after the emergency decision. This is done, in the case of a formal hearing procedure, by issuance of a notice of commencement of proceeding. Section 642.210.

§ 634.070. Agency record

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

Comment. Section 634.070 is drawn from 1981 Model State APA § 4-501(f).

§ 634.080. Judicial review

634.080. (a) On issuance of an emergency decision under this chapter, the person to which the agency action is directed may obtain judicial review of the decision in the manner provided in this section without prior administrative review.

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

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

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

(3) 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 Article 2 (commencing with Section 645.210) of Chapter 5 of Part 4.

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

Comment. Section 634.080 is drawn from Section 11529(h) (interim suspension of medical care professional), with the addition of paragraph (3) providing for discovery.

CHAPTER 5. DECLARATORY DECISION

§ 635.010. Application of chapter

635.010. If an agency decision is required to be formulated and issued under this division, the agency may select the declaratory decision procedure to govern the adjudicative proceeding, subject to the limitations in this chapter.

Comment. Chapter 5 (commencing with Section 635.010) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding.

The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

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

Section 635.010 makes clear that the declaratory decision procedure provided in this chapter applies only to decisions subject to this division. See Section 631.010 (application to constitutionally and statutorily required hearings).

§ 635.020. Declaratory decision permissive

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

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

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

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

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

Comment. Subdivisions (a) and (b) of Section 635.020 are drawn from 1981 Model State APA § 2-103(a). For the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation, see Gov't Code §§ 11347-11347.1. Unlike the model act, Section 635.020 is applicable only to cases involving an actual controversy, and issuance of a declaratory decision is discretionary with the agency, rather than mandatory.

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

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

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

§ 635.030. Notice of application

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

Comment. Section 635.030 is drawn from 1981 Model State APA § 2-103(c). See also Section 613.230 (extension of time). For persons to whom notice of an adjudicative proceeding is otherwise required, see Section 642.240 (jurisdiction over person to which the agency action is directed). The right to intervene is provided by Section 635.040 (applicability of rules governing administrative adjudication).

§ 635.040. Applicability of rules governing administrative adjudication

635.040. 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.

Comment. Section 635.040 is drawn from 1981 Model State APA § 2-103(d). It makes clear that the specific procedural requirements for adjudications imposed by the formal hearing procedure on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 635.070. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

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

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

A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions. See, e.g., Sections 6250-6268 (California Public Records Act). A declaratory decision may be given precedential effect, subject to the provisions governing precedent decisions. See Sections 649.310-649.340 (precedent decisions).

§ 635.050. Action of agency

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

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

(2) Set the matter for specified proceedings.

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

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

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

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

Comment. Subdivision (a) of Section 635.050 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

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

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

§ 635.060. Declaratory decision

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

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

Comment. Section 635.060 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

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

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

§ 635.070. Regulations governing declaratory decision

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

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

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

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

(4) The disposition of an application.

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

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

Comment. Section 635.070 is drawn from 1981 Model State APA § 2-103(b). An agency may choose to preclude declaratory decisions altogether.

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

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

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

CHAPTER 6. OFFICE OF ADMINISTRATIVE HEARINGS

Article 1. General Provisions

§ 636.110. Definitions

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

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

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

Comment. Subdivision (a) of Section 636.110 restates former Section 11370.1. Subdivision (b) is new.

§ 636.120. Office of Administrative Hearings

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

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

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

Comment. Section 636.120 restates former Section 11370.2.

§ 636.130. Administrative law judges

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

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

Comment. Subdivision (a) of Section 636.130 restates the first sentence of former Section 11370.3 and the second sentence of former Section 11502.

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

§ 636.140. Hearing personnel

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

Comment. Section 636.140 restates the second sentence of former Section 11370.3, deleting the reference to "hearing officers" and the "shorthand" hearing reporter limitation.

§ 636.150. Assignment of administrative law judges

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

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

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

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

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge employed by the office may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 636.180.

Comment. Subdivision (a) of Section 636.150 supersedes the first part of the third sentence of former Section 11370.3. This provision applies to the informal hearing procedure as well as to the formal hearing procedure. Section 632.040(a) (procedure for informal hearing). *Cf.* Section 631.040 (when adjudicative proceeding required to be conducted by administrative law judge employed by OAH).

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

Subdivision (c) restates the third part of the third sentence of former Section 11370.3.
Subdivision (d) restates the fifth sentence of former Section 11370.3.
Subdivision (e) restates the sixth sentence of former Section 11370.3.

§ 636.160. Regulations

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

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

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

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

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

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

Comment. Section 636.160 is drawn from 1981 Model State APA § 4-301(e).

§ 636.170. Cost of operation

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

Comment. Section 636.170 restates former Section 11370.4.

§ 636.180. Study of administrative adjudication

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

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

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

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

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

Comment. Section 636.180 restates former Section 11370.5 to the extent it related to the subject of administrative adjudication, with the addition of language protecting confidentiality of records. See also Section 610.190 ("agency" defined). For authority of the Office of Administrative Law to study administrative rulemaking, see Section 11340.4.

Article 2. Medical Quality Hearing Panel

§ 636.210. Establishment and qualifications of panel

636.210. (a) There is within the office a Medical Quality Hearing Panel, consisting of no fewer than five full-time administrative law judges. The administrative law judges shall have medical training as recommended by the Division of Medical Quality of the Medical Board of California and approved by the director.

(b) The director shall determine the qualifications of panel members, supervise their training, and coordinate the publication of a reporter of decisions pursuant to this section. The panel shall include only those persons specifically qualified and shall at no time constitute more than 25 percent of the total number of administrative law judges within the office. If the members of the panel do not have a full workload, they may be assigned work by the director. When the medically related case workload exceeds the capacity of the members of the panel, additional judges shall be requested to be added to the panels as appropriate. When this workload overflow occurs on a temporary basis, the director shall supply judges from the office to adjudicate the cases.

(c) The decisions of the administrative law judges of the panel, together with any court decisions reviewing those decisions, shall be published in a quarterly "Medical Discipline Report," to be funded from the Contingent Fund of the Medical Board of California.

(d) The administrative law judges of the panel shall have panels of experts available. The panels of experts shall be appointed by the director, with the advice of the Medical Board of California. These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross examination by all parties. The administrative law judge may award reasonable expert witness fees to any person or persons serving on a panel of experts, which shall be paid from the Contingent Fund of the Medical Board of California.

(e) On or before April 1, 1997, the Medical Board of California shall prepare, in consultation with the office, an analysis and report that evaluates the effectiveness of the Medical Quality Hearing Panel since its creation. Among other things, the report shall analyze whether administrative adjudications against physicians have been expedited, the aging of cases at the office, whether administrative decisions and penalties ordered in the discipline of physicians have become more consistent, and whether the panels of the Division of Medical Quality have adopted more proposed decisions than prior to the creation of the panel. The board shall send a copy of its report to the Chairpersons of the Senate Committee on Business and Professions and the Assembly Committee on Health, to the Office of Administrative Hearings, and to the Director of Consumer Affairs.

(f) This section shall remain in effect only until January 1, 1999, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

Comment. Section 636.210 continues former Section 11371 without substantive change. See Section 636.110 (definitions).

§ 636.220. Conduct of hearing by administrative law judge

636.220. (a) Except as provided in subdivision (b), all adjudicative hearings and proceedings relating to the discipline or reinstatement of licensees of the Medical Board of California, including licensees of allied health agencies within the jurisdiction of the Medical Board of California, that are heard pursuant to this division, shall be conducted by an administrative law judge as designated in Section 636.210, sitting alone if the case is so assigned by the agency filing the charging pleading.

(b) Proceedings relating to interim orders shall be heard in accordance with Section 494.1 of the Business and Professions Code.

Comment. Section 636.220 continues former Section 11372 without substantive change.

§ 636.230. Conduct of proceedings under Administrative Procedure Act

636.230. All adjudicative hearings and proceedings conducted by an administrative law judge as designated in Section 636.210 shall be conducted under the terms and conditions set forth in this division, except as provided in the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code).

Comment. Section 636.230 continues former Section 11373 without substantive change.

§ 636.240. Facilities and support personnel for review committee panel

636.240. The office shall provide facilities and support personnel for the review committee panel and shall assess the Medical Board of California for facilities and personnel, where used to adjudicate cases involving the Medical Board of California.

Comment. Section 636.240 continues former Section 11373.3 without change. See Section 636.110 (definitions).

PART 4. FORMAL HEARING

CHAPTER 1. APPLICABLE LAW AND REGULATIONS

§ 641.110. Application of part

641.110. (a) This part provides the formal hearing procedure.

(b) The formal hearing procedure governs conduct of an adjudicative proceeding for formulation and issuance of a decision under this division unless a different procedure is authorized and selected by the agency under Section 631.020 (applicable procedure)

Comment. Section 641.110 makes clear that the formal hearing procedure is the default procedure where a hearing is constitutionally or statutorily required. Section 631.010 (application to constitutionally and statutorily required hearings). Unless another hearing procedure is authorized and selected by the agency, this part governs the hearing.

Other hearing procedures are available in some circumstances. Section 631.020 (applicable procedure). The informal hearing procedure is available in small cases and cases where there is no disputed issue of fact, and in other cases designated by the agency where due process will allow it. Section 632.020 (when informal hearing may be used). A special hearing procedure may be available in cases where use of Office of Administrative Hearings personnel is not statutorily required. Section 633.020 (decisions for which special hearing procedure not authorized). The emergency decision procedure may be available in cases of immediate need. Section 634.030 (when emergency decision available). The declaratory decision procedure may be available in a case of stipulated facts. Section 635.020 (declaratory decision permissive).

§ 641.120. Modification or inapplicability of statute by regulation

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

(b) A provision of this part that authorizes an agency to modify a provision of this part or make a provision of this part inapplicable by regulation is subject to a statute that governs the matter expressly.

(c) An agency that adopts a regulation that modifies a provision of this part or makes a provision of this part inapplicable shall provide a copy of the regulation to any person to which the agency action is directed.

Comment. Section 641.120 recognizes that a number of the provisions of this part may be modified or made inapplicable by an agency to suit the circumstances of the particular type of adjudication administered by it. See, e.g., Sections 647.010 (regulations making alternative dispute resolution inapplicable), 645.150 (limitation of intervention provisions). The modification or inapplicability may occur only by regulation duly adopted and promulgated under the Administrative Procedure Act. The modification may alter, or make inapplicable to the agency's adjudicative proceedings, the particular provision as to which modification or inapplicability is permitted. For transitional provisions governing interim adoption of regulations, see Section 610.940 (adoption of regulations).

§ 641.130. Compilation of regulations governing adjudicative proceeding

641.130. (a) Regulations adopted pursuant to Section 641.120 shall be compiled in a title of the California Code of Regulations that includes other regulations of the adopting agency.

(b) Regulations adopted by the Office of Administrative Hearings under this division to govern an adjudicative proceeding may be duplicated with regulations compiled pursuant to subdivision (a) or cross-referenced by them.

Comment. Section 641.130 is intended to facilitate access by the public to the law governing administrative procedure.

CHAPTER 2. COMMENCEMENT OF PROCEEDING

Article 1. Initiation

§ 642.110. Initiation by agency

642.110. An agency may commence and conduct an adjudicative proceeding with respect to a matter within the agency's jurisdiction.

Comment. Section 642.110 is drawn from 1981 Model State APA § 4-102(a). It prevents any implication that Section 642.120 (agency action on application) sets forth the exclusive circumstances under which an agency may initiate an adjudicative proceeding. The authority in Section 642.110 for the agency to initiate an adjudicative proceeding with respect to a matter within its jurisdiction includes authority for the agency to initiate a proceeding to determine whether it has jurisdiction in the matter.

§ 642.120. Agency action on application

642.120. (a) An agency shall commence an adjudicative proceeding on application of a person for an agency decision if a hearing is required by Section 631.010 (application to constitutionally and statutorily required hearings) and the applicant is a person entitled to a hearing, unless any of the following provisions applies:

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

(2) Resolution of the matter requires the agency to exercise discretion within the scope of subdivision (b) of Section 631.030 (when adjudicative proceeding not required).

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

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

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

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

(b) A person who makes an application for an agency decision without expressly requesting an adjudicative proceeding does not thereby waive the right to an adjudicative proceeding.

Comment. Section 642.120 is drawn from 1981 Model State APA § 4-102(b). It supersedes any implication that may have been found under former Sections 11503 and 11504 that a third party has a right to demand that an agency conduct a proceeding. There may, however, be other specific statutes that provide initiation rights to third parties. See, e.g., Bus. & Prof. Code § 24203 (accusations against liquor licensees filed by various public officials).

Section 642.120 requires an agency to conduct an adjudicative proceeding on application of any person for an agency decision within the scope of this division. If the agency determines that any of the exceptions provided in this section is applicable, the agency may deny the application without commencing an adjudicative proceeding, or the agency may, in

its discretion under Section 642.110, commence an adjudicative proceeding although under no compulsion to do so. For the time within which an agency must act with respect to an application, see Section 642.130 (time for agency action). In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to conduct an adjudicative proceeding.

The introductory clause of subdivision (a) reinforces the point that this part only applies where a hearing is statutorily or constitutionally required. See Section 631.010 (application to constitutionally and statutorily required hearings).

Subdivision (a)(1) relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion to initiate or not to initiate an investigation, prosecution, adjudicative proceeding, or other proceeding before the agency or another agency or a court. For example, a person who submits a complaint about a licensee cannot compel the licensing agency to conduct an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to commence or not to commence an adjudicative proceeding in each case. The agency's decision whether or not to commence an adjudicative proceeding need not itself be preceded by an adjudicative proceeding. Section 631.030(b) (adjudicative proceeding not required for initiation decision).

Subdivision (a)(3) does not and could not authorize an agency to deprive any person of procedural rights guaranteed by the constitution. If a statute purporting to authorize an agency to dispense with an adjudicative proceeding conflicts with constitutional guarantees, the agency may exercise its discretion under Section 642.110 to conduct an adjudicative proceeding even though the statute does not require it or, if the agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give appropriate relief.

Subdivision (a)(4) closely relates to the definition of "decision" in Section 610.310 as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." If the applicant does not request agency action that would fit within the definition of a "decision," the agency need not commence an adjudicative proceeding. For example, if a person asks the agency to commence an adjudicative proceeding for the purpose of adopting a rule, or of carrying out a housekeeping function that affects nobody's legal rights, the request would be subject to denial because the requested agency action would not be a "decision." Subdivision (a)(4) provides that an agency need not commence an adjudicative proceeding unless *the applicant's* legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested decision. Interpretation of these terms, ultimately a matter for the courts, will clarify the range of situations in which this part entitles a person to require an agency to conduct an adjudicative proceeding. The availability of informal adjudicative proceedings may persuade courts to develop a more hospitable approach toward applicants than would have been feasible or practicable if the only available type of adjudicative proceeding were a trial-type, formal hearing.

§ 642.130. Time for agency action

642.130. (a) The time limits in this section apply except to the extent they are inconsistent with limits established by another statute for any stage of the proceeding.

(b) Within 30 days after receipt of an application for an agency decision, the agency shall examine the application, notify the applicant of any apparent error or omission, request any additional information from the applicant or another source that the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone

number of an agency member or employee who may be contacted regarding the application. Nothing in this subdivision limits the authority of the agency to request additional information more than 30 days after receipt of an application for an agency decision, but such a request and any response to the request do not extend the time provided in subdivision (c).

