Study N-100 June 22, 1995

First Supplement to Memorandum 95-29

Administrative Adjudication: Issues on SB 523 (Kopp)

The hearing on SB 523 set for June 27 in the Assembly policy committee (Consumer Protection, Governmental Efficiency & Economic Development) has been deferred until July 11 for a number of reasons, including additional time needed for the committee staff to analyze the bill and proposed amendments to it, and Senator Kopp's likely unavailability due to his service on the budget conference committee. The deferral is a mixed blessing. It leaves the bill sitting for an additional two weeks while opponents mobilize, and brings it down to only one hearing opportunity before legislative deadlines run. On the other hand, it gives us some additional time to work out problems before the bill goes before the committee, and the timing is such that it will enable us to have our consultant, Professor Asimow, present at the hearing.

This supplemental memorandum presents issues raised concerning SB 523 by the following entities:

Association of California State Attorneys and Administrative Law Judges
Board of Registration for Professional Engineers and Land Surveyors
California Medical Association
California Public Utilities Commission
Department of Consumer Affairs
State Water Resources Control Board

Again, the memorandum is limited to significant policy issues and does not discuss questions where the intent of the statute can be clarified by adding language to the Comment. A complete set of revised Comments is attached as an Exhibit.

Our objective has been to try to find common ground where possible, and to give on matters that appear politically necessary, in order to limit the number of issues raised at the hearing and to present for Committee decision fundamental aspects of the Commission's recommendation that should be preserved.

Alternative Dispute Resolution

The Association of California State Attorneys and Administrative Law Judges would delete the alternative dispute resolution provisions. ACSA's concern is that the cost of ADR may be higher than standard administrative adjudication procedures, particularly if improperly-decided cases must be relitigated. The reason SB 523 offers an ADR option, however, is the promise of less costly and more efficient dispute resolution. If that promise is not fulfilled, the agency ought not to use the option. **The staff has agreed to expand the Comment to proposed Government Code Section 11420.10 to emphasize the point that ADR is not required and that the cost of ADR is a factor the agency should take into account in deciding whether to use ADR**:

> **§ 11420.10. ADR authorized**
>
> **Comment.** The introductory portion of subdivision (a) of Section 11420.10 makes clear that alternative dispute resolution is not mandatory, but may only be used if all parties consent. The relative cost of alternative dispute resolution is a factor an agency should consider in determining whether to refer a dispute for alternative resolution proceedings.
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> Under subdivision (a)(1) ~~of Section 11420.10~~, the mediator may use any mediation technique.
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> Subdivision (a)(2) 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 (a)(3) 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).

Informal Hearing

The California Medical Association believes the informal hearing procedure should not be allowed if a licensee objects. The basis of their position is that the informal hearing procedure provides reduced procedural protections for a licensee whose livelihood is at stake.

The informal hearing procedure is intended for small, low-stakes cases. It promises substantial savings of time and money over the formal hearing procedure. But CMA points out that even a short suspension of an occupational license can have long-term effects on the licensee and the practice of the licensee's profession. In the case of a physician, for example, a suspension, no matter how brief, can affect the physician's ability to get on HMO panels.

After extensive discussion of this issue with key persons involved in this project, including the assessment of the political aspects of this issue by Senator Kopp's office, **we have reluctantly come to the conclusion that it is necessary to allow an occupational licensee to demand a full hearing**:

> **§ 11445.30. Selection of informal hearing**
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> 11445.30. (a) The notice of hearing 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. An objection to use of the informal hearing procedure in a disciplinary proceeding involving an occupational license shall be resolved in favor of the licensee.

Ex Parte Communications

The bill would generally prohibit ex parte communications, but would allow ex parte technical advice to the presiding officer in some circumstances. The California Medical Association notes that this exception is not necessary in medical quality cases since the law provides expressly for on the record technical advice in these cases. **The staff agrees, and would make the ex parte communications exception inapplicable in these cases**:

> **Gov't Code § 11371 (amended). Medical Quality Hearing Panel**
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> 11371. (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, and Section 11430.30 does not apply in a proceeding under this section. 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.

The State Water Resources Control Board has noted that the provision allowing for technical ex parte advice requires that the advice be disclosed on the record, including in the environmental/land use cases identified in the statute. In these types of cases there are extensive policy deliberations between the decisionmaker and agency staff which make disclosure improper as well as impractical. **We agree that this provision should be narrowed:**

§ 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:

.....

