Study N-100 January 13, 1995

Memorandum 95-8

Administrative Adjudication: Comments of Attorney General, State Bar, and Others

We have received comments on the administrative adjudication proposal from the following persons:

State Banking Department	Exhibit pp. 1-8
State Bar Litigation Section	Exhibit pp. 9-16
Michael Lawton, M.D.	Exhibit pp. 17-28

We also anticipate comments form the Attorney General and from the State Bar Committee on Administration of Justice. We will supplement this memorandum when further comments are received.

Our objective at the January meeting is to resolve the issues raised and approve a final recommendation to the Legislature on administrative adjudication by state agencies.

Following past practice, the staff plans to raise only bulleted [•] items in this memorandum at the meeting. A Commissioner or interested person who wishes to discuss an unbulleted item should plan to raise the issue at the meeting.

We have sent the current draft of the administrative adjudication proposal (copy attached to Memorandum 95-4) to Legislative Counsel to prepare for introduction. Depending on timing considerations we may need to introduce the bill before we have incorporated decisions made at the January meeting. If so, we will amend the bill after introduction to incorporate the decisions.

There may be some wording changes of a technical nature imposed by Legislative Counsel to conform to their current drafting conventions. We will try to hold any changes of this nature to a minimum.

• § 11410.20. Application to state

The State Banking Department requests an exemption from the adjudication provisions of the Administrative Procedure Act either for the agency individually or for small regulatory agencies generally. Exhibit pp. 1-8. The basis of the exemption request is that the Administrative Procedure Act will impose

burdens that will make it difficult for a small agency to function. These burdens include the separation of functions requirement, ex parte communications limitation, and open hearing requirement. Other concerns expressed by the department — the burden of adopting regulations, the time limits for hearing procedures, the burden of proof provisions, and the requirement that the hearing officer note use of personal knowledge in the record — are not relevant to the current draft, which leaves existing hearing procedures in place subject to the administrative adjudication bill of rights.

The problem areas identified by the department that remain relevant are analyzed below. The staff believes that if an individual provision creates serious problems for an agency, the Commission should consider a special rule for the agency or even a general modification of the provision. The staff believes that outright **exemption from the administrative adjudication bill of rights is not appropriate**.

In fact, one of the few hearing procedures Professor Asimow suggests might be shifted from the agency to the Office of Administrative Hearings is the power of the Superintendent of Banks to issue cease and desist orders. Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1191 fn. 415 (1992).

§ 11415.10. Applicable procedure

The State Bar Litigation Section recommends that all state hearing officer functions be provided by a central panel. Exhibit p. 10. **The Commission has considered this concept at length and rejected it.**

11420.10. ADR authorized

The State Bar Litigation Section questions whether the decision power of the state should be delegable to binding arbitration by an arbitrator "whose qualifications are unknown and whose responsiveness to public interest, as opposed to private interests, is non-existent." Exhibit p. 13.

The staff does not find this argument particularly compelling. The state agency is charged with decisionmaking authority in the public interest, and it should have the ability to make a determination that the public interest would best be served in the circumstances of a particular dispute by employment of a neutral arbitrator. **The staff would preserve the ability to refer an adjudicative proceeding for binding arbitration.**

§ 11420.20. Regulations governing ADR

The State Bar Litigation Section suggests the alternative dispute resolution provisions ought to be amplified to specify the allocation of costs of ADR, the right to discovery in ADR, and the rights to enforcement or review of a decision or settlement reached pursuant to ADR. Exhibit p. 14.

The statute contemplates that operational details of ADR will be governed by model regulations promulgated by the Office of Administrative Hearings or by an agency's own regulations. The statute is enabling, rather than regulating. **The staff would add language to the Comment to make clear that the types of issues raised by the State Bar section fall within the regulatory authority**:

> **Comment.** Section 11420.20 *provides for regulations to govern the detail of alternative dispute resolution proceedings. In addition to the matters listed in subdivision (b), the regulations may address other issues such as cost allocation, discovery, and enforcement and review of alternative dispute resolutions.*
>
> *This section* 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).
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> 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**

The State Bar Litigation Section is concerned about making alternative dispute resolution communications confidential. "We doubt that the reasons for decisions of a state agency in licensing, rate setting, or other matters of public concern should be sealed from public scrutiny." Exhibit pp. 13-14.

The staff thinks the State Bar is correct that this provision would override other fundamental principles controlling the conduct of public business, including the open hearing requirement and the public records act. If we wish to encourage alternative dispute resolution, we need to protect confidentiality of communications. **The staff cannot think of any way to reconcile these conflicting policies.**

• **§ 11425.10. Administrative adjudication bill of rights**

The administrative adjudication bill of rights is intended to apply to an agency's procedure whether or not the agency's procedure is consistent with the provisions. An agency need not revise its procedure to be consistent with the bill of rights — the bill of rights applies without further action by the agency.

An agency may wish to conform its procedure to the bill of rights, and this would be desirable. But it is not required.

The staff thinks it is worth stating these principles expressly in the statute and Comment, since some agencies may think the statute requires them to go through a rulemaking procedure to conform to the bill of rights. **The staff would revise the statute and Comment**:

> (b) *The requirements of this section apply to the governing procedure by which an agency conducts and adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20 (conflicting or inconsistent statute controls).* The governing procedure by which an agency conducts an adjudicative proceeding may include ~~procedures~~ *provisions* equivalent to, or more protective of the rights of the person to which the agency action is directed 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).
>
> *Under subdivision (b), this section is self-executing — it is part of the governing procedure by which an agency conducts an adjudicative proceeding whether or not regulations address the matter. The section does not, however, override conflicting or inconsistent state statutes, or federal statutes or regulations. Section 11415.20 (conflicting or inconsistent statute controls). If the governing procedure includes regulations that are at variance with the requirements of this section, it is desirable, but not necessary, that the agency revise the regulations; the requirements of this section apply regardless of the regulations.* Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section. ~~Subdivision (b).~~
>
> ...
>
> ~~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 statute controls).~~

• **§ 11425.20. Open hearings**

The State Banking Department disagrees with the policy of requiring hearings to be open to public observation. They point out reasons for closure of their hearings:

> The parties are usually concerned about the disclosure of sensitive or confidential business information and confidential personal information concerning their personnel and customers. Our observation has been that our ability to afford parties the opportunity of a closed hearing, which is more conducive to candor and a frank discussion of issues than would be possible if the hearing were to be held in public, has been an advantage.
> Exhibit p. 5.

The department suggests that the parties, rather than the presiding officer, should decide whether a hearing will be closed.

The staff notes that Professor Asimow's original recommendation to the Commission had been that a hearing should be closed on agreement of the parties, and the Commission's early drafts provided for this. The Commission deleted this concept from the draft in light of the comment of OSHAB that to close a hearing would be contrary to their procedures mandating that hearings are open to the public. "Matters requiring confidentiality (e.g., identification of complaining witnesses, trade secrets) can be handled through *in camera* review without limiting public access to the hearing itself." The Commission has also heard from other sources concerning the public interest, including media interest, in administrative proceedings.

A middle ground might be appropriate here; something along the following lines, perhaps:

> 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 the 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. *In making a determination under this paragraph, the presiding officer shall give great weight to an agreement of all the parties that it is necessary to close the hearing.*
> *(3)* 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.

§ 11425.30. Neutrality of presiding officer

• **Small Agency Problem**

The separation of functions provisions prohibit a person from serving as presiding officer who has served as investigator, prosecutor, or advocate in the proceeding. The State Banking Department states that this will cause problems for it: in a small agency an uninvolved hearing officer is often difficult to find.

> Because the majority of the personnel in the Department are engaged in examination and evaluation of our licensees, and because most regulatory matters go through several individuals for review before decision, hearings which are based upon challenges to that decision are going to be difficult to convene if we must find hearing officers (and possibly also hearing representatives) who are not already aware of the matter to be adjudicated.
> Exhibit p. 4.

The department rejects the option of using Office of Administrative Hearings personnel — "this would severely hamper our ability to, as appropriate, appoint hearing officers who possess knowledge of the complex and technical issues which we are called upon to consider and decide." Exhibit p. 4. They indicate that their experience has shown that the mere fact of a hearing officer's slight involvement in or knowledge of a case does not equate to bias.

This issue of whether minor involvement should be disqualifying for the presiding officer is addressed in the Comment to Section 11525.30:

> 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.