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

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

(2) Commence an adjudicative proceeding.

Comment. Section 642.130 is drawn from 1981 Model State APA § 4-104(a). See also Bus. & Prof. Code §§ 485, 487 (procedure on denial of license application). It establishes time limits and notification requirements for agency action on an application for a decision. *Cf.* Section 633.040 (action of agency in declaratory decision procedure).

The effect of this section, when combined with Section 631.030, is that this part imposes no procedures on the agency when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of denial, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this part, are subject to judicial review as a final agency action. An agency commences an adjudicative proceeding under subdivision (c)(2) by issuing a notice of commencement of proceeding. Section 642.210.

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

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

See also Section 613.230 (extension of time).

Article 2. Pleadings

§ 642.210. Proceeding commenced by notice of commencement

642.210. An adjudicative proceeding is commenced by issuance of a notice of commencement of proceeding.

Comment. Section 642.210 supersedes portions of the first sentences of former Sections 11503 and 11504. See also Section 610.410 ("notice of commencement of proceeding" includes accusation and statement of issues). Included among the issues that may be adjudicated are whether a right, authority, license, or privilege should be granted, issued, or renewed on application of a person, or revoked, suspended, limited, or conditioned on initiation of an agency. Sections 642.110-642.130 (initiation of proceeding).

By regulation an agency may require preparation of the notice of commencement of proceeding by another party or may permit a denied application to serve as the notice of commencement of proceeding. In such a case, verification is required unless by regulation

the agency provides otherwise. Section 642.220 (contents of notice of commencement of proceeding).

§ 642.220. Contents of notice of commencement of proceeding

642.220. (a) The notice of commencement of proceeding shall be in writing and shall include all of the following:

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

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

(3) The remedy sought.

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

Comment. Section 642.220 supersedes portions of former Sections 11503 and 11504. The verification requirement would apply where an agency permits preparation of the notice of commencement of proceeding by another party. *Cf.* Section 642.210 Comment (proceeding commenced by notice of commencement).

In the case of an informal hearing procedure, the notice must indicate the agency's selection of the procedure. Section 632.030 (selection of informal hearing procedure).

§ 642.230. Service of notice of commencement of proceeding and other information

642.230. (a) On issuance of the notice of commencement of proceeding, the issuing agency shall serve on the person to which the agency action is directed all of the following:

(1) A copy of the notice of commencement of proceeding.

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

(3) A form of response that acknowledges service of the notice of commencement of proceeding and constitutes a response under Section 642.250.

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

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

(b) The statement to the person to which the agency action is directed shall be substantially in the following form:

> You may request a hearing on this matter. If you do not request a hearing, [here insert name of agency] may proceed on the notice of commencement of proceeding without a hearing. Your failure to request a

hearing does not preclude you from serving on [here insert name of agency] a statement by way of mitigation.

In order to request a hearing, you or a person acting on your behalf must sign either the enclosed form entitled Response or your own form of response as provided in Section 642.250 of the Government Code, and deliver or send it to: [here insert name and address of agency]. You must deliver or send the response within 15 days after the notice of commencement of proceeding was personally served on you, or within 20 days after the notice of commencement of proceeding was sent to you.

You may, but need not, be represented by an attorney or other authorized representative at any or all stages of this proceeding.

To request the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 645.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

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

Comment. Section 642.230 is drawn from former Sections 11504 and 11505. Service under this section is limited to personal service or registered or certified mail; first class mail is not permissible except in cases before an appeals board such as the Unemployment Insurance Appeals Board, where the person to which the agency action is directed has previous involvement in the controversy and initial service provisions are therefore unnecessary.

Service is made by personal delivery or by other appropriate means to the last known address of the person to which the agency action is directed. Sections 613.210 (service) and 613.220 (mail). For this purpose, the person's last known address is the address maintained with the agency, if the person is required to maintain an address with the agency. Section 613.210(b).

An agency that fails properly to serve the person to which the agency action is directed does not acquire jurisdiction unless the person makes a general appearance. Section 642.240 (jurisdiction over person to which the agency action is directed).

The form of response may be a post card or other form provided by the agency. Signing and returning the form by the person to which the agency action is directed acknowledges service of the notice of commencement of proceeding and constitutes a response under Section 642.250.

The person to which the agency action is directed may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

§ 642.240. Jurisdiction over person to which the agency action is directed

642.240. The agency shall make no decision that adversely affects a legal right, duty, privilege, immunity, or other legal interest of the person to which the agency action is directed unless the person has been served as provided in this article or has responded or otherwise appeared.

Comment. Section 642.240 restates a portion of former Section 11505(c).

§ 642.250. Response

642.250. (a) Within 15 days after service of the notice of commencement of proceeding, or a later time that the agency in its discretion permits, the person to which the agency action is directed may serve a response on the agency.

(b) A response shall be in writing signed by the person to which the agency action is directed and shall state the person's mailing address. It need not be verified or follow any particular form.

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

(1) Request a hearing or a place of hearing.

(2) Object to the notice of commencement of proceeding on the ground that it does not state an act or omission or other ground on which the agency may proceed.

(3) Object to the form of the notice of commencement of proceeding on the ground that it is so indefinite or uncertain that the person to which the agency action is directed cannot identify the particular matters in issue or prepare a case. Unless objection is taken under this paragraph, all further objections to the form of the notice of commencement of proceeding are considered waived.

(4) Admit in whole or in part the notice of commencement of proceeding.

(5) Present new matter by way of defense.

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

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

(c) The person to which the agency action is directed is entitled to a hearing on the merits if the person serves a response on the agency under subdivision (a). A response constitutes a specific denial of all parts of the notice of commencement of proceeding not expressly admitted.

(d) Failure to serve a response on the agency under subdivision (a) is a default subject to the right of the person to which the agency action is directed to serve a statement by way of mitigation under Section 648.130 (default).

Comment. Section 642.250 is drawn from former Section 11506. See also Sections 613.340 (authority of attorney or other representative of party), 613.210 (service), 642.260 (amended and supplemental pleadings). If service is by mail or other means of delivery, the person to which the agency action is directed has 20 days after the date of sending in which to respond. Section 613.230 (extension of time).

If the response objects to the notice of commencement of proceeding on the ground that it does not state an act or omission or other ground on which the agency may proceed, or that it is indefinite or uncertain, the agency must rule on the objection before going forward with the hearing. Byment v. Board of Medical Examiners, 57 Cal. App. 260, 264, 207 P. 409, 411 (1922).

The authority to request a place of hearing is new. See also Section 642.340 (venue).

The references to a "hearing" include an informal hearing where appropriate.

§ 642.260. Amended and supplemental pleadings

642.260. (a) At any time before commencement of the hearing a party may amend or supplement a pleading. After commencement of the hearing a party may amend or supplement a pleading in the discretion of the presiding officer, including an amendment to conform to proof at the hearing.

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

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

(d) The presiding officer may order amendment of a pleading after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that the party will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in the party's behalf. If prejudice is shown the presiding officer shall reopen the case to permit the introduction of additional evidence.

(e) A reference in this part to a notice of commencement of proceeding or response includes an amended or supplemental notice or response.

Comment. Section 642.260 supersedes former Sections 11507 and 11516. It is broadened to permit amendment of responses as well as notices of commencement of proceeding, but is narrowed so that an amendment is subject to the presiding officer's discretion after commencement of the hearing. *Cf.* Code Civ. Proc. § 464 (supplemental pleading alleges facts material to case occurring after former pleading). This section is not intended to change the law governing relation back of amendments to pleadings. See discussion in California Administrative Hearing Practice § 3.71 (Cal. Cont. Ed. Bar 1984).

Article 3. Setting Matter for Hearing

§ 642.310. Time and place of hearing

642.310. (a) The agency initiating the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be held before expiration of the time within which the person to which the agency action is directed is entitled to respond.

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

Comment. Section 642.310 is drawn from former Sections 11508 and 11509. For limitations on the place of hearings required to be conducted by the Office of Administrative Hearings, see Section 642.340 (venue).

§ 642.320. Continuances

642.320. The presiding officer may grant a continuance for good cause if any of the following conditions is satisfied:

(1) The party seeking the continuance applied for it within 15 days after the party discovered or reasonably should have discovered the event or occurrence that establishes good cause for the continuance.

(2) The party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event that establishes good cause for the continuance.

Comment. Section 642.320 supersedes former Section 11524(a)-(b). 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.

§ 642.330. Judicial review of denial of continuance

642.330. (a) If an application for a continuance by a party is denied by an administrative law judge employed by the Office of Administrative Hearings, that party shall, within 10 calendar days after the denial, 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 642.330 continues the substance of former Section 11524(c).

§ 642.340. Venue

642.340. (a) Except as otherwise provided in this section, the hearing shall be held at a place designated by the agency in the notice of hearing.

(b) A hearing conducted by an administrative law judge employed by the Office of Administrative hearings shall be held in the following location:

(1) City and County of San Francisco, if the transaction occurred or the person to which the agency action is directed resides or is located within the First or Sixth Appellate District.

(2) County of Los Angeles, if the transaction occurred or the person to which the agency action is directed resides or is located within the Second Appellate District or within the Fourth Appellate District other than the County of Imperial or San Diego.

(3) County of Sacramento, if the transaction occurred or the person to which the agency action is directed resides or is located within the Third or Fifth Appellate District.

(4) County of San Diego, if the transaction occurred or the person to which the agency action is directed resides or is located within the Fourth Appellate District in the County of Imperial or San Diego.

(c) Notwithstanding subdivision (b):

(1) If the transaction occurred in a district other than that of residence or location of the person to which the agency action is directed, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the person to which the agency action is directed resides or is located.

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

Comment. Subdivision (a) of Section 642.330 is consistent with the rule that in a hearing not required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the agency may designate the place of hearing. Section 642.310 (time and place of hearing). For the notice of hearing, see Section 642.360.

Subdivision (b) is drawn from former Section 11508. Subdivision (b)(4) recognizes creation of a branch of the Office of Administrative Hearings in San Diego.

§ 642.350. Change of venue

642.350. The person to which the agency action is directed may move for, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing shall be made with 10 days after service of the notice of hearing on the person.

Comment. Section 642.350 codifies practice authorizing a motion for change of venue. See 1 Ogden, California Public Agency Practice § 33.02[4][d] (1991). Grounds for change of venue include selection of an improper county and promotion of convenience of witness and ends of justice. *Cf.* Code Civ. Proc. § 397. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing.

§ 642.360. Notice of hearing

642.360. (a) The agency shall serve a notice of hearing on all parties at least 15 days before the hearing.

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

> A hearing will be held before [here insert name of agency] at [here insert place of hearing] on [here insert date of hearing], at the hour of, on the issues stated in the notice of commencement of proceeding served on you.
>
> If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of hearing.
>
> The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the presiding officer within 15 days after you discover the good cause. Failure to notify the presiding officer within 15 days will deprive you of a postponement.
>
> You may be present at the hearing. You have the right to be represented by an attorney or other authorized representative at your own expense. You are not entitled to the appointment of an attorney or other authorized representative to represent you at public expense. You are entitled to represent yourself without an attorney.

Unless the hearing is an informal hearing:

You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to [here insert appropriate office of agency] or the presiding officer, or by your attorney of record.

Comment. Section 642.360 is drawn from former Sections 11509 and 11505, with an increase in time from 10 to 15 days and notification of the right to seek a change of venue. See Section 642.350 (change of venue). If notice of hearing is sent by mail or other means, it must be sent at least 20 days before the hearing date. Section 613.230 (extension of time). Proof of service by mail may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a.

The person to which the agency action is directed may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

For limitations on procedures in an informal hearing, see Section 632.040 (procedure for informal hearing).

CHAPTER 3. PRESIDING OFFICER

Article 1. Designation of Presiding Officer

§ 643.110. OAH administrative law judge as presiding officer

643.110. The following provisions apply in an adjudicative proceeding that is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings:

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

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

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

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

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

(2) The agency head shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

(3) The agency head shall issue a decision as provided in Section 649.110. The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency head. No agency member who did not hear the evidence shall vote.

(4) Notwithstanding any other provision of this subdivision, if after the hearing has commenced a quorum no longer exists, the administrative law judge who is

presiding shall complete the hearing as if sitting alone and shall deliver a proposed decision to the agency head as provided in Section 649.110.

Comment. Section 643.110 restates the substance of the first sentence of former Section 11512(a). Statutes apart from this division may require specific adjudicative proceedings to be conducted by an administrative law judge employed by the Office of Administrative Hearings. In addition, hearings by agencies created after the operative date of this division are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings unless expressly exempted by statute. *Cf.* Section 631.040 (when adjudicative proceeding required to be conducted by administrative law judge employed by OAH).

Assignment of an administrative law judge under subdivision (a) is governed by Section 636.150 (Office of Administrative Hearings).

Subdivision (b) restates the second sentence of former Section 11512(a).

Subdivision (c) restates the second sentence of former Section 11512(b).

Subdivisions (d)(1) and (2) restate the first sentence of former Section 11512(b). Subdivision (d)(3) restates former Section 11517(a) with the addition of a sentence that makes clear the agency head may issue a decision in the proceeding. Subdivision (d)(4) restates former Section 11512(e).

§ 643.120. Designation of presiding officer by agency head where exempt from OAH

643.120. If an adjudicative proceeding is not required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, any one or more of the following persons may, in the discretion of the agency head, be the presiding officer:

(a) The agency head.

(b) An agency member.

(c) An administrative law judge assigned by the director of the Office of Administrative Hearings.

(d) Another person designated by the agency head.

Comment. Section 643.120 is drawn from 1981 Model State Act § 4-202(a). It uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the persons may serve as spokesperson, but all persons collectively are regarded as the presiding officer. See also Section 13 (singular includes plural).

This part allows delegation of decision-making authority by the agency head. Section 649.210 (availability and scope of review). It permits a panel of agency head members to act as presiding officer; and if the agency has decided to preclude administrative review, the proposed decision of the panel would be the agency's decision. See Section 649.150 (time proposed decision becomes the decision).

Assignment of an administrative law judge under subdivision (c) is pursuant to Section 636.150 (assignment of administrative law judges). Discretion of the agency head to designate "another person" to serve as presiding officer under subdivision (d) is subject to Section 643.310 (separation of functions).

One consequence of determining who shall preside is provided in Sections 649.110 and 649.210. Under Section 649.110 (decision), if the agency head presides, the agency head shall issue the decision; if any other presiding officer presides, a proposed decision must be issued. Section 649.210 (availability and scope of review) establishes the general appealability of decisions and proposed decisions to the agency head.

For a statutory exception to the right of the agency head to designate the presiding officer, see Section 643.110 (OAH administrative law judge as presiding officer).

§ 643.130. Substitution of presiding officer

643.130. (a) If a substitute is required for a presiding officer who is disqualified or is unavailable for any other reason, the substitute shall be appointed by the appointing authority.

(b) A substitute appointed under this section is subject to the same qualifications as an original presiding officer.

(c) An action taken by a substitute appointed under this section is as effective as if taken by an original presiding officer.

(d) The provisions of this section governing substitution of the presiding officer also govern substitution of the reviewing authority.

