#N-100

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Administrative Adjudication by State Agencies

May 1993

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **August 31, 1993.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation proposes to replace the hearing provisions of the existing California Administrative Procedure Act with a new statute to govern all constitutionally and statutorily-required administrative adjudication by state agencies. The new statute builds on the existing Administrative Procedure Act by adapting its procedures to accommodate the wide variety of hearing circumstances found in state government and by bringing it into conformity with modern administrative practice, drawing extensively on experience in other states and at the federal level through the Model State and Federal Administrative Procedure Acts.

Among the major innovations in the new statute are:

•*Customized Statute.* The statute incorporates flexibility by authorizing an agency to adopt regulations that alter specified details of the statutory procedure where appropriate to the circumstances of that agency.

•*Separation of Functions.* The statute seeks to ensure fairness by requiring a separation of prosecutory and adjudicative functions within each agency. This is accomplished not by relocating agency hearing personnel to a central panel but by isolating the presiding officer from prosecutorial involvement (including assistance, advice, and supervision by prosecutorial staff).

•*Conference Hearing.* The statute provides agencies an informal and expeditious procedure to resolve minor disputes.

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

•*Declaratory Decision.* The statute makes clear that agencies have discretionary authority to issue advice by means of declaratory decisions.

•*Precedent Decision.* The statute provides for designation and indexing of important agency decisions as precedent for guidance of agency personnel and the public.

•*Emergency Decision.* The statute makes available to all agencies authority to act immediately in emergency situations.

•*Procedural Improvements.* The statute makes numerous improvements in hearing procedures, including provision for consolidation and severance, intervention, resolution of discovery disputes by the presiding officer rather than superior court, open hearings, telephonic conduct of hearings and prehearing conferences, electronic recording of proceedings, and clarification of burden of proof.

ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

OUTLINE

ADMINISTRATIVE PROCEDURE ACT

CONFORMING REVISIONS AND REPEALS

INTRODUCTION

HISTORY OF PROJECT

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

This is the first in a series of reports on the administrative law study. It presents the Commission's tentative recommendations concerning administrative adjudication. Professor Michael Asimow of UCLA Law School served as the Commission's consultant on this phase of the study. The Commission also made extensive use of materials from other jurisdictions, including the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws,[2] and the federal Administrative Procedure Act.[3]

EXISTING CALIFORNIA LAW GOVERNING ADMINISTRATIVE ADJUDICATION[4]

California's Administrative Procedure Act[5] was enacted in 1945[6] in response to a study and recommendations by the Judicial Council.[7] The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.[8] The decision to limit coverage to licensing agencies was not based on a principled decision that an administrative procedure act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other

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

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

3. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5362, 7521 (1976), originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. The federal statute is referred to in this report as the "federal APA."

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

5. The Administrative Procedure Act appears at Government Code Sections 11340-11528. Adjudication is governed by Sections 11500-11528. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11370.5.

6. 1945 Cal. Stat. ch. 867. Provisions on rulemaking were added in 1947 and substantially revised in 1979. 1947 Cal. Stat. ch. 1425; 1979 Cal. Stat. ch. 567. The adjudication provisions have had only minor revisions since 1945.

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

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

agencies were needed, but it was not prepared to make recommendations with respect to them.[9]

The Judicial Council's report and the resulting legislation was a pioneering effort. The creation of a central panel of hearing officers, for example, was an idea that was far ahead of its time. There were no comparable administrative procedure acts at that time and the idea of an administrative procedure code applicable to agencies in general was untried and controversial. The Judicial Council and the Legislature moved cautiously, but the Administrative Procedure Act was well conceived and has served well in the 45 years since it was enacted.

During that time, the provisions of the Administrative Procedure Act relating to adjudication and judicial review have been little changed.[10] Yet the regulatory and social welfare responsibilities of state government have broadened in ways unforeseen in 1945 and the scope of administrative adjudication is vastly greater now.

The California Administrative Procedure Act prescribes a single and unvarying mode of formal, trial-type adjudicatory procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.[11] The administrative law judge writes a proposed decision which the agency head can adopt, modify, or reject.[12] There is little or no flexibility in the system to accommodate the many differing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only specified named agencies, and it covers only those functions required by the agency's organic statute.[13] Many important California agencies are wholly uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and numerous

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

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

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

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

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

13. Government Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovals. Bus. & Prof. Code §§ 485, 495. A list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice (Cal. Cont. Ed. Bar, Supp. 1991).

others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.[14]

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings. The only unifying theme is that adjudication in these agencies is not conducted by an administrative law judge assigned by the Office of Administrative Hearings. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.[15]

COMPREHENSIVE REVISION OF ADMINISTRATIVE ADJUDICATION STATUTE

The Law Revision Commission recommends enactment of a new California Administrative Procedure Act. The new act builds on the existing Administrative Procedure Act, but takes into account the many developments that have occurred in the 45 years since enactment of California's groundbreaking law. This period has seen an explosive growth of our knowledge and experience in administrative law and procedure, including development of well-articulated statutes in other states and at the federal level, as well as promulgation of several generations of model State Administrative Procedure acts.

Comprehensive revision of the administrative procedure statute will enable California to take full advantage of these major developments in the law. It will enable complete and thorough procedural reform that could not easily be achieved on a piecemeal basis. And it will enable development of a broad and flexible statute that has the potential to be applied to a wider range of agencies and functions than are now governed by the Administrative Procedure Act.

CONSOLIDATION OF LAW GOVERNING ADMINISTRATIVE PROCEDURE

A major defect of the existing California law governing administrative adjudication by agencies is that the law as to the hearing procedures applicable in an individual agency may be relatively inaccessible. It is not atypical to find an agency's procedure governed by a combination of general procedural statutes, special statutes applicable to the particular agency, regulations adopted by the agency, rules of procedure that have not been adopted by regulation, and unwritten practices followed by the agency.[16] This situation makes it difficult in many cases for a person having to deal with the administrative procedures of an agency to know exactly what to expect and how to proceed.

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

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

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

One objective of the proposed revision of the California Administrative Procedure Act is to consolidate the law governing the procedures of an agency so that it is readily accessible to those having business before the agency. The law should be largely stated in the general administrative procedure act. Any variants of the law necessary for proceedings before a particular agency should be stated in the body of regulations adopted by that agency, and duplicated with other administrative procedure regulations in a single volume of the California Code of Regulations. This will ensure that a person having business before that agency will be able readily to find the governing administrative procedure.

MODIFICATION OF LAW BY AGENCY REGULATION

The proposed administrative procedure act is designed to be sufficiently broad to accommodate most hearings of most agencies. Nonetheless, there are situations where it is clear that the provisions of the statute should be modified for the circumstances of a particular agency or type of hearing. In these situations, the statute permits the agency to modify the rule by regulation.

In many cases, modification by regulation is permitted only in agencies whose hearings are not conducted by hearing personnel of the Office of Administrative Hearings. A uniform procedure applies now in hearings conducted by the Office of Administrative Hearings, which are under the existing administrative procedure act; that uniformity should be maintained to the extent practicable.

Adoption of a regulation is the only means authorized for an agency to depart from the general administrative procedure act. This compels an agency to conduct a rulemaking proceeding at which all constituencies will have an opportunity to call to the agency's attention inadequate procedures.

TRANSITIONAL PROVISIONS

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

APPLICATION OF STATUTE

APPLICATION TO HEARINGS REQUIRED BY CONSTITUTION OR STATUTE

Governmental agencies make many decisions that impact the rights and interests of citizens. However, most of these decisions are informal in character, and it would be inappropriate as well as a practical impossibility to burden those decisions with the hearing formalities of the Administrative Procedure Act. It is only where a decision affects a right or interest of a type entitled to due process protection under the state or federal constitution, or where the Legislature by

statute has expressly extended such protection, that the decision should be made through the hearing procedures of the Administrative Procedure Act.

The new statute would provide procedures to govern all decisions for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute. For this purpose, a "decision" is an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Thus the new statute does not apply to rulemaking since rules are of general rather than particular applicability. And since the statute governs only statutorily or constitutionally required hearings, it does not cover a large area of informal adjudication where agencies may choose to provide hearings even though no hearing is legally required.

APPLICATION TO ALL STATE AGENCIES

The existing scheme of having different rules of administrative procedure applicable to different agencies, or in some cases having different rules applicable to the same agency depending on the type of proceeding, makes it difficult for the public and for practitioners who must deal with administrative agencies. The situation is aggravated by the fact that although the Administrative Procedure Act is readily accessible, other applicable rules of administrative procedure may not be. It is often the case that the most important elements of an agency's procedural code are not written.[17]

The present system confers an advantage on agency staff and specialists who often deal with the agency or are former staff members or agency heads. They are familiar with the unwritten procedures and precedents and traditional ways of resolving issues. They know about the unwritten exceptions and ways of avoiding obstacles. Such a system seriously disfavors inexperienced advocates and the clients they represent, particularly community or public interest organizations that do not have access to the few experts in the procedure of a particular agency.

Uncodified procedures may be arbitrarily or unevenly applied because staff members may adhere to them or make exceptions to them as they feel is proper. In many cases, staff members would like to improve agency procedure, but agency heads resist changes or ignore established procedure. Since no one is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

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

Nowhere is it written that outsider ex parte contacts with the agency heads are tolerated, yet they are in some agencies. The extent to which agency functions are internally separated remains obscure, as does the process whereby agency heads reconsider ALJ decisions. Alternatively, the regulations may provide for procedures that are in fact never used. Nowhere are the rules about discovery stated. The factors that an agency uses to make particular kinds of decisions are seldom reduced to regulations or guidelines or made available through a system of adjudicatory precedents. Essentially, a great deal of the substantive law and procedure of the non-APA agencies is accessible only through the institutional memory of the staff.

When each agency has its own procedural law, the quality of judicial review is also degraded. For example, when a court engages in judicial review of agency action and a procedural issue is drawn into question, the court has recourse only to precedents relating to that agency, if there are any. Even though the same problem is clearly dealt with by the Administrative Procedure Act and there is a well developed scheme of precedents relating to that problem, the court must reinvent an appropriate independent result.

For these reasons the Law Revision Commission recommends expansion of the Administrative Procedure Act to govern the hearing procedures of all state agencies.[18] In order to accomplish this result, it is necessary that the act be sufficiently flexible to accommodate all the variant types of proceedings engaged in by the agencies. The Commission believes that the proposed new California Administrative Procedure Act achieves this objective, as explained below. Of course, there are special cases where a limited exception is warranted or a special procedure is necessary. These cases are also noted below, but they constitute the exception rather than the rule.[19]

DEFINITION OF "STATE AGENCY"

As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the result that it is unclear whether their administrative adjudications are to be governed by the new Administrative Procedure Act. The new act deals with these situations so as to effect the broadest possible coverage:

(1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the new act applies.[20]

(2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the new act.[21]

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

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

19. The existing Administrative Procedure Act by its terms applies to specifically identified agencies and proceedings, whose hearings would be conducted by personnel employed by the Office of Administrative Hearings. Gov't Code §§ 11500(a), 11501. Under the proposed statute this drafting technique would be reversed--the Administrative Procedure Act would apply to all agencies, and hearings of all agencies would be conducted by Office of Administrative Hearings personnel unless expressly excepted. The hearings expressly excepted are those not presently governed by the Administrative Procedure Act.

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

21. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501.

SEPARATION OF POWERS

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs.[22]

The Legislature. The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its members and expulsion of members,[23] determination of ethics violations of members,[24] impeachment of state officers and judges,[25] and confirmation of gubernatorial appointments.[26] These judgments are politically sensitive in nature, and the procedure for arriving at them is not susceptible to formalization but must be left to the political judgment of the Legislature based on its determination of the propriety of the procedure for each of these decisions.

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

The Judicial Branch. The judicial branch of state government includes, besides the court system,[27] the Judicial Council,[28] the Commission on Judicial Appointments,[29] the Commission on Judicial Performance,[30] and the Judicial Criminal Justice Planning Committee.[31]

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

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

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

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

23. Cal. Const. Art. 4, § 5.

24. Gov't Code §§ 8940-55 (Joint Legislative Ethics Committee).

25. Cal. Const. Art. 4, § 18.

26. See, e.g., Cal. Const. Art. 4, § 20 (approval by Senate of gubernatorial Fish and Game Commission appointees; removal by concurrent resolution adopted by each house).

27. The court system in California consists of the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. Cal. Const. Art. 6, § 1.

28. Cal. Const. Art. 6, § 6.

29. Cal. Const. Art. 6, § 7.

30. Cal. Const. Art. 6, § 7.

31. Penal Code § 13830.

(3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the Judicial Council.[32]

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

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

The Governor's Office. Although the Administrative Procedure Act is designed primarily for executive branch agencies, the head of the executive branch—the Governor and the Governor's executive office—must be able to make the kinds of political decisions necessary to run the executive branch effectively, free of administrative procedure act formalities in a way that appears appropriate to the Governor. The Administrative Procedure Act maintains the integrity of the Governor and Governor's office by exempting it from application of the act.[33]

UNIVERSITY OF CALIFORNIA

Article 9, Section 9 of the California Constitution makes the University of California independent and free of legislative control.[34] Although the Commission's fundamental recommendation is that the new Administrative Procedure Act should apply to all agencies of the state, it does not appear that the University may be subjected to the new act under this provision.[35]

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

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32. Cal. Const. Art. 6, § 18(h) ("The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."). The Judicial Council Rules of Court provide procedures at Rules 901-922.

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

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

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

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

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

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

BACKGROUND

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges and hearing officers employed by the Office of Administrative Hearings in the Department of General Services.[36] However, most of the major state agencies employ their own administrative law judges and hearing officers.[37] The Law Revision Commission estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings. And this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

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

HISTORY OF CENTRAL PANEL IN CALIFORNIA

California was the first, and for many years the only, jurisdiction in the United States to adopt the concept of a central panel of hearing officers who would hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial

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36. Gov't Code §§ 11501-2. The Office of Administrative Hearings has identified 95 state and miscellaneous agencies for which it currently conducts some or all adjudicative hearings.

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

Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.[38] The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert in a number of fields, yet who would not have a potential conflict of interest with the agency for which they conducted hearings and would impart an appearance of fairness to hearings. The Judicial Council also foresaw some organizational efficiency in this arrangement.

Although the Judicial Council considered the possibility that hearing officers could be drawn from the central panel for all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise."[39]

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

EXPANSION OF CALIFORNIA CENTRAL PANEL

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

The Law Revision Commission's study of the operation of the central panel system in California and in the other jurisdictions that have adopted it, including review of California's major administrative agencies not presently covered by the central panel, indicates that despite these potential benefits, there are a number of serious objections to expansion of the central panel beyond its present scope in California.[40]

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

39. *Id.* at 14.

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

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

First, there does not appear to be a compelling case for a general removal of hearing officers to the central panel. The concept of fairness and the appearance of fairness is sound in theory, but the Commission's investigation did not reveal any evidence of unfairness or a perception of unfairness in California.

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

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

Fourth, further centralization is unlikely to generate savings for the state and it could increase costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges and concluded it was not clear any savings would result.[41] There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law judges serve several functions, acting as

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

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

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

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

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

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

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

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

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

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

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

legal advisors as well as hearing officers; loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fifth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency.

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

ROLE OF ADMINISTRATIVE LAW JUDGE

The existing administrative procedure act is based on a model of fact-finding by an administrative law judge employed by the Office of Administrative Hearings.[42] In general, the administrative law judge holds a hearing, formulates a proposed decision, and transmits it to the agency for which the hearing is held; the agency head may either adopt the proposed decision as its final decision, or reject the decision and decide the case itself on the record.[43]

This procedural format of the division of responsibilities between the administrative law judge and the agency head must be modified so it is adaptable for use by all agencies and for all types of cases. This includes agencies that employ their own administrative law judges, agencies where the agency head is both the finder of fact and the decision maker, and agencies that have lengthy hearings as well as those whose hearings are brief.

The basic device used in the proposed law to build sufficient flexibility into the new administrative procedure act to accommodate the wide range of hearings by state agencies is authority for an agency to adopt regulations allowing it to depart from the basic procedure at certain key points. The regulation process will ensure that any deviation from the main line administrative procedure is publicly proposed, considered, and adopted, and is accessible as a published and compiled governing instrument, while still allowing the individual agency to build in necessary variations.[44]

The proposed law is based on the existing administrative procedure act, with several concepts drawn from the 1981 Model State APA, and various exceptions to accommodate the existing practices of state agencies not covered by the administrative procedure act. The Commission believes the approach of the proposed law, outlined below, has the necessary flexibility to enable all state

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42. For a more detailed description of proceedings under the existing administrative procedure act, see Office of Administrative Hearings, "Outline of Administrative Practice before the Office of Administrative Hearings" (March 1989).

43. Gov't Code § 11517.

44. See discussion of "Modification of Law by Agency Regulation", *supra*.

agencies to conduct their administrative hearings under one fundamental procedure.

(1) Each agency head decides whether the hearing in an administrative adjudication by that agency will be conducted by an administrative law judge or by the agency head itself. The agency head may, instead of sitting en banc, divide into panels, or delegate the hearing function to a person charged with that responsibility. However, a hearing of a type for which an administrative law judge from outside the agency is presently required by statute would continue to be heard by an independent administrative law judge, ordinarily provided by the Office of Administrative Hearings.