In light of the Department of Banking concern, **the staff would elevate this language from the Comment to the statute**:

> (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.

(3) A person whose participation as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage is not substantial may serve as presiding officer in the proceeding.

Probable Cause Determination

The statute does not disqualify from service as presiding officer a person who participated in a determination of probable cause to bring the proceeding. The State Bar Litigation Section objects to this provision — it "destroys any appearance of impartiality and should not be part of the Act." Exhibit p. 11.

This provision is not intended to violate the concept of separation of adjudicative from prosecutorial functions. It is intended merely to allow the same person to preside both at a probable cause determination in the proceeding and at the main proceeding. The provision does not allow an advocate in a probable cause determination to serve as presiding officer in the main proceeding. **The staff would add clarifying language to the Comment**:

Subdivision (b) is drawn from 1981 Model State APA § 4-214(c)-(d). ~~This~~ *It allows a person to be involved* ***as a decisionmaker*** *in both a probable cause determination and in the subsequent hearing; it does not allow a person to serve as a presiding officer at the hearing if the person was involved in a probable cause determination as an investigator, prosecutor, or advocate.*

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. See Sections 11430.60 (disqualification of presiding officer), 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).

§ 11430.30. Permissible ex parte communications from agency personnel

Assistance and Advice from Nonadversarial Personnel

Section 11430.30 includes a provision permitting ex parte communications between the presiding officer and nonadversarial agency staff for purposes of assistance and advice. The State Bar Litigation Section opposes this provision, noting that all communications between adjudicator and agency personnel should be prohibited. "This will destroy the fundamental fairness that would have been created by the efforts to make the adjudicator independent of the agency. We strongly recommend that this provision be disapproved." Exhibit p. 11.

The staff thinks **there is nothing wrong with this provision**. The agency is charged with a factfinding task, and it may be important for the factfinder to consult with specialists within the agency to ensure a proper decision. We allow the presiding officer to evaluate evidence based on the presiding officer's special knowledge of the subject matter. It is consistent to allow a nonexpert presiding officer to achieve the same result by consulting with nonadversary agency staff, and the agency could achieve the same result by using as presiding officer a panel of persons that includes agency experts who consult with each other in developing a proposed decision. The provision does not violate our basic purpose of ensuring the neutrality of the factfinder, and is part of the 1981 Model State APA.

Advice Concerning Settlement Proposal

The statute allows ex parte communication between agency personnel and the presiding officer in connection with a settlement proposal. The State Bar Litigation Section disapproves this provision — "It would be too easy for agency personnel to bias the adjudicator during such communications." Exhibit p. 12.

The reason the Commission adopted this provision is to maintain the confidentiality necessary to encourage settlements. The staff believes this is an important policy and **we would not change this provision.**

• **Advice Involving Technical Issue**

The statute allows ex parte advice from adversarial agency personnel to the presiding officer in cases that are nonprosecutorial in character where the advice involves a technical issue and is necessary for and not otherwise reasonably

available to the presiding officer. The content of the advice must be disclosed on the record and the parties given an opportunity to comment.

The State Bar Litigation Section thinks a different procedure should be used. The presiding officer should give notice to the parties before seeking advice, and the parties should have an opportunity to be present when the advice is given. "Otherwise, there is a substantial risk that information may be communicated in such a way as to bias the adjudicator in future proceedings or that additional prejudicial communications may occur." Exhibit p. 11.

The staff is concerned that the proposed procedure will bog down proceedings. A presiding officer would be precluded from just calling an agency expert and getting quick information on a technical matter. The disclosure process in the statute is derived from the existing ex parte communications procedure in the APA, which appears to be working satisfactorily. **The staff would not change it.**

In fact, the Department of Banking feels that the provision allowing technical advice to the presiding officer from adversarial staff does not go far enough:

(1) Typical interactions between senior staff personnel (from whom the presiding officer is selected) might nonetheless be challenged by a party as prohibited ex parte communications.

(2) The requirement that a permitted communication between agency personnel be made part of the record and subject to comment by the parties "could result in a significant lengthening of administrative hearings, adding disputes which are not necessarily relevant to the subject matter." Exhibit p. 4.

The staff can suggest nothing to address this concern. The Commission has felt that the ex parte communications prohibition is fundamental to fairness in adjudicative proceedings. The consequence of permitting some types of ex parte communications is that, in fairness to the parties, the communications must be disclosed. Disclosure may result in some inefficiency, but the cure is for agency personnel who feel they need to make communications to the presiding officer concerning the merits of the case to do so on the record.

• § 11440.10. Delegation of review authority

This section makes clear that an agency may determine that decisions of the presiding officer are final and not subject to administrative review. The State Bar Litigation Section, which characterizes this provision as a change from present law, is concerned that this will increase the need for judicial review of agency

decisions. "If the agency elects not to reconsider a decision, the parties have no recourse other than judicial relief. Not only will this increase the costs of handling administrative proceedings by forcing the parties into the judicial branch of government, but this approach will also increase the delays in administrative adjudications and further impact the dockets of the judiciary." Exhibit pp. 14-15.

In the staff's opinion, this section recognizes and makes explicit a practice that is permitted under existing law. Existing Section 11517(b) allows an agency to adopt the administrative law judge's proposed decision and does not require a review of the record; existing Section 11517(d) provides that if the agency does not act on a proposed decision, the proposed decision is deemed adopted by the agency. The staff believes the proposed statute is consistent with, and will help clarify, agency review procedures. **We would not change this provision.**

§ 11440.30. Hearing by electronic means

The State Bar Litigation Section is concerned that if electronic hearings are used, there should be an exchange of exhibits in advance. "Challenges to the authenticity of documents may be difficult or impossible in a hearing conducted only by telephone." Exhibit p. 16.

The draft allows electronic hearings if the parties have the opportunity to "observe" exhibits. **The staff would add language to the Comment** to make clear that, "The opportunity to observe exhibits includes a reasonable opportunity to examine and object to exhibits before or at the hearing." The staff also notes that, under the current draft of this provision, if a party is not satisfied with the opportunity provided to observe exhibits, the party may preclude hearing the matter electronically. Subdivision (b).

§ 11460.20. Agency regulation required for emergency decision

The emergency decision provisions allow an agency to prescribe procedures within a basic framework. The State Bar Litigation Section does not like this opportunity for variation among agencies — it destroys the stated goals of uniformity and independence. Exhibit p. 14.

The Commission has felt that the circumstances under which an emergency decision must be made vary so widely among agencies that the best we can do is set out the basic parameters of due process and allow agencies to shape appropriate procedures within those parameters. This is consistent with the

fundamental approach of the recommendation to allow existing agency procedures to stand, subject to basic due process and public policy requirements. **The staff would not change this provision.**

§ 11460.30. When emergency decision available

The emergency decision procedure is available only where there is an immediate danger to the public health, safety, or welfare. The State Bar Litigation Section is concerned that the proposed statute does not define terms such as "welfare". Exhibit p. 14. **The staff would not attempt to define these concepts.** They are common in the California statutes, and intended to be sufficiently flexible to encompass the varying situations that might arise calling for immediate agency action. Any action under this standard is subject to judicial review.

The State Bar Section would also make a few **stylistic changes, which are acceptable to the staff**:

> (a) An agency may *only* 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 ~~only~~ 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.

• **§ 11460.40. Emergency decision procedure**

The State Bar Litigation Section is concerned that the statute does not specify the burden of proof required to obtain emergency relief. The staff notes that the Commission has generally removed burden of proof issues from the draft. However, it is arguable that in the case of an emergency decision, involving reduced due process protections, a high standard should be imposed for agency action. **The staff recommends that the Commission consider addition of a burden of proof provision along the following lines**:

> (c) An agency may issue an emergency decision under this article only on a determination based on **clear and convincing evidence** that the requirements of Section 11460.30 (when emergency decision available) are satisfied.

• § 11465.20. Declaratory decision permissive

The declaratory decision provisions are applicable "in case of an actual controversy", but the decision may not be issued where the rights of a "necessary party" would be substantially prejudiced. The State Bar Litigation Section points out that these concepts are undefined, and therefore the effects of a declaratory decision on the rights of parties and nonparties are unclear.