Comment. Section 643.130 is drawn from 1981 Model State APA § 4-202(e)-(f). This provision also applies on administrative review. See Section 649.230 Comment (review procedure). The section only applies where a substitute is "required," i.e., is necessary because the presiding officer is otherwise unable to act, for example because of lack of a quorum.

In cases where there is no appointing authority, e.g., the presiding officer is an elected official, this section provides for no appointment of a substitute, and the "rule of necessity" applies. *Cf.* former Section 11512(c) (no agency member subject to disqualification if disqualification would prevent existence of quorum qualified to act).

Article 2. Disqualification

§ 643.210. Grounds for disqualification of presiding officer

643.210. (a) The presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided by law.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of or has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(4) Is subject to the authority, direction, or discretion of a person who has served as, investigator, prosecutor, or advocate in the proceeding, to the extent those circumstances are not prohibited by Article 3 (commencing with Section 643.310) (separation of functions).

Comment. Section 643.210 supersedes former Section 11512(c). Section 643.210 applies whether the presiding officer serves alone or with others. Other causes of disqualification provided by law include receipt of ex parte communications. Section 643.460 (disqualification of presiding officer). For separation of functions requirements, see Section 643.310. This provision also applies to the reviewing authority. Section 643.240 (provisions applicable to reviewing authority).

Subdivision (a) specifies grounds for disqualification drawn from 1981 Model State APA § 4-202(b).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding does not in itself disqualify the presiding officer under Section 643.210, disqualification in such a situation might occur under Section 643.310 (separation of functions).

§ 643.220. Self disqualification

643.220. (a) The presiding officer shall disqualify himself or herself and withdraw from a proceeding in which there are grounds for disqualification.

(b) The parties may waive disqualification under subdivision (a) by a writing that recites the basis for disqualification. The waiver is effective only when signed by all parties, accepted by the presiding officer, and included in the record.

Comment. Section 643.220 is drawn from the first sentence of former Section 11512(c) and from Code of Civil Procedure Section 170.3(b)(1). This provision also applies to the reviewing authority. Section 643.240 (provisions applicable to reviewing authority).

A waiver of disqualification under subdivision (b) is a voluntary relinquishment of rights by the parties. It should be noted that the waiver may be signed by the attorney or other authorized representative of a party. Section 613.340 (authority of attorney or other representative of party). The presiding officer need not accept a waiver; the waiver is effective only if accepted by the presiding officer.

§ 643.230. Procedure for disqualification of presiding officer

643.230. (a) A party may request disqualification of the presiding officer by filing an affidavit within 10 days after receipt of notice of the presiding officer's identity or within 10 days after discovering facts establishing grounds for disqualification, whichever is later. The affidavit shall state with particularity the grounds of the request for disqualification of the presiding officer.

(b) The presiding officer whose disqualification is requested shall determine whether to grant the request. If the presiding officer is more than one person, the person whose disqualification is requested shall not participate in the determination.

(c) A determination not to grant the disqualification request shall state facts and reasons for the determination.

(d) The determination of the disqualification request is subject to administrative and judicial review at the same time, in the same manner, and to the same extent as other determinations of the presiding officer in the proceeding.

Comment. Section 643.230 supersedes former Section 11512(c). It is drawn from 1981 Model State APA § 4-202(c)-(d). This provision also applies to the reviewing authority. Section 643.240 (provisions applicable to reviewing authority).

§ 643.240. Provisions applicable to reviewing authority

643.240. The provisions of this article governing qualifications of the presiding officer also govern qualifications of the reviewing authority.

Comment. Under Section 643.240, this article is applicable on administrative review. See also Section 649.230 Comment (review procedure).

Article 3. Separation of Functions

§ 643.310. Limitation on service as presiding officer

643.310. (a) A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances:

(1) The person has served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage.

(2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage.

(b) This section does not apply to a proceeding for issuance, denial, revocation, or suspension of a driver's license pursuant to Division 6 (commencing with Section 12500) of the Vehicle Code. The Department of Motor Vehicles shall study the effect of this section on proceedings involving vehicle operation certificates and shall report to the Legislature by December 31, 1999, with recommendations concerning experience with its application in those proceedings.

Comment. Subdivision (a) of Section 643.310 is drawn from 1981 Model State APA § 4-214(a)-(b). This provision also applies on administrative review. Section 643.330 (application of provisions to reviewing authority). For exceptions to this provision, see Section 643.320 (when separation not required).

Under this provision, a person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case.

Subdivision (b) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Subdivision (b) makes separation of powers requirements inapplicable in drivers' licensing cases, including license classifications and endorsements. However, the separation of functions requirements remains applicable in other Department of Motor Vehicle hearings, including schoolbus and ambulance operation certificate hearings, on which the department is required to report.

§ 643.320. When separation not required

643.320. Notwithstanding Section 643.310:

(a) A person may serve as presiding officer at successive stages of an adjudicative proceeding.

(b) A person who has participated as decisionmaker in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its pre-adjudicative stage may serve as presiding officer in the proceeding.

Comment. Section 643.320 is drawn from 1981 Model State APA § 4-214(c)-(d). This provision also applies on administrative review. Section 643.330 (application of provisions to reviewing authority).

This section, dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 643.410, which prohibits certain ex parte communications. The policy issues in Section 643.410 regarding ex parte communication between two persons differ from the policy issues in subdivisions (a) and (b) regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications. Section 643.460 (disqualification of presiding officer). See also Section 643.210 (grounds for disqualification of presiding officer).

§ 643.330. Application of provisions to reviewing authority

643.330. The provisions of this article governing separation of functions as to the presiding officer also govern separation of functions as to the reviewing authority.

Comment. Under Section 643.330, this article is applicable on administrative review. See also Section 649.230 Comment (review procedure).

Article 4. Ex Parte Communications

§ 643.410. Ex parte communications prohibited

643.410. (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

(c) For the purpose of this section, 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.

Comment. Section 643.410 is drawn from former Section 11513.5(a) and (b). See also 1981 Model State APA § 4-213(a), (c). This provision also applies on administrative review. Section 643.470 (application of provisions to reviewing authority). For exceptions to this section, see Sections 643.420 (permissible ex parte communications generally) and 643.430 (permissible ex parte communications from agency personnel).

The reference to a representative of a party is consistent with Section 613.340 (authority of attorney or other representative of party). The reference to an "interested person outside the agency" replaces the former reference to a "person who has a direct or indirect interest in the outcome of the proceeding," and is drawn from federal law. See Federal APA § 557(d)(1)(A); see also PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982) (construing the federal standard to include person with an interest beyond that of a member of the general public).

While this section precludes an adversary from communicating with the presiding officer, it does not preclude the presiding officer from communicating with an adversary. This reverses a provision of former Section 11513.5(a). Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed. However, a presiding officer should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others.

Nothing in this section limits the authority of the presiding officer to conduct an in camera examination of proffered evidence. *Cf.* Section 645.320 (lodging discovery matters with court).

This section does not preclude ex parte communications between the agency head making a decision and any person who presided at a previous stage of the proceeding, including communications between the agency head deciding whether to adopt a proposed decision and the presiding officer who made the proposed decision. This reverses a provision of former Section 11513.5(a).

OR

Where the agency conducting the hearing is not a party to the proceeding, the presiding officer employed by the agency conducting the hearing may consult with the head of the agency conducting the hearing in the preparation of the proposed decision. The ex parte communications prohibition only applies as between the presiding officer and parties and other interested persons, not as between the presiding officer and disinterested personnel of a non-party agency conducting the hearing.

This section does not address the matter of a party providing information to the decision maker after submission of a decision for review. Such additional information is treated not as an ex parte communication but as a supplement to the record, which may serve as a basis for a decision if all parties are given an opportunity to comment on it. Section 649.120 (form and contents of decision).

§ 643.420. Permissible ex parte communications generally

643.420. A communication otherwise prohibited by Section 643.410 is permissible in any of the following circumstances:

(a) The communication is required for disposition of an ex parte matter specifically authorized by statute.

(b) The communication concerns a matter of procedure or practice that is not in controversy.

Comment. Section 643.420 is drawn from former Section 11513.5(a) and (b). This provision also applies on administrative review. Section 643.470 (application of provisions to reviewing authority).

This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

§ 643.430. Permissible ex parte communications from agency personnel

643.430. A communication otherwise prohibited by Section 643.410 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning the following matters in an adjudicative proceeding that is nonprosecutorial in character, provided the content of the advice is disclosed on the record and all parties are given an opportunity to comment on it in the manner provided in Section 643.450 (disclosure of ex parte communication):

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer.

(2) The advice involves an issue in a proceeding of the California Coastal Commission, San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

Comment. Section 643.430 is most useful in hearings where the presiding officer is not an administrative law judge employed by the Office of Administrative Hearings. This provision also applies on administrative review. Section 643.470 (application of provisions to reviewing authority). It should be noted that this article does not limit on-the-record communications between agency personnel and the presiding officer. Section 643.410(b) (ex parte communications prohibited). Only advice or assistance given outside the hearing is prohibited.

The first sentence of subdivision (a) is drawn from 1981 Model State APA § 4-214(a)-(b). The second sentence is drawn from 1981 Model State APA § 4-213(b). Under this provision, a person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The limitation is intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. Thus a person who merely participated in a preliminary determination in an adjudicative proceeding or its pre-adjudicative stage would ordinarily be able to assist or advise the presiding officer in the proceeding. *Cf.* Section 643.320 (when separation of functions not required). For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by this section.

This provision is not limited to agency personnel, but includes participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the reviewing authority at the administrative review level, except with respect to settlement matters. Subdivision (b).

Subdivision (b), permitting an investigator, prosecutor, or advocate to advise the presiding officer regarding a settlement proposal, is limited to advice in support of the proposed settlement; the insider may not use the opportunity to argue against a previously agreed-to settlement. *Cf.* Alhambra City and High School Districts (1986) PERB Decision No. 560 [10 PERC ¶ 17046]. Insider access is permitted here in furtherance of public policy favoring settlement, and because of the consonance of interest of the parties in this situation.

Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as power plant siting and land use decisions. The provision 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 restrictions of this article, given limited staffing and personnel. Subdivision (c)(1) recognizes such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer under standard doctrine. Subdivision (c)(2) recognizes the need for policy advice from planning staff in proceedings such as land use and environmental matters.

This section is augmented by special statutes applicable to individual agencies. See, e.g., Pub. Res. Code § 30322(b)(1) (communication between a Coastal Commission staff member acting in official capacity and commission member or interested person not prohibited).

§ 643.440. Prior ex parte communication

643.440. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to comment on it in the manner provided in Section 643.450 (disclosure of ex parte communication).

Comment. Section 643.440 is drawn from former Section 11513.5(c), but is limited to communications received during pendency of the proceeding. See also 1981 Model State APA § 4-213(d). This provision also applies on administrative review. Section 643.470 (application of provisions to reviewing authority). For the purpose of this section, a proceeding is pending on the earlier of issuance of a notice of commencement of proceeding or an application for an agency decision. Section 643.410(c) (ex parte communications prohibited).

§ 643.450. Disclosure of ex parte communication

643.450. (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record of the proceeding:

(1) If the communication is written, the writing and any written response to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made, and the identity of each person from which the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record. A party that requests an opportunity to comment on the communication within ten (10) days after notice of the communication shall be allowed to comment.

Comment. Section 643.450 is drawn from former Section 11513.5(d). This provision also applies on administrative review. Section 643.470 (application of provisions to reviewing authority). It should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.430(a) (staff assistance for presiding officer).

See also Section 613.230 (extension of time).

§ 643.460. Disqualification of presiding officer

643.460. Receipt by the presiding officer of a communication in violation of this article may provide a basis for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

Comment. Section 643.460 is drawn from former Section 11513.5(e). This provision also applies on administrative review. Section 643.470 (application of provisions to reviewing authority).

Section 643.460 permits the disqualification of a presiding officer if necessary to eliminate the effect of an ex parte communication. For the disqualification procedure, see Section 643.230.

In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Issuance of a protective order under this section is permissive, not mandatory, and is therefore within the discretion of a presiding officer who has knowledge of the improper communication.

§ 643.470. Application of provisions to reviewing authority

643.470. The provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications to the reviewing authority.

Comment. Under Section 643.470, this article is applicable on administrative review. See also Section 649.230 Comment (review procedure).

CHAPTER 4. INTERVENTION

§ 644.110. Intervention

644.110. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(a) The motion is submitted in writing to the presiding officer, with copies served on all parties named in the notice of the hearing.

(b) The motion is made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference.

(c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

(d) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

Comment. Section 644.110 is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (c) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities will be substantially affected by the proceeding." Cf. Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (right to notice and hearing if agency action will constitute substantial deprivation of property rights). However, subdivision (d) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings on the legal rights, etc., of the applicant for

intervention (subdivision (c)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (d)).

§ 644.120. Conditions on intervention

644.120. If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceedings, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(b) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(d) Limiting or excluding the intervenor's participation in settlement negotiations.

Comment. Section 644.120 is drawn from 1981 Model State APA § 4-209(c). This section, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceeding, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceeding to unreasonably burdensome or repetitious presentations.

§ 644.130. Order granting, denying, or modifying intervention

644.130. (a) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying each motion for intervention, specifying any conditions, and briefly stating the reasons for the order.

(b) The presiding officer may modify the order at any time, stating the reasons for the modification.

(c) The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant and to all parties.

Comment. Section 644.130 is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this section is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding.

§ 644.140. Intervention determination nonreviewable

644.140. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's sole discretion based on the knowledge and judgment of the presiding officer at that time, and the presiding officer's determination is not subject to administrative or judicial review.

Comment. Section 644.140 is new.

§ 644.150. Limitation of intervention provisions

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 4 (commencing with Section 643.410) of Chapter 3 (ex parte communications).

(b) By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

Comment. Subdivision (a) of Section 644.150 recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

Subdivision (b) makes clear that an agency may limit or preclude intervention in a proceeding.

CHAPTER 5. DISCOVERY

Article 1. General provisions

§ 645.110. Application of chapter

645.110. This chapter provides the exclusive right to and method of discovery in a proceeding governed by this part.

Comment. Section 645.110 supersedes former Section 11507.5. The civil discovery provisions of the Code of Civil Procedure are inapplicable to this part except to the extent a provision of this part incorporates them.

§ 645.120. Discovery of evidence of sexual conduct

645.120. (a) This section is intended only to limit the scope of discovery. It is not intended to affect the methods of discovery allowed under this chapter.

(b) In a proceeding under subdivision (i) or (j) of Section 12940 or under Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided in Section 648.470 (evidence of sexual conduct).

Comment. Section 645.120 supersedes former Section 11507.6(g).

§ 645.130. Preservation of testimony by deposition

645.130. (a) A party may, by petition as provided in this section, request an order that the testimony of a material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions.

(b) The petition shall be verified, shall request an order that the witness appear and testify before an officer named in the petition for that purpose, and shall state all of the following:

(1) The nature of the pending proceeding.

(2) The name and address of the witness whose testimony is requested.

(3) A showing of the materiality of the testimony of the witness.

(4) A showing that the witness will be unable or cannot be compelled to attend the hearing.

(c) The applicant shall serve notice of hearing and a copy of the petition on the other parties to the proceeding at least 10 days before the hearing.

(d) If the witness resides within the state, the petition shall be made to, and an order may be issued by, the presiding officer or, if a presiding officer has not been appointed, the agency. If the witness resides without the state, the petition shall be made to, and an order may be issued by, the agency, which shall obtain an order of the superior court to that effect either in the county where the proceeding is conducted or the County of Sacramento.

