Study N-100 September 18, 1995

Memorandum 95-42

Administrative Adjudication by State Agencies: Report on SB 523

The problems and issues on Senate Bill 523 — the Commission's recommended legislation on administrative adjudication by state agencies — have continued unabated up to the last minute. Thanks to the extraordinary efforts of Senator Kopp and his staff, and to behind-the-scenes efforts of persons and agencies that favor the bill but cannot take a support position due to agency policy — we had been able to keep the bill more or less on track.

We were held up by a battle between the Senate and the Assembly over $1.3 million of the Legislature's operating budget. Senate Bill 523, and all other Senate bills on the Assembly floor, became hostage in the dispute. However, all's well that ends well, and the bill has now gone to the Governor.

This memorandum reviews substantive issues that have come up since the last Commission meeting. Technical issues and clarifying amendments are not discussed. Attached to this memorandum is a set of new and revised Comments to reflect amendments made to the bill or to clarify issues. We distribute copies of the revised Comments to the legislative policy committees and the Governor's office. The staff is currently reviewing these, and the other printed Comments, for accuracy. These will become the Official Comments that are printed in the Commission's annual report (or in a separate report on the bill) and distributed to law publishers for inclusion in their annotated codes.

Issues Raised by California State Board of Pharmacy

The California State Board of Pharmacy wrote a letter opposing Senate Bill 523 on a number of grounds, all of which the staff would characterize as weak and based on a lack of understanding that many of the provisions of the bill are optional for state agencies. The staff wrote the Board a letter that explains this, and we have not heard further from them.

Issues Raised by Respiratory Care Board

The Respiratory Care Board wrote a letter of opposition to the provisions of the bill that disciplinary guidelines may not be the basis of a penalty unless

adopted as regulations and that settlement of an occupational license disciplinary proceeding may not be made before issuance of the agency's pleading. We responded to them that the disciplinary guideline provision merely implements existing law, and that the settlement provision is designed for consumer information and protection. We have not heard further from them.

Ex Parte Communications Issues

Issues involving the ex parte communications prohibitions continue to surface regularly. The new ones include:

Individualized ratemaking proceedings. Southern California Edison Company opposed the bill because it would prohibit ex parte communications to the agency head in individualized ratemaking proceedings, which are quasi-legislative in nature. Although this is mainly an issue in PUC proceedings, and PUC is no longer covered by the bill, it also applies in other circumstances, particularly Insurance Commissioner proceedings. When PUC had been under the bill, the Commission had addressed this issue by allowing ex parte communications in individualized ratemaking proceedings, but requiring them to be disclosed on the record. Senator Kopp agreed to resurrect this provision, which was added to the bill, changing the Southern California Edison position on the bill from opposition to support.

> **11430.70. Application of provisions to agency head or other person**
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> 11430.70. ~~The~~ (a) Subject to subdivision (b), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.
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> (b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

Insurance Commissioner Communications under Proposition 103. Proposition 103 incorporates by reference the existing ex parte communications prohibition of the Administrative Procedure Act (Government Code Section 11513.5). SB 523 repeals and expands that section, thus indirectly amending Proposition 103. Proposition 103 includes a 2/3 vote requirement for

amendment. A consumer group, the Proposition 103 Enforcement Project, was concerned about the repeal of the ex parte communications statute to which Proposition 103 refers. We were able to satisfy their concern by pointing out the replacement provisions in SB 523, and by adding Comment language emphasizing the statutory scheme that references to repealed statutes are deemed to be references to the statutes that supersede them, and the obligation of the repealed statutes is continued in the new statutes to the extent provided in the statutes. However, we should amend Proposition 103 directly in followup legislation. See Memorandum 95-54. (We did not do this in SB 523 because we did not want to burden the bill with a two-thirds vote requirement; we figured it would have enough troubles without that.)

Integrated Waste Management Board communications. The Integrated Waste Management Board statute includes a special ex parte communications provision, enforceable by criminal sanctions. SB 523 would have engrafted general ex parte communications provisions onto this scheme. At literally the last minute, as the bill was to be taken up on the Assembly floor, we received opposition from the industry regulated by the Board, pointing out that the special statute was a recently negotiated legislative compromise addressed to their specific circumstances (permit concurrence), and should not be disturbed. We agreed to preserve their existing statute; this is the same approach the Commission has taken with respect to other special ex parte communications statutes in the Public Resources Code (i.e., Coastal Commission; State Mining and Geology Board).

> **Public Resources Code § 40412 (amended). Ex parte communication**
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> 40412. (a) For the purposes of this section, "ex parte communication" means any oral or written communication concerning matters, other than purely procedural matters, under the board's jurisdiction which are subject to a rollcall vote pursuant to Section 40510.
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> (b) No board member or any person, excepting a staff member of the board acting in his or her official capacity, who intends to influence the decision of a board member on a matter before the board, shall conduct an ex parte communication, except as follows:
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> (1) If an ex parte communication occurs, the board member shall notify the interested party that a full disclosure of the ex parte communication shall be entered in the board's record.
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> (2) Communications cease to be ex parte communications when either of the following occurs:

(A) The board member or the person who engaged in the communication with the board member fully discloses the communication and requests in writing that it be placed in the board's official record of the proceeding.

(B) When two or more board members receive substantially the same written communication, or are party to the same oral communication, from the same party on the same matter, and a single board member fully discloses the communication on behalf of the other board member or members who received the communication and requests in writing that it be placed in the board's official record of the proceeding.

(c) Notwithstanding Section 11425.10 of the Government Code, the ex parte communications provisions of the Administrative Procedure Act (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the board to which this section applies.