The staff notes that the 1981 Model State APA, from which the declaratory decision provisions are drawn, does not include the "actual controversy" language. The Commission added the provision in an effort to narrow the potentially unlimited scope of the provision. The staff agrees that the provision tends to cause confusion, and believes that **the limiting language is no longer necessary**, since we have revised the declaratory decision provisions to make issuance of a declaratory decision optional with the agency.

> 11465.20. (a) ~~In case of an actual controversy, a~~ 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.

§ 11465.70. Regulations governing declaratory decision

The declaratory decision provisions allow an agency to modify them or make them inapplicable. The State Bar Litigation Section is concerned that this will allow agencies to ignore the provisions simply by opting out of them, or to create nonuniform provisions. Exhibit pp. 10-11.

The Commission has viewed the declaratory decision provisions as flexibility-enhancing for agencies that want to make use of them. The Commission has

never viewed these provisions as fundamental requirements that ought to be imposed on agencies. **The staff would not change this approach.**

• § 11507.2. Intervention

Section 11507.2 provides procedures to allow a third party to intervene in an administrative adjudication under the formal hearing procedure. An intervention determination by the administrative law judge would not be administratively or judicially reviewable. An agency could by regulation preclude intervention in its proceedings.

The Commission has heard varying concerns about this provision. The State Bar Committee on Administration of Justice thought that intervention decisions should be reviewable. Professor Asimow thought the intervention provisions should be made applicable in all state administrative adjudication. The Attorney General thought that the intervention provisions should be omitted from the statute.

In Memorandum 95-4, the staff solicited comment on the intervention provision. Further commentary indicates:

The State Bar Litigation Section believes the intervention determination should be reviewable — "Generally, all adjudicative decisions are subject to at least one level of potential review at the request of an aggrieved party. Otherwise, an adjudicator could act arbitrarily and never be subject to reversal." Exhibit p. 13. The Litigation Section would go even further, however, and provide for *interlocutory* review of an intervention decision; otherwise, a would-be intervenor will have an impossible task persuading the reviewing authority that result of the administrative proceeding would have been different if intervention had been allowed. The **Commission as a matter of principle has disfavored interlocutory appeals in administrative adjudication**; they cause delay in proceedings that should be concluded expeditiously.

§ 11508. Time and place of hearing

The Office of Administrative Hearings conducts hearings in San Francisco, Los Angeles, Sacramento, and San Diego unless the agency selects, or the parties agree on, a different place. The State Bar Litigation Section thinks administrative hearings should normally be held where the events and the parties are located, "not in a distant major metropolitan community solely for the convenience of the administrative law judges." Exhibit p. 12.

The locations listed in the statute are where OAH maintains hearing facilities and has personnel stationed. **The staff would not change existing law on this issue.**

• § 11513. Evidence

Section 11513 provides that, "The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing". The State Bar Committee on Administration of Justice has relayed a concern of one of its members that if a person testifies in an administrative hearing, the person may be deemed to have waived a privilege, so that the communication could not be protected in subsequent civil litigation.

As a general principle, evidentiary privileges apply in any type of proceeding, administrative or civil, to protect the privileged communication. Evid. Code §§ 901, 910. If the holder of the privilege voluntarily allows the communication to be disclosed in a proceeding, the privilege is waived and no longer applies in subsequent proceedings. Evid. Code § 912; see, e.g., People v. Clark, 5 Cal. 4th 950, 1006, 857 P.2d 1099, 22 Cal. Rptr. 2d 689 (1993) (testimony in pretrial hearing waives privilege).

Is there something unique about administrative adjudication that should cause a communication voluntarily disclosed in an administrative proceeding to be privileged in subsequent proceedings? In fact, the argument for preserving a privilege waived in administrative adjudication is weak, since as a practical matter a person who wishes to protect the confidentiality of a communication may do so more easily in an administrative proceeding than in a judicial proceeding due to the difficulty of enforcing a disclosure order in an administrative proceeding.

It seems to the staff that if a partial waiver is to be allowed for administrative proceedings, it also should be allowed for judicial proceedings. But what is the policy behind continuing to protect the confidentiality of a communication once it has been disclosed in a public proceeding and is no longer private?

The staff believes that if the Commission wishes to investigate the possibility of revising the law to allow partial waivers of privileges, this should be done as part of a systematic study of the issue on general evidentiary principles, including a review of the policies behind privileges and waivers. **We would not do it as part of the administrative adjudication study** but only as a separate project taking into account proceedings of all types.

• § 11526. Voting by agency member

The Commission's proposed amendment to Section 11526 would allow agency members to vote by other means besides in person or mail voting, such as by fax:

> 11526. The members of an agency qualified to vote on any question may vote by mail or otherwise .

Dr. Michael Lawton (Exhibit pp. 17-28) would rewrite this section to restrict the ability of agency members to vote remotely:

> Any committee composed of fewer than three members may vote by mail if qualified to do so. Decisionmaking related to the disciplinary action against a licensee shall not occur by mail, but deliberations may take place in a closed session meeting as part of a regular session or as part of an emergency meeting. The subject of the closed session meeting must be clearly listed in the agenda, and the vote from the meeting announced publicly. Minutes of the closed session must be kept, but are confidential.

Most of Dr. Lawton's proposed language merely restates existing provisions of the open meeting law. See Gov't Code §§ 11126(d) (deliberation on decision under Administrative Procedure Act may be made in closed session), 11126.3(a) (public notice of subject of closed session), 11126.1 (minutes of closed session). Only the limitation on mail voting is new.

Dr. Lawton's particular concern is medical quality board, division, and panel decisions. This matter is covered in some detail in legislation most recently addressed by the Legislature in 1994, effective January 1, 1995. Business and Professions Code Section 2013(c) now provides (emphasis added):

> It shall require the affirmative vote of a majority of those members present at a division, panel, or board meeting, those members constituting at least a quorum, to pass any motion, resolution, or measure. A decision by a panel of the Division of Medical Quality to discipline a physician and surgeon shall require an affirmative vote, **at a meeting or by mail**, of a majority of the members of that panel; except that a decision to revoke the certificate of a physician and surgeon shall require the affirmative vote of four members of that panel.

The Commission has previously considered the general argument that mail or other remote voting undercuts the implied deliberation requirement of the open

meeting law. **The Commission concluded that law should allow agencies to decide how they can most effectively reach a decision.** For example, an administrative law judge's proposed decision might be circulated among agency members and allowed to become the agency's decision if all agency members agree after reviewing the record. This would be subject special statutes, such as a statute requiring a vote at a meeting.

• **Vehicle Code § 14112. Exemption from separation of functions**

This statute exempts driver's license hearings from the separation of functions requirements, due to the practical impossibility of requiring a separate prosecutor and judge in each driver's license hearing. The State Bar Litigation Section strongly opposes this exemption. "If the prosecutor, investigator, or other advocate has already recommended that a license be revoked, trying the adjudicative proceeding before that same person deprives the licensee of both the fact of impartiality and the appearance of impartiality." Exhibit p. 15.

The staff notes that it is not the intent of the drivers license exemption to allow a person who has served as a prosecutor, investigator, or advocate in a license revocation proceeding also to serve as presiding officer. The intent is to allow the presiding officer to review the case prepared by other departmental personnel, hear the licensee's response, and make a decision. The staff believes that **this provision needs further clarification** so it is not read to allow the person who prepared the case against the licensee to serve as presiding officer.

> 14112. (a) All matters in a hearing not covered by this chapter shall be governed, as far as applicable, by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> (b) ~~Subdivision (a) of~~ Section 11425.30 of the Government Code does not ~~apply to~~ *preclude the presiding officer from presenting the department's case in* a proceeding for issuance, denial, revocation, or suspension of a driver's license pursuant to this division *, so long as Section 11425.30 is otherwise satisfied* . The ~~Department of Motor Vehicles~~ *department* shall study the effect of ~~that subdivision~~ *Section 11425.30* 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 (b) is added to Section 14112 in recognition of the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases.

Subdivision (b) ~~makes~~ *limits the application of* separation of functions requirements ~~inapplicable~~ in drivers' licensing cases, including license classifications and endorsements. *Subdivision (b) allows the presiding officer to present the department's case, but does not authorize a person to preside who was involved in preparation of the case against the licensee, in such proceedings.* However, the separation of functions requirements remain *fully* applicable in other Department of Motor Vehicle hearings, including schoolbus and ambulance operation certificate hearings, on which the department is required to report.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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November 29, 1994

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Re: Administrative Adjudication by State Agencies --
Comments on Tentative Recommendation

Dear Mr. Sterling:

The State Banking Department (the "Department") welcomes the opportunity granted by the California Law Revision Commission (the "Commission") to submit comments on the Commission's Revised Tentative Recommendation on Administrative Adjudication By State Agencies (the "Revision").