(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 address it in the manner provided in Section 11430.50~~:

(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, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(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. Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as power plant siting ~~and land use decisions~~, land use decisions, and proceedings allocating water or setting water quality protection or instream flow requirements. 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 that 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.

After further discussions with the Department of Industrial Relations (see Memorandum 95-29), we have finally isolated their problem: The bill precludes the agency head from communicating with the presiding officer off the record, but in some types of proceedings in the Department of Industrial Relations only the agency head, and not the presiding officer, issues a decision. The function of the presiding officer is not to issue a proposed decision but to assist the agency head by hearing the evidence and helping the agency head prepare a decision. For this purpose **the agency head and presiding officer must be able to consult and communicate freely**. This situation is easily addressed by the following revision, which we have incorporated in the bill:

§ 11430.80. Communications between presiding officer and agency head

11430.80. (a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of 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, or where the presiding officer does not issue a decision in the proceeding.

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 limitation does not apply where the presiding officer does not issue a decision to the parties, but merely prepares a recommended decision for the agency head or other person or body to which the power to decide is delegated.

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. Nothing in this section restricts on-the-record communications in between the presiding officer and the agency head. Section 11430.10(b).

This section precludes only communications concerning the merits of an issue in the proceeding while the proceeding is pending. It does not preclude, for example, the agency head from directing the presiding officer to elaborate portions of the proposed decision in the proceeding, from asking the presiding officer for tapes of settlement discussions in the proceeding, or from informing the presiding officer of an investigation concerning disciplinary action involving the presiding officer arising out of the proceeding.

Change in Legal Basis of Opinion

The bill adds a number of options for the agency head in acting on the administrative law judge's proposed decision. Among other options, it allows the agency head to adopt the proposed decision "with a change in legal basis", allowing the parties to comment on it. The California Medical Association believes this is inappropriate.

The reason for the provision is to avoid the agency head having to reject a decision where the agency head agrees with the outcome but disagrees with some aspect of the reasoning. The provision is an economy measure — it minimizes the need to call up the transcript in order for the agency head to modify the proposed decision and affirm it.

The counterargument is that if the case was heard on one basis, the agency head should not be able to shift ground at the last minute. The right to comment is insufficient, since if the proceeding had been conducted on a different legal basis, the parties might have prepared a different case and presented different evidence. In any event, the agency head should be required to review the record before concluding that the evidence supports a different legal conclusion from that found by the administrative law judge.

We have concluded that we cannot prevail on this issue in committee over the CMA objection, and have agreed to delete it:

(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 a form that may be adopted as the decision in the case. 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.~~

Comment. Subdivision (b) is amended to add 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 (b)(2) 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.~~

Assembly Bill 1069 (Hauser), which is referred to in Memorandum 95-29, would remove the authority of the agency head to review ALJ decisions completely. ALJ decisions would become final rather than proposed decisions. The bill will not make it out of the Senate policy committee this year. **We will not need to develop conforming changes for that bill.**

Underground Regulations

The bill prohibits a penalty based on an agency guideline unless the guideline has been adopted as a regulation. This provision is opposed by the Department

of Consumer Affairs and the Board of Registration for Professional Engineers and Land Surveyors. Their concern is that this requirement would be costly and staff intensive to implement. In addition, putting guidelines into regulation form would reduce flexibility and discretion and would hinder modification where appropriate.

However, the provision merely implements existing law, which prohibits underground regulations. In this connection, the State Water Resources Control Board has noted that some of its water standards are exempt from the regulation process and should not be made subject to it by the bill. This is a good point; **the bill should be limited only to agency guidelines that are subject to the rulemaking provisions of the administrative procedure act**:

> (e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

Precedent Decisions

The bill establishes a precedent decision process, which precludes an administrative decision from being relied as precedent unless it has been so designated by the agency. ACSA suggests that the precedential effect of a decision be limited to one year, to encourage codification in the form of a regulation. This is an interesting suggestion. It would further advance the purpose we are trying to achieve with the precedent decision procedure of making the governing rules accessible to the public. However, we have had enough trouble selling the agencies on the concept of precedent decisions, and we would be concerned that the cost of turning them into regulations would turn the tide against the concept. **The staff agrees that the ACSA proposal should be considered, and we will put this suggestion on the Commission's agenda this fall for possible future legislation.**

Emergency Decision Procedure

The California Medical Association notes that the Medical Board already has available to it an interim suspension order procedure that was carefully worked out among the parties and provides more detailed protections for the licensee

than are found in the emergency decision procedure. They would require the Medical Board to use the special interim suspension procedure rather than the emergency decision procedure.