Comment. Section 645.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition where the witness resides within the state. The section also requires notice to the other parties of the hearing on the petition. See also Section 613.230 (extension of time).

Article 2. Discovery

§ 645.210. Time and manner of discovery

645.210. (a) After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after service on the party of the notice of commencement of proceeding or within 15 days after service on the party of an additional or supplemental pleading, is entitled to discovery to the extent provided in this article.

(b) A party shall respond to a request for discovery within 30 days after service of the request, or within another time provided by stipulation.

Comment. Subdivision (a) of Section 645.210 supersedes the introductory portion of the first paragraph of former Section 11507.6. It should be noted that an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing may be required at a prehearing conference. Section 646.120 (subject of prehearing conference).

Subdivision (b) is new. If the request is served by mail or other means, the party has 35 days after the date of sending in which to respond. Section 613.230 (extension of time). The reference to another time provided by stipulation is a specific instance of the general principle that time periods under this division may be waived by agreement of the parties. An express provision is included here because under Section 645.310 (motion to compel discovery) the time within which a motion must be made commences to run from expiration of the time provided in this section.

§ 645.220. Discovery of witness list

645.220. A party requesting discovery under this article is entitled to obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

Comment. Section 645.220 supersedes clause (1) of the first paragraph of former Section 11507.6. For the time within which a party must respond to a discovery request, see Section 645.210 (time and manner of discovery).

§ 645.230. Discovery of statements, writings, and reports

645.230. (a) As used in this section, "statement" includes all of the following:

(1) A written statement by a person signed or otherwise authenticated by the person.

(2) A stenographic, mechanical, electrical, or other recording or transcript of an oral statement by a person.

(3) A written report or summary of an oral statement by a person.

(b) A party requesting discovery under this article is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of another party:

(1) A statement of a witness then proposed to be called by the party or of any other person, including a party or the complainant, having personal knowledge of the acts, omissions, or events that are the basis for the proceeding.

(2) 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.

(3) Any other writing or thing that is relevant.

(4) An investigative report made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report (i) contains the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, or (ii) reflects matters perceived by the investigator in the course of the investigation, or (iii) contains or includes by attachment any statement or writing or summary of a statement or writing described in this section.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Comment. Section 645.230 supersedes clause (2) of the first paragraph of, subdivisions (a)-(f) of, and the second and third paragraphs of, former Section 11507.6. See also Section 610.410 ("notice of commencement of proceeding" defined).

Subdivision (b)(1) generalizes specific provisions of former law that allowed discovery of both (1) a statement of a person, other than the person to which the agency action is directed, named in the notice of commencement of proceeding, when it is alleged that an act or omission as to the person is the basis for the adjudicative proceeding, and (2) a statement pertaining to the subject matter of the proceeding made by a party to another party or person. This generalization is for drafting convenience and is not intended to repeal any authority for discovery that existed under former law; that authority is continued in the new provision.

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). Although subdivision (b)(3) permits discovery of anything that is relevant, it should be noted that Section 648.420 provides the presiding officer discretion to exclude evidence.

For the time within which a party must respond to a discovery request, see Section 645.210 (time and manner of discovery).

Article 3. Compelling Discovery

§ 645.310. Motion to compel discovery

645.310. (a) If a party fails to respond to a request for discovery within the time provided in Section 645.210, the party making the request may make a motion to the presiding officer to compel discovery.

(b) A motion to compel discovery shall be made and notice of motion served on the party within 15 days after expiration of the time provided in Section 645.210, or if the party evidences refusal to respond before expiration of the time provided in Section 645.210, within 15 days after the evidence of refusal.

(c) The motion shall state facts showing the party's failure or refusal to comply with the request for discovery, a description of the matter sought to be discovered, the reason the matter is discoverable under this chapter, that a reasonable and good faith attempt to contact the party for an informal resolution of the issue has been made, and the ground of the party's refusal so far as known to party making the request.

Comment. Section 645.310 supersedes subdivision (a) and a portion of subdivision (b) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.320. Lodging matters with presiding officer

645.320. Where the matter sought to be discovered is under the custody or control of the opposing party and the opposing party asserts that the matter is not discoverable or is privileged against disclosure under this chapter, the presiding officer may order lodged with it matters provided in, and examine the matters in accordance with the provisions of, subdivision (b) of Section 915 of the Evidence Code.

Comment. Section 645.320 supersedes former Section 11507.7(e). Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.330. Hearing

645.330. (a) The hearing on the motion to compel discovery shall be within 15 days after the motion is made, or a later time that the presiding officer may on its own motion for good cause determine. The party against which the motion is made may file an opposition to the motion before or at the time of the hearing.

(b) The presiding officer shall decide the case on the matters examined by the presiding officer in camera, the papers filed by the parties, and oral argument and additional evidence that the presiding officer allows.

(c) The presiding officer shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the party requesting discovery, whether the granting of the motion will delay the commencement of the hearing on the date set, and the possible prejudice to any party.

Comment. Section 645.330 supersedes a portion of subdivision (b) and subdivision (f) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.340. Order compelling discovery

645.340. (a) Unless otherwise stipulated by the parties, the presiding officer shall no later than 15 days after the hearing make its order denying or granting the motion.

(b) The order of the presiding officer shall be in writing setting forth the matters the party requesting discovery is entitled to discover under this chapter.

(c) The presiding officer shall serve the order on the parties. Where the order grants the motion in whole or in part, the order does not become effective until 10 days after the date the order is served on the party. Where the order denies relief to the party requesting discovery, the order is effective on the date it is served on the party.

Comment. Section 645.340 supersedes former Section 11507.7(g). Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

An order of the presiding officer compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 648.510-648.520. 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 648.530.

Article 4. Subpoenas

§ 645.410. Subpoena authority

645.410. (a) 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.

(b) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit of authenticity,

Comment. Subdivision (a) of Section 645.410 supersedes a portion of former Section 11510. This article gives subpoena power to all adjudicating agencies and attorneys for parties. See Section 645.420 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also broadens former law to allow a subpoena

duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

Subdivision (b) provides an alternative means of satisfying a subpoena duces tecum without the custodian's appearance. This is analogous to the procedure available in court proceedings. See Code Civ. Proc. § 2020. A custodian of subpoenaed documents who fails to comply with the subpoena may be compelled to appear and produce the documents. See Section 648.510 (misconduct in proceeding).

This article incorporates privacy protections from civil practice. Section 645.420(a).

§ 645.420. Issuance of subpoena

645.420. (a) Subpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and diver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(c) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

Comment. Section 645.420 restates a portion of former Section 11510, and expands it to include issuance by an attorney and to incorporate civil practice privacy protections. See Code Civ. Proc. §§ 1985-1985.4. See also Sehlmeyer v. Department of Gen. Serv., 21 Cal. Rptr. 2d 840 (1993). For enforcement of a subpoena, see Section 648.510.

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.

§ 645.430. Motion to quash

645.430. (a) An objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, may be reasonably made by a party.

(b) The objection shall be resolved by the presiding officer on terms and conditions that the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands including violations of the right to privacy.

(c) A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

Comment. Section 645.430 addresses matters not previously covered by statute but covered by regulation in some agencies. See, e.g., Cal. Code Regs. tit. 20, § 61 (Public Utilities Commission).

§ 645.440. Witness fees

645.440. A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the appearance the following mileage and fees, to be paid by the party on whose motion the witness is subpoenaed:

(a) The same mileage allowed by law to a witness in a civil case.

(b) The same fees allowed by law to a witness in a civil case. This subdivision does not apply to an officer or employee of the state or a political subdivision of the state.

Comment. Section 645.440 restates a portion of former Section 11510. Its coverage is extended to a subpoena duces tecum and is conformed to the mileage and fees applicable in civil cases. See Sections 68093-68098 (mileage and fees in civil cases).

CHAPTER 6. PREHEARING AND SETTLEMENT CONFERENCES

Article 1. Prehearing Conference

§ 646.110. Conduct of prehearing conference

646.110. (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.

(b) The presiding officer shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties. The notice shall inform the parties that at the prehearing conference the proceeding may be converted into an informal hearing for disposition of the matter.

(c) The presiding officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(d) At the prehearing conference the proceeding may be converted into either of the following:

(1) An informal hearing for disposition of the matter as provided in this division. 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 647.010).

Comment. Subdivisions (a) and (b) of Section 646.110 supersede former Section 11511.5(a). See also Section 613.230 (extension of time).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii), expanded to include alternative dispute resolution.

§ 646.120. Subject of prehearing conference

646.120. A prehearing conference may deal with one or more of the following matters:

(a) Exploration of settlement possibilities.

(b) Objections to use of informal hearing procedure.

(c) Preparation of stipulations.

(d) Clarification of issues.

(e) Rulings on identity and limitation of the number of witnesses.

(f) Objections to proffers of evidence.

(g) Order of presentation of evidence and cross-examination.

(h) Rulings regarding issuance of subpoenas and protective orders.

(i) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(j) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

(k) Motions for intervention.

(*l*) Exploration of the possibility of using dispute resolution provided in Chapter 7 (commencing with Section 647.010).

(m) Any other matters that promote the orderly and prompt conduct of the hearing.

Comment. Section 646.120 supersedes former Section 11511.5(b).

Subdivision (j) is new. If a party has not availed itself of discovery within the time periods provided by Chapter 5 (commencing with Section 645.110), it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

Subdivision (k) implements Section 644.110 (intervention).

§ 646.130. Prehearing order

646.130. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference. The presiding officer may direct one or more of the parties to prepare the prehearing order.

Comment. Section 646.130 supersedes former Section 11511.5(c).

Article 2. Settlement Conference

§ 646.210. Settlement

646.210. (a) Subject to subdivision (b), the parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. This subdivision applies:

(1) After issuance of a notice of commencement of proceeding in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned.

(2) Before or after issuance of a notice of commencement of proceeding in a case other than a case described in paragraph (1).

(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. An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 646.210 codifies the rule in Rich Vision Centers, Inc. v. Board of Medical Examiners, 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983). It also makes clear that an agency can settle a case without filing a notice of commencement of proceeding, except in a licensing disciplinary case. See also Section 610.430 ("occupational license" defined).

This provision is subject to a specific statute to the contrary governing the matter. See, e.g., Gov't Code § 18681 (authority of State Personnel Board to approve settlements), Lab. Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

§ 646.220. Mandatory settlement conference

646.220. (a) The presiding officer may order the parties to attend and participate in a settlement conference.

(b) If the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference shall be different from the presiding officer at the hearing. In other cases, the presiding officer at the settlement conference may, but need not, be different from the presiding officer at the hearing.

(c) The presiding officer shall set the time and place for the settlement conference, and the agency shall give reasonable written notice to all parties.

(d) The presiding officer may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the

conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

Comment. Under Section 646.220 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur); the conduct of the settlement conference parallels that of the prehearing conference. See Sections 646.110, 646.120 & Comments (prehearing conference).

Attendance and participation in the settlement conference is mandatory.

An agency may, but is not required to, put in place a system of settlement judges, whereby a judge of comparable status to the presiding officer who will hear the case is assigned to help mediate a settlement. Separate settlement judges are required in settlement conferences before the Office of Administrative Hearings.

See also Section 613.230 (extension of time).

§ 646.230. Confidentiality of settlement communications

646.230. Notwithstanding any other statute, no evidence of an offer of compromise or settlement made in settlement negotiations under this article is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

Comment. Section 646.230 applies notwithstanding Section 648.410 (technical rules of evidence inapplicable). It is drawn from Evidence Code Section 1152 (compromise and settlement offers). See also Section 647.040 & Comment (confidentiality of communications in alternative dispute resolution). 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.

CHAPTER 7. ALTERNATIVE DISPUTE RESOLUTION

§ 647.010. Application of chapter

647.010. (a) This chapter is subject to a statute that requires mediation or arbitration in an adjudicative proceeding.

(b) By regulation an agency may make this chapter inapplicable.

Comment. Subdivision (a) of Section 647.010 recognizes that some statutes require alternative dispute resolution techniques.

If there is no statute requiring the agency to use mediation or arbitration, this chapter applies unless the agency makes it inapplicable by regulation under subdivision (b). Subdivision (b) only permits an agency to make this chapter inapplicable, not to modify it. But, under Section 647.030, an agency that does not make this chapter inapplicable may modify model regulations promulgated by the Office of Administrative Hearings.

§ 647.020. ADR authorized

647.020. (a) An agency may, with the consent of all the parties, refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator. An award in a binding arbitration is subject to judicial review in the manner provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the agency head a party requests the agency for a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure (judicial arbitration) insofar as applicable in the adjudicative proceeding.

Comment. Section 647.020 is new. Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21. The costs and fees specified in Section 1141.21 for a civil proceeding may not all be applicable in an adjudicative proceeding, but subdivision (c) requires such costs and fees to be assessed to the extent they are applicable.

§ 647.030. Regulations governing ADR

647.030. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations for dispute resolution under this chapter. The model regulations govern dispute resolution by an agency under this chapter, unless by regulation the agency modifies the model regulations or makes the model regulations inapplicable.

(b) The model regulations shall include provisions for selection and compensation of a mediator or arbitrator, qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding.

Comment. Section 647.030 does not require each agency to adopt regulations. The model regulations developed by the Office of Administrative Hearings will automatically govern mediation or arbitration for an agency, unless the agency provides otherwise. The agency may choose to preclude mediation or arbitration altogether. Section 647.010 (application of chapter).

The Office of Administrative Hearings could maintain a roster of neutral mediators and arbitrators who are available for dispute settlement in all administrative agencies.

§ 647.040. Confidentiality and admissibility of ADR communications

647.040. Notwithstanding any other statute, a communication made in dispute resolution under this chapter is protected to the following extent:

(a) Anything said, any admission made, and any document prepared in the course of or pursuant to mediation under this division is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or otherwise. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.

(b) No reference to nonbinding arbitration proceedings or an award under this division or the evidence produced or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No presiding officer, arbitrator, or mediator 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.

Comment. Section 647.040 applies notwithstanding Section 648.410 (technical rules of evidence inapplicable).

Subdivision (a) is analogous to Evidence Code Section 1152.5(a)-(b) (mediation). Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (c) is drawn from Evidence Code Section 703.5.

CHAPTER 8. CONDUCT OF HEARING

Article 1. General Provisions

§ 648.110. Presiding officer controls conduct of hearing

648.110. The presiding officer shall exercise all powers relating to the conduct of the hearing.

Comment. Section 648.110 supplements Section 643.110 (OAH administrative law judge as presiding officer). This section gives the presiding officer broad discretion over the conduct of the hearing, including regulating the order of proof and personally questioning witnesses. See California Administrative Hearing Practice § 3.20, at 168, §3.48, 193 (Cal. Cont. Ed. Bar 1984). See also Section 648.420 (discretion of presiding officer to exclude evidence).

§ 648.120. Consolidation and severance

648.120. (a) When proceedings that involve a common question of law or fact are pending, the agency or presiding officer on its own motion or on motion of a party may order a joint hearing of any or all the matters at issue in the proceedings. The agency or presiding officer may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) The agency or presiding officer on its own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the response, or of any number of issues.

(c) If the agency and presiding officer make conflicting orders under this section, the agency's order controls.