While we acknowledge the immense effort which the Commission made to draft and amend its comprehensive overhaul of procedures for administrative adjudication, and appreciate the Commission's attempt to adapt the Revision to the concerns of smaller state agencies such as the Department, we must respectfully request that the Department remain exempt from the Administrative Procedure Act ("APA"). In the event that the Commission is unwilling to grant individual agency exemptions, we respectfully suggest that a group of state agencies similar to the Department - small, specialized regulatory agencies - be exempt from the APA. If the Commission remains, however, opposed to exemption for any state agencies, then we respectfully request that the current draft of the Revision be opened up for further amendment in an effort to resolve the problems discussed herein.

In brief, we do not believe that the framework for administrative adjudication contained in the Revision is sufficiently adaptable to our administrative hearing practice. We are also concerned that certain provisions, including the conflict of interest standards, are unnecessarily broad and rigid, and that we will encounter great difficulty in adhering to them.

The Department is a small state agency (approximately 200 employees), charged with the regulation of state chartered banks and other licensees pursuant to Divisions 1, 15 and 16 of the Financial Code. Certain orders issued by the Superintendent of Banks (for

example, cease and desist orders to banks pursuant to Financial Code Sections 1912 and 1913) are subject to a statutory requirement that a hearing be afforded the affected parties before the order can become final. In addition, the Superintendent's denial of certain license applications (for example, the denial of a money transmitter license application pursuant to Financial Code Section 1802.2) cannot become final until the applicant is afforded a hearing. The Superintendent also conducts "Skelly" hearings in personnel adverse action cases, and provides officers to serve as the "steps" in contract grievances, pursuant to the Rules of the Department of Personnel Administration. Finally, the Superintendent may convene a hearing to investigate matters within his jurisdiction, either on his own initiative or upon the request of certain parties. These hearings are substantially varied in scope as well as in degree of complexity. Although the Superintendent often designates Administrative Law Judges from the Office of Administrative Hearings ("OAH") as hearing officers, the Superintendent also appoints Department personnel to hear matters, particularly where the hearing involves complex issues requiring a high level of technical expertise.

We understand that the provisions authorizing the informal and special hearing procedures represent an attempt to reconcile the adoption of broad, statewide adjudicatory procedures with the specialized needs of some state agencies. Our ability to adopt regulations tailoring, in particular, special hearing procedures to our hearing needs, however, is impaired by the Revision's requirement (in Section 633.030) that specified provisions be retained in any adopted procedure. Of particular concern are the requirements which fall into the Commission's general category of conflict of interest. The Revision imposes a rigid structure which purports to eliminate conflicts of interest through agency adherence to a set of overly broad and inflexible requirements. We find the requirements to be excessive and unnecessary. We believe that a framework to prevent conflicts of interest which is comprised of less than absolute standards and which can be adapted the myriad situations encountered by parties and agencies - such as that currently utilized by the Department - is consistent with due process requirements without being overly burdensome. The Department understands and shares the Commission's interest in the elimination of potential conflicts of interest and bias from administrative adjudication, but the implementation of the Revision's requirements regarding exclusivity of record, bias/separation of function, and *ex parte* communications gives rise to serious practical problems when applied to our administrative hearings. In short, the Revision's goals regarding exclusivity of record appear to be achievable through less subjective means, while the requirements prohibiting bias and ex parte communications threaten agencies' ability to utilize their own personnel as hearing officers.

Exclusivity of Record.

Decisions are required to be based exclusively upon the hearing record, although the hearing officer may use matters such as his or her own specialized knowledge or experience in reaching the decision so long as the hearing officer notes in the record what specific experience or knowledge was used, and how it was used. Department hearing officers are usually appointed specifically because they have specialized knowledge and experience in the subject matter of the hearing, but the provision that requires noting this in the record strikes us as vague and probably unrealistic. All hearing officers, whether they work for OAH or not, possess varying degrees of knowledge in subject areas which may assist them in reaching a decision in a particular case. Except for the simplest situation, where the hearing officer can identify a particular fragment of personal knowledge or experience which is useful and relevant to the subject matter of the hearing, it is hard to imagine how a hearing officer is supposed to meaningfully and concisely note for the record what he or she "knows". Other requirements contained in Section 633.030, such as the requirement in Subsection (a)(7) that the decision must be in writing and include a statement of the factual and legal basis of the decision, should be sufficient to permit the hearing officer to adequately document the rationale utilized in reaching the decision.

Bias/Separation of Function.

The Revision requires state agencies to find ways to separate their various functions regarding issues which may end up in administrative adjudication, based upon the concern that the same individuals inside an agency who investigate a matter may also make recommendations on the disposition of that matter (and possibly make the decision on the matter) - and yet find themselves called upon to decide the matter at a hearing. In larger state agencies, where staff and administrative functions are more organizationally separate, it may not be hard for an agency to appoint a hearing officer who has not been involved in the agency's consideration of the matter to be adjudicated. For smaller agencies like the Department, the uninvolved hearing officer could be significantly more difficult to find. The Department is so small that the same chain of review is, mostly out of necessity, utilized both for investigation and for decision making. Yet it will, in most cases, also constitute the pool from which hearing officers are drawn. The Department's experience in personnel hearings has been that it has been difficult simply to find an uninvolved "Skelly" hearing officer to provide the initial review of a proposed (but not yet implemented) adverse action. This has not severely

hampered our efforts because our experience has shown that the mere fact of a hearing officer's slight involvement in or knowledge of a case does not equate to bias. In fact, in two of our four most recent adverse actions, we have successfully defended our Skelly hearing officers against challenges on bias grounds. We think that this represents a more appropriate and flexible approach to the subject of bias than that contained in the Revision. Because the majority of the personnel in the Department are engaged in examination and evaluation of our licensees, and because most regulatory matters go through several individuals for review before decision, hearings which are based upon challenges to that decision are going to be difficult to convene if we must find hearing officers (and possibly also hearing representatives) who are not already aware of the matter to be adjudicated. It can be argued that we could eliminate these problems by exclusively appointing OAH personnel to conduct our hearings, but this would severely hamper our ability to, as appropriate, appoint hearing officers who possess knowledge of the complex and technical issues which we are called upon to consider and decide.

Ex Parte Communications.

Finally, the prohibition against *ex parte* communications poses problems for the Department, again related to our small size. It is not uncommon for Department personnel to have *ex parte* communications with hearing officers who are also Department staff, because in a small Department subject-related communication is a part of every day interaction. Although the Revision allows limited exceptions to the prohibition for matters of a technical nature, we are concerned that the typical interaction between our more senior staff personnel (who would most likely constitute the pool from which we would draw hearing officers and Department representatives) could be considered prohibited *ex parte* communications by parties to an administrative adjudication. Similarly, the requirements that any such communications must be made part of the record and be subject to comment by the parties could result in a significant lengthening of administrative hearings, adding disputes which are not necessarily relevant to the subject matter. Again, it could be argued that our concerns could be alleviated by exclusively utilizing non-Department hearing officers, but for the reasons expressed above this is not a desirable option.

There are also several additional issues, outside of conflict of interest, which appear problematical to the Department; in particular, the Revision's time limits, its open hearing requirements, the administrative burden of adopting a large number of new regulations in a comparatively short period of time and the imposition of a higher burden of proof for hearings involving "occupational licenses".

Time Limits.

Time limits are specified for certain hearing procedures, as well as for applications and other submissions from outside parties. The Department is already subject to time limits provided in the Financial Code (for example, Sections 554 and 706) and in the Permit Reform Act (Government Code Sections 15374, *et seq.* and 10 California Code of Regulations, Sections 5.6000, *et seq.*) which present a potential for conflict. Where the Revision time limits are applicable to hearings, they will control. But where the Revision's time limits conflict with our time limits, they may have the unintended effect of misleading other parties and creating additional disputes. Moreover, application processing and other related time limits are outside of the scope of the APA.

Open Hearings.