(2) If the agency head conducts the hearing, the agency head issues a final decision within 100 days after the end of the hearing. An agency whose hearings are more complex may adopt a regulation permitting more time; an agency whose hearings require less time or which are required by federal law to be rendered within a shorter period may adopt a regulation permitting less time.

(3) If an administrative law judge conducts the hearing, the administrative law judge renders a proposed decision within 30 days after the end of the hearing. Again, the agency may vary the time within which a proposed decision is required.[45] The agency head receives the proposed decision and has 100 days within which to act on it—either to adopt it, modify it, or commence review proceedings on it. This period also can be varied by regulation depending on the needs of the agency.[46] A proposed decision that is not acted on by the agency within the required period becomes a final decision by operation of law.

(4) Either a proposed decision or a final decision is subject to administrative review in the discretion of the agency. This reverses the general rule under existing law that an appeal to the agency head is available as a matter of right, with its attendant expense. The agency would have authority to review some but not all issues, or to preclude further administrative review outright. Where review is provided, an agency would have authority to delegate the review function to subordinate employees.

In order to avoid unnecessary review procedures, the proposed law provides expeditious means of correcting mistakes and technical errors in the decision. In the review process, the reviewing authority is limited to a review of the record, except for newly-discovered evidence or evidence that was otherwise unavailable at the time of the hearing. This will ensure that the parties to the administrative proceeding are not unduly exposed to the time and expense of a second formal hearing process. In addition, since the presiding officer at the hearing has had the opportunity to observe the witnesses, the presiding officer's

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45. Variance would not be available in hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Existing law requires a proposed decision within 30 days, and that requirement would be unchanged. Gov't Code § 11517(b).

46. Again, a variance would not be available unless the proposed decision is rendered after a hearing required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

credibility determinations based on observation of demeanor and the like are entitled to great weight on review.[47]

The end result of administrative review is either issuance of a final decision or a remand for further hearings within 100 days or other period adopted by agency regulation.[48]

IMPARTIALITY OF DECISION MAKER

Fairness and due process are ensured in administrative adjudication by the basic requirement of impartiality of the decision maker. The Commission recommends codification of five fundamental elements of impartiality in the Administrative Procedure Act: (1) the decision should be based exclusively on the record in the proceeding, (2) ex parte communications to the decision maker should be prohibited, (3) the decision maker should be free of bias, (4) adversarial functions should be separated from decision making functions within the agency, and (5) decision making functions should be insulated from adversarial command influence within the agency. Each of these elements is elaborated below.

EXCLUSIVITY OF RECORD

Existing California case law requires that the decision be based on the factual record produced at the hearing.[49] Both the federal[50] administrative procedure and the model state[51] administrative procedure statutes codify this aspect of due process, and the proposed legislation does the same for California.

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

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

48. The 100-day period could not be varied in the case of a hearing required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

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

50. 5 U.S.C. § 556(e).

51. 1981 Model State APA § 4-215(d).

EX PARTE COMMUNICATIONS

While existing California law is clear that factual inputs to the decision maker must be on the record, it is not clear whether ex parte contacts concerning law or policy are permissible.[52] Existing Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of Administrative Hearings, but is silent as to the majority of administrative adjudications in California that do not fall under it. In some state agencies ex parte contacts are tolerated or encouraged.[53]

Fundamental fairness in decision making demands that any arguments to the decision maker on law and policy be made openly and be subject to argument by all parties. The proposed legislation prohibits ex parte communications with the decision maker, subject to several qualifications necessary to facilitate the decision-making process:

(1) The ban on ex parte communications would not apply to a nonprosecutorial proceeding, such as an individualized ratemaking or initial licensing decision. Although these are trial-type proceedings, they involve a substantial element of policy determination where it may be important that the decision maker consult more broadly than the immediate parties to the proceeding.

(2) The decision maker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decision maker is from personnel within the agency that is a party to the proceeding. However, the decision maker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.[54]

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

Where an improper ex parte contact has been made, the proposed legislation provides several curative devices. A decision maker who receives an improper ex parte communication must place it on the record of the proceeding and advise the parties of it, and the parties are allowed an opportunity to respond. To rectify cases where the ex parte communication would unduly prejudice the decision maker, the ex parte communication could be grounds for disqualification of the decision maker. In such a case, the record of the communication would be sealed by protective order of the disqualified decisionmaker.

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

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

54. See discussion of "Separation of Functions", *infra.*

BIAS

The existing California Administrative Procedure Act makes clear that a decision maker may be disqualified if unable to "accord a fair and impartial hearing or consideration".[55] The proposed law would recodify this standard in the more concrete traditional terms of "bias, prejudice, interest",[56] and imports from the Code of Civil Procedure a few key criteria of particular relevance to administrative adjudication.[57]

Notwithstanding actual bias, existing law adopts a "rule of necessity" that if disqualification of the decision maker would prevent the agency from acting (e.g., causing lack of a quorum), the decision maker may nonetheless participate. The proposed law addresses this problem with a provision drawn from the Model State Administrative Procedure Act that disqualifies the decision maker and provides for substitution of another person by the appointing authority.[58]

SEPARATION OF FUNCTIONS

Existing California statute and case law on separation of functions is unclear.[59] To avoid prejudgment, the decision maker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. Nor should a person assisting or advising the decisionmaker have served in that capacity. The proposed law codifies these principles.

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

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

(2) A lengthy nonprosecutorial case such as individualized ratemaking or power plant siting may continue for years while agency personnel transfer from one type of function to another within the agency. The proposed law allows violation of the separation of functions principle in nonprosecutorial cases where the contrary function occurred more than one year before the decision making.

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55. Gov't Code § 11512(c).

56. The proposed law would also permit an agency to provide by regulation for peremptory challenge of the decision maker regardless of bias. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

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

58. 1981 Model State APA § 4-202(e)-(f).

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

(3) A nonprosecutorial case may involve specialized technical issues for which the decision maker needs advice that is available only from an agency employee who has also been involved in other aspects of the case. The proposed law would allow such technical advice to be given, provided it is summarized in the record and made available to all parties.

(4) Prosecutorial personnel must be able to advise the decision maker concerning aspects of a settlement proposed by the prosecution. The proposed law recognizes this situation.

(5) Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would gridlock the system. The proposed law exempts drivers' licensing cases from the separation of functions requirements. The exemption is limited in scope and would not extend to other types of operators' certificates, such as schoolbus driver certificates.

COMMAND INFLUENCE

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

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

THE ADJUDICATION PROCESS

MODIFICATION OF STATUTE BY REGULATION[60]

The proposed law sets out a basic procedure for the adjudicative process that is complete in itself. The procedure builds on the 1945 California APA,[61] which is widely applicable in California agencies.[62] However, because of the expanded scope and application of the proposed law, there will be some procedural details that are not appropriate for all agencies. For this reason, the proposed law permits

60. See also general discussion, "Modification of Law by Agency Regulation", *supra*.

61. Gov't Code §§ 11500-11529.

62. For a current listing of administrative hearings in which the California Administrative Procedure Act is applicable, see California Administrative Hearing Practice, Appendix A: Table of State-Level Adjudicatory Activities (Cal. Cont. Ed. Bar, Supp. 1991).

an agency to modify key aspects of its administrative procedure or to provide that certain provisions of the new law are inapplicable to the agency.[63]

There are two significant limitations on the ability of an agency to modify specified aspects of the proposed law by regulation.

First, the modification option is frequently not available in proceedings that are currently governed by the 1945 California APA.[64] The opportunity for modification is generally not necessary in those proceedings since the proposed law is based upon them. Restricting modification in this situation will also promote uniformity of administrative procedure among state agencies—one of the chief goals of the proposed law.

Second, any modification must be done by regulation through the rulemaking provisions of the Administrative Procedure Act.[65] This process will ensure the opportunity for participation of interested and affected parties in the procedures of the agencies with which they are involved. It will also ensure that any variations from the statutory procedure are embodied in regulations that are accessible to the public.

NOTICE AND PLEADINGS

Terminology. Existing administrative procedures in California employ a wide variety of terminology to describe the parties and their pleadings. These include "accusation", "statement of issues", "order initiating investigation", "notice of defense", "appeal", "notice of adverse action", and "petition for hearing". The proposed law standardizes the terminology. The parties to an administrative adjudication are the agency and the respondent; their pleadings are the initial pleading and the responsive pleading.

Initiation of proceedings. The proposed law makes clear that a proceeding is initiated by the agency having jurisdiction over the matter, either on its own motion or in response to an application from a person. To encourage agency responsiveness to applications for agency action, the proposed law requires the agency within 30 days to acknowledge receipt of the application and provide contact information, and within 90 days to act on the application, either by granting or denying it or by commencing an adjudicative proceeding in response. The proposed law makes clear that a third party does not have a right to compel an agency to prosecute a case. An agency is permitted to modify these requirements by regulation, and a special statute may provide a different rule for a specific situation.[66]

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63. Major areas where agency modification is permitted include declaratory decisions, emergency adjudicative proceedings, pleading and scheduling details, discovery, prehearing conference, and details concerning the conduct of the hearing (including evidence and burden of proof).

64. There are a few modification opportunities available even to existing Administrative Procedure Act agencies. See, e.g., proposed Sections 641.310 (declaratory decision) and 648.310 (burden of proof).

65. Gov't Code §§ 11340-11356.

66. E.g., Bus. & Prof. Code §§ 10086 (hearing must commence within 30 days after request to Real Estate Commissioner); 11019 (hearing must commence within 15 days after request to Real Estate Commissioner).

Service. First class mail is generally permitted for notices, and the proposed law adds flexibility by authorizing other means of notification such as delivery service and facsimile transmission. However, service of the initial pleading and notice must be by registered or certified mail or personal service. This requirement would not apply where the respondent has previously appeared in the same or a related proceeding; service in a proceeding before an appeals board, for example, could be by first class mail or other means.

Amendment of pleadings. The 1945 California APA allows amendment of the initial pleading.[67] The law is silent concerning amendment of responsive pleadings, and there is doubt about the propriety of amendment of pleadings outside of the 1945 California APA.[68] The proposed law makes clear that both the initial pleading and the responsive pleading may be amended or supplemented at will before commencement of the hearing, subject to the right of the other party to prepare a case in response. After commencement of the hearing, amendments are discretionary with the presiding officer.

CONTINUANCES

The 1945 California APA includes a special proceeding for judicial review of an agency decision to deny a request for a continuance of an administrative proceeding.[69] Denial of a continuance is potentially no more prejudicial to a person that is the subject of agency action than any other adverse decision in the hearing process, and should not require an early and separate judicial review. In the interest of judicial economy, the proposed law eliminates the special appeal for denial of a continuance. Instead, an appeal on this issue is made with other matters judicially reviewable at the end of the administrative adjudication process.

INTERVENTION

The 1945 California APA is not clear on the right of a third party to intervene in an administrative adjudication. Yet situations do arise when an administrative adjudication will affect the legal rights, duties, privileges, or immunities of a person who has not been made a party to the proceeding. In such a situation, the proposed law would permit intervention by the affected party if the intervention will not impair the interests of justice and the orderly and prompt conduct of the proceedings. This determination is vested in the presiding officer, and the presiding officer's decision is final and nonreviewable. The presiding officer may impose appropriate conditions on intervention, such as limiting the issues addressed by the intervenor, regulating discovery and cross-examination by the intervenor, and limiting the intervenor's involvement in settlement negotiations.

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67. Gov't Code §§ 11507, 11516.

68. See discussion in Asimow, *The Adjudication Process* 16 n.30 (Oct. 1991).

69. Gov't Code § 11524(c). The special provision does not apply to the Department of Alcoholic Beverage Control.

DISCOVERY AND SUBPOENAS

The 1945 California APA provides for limited discovery in administrative adjudications.[70] The Commission believes the extensive discovery available in civil proceedings is inappropriate for administrative adjudications, which should be simple, quick, and inexpensive. For this reason the proposed law continues the limited discovery approach of existing law, subject to a number of minor changes,[71] and broadens its application to all agencies. This would not preclude an agency from providing by regulation for more extensive discovery if appropriate to the type of case administered by that agency, or from otherwise regulating discovery, for example by providing for protection of confidential information or other privileges.

Under the 1945 California APA an agency has broad subpoena authority.[72] The proposed law continues this authority and extends it to the other state agencies, as well as to attorneys of the parties as in civil practice; the proposed law adds provisions clarifying procedures for quashing a subpoena once issued. In addition, the proposed law permits the respondent to request issuance of a subpoena duces tecum for production of a document at any reasonable time and place, rather than only at the hearing. This will enable the respondent adequate time to prepare and help avoid the need for a continuance.

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

PREHEARING CONFERENCE

The proposed law makes the prehearing conference, presently available in proceedings before 1945 California APA agencies, applicable to all state agencies, subject to the ability of an agency to control its use by regulation. The proposed law adds the following features designed to enhance the effectiveness of the prehearing process:

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

(2) A party who fails to attend the conference may be held in default.

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

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

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

The proposed law fills a gap in existing statutes by making clear that a party on whom a discovery request is served has a continuing duty to disclose any supplemental matter on learning of it.

72. Gov't Code § 11510.

(4) The conference should offer the opportunity for alternative dispute resolution, and where appropriate be converted into a conference adjudicative hearing.

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

DECLARATORY DECISIONS

Declaratory relief may be a useful means by which a person may obtain fully reliable information concerning application of agency regulations to the person's particular circumstances. The federal administrative procedure act provides for declaratory orders,[73] as do modern state statutes.[74] However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

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

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

SETTLEMENT

An agency has implied power to settle a case.[75] The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a

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73. Federal APA § 554(e).

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

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

settlement.[76] This resolves the difficulty under the 1945 California APA that the agency head is required to approve a settlement but in many cases the agency head is a body of part-time appointees unable to meet and consider the settlement for a considerable period of time. The proposed law also makes clear that a settlement may be made before or after issuance of the initial pleading, except in an occupational licensing case.[77]

ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution techniques, such as mediation and arbitration, offer the potential of substantial savings of time and money in administrative adjudication. Federal administrative procedure in recent years has made effective use of alternative dispute resolution,[78] and in 1990 Congress amended the federal APA to require agencies to explore and utilize alternative dispute resolution techniques in all agency functions.[79] The 1945 California APA is silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.[80] A negotiated outcome is preferable in most situations to the costly, time-consuming, and difficult process of adjudication and judicial review. The Law Revision Commission recommends that alternative dispute resolution be fostered in California administrative adjudication by statutorily recognizing these techniques and encouraging agencies to put in place feasible mechanisms to facilitate them.

The proposed law makes clear that all agencies have authority to refer cases, with the consent of the parties, for mediation or for binding or nonbinding arbitration by neutral dispute resolution personnel. Mediation communications are kept confidential just as such communications remain confidential in civil proceedings,[81] and reference to nonbinding arbitration activities is inadmissible in a subsequent de novo proceeding; the presiding officer, mediator, or arbitrator cannot be compelled to testify in subsequent proceedings concerning the alternative dispute resolution activities.[82] The Office of Administrative Hearings is charged with responsibility to develop model regulations for alternative dispute resolution proceedings that govern disputes referred to alternative dispute resolution unless modified by the agency. The Commission believes these

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

77. An occupational licensing case may be settled only after issuance of the initial pleading in order to ensure that the disciplinary action is a matter of public record.

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

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

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

81. Evid. Code § 1152.5.

82. Cf. Evid. Code § 703.5.

provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

CONFERENCE HEARINGS

The standard formal adjudicatory hearing procedure under the 1945 California APA may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process.[83]

To address this concern, the proposed law permits agencies to resolve matters involving only a minor sanction or matters in which there is no factual dispute by means of a conference adjudicative hearing process, drawn from the 1981 Model State APA.[84] This process would also be available to an agency that specifies classes of cases where it would be appropriate, provided use of the conference process would not violate due process requirements for those cases.

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

The proposed conference hearing process is a simplified administrative adjudication, involving no prehearing conference or discovery. At the hearing the presiding officer regulates the course of proceedings and limits witnesses, testimony, evidence, rebuttal, and argument. Cross-examination is ordinarily not permitted, and a conference hearing should only be used in a case that is susceptible of determination without the need for substantial cross-examination.

"Thus a conference hearing is essentially just that—a conference that lacks courtroom drama but nevertheless provides assurance that the issues will be aired, an unbiased decisionmaker will make a decision based exclusively on the record of the proceedings, the decision will be explained, and it will be reviewed by a higher-level decisionmaker (such as the agency heads)."[85]

The conference hearing may be particularly useful in a number of situations:[86]

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

84. 1981 Model State APA §§ 4-401-3. The notion of establishing alternate adjudicative procedures is found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Admin. L. Rev. 31, 47 (1979).

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

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

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

EMERGENCY DECISION

In some circumstances there is a need for an agency to take immediate action for the protection of the public. If there is serious abuse that causes immediate and irreparable physical or emotional injury to a ward in a child or elder care facility, for example, an agency may need to act quickly to remove the ward or close the facility or temporarily suspend its license. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation.

The 1945 California APA does not recognize the need of an agency to make a quick decision in an emergency situation, although a few special statutes provide individual agencies the ability to act quickly in cases of necessity.[87] All agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

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

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

CONSOLIDATION AND SEVERANCE

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

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

88. Code Civ. Proc. § 1048.

CONVERSION OF PROCEEDINGS

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

There are no provisions in the 1945 California APA for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.[89] Under this procedure, the presiding officer or other agency official responsible for the proceeding may convert it to another type if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party. Notice to affected parties is required.