The staff agrees that this represents a legislative compromise, and it is necessary to limit use of the emergency decision procedure where Government Code Section 11529 is applicable:

> The interim order provided for by this section shall be ~~in~~ :
>
> (1) In addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.
>
> (2) A limitation on the emergency decision procedure provided in Article 13 (commencing with Section 11460.10) of Chapter 4.5.
>
> **Comment.** Subdivision (i) is amended to make clear that, notwithstanding Section 11415.10, the emergency decision procedure of the Administrative Procedure Act may not be used as an alternative to the interim order procedure provided in this section for interim suspension of a license, or imposition of drug testing, continuing education, supervision of procedures, or other license restrictions.

Standardized "Administrative Law Judge" Terminology

ACSA proposes that the term "administrative law judge" should be used throughout SB 523 in place of "presiding officer". We cannot do that in Chapter 4.5, which applies to administrative adjudication in all state agencies, since many agencies do not use administrative law judges, but rather the agency head (or even a lay hearing officer) may preside. However, **the term should be standardized throughout Chapter 5,** and the staff has agreed to correct a stray reference to "presiding officer" found in Government Code Section 11511.5.

Exemptions from Statute

Proceedings of the Public Utilities Commission under the Public Utilities Act are exempt from application of the statute. PUC now indicates that there are a few statutory hearings outside the Act that incorporate the Act by reference and should likewise be exempt. PUC also indicates that there are other statutory hearings that do not incorporate the Act by reference but that the PUC uses the same procedure for, and that there is benefit to uniformity in all proceedings before that agency. On the other hand, the statute now imposes minimal procedural detail on agencies — just the administrative adjudication bill of rights. It is arguable that if we had started with our current limited proposal, we

would not have exempted Public Utilities Act hearings to begin with. **We have not yet reviewed the details of the affected statutes or resolved this issues with PUC; the Commission's general perspective on this matter would be helpful.**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

NEW AND REVISED COMMENTS FOR
SB 523 (KOPP), AS AMENDED

Bus. & Prof. Code § 124 (amended). Notice

Comment. Section 124 is amended to correct cross references. It should be noted that a notice, order, or document given or served pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code is governed by Government Code Section 11440.20. In addition to notice by personal delivery or regular mail to the person's last known address, Government Code Section 11440.20 permits service or notice by mail delivery service, facsimile transmission, or by such other electronic means as is provided by agency regulation. The procedures to which Government Code Section 11440.20 applies include alternative dispute resolution, informal hearing, emergency decision, declaratory decision, and conversion of the proceeding to another type of proceeding. See Gov't Code § 11440.20 (introductory clause).

Gov't Code § 11371 (amended). Medical Quality Hearing Panel

Comment. Subdivision (d) of Section 11371 is amended to make certain ex parte communications exceptions inapplicable in proceedings under this section.

Gov't Code § 11410.10 (added). Application to constitutionally and statutorily required hearings

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. of Eureka City Schools, 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 of Sacramento County, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of "appeal" means hearing required — 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. In other cases, the hearing called for by the statute is informal and investigative in nature, and any decision that results is not final but is subject to a full administrative hearing at a higher agency level. See, e.g.,

Rev. & Tax Code §§ 19044, 19084 (statutory oral hearing available, with opportunity for full administrative hearing before State Board of Equalization). 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, 539 P. 2d 774, 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 and does not apply to rulemaking, which is agency action of general applicability.

This chapter does not apply where agency regulations or practice, rather than a statute or the constitution, call for a hearing. For example, an agency may provide an informal "hearing" as part of its process for deciding whether to issue a license or for deciding whether a particular educational program meets requirements established by regulation for continuing education credits; if a statute does not require a hearing in such a case, this chapter does not apply. 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 10 (commencing with Section 11445.10), 13 (commencing with Section 11460.10), and 14 (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).

Gov't Code § 11420.10 (added). ADR authorized

Comment. The introductory portion of subdivision (a) of Section 11420.10 makes clear that alternative dispute resolution is not mandatory, but may only be used if all parties consent. The relative cost of alternative dispute resolution is a factor an agency should consider in determining whether to refer a dispute for alternative resolution proceedings.