Virtually all administrative hearings, including those conducted electronically, would be required to be open to the public or to be as accessible to public viewing as possible. Our experience is that most of the parties who get involved in disputes which can or do lead to administrative adjudication do not desire that hearings be conducted in public. The parties are usually concerned about the disclosure of sensitive or confidential business information and confidential personal information concerning their personnel and customers. Our observation has been that our ability to afford parties the opportunity of a closed hearing, which is more conducive to candor and a frank discussion of issues than would be possible if the hearing were to be held in public, has been an advantage. The weakness in the Revision's limited authorization to close hearings in certain specified situations is that it does not permit the parties to move to close the hearings, but rather places the entire responsibility upon the hearing officer. Further, because we do not know what will become the standard for "sensitive information" necessitating a closed hearing, we suspect that any hearing closed for this reason may breed increased litigation.

Administrative Burdens.

The sheer quantity of procedure contained in the Revision, coupled with the built-in requirements for action by agencies (most notably, to adopt regulations along specified guidelines, or to modify existing regulations in order to tailor them to agency practice) will impose significant additional demands. In some areas, regulations are required as a means of implementation (such as informal and special hearing procedures), while in other areas regulations are required to get out of pre-established procedures (such as the declaratory decision procedure or the elimination of procedural devices otherwise required by the formal hearing procedure). Because the Revision structure places a premium upon use of regulations to implement the statutory structure, a significant burden is placed upon agencies to implement the structure created by the Revision within a fairly short period of time (between 18 months and 2 years).

Burden of Proof.

Finally, the Revision has taken the unprecedented step of providing for an increase in the burden of proof in administrative adjudication involving the "revocation or suspension of occupational licenses". While we believe that the higher standard of proof will not, at least initially, be applicable to any of our administrative hearings, the Department nevertheless objects to its inclusion in the Revision. It seems completely unwarranted, as we are aware of no constitutional requirement or compelling public purpose that a higher burden must be placed upon certain administrative hearings, but not others. In addition, a higher burden adds substantially to the complexity of administrative adjudication. Also, we are concerned that the definition of "revocation or suspension of occupational licenses" will become broadened over time. The imprecise definition provided for "occupational licenses" provides ground which is a bit too ripe for gradual expansion. If the edges of this definition are expanded, problems will be presented for all state agencies, as the higher burden of proof becomes applied to a greater number of their administrative hearings.

The Department has approached matters of administrative adjudication on a case-by-case basis, frequently opting to have the hearing conducted under the provisions of the APA, while at other times utilizing our own hearing regulations for purposes of the proceeding. The retention of our ability to approach each matter on a case-by-case basis gives us a degree of flexibility which has served us well. Exemption from the APA would allow us to continue an administrative hearing practice which has merit, because it works, while allowing us to adopt revised hearing procedures as necessary and as practicable. The Department could become overwhelmed by the need to carry out Revision hearing procedures, which ultimately result in a scheme which is too comprehensive for our needs. The prospect of administrative hearings which include complex procedural devices and rigid requirements regarding conflict of interest does not suggest the qualities of timeliness and economy which have normally been associated with the administrative process. The Department's consistent goal has been to provide administrative

adjudication as a means for persons affected by our decisions (as well as ourselves) to have an opportunity to present their views, to confront witnesses and to receive a decision, in a forum which is relatively expedient and inexpensive - not in forum that comes close to being as tedious and expensive as the Superior Court.

To conclude, the Department is a small department operating in a narrow and technical regulatory area, with an administrative hearing history characterized by infrequency of hearings and diversity of subject matter. Our incorporation into a comprehensive statewide procedural scheme for administrative adjudication appears to be as unviable today as it was forty years ago, when we were granted our current exemption from the APA. We know that the Commission is aware of, and sympathetic to, the problems of smaller state agencies and the difficulties they could encounter in their attempt to implement the Revision. We acknowledge that the Commission has made an effort to respond to those concerns. However, the Revision simply does not go far enough to address the problems which arise out of its unnecessary breadth and rigidity. We find ourselves confronted with a system which imposes requirements which we think are absolute and unnecessary, and which will pose great practical difficulties for us in its implementation. Retaining our exemption will allow us to continue our present hearing practice while permitting us to implement whatever APA provisions we find most adaptable to our practice, as and when appropriate both to our needs and to our available resources. As stated earlier, if the Commission declines to grant exemptions to individual agencies, then we respectfully suggest that an exemption be made available to a group of agencies which have similar characteristics and problems - such as small regulatory agencies. Finally, if the Commission remains opposed to all exemption, then

we respectfully request that the Revision be reopened to further revision along the lines suggested herein.

Very truly yours,

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Acting Superintendent of Banks

By
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November 17, 1994

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

re: California Law Revision Commission Revised Tentative Recommendation on Administrative Adjudication by State Agencies (July, 1994)

Ladies and Gentlemen:

This letter is submitted on the behalf of the Litigation Section in response to the California Law Revision Commission proposal to revise the Administrative Procedure Act (the "Act").

The Litigation Section submitted to you a report dated August 20, 1993, commenting on the original tentative recommendation. Some, but not all, of the concerns expressed in that report have been incorporated into the July, 1994, revision. We urge the State Bar, however, to oppose adoption of the revised tentative recommendation unless further revisions are made to deal with the substantive issues addressed both in this letter and in our letter of August 20, 1993. In this letter, we will not repeat all of the comments in our earlier letters, but those comments are still apropos.

The Litigation Section's recommendations on this matter do not apply to the Worker's Compensation Appeals Board, or to the State Bar Court, because the former functions in a way that avoids the problems this legislation is designed to address and because the latter is not an executive branch tribunal.

1. FURTHER REVISIONS SHOULD BE MADE TO PROTECT THE INDEPENDENCE OF THE ADJUDICATORS.

Although many aspects of the current Administrative Procedure Act have been upheld as being constitutional, the lack of independence of the persons who adjudicate administrative hearings creates perceptions of partiality and unfairness. Where the adjudicator is employed by the administrative agency, and the administrative agency personnel have access to the adjudicator without the knowledge or presence of the other party, those who are not part of the administrative agency but whose rights are affected by the adjudication will inherently perceive that their rights are not being dealt with impartially. Even if the results of the adjudication would otherwise be the same, decision making under these circumstances inherently causes members of the public to doubt that they have received fair treatment. Separating the prosecutory and adjudicatory functions of administrative proceedings should be the goal of all revisions to the Act.

With this concept in mind, we recommend that further revisions to the tentative recommendation be made as follows:

a. All state agency hearing personnel and functions should be removed to, compensated by, and assigned by a central panel, unless the adjudicative functions of a given agency are expressly excepted from this practice by the Legislature.

b. If specialization is required of an administrative law judge in a given area, specialization should be accomplished by establishing specialized sub-panels within the centralized panel of administrative law judges. Through education and experience, the administrative law judges who work for the centralized panel can develop the expertise required. However, the development of such expertise does not require employment by the administrative agency whose cases they are adjudicating.

c. We applaud most of the revisions in Chapter 5 of the revised tentative recommendation dealing with declaratory decisions. However, proposed Section 635.070(c) is still too broad. It would allow any administrative agency to modify the provisions of the Act or make it inapplicable. Giving such broad discretion to all agencies would allow the administrative agencies to ignore the Act by simply opting out of it or by adopting disparate regulations and thereby destroying

both uniformity and independence, which both are stated goals of the recommendation.

d. Chapter 4 of the proposed Act, dealing with emergency decisions, still does not require uniformity among the various administrative agencies and permits each agency to adopt its own emergency procedures independent of the Act. This destroys the stated goals of uniformity and independence.

e. Section 643.320(b) of the revised tentative recommendation would allow a person who participated in deciding that there was probable cause to initiate the proceeding to serve as the adjudicator in a proceeding that results from that finding of probable cause. This destroys any appearance of impartiality and should not be part of the Act. Conversely, we endorse the revisions of proposed Section 643.310, in which the disqualification of a person who has served as an investigator, prosecutor, or advocate in the proceeding or in pre-adjudicative stages is now made absolute.

f. Proposed Section 643.430(c)(1) would still permit the adjudicator to obtain ex parte advice and assistance from agency personnel. This will destroy the fundamental fairness that would have been created by the efforts to make the adjudicator independent of the agency. We strongly recommend that this provision be disapproved.

g. For the same reason, proposed Section 643.430(c)(1) should be disapproved. This section would allow an investigator or advocate to give advice to an adjudicator concerning a technical issue in a non-prosecutory proceeding, if the advice is necessary for and not otherwise reasonably available to the adjudicator. All the section requires is that the content of the advice be disclosed on the record and that all parties have an opportunity to comment on the advice. The revised version of this section should require the adjudicator to give notice to the parties who are not part of the administrative agency before seeking such advice, and the adjudicator should be required to give such parties an opportunity to be present when the advice is sought and given. Otherwise, there is a substantial risk that information may be communicated in such a way as to bias the adjudicator in future proceedings or that additional prejudicial communications may occur.

h. Proposed Section 643.430(b) should also be disapproved in its present form. It would permit agency personnel to communicate ex parte with the adjudicator concerning a settlement proposal advocated by the agency personnel. It would be too easy for agency personnel to bias the adjudicator during such communications.