HEARING PROCEDURES

Transcripts. The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improvement of the quality of electronic recording, and with the use of multi-track recorders, monitors, and trained hearing officers, the problems of electronic recording are minimized, and the cost saving may be substantial. For these reasons the proposed law permits an agency to provide electronic recording of proceedings in all cases. The presiding officer would have authority to require stenographic reporting in an appropriate situation, and a party could require it at the party's own expense.

Telephone hearings. The 1945 California APA contemplates a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical attendance at the hearing difficult. Moreover, an in-person hearing may require parties or witnesses to sit and wait for long periods of time. In such situations, it makes sense to take testimony telephonically. The Unemployment Insurance Appeals Board makes use of telephone hearings with a great amount of success.[90]

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

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89. 1981 Model State APA § 1-107.

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

Interpreters. Existing provisions for interpreters for language-disabled parties[91] are expanded by the proposed law to include language-disabled witnesses.

Open hearings. The 1945 California APA is silent on the issue whether an administrative hearing is open to the public. The general assumption is that hearings are open, and there is authority that this is a matter of due process.[92] The proposed law makes clear that a hearing is generally open to the public, subject to special statutes such as those protecting trade secrets or other confidential or privileged matters, or those protecting child victims and witnesses.

EVIDENCE

Under the 1945 California APA technical rules of evidence are inapplicable—any relevant evidence is admissible if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.[93] The reasons for adoption of this rule in 1945 were that many parties are unrepresented by counsel in administrative adjudications, and that the protections of the rules of evidence designed for fact-finding by lay juries are unnecessary in administrative decision making by experts in the field.[94] These reasons are sound to this day, and the proposed law preserves the basic rule of broad admissibility, subject to the right of an agency by regulation to require adherence to technical rules of evidence.

The proposed law codifies a few key exceptions to the general rule of admissibility. Existing law permits the presiding officer to exclude irrelevant and unduly repetitious evidence.[95] This authority should be broadened so that the presiding officer also has discretion to exclude evidence that contributes little to the result but promotes delay and confusion. The proposed law adopts the standard of Evidence Code Section 352, which provides for exclusion of evidence whose probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Where evidence is based on a method of proof that is not generally accepted as reliable in the scientific community, rules applicable in civil litigation require exclusion of the evidence.[96] This principle has been applied in administrative adjudication as well,[97] and the proposed law codifies it. The factfinder should not be compelled to weigh in each case the probative value of testimony that is based on methodologies not recognized as scientifically reliable—this is a specific instance of evidence that does not satisfy the general requirement that it is the

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

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

93. Gov't Code § 11513(c)

94. Judicial Council of California, Tenth Biennial Report 21 (1944).

95. Gov't Code § 11513(c).

96. See discussion in Asimow, *The Adjudicative Process* 61-63 (October 1991).

97. Seering v. Dept. Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987)

sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

The 1945 California APA permits use of affidavits as evidence, with notification of the intent to introduce the affidavit at least 10 days before the hearing.[98] The affidavit procedure is useful, and the proposed law extends it to all state agencies, subject to the right of an agency to limit use of affidavits by regulation. The 10 day notice requirement is extended to 15 days, to give the opposing party an adequate opportunity to retain counsel and respond by cross-examination or otherwise.

Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding.[99] The proposed law extends this provision (known as the "residuum rule") to other agencies as well, subject to the right of an agency to adopt a different rule by regulation. The residuum rule is desirable as a general matter because it forces the use of reliable evidence, which may be particularly important in an administrative adjudication in which the sanction is severe, such as a license revocation.

The proposed law also makes clear that the residuum rule can be raised for the first time on judicial review. Existing law is unclear on this matter.[100] It may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence.

It is not clear whether the evidentiary rulings of the presiding officer are subject to administrative review. An argument can be made that the rulings are conclusive.[101] The proposed law makes clear that the agency head may review evidentiary determinations of the presiding officer. The adjudicatory authority is vested in the agency head, and the agency head should be the ultimate administrative decisionmaker.

BURDEN OF PROOF

The 1945 California APA is silent on the issue of burden of proof in an administrative hearing, but cases put the burden on the proponent of an order.[102] The proposed law codifies this rule, and provides generally that the burden is a preponderance of the evidence. In the case of an occupational license, however, because of the potential severity of the sanction, the burden is clear and convincing evidence. An agency, including a licensing agency, would have the ability to change the burden of proof in light of the circumstances in adjudications administered by it.

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98. Gov't Code § 11514.

99. Gov't Code § 11513(c).

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

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

102. See discussion in Asimow, *The Adjudication Process* 73 (Oct. 1991).

DECISION

Voting by agency members. The 1945 California APA permits voting by agency members by mail.[103] The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

Findings and basis of decision. The 1945 California APA requires the decision to contain findings of fact and a determination of issues, together with the penalty if any.[104] The statute is supplemented by the requirement that the decision contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts.[105] The proposed law augments this recitation with the requirement that the factual and legal basis for the decision be stated as to each of the principal controverted issues. This will force the decision maker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

Precedent decisions. The proposed law requires that an agency designate as precedential a decision that contains a significant legal or policy determination that is likely to recur and maintain an index of determinations made in precedent decisions. This requirement recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although agency decisions are public records, they are inaccessible to the public except in the case of the few existing agencies that publish their decisions or designate precedent decisions.[106]

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

ENFORCEMENT OF ORDERS AND SANCTIONS

The 1945 California APA provides that disobedience of orders or obstructive or contumacious behavior in an administrative adjudication proceeding may be

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103. Gov't Code § 11526.

104. Gov't Code 11518.

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

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

The Fair Employment and Housing Commission (Gov't Code § 12935(h)), the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409), and the State Personnel Board (Gov't Code § 19582.5) designate and publish precedent decisions.

certified to the superior court for contempt proceedings.[107] This authority is continued in the proposed law.

The proposed law also seeks to curb bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. These are addressed in civil actions by monetary sanctions,[108] where experience has been favorable. The proposed law extends to the presiding officer or agency in an adjudicative proceeding the right to order monetary sanctions for such behavior. The order is subject to administrative and judicial review to the same extent as other orders in the adjudicative proceeding.

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107. Gov't Code § 11525.

108. Code Civ. Proc. § 128.5.

ADMINISTRATIVE PROCEDURE ACT

SECTION 1. Division 3.3 (commencing with Section 600) is added to Title 1 of the Government Code, to read:

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

Article 1. Short Title

§ 600. Short title

600. (a) This division, and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, constitute and may be cited as the Administrative Procedure Act.

(b) A reference in any other statute or in a rule of court, executive order, or regulation to the hearing provisions of the Administrative Procedure Act, or to Chapter 4 (commencing with Section 11370) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, means this division.

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a regulation to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. This division, as currently drafted, applies only to the administrative adjudication portion of the Administrative Procedure Act. When the division is expanded to include rulemaking, the general provisions will be reviewed for applicability.

References in section Comments in this division to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, and to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3344, 5362, 7521 (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237), from which a number of the provisions of this division are drawn.

Article 2. Definitions

§ 610.010. Application of definitions

610.010. (a) Unless the provision or context requires otherwise, the definitions in this article govern the construction of this division.

(b) The definitions in this article apply to grammatical variants of the terms defined.

Comment. Subdivision (a) of Section 610.010 restates the introductory portion of former Section 11500. Subdivision (b) is new. Under subdivision (b), for example, the definition of the term "license" in Section 610.360 to include "certificate" would extend, mutatis

mutandis, to variant forms such as "licensed", "licensee", and "licensing" ("certificated", "certificate holder", and "certificate issuance").

§ 610.190. Agency

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

Comment. Section 610.190 supersedes Section 11000 and former Section 11500(a). It is drawn from 1981 Model State APA § 1-102(1). The intent of the definition is to subject as many governmental units as possible to the provisions of this division. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council.

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

§ 610.250. Agency head

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

Comment. The first portion of Section 610.250 is drawn from 1981 Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in whom the final legal authority over its operations is vested.

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.210 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member

610.280. "Agency member" means a member of the body that constitutes the agency head and includes a person who alone constitutes the agency head.

Comment. Section 610.280 restates former Section 11500(e) ("agency member" defined).

§ 610.310. Decision

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

(b) Nothing in this section limits:

(1) The authority of an agency to make a declaratory decision pursuant to Article 2 (commencing with Section 641.210) of Chapter 1 of Part 4.

(2) The precedential effect of a decision pursuant to Article 3 (commencing with Section 649.310) of Chapter 9 of Part 4.

Comment. Section 610.310 is drawn from 1981 Model State APA § 1-102(5). The definition of decision makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. Section 13 (singular includes plural). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific identified individual or individuals. This is to be compared to a regulation, which is an agency action of general application, that is, applicable to all members of a described class. Sections 610.660 and 11342 ("regulation" defined). The primary operative effect of the definition of decision is in Part 4 (commencing with Section 641.110), governing adjudicative proceedings. This section is not intended to expand the types of cases in which an adjudicative proceeding is required; an adjudicative proceeding is required only where another statute or the constitution requires one. Section 641.110 (when adjudicative proceeding required).

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain utility company or a certain licensee, are decisions subject to the adjudication provisions of this statute. *Cf.* Federal APA § 551(4), defining all rate making as rulemaking. On the other hand, rate making and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations under this statute, subject to its rulemaking provisions. See the Comment to Section 610.660. However, some decisions may have precedential effect pursuant to Sections 649.310-649.340 (precedent decisions).

§ 610.350. Initial pleading

610.350. "Initial pleading" commencing an adjudicative proceeding includes an accusation, statement of issues, and order instituting investigation. The term also includes an amended or supplemental initial pleading as the context requires.

Comment. Section 610.350 supersedes former Section 11504.5 and portions of the first sentences of former Sections 11503 and 11504.

§ 610.360. License

610.360. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

Comment. Section 610.360 is drawn from 1981 Model State APA § 1-102(4).

§ 610.370. Local agency

610.370. "Local agency" means a county, city, district, public authority, public agency, or other political subdivision or public corporation in the State of California other than the state.

Comment. Section 610.370 is new. Local agencies are not governed by this division, subject to exceptions. See Section 612.120 (application of division to local agencies) [and judicial review provisions]. See also Section 610.770 ("state" defined).

§ 610.460. Party

610.460. "Party", in an adjudicative proceeding, includes the agency that is taking action, the person to whom the agency action is directed, and any other person named as a party or allowed to intervene in the proceeding.

Comment. Section 610.460 restates former Section 11500(b); see also 1981 Model State APA § 1-102(6). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. For provisions on intervention, see Sections 644.110-644.150.

This section is not intended to address the question whether a person is entitled to judicial review. This division deals with standing to seek judicial review in Section [to be drafted].

§ 610.520. Person

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

Comment. Section 610.520 supplements the definition of "person" in Section 17. It is drawn from 1981 Model State APA § 1-102(8). It would include the trustee of a trust or other fiduciary.

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

§ 610.660. Regulation

610.660. "Regulation" has the meaning provided in Section 11342.

Comment. Section 610.660 incorporates the definition of "regulation" found in the rulemaking provisions of the Administrative Procedure Act. Subdivision (b) of Section 11342 provides:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency. "Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

§ 610.670. Respondent

610.670. "Respondent" means a person named as a party in an adjudicative proceeding whose legal right, duty, privilege, immunity, or other legal interest is determined in the proceeding.

Comment. Section 610.670 supersedes former Section 11500(c).

§ 610.672. Responsive pleading

610.672. "Responsive pleading" to an initial pleading includes a notice of defense. The term also includes an amended or supplemental responsive pleading as the context requires.

Comment. Section 610.672 supersedes a portion of former Section 11506.

§ 610.680. Reviewing authority

610.680. "Reviewing authority" means the agency head and includes the person or body to which the agency head has delegated its review authority pursuant to Section 649.210 (availability and scope of review).

Comment. Section 610.680 is new. It is intended for drafting convenience.

§ 610.770. State

610.770. "State" means the State of California and includes any agency or instrumentality of the State of California, whether in the executive department or otherwise.

Comment. Section 610.770 supplements Section 18 ("state" defined). This division applies to state agencies other than the Legislature, the courts and judicial branch, the Governor and Governor's office, and the University of California. See Section 612.110 (application of division to state) and Comment; see also Section 610.190 ("agency" defined). It does not apply to local agencies. See Section 612.120 (application of division to local agencies); see also Section 610.370 ("local agency" defined).

Article 3. Transitional Provisions

§ 610.910. Operative date

610.910. This division becomes operative on January 1, 1996.

Comment. Section 610.910 provides a one-year deferred operative date to enable agencies to adopt any necessary regulations.

§ 610.920. Pending proceedings

610.920. Subject to Section 610.930, an adjudicative proceeding commenced before the operative date of this division is governed by the applicable law in effect at the time of commencement of the adjudicative proceeding and not by this division.

Comment. Section 610.920 speaks in terms of commencement of a proceeding. A proceeding is considered commenced for purposes of this division on issuance of an initial pleading. Section 642.310; see also Section 610.350 ("initial pleading" defined).

§ 610.930. Commencement or remand after operative date

610.930. (a) An adjudicative proceeding commenced on or after the operative date of this division is governed by this division.

(b) An adjudicative proceeding conducted on a remand from a court or another agency after the operative date of this division is governed by this division.

Comment. Subdivision (b) of Section 610.930 is an exception to the rule of 610.920 (proceeding commenced before operative date governed by prior law).

§ 610.940. Adoption of regulations

610.940. (a) Notwithstanding Section 610.910, before, on, or after the operative date of this division an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under Part 4 (commencing with Section 641.110).

(b) Subject to Section 11351:

(1) Interim regulations need not comply with the Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2, but are governed by Chapter 3.5 in all other respects.

(2) Interim regulations expire on June 30, 1997, unless earlier terminated or replaced by or readopted as permanent regulations in compliance with Articles 5 (commencing with Section 11346) and 6 (commencing with Section 11349) and all other provisions of Chapter 3.5 of Part 1 of Division 3 of Title 2,.

Comment. Subdivision (a) of Section 610.940 makes clear that an agency may act to adopt regulations under this division after enactment but before the division becomes operative. This will enable the agency to have any necessary regulations in place on the operative date.

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

Interim regulations are only valid up to 18 months, through June 30, 1997. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process.

CHAPTER 2. APPLICATION OF DIVISION

§ 612.110. Application of division to state

612.110. Except as otherwise expressly provided by statute:

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

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

(c) This division does not apply to the University of California.

Comment. Section 612.110 supersedes former Section 11501. Whereas former law specified agencies subject to the Administrative Procedure Act, Section 612.110 reverses this statutory scheme and applies this division to all state agencies unless specifically excepted. The intent of this statute is to subject as many state governmental units as possible to the provisions of this division.

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

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Note that exemptions from the division are to be construed narrowly.

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

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

Subdivision (c) recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, free of legislative control, and independent in administration of its affairs). Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 612.140.

§ 612.120. Application of division to local agencies

612.120. (a) This division does not apply to a local agency except to the extent this division is made applicable by statute.

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

Comment. Section 612.120 is drawn from 1981 Model State APA § 1-102(1). See also Section 610.370 ("local agency" defined). Local agencies are excluded because of the very different circumstances of local government units when compared to state agencies. The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage.

This division is made applicable by statute to local agencies in a number of instances, including:

[Judicial review.]

Suspension or dismissal of permanent employee by school district. Ed. Code § 44944.

Nonreemployment of probationary employee by school district. Ed. Code § 44948.5.

Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Ed. Code § 87679.

§ 612.130. [Reserved]

§ 612.140. Election to apply division

612.140. Notwithstanding any other provision of this chapter, by regulation, ordinance, or other appropriate action an agency may adopt this division or any of its provisions for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this division.

Comment. Section 612.140 is new. An agency may elect to apply this division even though the agency would otherwise be exempt (Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies)) or the particular action taken by the agency would otherwise be exempt (Section 641.110 (when adjudicative proceeding required)).

§ 612.150. Contrary express statute controls

612.150. Notwithstanding any other provision of this division, a statute expressly applicable to a particular agency prevails over a contrary provision of this division.

Comment. Section 612.150 makes clear that the general provisions of the Administrative Procedure Act are not intended to override contrary statutes of express applicability to an agency.

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

612.160. (a) To the extent necessary to avoid a denial of funds or services from the United States that would otherwise be available to the state, by executive order the Governor may suspend, in whole or in part, any provision of this division. By executive order the Governor shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.

(b) If a provision of this division is suspended pursuant to this section, the Governor shall promptly report the suspension to the Legislature. The report shall include recommendations concerning any desirable legislation that may be necessary to conform this division to federal law.

Comment. Section 612.160 is drawn from 1981 Model State APA § 1-104. *Cf.* Section 8571 (power of Governor to suspend statute in emergency). This section permits specific functions of agencies to be exempted from applicable provisions of this division only to the extent that is necessary to prevent the denial of federal funds or a loss of federal services. The test to be met is simply whether, as a matter of fact, there will actually be a loss of federal funds or a loss of federal services if there is no suspension. And the suspension is effective only so long as and to the extent necessary to avoid the contemplated loss.