Under subdivision (a)(1), the mediator may use any mediation technique.

Subdivision (a)(2) 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 (a)(3) 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).

Gov't Code § 11420.30 (added). Confidentiality and admissibility of ADR communications

Comment. The policy of Section 11420.30 is not to restrict access to information but to encourage dispute resolution.

Subdivision (a) is analogous to Evidence Code Section 1152.5(a) (mediation).

Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (b) protects confidentiality of a proposed decision in nonbinding arbitration that is rejected by a party; it does not protect a decision accepted by the parties in a nonbinding arbitration, nor does it protect an award in a binding arbitration. See also Section 11425.20 (open hearings).

Subdivision (c) is drawn from Evidence Code Section 703.5.

Subdivision (d) is drawn from Evidence Code Section 1152.5(a)(6).

Gov't Code § 11425.10 (added). Administrative adjudication bill of rights

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 11410.50 (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. Conforming regulations may be adopted by a simplified procedure under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100. Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section.

Subdivision (a)(1), providing a person the opportunity to present and rebut evidence, is subject to reasonable control and limitation by the agency conducting the hearing, including the manner of presentation of evidence, whether oral, written, or electronic, limitation on lengthy or repetitious testimony or other evidence, and other controls or limitations appropriate to the character of the hearing.

Subdivision (a)(2) requires only that the agency "make available" a copy of the applicable hearing procedure. This requirement is subject to a rule of reasonableness in the circumstances and does not necessarily require the agency routinely to provide a copy to a person each time agency action is directed to the person. The requirement may be satisfied, for example, by the agency's offer to provide a copy on request.

Subdivision (a)(9), 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).

[Gov't Code § 11425.30 (added). Neutrality of presiding officer

Comment. Subdivision (a) of Section 11425.30 is drawn from 1981 Model State APA § 4-214(a)-(b). See also Veh. Code § 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.

Thus, for example, subdivision (a) does not preclude a Franchise Tax Board auditor from acting as presiding officer in a protest hearing requested by a taxpayer under Revenue and Taxation Code Section 19044, provided the auditor was neither involved in the preparation of the deficiency assessment against the taxpayer nor subject to supervision by a person who was. In such a situation, subdivision (a) would allow the auditor to both consider the Franchise Tax Board's case for a deficiency assessment and hear the taxpayer's case, even though the auditor may be involved in preparation of deficiency assessments against other taxpayers.

Subdivision (b) is drawn from 1981 Model State APA § 4-214(c)-(d). 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).]

Gov't Code § 11425.40 (added). Disqualification of presiding officer for bias, prejudice, or interest

Comment. Section 11425.40 applies in all administrative adjudications subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter). 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, as a general principle, 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, expression of a view could be a basis for disqualification in conjunction with other acts of the presiding officer. Moreover, expression of a view concerning the particular proceeding before the presiding officer could be grounds for disqualification, and disqualification in such a situation might also occur under Section 11425.30 (neutrality of presiding officer).

Subdivision (d) adds authority for an agency to allow peremptory challenge of the presiding officer. This is consistent with existing practice in some agencies. See, e.g., 8 Cal. Code Reg. § 10453 (Workers' Compensation Appeals Board). In the case of a proceeding conducted under Chapter 5 (formal hearing procedure) by an administrative law judge employed by the Office of Administrative Hearings, this provision authorizes the Office of Administrative Hearings, and not the agency for which the Office of Administrative Hearings is conducting the proceeding, to provide for peremptory challenge of the administrative law judge.

Gov't Code § 11425.40 (added). Disqualification of presiding officer for bias, prejudice, or interest

Comment. Section 11425.40 applies in all administrative adjudications subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter). 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).

§ 11430.30. Permissible ex parte communications from agency personnel

Comment. The exceptions to the prohibition on ex parte communications provided in Section 11430.30 are most likely to be 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).

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 (neutrality of presiding officer). 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 Teachers Ass'n CTA/NEA v. Alhambra City and High School Districts (1986), PERB Decision No. 560. 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,, land use decisions, and proceedings allocating water or setting water quality protection or instream flow requirements. 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 that 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.

Gov't Code § 11430.80 (added). Communications between 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 limitation does not apply where the presiding officer does not issue a decision to the parties, but merely prepares a recommended decision for the agency head or other person or body to which the power to decide is delegated.

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. Nothing in this section restricts on-the-record communications in between the presiding officer and the agency head. Section 11430.10(b).