2. ADDITIONAL SITES FOR ADMINISTRATIVE HEARINGS SHOULD BE PROVIDED.

Proposed Section 642.340 would require administrative law judges to sit only in San Francisco, Los Angeles, Sacramento, or San Diego, unless the administrative agency decides otherwise or the parties agree otherwise. There are many other counties in which the events that lead to administrative proceedings occur, parties or witnesses are located, or evidence is available. Santa Clara County, Riverside County, Orange County, San Bernardino County, Stanislaus County, and many other areas of the State contain substantial population centers which are ignored by the proposal. This should not be. Administrative hearings should normally be held where the events and the parties are located, not in a distant major metropolitan community solely for the convenience of the administrative law judges. At a minimum, hearings could be held wherever the courts of appeal sit.

3. FURTHER REVISIONS TO THE DECLARATORY DECISION CHAPTER ARE APPROPRIATE.

Proposed Section 635.020(a) still uses the phrase "an actual controversy" but does not define that phrase. We recommend that such a definition be promulgated.

Section 635.020(b)(2) still uses the phrase "necessary party" without defining that phrase. If the comment's suggestion that a "necessary party" is a person whose presence would be indispensable is what is intended, that concept should appear in the statute itself, and not merely in the comment. The proposal should include standards by which the agency may determine who is "necessary" or "indispensable." The proposal ought also to state the consequences if the agency issues a declaratory decision that affects a "necessary" or "indispensable" party about whom the agency does not know or who has not consented to the declaratory decision process by the time of the decision.

For the reasons stated in our August 20, 1993, letter, we recommend that the declaratory decision process be limited to

situations in which the person applying for a declaratory decision has a question regarding interpretation of, or the application of, a regulation that affects only that applicant or which takes place in a non-adversarial context.

4. NON-REVIEWABILITY OF INTERVENTION DETERMINATION.

Proposed Section 644.140 would provide that the determination by the adjudicator of whether intervention should or should not be allowed "is not subject to administrative or judicial review." Since proposed Section 650 defines "judicial review" as obtained by a petition for a writ of mandate, this language appears to make the decision of the adjudicator absolute and non-reviewable. This would be contrary to accepted standards of jurisprudence. Generally, all adjudicative decisions are subject to at least one level of potential review at the request of an aggrieved party. Otherwise, an adjudicator could act arbitrarily and never be subject to reversal.

We recommend that decisions regarding intervention should be subject to interlocutory review if intervention is denied. Otherwise, the aggrieved intervenor would have an almost insuperable task of persuading the administrative agency or a court that the result of the adjudication would have been different if intervention had been allowed. In any event, we recommend that the last clause of proposed Section 644.140 be deleted.

5. WE ARE STILL CONCERNED ABOUT THE PROPOSED ALTERNATIVE DISPUTE RESOLUTION PROVISIONS.

Although some of the concerns expressed in our October 20, 1993, letter regarding alternative dispute resolution have been addressed in the revised tentative recommendation, not all of them have been. Specifically:

a. Referral of an adjudicative proceeding from an administrative law judge to binding arbitration separates the State from the decision making process on matters of both public and private concern. We question whether the powers of the State should be delegated to an arbitrator whose qualifications are unknown and whose responsiveness to public interest, as opposed to private interests, is non-existent.

b. The confidentiality provisions of Section 647.404 are still of concern. We doubt that the reasons for decisions of a

state agency in licensing, rate setting, or other matters of public concern should be sealed from public scrutiny. Since the public is affected by the consequences of public agency decisions, the reasons for the decisions should be accessible to the public. Otherwise, the risk of corruption is enhanced.

c. The proposal ought to be amplified to specify the allocation of the costs of alternative dispute resolution, the right to discovery in alternative dispute resolution, and the rights to enforcement or review of a decision or settlement reached pursuant to alternative dispute resolution.

6. EMERGENCY DECISIONS.

The substantive concerns expressed in our August 20, 1993, letter have not been cured by the revisions in Chapter 4, dealing with emergency decisions, in the proposed Act. Highlights of our concerns include:

a. The revised tentative recommendation still encourages non-uniformity between agencies, rather than uniformity of practice.

b. The revised tentative recommendation still does not define terms, such as "welfare."

c. The revised tentative recommendation still does not specify the burden of proof required to obtain emergency relief.

In addition, several stylistic changes should be considered. For example, proposed Section 634.030(a) should be restricted to add the word "only" after the word "may." The word "only" in proposed Section 634.030(b) should follow the word "may" rather than the word "take." There are other stylistic changes that might be considered and as to which we would be pleased to consult with you, if you wish.

7. ROLE OF ADMINISTRATIVE LAW JUDGE.

Proposed Section 649.210 would still change the general rule that an appeal to the head of the agency is available as a matter of right. It would provide that the agency has discretion whether to review a proposed decision or not. We are still concerned that this change from present law will increase the frequency of judicial administrative mandamus proceedings. If the agency

elects not to reconsider a decision, the parties have no recourse other than judicial relief. Not only will this increase the costs of handling administrative proceedings by forcing the parties into the judicial branch of government, but this approach will also increase the delays in administrative adjudications and further impact the dockets of the judiciary. We still recommend that this provision be opposed.

8. WE STILL OPPOSE THE EXCEPTION FOR THE DEPARTMENT OF MOTOR VEHICLES UNDER PROPOSED SECTION 643.310.

Proposed Section 643.310 defines when a person may not serve as an adjudicator. The prohibited persons include a person who has served as an investigator, prosecutor, or advocate in the adjudicative proceeding or in the pre-adjudicative stage of the proceeding, or if the person is subject to the authority, direction, or discretion of a person who has served as the investigator prosecutor, or advocate. These are laudable. However, paragraph (b) of that proposed section exempts the Department of Motor Vehicles from those limitations.

We opposed former proposed Section 643.320(b), and proposed new Section 643.310(b) is the analog of the earlier section. We still oppose it.

The existence of a driver's license is essential to many people for economic, medical, and other reasons. Both fairness and the appearance of fairness in proceedings relating to drivers' licenses are important to all residents of this State. Depriving the residents of California of both the appearance and the reality of fairness in adjudicative proceedings regarding their licenses is not justified by the volume of proceedings regarding drivers' licenses. If a prosecutor, investigator, or other advocate has already recommended that a license be revoked, trying the adjudicative proceeding before that same person deprives the licensee of both the fact of impartiality and the appearance of impartiality.

Section 643.310(b) should strongly be opposed.

9. WE ARE STILL CONCERNED ABOUT THE ABSENCE OF SAFEGUARDS IN A HEARING BY ELECTRONIC MEANS.

We are grateful that proposed Section 648.150 incorporates some of the procedural safeguards recommended in our letter of August 20, 1993. However, the proposal still does not include

exchange of exhibits in advance of a telephonic hearing, so the absent parties would have time to prepare for the hearing and to decide whether to object to the use of an electronic hearing once they have had the opportunity to review the exhibits. Challenges to the authenticity of documents may be difficult or impossible in a hearing conducted only by telephone.

If you have any questions regarding these recommendations, please do not hesitate to call.

Very truly yours,

Jerome Sapiro, Jr.

JS/vy
(1:9930.04:56)

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December 28, 1994

THE MEDICAL PRACTICE ACT (B&P 2013)
THE BAGLEY-KEENE ACT AND GOV'T CODE 11526
STATE AGENCIES CANNOT "VOTE BY MAIL"

All Acts agree that a meeting is required for formal action by the Board, not a secret mail vote. State Agencies may not "vote by mail".