The Governor is not required to issue a suspension determination merely on the receipt of a federal agency certification that a suspension is necessary. The suspension must be actually necessary. That is, the Governor must first decide that the federal agency is correct in its assertion that federal funds may *lawfully* be withheld from the state agency if that agency complies with certain provisions of this division, and that the federal agency intends to exercise its authority to withhold those funds if certain provisions of this division are followed. However, if these two requirements are met, the Governor may suspend the provision.

§ 612.170. Waiver of provisions

612.170. Except to the extent precluded by another statute or regulation, a person may waive a right conferred on the person by this division.

Comment. Section 612.170 is drawn from 1981 Model State APA § 1-105. It embodies the standard notion of waiver, which requires an intentional relinquishment of a known right. A right under this division is subject to waiver in the same way that a right under any other civil statute is normally subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily preferable. This section applies to all affected persons, whether or not parties.

CHAPTER 3. PROCEDURAL PROVISIONS

Article 1. Miscellaneous Provisions

§ 613.110. Voting by agency member

613.110. Agency members qualified to vote on a matter may vote by mail or otherwise, without being present at a meeting of the agency.

Comment. Section 613.110 restates and broadens former Section 11526 to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote as a presiding officer in an adjudicative proceeding if the agency member did not hear the evidence. Section 643.120(d)(3). It should be noted that under the Open Meeting Law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). See also Section 610.280 ("agency member" defined).

§ 613.120. Oaths, affirmations, and certification of official acts

613.120. In a proceeding under this division an agency, agency member, secretary of an agency, hearing reporter, or presiding officer has power to administer oaths and affirmations and to certify to official acts.

Comment. Section 613.120 restates former Section 11528.

Article 2. Notice

§ 613.210. Service

613.210. (a) If this division requires that an order or other writing be served on or notice given to a person, the writing or notice shall be delivered personally or sent by mail or other means pursuant to Section 613.220 to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.

(b) For the purpose of this section, if a party is required by statute or regulation to maintain an address with the agency that is sending the order or other writing, the party's last known address is the address maintained with the agency.

Comment. Section 613.210 is intended for drafting convenience. It supersedes a provision of former Section 11517(b).

§ 613.220. Mail or other delivery

613.220. Unless a provision specifies the form of mail, service or notice by mail under this division may be by first class mail, registered mail, or certified mail, or by mail delivery service or facsimile transmission or other electronic means, in the discretion of the sender.

Comment. Section 613.220 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail). Failure of a person to receive notice of a hearing sent under this section is prima facie evidence of good cause for failure to attend the hearing. Section 648.130(c) (default). Proof of service by mail may be made by any

appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a.

§ 613.230. Extension of time

613.230. Service or notice by mail or other means pursuant to Section 613.220 extends by five days any prescribed period of notice and any right or duty to do an act or make a response within a prescribed period after service or notice.

Comment. Section 613.230 is drawn from the portion of Code of Civil Procedure Section 1013 relating to service of notice by mail within California. This reverses existing law as to some administrative procedures. See, e.g., Camper v. Workers' Compensation Appeals Board, 12 Cal. Rptr. 2d 101 (1992); Southwest Airlines v. Workers' Compensation Appeals Board, 234 Cal. App. 3d 1421 (1991).

Article 3. Representation of Parties

§ 613.310. Self representation

613.310. A party may represent itself without an attorney.

Comment. Section 613.310 generalizes a provision of former Section 11509. In the case of a party that is an entity, the entity may select any of its members to represent it, and is bound by the acts of its authorized representative.

§ 613.320. Representation by attorney

613.320. A party may be represented by an attorney at the party's own expense. A party is not entitled to appointment of an attorney to represent the party at public expense.

Comment. Section 613.320 generalizes a provision of former Sections 11500(f)(3) and 11509. Qualification and discipline of attorneys that practice before administrative agencies is governed by the State Bar of California and not by the agencies. It should be noted, however, that an agency may seek the contempt sanction for misconduct by a participant in a hearing and may impose monetary sanctions on a party or attorney for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Sections 648.610 to 648.630 (enforcement of orders and sanctions).

§ 613.330. Lay representation

613.330. (a) An agency may permit a party to be represented by a person not otherwise authorized under this article.

(b) An agency may adopt regulations that impose qualification and disciplinary standards for representation under this section.

Comment. Subdivision (a) of Section 613.330 recognizes the practice of some agencies to permit lay representation. See, e.g., Labor Code § 5700 (Workers Compensation Appeals Board); Unemp. Ins. Code § 1957 (Unemployment Insurance Appeals Board); 18 CCR § 5056 (State Board of Equalization).

Under subdivision (b) an agency may regulate such matters as standards of competency and character for lay representatives, standards of conduct (including confidentiality) and disciplinary control, and procedures to bar representatives guilty of violating the standards from future representation before the agency.

§ 613.340. Authority of attorney or other representative of party

613.340. Unless the provision or context requires otherwise, any act required or permitted by this division to be performed by, and any notice required or permitted by this division to be given to, a party may be performed by, or given to, the attorney or other authorized representative of the party.

Comment. Section 613.340 is intended for drafting convenience. *Cf.* Code Civ. Proc. §§ 283, 446, 465, 1010, 1014 (authority of party or attorney in civil actions and proceedings). The section recognizes that an administrative proceeding may involve a non-attorney authorized representative of a party. Section 613.330.

CHAPTER 4. CONVERSION OF PROCEEDING

§ 614.110. Conversion authorized

614.110. (a) Subject to any applicable regulation adopted under Section 614.150, at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

(1) May convert the proceeding to another type of agency proceeding provided for by the Administrative Procedure Act if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party.

(2) Shall convert the proceeding to another type of agency proceeding provided for by the Administrative Procedure Act, if required by regulation or statute.

(b) A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding.

Comment. Section 614.110 is drawn from 1981 Model State APA § 1-107(a)-(b). A reference in this section to a "party", in the case of an adjudicative proceeding means "party" as defined in Section 610.460, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. A reference to a proceeding provided by the Administrative Procedure Act includes a rulemaking proceeding as well as an adjudicative proceeding. Section 600.

Under subdivision (a)(1), a proceeding may not be converted to another type that would be inappropriate for the action being taken. For example, if an agency elects to conduct a full hearing in a case where it could have elected a conference hearing initially, a subsequent decision to convert to a conference hearing would be appropriate under subdivision (a)(1).

The further limitation in subdivision (a)(1) that the conversion may not substantially prejudice the rights of a party must also be satisfied. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice. The concept includes both the right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. Of course, even if the rights of a party are substantially prejudiced by a conversion, the party may voluntarily waive them.

It should be noted that the substantial prejudice to the rights of a party limitation on discretionary conversion of an agency proceeding from one type to another is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual otherwise would be entitled by conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding. See Note, *The Use of*

Agency Rule-making to Deny Adjudications Apparently Required by Statute, 54 Iowa L. Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing an agency, in certain situations, to make a determination through an adjudicative proceeding that have the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding were used instead.

Subdivision (a)(2) makes clear that an agency must convert a proceeding of one type to a proceeding of another type when required by regulation or statute, even if a nonconsenting party is greatly prejudiced thereby. Under subdivision (b), however, both a discretionary and a mandatory conversion must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate opportunity to protect their interests.

Within the limits of this section, an agency should be authorized to use those procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency that desirable flexibility. For example, an agency that wants to convert a formal adjudicative hearing into a conference hearing, or a conference hearing into a formal adjudicative hearing, may do so under this provision if the conversion is appropriate, in the public interest, adequate notice is given, and the rights of no party are substantially prejudiced.

Similarly, an agency called on to explore a new area of law in a declaratory decision proceeding may prefer to do so by rulemaking. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the request of a specific party in a more limited proceeding. So long as all of the standards in this section are met, this section would authorize such a conversion from one type of agency proceeding to another.

While it is unlikely that a conversion consistent with all of the statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In an adjudication, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of a later conversion.

See also Section 613.230 (extension of time).

§ 614.120. Presiding officer

614.120. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the officer or official shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

Comment. Section 614.120 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

§ 614.130. Agency record

614.130. To the extent practicable and consistent with the rights of parties and the requirements of this division relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding.

Comment. Section 614.130 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the Administrative Procedure Act.

§ 614.140. Procedure after conversion

614.140. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

(a) Give additional notice to parties or other persons necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

(b) Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

(c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

Comment. Section 614.140 is drawn from 1981 Model State APA § 1-107(e). See also Section 613.230 (extension of time).

§ 614.150. Agency regulations

614.150. An agency may adopt regulations to govern the conversion of one type of proceeding to another. The regulations may include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

Comment. Section 614.150 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

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PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

§ 641.110. When adjudicative proceeding required

641.110. (a) An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute.

(b) Nothing in this section precludes an agency from formulating and issuing a decision by settlement, pursuant to an agreement of the parties, without conducting a proceeding under this part.

(c) Nothing in this section limits the authority of an agency to provide any appropriate procedure for a decision that is not required to be conducted under this part.

(d) Nothing in this section requires a proceeding under this part for informal factfinding or informal investigatory hearing.

Comment. Section 641.110 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision, subject to settlement negotiations. This section does not specify which type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing, a conference hearing, or an emergency decision, in accordance with other provisions of this part.

Under this part, the formal hearing procedure is standard unless circumstances permit the conference hearing or emergency decision. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 612.170 (waiver of provisions) and 646.210 (settlement). However, a person who requests agency action without expressly requesting the agency to conduct appropriate proceedings will not be regarded, on that account, as having waived the appropriate procedures; see Section 642.220 and Comment (application for decision).

This part by its terms applies only to adjudicative proceedings required by constitution or statute. See also Code Civ. Proc. § 1094.5 ("a proceeding in which by law a hearing is required to be given"). However, by regulation an agency may require a hearing for a particular decision that is not constitutionally or statutorily required, and may elect to have the hearing governed by this part. See Section 612.140 (election to apply division).

§ 641.120. When adjudicative proceeding not required

641.120. An agency need not conduct a proceeding under this part as the process for formulating and issuing a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

Comment. Section 641.120 is drawn from 1981 Model State APA § 4-101(a). The provision lists the situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court. Likewise, an agency may issue an initial pleading under this part without first conducting a proceeding to decide whether to issue the pleading. See, e.g., Sections 642.210 (initiation by agency) and 610.350 ("initial pleading" defined).

§ 641.130. Modification or inapplicability of statute by regulation

641.130. (a) Except as otherwise provided in this section, if a provision of this part authorizes an agency to modify this part or make this part inapplicable by regulation, the agency may, to that extent, adopt a regulation pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, that modifies this part or makes this part inapplicable, and the regulation so adopted, and not this part, governs the matter.

(b) A provision of this part that authorizes an agency to modify this part or make this part inapplicable by regulation is subject to a statute that governs the matter expressly.

Comment. Section 641.130 recognizes that a number of the provisions of this part may be modified or made inapplicable by an agency to suit the circumstances of the particular type of adjudication administered by it. The modification or inapplicability may occur only by

regulation duly adopted and promulgated under the Administrative Procedure Act. The modification may alter, or make inapplicable to the agency's adjudicative proceedings, the particular provision as to which modification or inapplicability is permitted.

In the interest of uniformity of procedure, the opportunity for modification or inapplicability is restricted in many cases under this part where the proceedings are conducted by Office of Administrative Hearings personnel. These cases historically have been subject to a uniform procedure under the former Administrative Procedure Act. A number of provisions do not restrict modification or inapplicability in an Office of Administrative Hearings case. See, e.g., Sections 641.210 (regulations governing declaratory decision), 647.210 (regulations making alternative dispute resolution inapplicable), 648.310 (burden of proof).

§ 641.140. Compilation of regulations governing adjudicative proceeding

641.140. (a) Regulations adopted by the Office of Administrative Hearings or by any other agency to govern an adjudicative proceeding under this part shall be compiled in one title of the California Code of Regulations relating to administrative procedure.

(b) Regulations compiled pursuant to subdivision (a) may be duplicated in a title of the California Code of Regulations that includes other regulations of the adopting agency if applicable regulations adopted by the Office of Administrative Hearings are duplicated with them or are cross-referenced by them.

Comment. Section 641.140 is intended to facilitate access by the public to the law governing administrative procedure. Just as this part consolidates administrative procedure statutes, the California Code of Regulations should consolidate administrative procedure regulations. Consolidation of regulations is particularly important since administrative procedures of an agency may be affected not only by regulations adopted by the agency but also by regulations adopted by the Office of Administrative Hearings. See, e.g., Section 641.210 (regulations governing declaratory decision adopted by OAH).

Article 2. Declaratory Decision

Comment. Article 2 (commencing with Section 641.210) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

It should be noted that an agency not governed by this article 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).

For the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation, see Gov't Code §§ 11347-11347.1.

§ 641.210. Regulations governing declaratory decision

641.210. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations under this article that are consistent with the public interest and with the general policy of this article to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following:

(1) A description of the classes of circumstances in which an agency will not issue a declaratory decision.

(2) The form, contents, and filing of an application for a declaratory decision.

(3) The procedural rights of a person in relation to an application.

(4) The disposition of an application.

(b) The regulations adopted by the Office of Administrative Hearings under this article apply in an adjudicative proceeding unless an agency adopts its own regulations to govern declaratory decisions of the agency.

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

Comment. Section 641.210 is drawn from 1981 Model State APA § 2-103(b). An agency may choose to preclude declaratory decisions altogether.

Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the application; when, how, and where an application is to be filed; whether an applicant has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like.

Regulations also should require a clear and precise presentation of facts, so that an agency will not be required to rule on the application of law to unclear or excessively general facts. The regulations should make clear that, if the facts are not sufficiently precise, the agency can require additional facts or a narrowing of the application.

Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest—which includes the efficient and effective accomplishment of the agency's mission—and the express general policy of this article to facilitate and encourage the issuance of reliable agency advice. Within these general limits, therefore, an agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory decision.

§ 641.220. Declaratory decision permissive

641.220. (a) In case of an actual controversy, a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency.

(b) The agency in its discretion may issue a declaratory decision in response to the application. The agency shall not issue a declaratory decision if the agency determines that any of the following applies:

(1) Issuance of the decision would be contrary to a regulation adopted under this article.

(2) The decision would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory decision proceeding.

(c) An application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review.

Comment. Subdivisions (a) and (b) of Section 641.220 are drawn from 1981 Model State APA § 2-103(a); subdivision (c) is new. Unlike the model act, Section 641.220 is applicable only to cases involving an actual controversy, and issuance of a declaratory decision is discretionary with, rather than mandatory for, the agency.

This section prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be indispensable—that is a "necessary"—party, and who does not consent to the determination of the matter by a declaratory decision proceeding. Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicative proceeding to which the person would be entitled.

§ 641.230. Notice of application

641.230. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application to all persons to whom notice of an adjudicative proceeding is otherwise required, and may give notice to any other person.

Comment. Section 641.230 is drawn from 1981 Model State APA § 2-103(c). See also Section 613.230 (extension of time).

§ 641.240. Applicability of rules governing administrative adjudication

641.240. (a) The provisions of this part other than this article do not apply to an agency proceeding for a declaratory decision except to the extent the agency so provides by regulation or order.

(b) Notwithstanding subdivision (a), a person who qualifies under Chapter 4 (commencing with Section 644.110) (intervention) and files a timely motion for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.

Comment. Section 641.240 is drawn from 1981 Model State APA § 2-103(d). It makes clear that persons must be allowed to intervene in a declaratory decision proceeding to the same extent they are allowed to intervene in other adjudicative proceedings under this part. It also makes clear that all the other specific procedural requirements for adjudications imposed by this part on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 641.210. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to unproven facts furnished by the applicant. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process governed by this part.

A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions. See, e.g., Sections 6250-6268 (California Public Records Act). A declaratory decision may be given

precedential effect, subject to the provisions governing precedent decisions. See Sections 649.310-649.340 (precedent decisions).

§ 641.250. Action of agency

641.250. (a) Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing:

(1) Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances.

(2) Set the matter for specified proceedings.

(3) Agree to issue a declaratory decision by a specified time.

(4) Decline to issue a declaratory decision, stating in writing the reasons for its action. Agency action under this paragraph is not subject to administrative or judicial review.

(b) A copy of the agency's action under subdivision (a) shall be served promptly on the applicant and any other party.

(c) If an agency has not taken action under subdivision (a) within 60 days after receipt of an application for a declaratory decision, the agency is considered to have declined to issue a declaratory decision on the matter.

Comment. Subdivision (a) of Section 641.250 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail or other means to the respondent's last known address. Sections 613.210 (service) and 613.220 (mail).

The decision by an agency whether or not to issue a declaratory decision is within the absolute discretion of the agency and is therefore not reviewable. Subdivision (a)(4).

§ 641.260. Declaratory decision

641.260. (a) A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion.

(b) A declaratory decision has the same status and binding effect as any other decision issued in an agency adjudicative proceeding.

Comment. Section 641.260 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

Note that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued.

Note also that the requirement in this section that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and other persons interested in the decision because of its possible precedential effect.

§ 641.310. Agency regulation required

641.310. (a) An agency may issue an emergency decision for temporary, interim relief under this article if the agency has adopted a regulation that makes this article applicable.

(b) The regulation shall do all of the following:

(1) Define the circumstances in which an emergency decision may be issued under this article.

(2) State the nature of the temporary, interim relief that the agency may order.