Comment. Section 648.120 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding. See also Section 13 (singular includes plural).

§ 648.130. Default

648.130. (a) Failure of the person to which the agency action is directed to serve a response or to appear at the hearing is a default.

(b) If the person to which the agency action is directed defaults:

(1) The default is a waiver of the person's right to a hearing.

(2) The agency may take action based on the person's express admissions or on other evidence. Affidavits may be used as evidence without notice to the person to which the agency action is directed.

(3) Where the burden of proof is on the person to establish that the person is entitled to the agency action sought, the agency may act without taking evidence.

(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 the hearing.

(d) Within 7 days after service on the person to which the agency action is directed of a decision based on the person's default, the person may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the person to receive notice sent pursuant to Section 613.220. If the person is required by statute or regulation to maintain an address with the agency and failure to receive the notice is because the person did not comply with that requirement, the agency may consider that fact in determining whether there has been a showing of good cause under this subdivision.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Comment. Subdivisions (a)-(c) of Section 648.130 are drawn from former Section 11506(b) and (d), with the addition of the provision enabling the presiding officer to waive a default and impose costs, and requiring reasonable notice, and from former Section 11520. See also Section 613.230 (extension of time).

Subdivision (d) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

§ 648.140. Open hearings

648.140. (a) The hearing is open to public observation except to the extent:

(1) A closed hearing is required in whole or in part by statute or by federal or state constitution.

(2) The presiding officer determines it is necessary to close the hearing in whole or in part to ensure a fair hearing in the circumstances of the particular case.

(b) To the extent a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity (1) at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency, and (2) to be physically present at the place where the presiding officer is conducting the hearing.

(c) This section does not apply to a prehearing conference or settlement conference, or proceedings for alternative dispute resolution.

Comment. 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). See also Section 610.280 ("agency member" defined). And under the Open Meeting Law, a settlement proposal may be considered by the agency in closed session if it sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting. Section 11126(d), (q).

Subdivision (a) codifies existing practice. See discussion in 1 G. Ogden, California Public Agency Practice § 37.03 (1991). Statutory protection of trade secrets and other confidential or privileged information is covered by subdivision (a)(1). See, e.g., Evid. Code §§ 1060-1063. Discretion of the presiding officer under subdivision (a)(2) could include such matters as protection of a minor or developmentally disabled witness. *Cf.* Section 648.350 (protection of minor or developmentally disabled witness).

Subdivision (b) is drawn in part from 1981 Model State APA § 4-211(6). The right of the public to be present where a hearing is being conducted telephonically does not include the right to participate, and the right of the public to inspect the record does not impose an duty on the agency independent of the public records act to provide a copy.

§ 648.150. Hearing by electronic means

648.150. (a) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party shows that a determination in the proceeding will be based substantially on the credibility of a witness and that a hearing by telephone, television, or other electronic means will impair a proper determination of credibility.

Comment. Subdivision (a) of Section 648.150 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants.

§ 648.160. Report of proceedings

648.160. (a) Except as provided in subdivision (b), the proceedings at the hearing shall be reported by a stenographic reporter or electronically, in the discretion of the agency.

(b) Notwithstanding an agency's election of electronic reporting of proceedings:

(1) The presiding officer may, if the presiding officer determines electronic reporting will not provide an adequate record of the proceedings, require stenographic reporting.

(2) A party may at the party's own expense require stenographic recording.

Comment. Section 648.160 supersedes former Section 11512(d).

Article 2. Language Assistance

§ 648.210. "Language assistance"

648.210. As used in this article, "language assistance" means oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

Comment. Section 648.210 supersedes former Section 11500(g). It extends this article to language translation for witnesses.

§ 648.220. Interpretation for hearing-impaired person

648.220. Nothing in this article limits the application or effect of Section 754 of the Evidence Code to interpretation for a deaf or hard-of-hearing party or witness in an adjudicative proceeding.

Comment. Section 648.220 makes clear that the language assistance provisions of this article are not intended to limit the application to adjudicative proceedings of the provisions of Evidence Code Section 754.

§ 648.230. Application of article

(a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

Agricultural Labor Relations Board
State Department of Alcohol and Drug Abuse
Athletic Commission
California Unemployment Insurance Appeals Board
Board of Prison Terms
State Board of Barbering and Cosmetology
State Department of Developmental Services
Public Employment Relations Board
Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development
Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Workers' Compensation Appeals Board
Department of the Youth Authority

Youthful Offender Parole Board
Bureau of Employment Agencies
Department of Insurance
State Personnel Board
Board of Podiatric Medicine
Board of Psychology

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 648.250.

(c) Nothing in this section prohibits an agency from providing an interpreter during an informal factfinding or informal investigatory hearing.

(d) This article applies to an agency listed in subdivision (a) notwithstanding a general exemption of some or all of an agency's hearings from this division.

Comment. Subdivisions (a) and (b) of Section 648.230 restate former Section 11501.5. Subdivision (c) restates a portion of former Section 11500(f). Subdivision (d) is added to make clear that exemption of an agency's hearings from the other provisions of the administrative procedure act does not exempt the hearings from the requirements of this article if the agency is listed in this section.

§ 648.240. Provision for interpreter

648.240. (a) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language.

(b) If a party or the party's witness does not proficiently speak or understand the English language and before commencement of the hearing or medical examination requests language assistance, an agency subject to the language assistance requirement of this article shall provide the party or witness an interpreter.

(c) Except as provided in Section 648.275:

(1) An interpreter used in a hearing shall be certified pursuant to Section 648.250.

(2) An interpreter used in a medical examination shall be certified pursuant to Section 648.255.

Comment. Section 648.240 continues the first three sentences of former Section 11513(d) and extends it to witnesses as well as parties. See Section 648.210 ("language assistance" defined).

§ 648.245. Cost of interpreter

648.245. The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the presiding officer so directs, otherwise the party at whose request the interpreter is provided.

(b) The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay.

(c) Notwithstanding any other provision of this section, in a hearing before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to worker's compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.

Comment. Section 648.245 continues the fourth sentence and the second paragraph of former Section 11513(d) without substantive change.

§ 648.250. Certification of hearing interpreters

648.250. (a) The State Personnel Board shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 648.260. Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures.

(b) Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters before July 1, 1993, shall be deemed certified for purposes of this section.

Comment. Section 648.250 continues former Section 11513(e) without substantive change.

§ 648.255. Certification of medical examination interpreters

648.255. (a) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 648.260.

(b) Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to Section 648.250 shall be deemed certified for purposes of this section.

Comment. Section 648.255 continues former Section 11513(f) without substantive change.

§ 648.260. Designation of languages for certification

648.260. (a) The State Personnel Board shall designate the languages for which certification shall be established under Sections 648.250 and 648.255. The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages.

(b) The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

Comment. Section 648.260 continues former Section 11513(g) without substantive change.

§ 648.265. Certification fees

648.265. (a) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this article. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance.

(b) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of the certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(c) If the amount of money collected in fees is not sufficient to cover the costs of carrying out this article, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

Comment. Section 648.265 continues former Section 11513(h) and (i) without substantive change.

§ 648.270. Decertification

648.270. The State Personnel Board may remove the name of a person from the list of certified interpreters if any of the following conditions occurs:

(a) The person is deceased.

(b) The person notifies the board that the person is unavailable for work.

(c) The person does not submit a renewal fee as required by Section 648.265.

Comment. Section 648.270 continues former Section 11513(j) without substantive change.

§ 648.275. Unavailability of certified interpreter

648.275. (a) In the event an interpreter certified pursuant to Section 648.250 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize another interpreter.

(b) In the event an interpreter certified pursuant to Section 648.255 cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.

Comment. Section 648.275 continues former Section 11513(k) without substantive change.

§ 648.280. Duty to advise party of right to interpreter

648.280. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

Comment. Section 648.280 continues former Section 11513(*l*) without substantive change.

§ 648.285. Confidentiality and impartiality of interpreter

648.285. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding shall apply to any interpreter in the hearing, whether or not the rules so state.

(b) The interpreter shall not have had any involvement in the issues of the case before the hearing.

Comment. Section 648.285 continues former Section 11513(m) and (n) without substantive change.

Article 3. Testimony and Witnesses

§ 648.310. Burden of proof

648.310. The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter.

Comment. Section 648.310 generally codifies case law concerning the burden of proof in adjudicative proceedings. See discussion in 1 G. Ogden, California Public Agency Practice § 39 (1991). If a party defaults in a case where the party has the burden of proof, the agency may act without taking evidence. Section 648.130 (default).

§ 648.320. Presentation of testimony

648.320. (a) Each party has the right to do all of the following:

(1) Call and examine witnesses.

(2) Introduce exhibits and examine exhibits introduced by the opposing party.

(3) Cross-examine and confront opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.

(4) Impeach a witness regardless of which party first called the witness to testify.

(5) Rebut the evidence against the party.

(b) The person to which the agency action is directed may be called and examined as if under cross-examination by an adverse party if the person does not testify in the person's own behalf.

Comment. Section 648.320 supersedes former Sections 11500(f)(2) and 11513(b).

§ 648.330. Oral and written testimony

648.330. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Any part of the evidence may be received in written form if to do so will expedite the hearing without claim of prejudice to the interests of a party.

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original if available, and to compare an excerpt with the complete text if available.

Comment. Subdivision (a) of Section 648.330 restates former Sections 11500(f)(1) and 11513(a).

Subdivision (b) is drawn from 1981 Model State APA § 4-212(d).

Subdivision (c) is drawn from 1981 Model State APA § 4-212(e). It requires that parties be given an opportunity to compare a copy with the original and an excerpt with the complete text, "if available." The original or complete text is "available" if it is procurable by process, such as a subpoena duces tecum, or by any other available means. If the original is not available, the copy or excerpt may still be received in evidence, but its probative effect is likely to be weaker than if the original or complete text were available.

For general provisions on oaths, affirmations, and certification of official acts, see Section 613.120.

§ 648.340. Affidavits

648.340. (a) At any time 15 or more days before a hearing or a continued hearing, a party may serve on the opposing party a copy of an affidavit the party proposes to introduce in evidence, together with a notice substantially in the following form:

> The accompanying affidavit of [here insert name of affiant] will be introduced as evidence at the hearing in [here insert title of proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question the affiant unless you notify [here insert name of proponent or proponent's attorney or authorized representative] at [here insert address] that you wish to cross-examine the affiant.
>
> To be effective your request must be sent or delivered to [here insert name of proponent or proponent's attorney or authorized representative] on or before [here insert a date 10 days after the date of sending or delivery of the affidavit to the opposing party].

(b) Unless the opposing party, within ten days after service, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally.

(c) If an opportunity to cross-examine an affiant is not given after request to cross-examine is made as provided in this section, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

Comment. Section 648.340 restates former Section 11514, except the notice must be served at least 15, rather than 10, days before the hearing, and the opposing party has 10, rather than seven, days to request cross-examination. See also Section 613.230 (extension of time). "Affidavit" includes declaration under penalty of perjury. Code of Civil Procedure Section 2015.5 (affidavit includes declaration under penalty of perjury "under any law of this state").

§ 648.350. Protection of minor or developmentally disabled witness

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 minor 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.

Comment. Section 648.350 codifies and broadens an aspect of Seering v. Department of Social Serv., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). See also Section 648.140(a)(2) (discretion of presiding officer to close hearing in appropriate circumstances). It should be noted that the rights of persons to be taken into account includes the right of the parties to observe the proceedings in an appropriate manner.

§ 648.360. Exclusion of witnesses from hearing

648.360. (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 proceeding, an officer or employee designated by its attorney is entitled to be present.

Comment. Section 648.360 is drawn from Evidence Code Section 777. Subdivision (b) makes clear that a party cannot be excluded under this section; however, a party may be excluded under Section 648.350 (protection of minor or developmentally disabled witness).

§ 648.370. Official notice

648.370. (a) Official notice may be taken of any of the following:

(1) A generally accepted technical or scientific matter within the agency's special field.

(2) A fact that may be judicially noticed by the courts of this state.

(b) Official notice may be taken before or after submission of the case for decision. The matters of which official notice is taken shall be noted in, referred to in, or appended to, the record.

(c) All parties present at the hearing shall be notified at the hearing, or before issuance of the decision or a proposed decision, of the matters of which official notice is taken. A party shall have a reasonable opportunity on request to rebut the officially noticed matters by evidence or by written or oral presentation of authority, the manner of rebuttal to be determined by the agency.

Comment. Section 648.370 supersedes former Section 11515. For matters subject to judicial notice by the courts, see Evid. Code §§ 451-452.

Section 648.370 makes clear that all parties have an opportunity to rebut an officially noticed matter, including the agency that is a party to the adjudicative proceeding. Compare Harris v. Alcoholic Beverage Cont. App. Bd., 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965).

Article 4. Evidence

§ 648.410. Technical rules of evidence inapplicable

648.410. (a) Except as provided in this chapter, the hearing need not be conducted in accordance with technical rules relating to evidence and witnesses.

(b) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil action.

Comment. Section 648.410 restates the first two sentences of former Section 11513(c). The intent of Section 648.410 is to make available to the fact finder evidence that might not be admissible under evidentiary limitations of civil or criminal cases. Thus, for example, the Evidence Code rules relating to excludability of evidence about prior convictions should not apply automatically in the administrative setting. Contrast Coburn v. State Personnel Bd., 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (1978).

§ 648.420. Discretion of presiding officer to exclude evidence

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

Comment. Section 648.420 supersedes the last clause of the first paragraph of former Section 11513(c) (exclusion of irrelevant and unduly repetitious evidence). It is drawn from Evidence Code Section 352.

§ 648.430. Review of presiding officer evidentiary rulings

648.430. A ruling of the presiding officer admitting or excluding evidence is subject to administrative review in the same manner and to the same extent as the presiding officer's proposed decision in the proceeding.

Comment. Section 648.430 is new. It overrules any contrary implication that might be drawn from former Section 11512(b).

§ 648.440. Privilege

648.440. The rules of privilege are effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Comment. Section 648.440 restates the first portion of the last sentence of the first paragraph of former Section 11513(c). Under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions. See also Evid. Code §§ 901, 910.

§ 648.450. Hearsay evidence and the residuum rule

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 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.

Comment. Subdivision (a) of Section 648.450 restates the third sentence of former Section 11513(c). As used in subdivision (a), "other evidence" refers to non-hearsay evidence. Subdivision (b) provides an exception to the general requirement of exhaustion of administrative remedies on judicial review.

§ 648.460. Admissibility of scientific evidence

648.460. Evidence based on a scientific method of proof is admissible if it would be admissible in a proceeding in state or federal court.

Comment. Section 648.460 incorporates judicial rules for admissibility of scientific evidence. Under this provision, scientific evidence is admissible if it would be admissible either in state court or in federal court. For a recent state court standard, see Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). For a recent federal court standard, see Daubert v. Merrell Dow Pharm., 113 S. Ct. 2786 (1993).

§ 648.470. Evidence of sexual conduct

648.470. (a) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

(b) Notwithstanding any other provision of this chapter:

(1) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at the hearing unless offered to attack the credibility of the complainant, as provided for under paragraph (2). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(2) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Comment. Subdivision (a) of Section 648.470 restates former Section 11513(p). Paragraph (b)(1) restates the second paragraph of former Section 11513(c). Paragraph (b)(2) restates former Section 11513(o). This section applies notwithstanding agency rules to the contrary.