THE MEDICAL BOARD AND OTHER AGENCIES HAVE MISUSED GOV'T CODE 11526 OF THE ADMINISTRATIVE PROCEDURE ACT TO VIOLATE SPECIFIC PROVISIONS OF THEIR OWN ACTS AND SPECIFIC PROVISIONS OF THE BAGLEY-KEENE OPEN MEETING ACT.

A. The Language Of Gov't Code 11526, Is Permissive, "May Vote By Mail".

The language of Gov't Code 11526 in the Admin. Proc. Act (APA) is "permissive".

> "The members of an agency qualified to vote on any question may vote by mail". [emphasis added GC 11526]

The Administrative Procedure Act was modified in January, 1991, and Government Code 11373 was added to include mention of Business and Professions Code 2013 (the open meeting requirement for disciplinary action of the Medical Practice Act):

> "Upon receipt of the proposed decision, The Division of Medical Quality... shall have 90 days to review the proposed decision and may, in its discretion, upon a majority vote, except as required in Section 2013 of the Business and Professions Code for revocations of licensure, take any action authorized in Section 11517."

The Bagley-Keene Act was incorporated into the Medical Practice Act (B&P 2013-2017) and by reference to B&P 2013 into the Administrative Procedure Act (Gov't Code 11373).

THE MEDICAL PRACTICE ACT

THE MANDATORY LANGUAGE OF BUS. AND PROF. CODE 2013(c) IS CONTROLLING OVER THE PERMISSIVE LANGUAGE OF GOV'T CODE 11526.

The language of Bus. and Prof. Code 2013(c) is mandatory:

"MEETINGS OF BOARD AND DIVISIONS; QUORUM; VOTES NECESSARY" (B&P 2013) Paragraph (c) :

> "It shall require the affirmative vote of a majority of those members present at a division or board meeting, such members constituting at least a quorum, to pass any motion, resolution, or measure, except that a decision by the Division of Medical Quality to revoke the certificate of a physician and surgeon shall require an affirmative vote of five members of that division." [emphasis added B&P 2013(c)]

The need for a BOARD meeting is a due process issue and was devised by the Legislature in the Medical Practice Act to ensure that no license of a physician or surgeon would be disciplined, unless careful deliberation and strict compliance with meetings, quorum, and voting "while present at a meeting" occurred.

"The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection", Yakov v. Board of Medical Examiners (1967) 68 Cal.2d 67, 78.

Business and Professions Code 2013 (c) is a specific code designed to give licensees of the Division of Medical Quality additional protection of due process requiring discussion and deliberation at a meeting and compliance with the Bagley-Keene Act.

Gov't Code 11526, enacted in 1946 is an attractive statute inviting agency members in these days of budgetary concerns to vote without any meeting, however to do so is a crime under the Bagley-Keene Act, and also invalidates any such decision.

Local agencies used the same rationale until recently when the Brown Act was revised by request of Governor Pete Wilson to prohibit circumventing the Open Meeting Laws. Clearly a mail vote was acceptable in 1946, but was prohibited since 1967 by the Bagley-Keene Act.

Voting by mail would still be acceptable when a committee is made up of fewer than three members, but deliberately down-sizing committee's to circumvent the Bagley-Keene Act would be improper and that was the main reason for the recent revision of the BROWN ACT by Governor Wilson.

The Administrative Procedure Act declares that the statutes of the Medical Practice Act (such as B&P 2013) are controlling over the APA:

> "This chapter applies to any agency as determined by the statutes relating to that agency" [Gov't Code 11501(a)]

Therefore, each Act of each Agency is controlling over the provisions of the APA. And where the Medical Practice Act has a specific provision to prohibit action without any meeting, the APA is subservient, Gov't Code 11526 does not apply, and to use that statute to violate the Bagley-Keene Act is improper.

11120. Legislative finding and declaration; Open proceedings; Citation of article: BAGLEY-KEENE OPEN MEETING ACT.

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

CROSS REFERENCES:

Public policy that local agencies' proceedings be conducted openly: Gov C 54950 (BROWN ACT).

Attorney General's Opinions Bagley-Keene Act:

State agencies required to act by meeting cannot vote by mail or proxy. 85 Ops Atty Gen 103 .

BAGLEY-KEENE 11130.7. Offenses

Each member of a state body who attends a meeting of such body in violation of any provision of this article, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor.

A meeting is required to take action in the following areas:

1.) Vote to Discipline or Revoke a license.

2.) Delegation of Jurisdiction to a specific ALJ to preside at an Administrative hearing "sitting alone".

The Medical Board has admitted that the Division of Medical Quality (BOARD) never holds the mandatory meeting of the BOARD required to discuss, decide and vote, and to issue a formal order, to formally delegate jurisdiction to an ALJ to preside at an Administrative Hearing sitting alone.

The Medical Board employs a secretary called an "analyst" to perform the highly discretionary function of determining that an ALJ shall preside "sitting alone" and to "delegate" the jurisdiction to the ALJ without formal Order or BOARD vote.

The Medical Board admits that all tentative decisions to adopt or non-adopt an ALJ's Proposed Decision takes place by secret ballot with no record of any proceedings related to the secret vote. When the BOARD tentatively decides to non-adopt the ALJ's Proposed Decision, then (in those 20% of cases), the Medical Board conducts a meeting.

But by that time, a secret ballot, possibly unlawful ex parte communications, additional evidence or argument has been provided to the BOARD in secret, and the Bagley-Keene Act has been violated and Due Process has been violated.

The California State Attorney General's written opinion, was that voting by any agency subject to the Bagley-Keene Open Meeting Act, could not vote by mail or by proxy, 85 Op. Att'y Gen. 103 (1985), "balloting by mail is not permissible where such bodies must act at meetings".

The Bagley-Keene Act defines "action" by an agency "to make a decision by a body sitting as a body upon a motion, proposal, resolution, or similar action"(Gov't Code 11123). Therefore, by definition of Gov't Code 11123, if the agency did not "make a decision as a body sitting as a body", then no "action" was taken.

The Medical Practice Act, Business and Professions Code 2017 requires, "the board and each division shall keep an official record of all their proceedings." And the Bagley-Keene Act, Gov't Code 11125.1, requires each agency to keep minutes of each closed session meeting. All decisions reached in closed session must be reported openly at the next public session meeting (Gov't Code 11125.2).

Therefore, any decision reached in closed session must be reported publicly at the next open session. The failure to show any evidence of a licensee's name in the minutes of meetings is presumptive proof, that no vote or decision by the BOARD was ever made.

Voting by mail or secret ballot occurs without records kept of the proceedings and invalidates all decisions which occur by that method. State Agencies are not secret societies and should not act like a "Klan" and should not hide their activities.

THE BAGLEY-KEENE OPEN MEETING LAWS PROVIDE DUE PROCESS PROTECTIONS FOR THE LICENSEE AND PREVENT A "RUBBER STAMP" OF THE ALJ'S PROPOSED DECISION.

Dr. LAWTON called 35 State Medical Boards across the United States, and none of the Agencies ever disciplined a licensee without the BOARD conducting a meeting for that purpose.

The Bagley-Keene Open Meeting Laws as incorporated into Business and Professions Code 2013 (c) is a specific code designed to give licensees of the Division of Medical Quality additional protection of due process requiring discussion and deliberation at a meeting.

The requirement for a meeting prevents a "rubber stamp" of the ALJ's Proposed Decision, and places the final decision-making process in the hands of the Medical Board itself, and prevents the appearance of delegating the final decision-making process to the Office of Administrative Hearings.

Indeed, the Presley Bill 2375, Chapter 1597, called the Medical Judicial Procedure Improvement Act enacted in 1991, prohibited the delegation of the final decision-making authority to any outside agency by passing an amended Business and Professions Code 2224, to read in part:

> "... but shall not delegate its authority to take final disciplinary action against a licensee.."

Gov't Code 11526 is ambiguous and appears to permit some agencies to vote by mail vote when "the members of <u>an agency</u> [are] <u>qualified</u> ...". However a mail vote without deliberation and discussion at a meeting would be a rubber stamp of the ALJ's decision and a technical delegation of the final authority to the Office of Administrative Hearings in violation of Bus. and Prof. Code 2224.

Why would the State of California need a BOARD if they don't deliberate and don't discuss an issue, and simply rubber stamp the proposal of another Agency?

The word "meeting" is defined as: "the act of assembling or joining at one time and place", Webster's Ninth New Collegiate Dictionary, (1986) Miriam-Webster Inc., Publishers.