(3) Prescribe the procedures that will be available before and after issuance of an emergency decision under this article. The procedures may be more protective of the respondent than those provided in this article.

(c) This section does not apply to an emergency decision issued pursuant to other express statutory authority.

Comment. Section 641.310 requires specificity in agency regulations that adopt an emergency decision procedure.

§ 641.320. When emergency decision available

641.320. (a) An agency may issue an emergency decision under this article in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action.

(b) An agency may take only action under this article that is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies issuance of an emergency decision.

(c) An emergency decision issued under this article is limited to temporary, interim relief. The temporary, interim relief is subject to administrative and judicial review under Sections 641.370 and 641.380, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding pursuant to Section 641.350.

Comment. Section 641.320 is drawn from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is available only if the agency has adopted an authorizing regulation. Section 641.310.

§ 641.330. Emergency decision procedure

641.330. (a) Before issuing an emergency decision under this article, the agency shall, if practicable, give the respondent notice and an opportunity to be heard.

(b) Notice and hearing under this section may be oral or written, including notice and hearing by telephone, facsimile transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as a conference adjudicative hearing.

Comment. Section 641.330 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For

the conduct of a hearing in the manner of a conference adjudicative hearing, see Section 647.120 (procedure for conference adjudicative hearing).

By regulation the agency may prescribe the emergency notice and hearing procedure. See, e.g., State Bar Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective to the respondent than the provisions of this article. Section 641.310 (agency regulation required).

See also Section 613.230 (extension of time).

§ 641.340. Emergency decision

641.340. (a) The agency shall issue an emergency decision, including a brief explanation of the factual and legal basis and reasons for the emergency decision, to justify the determination of an immediate danger and the agency's emergency decision to take the specific action.

(b) The agency shall give notice to the extent practicable to the respondent. The emergency decision is effective when issued.

Comment. Section 641.340 is drawn from 1981 Model State APA § 4-501(c)-(d). Under this section the agency has flexibility to issue its emergency decision orally, if necessary to cope with the emergency. See also Section 613.230 (extension of time).

§ 641.350. Completion of proceedings

641.350. (a) After issuing an emergency decision under this article for temporary, interim relief, the agency shall conduct an adjudicative proceeding to resolve the underlying issues giving rise to the temporary, interim relief.

(b) The agency shall commence an adjudicative proceeding within 10 days after issuing an emergency decision under this article, notwithstanding the pendency of proceedings for administrative or judicial review of the emergency decision.

Comment. Section 641.350 is drawn from 1981 Model State APA § 5-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances.

§ 641.360. Agency record

641.360. (a) The agency record consists of any documents concerning the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(b) Unless otherwise required by regulation, statute, or federal or state constitution, the agency record need not constitute the exclusive basis for an emergency decision or for administrative or judicial review of an emergency decision under this article.

Comment. Section 641.360 is drawn from 1981 Model State APA § 4-501(f)-(g). Under this section the agency has flexibility to act on the basis of nonrecord information if necessary to cope with the emergency.

§ 641.370. Agency review

641.370. (a) On petition by the respondent, the agency head or other reviewing authority shall, on the earliest day that the business of the agency will admit of, but not later than 15 days after service of the petition on the agency, review and confirm, revoke, or modify an emergency decision issued under this article.

(b) The procedure for administrative review of the emergency decision under this section shall be the same as the procedure for administrative review of a proposed decision under Section 649.230.

Comment. Section 641.370 requires prompt administrative review of an emergency decision on petition of the respondent. Administrative review under this section is not a prerequisite for judicial review. See Section 641.380 (judicial review).

The administrative review procedure is prescribed in Section 649.230. The procedure includes decision on the record, with the possibility of supplementation by additional evidence. Section 649.230(a). Each party has an opportunity to present a written brief or oral argument, as determined by the reviewing authority. Section 649.230(b).

§ 641.380. Judicial review

641.380. (a) On issuance of an emergency decision under this article, the respondent may obtain judicial review of the decision in the manner provided in this section without prior administrative review.

(b) On confirmation or modification of an emergency decision pursuant to Section 641.370, the respondent may obtain judicial review of the decision in the manner provided in this section.

(c) Judicial review under this section shall be pursuant to Section 1094.5 of the Code of Civil Procedure, subject to the following provisions:

(1) The hearing shall be on the earliest day that the business of the court will admit of, but not later than 15 days after service of the petition on the agency.

(2) Where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(3) The relief that may be ordered on judicial review is limited to a stay of the emergency decision.

Comment. Section 641.380 is drawn from Section 11529(h) (interim suspension of medical care professional).

If the emergency decision is issued orally, a person seeking judicial review of the emergency decision must set forth in the petition for review a summary or brief description of the agency action; see Section [to be drafted]. See also Sections [to be drafted] on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

Article 4. Office of Administrative Hearings

§ 641.410. Definitions

641.410. Unless the provision or context requires otherwise, the following definitions govern the construction of this article:

(a) "Director" means the executive officer of the Office of Administrative Hearings.

(b) "Office" means the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 641.410 restates former Section 11370.1. Subdivision (b) is new.

§ 641.420. Office of Administrative Hearings

641.420. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as an administrative law judge employed by the office, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) A reference in a statute or regulation to the Office of Administrative Procedure means the Office of Administrative Hearings.

Comment. Section 641.420 restates former Section 11370.2.

§ 641.430. Administrative law judges

641.430. (a) The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges sufficient to fill the needs of the various state agencies.

(b) An administrative law judge employed by the office shall have been admitted to practice law in this state for at least five years immediately preceding the appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Subdivision (a) of Section 641.430 restates the first sentence of former Section 11370.3 and the second sentence of former Section 11502.

Subdivision (b) restates the third sentence of former Section 11502.

§ 641.440. Hearing personnel

641.440. The director shall appoint hearing reporters and such other technical and clerical personnel as may be required to perform the duties of the office.

Comment. Section 641.440 restates the second sentence of former Section 11370.3, deleting the reference to "hearing officers" and the "shorthand" hearing reporter limitation.

§ 641.450. Assignment of administrative law judges

641.450. (a) The director shall assign an administrative law judge employed by the office for an adjudicative proceeding except a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the office.

(b) On request from an agency, the director may assign an administrative law judge employed by the office for an adjudicative proceeding that by statute is

exempt from the requirement that it be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge employed by the office or other employee assigned under this section is considered an employee of the office and not of the agency to which the administrative law judge or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge employed by the office may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 641.480.

Comment. Subdivision (a) of Section 641.450 supersedes the first part of the third sentence of former Section 11370.3. Adjudicative proceedings exempted by statute from the requirement that they be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

[All proceedings exempt under existing law.]

Subdivision (b) restates the second part of the third sentence of former Section 11370.3.

Subdivision (c) restates the third part of the third sentence of former Section 11370.3.

Subdivision (d) restates the fifth sentence of former Section 11370.3.

Subdivision (e) restates the sixth sentence of former Section 11370.3.

§ 641.460. Regulations

641.460. The office may adopt regulations for all of the following purposes:

(a) To establish further qualifications of administrative law judges employed by the office.

(b) To establish procedures for agencies to request and for the director to assign administrative law judges employed by the office.

(c) To establish procedures and adopt forms, consistent with this part and other law, to govern administrative law judges employed by the office and to govern adjudicative proceedings under this division to the extent expressly provided by statute.

(d) To establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges employed by the office.

(e) To facilitate the performance of the responsibilities conferred on the office by this part.

Comment. Section 641.460 is drawn from 1981 Model State APA § 4-301(e).

§ 641.470. Cost of operation

641.470. The total cost to the state of maintaining and operating the office shall be determined and collected by the Department of General Services in advance or on such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Section 641.470 restates former Section 11370.4.

§ 641.480. Study of administrative adjudication

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

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

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

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

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

Comment. Section 641.480 restates former Section 11370.5 to the extent it related to the subject of administrative adjudication, with the addition of language protecting confidentiality of records. See also Section 610.190 ("agency" defined). For authority of the Office of Administrative law to study administrative rulemaking, see Section 11340.4.

CHAPTER 2. COMMENCEMENT OF PROCEEDING

Article 1. General Provisions

§ 642.110. Provisions may be modified or made inapplicable by regulation

642.110. By regulation an agency may modify the provisions of this chapter, or make the provisions of this chapter inapplicable, in an adjudicative proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 642.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Article 2. Initiation

§ 642.210. Initiation by agency

642.210. An agency may initiate an adjudicative proceeding with respect to a matter within the agency's jurisdiction.

Comment. Section 642.210 is drawn from 1981 Model State APA § 4-102(a). It prevents any implication that Section 642.220 (application for decision) sets forth the exclusive circumstances under which an agency may initiate an adjudicative proceeding.

§ 642.220. Application for decision

642.220. (a) Any person may make an application for an agency decision.

(b) An application for an agency decision includes an application for the agency to initiate an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding.

Comment. Section 642.220 is drawn from 1981 Model State APA § 4-102(c). It ensures that a person who requests an agency to issue a decision, but does not expressly request the agency to conduct an adjudicative proceeding, will not on that account be regarded as having

waived the right to any available adjudicative proceeding. This assurance may be especially important to protect unrepresented parties.

In addition, this provision clarifies that the term "application", as used in this part, may refer either to the request for the agency to issue a decision, or to the request for the agency to conduct an appropriate adjudicative proceeding, or both, as the context suggests. Similarly, the term "applicant" may be used with either or both meanings.

§ 642.230. Agency action on application

642.230. An agency shall initiate an adjudicative proceeding on application of a person for an agency decision for which a hearing or other adjudicative proceeding is required by Section 641.110 (when adjudicative proceeding required), unless any of the following provisions applies:

(a) The agency lacks jurisdiction of the subject matter.

(b) Resolution of the matter requires the agency to exercise discretion within the scope of Section 641.120 (when adjudicative proceeding not required).

(c) A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding and, in the exercise of discretion, the agency has determined not to conduct an adjudicative proceeding.

(d) Resolution of the matter does not require the agency to issue a decision that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

(e) The matter is not timely submitted to the agency.

(f) The matter is not submitted in a form substantially complying with an applicable statute or regulation.

Comment. Section 642.230 is drawn from 1981 Model State APA § 4-102(b). It supersedes any implication that may have been found under former Sections 11503 and 11504 that a third party has a right to demand that an agency conduct a proceeding. There may, however, be other specific statutes that provide initiation rights to third parties. See, e.g., Bus. & Prof. Code § 24203 (accusations against liquor licensees filed by various public officials).

Section 642.230 requires an agency to initiate an adjudicative proceeding on application of any person for an agency decision within the scope of this part. If the agency determines that any of the exceptions provided in this section is applicable, the agency may deny the application without commencing an adjudicative proceeding, or the agency may, in its discretion under Section 642.210, commence an adjudicative proceeding although under no compulsion to do so. For the time within which an agency must act with respect to an application, see Section 642.240 (time for agency action). In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to initiate an adjudicative proceeding.

The introductory clause reinforces the point that this part only applies where a hearing is statutorily or constitutionally required. See Section 641.110 (when adjudicative proceeding required).

Subdivision (b) relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion to initiate or not to initiate an investigation, prosecution, adjudicative proceeding, or other proceeding before the agency or another agency or a court. For example, a person who submits a complaint about a licensee cannot compel the licensing agency to commence an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to commence or not to commence an adjudicative proceeding in each

case. The agency's decision whether or not to commence an adjudicative proceeding need not itself be preceded by an adjudicative proceeding. Section 641.120 (when adjudicative proceeding not required).

Subdivision (c) does not and could not authorize an agency to deprive any person of procedural rights guaranteed by the constitution. If a statute purporting to authorize an agency to dispense with an adjudicative proceeding conflicts with constitutional guarantees, the agency may exercise its discretion under Section 642.210 to conduct an adjudicative proceeding even though the statute does not require it or, if the agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give appropriate relief.

Subdivision (d) closely relates to the definition of "decision" in Section 610.310 as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person". If the applicant does not request agency action that would fit within the definition of a "decision", the agency need not commence an adjudicative proceeding. For example, if a person asks the agency to commence an adjudicative proceeding for the purpose of adopting a rule, or of carrying out a housekeeping function that affects nobody's legal rights, the request would be subject to denial because the requested agency action would not be a "decision". Subdivision (d) provides that an agency need not commence an adjudicative proceeding unless *the applicant's* legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested decision. Interpretation of these terms, ultimately a matter for the courts, will clarify the range of situations in which this part entitles a person to require an agency to initiate an adjudicative proceeding. The availability of various types of adjudicative proceedings may persuade courts to develop a more hospitable approach toward applicants than would have been feasible or practicable if the only available type of adjudicative proceeding were a trial-type, formal hearing.

§ 642.240. Time for agency action

642.240. (a) The time limits in this section apply except to the extent they are inconsistent with limits established by another statute for any stage of the proceeding or with limits established by the agency by regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) Within 30 days after receipt of an application for an agency decision, the agency shall examine the application, notify the applicant of any apparent error or omission, request any additional information from the applicant or another source that the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of an agency member or employee who may be contacted regarding the application. Nothing in this subdivision limits the authority of the agency to request additional information more than 30 days after receipt of an application for an agency decision, but such a request and any response to the request do not extend the time provided in subdivision (c).

(c) Within 90 days after the later of (i) receipt of an application for an agency decision or (ii) receipt of the response to a timely request made by the agency under subdivision (b), the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part. The agency shall serve on the applicant a written notice of any denial, which shall include a brief

statement of the agency's reasons and of any administrative review available to the applicant.

(2) Commence an adjudicative proceeding.

Comment. Section 642.240 is drawn from 1981 Model State APA § 4-104(a). See also Bus. & Prof. Code §§ 485, 487 (procedure on denial of license application). It establishes time limits and notification requirements for agency action on applications for decisions other than declaratory decisions. The effect of this section, when combined with Section 641.120, is that this part imposes no procedures on the agency when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of denial, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this part, are subject to judicial review as a final agency action under Section [to be drafted].

Failure of an agency to meet the time limits provided in this section does not entitle the applicant to issuance of a license or other action sought in the application. The applicant's remedy for the agency's failure is judicial action by writ of mandate to compel appropriate agency action.

By regulation an agency whose hearings are not required to be conducted by an administrative law judge employed by the Office of Administrative Hearings may modify the provisions of this section or make the provisions of this section inapplicable to tailor the procedures to suit its individual needs. The agency may, for example, provide shorter times for emergencies, and the like. Section 642.110.

It should be noted that the time limits provided in this section are subject to contrary statutes that govern particular proceedings. See, e.g., Bus. & Prof. Code §§ 10086 (hearing must commence within 30 days after request to Real Estate Commissioner); 11019 (hearing must commence within 15 days after request to Real Estate Commissioner).

See also Section 613.230 (extension of time).

Article 3. Pleadings

§ 642.310. Proceeding commenced by initial pleading

642.310. An adjudicative proceeding is commenced by issuance of an initial pleading by an agency.

Comment. Section 642.310 supersedes portions of the first sentences of former Sections 11503 and 11504. See also Section 610.350 ("initial pleading" includes accusation and statement of issues). Included among the issues that may be adjudicated are whether a right, authority, license, or privilege should be granted, issued, or renewed on application of a person, or revoked, suspended, limited, or conditioned on initiation of an agency. Sections 642.210-642.240 (initiation of proceeding).

It should be noted that by regulation an agency may require preparation of the initial pleading by another party or may permit a denied application to serve as the initial pleading. In such a case, verification is required unless by regulation the agency provides otherwise. Section 642.320 (contents of initial pleading).

§ 642.320. Contents of initial pleading

642.320. (a) The initial pleading shall be in writing and shall include all of the following:

(1) A statement that sets forth in ordinary and concise language the issues to be determined in the adjudicative proceeding, including any acts or omissions with which the respondent is charged and any particular matters that have come to the

attention of the agency and that would justify a decision against the respondent. The statement shall be sufficient to enable the respondent to prepare a case.

(2) A specification of the statutes and regulations that are at issue in the adjudicative proceeding, including any the respondent is alleged to have violated or with which the respondent must show compliance by producing proof at the hearing. The specification shall not consist merely of issues or charges phrased in the language of the statutes and regulations.

(3) The remedy sought.

(b) The initial pleading shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. Section 642.320 supersedes portions of former Sections 11503 and 11504. The verification requirement would apply where an agency permits preparation of the initial pleading by another party, unless the requirement is modified or made inapplicable by regulation. *Cf.* Comment to Section 642.310 (proceeding commenced by initial pleading).

§ 642.330. Service of initial pleading and other information

642.330. (a) On issuance of the initial pleading, the issuing agency shall serve on the respondent all of the following:

(1) A copy of the initial pleading.

(2) A statement to the respondent in the form provided in subdivision (b).

(3) A form of responsive pleading that acknowledges service of the initial pleading and constitutes a responsive pleading under Section 642.350.

(4) A copy of Chapter 5 (commencing with Section 645.110) (discovery).

(5) Any other information the agency determines is appropriate.