Article 5. Enforcement of Orders and Sanctions

§ 648.510. Misconduct in proceeding

648.510. A person is subject to the contempt sanction for any of the following in a proceeding before an agency under this part:

(a) Disobedience of or resistance to a lawful order.

(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.

(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.

(2) Breach of the peace, boisterous conduct, or violent disturbance.

(3) Other unlawful interference with the process or proceedings of the agency.

(d) Violation of the prohibition of ex parte communications under Article 4 (commencing with Section 643.410) of Chapter 3.

(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer under Chapter 4 (commencing with Section 645.110), or moving, without substantial justification, to compel discovery.

Comment. Section 648.510 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

§ 648.520. Contempt

648.520. (a) The presiding officer or reviewing authority may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Section 648.520 restates a portion of former Section 11525, but vests certification authority in the presiding officer or reviewing authority. For monetary sanctions for bad faith tactics, see Section 648.530. For enforcement of discovery orders, see Sections 645.310-645.360.

§ 648.530. Monetary sanctions for bad faith actions or tactics

648.530. (a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to administrative and judicial review in the same manner as a decision in the proceeding, and is enforceable by writ of execution, by the contempt sanction, or by other proper process.

Comment. Section 648.530 permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or

refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. A person 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. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

For authority to seek the contempt sanction, see Section 648.520. For enforcement of discovery orders, see Sections 645.310-645.360.

CHAPTER 9. DECISION

Article 1. Issuance of Decision

§ 649.110. Decision

649.110. (a) If the presiding officer is the agency head, the presiding officer shall issue a decision within 100 days after the case is submitted.

(b) If the presiding officer is not the agency head, the presiding officer shall deliver a proposed decision to the agency head within 30 days after the case is submitted, and make proof of delivery. Failure of the presiding officer to deliver a proposed decision within the time required does not prejudice any rights of the agency in the case.

(c) A proposed decision becomes the decision at the time provided in Section 649.150.

Comment. Subdivision (a) of Section 649.110 restates the second sentence of former Section 11517(d). See also 1981 Model State APA § 4-215(a).

The first sentence of subdivision (b) restates the first sentence of former Section 11517(b). The second sentence makes clear that the agency is not accountable for the presiding officer's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a decision.

A case is submitted for purposes of this section when the hearing record is closed, in the sense that evidence has been taken and briefs submitted.

The time limits in this section may be modified by another statute. See Section 612.140 (contrary express statute controls).

For the form and contents of a decision, see Section 649.120.

Either the decision or a proposed decision may be subject to administrative review. Section 649.210 (availability and scope of review). See also Section 610.310 ("decision" defined). Errors in a decision may be corrected under Section 649.170 (correction of mistakes in decision). A proposed decision becomes the decision unless it is subjected to administrative review under Article 2 (commencing with Section 649.210).

§ 649.120. Form and contents of decision

649.120. (a) The decision or a proposed decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the decision or a proposed decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the

statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision or a proposed decision. If the factual basis for the decision or a proposed decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.

(c) The statement of the factual basis for the decision or a proposed 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 supplements to the record that are made after the hearing, provided that all parties are given an opportunity to comment on it. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

(d) Nothing in this section limits the information that may be contained in the decision or a proposed decision, including a summary of evidence relied on.

Comment. Section 649.120 supersedes the first two sentences of former Sections 11500(f)(4) and 11518. Under Section 649.120, the form and contents of a decision or proposed decision are the same. *Cf.* former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for 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 (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 requirement in subdivision (b) that a mere repetition or paraphrase of the relevant statute or regulation be accompanied by a statement of the underlying facts is drawn from the second sentence of 1981 Model APA § 4-215(c).

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Washington law. See Wash. Rev. Code Ann. §§ 34.05.461(3), 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the observed demeanor, manner, or attitude of the witness that supports the determination. Code Civ. Proc. § 1094.5 (administrative mandamus). The observed manner of a witness includes observed actions of the witness.

The first sentence of subdivision (c) codifies existing California case law. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn from the first sentence of 1981 Model State APA § 4-215(d). The second sentence codifies existing

practice in some agencies. Official notice of some matters may be taken by the presiding officer. See Section 648.370 (official notice). The third sentence is drawn from 1981 Model State APA § 4-215(d).

§ 649.130. Issuance of proposed decision

649.130. (a) Within 30 days after delivery of a proposed decision to the agency head, the agency head shall issue the proposed decision as a public record and serve a copy of the proposed decision on each party.

(b) Issuance and service under this section is not an adoption of a proposed decision by the agency head. Nothing in this section limits the time within which a proposed decision becomes the decision under Section 649.150.

Comment. Subdivision (a) of Section 649.130 restates the second paragraph of former Section 11517(b) and extends it to an exempt hearing, along with the authority of the agency to vary the time allowed for issuance. Service on a party is accomplished by service on the party's attorney or authorized representative if the party has an attorney or authorized representative of record in the proceeding. Section 613.210 (service).

Subdivision (b) makes clear the distinction between the issuance requirement for a proposed decision (this section) and the time within which the agency must act before a proposed decision becomes the decision (Section 649.150). The time within which a proposed decision must be issued does not affect the time the agency has for acting on the proposed decision.

§ 649.140. Adoption of proposed decision

649.140. (a) Within 100 days after delivery of the proposed decision to the agency head, the agency head may summarily do any of the following:

(1) Adopt the proposed decision in its entirety as the decision.

(2) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency head under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(3) Reduce or otherwise mitigate a proposed remedy and adopt the balance of the proposed decision as the decision.

(4) Change the legal basis of the proposed decision and adopt the proposed decision with that change as the decision. Before acting under this paragraph the agency head shall provide the parties an opportunity to comment on the proposed change in legal basis.

(b) In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

Comment. Section 649.140 is drawn from the second paragraph of former Section 11517(b). The authority in subdivision (a)(2) to adopt "with changes" supplements the general authority of the agency head under Section 649.170 (correction of mistakes and clerical errors in the decision). The authority in subdivision (a)(4) to adopt with change of the legal basis is subject to the proviso that the parties be afforded an opportunity to comment on the proposed change. The agency head may specify the time and manner of comment, e.g. written comment within 10 days.

Mitigation of a proposed remedy under subdivision (a)(3) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity.

It should be noted that the adoption procedure is available to an agency as an alternative to review procedures under Article 2 (commencing with Section 649.210) (administrative review of proposed decision).

§ 649.150. Time proposed decision becomes the decision

649.150. Unless adopted as the decision under Section 649.140 or reviewed under Article 2 (commencing with Section 649.210), a proposed decision becomes the decision at the earliest of the following times:

(a) If pursuant to Section 649.210 by regulation the agency precludes administrative review, at the time the proposed decision is issued by the presiding officer.

(b) If pursuant to Section 649.210 by regulation the agency limits administrative review, at the time limited in the regulation.

(c) If the agency head in the exercise of discretion denies administrative review, at the time administrative review is denied.

(d) One hundred days after delivery of the proposed decision to the agency head.

Comment. Section 649.150 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b). The time within which a proposed decision becomes the decision is not affected by the time within which a copy of the proposed decision must be issued by the agency as a public record. See Section 649.130 & Comment (issuance of proposed decision).

An agency that wishes to reject a proposed decision must do so through the administrative review procedure. *Cf.* Section 649.240 (decision or remand).

§ 649.160. Service of decision on parties

649.160. (a) The agency shall serve a copy of the decision in the proceeding on each party within 10 days after the decision is issued. The 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 service of the decision.

(b) If a proposed decision is issued and served on the parties in the proceeding and the agency head adopts the proposed decision as the decision under Section 649.140 or the proposed decision becomes the decision by operation of law under Section 649.150, the agency may satisfy subdivision (a) by service of a notice that states the effective date and judicial review period and that the proposed decision is the decision or, if the decision makes technical or other minor changes in the proposed decision, that the proposed decision is the decision, with specified changes. A notice under this subdivision may be served simultaneously with service of a copy of the proposed decision under Section 649.130.

(c) The decision shall be issued immediately by the agency as a public record.

Comment. Section 649.160 supersedes the third sentence of former Section 11517(b), former Section 11517(e), and the third sentence of former Section 11518. For the manner of service (including service on a party's attorney or authorized representative of record instead of the party), see Section 613.210.

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

§ 649.170. Correction of mistakes and clerical errors in decision

649.170. (a) Within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the agency head for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking administrative or judicial review.

(b) The agency head may refer the application to the presiding officer who formulated the decision or proposed decision or may delegate its authority under this section to one or more persons.

(c) The agency head may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency head does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency head, on its own motion or on motion of the presiding officer, from modifying the decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the decision.

(e) The agency head shall, within 15 days after correction of a mistake or clerical error in the decision, serve a copy of the correction on each party on which a copy of the decision was previously served.

Comment. Section 649.170 supersedes former Section 11521 (reconsideration). It is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 610.460 ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the decision without the need for administrative or judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the decision. This supplements the authority in Section 649.140(a)(2) of the agency head to adopt a proposed decision with technical or other minor changes.

For general provisions on notices to parties, see Sections 613.210 (service), 613.220 (mail). The times provided in this section are extended in the case of service by mail or other means. Section 613.230 (extension of time).

Article 2. Administrative Review of Decision

§ 649.210. Availability and scope of review

649.210. (a) Subject to subdivision (b), an agency may review a decision or proposed decision on its own motion or on petition of a party. In the exercise of discretion under this subdivision, the agency head may do any of the following with respect to administrative review of the decision or a proposed decision:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(b) By regulation an agency may mandate administrative review, or may preclude or limit administrative review, of the decision or a proposed decision.

Comment. Section 649.210 is drawn from 1981 Model State APA § 4-216(a)(1)-(2). A proposed decision that is not reviewed becomes the decision at the time specified in Section 649.150.

This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. See, e.g., Greer v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Educ. Code § 13443). See Section 641.120 (modification or inapplicability of statute by regulation).

§ 649.220. Initiation of review

649.220. On service of a copy of the decision or a proposed decision that is subject to review under Section 649.210, but not later than the effective date of the decision stated in the decision or, if the effective date is not stated in the decision, not later than 30 days after service:

(a) A party may petition the agency head for administrative review of the decision or proposed decision. The petition shall state the basis for review.

(b) The agency head on its own motion may give written notice of administrative review of the decision or proposed decision. The notice shall be served on each party and, if review is limited to specified issues, shall identify the issues for review.

Comment. Section 649.220 supersedes a portion of the first sentence of former Section 11517(d). See also 1981 Model State APA § 4-216(b)-(c). For the manner of service, see Section 613.210. See also Section 613.230 (extension of time).

§ 649.230. Review procedure

649.230. (a) The reviewing authority shall decide the case on the record, including an agreed statement of the parties or a transcript, 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.

(b) The reviewing authority shall allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority.

(c) The reviewing authority may remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed decision, if reasonably available.

Comment. Section 649.230 restates the first, second, and fifth sentences of former Section 11517(c), with the addition of the provision for an agreed statement of the parties. See Cal. R. Ct. 6 (agreed statement). The reviewing authority is the agency head or person to which the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

Subdivision (a) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation.

The reviewing authority is subject to the provisions of this part governing qualifications (Sections 643.210-643.230), separation of functions (Sections 643.310-643.350), ex parte communications (Sections 643.410-643.470), and substitution (Section 643.130), that are applicable to the presiding officer.

If further proceedings are required, they may be obtained on remand under Section 649.240.

§ 649.240. Decision or remand

649.240. (a) Within 100 days after presentation of briefs and arguments, or if a transcript is ordered, after receipt of the transcript, the reviewing authority shall do one of the following:

(1) Issue a decision disposing of the proceeding.

(2) Remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the decision or proposed decision, if reasonably available.

(3) Reject the decision or proposed decision, without remand. The reviewing authority shall dispose of the proceeding within a reasonable time after rejection.

(b) The time under subdivision (a) may be waived or extended with the written consent of all parties or for good cause. Disposition of the proceeding under subdivision (a) shall only be pursuant to the procedure provided in Section 649.230 (review procedure).

(c) The decision or a remand for further proceedings shall be in writing and shall include, or incorporate by express reference to the original decision or proposed decision, all the matters required by Section 649.120 (form and contents of decision). A remand for further proceedings shall specify the ground for remand and shall include precise instructions to the presiding officer of the action required.

(d) The reviewing authority shall cause a copy of the decision or remand for further proceedings to be served on each party.

Comment. Section 649.240 supersedes former Section 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j). Disposition of the proceeding under this section must be done pursuant to Section 649.230, which provides for either review on the record or remand. The reviewing authority may not hear the matter de novo but may take additional evidence.

Remand is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

Specification of the ground for remand must be precise, but need not include the same details of explanation as the decision would contain. The specification may include such matters as the need for additional proceedings resulting from newly discovered evidence.

The reviewing authority is the agency head or person to which the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.210.

§ 649.250. Procedure on remand

649.250. (a) On remand, the reviewing authority may order authorized and appropriate temporary relief.

(b) The presiding officer shall prepare a revised decision or proposed decision on remand based on the additional evidence, if any, and the record of the prior hearing.

(c) The revised decision or proposed decision on remand shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original decision or proposed decision.

Comment. Subdivision (a) of Section 649.250 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) restate the third and fourth sentences of former Section 11517(c). For the record in the proceeding, see Section 649.230 (review procedure). For the manner of service, see Section 613.210.

§ 649.260. Communications between presiding officer and reviewing authority

649.260. (a) Notwithstanding any other provision of this part:

ALTERNATIVE A. There shall be no communication, direct or indirect, regarding any issue in the proceeding, between the presiding officer and reviewing authority.

ALTERNATIVE B. The provisions of this part restricting ex parte communications between the presiding officer and an employee or representative of an agency that is a party govern communications between the reviewing authority and the presiding officer.

(b) This provision does not apply where the agency head serves as both presiding officer and reviewing authority.

Comment. Section 649.260 is a special application of the provisions governing ex parte communications in administrative adjudication. It expresses the general principle that the presiding officer should not be an advocate for the proposed decision on administrative review.

Article 3. Precedent Decisions

§ 649.310. Precedential effect of decision

649.310. A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

Comment. Section 649.310 is new.

§ 649.320. Designation of precedent decision

649.320. (a) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur.

(b) Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, relating to rulemaking.

(c) An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

Comment. Section 649.320 recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Section 12935(h) (Fair Employment and Housing Commission); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 649.320 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.

Under subdivision (b), this section applies notwithstanding Section 11347.5 ("underground regulations"). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates Government Code Section 11347.5 unless made pursuant to rulemaking procedures). Subdivision (b) is drawn from Government Code Section 19582.5 (express exemption of precedent decision designation by State Personnel Board from rulemaking procedures). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

§ 649.330. Index of precedent decisions

649.330. (a) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update.

(b) The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

Comment. The index required by Section 649.330 is a public record, available for public inspection and copying.

§ 649.340. Article not retroactive

649.340. (a) This article applies to decisions issued on or after July 1, 1997.

(b) Nothing in this article precludes an agency from designating as a precedent decision a decision issued before July 1, 1997.

Comment. Section 649.340 minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

Article 4. Implementation Of Decision

§ 649.410. Effective date of decision

649.410. (a) The decision is effective on the date stated in the decision or, if the effective date is not stated in the decision, 30 days after it is served on the person to which the agency action is directed, unless:

(1) The agency head orders that the decision becomes effective sooner.