This section precludes only communications concerning the merits of an issue in the proceeding while the proceeding is pending. It does not preclude, for example, the agency head from directing the presiding officer to elaborate portions of the proposed decision in the proceeding, from asking the presiding officer for tapes of settlement discussions in the proceeding, or from informing the presiding officer of an investigation concerning disciplinary action involving the presiding officer arising out of the proceeding.

§ 11440.50. Intervention

Comment. Subdivision (a) of Section 11440.50 makes clear that this section does not apply to a proceeding unless an agency has acted to make it applicable. This section provides an optional means by which an agency can provide for intervention. This section does not provide an exclusive intervention procedure, and an agency may adopt other intervention rules or may preclude intervention entirely, subject to due process limitations.

Subdivision (b)(1) 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 (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." This provision is not intended to permit intervention by a person such as a victim or interest group whose legal rights are not affected by the proceeding, but to permit intervention only by a person who has a legal right entitled to protection by due process of law that will be substantially impaired 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 presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact that the proceeding will have on the legal rights 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 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.

Subdivision (d) 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 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.

Gov't Code § 11445.10 (added). Purpose of informal hearing procedure

Comment. Section 11445.10 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure is 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 presiding officer must be neutral, the adjudicative function being 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).

It should be noted that a decision made pursuant to the informal hearing procedure is subject to judicial review to the same extent and in the same manner as a decision made pursuant to a formal hearing procedure. See, e.g., Code Civ. Proc. § 1094.5(a) (administrative mandamus for decisions "made 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]"; see also Sections 11445.40 (procedure for informal hearing) and 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.")

Gov't Code § 11450.05 (added) . Application of article

Comment. Subdivision (a) of Section 11450.05 makes clear that the subpoena provisions of this article apply automatically in hearings required to be conducted under Chapter 5. Under subdivision (b), application of the subpoena provisions in other hearings is discretionary with the agency. But if the agency uses the subpoena procedure in other hearings, all provisions of this article apply, including the service and protective provisions, as well as the requirement for issuance of a subpoena on request of a party or by the attorney of record for a party. See Section 11450.20(a) (issuance of subpoena).

Gov't Code § 11450.50 (added) . Written notice to attend

Comment. Section 11450.50 is drawn from Code of Civil Procedure Section 1987 and adapted for administrative adjudication proceedings.

Gov't Code § 11460.20 (added). Agency regulation required

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 interim and temporary suspension orders, applicable to a

particular agency or proceeding prevails over the provisions of this article. Section 11415.20 (conflicting or inconsistent statute controls).

Gov't Code § 11465.10 (added). Application of 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.

The declaratory decision procedure is thus quasi-adjudicative in nature, enabling an agency to issue in effect an advisory opinion concerning assumed facts submitted by a person. The procedure does not authorize an agency "declaration" of a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is an "underground regulation". See Section 11340.5.

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 11410.50 (application where formal hearing procedure required), 11501 (application of chapter). See also Section 11410.10 (application to constitutionally and statutorily required hearings).

Gov't Code § 11501.5 (repealed). Language assistance; provision by state agencies

Comment. Former Section 11501.5 is restated in Section 11435.15 (application of article), with the exception of the reference to the Bureau of Employment Agencies, which no longer exists.

Gov't Code § 11507.7 (amended). Motion to compel discovery

Comment. Section 11507.7 is amended to provide for proceedings to compel discovery before the administrative law judge rather than the superior court. The administrative law judge may continue the proceeding if necessary to allow adequate briefing of the motion. Cf. Section 11524(a) (continuances granted by administrative law judge for good cause).

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 are reviewable in the same manner as the decision in the proceeding. Section 11455.30.

Gov't Code § 11508 (amended). Time and place of hearing

Comment. Subdivision (a) of Section 11508 is amended to reflect relocation of the San Francisco branch of the Office of Administrative Hearings to Oakland and to recognize creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) codifies practice authorizing a motion for change of venue. See 1 G. Ogden, California Public Agency Practice § 33.02[4][d] (1994). Grounds for change of venue include selection of an improper county and promotion of the 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.

Gov't Code § 11511.5 (amended). Prehearing conference

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)(9) 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)(10) implements Section 11440.50 (intervention) for those proceedings in which an agency has by regulation provided for 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.

Gov't Code § 11512 (amended). Presiding officer

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). 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. See 1 G. Ogden, California Public Agency Practice § 36.14 (1994).