(b) The statement to the respondent shall be substantially in the following form:

> You may request a hearing on this matter. If you do not request a hearing, [here insert name of agency] may proceed on the initial pleading without a hearing. Your failure to request a hearing does not preclude you from serving on [here insert name of agency] a statement by way of mitigation.
>
> In order to request a hearing, you or a person acting on your behalf must sign either the enclosed form entitled Responsive Pleading or your own form of responsive pleading as provided in Section 642.350 of the Government Code, and deliver or send it to: [here insert name and address of agency]. You must deliver or send the responsive pleading within 15 days after the initial pleading was personally served on you, or within 20 days after the initial pleading was sent to you.
>
> You may, but need not, be represented by an attorney or other authorized representative at any or all stages of this proceeding.
>
> To request the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 645.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

(c) Notwithstanding Sections 613.210 (service) and 613.220 (mail), service under this section shall be by certified or registered mail or by personal delivery. Service may be by first class mail or other means pursuant to Section 613.220 to initiate an adjudicative proceeding before an independent appeals board or other independent agency if the respondent has previously appeared in the same or a related proceeding.

Comment. Section 642.330 is drawn from former Sections 11504 and 11505. Service under this section is limited to personal service or registered or certified mail; first class mail is not permissible except in cases before an appeals board such as the Unemployment Insurance Appeals Board, where the respondent has previous involvement in the controversy and initial service provisions are therefore unnecessary.

Service is made by personal delivery or by other appropriate means to the respondent's last known address. Sections 613.210 (service) and 613.220 (mail). For this purpose, the respondent's last known address is the address maintained with the agency, if the respondent is required to maintain an address with the agency. Section 613.210(b).

An agency that fails properly to serve the respondent does not acquire jurisdiction unless the respondent makes a general appearance. Section 642.340 (jurisdiction over respondent).

The form of responsive pleading may be a post card or other form provided by the agency. Signing and returning the form by the respondent acknowledges service of the initial pleading and constitutes a responsive pleading under Section 642.350.

The respondent may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

§ 642.340. Jurisdiction over respondent

642.340. The agency shall make no decision adversely affecting the rights of the respondent unless the respondent has been served as provided in this article or has responded or otherwise appeared.

Comment. Section 642.340 restates a portion of former Section 11505(c).

§ 642.350. Responsive pleading

642.350. (a) Within 15 days after service of the initial pleading, or a later time that the agency in its discretion permits, the respondent may serve a responsive pleading on the agency.

(b) A responsive pleading shall be in writing signed by the respondent and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(c) A responsive pleading may do one or more of the following:

(1) Request a hearing.

(2) Object to the initial pleading on the ground that it does not state an act or omission or other ground on which the agency may proceed.

(3) Object to the form of the initial pleading on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a case. Unless objection is taken under this paragraph, all further objections to the form of the initial pleading are considered waived.

(4) Admit the initial pleading in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the initial pleading on the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation adopted by another agency affecting substantive rights.

(7) Raise such other matter as may be appropriate.

(c) The respondent is entitled to a hearing on the merits if the respondent serves a responsive pleading on the agency under subdivision (a). A responsive pleading constitutes a specific denial of all parts of the initial pleading not expressly admitted.

(d) Failure to serve a responsive pleading on the agency under subdivision (a) is a default subject to the right of the respondent to serve a statement by way of mitigation under Section 648.130 (default).

Comment. Section 642.350 is drawn from former Section 11506. See also Sections 613.340 (authority of attorney or other representative of party), 613.210 (service), 642.360 (amended and supplemental pleadings). If service is by mail or other means of delivery, the respondent has 20 days after the date of sending in which to respond. Section 613.230 (extension of time).

The references to a "hearing" include a conference hearing where appropriate.

§ 642.360. Amended and supplemental pleadings

642.360. (a) At any time before commencement of the hearing a party may amend or supplement a pleading. After commencement of the hearing a party may amend or supplement a pleading in the discretion of the presiding officer, including an amendment to conform to proof at the hearing.

(b) An amended or supplemental pleading shall be served on all parties.

(c) If an amended or supplemental pleading presents a new issue, the opposing party shall be given a reasonable opportunity to prepare a case. Any new matter is considered controverted without further pleading, and any objection to the amended or supplemental pleading may be made orally and shall be noted in the record.

Comment. Section 642.360 supersedes former Sections 11507 and Section 11516. It is broadened to permit amendment of responsive pleadings as well as initial pleadings, but is narrowed so that an amendment is subject to the presiding officer's discretion after commencement of the hearing. *Cf.* Code Civ. Proc. § 464 (supplemental pleading alleges facts material to case occurring after former pleading).

Article 4. Setting Matter for Hearing

§ 642.410. Time and place of hearing

642.410. (a) The agency initiating the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be held before expiration of the time within which the respondent is entitled to respond.

(b) The agency shall consult the Office of Administrative Hearings and the time and place of hearing are subject to the availability of its staff, except for an adjudicative proceeding that by statute is exempt from the requirement that it be

conduced by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 642.410 is drawn from former Sections 11508 and 11509.

§ 642.420. Continuances

642.420. (a) The presiding officer may grant a continuance for good cause.

(b) A party shall apply for a continuance within 15 days after the party discovered or reasonably should have discovered the event or occurrence that establishes good cause for the continuance. A continuance may be granted for good cause after the 15 days have elapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

Comment. Section 642.420 supersedes former Section 11524. The section vests continuance decisions in the presiding officer, whether or not employed by the Office of Administrative Hearings, and revises the times from 10 working days to 15 calendar days. The section eliminates the provision for special judicial review of denial of a continuance request; this matter is subject to judicial review at the same time and in the same manner as other disputed matters. Section [to be drafted].

§ 642.430. Venue and change of venue

642.430. (a) The hearing shall be held in the following location:

(1) City and County of San Francisco, if the transaction occurred or the respondent resides or is located within the First or Sixth Appellate District.

(2) County of Los Angeles, if the transaction occurred or the respondent resides or is located within the Second Appellate District or within the Fourth Appellate District other than the County of Imperial or San Diego.

(3) County of Sacramento, if the transaction occurred or the respondent resides or is located within the Third or Fifth Appellate District.

(4) County of San Diego, if the transaction occurred or the respondent resides or is located within the Fourth Appellate District in the County of Imperial or San Diego.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence or location, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides or is located.

(3) The parties may select any place within the state by agreement.

(c) The respondent may move for, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing.

Comment. Section 642.330 is drawn from former Section 11508. By regulation an agency may modify the provisions of this section, or make the provisions of this section inapplicable, if the hearing is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 642.110.

Subdivision (a)(4) recognizes creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) is new. It codifies practice authorizing a motion for change of venue. See 1 Ogden, Cal. Public Agency Prac. § 33.02[4][d] (1991). Grounds for change of venue include selection of an improper county and promotion of convenience of witness and ends of justice. *Cf.* Code Civ. Proc. § 397.

§ 642.440. Notice of hearing

642.440. (a) The agency shall serve a notice of hearing on all parties at least 15 days before the hearing.

(b) The notice of hearing shall be substantially in the following form and may include other information:

> A hearing will be held before [here insert name of agency] at [here insert place of hearing] on [here insert date of hearing], at the hour of, on the charges made or issues stated in the initial pleading served on you.
>
> The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the presiding officer within 15 days after you discover the good cause. Failure to notify the presiding officer within 15 days will deprive you of a postponement.
>
> You may be present at the hearing. You have the right to be represented by an attorney or other authorized representative at your own expense. You are not entitled to the appointment of an attorney or other authorized representative to represent you at public expense. You are entitled to represent yourself without an attorney.
>
> Unless the hearing is a conference adjudicative hearing:
>
> You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to [here insert appropriate office of agency] or the presiding officer, or by your attorney of record.

Comment. Section 642.440 is drawn from former Sections 11509 and 11505, with an increase in time from 10 to 15 days. If notice of hearing is sent by mail or other means, it must be sent at least 20 days before the hearing date. Section 613.230 (extension of time). Proof of service by mail may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a.

The respondent may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

For limitations on procedures in a conference adjudicative hearing, see Section 647.120 (procedure for conference adjudicative hearing).

CHAPTER 3. PRESIDING OFFICER

Article 1. Designation of Presiding Officer

§ 643.110. Designation of presiding officer by agency head

643.110. Except as otherwise provided by statute, any one or more of the following persons may, in the discretion of the agency head, be the presiding officer:

(a) The agency head.

(b) An agency member.

(c) An administrative law judge assigned by the director of the Office of Administrative Hearings.

(d) Another person designated by the agency head.

Comment. Section 643.110 is drawn from 1981 Model State Act § 4-202(a). It uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the persons may serve as spokesperson, but all persons collectively are regarded as the presiding officer. See also Section 13 (singular includes plural).

Assignment of an administrative law judge under subdivision (c) is pursuant to Section 641.450 (assignment of administrative law judges). Discretion of the agency head to designate "another person" to serve as presiding officer under subdivision (d) is subject to Section 643.320 (separation of functions).

One consequence of determining who shall preside is provided in Sections 649.110 and 649.210. Under Section 649.110 (proposed and final decisions), if the agency head presides, the agency head shall issue a final decision; if any other presiding officer presides, a proposed decision must be issued. Section 649.210 (availability and scope of review) establishes the general appealability of proposed and final decisions to the agency head.

For a statutory exception to the right of the agency head to designate the presiding officer, see Section 643.120 (OAH administrative law judge as presiding officer).

§ 643.120. OAH administrative law judge as presiding officer

643.120. Unless an adjudicative proceeding is exempt by statute from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, the following provisions apply:

(a) The presiding officer shall be an administrative law judge assigned by the director of the Office of Administrative Hearings.

(b) In the discretion of the agency head, the administrative law judge may hear the case alone or the agency head may hear the case with the administrative law judge.

(c) If the administrative law judge hears the case alone, the administrative law judge shall exercise all powers relating to the conduct of the hearing.

(d) If the agency head hears the case with the administrative law judge:

(1) The administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency head on matters of law.

(2) The agency head shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

(3) The agency head shall issue a final decision as provided in Section 649.110. The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency head. No agency member who did not hear the evidence shall vote.

(4) Notwithstanding any other provision of this subdivision, if after the hearing has commenced a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall deliver a proposed decision to the agency head as provided in Section 649.110.

Comment. Section 643.120 restates the substance of the first sentence of former Section 11512(a). It recognizes that a number of statutes exempt hearings from the requirement that the hearings be conducted by an administrative law judge employed by the Office of Administrative Hearings. Assignment of an administrative law judge under subdivision (a) is governed by Section 641.450 (Office of Administrative Hearings).

Subdivision (b) restates the second sentence of former Section 11512(a).

Subdivision (c) restates the second sentence of former Section 11512(b).

Subdivisions (d)(1) and (2) restate the first sentence of former Section 11512(b). Subdivision (d)(3) restates former Section 11517(a) with the addition of a sentence that makes clear the agency head may issue a final decision in the proceeding. Subdivision (d)(4) restates former Section 11512(e).

§ 643.130. Substitution of presiding officer

643.130. (a) If a substitute is required for a presiding officer who is disqualified or is unavailable for any other reason, the substitute shall be appointed by the appointing authority.

(b) A substitute appointed under this section is subject to the same qualifications as an original presiding officer.

(c) An action taken by a substitute appointed under this section is as effective as if taken by an original presiding officer.

Comment. Section 643.130 is drawn from 1981 Model State APA § 4-202(e)-(f). This provision also applies to the reviewing authority. Section 649.230 (review procedure). The section only applies where a substitute is "required", i.e., is necessary because the presiding officer is otherwise unable to act, for example because of lack of a quorum.

In cases where there is no appointing authority, e.g., the presiding officer is an elected official, this section provides for no appointment of a substitute, and the "rule of necessity" applies. *Cf.* former Section 11512(c) (no agency member subject to disqualification if disqualification would prevent existence of quorum qualified to act).

Article 2. Disqualification

§ 643.210. Grounds for disqualification of presiding officer

643.210. (a) The presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this part.

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

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

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

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

(4) Is subject to the authority, direction, or discretion of or is assisted or advised by a person who has served as, investigator, prosecutor, or advocate in the proceeding, to the extent those circumstances are not prohibited by Article 3 (commencing with Section 643.310) (separation of functions).

(c) By regulation an agency may provide for peremptory challenge of the presiding officer in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 643.210 supersedes former Section 11512(c). Section 643.210 applies whether the presiding officer serves alone or with others. Other causes of disqualification provided in this part include receipt of ex parte communications. Section 648.550 (disqualification of presiding officer). For separation of functions requirements, see Section 643.320. This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivision (a) specifies grounds for disqualification drawn from 1981 Model State APA § 4-202(b).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding does not in itself disqualify the presiding officer under Section 643.210, disqualification in such a situation might occur under Section 643.320 (separation of functions).

Subdivision (c) codifies existing practice. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

§ 643.220. Self disqualification

643.220. (a) The presiding officer shall disqualify himself or herself and withdraw from a proceeding in which there are grounds for disqualification.

(b) The parties may waive disqualification under subdivision (a) by a writing that recites the basis for disqualification. The waiver is effective only when signed by all parties, accepted by the presiding officer, and included in the record.

Comment. Section 643.220 is drawn from the first sentence of former Section 11512(c) and from Code of Civil Procedure Section 170.3(b)(1). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

A waiver of disqualification under subdivision (b) is a voluntary relinquishment of rights by the parties. It should be noted that the waiver may be signed by the attorney or other authorized representative of a party. Section 613.340 (authority of attorney or other representative of party). The presiding officer need not accept a waiver; the waiver is effective only if accepted by the presiding officer.

§ 643.230. Procedure for disqualification of presiding officer

643.230. (a) A party may request disqualification of the presiding officer by filing an affidavit within 10 days after receipt of notice of the presiding officer's identity or within 10 days after discovering facts establishing grounds for disqualification, whichever is later. The affidavit shall state with particularity the grounds of the request for disqualification of the presiding officer.

(b) The presiding officer whose disqualification is requested shall determine whether to grant the request. If the presiding officer is more than one person, the person whose disqualification is requested shall not participate in the determination. The agency may by regulation provide for determination of a disqualification request by a person other than the presiding officer whose disqualification is requested.

(c) A determination not to grant the disqualification request shall state facts and reasons for the determination.

(d) Unless by regulation the agency provides for administrative review at an earlier time, the determination of the disqualification request is subject to administrative and judicial review at the same time, in the same manner, and to the same extent as other determinations of the presiding officer in the proceeding.

Comment. Section 643.230 supersedes former Section 11512(c). It is drawn from 1981 Model State APA § 4-202(c)-(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Article 3. Separation of Functions

§ 643.310. Adoption of stricter limitations

643.310. Nothing in this article limits the authority of an agency by regulation to adopt limitations in addition to or greater than the limitations in this article.

Comment. Section 643.310 allows an agency to expand but not to diminish separation of functions requirements.

§ 643.320. When separation required

643.320. (a) Except to the extent provided in Section 643.330:

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person who is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer in the same proceeding.

(b) This section does not apply to issuance, denial, revocation, or suspension of a driver's license pursuant to Division 6 (commencing with Section 12500) of the Vehicle Code.

Comment. Section 643.320 is drawn from 1981 Model State APA § 4-214(a)-(b). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

In subdivision (a), the term "a person who has served" in any of the capacities mentioned is intended to mean a person who has personally carried out the function, and not one who has 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. For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by the limitations of subdivision (a).

The separation of functions requirements of subdivision (a) are not limited to agency personnel, but include participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the reviewing authority at the administrative review level, except with respect to settlement matters. Section 643.330 (b)(4).

While subdivision (a) precludes an adversary from assisting or advising a presiding officer, it does not preclude a presiding officer from assisting or advising an adversary. Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed.

Subdivision (a)(2), unlike 1981 Model State APA § 4-214(b), does not preclude a subordinate of an adversary from assisting or advising the presiding officer. However, by regulation an agency may adopt a more stringent separation of functions requirement. Section 643.310.

Subdivision (b) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Although subdivision (b) makes separation of powers requirements inapplicable in drivers' licensing cases, the separation of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus operation certificate hearings.

§ 643.330. When separation not required

643.330. (a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise the presiding officer in the same proceeding.

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

(3) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding may advise the presiding officer concerning a settlement proposal advocated by the person in the same proceeding.

(4) A person who has served as investigator or advocate in an adjudicative proceeding may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character and the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.

(5) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the presiding officer concerning a technical issue

involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice.

(b) Nothing in this section authorizes a communication between the presiding officer and another person to the extent the communication is otherwise prohibited by Section 648.520.

Comment. Section 643.330 is drawn from 1981 Model State APA § 4-214(c)-(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivisions (a)(1) and (2), 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 648.520, which prohibits certain ex parte communications. The policy issues in Section 648.520 regarding ex parte communication between two persons differ from the policy issues in subdivisions (a)(1) and (2) 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. Subdivision (b); Section 648.550. See also Section 643.210 (grounds for disqualification of presiding officer).

Subdivision (a)(3), permitting an investigator, prosecutor, or advocate to advise the presiding officer regarding a settlement proposal, is limited to advice in support of the proposed settlement; the insider may not use the opportunity to argue against a previously agreed-to settlement. *Cf.* Alhambra City and High School Districts (1986) PERB Decision No. 560 [10 PERC ¶ 17046]. Insider access is permitted here in support of public policy favoring settlement, and because of the consonance of interest of the parties in this situation.

Subdivisions (a)(4) and (5) apply to nonprosecutorial types of administrative adjudications, such as individualized ratemaking and power plant siting decisions. The subdivisions recognize that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the separation of functions requirements, given limited staffing and personnel. Subdivision (a)(4) excuses compliance with the separation of functions requirements in such a case if more than one year has elapsed between the contrary functions. Subdivision (a)(5) recognizes such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer under standard separation of functions doctrine.