(2) The agency head orders that enforcement of the decision shall be stayed.

(b) The person to which the agency action is directed may not be required to comply with a decision unless the person has been served with or has actual knowledge of the decision.

(c) A nonparty may not be required to comply with a decision unless the agency has made the decision available for public inspection and copying or the nonparty has actual knowledge of the decision.

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Chapter 4 (commencing with Section 634.010) of Part 3 (emergency decision).

Comment. Subdivision (a) of Section 649.410 restates subdivision (a) and a portion of the first sentence of subdivision (b) of former Section 11519, with the addition of the provision for statement of the effective date in the decision. The remainder of the section is drawn from 1981 Model State APA § 4-220(c)-(d). The section distinguishes between the effective date of a decision and the time when it can be enforced. For provisions on stays, see Section 649.420.

The requirement of "actual knowledge" in subdivisions (b) and (c) is intended to include not only knowledge that a decision has been issued, but also knowledge of the general contents of the decision insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of a decision, this must be resolved in the manner that other fact questions are resolved.

The binding effect of a decision on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues a decision revoking the license of a particular dealer, this decision is binding on any wholesaler who has actual knowledge of it, even before the decision is made available for public inspection and copying; the decision binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 649.420. Stay

649.420. A stay of enforcement may be included in the decision or may be ordered at any time before the decision becomes effective.

Comment. Section 649.420 restates the first sentence of former Section 11519(b).

§ 649.430. Probation

649.430. (a) A stay of enforcement may be accompanied by an express condition that the person to which the agency action is directed comply with specified terms of probation. Specified terms of probation shall be just and reasonable in the light of the findings and decision.

(b) Specified terms of probation may include an order of restitution that requires the person to which the agency action is directed to compensate the other party to a contract damaged as a result of a breach of contract by the person to which the agency action is directed. In such a case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of the breach. If restitution is ordered and paid under this subdivision, the amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Subdivision (a) of Section 649.430 restates the last sentence of former Section 11519(b). Subdivision (b) restates former Section 11519(d).

§ 649.440. Registration with public officer

649.440. If a person whose license has been revoked or suspended was required to register with a public officer, a notification of the suspension or revocation shall be sent to the officer after the decision has become effective.

Comment. Section 649.440 restates former Government Code Section 11519(c).

§ 649.450. Reinstatement of license or reduction of penalty

649.450. (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 head.

(c) The agency head shall decide the petition. The decision shall include the reasons therefor.

Comment. Section 649.450 supersedes the first three sentences of former Section 11522. The last sentence of former Section 11522 is continued in substance in Section 612.140 (contrary express statute controls).

PART 5. JUDICIAL REVIEW

§ 650. Judicial review

650. Judicial review in an adjudicative proceeding required by statute to be conduced by an administrative law judge employed by the Office of Administrative Hearings may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or the parts thereof as are designated by the petitioner, shall be

prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days, which time shall be extended for good cause shown, after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which administrative review can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to the petitioner. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Comment. Section 650 continues former Section 11523 without substantive change.

SELECTED CONFORMING REVISIONS AND REPEALS

IMPORTANT NOTE

Only selected conforming revisions and repeals are set out here. The entire text of conforming revisions and repeals is in preparation and will be available for review and comment on request.

In general, the conforming revisions and repeals will do the following:

(1) A statute that refers to the Administrative Procedure Act or a provision of the Administrative Procedure Act will be converted to a reference to the proposed law.

(2) A statute that requires a hearing under the Administrative Procedure Act will be converted to require a hearing conducted under the proposed law by an administrative law judge employed by the Office of Administrative Hearings.

(3) A statute that provides a rule governing an administrative hearing that differs from the proposed law will **not** be revised or repealed unless it appears to differ arbitrarily. The principle embodied in the proposed law is that the proposed statute provides default rules and express contrary statutes control.

If you wish to review the conforming revisions and repeals affecting a specific agency or type of hearing, or if it is necessary to review all the conforming revisions and repeals, please request a copy from the California Law Revision Commission, 4000 Middlefield Road, Palo Alto, CA 94303. Phone: (415) 494-1335. The material will be provided when it is available.

MEDICAL QUALITY HEARING PANEL INTERIM ORDERS

Bus. & Prof. Code § 494.1 (added). Interim orders

SEC. 2. Section 494.1 is added to the Business and Professions Code to read:

494.1. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 636.210 of the Government Code may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive

at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

(1) To be represented by counsel.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.

(3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a superior court judge to permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the administrative law judge shall grant the interim order where, in the exercise of its discretion, the administrative law judge concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and a notice of commencement of proceeding is not filed and served pursuant to the Administrative Procedure Act, Division 3.3 (commencing with Section 600) of Title 1 of the Government Code, within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the notice of commencement of proceeding the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in the Administrative Procedure Act. If the licensee requests a hearing pursuant to the Administrative Procedure Act, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the division for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by the Administrative Procedure Act, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing pursuant to the Administrative Procedure Act.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in this code.

Comment. Section 494.1 continues former Government Code Section 11529, substituting the administrative law judge for the court in subdivision (e). A statement of legislative intent concerning this section is enacted at 1993 Cal. Stat. ch. 1267, § 58:

> It is the intent of the Legislature to substitute the standard governing the issuance of a preliminary injunction under Section 527 of the Code of Civil Procedure for the "clear and convincing evidence" standard as the standard for granting an interim order pursuant to Section 11529 of the Government Code, and to this extent the decision of the Court of Appeal in Silva v. Superior Court, (Heerhartz) (March 1993), 14 Cal. App. 4th 562, mod. of opn. on den. rehg. 14 Cal. App. 4th 1678b, rev. den. (1993) _____ Cal. 4th _____, is expressly overturned. It is also the intent of the Legislature that the standard of proof applicable to an accusation filed in connection with a petition for an interim order shall continue to be clear and convincing evidence.

ADMINISTRATIVE MANDAMUS

Code Civ. Proc. § 1094.5 (amended). Administrative mandamus

SEC. 3. Section 1094.5 of the Code of Civil Procedure is amended to read:

1094.5. ...

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. *In making a determination under this subdivision in a review of a decision under Division 3.3 (commencing with Section 600) of Title 1 of the Government Code, the court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness that supports the determination.*

...

Comment. Subdivision (c) of Section 1094.5 is amended to adopt the rule of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), for proceedings under the Administrative Procedure Act, requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Lamb v. Workmen's Compensation Appeals Bd., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Unemp. Ins. App. Bd., Precedent Decisions P-B-10, P-T-13, P-B-57; Lab. Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1114 (1992).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. Gov't Code § 649.120(b) (form and contents of decision). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness.

Under subdivision (c), even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (c) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

ADMINISTRATIVE PROCEDURE ACT

Gov't Code § 11340.4 (added). Study of administrative rulemaking

SEC. 4. Section 11340.4 is added to the Government Code to read:

11340.4. (a) The office is authorized and directed to:

(1) Study the subject of administrative rulemaking in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this subdivision authorizes an agency to give access to records required by statute to be kept confidential.

Comment. Section 11340.4 is new. It delegates to the Office of Administrative Law authority formerly found in Section 11370.5 relating to the study of "administrative law" by the Office of Administrative Hearings. See also Section 610.190 ("agency" defined). *Cf.*

Section 636.180 (authority of Office of Administrative Hearings to study administrative adjudication).

Gov't Code §§ 11370-11373.3 (repealed). Office of Administrative Hearings

SEC. 5. Chapter 4 (commencing with Section 11370) of Part 1 of Division 3 of Title 2 of the Government Code is repealed.

Comment. Sections 11370-11373.3, relating to the Office of Administrative Hearings, are superseded by Sections 636.110-636.240. The text of each former section and its disposition is set out below.

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

§ 11370 (repealed). Administrative Procedure Act

11370. Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act.

Comment. Former Section 11370 is restated in Section 600 (short title).

§ 11370.1 (repealed). "Director"

11370.1. As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

Comment. Former Section 11370.1 is continued in Section 636.110(a) ("director" defined).

§ 11370.2 (repealed). Office of Administrative Hearings

11370.2. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

Comment. Former Section 11370.2 is restated in Section 636.120 (Office of Administrative Hearings).

§ 11370.3 (repealed). Personnel

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge or a hearing officer to conduct other administrative proceedings not arising under that chapter and shall

assign hearing reporters as required. The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor. Any administrative law judge, hearing officer, or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges and hearing officers may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

Comment. The first sentence of former Section 11370.3 is restated in Section 636.130(a) (administrative law judges). The second sentence is restated in Section 636.140 (and other personnel), deleting the reference to hearing officers and the limitation to shorthand reporters.

The first part of the third sentence is superseded by Section 636.150(a) (assignment of administrative law judges). The second part is restated in subdivision (b) of Section 636.150, deleting the reference to hearing officers. The third part is restated in Section 636.150(c).

The fourth sentence is omitted as unnecessary. See Section 636.150(a) (assignment of administrative law judges); Bus. & Prof. Code § 22460.5.

The fifth sentence is restated in Section 636.150(d) (assignment of administrative law judges), deleting the reference to hearing officers.

The sixth sentence is restated in Section 636.150(e) (assignment of administrative law judges), deleting the reference to hearing officers.

§ 11370.4 (repealed). Costs

11370.4. The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Former Section 11370.4 is restated in Section 636.170.

§ 11370.5 (repealed). Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge of control.

Comment. Former Section 11370.5 is restated in Sections 610.190 ("agency" defined) and 636.180 (study of administrative law and procedure).

§ 11371 (repealed). Medical Quality Hearing Panel

11371. (a) There is within the Office of Administrative Hearings a Medical Quality Hearing Panel, consisting of no fewer than five full-time administrative law judges. The administrative law judges shall have medical training as

recommended by the Division of Medical Quality of the Medical Board of California and approved by the Director of the Office of Administrative Hearings.

(b) The director shall determine the qualifications of panel members, supervise their training, and coordinate the publication of a reporter of decisions pursuant to this section. The panel shall include only those persons specifically qualified and shall at no time constitute more than 25 percent of the total number of administrative law judges within the Office of Administrative Hearings. If the members of the panel do not have a full workload, they may be assigned work by the Director of the Office of Administrative Hearings. When the medically related case workload exceeds the capacity of the members of the panel, additional judges shall be requested to be added to the panels as appropriate. When this workload overflow occurs on a temporary basis, the Director of the Office of Administrative Hearings shall supply judges from the Office of Administrative Hearings to adjudicate the cases.

(c) The decisions of the administrative law judges of the panel, together with any court decisions reviewing those decisions, [~~or any court decisions relevant to medical quality adjudications~~] shall be published in a quarterly "Medical Discipline Report," to be funded from the Contingent Fund of the Medical Board of California.

(d) The administrative law judges of the panel shall have panels of experts available. The panels of experts shall be appointed by the Director of the Office of Administrative Hearings, with the advice of the Medical Board of California. These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross examination by all parties. The administrative law judge may award reasonable expert witness fees to any person or persons serving on a panel of experts, which shall be paid from the Contingent Fund of the Medical Board of California.

(e) On or before April 1, 1997, the Medical Board of California shall prepare, in consultation with the Office of Administrative Hearings, an analysis and report that evaluates the effectiveness of the Medical Quality Hearing Panel since its creation. Among other things, the report shall analyze whether administrative adjudications against physicians have been expedited, the aging of cases at the office, whether administrative decisions and penalties ordered in the discipline of physicians have become more consistent, and whether the panels of the Division of Medical Quality have adopted more proposed decisions than prior to the creation of the panel. The board shall send a copy of its report to the Chairpersons of the Senate Committee on Business and Professions and the Assembly Committee on Health, to the Office of Administrative Hearings, and to the Director of Consumer Affairs.

(f) This section shall remain in effect only until January 1, 1999, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

Comment. Former Section 11371 is continued without change in Section 636.210 (Medical Quality Hearing Panel).

§ 11372 (repealed). Conduct of hearing by administrative law judge

11372. (a) Except as provided in subdivision (b), all adjudicative hearings and proceedings relating to the discipline or reinstatement of licensees of the Medical Board of California, including licensees of allied health agencies within the jurisdiction of the Medical Board of California, that are heard pursuant to the Administrative Procedure Act, shall be conducted by an administrative law judge as designated in Section 11371, sitting alone if the case is so assigned by the agency filing the charging pleading.

(b) Proceedings relating to interim orders shall be heard in accordance with Section 11529.

Comment. Former Section 11372 is continued in Section 636.220 (conduct of hearing by administrative law judge) without substantive change.

§ 11373 (repealed). Conduct of proceedings under Administrative Procedure Act

11373. All adjudicative hearings and proceedings conducted by an administrative law judge as designated in Section 11371 shall be conducted under the terms and conditions set forth in the Administrative Procedure Act, except as provided in the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code).

Comment. Former Section 11373 is continued in Section 636.230 (conduct of proceedings under Administrative Procedure Act) without substantive change.

§ 11373.3 (repealed). Facilities and support personnel for review committee panel

11373.3. The Office of Administrative Hearings shall provide facilities and support personnel for the review committee panel and shall assess the Medical Board of California for facilities and personnel, where used to adjudicate cases involving the Medical Board of California.

Comment. Former Section 11373.3 is continued in Section 636.240 (facilities and support personnel for review committee panel) without change.

Gov't Code §§ 11500-11529 (repealed). Administrative adjudication

SEC. 6. Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is repealed.

Comment. Sections 11500-11529, relating to administrative adjudication, are superseded by Sections 600-650. The text of each former section and its disposition is set out below.

CHAPTER 5. ADMINISTRATIVE ADJUDICATION

§ 11500 (repealed). Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers enumerated in Section 11501 and those to which this chapter is made applicable by law,

except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Administrative law judge" means an individual qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself or herself constitutes an agency.

(f) "Adjudicatory hearing" means a state agency hearing which involves personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. However, the procedures governing such a hearing shall include, but not be limited to, all of the following:

(1) Testimony under oath.

(2) The right to cross-examination and to confront adversary witnesses.

(3) The right to representation.

(4) The issuance of a formal decision.

For purposes of this subdivision, an "adjudicatory hearing" shall not be required to include any informal factfinding or informal investigatory hearing. However, nothing in this subdivision shall be construed to prohibit an agency from providing an interpreter during any such informal hearing.

(g) "Language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party who cannot speak or understand English or who can do so only with difficulty.

Comment. The introductory portion of former Section 11500 is restated in Section 610.010 (application of definitions).

Subdivision (a) is superseded by Sections 612.110 (application of division to state) and 610.250 ("agency head" defined). An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.220 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

The substance of subdivision (b) is restated in Section 610.460 ("party" defined).

Subdivision (c) is not continued. The respondent is referred to as the person to which the agency action is directed.

Subdivision (d) is superseded by Section 643.120 (presiding officer).

The substance of subdivision (e) is restated in Section 610.280 ("agency member" defined).

Subdivision (f) is superseded by Sections 612.110 (application of division to state), 610.310 ("decision" defined), 648.330 (oral and written testimony), 648.320 (presentation of testimony), 613.320 (representation by attorney), 649.120 (form and contents of decision), 631.010 (application to constitutionally and statutorily required hearings), and 648.230 (language assistance).

Subdivision (g) is superseded by Section 648.210 ("language assistance" defined).