The Bagley-Keene Act defines "action" by an agency "to make a decision by a body sitting as a body upon a motion, proposal, resolution, or similar action" (Gov't Code 11122). Therefore, by definition pursuant to Gov't Code 11122, if the agency did not "make a decision as a body sitting as a body", then no "action" was taken.

Eliminating the "meeting" requirement from the Bagley-Keene Open Meeting Act renders it meaningless. Statutes are not to be construed so as to render them meaningless, Bryant v. Swoap (1975) 48 Cal.App.3d 431, 439.

Gov't Code 11526 is not to be followed by any Agency required to act at a meeting; construing a statute must be performed so as to "accord significance to each word and phrase...", Pacific Legal Foundation v. Unemployment Ins. Appeals Board (1981) 29 Cal.3d 101, 114. A construction making some words surplusage is to be avoided, Moyer v. Workman's Comp. App. Bd. (1973) 10 Cal.3d 222, 230.

A. THE ATTRACTIVENESS OF VOTING BY MAIL IS NOT TO BE FOLLOWED BECAUSE OF BUDGETARY CONSIDERATIONS

The Medical Board's alibi for such denial of due process, violation of Business and Professions Code 2013 (c) and the Bagley-Keene Act is twofold:

1. There is a need to vote quickly as possible to protect the public... [Declaration of Medical Board Legal Counsel.]

2. Some cases need to be acted on within a short period of time "to comply with the law". [From Declaration of Foone Louie, Legal Counsel for the Medical Board.]

Since the Legislature provided for emergency meetings in the Bagley-Keene Act, codified in Gov't Code 11125.5 the need to act quickly was determined by statute to be performed at an emergency meeting, allowing for less than the usual 10 day notice, but not by mail.

Non-emergency meetings require a 10 day notice pursuant to Gov't Code 11125; the Division of Medical Quality has codified all important aspects of the Bagley-Keene Act, including the requirement for 10 day notice as shown by Bus. and Prof. Code 2014.

B. B&P 2014 WAS AMENDED, TO COMPLY WITH THE BAGLEY-KEENE ACT

Just as Gov't Code 11373 was added to the APA to enforce compliance with the Bagley-Keene Act, B&P 2014 was amended.

The 1990 Presley Bill amendments, enacted Jan. 1, 1991, to the APA and the Medical Practice Acts were to enforce the Bagley-Keene Act, and B&P 2014, was specifically amended to read as follows:

"NOTICE OF MEETING" Notice of each meeting of the board or division shall be given *** in accordance with the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Part 1 of Division 3 of Title 2 of the Governement Code).

DUE PROCESS, AND THE BAGLEY-KEENE ACT ARE COMPELLING REASONS TO RULE ANY SHORT-CUT ACTIONS BY A BOARD "VOTING BY MAIL" AS UNLAWFUL AND TO VOID ANY SUCH ACTIONS

The Bagley-Keene Act (Gov't Code 11120 et. seq.) has been incorporated into the Medical Practice Act (B&P 2013, 2014, & 2017) and governs the actions of the Division when any motion, or measure is voted upon.

The same issues were raised by Cooper, in Cooper v. Board of Med. Examiners (1975) 49 Cal.App.3d 931.

The Appellate Court in Cooper identified the necessary elements to show compliance by the Board of Medical Examiners with the Bagley-Keene Open Meeting Act, and determined that prejudice to the licensee occurred unless:

1. The Administrative Law Judge had been shown to be selected by the BOARD, pursuant to Gov't Code 11512(a) by meeting;

2. All closed session meetings were actual assemblies of the BOARD with a quorum, for the purpose of "deliberation" only, of those facts which had been introduced before the BOARD at an Open Hearing;

3. All subjects for deliberation were announced on the record before deliberation, or after deliberation, and sometimes both, and all decisions were announced on the record;

4. "... the accused had the opportunity to examine and challenge each of the decisions made in executive session..."

A licensee is provided by statute, the right to examine, challenge, make oral argument, and statements of mitigating circumstances before the BOARD itself, prior to imposing discipline. This is in agreement with all other Medical Agencies across the United States and Appellate Decisions in a variety of States and a variety of professions.

Allowing a licensee the right to respond to the ALJ's Proposed Decision could lead to a different conclusion by a BOARD and the Due Process reason that the BOARD must act on the matter at a public meeting.

The Cooper case showed that licensee's should be allowed to object to any proposed decision by the BOARD.

The procedural Due Process right to object to a Proposed Decision is provided in the California Rules of Court and is binding in all Courts of lessor jurisdiction; see California Rules of Court 232 (b).

B. THE AGENCIES EMPLOYING THE ADMINISTRATIVE PROCEDURE ACT ARE CONSUMER AGENCIES, AND ARE BOUND BY THE INFORMATION PRACTICES ACT, CODIFIED IN THE CIVIL CODES. THE ACT PROVIDES FOR RECEIPT OF ANY INFORMATION GATHERED BY A CONSUMER AGENCY, AND THE RIGHT TO MAKE ORAL AND WRITTEN ARGUMENT IN OPPOSITION TO THE INFORMATION. FAILURE TO ALLOW FOR THE RIGHT TO OBJECT CAUSES THE CONSUMER AGENCY TO BE SUBJECT TO CIVIL DAMAGES.

Business and Professions code 800.0, is a specific guarantee of the right to any information collected by the Consumer Agency to "make a full disclosure of any information that could reflect or convey anything detrimental, disparaging, or threatening to the licensee's rights, reputation, benefits, privileges, or qualifications..." or be used by the BOARD for those purposes.

Bus. and Prof. Code 800 (c) with specific rules for objection related to the Division of Medical Quality is a restatement of the Information Practices Act (Civil Code 1798.35 (a) and (b), 1798.36, and 1798.37 .)

A FULL DIVISION MEETING, BOARD VOTE, AND FORMAL WRITTEN ORDER ARE REQUIRED TO DELEGATE JURISDICTION TO AN ALJ TO HEAR ANY BOARD CASE WHEN THE ALJ IS SITTING ALONE

An Administrative Law Judge sitting alone cannot hear a case unless a meeting and vote of the Board delegated jurisdiction to the ALJ.

The power to assign a case cannot be delegated, unless there is a full BOARD meeting and vote: see Gov't Code 11500 (a):

> "...except wherever the word "agency" alone is used... and wherever the words "agency itself" are used, the power to act shall not be delegated.."

Gov't Code 11372 (a) uses the word "agency" alone in the phrase:

> "...shall be conducted by an administrative law judge... sitting alone if the case is so assigned by the agency ..."

The words, "agency itself" are used in Gov't Code 11512 (a), indicating that the power to delegate jurisdiction to an ALJ sitting alone, requires action at full Division (BOARD) meeting:

> "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..." (Gov't Code 11512 (a)) [emphasis added].

It is necessary for the BOARD to provide proof of the meeting to delegate the authority to an ALJ to hear the case sitting alone, and the BOARD must provide proof of the formal order showing that action was taken by the Division or BOARD; See Gamm v. BMQA (1982) 126 cal.App.3d 34 (action by the BOARD required full Board vote and formal written Order.)

In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read together in order to achieve a uniform and consistent legislative purpose, Isobe v. Unemployment Ins. Appeals Bd. (1974) 12 Cal.3d 584, 590-591.

Proving jurisdiction was conveyed to the ALJ who presided sitting alone, is the burden of the party claiming to have delegated the jurisdiction.

Absence of any meetings, or minutes mentioning a licensee's name at an Open Full Board Meeting indicates that the ALJ presiding alone was not the designee of the BOARD and lacked the necessary jurisdiction to preside sitting alone and invalidates any Proposed Decision of the ALJ.

The Agency cannot delegate jurisdiction after the fact by adopting the proposed decision; the delegation of authority must occur before the ALJ presides sitting alone (unless the Agency is also in attendance.)

PROPOSED AMENDMENT TO GOVERNMENT CODE 11526

"Any committee composed of fewer than three members may vote by mail if qualified to do so. Decision-making related to the disciplinary action against a licensee shall not occur by mail, but deliberations may take place in a closed session meeting as part of a regular session or as part of an emergency meeting. The subject of the closed session meeting must be clearly listed in the Agenda, and the vote from the meeting announced publicly. Minutes of the Closed Session must be kept, but are confidential."

Dated: December 28, 1994

Respectfully submitted,

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