§ 643.340. Staff assistance for presiding officer

643.340. A presiding officer may receive assistance from a staff assistant if the assistant does not (1) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (2) furnish, augment, diminish, or modify the evidence in the record.

Comment. Section 643.340 is drawn from 1981 Model State APA § 4-213(b). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

CHAPTER 4. INTERVENTION

§ 644.110. Intervention

644.110. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(a) The motion is submitted in writing to the presiding officer, with copies served on all parties named in the notice of the hearing.

(b) The motion is made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference.

(c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities may be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

(d) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

Comment. Section 644.110 is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (c) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities may be substantially affected by the proceeding". However, subdivision (d) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings on the legal rights, etc. of the applicant for intervention (subdivision (c)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (d)).

§ 644.120. Conditions on intervention

644.120. If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceedings, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(b) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(d) Limiting or excluding the intervenor's participation in settlement negotiations.

Comment. Section 644.120 is drawn from 1981 Model State APA § 4-209(c). This section, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceeding, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceeding to unreasonably burdensome or repetitious presentations.

§ 644.130. Order granting, denying, or modifying intervention

644.130. (a) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying each motion for intervention, specifying any conditions, and briefly stating the reasons for the order.

(b) The presiding officer may modify the order at any time, stating the reasons for the modification.

(c) The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant for intervention and to all parties.

Comment. Section 644.130 is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this section is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding.

§ 644.140. Intervention determination nonreviewable

644.140. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's sole discretion based on the knowledge and judgment of the presiding officer at that time, and the presiding officer's determination is not subject to administrative or judicial review.

Comment. Section 644.140 is new.

§ 644.150. Participation short of intervention

644.150. Nothing in this chapter precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 5 (commencing with Section 648.510) of Chapter 8 (ex parte communications).

Comment. Section 644.150 recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

CHAPTER 5. DISCOVERY

Article 1. General provisions

§ 645.110. Application of chapter

645.110. (a) Subject to subdivision (b), the provisions of this chapter provide the exclusive right to and method of discovery in a proceeding governed by this part.

(b) By regulation an agency may modify the provisions of this chapter, or make the provisions of this chapter inapplicable, in a proceeding that by statute is

exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 645.110 supersedes former Section 11507.5 and broadens it to apply to all adjudicative proceedings covered by this part. Under subdivision (a), the civil discovery provisions of the Code of Civil Procedure are inapplicable to this part except to the extent a provision of this part incorporates them.

Subdivision (b) does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, or where there is a specifically applicable statute that governs the matter such as in the case of workers' compensation or Insurance Commission ratemaking. Regulations adopted by an agency under authority of subdivision (b) could provide for additional discovery or could limit discovery or eliminate the right of discovery completely.

§ 645.120. Discovery of evidence of sexual conduct

645.120. (a) This section is intended only to limit the scope of discovery. It is not intended to affect the methods of discovery allowed under this chapter.

(b) In a proceeding under subdivision (i) or (j) of Section 12940 or under Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided in Section 648.470 (evidence of sexual conduct).

Comment. Section 645.120 supersedes subdivision (g) of former Section 11507.6.

§ 645.130. Depositions

645.130. (a) A party may, by petition as provided in this section, request an order that the testimony of a material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions.

(b) The petition shall be verified, shall request an order that the witness appear and testify before an officer named in the petition for that purpose, and shall state all of the following:

(1) The nature of the pending proceeding.

(2) The name and address of the witness whose testimony is requested.

(3) A showing of the materiality of the testimony of the witness.

(4) A showing that the witness will be unable or can not be compelled to attend the hearing.

(c) The applicant shall serve notice of hearing and a copy of the petition on the other parties to the proceeding at least 10 days before the hearing.

(d) If the witness resides within the state, the petition shall be made to, and an order may be issued by, the presiding officer or, if a presiding officer has not been appointed, the agency. If the witness resides without the state, the petition shall be made to, and an order may be issued by, the agency, which shall obtain an order of the superior court to that effect either in the county where the proceeding is conducted or the County of Sacramento.

Comment. Section 645.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition where the witness resides within the state. The section also requires notice to the other parties of the hearing on the petition. See also Section 613.230 (extension of time).

Article 2. Discovery

§ 645.210. Time and manner of discovery

645.210. (a) After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after service on the party of the initial pleading or within 15 days after service on the party of an additional or supplemental pleading, is entitled to discovery to the extent provided in this article.

(b) Notwithstanding a party's compliance with a request for discovery under this article, the party has a continuing duty to disclose and make available to the requesting party any supplemental matter within the scope of the request for discovery immediately on obtaining knowledge, possession, custody, or control of the matter.

Comment. Subdivision (a) of Section 645.210 supersedes the introductory portion of the first paragraph of former Section 11507.6. Subdivision (b) is new. For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

§ 645.220. Discovery of witness list

645.220. A party requesting discovery under this article is entitled to obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

Comment. Section 645.220 supersedes clause (1) of the first paragraph of former Section 11507.6. For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

§ 645.230. Discovery of statements, writings, and reports

645.230. (a) As used in this section, "statement" includes all of the following:

(1) A written statement by a person signed or otherwise authenticated by the person.

(2) A stenographic, mechanical, electrical, or other recording or transcript of an oral statement by a person.

(3) A written report or summary of an oral statement by a person.

(b) A party requesting discovery under this article is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of another party:

(1) A statement of a witness then proposed to be called by the party or of any other person, including a party or the complainant, having personal knowledge of the acts, omissions, or events that are the basis for the proceeding.

(2) All writings, including, but not limited to, reports of mental, physical, and blood examinations, and things that the party then proposes to offer in evidence.

(3) Any other writing or thing that is relevant.

(4) An investigative report made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report (i) contains the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, or (ii) reflects matters perceived by the investigator in the course of the investigation, or (iii) contains or includes by attachment any statement or writing or summary of a statement or writing described in this section.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Comment. Section 645.230 supersedes clause (2) of the first paragraph of, subdivisions (a)-(f) of, and the second and third paragraphs of, former Section 11507.6. See also Section 610.350 ("initial pleading" defined).

Subdivision (b)(1) generalizes specific provisions of former law that allowed discovery of both (1) a statement of a person, other than the respondent, named in the initial pleading, when it is alleged that the act or omission of the respondent as to the person is the basis for the adjudicative proceeding, and (2) a statement pertaining to the subject matter of the proceeding made by a party to another party or person. This generalization is for drafting convenience and is not intended to repeal any authority for discovery that existed under former law; that authority is continued in the new provision.

Although subdivision (b)(3) permits discovery of anything that is relevant, it should be noted that Section 648.420 provides the presiding officer discretion to exclude evidence.

For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310) (compelling discovery).

Article 3. Compelling Discovery

§ 645.310. Time for response to discovery request

645.310. A party shall respond to a request for discovery within 20 days after service of the request.

Comment. Section 645.310 is new. If the request is served by mail or other means, the party has 25 days after the date of sending in which to respond. Section 613.230 (extension of time).

§ 645.320. Motion to compel discovery

645.320. (a) If a party fails to respond to a request for discovery within the time provided in Section 645.310, the party making the request may make a motion to the presiding officer to compel discovery.

(b) A motion to compel discovery shall be made and notice of motion served on the party within 15 days after expiration of the time provided in Section 645.310, or if the party evidences refusal to respond before expiration of the time provided in Section 645.310, within 15 days after the evidence of refusal.

(c) The motion shall state facts showing the party's failure or refusal to comply with the request for discovery, a description of the matter sought to be discovered, the reason the matter is discoverable under this chapter, that a reasonable and good faith attempt to contact the party for an informal resolution of the issue has been made, and the ground of the party's refusal so far as known to party making the request.

Comment. Section 645.320 supersedes subdivision (a) and a portion of subdivision (b) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.330. Lodging matters with presiding officer

645.330. Where the matter sought to be discovered is under the custody or control of the opposing party and the opposing party asserts that the matter is not discoverable or is privileged against disclosure under this chapter, the presiding officer may order lodged with it matters provided in, and examine the matters in accordance with the provisions of, subdivision (b) of Section 915 of the Evidence Code.

Comment. Section 645.330 supersedes subdivision (e) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.340. Hearing

645.340. (a) The hearing on the motion to compel discovery shall be within 15 days after the motion is made, or a later time that the presiding officer may on its own motion for good cause determine. The party against whom the motion is made may file an opposition to the motion before or at the time of the hearing.

(b) The presiding officer shall decide the case on the matters examined by the presiding officer in camera, the papers filed by the parties, and oral argument and additional evidence that the presiding officer allows.

(c) The presiding officer shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the party requesting discovery, whether the granting of the motion will delay the commencement of the hearing on the date set, and the possible prejudice to any party.

Comment. Section 645.340 supersedes a portion of subdivision (b) and subdivision (f) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.350. Order compelling discovery

645.350. (a) Unless otherwise stipulated by the parties, the presiding officer shall no later than 15 days after the hearing make its order denying or granting the motion.

(b) The order of the presiding officer shall be in writing setting forth the matters the party requesting discovery is entitled to discover under this chapter.

(c) The presiding officer shall serve the order on the parties. Where the order grants the motion in whole or in part, the order does not become effective until 10 days after the date the order is served on the party. Where the order denies relief to the party requesting discovery, the order is effective on the date it is served on the party.

Comment. Section 645.350 supersedes subdivision (g) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

Article 4. Subpoenas

§ 645.410. Subpoena authority

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

Comment. Section 645.410 supersedes a portion of former Section 11510. This article gives all adjudicating agencies, and attorneys for parties, subpoena power. See Section 645.420 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also broadens former law to allow a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

This article incorporates privacy protections from civil practice. Section 645.420(a).

An agency whose hearings are by statute exempt from the requirement that they be conducted by an administrative law judge employed by the Office of Administrative Hearings may modify the subpoena provisions or make the subpoena provisions inapplicable by regulation. Section 645.110. Regulations might provide, for example, that a subpoena will not issue unless the party seeking it first establishes the relevance of the evidence sought; or the regulation could provide different standards for subpoenas compelling the attendance of witnesses and subpoenas duces tecum.

§ 645.420. Issuance of subpoena

645.420. (a) Subpoenas and subpoenas duces tecum may be issued by the agency, presiding officer, or attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure.

(c) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

Comment. Section 645.420 restates a portion of former Section 11510, and expands it to include issuance by an attorney and to incorporate civil practice privacy protections. See Code Civ. Proc. §§ 1985-1985.4. For enforcement of a subpoena, see Section 648.610.

§ 645.430. Motion to quash

645.430. (a) An objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, may be reasonably made by a party.

(b) The objection shall be resolved by the presiding officer on terms and conditions that the presiding officer declares. The presiding officer may make

another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands including violations of the right to privacy.

(c) A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

Comment. Section 645.430 addresses matters not previously covered by statute but covered by regulation in some agencies. See, e.g., 20 Cal. Code Regs. § 61 (Public Utilities Commission).

§ 645.440. Witness fees

645.440. A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the appearance the following mileage and fees, to be paid by the party on whose motion the witness is subpoenaed:

(a) The same mileage allowed by law to a witness in a civil case.

(b) The same fees allowed by law to a witness in a civil case. This subdivision does not apply to an officer or employee of the state or a political subdivision of the state.

Comment. Section 645.440 restates a portion of former Section 11510. Its coverage is extended to a subpoena duces tecum as well as a subpoena, and is conformed to the mileage and fees applicable in civil cases. See Sections 68093-68098 (mileage and fees in civil cases).

CHAPTER 6. PREHEARING AND SETTLEMENT CONFERENCES

Article 1. Prehearing Conference

§ 646.110. Modification or inapplicability by regulation

646.110. By regulation an agency may modify the provisions of this article, or make the provisions of this article inapplicable, in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 646.110 permits an exempt agency by regulation to dispense with or change the provisions of this article relating to prehearing conferences.

§ 646.120. Conduct of prehearing conference

646.120. (a) On motion of a party or by order of the presiding officer, the presiding officer may conduct a prehearing conference.

(b) The presiding officer shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties. The notice shall inform the parties that at the prehearing conference the proceeding may be converted into a conference adjudicative hearing for disposition of the matter.

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

(d) At the prehearing conference the proceeding may be converted into a conference adjudicative hearing for disposition of the matter as provided in this part. The notice of the conference adjudicative hearing shall state the date of the hearing.

(e) A party who fails to attend or participate in a conference may be held in default under this part. The notice of the prehearing conference shall so inform the parties.

Comment. Subdivisions (a) and (b) of Section 646.120 supersede former Section 11511.5(a). See also Section 613.230 (extension of time).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii).

Subdivision (e) is drawn from 1981 Model State APA § 4-204(3)(viii). For default procedures, see Section 648.130.

§ 646.130. Subject of prehearing conference

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

(a) Exploration of settlement possibilities.

(b) Preparation of stipulations.

(c) Clarification of issues.

(d) Rulings on identity and limitation of the number of witnesses.

(e) Objections to proffers of evidence.

(f) Order of presentation of evidence and cross-examination.

(g) Rulings regarding issuance of subpoenas and protective orders.

(h) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(i) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

(j) Motions for intervention.

(k) Any other matters that promote the orderly and prompt conduct of the hearing.

Comment. Section 646.130 supersedes former Section 11511.5(b).

Subdivision (i) is new. If a party has not availed itself of discovery within the time periods provided by Chapter 5 (commencing with Section 645.110), it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing.

Subdivision (j) implements Section 644.110 (intervention).

§ 646.140. Prehearing order

646.140. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference. The presiding officer may direct one or more of the parties to prepare the prehearing order.

Comment. Section 646.140 supersedes former Section 11511.5(c).

Article 2. Settlement Conference

§ 646.210. Settlement

646.210. (a) The parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. This subdivision applies:

(1) After issuance of an initial pleading in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned.

(2) Before or after issuance of an initial pleading in a case other than a case described in paragraph (1).

(b) This section is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 646.210 codifies the rule in Rich Vision Centers, Inc. v. Bd. of Med. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983). It also makes clear that an agency can settle a case without filing an initial pleading, except in a licensing disciplinary case. This provision is subject to a specific statute to the contrary governing the matter. See, e.g., Labor Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

§ 646.220. Mandatory settlement conference

646.220. (a) The presiding officer may order the parties to attend and participate in a settlement conference.

(b) The presiding officer at the settlement conference shall be different from the presiding officer at the hearing, except that if the adjudicative proceeding is not required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference may, but need not, be different from the presiding officer at the hearing.

(c) The presiding officer shall set the time and place for the settlement conference, and the agency shall give reasonable written notice to all parties.

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

(e) A party who fails to attend or participate in a settlement conference may be held in default under this part. The notice of the settlement conference shall so inform the parties.

Comment. Under Section 646.220 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur); the conduct of the settlement conference parallels that of the prehearing conference. See Sections 646.120, 646.130 and Comments (prehearing conference).

Attendance and participation in the settlement conference is mandatory. For default procedures, see Section 648.130.

An agency may, but is not required to, put in place a system of settlement judges, whereby a judge of comparable status to the presiding officer who will hear the case is assigned to help mediate a settlement. Separate settlement judges are required in settlement conferences before the Office of Administrative Hearings.

See also Section 613.230 (extension of time).

§ 646.230. Confidentiality of settlement communications

646.230. Notwithstanding any other statute, no evidence of an offer of compromise or settlement made in settlement negotiations under this article is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

Comment. Section 646.230 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified or made inapplicable by regulation). It is drawn from Evidence Code § 1152 (compromise and settlement offers). See Section 647.240 and Comment (confidentiality of communications in alternative dispute resolution).

CHAPTER 7. HEARING ALTERNATIVES

Article 1. Conference Adjudicative Hearing

§ 647.110. When conference hearing may be used

647.110. A conference adjudicative hearing may be used in proceedings where:

(a) There is no disputed issue of material fact.

(b) There is a disputed issue of material fact, if the matter involves only:

(1) A monetary amount of not more than $1,000.

(2) A disciplinary sanction against a prisoner.

(3) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.

(4) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.

(5) A disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment of a license.

(c) By regulation the agency has authorized use of a conference hearing, if in the circumstances its use does not violate a statute or the federal or state constitution.

Comment. Section 647.110 is new.

Subdivision (a) permits the conference hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared. An example might be a utility rate proceeding in which the utility company and the Public Utilities Commission have agreed on all material facts. If, however, consumers intervene and raise material fact disputes, the

proceeding will be subject to conversion from the conference adjudicative hearing to the formal adjudicative hearing in accordance with Sections 614.110-614.150.

Subdivision (b) permits the conference adjudicative hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner. The reference to a "licensee" in subdivision (b)(5) includes a certificate holder. Section 610.360 ("license" defined).

Subdivision (c) imposes no limits on the authority of the agency to adopt the conference adjudicative hearing by regulation, other than statutory and constitutional due process limits.

§ 647.120. Procedure for conference adjudicative hearing

647.120. (a) Except as provided in this article, the procedures of this part otherwise applicable to an adjudicative hearing apply to a conference adjudicative hearing.

(b) The presiding officer shall regulate the course of the proceeding and may limit witnesses, testimony, evidence, rebuttal, and argument, provided that the presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues.