§ 11501 (repealed). Application of chapter

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

Accountancy, State Board of
Air Resources Board, State
Alcohol and Drug Programs, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California Board of
Attorney General
Auctioneer Commission, Board of Governors of
Automotive Repair, Bureau of
Barbering and Cosmetology, State Board of
Behavioral Science Examiners, Board of
Boating and Waterways, Department of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Security and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Department of
Contractors, State License Board
Corporations, Commissioner of
Court Reporters, Board of California
Dental Examiners of California, Board of
Education, State Department of
Electronic and Appliance Repair, Bureau of
Engineers and Land Surveyors, State Board of Registration for Professional
Fair Political Practices Commission
Fire Marshal, State
Food and Agriculture, Director of
Forestry and Fire Protection, Department of
Funeral Directors and Embalmers, State Board of
Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of

Health Services, State Department of
Highway Patrol, Department of the California
Home Furnishings and Thermal Insulation, Bureau of
Horse Racing Board, California
Housing and Community Development, Department of
Insurance Commissioner
Labor Commissioner
Landscape Architects, State Board of
Medical Board of California, Medical Quality Review Committees and Examining Committees
Motor Vehicles, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Medical Board of California
Pharmacy, California State Board of
Podiatric Medicine, Board of
Psychology, Board of
Public Employees' Retirement System, Board of Administration of the
Real Estate, Department of
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of
Savings and Loan Commissioner
School Districts
Secretary of State, Office of
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparers Program
Teacher Credentialing, Commission on
Teachers' Retirement System, State
Transportation, Department of, acting pursuant to the State Aeronautics Act
Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of

Comment. Former Section 11501 is superseded by Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies).

§ 11501.5 (repealed). Language assistance; provision by state agencies

11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:

Agricultural Labor Relations Board

State Department of Alcohol and Drug Abuse
Athletic Commission
California Unemployment Insurance Appeals Board
Board of Prison Terms
State Board of Barbering and Cosmetology
State Department of Developmental Services
Public Employment Relations Board
Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development
Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Workers' Compensation Appeals Board
Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
Department of Insurance
State Personnel Board
Board of Podiatric Medicine
Board of Psychology

(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.

Comment. Former Section 11501.5 is restated in Section 648.230 (application of article).

§ 11502 (repealed). Administrative law judges

11502. All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 of the Government Code. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. The first sentence of former Section 11502 is superseded by Section 643.120 (designation of presiding officer by agency head where exempt from OAH). The second sentence is restated in Section 636.130(a) (administrative law judges). The third sentence is restated in Section 636.130(b).

§ 11502.1 (repealed). Health planning unit

11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Safety Code § 439.7 (1984 Cal. Stat. ch. 1745, § 14).

§ 11503 (repealed). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. The first sentence of former Section 11503 is superseded by Sections 610.410 ("notice of commencement of proceeding" includes accusation) and 642.210 (proceeding initiated by notice of commencement. The remainder is superseded by Section 642.220 (contents of notice of commencement of proceeding).

§ 11504 (repealed). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the

attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Comment. The first sentence of former Section 11504 is superseded by Sections 610.410 ("notice of commencement of proceeding" includes statement of issues) and 642.210 (proceeding commenced by notice of commencement). The remainder is superseded by Sections 642.220 (contents of notice of commencement of proceeding) and 642.230 (service of notice of commencement of proceeding).

§ 11504.5 (repealed). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Comment. Section 11504.5 is superseded by Section 610.410 ("notice of commencement of proceeding" includes accusation and statement of issues).

§ 11505 (repealed). Service on respondent

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing

the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within 10 working days after you discover the good cause. Failure to notify the agency within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

Comment. Section 11505 is superseded by Sections 643.230 (service of notice of commencement of proceeding and other information), 642.360 (notice of hearing), 642.240 (jurisdiction over person to which the agency action is directed), 613.210 (service), and 613.220 (mail).

§ 11506 (repealed). Notice of defense

11506. (a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Comment. Former Section 11506 is superseded by Sections 642.250 (response), 648.130 (default), and 613.210 (service).

§ 11507 (repealed). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Comment. Former Section 11507 is superseded by Section 642.260 (amended and supplemental pleadings).

§ 11507.5 (repealed). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Comment. Former Section 11507.5 is superseded by Section 645.110 (application of article).

§ 11507.6 (repealed). Discovery

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigate reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

Comment. Former Section 11507.6 is superseded by Sections 645.210 (time and manner of discovery), 645.220 (discovery of witness list), 645.230 (discovery or statements, writings, and reports), and 645.120 (discovery of evidence of sexual conduct).

§ 11507.7 (repealed). Petition to compel discovery

11507.7. (a) Any party claiming his request for discovery pursuant to Section 11507.6 has not been complied with may serve and file a verified petition to

compel discovery in the superior court for the county in which the administrative hearing will be held, naming as respondent the party refusing or failing to comply with Section 11507.6. The petition shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why such matter is discoverable under this section, and the ground or grounds of respondent's refusal so far as known to petitioner.

(b) The petition shall be served upon respondent party and filed within 15 days after the respondent party first evidenced his failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.

(c) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition. The respondent party shall have the right to serve and file a written answer or other response to the petition and order to show cause.

(d) The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.

(e) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that such matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under such provisions, the court may order lodged with it such matters as are provided in subdivision (b) of Section 915 of the Evidence Code and examine such matters in accordance with the provisions thereof.

(f) The court shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and such oral argument and additional evidence as the court may allow.

(g) Unless otherwise stipulated by the parties, the court shall no later than 30 days after the filing of the petition file its order denying or granting the petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days. The order of the court shall be in writing setting forth

the matters or parts thereof the petitioner is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the clerk upon the parties. Where the order grants the petition in whole or in part, such order shall not become effective until 10 days after the date the order is served by the clerk. Where the order denies relief to the petitioning party, the order shall be effective on the date it is served by the clerk.

(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.

(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.

Comment. Former Section 11507.7 is superseded by Sections 645.310-645.340 (compelling discovery) and 648.510-648.530 (enforcement of orders and sanctions).

§ 11508 (repealed). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or fifth Appellate District.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides.

(3) The parties by agreement may select any place within the state.

Comment. Former Section 11508 is superseded by Sections 642.310 (time and place of hearing) and 642.340 (venue).

§ 11509 (repealed). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the day of , 19_, at the hour of , upon the charges made in the accusation served upon you. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency].

Comment. Former Section 11509 is superseded by Sections 642.310 (time and place of hearing) and 642.360 (notice of hearing). See also Section 613.320 (representation by attorney).

§ 11510 (repealed). Subpoenas

11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to his or her date of birth and his or her diver's license number or Department of Motor Vehicles identification number, or, the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section shall have the same force and effect as a subpoena personally served. Failure to

comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for his or her appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

Comment. Former Section 11510 is superseded by Sections 645.410-645.440 (subpoenas).

§ 11511 (repealed). Depositions

11511. On verified petition of any party, an agency may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the State and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

Comment. Former Section 11511 is superseded by Section 645.130 (preservation of testimony by deposition).

§ 11511.5 (repealed). Prehearing conferences

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The

administrative law judge shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(9) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Comment. Former Section 11511.5 is superseded by Article 6.5 (commencing with Section 646.110) (prehearing conference).

§ 11512 (repealed). Presiding officer

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing.

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall

withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall render a proposed decision in accordance with subdivision (b) of Section 11517 of the Government Code.

Comment. The substance of the first sentence of subdivision (a) of former Section 11512 is restated in Section 643.110(a) (where administrative law judge required). The second sentence is restated in Section 643.110(b).

The first sentence of subdivision (b) is restated in Section 643.110(d)(1) and (2). The second sentence is restated in Section 643.110(c).

The first sentence of subdivision (c) of former Section 11512 is superseded by Section 643.220 (self disqualification). The second, third, and fourth sentences are superseded by Section 643.230 (procedure for disqualification of presiding officer). The fifth sentence is not continued: If disqualification would prevent the existence of a quorum qualified to act, a substitute presiding officer may be appointed under Section 643.130.

Subdivision (d) is superseded by Section 648.160 (report of proceedings).

Subdivision (e) is restated in Section 643.110(d)(3).

§ 11513 (repealed). Evidence

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual

assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (o). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(d) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter. Except as provided in subdivision (k), interpreters utilized in hearings shall be certified pursuant to subdivision (e). Except as provided in subdivision (k), interpreters utilized in medical examinations shall be certified pursuant to subdivision (f). The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.

The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except with respect to hearings before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to worker's compensation claims. With respect to these hearings, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.

(e) The State Personnel Board which shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures. Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this subdivision.

(f) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to subdivision (e) shall be deemed certified for purposes of this subdivision.

(g) The State Personnel Board shall designate the languages for which certification shall be established under subdivisions (e) and (f). The languages

designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages. The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

(h) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of his or her certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(i) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this section. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance. If the amount of money collected in fees is not sufficient to cover the costs of carrying out this section, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

(j) The State Personnel Board may remove the names of people form the list of certified interpreters if the following conditions occur:

(1) A person on the list is deceased.

(2) A person on the list notifies the board that he or she is unavailable for work.

(3) A person on the list does not submit a renewal fee as required by subdivision (h).

(k) In the event that interpreters certified pursuant to subdivision (e) cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters. In the event that interpreters certified pursuant to subdivision (f) cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.

(l) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

(m) The rules of confidentiality of the agency, if any, that may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing, whether or not the rules so state.

(n) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.

(o) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

(p) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.

(q) This section becomes operative on July 1, 1995.

Comment. Subdivision (a) of former Section 11513 is superseded by Section 648.330(a) (oral evidence).

Subdivision (b) is superseded by Section 648.320 (presentation of evidence).

The first two sentences of subdivision (c) are superseded by Section 648.410 (technical rules of evidence inapplicable). The third sentence is restated in Section 648.450 (hearsay evidence and the residuum rule). The fourth sentence is superseded by Sections 648.440 (privilege) and 648.420 (discretion of presiding officer to exclude evidence). The second paragraph is restated in Section 648.470(b).

Subdivisions (d)-(n) are restated in Sections 648.240-648.285.

Subdivision (o) is restated in Section 648.470(c).

Subdivision (p) is restated in Section 648.470(a).

§ 11513.5 (repealed). Ex parte communications

11513.5. (a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the complaint, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the complaint, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as administrative law judge, without notice and opportunity for all parties to participate in the communication.

(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be

received while serving, the person, promptly after starting to serve, shall disclose the content of the communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

Comment. Subdivisions (a) and (b) of former Section 11513.5 are restated in Section 643.410 (ex parte communications prohibited), omitting the prohibition on the presiding officer communicating with others and the limitation on communications with a person who presided at a previous stage of the proceeding. Subdivision (c) is restated in Section 643.440 (prior ex parte communication) but is limited to communications received during the pendency of the proceeding. Subdivision (d) is restated in Section 643.450 (disclosure of ex parte communication). Subdivision (e) is restated in Section 643.460 (disqualification of presiding officer).

§ 11514 (repealed). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request

must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Comment. Former Section 11514 is restated in Section 648.340 (affidavit evidence), except that the ten-day period for service of notice of intent to produce affidavit evidence is changed to 30 days, and the seven-day period to request cross-examination is changed to 10 days.

§ 11515 (repealed). Official notice

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Comment. Former Section 11515 is superseded by Section 648.370 (official notice).

§ 11516 (repealed). Amendment of accusation after submission of case

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Comment. Former Section 11516 is superseded by Section 642.260 (amended and supplemental pleadings).

§ 11517 (repealed). Decision in contested cases

11517. (a) If a contested case is heard before an agency itself, the administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision. Thirty days after receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Comment. Subdivision (a) of former Section 11517 is restated in Section 643.110(d)(3) with the addition of a sentence that makes clear the agency head may make the decision in the proceeding.

The substance of the first sentence of subdivision (b) is restated in Section 649.110(b) (decision) and is superseded by Section 649.120 (form and contents of decision). The second sentence is restated in Section 649.140 (adoption of proposed decision). The third sentence is restated in Sections 613.210 (service) and 649.130 (filing of proposed decision).

The first and second sentences of subdivision (c) are restated in Section 649.240 (review procedure). The third and fourth sentences are restated in Section 642.860 (procedure on remand). The fifth and sixth sentences are superseded by Section 649.240 (review procedure).

The first sentence of subdivision (d) is superseded by Sections 649.150 (time proposed decision becomes decision) and 649.220 (initiation of review). The second sentence is restated in Section 649.110(a) (decision). The third, fourth, and fifth sentences are restated in Section 649.220 (initiation of review).

Subdivision (e) is restated in Section 649.160 (delivery of decision to parties).

§ 11518 (repealed). Decision

11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. The substance of the first two sentences of former Section 11518 is restated in Section 649.120 (contents of decision). The third sentence is restated in Section 649.160 (delivery of decision to parties).

§ 11519 (repealed). Effective date of decision; stay of execution; notification; restitution

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; provided, however, that the terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to such officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution which requires the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged as a result of a breach of contract by the party against whom the decision is rendered. In such case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of such breach. Where restitution is ordered and paid pursuant to the provisions of this subdivision, such amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Former Section 11519 is restated in Chapter 12 (commencing with Section 649.410) (enforcement of decision).

§ 11520 (repealed). Defaults

11520. (a) If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence.

(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

Comment. Former Section 11520 is superseded by Section 648.130 (default).

§ 11521 (repealed). Reconsideration

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

Comment. Former Section 11521 is superseded by Section 649.170 (correction of mistakes in decision).

§ 11522 (repealed). Reinstatement of license or reduction of penalty

11522. 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. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Former Section 11522 is restated in Section 649.450 (reinstatement of license or reduction of penalty).

§ 11523 (repealed). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil procedure, subject, however,

to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or the parts thereof as are designated by the petitioner, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days, which time shall be extended for good cause shown, after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Comment. Former Section 11523 is continued in Section 650 (judicial review) without substantive change.

§ 11524 (repealed). Continuances; grant time; good cause; denial; notice review

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the administrative law judge in charge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof 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 be either oral at the time of the denial of application for a continuance 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. Former Section 11524(a)-(b) is superseded by Section 642.320 (continuances). The substance of subdivision (c) is continued in Section 642.330 (judicial review of denial of continuance).

§ 11525 (repealed). Contempt

11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Former Section 11525 is restated in Sections 648.510-648.530 (enforcement of orders and sanctions).

§ 11526 (repealed). Voting by mail

11526. The members of an agency qualified to vote on any question may vote by mail.

Comment. Former Section 11526 is restated in Section 613.110 (voting by agency member).

§ 11527 (repealed). Charge against funds of agency

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

Comment. Section 11527 is not continued.

§ 11528 (repealed). Oaths

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

Comment. Former Section 11528 is restated in Section 613.120 (oaths, affirmations, and certification of official acts).

§ 11529 (repealed). Interim orders

11529. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 11371 may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

(1) To be represented by counsel.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.

(3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a

superior court judge to permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the court shall grant the interim order where, in the exercise of its discretion, it concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and an accusation is not filed and served pursuant to Sections 11503 and 11505 within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the accusation the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in this chapter. If the licensee requests a hearing on the accusation, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the division for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by this chapter, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing on the accusation.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.

Comment. Former Section 11529 is continued in Business and Professions Code Section 494.1 without substantive change.