Gov't Code § 11513 (amended). Evidence

Comment. The "irrelevant and unduly repetitious" standard formerly found in Section 11513 is replaced in subdivision (f) by the general standard of Evidence Code Section 352. The basic standard of admissibility of relevant evidence is stated in subdivision (c); nothing subdivision (f) authorizes admission of irrelevant evidence.

The unnumbered paragraph formerly located between subdivisions (c) and (d) is restated in Section 11440.40(a).

Former subdivisions (d)-(n) are restated in Sections 11435.20-11435.65.

Former subdivision (o) is restated in Section 11440.40(b).

Former subdivision (p) is restated in Section 11440.40(c).

Former subdivision (q) is deleted as obsolete.

Gov't Code § 11517 (amended). Decision in contested cases

Comment. Subdivision (a) of Section 11517 is amended to add a provision formerly located in subdivision (d).

Subdivision (b) is amended to add 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 (b)(2) includes adoption of a

different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity.

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. This implements case law determinations that the time periods provided in this section are directory and not mandatory or jurisdictional. See, e.g., Chrysler v. New Motor Vehicle Bd., 12 Cal. App. 4th 628, 11 Cal. Rptr. 771 (1993); Outdoor Resorts/Palm Springs Owners' Assn. v. Alcoholic Beverage Control Appeals Bd., 224 Cal. App. 3d 696, 273 Cal.Rptr. 748 (1990). 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.

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. The addition of the provision for an agreed statement of the parties in subdivision (c) is drawn from Rule 6 of the California 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.

The authority in subdivision (c) for the agency itself to elect to decide some but not all issues in the case is drawn from 1981 Model State APA § 4-216(a)(2)(i).

Subdivision (d) is amended to require affirmative notice of nonadoption of a proposed decision with the 100-day period. The provision formerly found in subdivision (d) giving an agency 100 days in which to issue a decision where the case is heard by the agency itself is relocated to subdivision (a) for clarity.

Gov't Code § 11529 (amended). Interim orders

Comment. Comment. Section 11529 is amended to substitute the administrative law judge for the court in subdivision (e).

Subdivision (i) is amended to make clear that, notwithstanding Section 11415.10, the emergency decision procedure of the Administrative Procedure Act may not be used as an alternative to the interim order procedure provided in this section for interim suspension of a license, or imposition of drug testing, continuing education, supervision of procedures, or other license restrictions.

Pub. Res. Code § 40412 (amended). Ex parte communication

Comment. Section 40412 is amended to apply the ex parte communications provisions of the Administrative Procedure Act to matters under the jurisdiction of the California Integrated Waste Management Board which are subject to a rollcall vote under Section 40510. The penalty provided in Section 40413 for violating Section 40412 is in addition to the sanctions provided by the ex parte communications provisions of the Administrative Procedure Act.

~~**Pub. Res. Code § 40413 (amended). Penalties for violations**~~

~~**Comment.** Section 40413 is amended to make clear that the penalty for violating Section 40412 is in addition to the sanctions provided by the ex parte communications provisions of the Administrative Procedure Act.~~

Rev. & Tax Code § 19044 (amended). Deficiency assessment protest

Comment. Section 19044 is amended to make clear that the general provisions of the Administrative Procedure Act do not apply to an oral deficiency assessment protest hearing, which is investigative and informal in nature. *Cf.* Government Code Section 11415.40 (when adjudicative proceeding not required). A taxpayer that is unable to resolve the issue at the

Franchise Tax Board level has available an administrative hearing remedy before the State Board of Equalization, to which the general provisions of the Administrative Procedure Act apply. See Section 19045-19048.

Rev. & Tax Code § 19084 (amended). Jeopardy assessment review

Comment. Paragraph (4) of Section 19084(a) is amended to make clear that the general provisions of the Administrative Procedure Act do not apply to an oral jeopardy assessment review hearing, which is investigative and informal in nature. *Cf.* Government Code Section 11415.40 (when adjudicative proceeding not required). A taxpayer that is unable to resolve the issue at the Franchise Tax Board level has available an administrative hearing remedy before the State Board of Equalization, to which the general provisions of the Administrative Procedure Act apply. See subdivision (b).

Welf. & Inst. Code § 11350.6 (amended). Compliance with support order

Comment. Section 11350.6 is amended to correct references to the Administrative Procedure Act.