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 § 11370.5 (amended). Administrative law and procedure

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

Subdivision (b) is added to make clear the general authority of the Office of Administrative Hearings to adopt implementing regulations concerning the office and proceedings under the Administrative Procedure Act. For specific regulation authority of the office, see, e.g., Sections 11420.20 (regulations governing ADR), 11465.70. (regulations governing declaratory decision).

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 § 11400 (added). Administrative adjudication provisions of Administrative Procedure Act

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

Various statutes and regulations incorporate provisions of the existing Administrative Procedure Act by referring to specific section numbers. See, e.g., Ins. Code § 1861.08 (Proposition 103). This chapter is not intended to change those incorporated provisions. See Section 11415.10 & Comment (governing procedure determined by applicable statutes; this chapter supplements and does not replace governing procedure). Where a specific provision that is incorporated by reference has been moved to a differently numbered section of this chapter, it is intended that the obligation will continue to apply as provided in this chapter. Subdivision (b).

References in section Comments in this chapter and Chapter 5 to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws. See 15 U.L.A. 1 (1990). References to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-583, 701-706,

1305, 3105, 3344, 5372, 7521 (1988 & Supp. V 1993), and related sections (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237). A number of the administrative adjudication provisions of the Administrative Procedure Act are drawn from the Federal APA.

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 § 11415.50 (added). When adjudicative proceeding not required

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

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

Nothing in this section excuses compliance with this chapter in an agency decision for which an evidentiary hearing may be statutorily or constitutionally required. See Section 11410.10 (application to constitutionally and statutorily required hearings). A hearing may be statutorily or constitutionally required for a decision that an occupational license should be granted. revoked, suspended, limited, or conditioned. See, e.g., Bus. & Prof. Code §§ 485 (denial of license), 2555 (suspension, revocation, or probation of medical license); Suckow v. Alderson, 182 Cal. 247, 187 Pac. 965 (1920) (occupational license a vested property right that cannot be impaired without affording licensee an opportunity for a hearing).

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 § 11425.40 (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 § 11430.10 (added). Ex parte communications prohibited

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

The reference to an "interested person outside the agency" replaces the former reference to a "person who has a direct or indirect interest in the outcome of the proceeding," and is drawn from federal law. See Federal APA § 557(d)(1)(A) (1988); see also Professional Air Traffic Controllers Organization v. Federal Labor Relations Auth., 685 F.2d 547, 562 (D.C. Cir. 1982) (construing the federal standard to include person with an interest beyond that of a member of the general public).

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

While this section precludes an adversary from communicating with the presiding officer, it does not preclude the presiding officer from communicating with an adversary. This reverses a provision of former Section 11513.5(a). Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed. However, a

presiding officer should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others.

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

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

Gov't Code § 11430.30 (added). 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 § 11430.70 (added). Application of provisions to agency head or other person

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

Section 11430.70 applies only in administrative adjudication proceedings; it does not apply in rulemaking proceedings. Cf. Sections 11405.20 ("adjudicative proceeding" defined); 11405.50 ("decision" defined). See also Sections 11400 (administrative adjudication provisions); 11410.10 (application of chapter). While subdivision (b) permits ex parte communications to the agency head in an individualized ratemaking proceeding, it does not require an agency head to accept ex parte communications. Moreover, an agency may provide greater limitations on acceptance of ex parte communications than would be permitted by this provision. See Section 11425.10(b) & Comment (administrtive adjudication bill of rights).

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 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.

References in this section to a "person or body to which the power to hear or decide in the proceeding is delegated" mean a referral by the agency head pursuant to legal authority vested in the agency head. Cf. Section 11405.40 & Comment ("agency head" defined).

Gov't Code § 11440.50 (added). 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.

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).

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).

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 otherwise 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. Subdivision (d) of Section 11513 is intended to avoid or eliminate routine objections to administrative hearsay. If a proposed finding is supported only by hearsay evidence, a single objection at the conclusion of testimony, or on petition for reconsideration by the agency, is sufficient and timely.

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 in 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 (l993); 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). The authority of the agency itself to select issues for decision under this provision is unlimited, and includes authority to select for agency decision questions of law, questions of fact, and mixed questions of law and fact.

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. 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.

Gov't Code § 15609.5 (added). State Board of Equalization

Comment. The language in Section 15609.5 making Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 (formal hearing procedure) inapplicable is surplus, because that chapter does not apply unless a statute makes it applicable. See Section 11501 (application of chapter). Since there is no statute that makes Chapter 5 applicable to the board, Chapter 5 does not apply in any event. The language making Chapter 5 inapplicable to the board should not be read to create an implication that Chapter 5 is applicable in a proceeding of any other agency absent language making it inapplicable. Chapter 5 is only applicable in a proceeding to which it is made applicable by statute. Cf., e.g., Labor Code Section 1144.5 & Comment (language exempting certain hearings of Agricultural Labor Relations Board from Chapter 4.5 does not create implication that Chapter 5 is applicable in those hearings; whether Chapter 5 applies to a hearing is determined by statutes governing hearing).

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

Comment. Section 40412 is amended to make clear that the ex parte communications provisions of the Administrative Procedure Act do not apply to proceedings of the California Integrated Waste Management Board governed by this section. This section continues to apply to proceedings of the California Integrated Waste Management Board.

~~**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.~~

Pub. Util. Code § 1701 (amended). Rules of procedure

Comment. Section 1701 is amended to make the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a hearing of the Public Utilities Commission under the Public Utilities Code. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 1701 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a hearing of the Public Utilities Commission under the Public Utilities Code. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 1701 excuses compliance with procedural protections required by due process of law.

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. See Sections 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. 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.