Comment. Section 647.120 is drawn from 1981 Model State APA § 4-402. The section indicates that the conference adjudicative hearing is a "peeled down" version of the formal adjudicative hearing. The conference adjudicative hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties. However, it is intended to permit agencies to allow public participation where appropriate.

§ 647.130. Cross-examination

647.130. (a) A conference adjudicative hearing may be not be used unless it appears to the presiding officer that in the circumstances either (1) cross-examination of witnesses will not be necessary for proper determination of the matter or (2) any delay, burden, or complication due to cross-examination will be minimal.

(b) If after a conference adjudicative hearing is commenced it appears that the requirements of subdivision (a) are not satisfied, the presiding officer shall convert the conference adjudicative hearing to a formal adjudicative hearing.

Comment. Section 647.130 limits availability of cross-examination in a conference adjudicative hearing.

§ 647.140. Proposed proof

647.140. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or federal or state constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain the facts if the proceeding were converted to a formal adjudicative hearing.

Comment. Section 647.140 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 614.110-614.150.

Article 2. Alternative Dispute Resolution

§ 647.210. Application of article

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

(b) By regulation an agency may make this article inapplicable.

Comment. Subdivision (a) of Section 647.210 recognizes that some statutes require alternative dispute resolution techniques. See, e.g., [references to be supplied, particularly relating to labor relations disputes].

§ 647.220. ADR authorized

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

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator.

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

Comment. Section 647.220 is new. Under subdivision (a), the mediator may use any mediation technique.

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

§ 647.230. Regulations governing ADR

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

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

Comment. Section 647.230 does not require each agency to adopt regulations. The model regulations developed by the Office of Administrative Hearings will automatically govern mediation or arbitration for an agency, unless the agency provides otherwise. The agency may choose to preclude mediation or arbitration altogether. Section 647.210 (application of article).

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

§ 647.240. Confidentiality and admissibility of ADR communications

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

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

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

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

Comment. Section 647.240 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified or made inapplicable by regulation).

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

CHAPTER 8. CONDUCT OF HEARING

Article 1. General Provisions

§ 648.110. Provisions may be modified or made inapplicable by regulation

648.110. (a) By regulation an agency may modify the provisions of this chapter, or make the provisions of this chapter inapplicable, in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) Subdivision (a) does not apply to Article 2 (commencing with Section 648.210) (language assistance).

Comment. Subdivision (a) of Section 648.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

§ 648.120. Consolidation and severance

648.120. (a) When proceedings that involve a common question of law or fact are pending, the agency or presiding officer on its own motion or on motion of a party may order a joint hearing of any or all the matters at issue in the proceedings. The agency or presiding officer may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) The agency or presiding officer on its own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the responsive pleading, or of any number of issues.

(c) If the agency and presiding officer make conflicting orders under this section, the agency's order controls.

Comment. Section 648.120 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding, and to enable an agency to employ class action procedures in the agency's discretion. See also Section 13 (singular includes plural).

§ 648.130. Default

648.130. (a) Failure of the respondent to serve a responsive pleading or to appear at a prehearing conference or settlement conference or at the hearing is a default.

(b) If the respondent defaults:

(1) The default is a waiver of the respondent's right to a hearing.

(2) The agency may take action based on the respondent's express admissions or on other evidence. Affidavits may be used as evidence without notice to the respondent.

(3) Where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(c) Notwithstanding the respondent's default, the agency or the presiding officer in its discretion may, before a proposed decision is issued, grant a hearing on reasonable notice to the parties.

(d) Within 7 days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the respondent to receive notice sent pursuant to Section 613.220.

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

Comment. Subdivisions (a)-(c) of Section 648.130 are drawn from subdivisions (b) and (d) of former Section 11506, with the addition of the provision enabling the presiding officer to waive a default and requiring reasonable notice, and from former Section 11520. See also Section 613.230 (extension of time). Subdivision (d) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

§ 648.140. Open hearings

648.140. (a) The hearing is open to public observation except to the extent:

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

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

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

(c) This section applies notwithstanding any regulation to the contrary adopted pursuant to Section 648.110.

Comment. Section 648.140 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. Notwithstanding Section 648.110, this section may not be modified by agency regulation.

Subdivision (a) codifies existing practice. See discussion in 1 G. Ogden, Cal. Public Agency Prac. § 37.03 (1991). Statutory protection of trade secrets and other confidential or privileged information is covered by subdivision (a)(1). See, e.g., Evid. Code §§ 1060-1063. Discretion of the presiding officer under subdivision (a)(2) could include such matters as protection of a child witness. *Cf.* Section 648.350 (protection of child witnesses).

Subdivision (b) is drawn in part from 1981 Model State APA § 4-211(6).

§ 648.150. Hearing by electronic means

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

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party shows that a determination in the proceeding will be based substantially on the credibility of a witness and that a hearing by telephone, television, or other electronic means will impair a proper determination of credibility.

Comment. Subdivision (a) of Section 648.150 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants.

§ 648.160. Report of proceedings

648.160. (a) Except as provided in subdivision (b), the proceedings at the hearing shall be reported by a stenographic reporter or electronically, in the discretion of the agency.

(b) Notwithstanding an agency's election of electronic reporting of proceedings:

(1) The presiding officer may, if the presiding officer determines electronic reporting will not provide an adequate record of the proceedings, require stenographic reporting.

(2) A party may at the party's own expense require stenographic recording.

Comment. Section 648.160 supersedes former Section 11512(d).

Article 2. Language Assistance

§ 648.210. "Language assistance"

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

Comment. Section 648.210 supersedes former Section 11500(g). It extends this article to language translation for witnesses as well as for parties.

§ 648.220. Interpretation for hearing-impaired person

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

Comment. Section 648.220 makes clear that the language assistance provisions of this article are not intended to limit the application to adjudicative proceedings of the provisions of Evidence Code Section 754.

§ 648.230. Application of article

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

Agricultural Labor Relations Board
State Department of Alcohol and Drug Abuse
Athletic Commission
California Unemployment Insurance Appeals Board
Board of Prison Terms

Board of Cosmetology
State Department of Developmental Services
Public Employment Relations Board
Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development
Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Workers' Compensation Appeals Board
Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
Board of Barber Examiners
Department of Insurance
State Personnel Board

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 648.250.

(c) Nothing in this section prohibits an agency from providing an interpreter during an informal factfinding or informal investigatory hearing.

Comment. Subdivisions (a) and (b) of Section 648.230 restate former Section 11501.5. Subdivision (c) restates a portion of former Section 11500(f).

§ 648.240. Provision for interpreter

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

(b) If a party or the party's witness does not proficiently speak or understand the English language and before commencement of the hearing or medical examination requests language assistance, an agency subject to the language assistance requirement of this article shall provide the party or witness an interpreter.

(c) Except as provided in Section 648.275:

(1) An interpreter used in a hearing shall be certified pursuant to Section 648.250.

(2) An interpreter used in a medical examination shall be certified pursuant to Section 648.255.

Comment. Section 648.240 continues the first three sentences of former Section 11513(d) and extends it to witnesses as well as parties. See Section 648.210 ("language assistance" defined).

§ 648.245. Cost of interpreter

648.245. The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the presiding officer so directs, otherwise the party at whose request the interpreter is provided.

(b) The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay.

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

Comment. Section 648.245 continues the fourth sentence of, and the second paragraph of, former Section 11513(d) without substantive change.

§ 648.250. Certification of hearing interpreters

648.250. (a) The State Personnel Board shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 648.260. Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures.

(b) Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters before July 1, 1993, shall be deemed certified for purposes of this section.

Comment. Section 648.250 continues subdivision (e) of former Section 11513 without substantive change.

§ 648.255. Certification of medical examination interpreters

648.255. (a) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 648.260.

(b) Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to Section 648.250 shall be deemed certified for purposes of this section.

Comment. Section 648.255 continues subdivision (f) of former Section 11513 without substantive change.

§ 648.260. Designation of languages for certification

648.260. (a) The State Personnel Board shall designate the languages for which certification shall be established under Sections 648.250 and 648.255. The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages.

(b) The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

Comment. Section 648.260 continues subdivision (g) of former Section 11513 without substantive change.

§ 648.265. Certification fees

648.265. (a) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this article. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance.

(b) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of the certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(c) If the amount of money collected in fees is not sufficient to cover the costs of carrying out this article, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

Comment. Section 648.265 continues subdivisions (h) and (i) of former Section 11513 without substantive change.

§ 648.270. Decertification

648.270. The State Personnel Board may remove the name of a person from the list of certified interpreters if any of the following conditions occurs:

(a) The person is deceased.

(b) The person notifies the board that the person is unavailable for work.

(c) The person does not submit a renewal fee as required by Section 648.265.

Comment. Section 648.270 continues subdivision (j) of former Section 11513 without substantive change.

§ 648.275. Unavailability of certified interpreter

648.275. (a) In the event an interpreter certified pursuant to Section 648.250 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize another interpreter.

(b) In the event an interpreter certified pursuant to Section 648.255 cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.

Comment. Section 648.275 continues subdivision (k) of former Section 11513 without substantive change.

§ 648.280. Duty to advise party of right to interpreter

648.280. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

Comment. Section 648.280 continues subdivision (l) of former Section 11513 without substantive change.

§ 648.285. Confidentiality and impartiality of interpreter

648.285. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding shall apply to any interpreter in the hearing, whether or not the rules so state.

(b) The interpreter shall not have had any involvement in the issues of the case before the hearing.

Comment. Section 648.285 continues subdivisions (m) and (n) of former Section 11513 without substantive change.

Article 3. Testimony and Witnesses

§ 648.310. Burden of proof

648.310. (a) The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter. Except as provided in subdivision (b), the burden of proof is a preponderance of the evidence.

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

Comment. Section 648.310 generally codifies case law concerning the burden of proof in adjudicative proceedings. See discussion in 1 G. Ogden, California Public Agency Practice §

39 (1991). As used in this section, "license" includes "certificate". Section 610.360 ("license" defined).

This section is also subject to specific statutes to the contrary. See Section 612.150 (contrary express statute controls).

If a party defaults in a case where the party has the burden of proof, the agency may act without taking evidence. Section 648.130 (default).

§ 648.320. Presentation of testimony

648.320. (a) Each party has the right to do all of the following:

(1) Call and examine witnesses.

(2) Introduce exhibits and examine exhibits introduced by the opposing party.

(3) Cross-examine and confront opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.

(4) Impeach a witness regardless of which party first called the witness to testify.

(5) Rebut the evidence against the party.

(b) A party or person identified with a party may be called and examined as if under cross-examination by an adverse party at any time during the presentation of evidence by the party calling the witness.

Comment. Section 648.320 supersedes former Sections 11500(f)(2) and 11513(b). Subdivision (b) is drawn from Evidence Code § 776(a).

§ 648.330. Oral and written testimony

648.330. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Any part of the evidence may be received in written form if to do so will expedite the hearing without claim of prejudice to the interests of a party.

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original and an excerpt with the complete text if available.

Comment. Subdivision (a) of Section 648.330 restates former Sections 11500(f)(1) and 11513(a).

Subdivision (b) is drawn from 1981 Model State APA § 4-212(d).

Subdivision (c) is drawn from 1981 Model State APA § 4-212(e). It requires that parties be given an opportunity to compare a copy with the original and an excerpt with the complete text, "if available". If the original is not available, the copy or excerpt may still be received in evidence, but its probative effect is likely to be weaker than if the original or complete text were available.

For general provisions on oaths, affirmations, and certification of official acts, see Section 613.120.

§ 648.340. Affidavits

648.340. (a) At any time 15 or more days before a hearing or a continued hearing, a party may serve on the opposing party a copy of an affidavit the party proposes to introduce in evidence, together with a notice substantially in the following form:

The accompanying affidavit of [here insert name of affiant] will be introduced as evidence at the hearing in [here insert title of proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question the affiant unless you notify [here insert name of proponent or proponent's attorney or authorized representative] at [here insert address] that you wish to cross-examine the affiant.

To be effective your request must be sent or delivered to [here insert name of proponent or proponent's attorney or authorized representative] on or before [here insert a date 10 days after the date of sending or delivery of the affidavit to the opposing party].

(b) Unless the opposing party, within ten days after service, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally.

(c) If an opportunity to cross-examine an affiant is not given after request to cross-examine is made as provided in this section, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(d) As used in this section, "affidavit" includes declaration under penalty of perjury.

Comment. Section 648.340 restates former Section 11514, except the notice must be served at least 15, rather than ten, days before the hearing, and the opposing party has ten, rather than seven, days to request cross-examination. See also Section 613.230 (extension of time). Subdivision (d) is a specific application of the general rule stated in Code of Civil Procedure Section 2015.5 (affidavit includes declaration under penalty of perjury "under any law of this state").

§ 648.350. Protection of child witnesses

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses and closing the hearing, in a way that is appropriate to protect a child witness from intimidation or other harm, taking into account the rights of all persons.

Comment. Section 648.350 codifies an aspect of Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). See also Section 648.140(a)(2) (discretion of presiding officer to close hearing in appropriate circumstances).

§ 648.360. Official notice

648.360. (a) Official notice may be taken of any of the following:

(1) A generally accepted technical or scientific matter within the agency's special field.

(2) A fact that may be judicially noticed by the courts of this state.

(b) Official notice may be taken before or after submission of the case for decision. The matters of which official notice is taken shall be noted in, referred to in, or appended to, the record.

(c) All parties present at the hearing shall be notified at the hearing, or before issuance of an initial or final decision, of the matters of which official notice is

taken. A party shall have a reasonable opportunity on request to rebut the officially noticed matters by evidence or by written or oral presentation of authority, the manner of rebuttal to be determined by the agency.

Comment. Section 648.360 supersedes former Section 11515. For matters subject to judicial notice by the courts, see Evidence Code §§ 451-52.

An agency may limit the matters subject to official notice in an exempt proceeding. Section 648.110 (provisions may be modified or made inapplicable by regulation). See, e.g., 18 CCR 5006, 20 CCR 73 (limitation to judicially noticeable matters in State Board of Equalization and Public Utilities Commission).

Section 648.360 makes clear that all parties have an opportunity to rebut an officially noticed matter, including the agency that is a party to the adjudicative proceeding. Contrast Harris v. ABC App. Bd., 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965).

Article 4. Evidence

§ 648.410. Technical rules of evidence inapplicable

648.410. (a) Except as provided in this chapter, the hearing need not be conducted in accordance with technical rules relating to evidence and witnesses.

(b) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil action.

Comment. Section 648.410 restates the first two sentences of former Section 11513(c). The intent of Section 648.410 is to make available to the fact finder evidence that might not be admissible under evidentiary limitations of civil or criminal cases. Thus, for example, the Evidence Code rules relating to excludability of evidence about prior convictions should not apply automatically in the administrative setting. Contrast Coburn v. State Personnel Board, 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (1978).

An agency may make the Evidence Code applicable in the agency's administrative hearings notwithstanding this section in proceedings that by statute are exempt from the requirement that they be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 648.110.

§ 648.420. Discretion of presiding officer to exclude evidence

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Comment. Section 648.420 supersedes the last clause of the first paragraph of former Section 11513(c) (exclusion of irrelevant and unduly repetitious evidence). It is drawn from Evidence Code Section 352.

§ 648.430. Review of presiding officer evidentiary rulings

648.430. A ruling of the presiding officer admitting or excluding evidence is subject to administrative review in the same manner and to the same extent as the presiding officer's proposed decision in the proceeding.

Comment. Section 648.430 is new. It overrules any contrary implication that might be drawn from former Section 11512(b).

§ 648.440. Privilege

648.440. The rules of privilege are effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Comment. Section 648.440 restates the first portion of the last sentence of the first paragraph of former Section 11513(c). Under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions. See also Evid. Code §§ 901, 910.

§ 648.450. Hearsay evidence and the residuum rule

648.450. (a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

(b) On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of subdivision (a), whether or not the objection was previously raised in the adjudicative proceeding.

Comment. Subdivision (a) of Section 648.450 restates the third sentence of former Section 11513(c). Subdivision (b) provides an exception to the general requirement of exhaustion of administrative remedies on judicial review.

It should be noted that by regulation an agency may provide a different rule than the one provided in this section in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings. See Section 648.110 (provisions may be modified or made inapplicable by regulation) and Comment.

§ 648.460. Unreliable scientific evidence

648.460. Notwithstanding any other provision of this chapter, evidence based on methods of proof that are not generally accepted as reliable in the scientific community shall be excluded.

Comment. Section 648.460 codifies case law applicable to administrative hearings. Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). This section applies notwithstanding agency rules to the contrary.

§ 648.470. Evidence of sexual conduct

648.470. (a) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

(b) Notwithstanding any other provision of this chapter:

(1) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at the hearing unless offered to attack the credibility of the complainant, as provided

for under paragraph (2). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(2) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Comment. Subdivision (a) of Section 648.470 restates former Section 11513(p). Paragraph (b)(1) restates the second paragraph of former Section 11513(c). Paragraph (b)(2) restates former Section 11513(o). This section applies notwithstanding agency rules to the contrary.

Article 5. Ex Parte Communications

§ 648.510. Scope of article

648.510. Nothing in this article limits the authority of an agency to do either of the following by regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings:

(a) Impose greater restrictions on ex parte communications than are provided in this article.

(b) In the case of a proceeding that is nonprosecutorial in character, impose different restrictions on ex parte communications than are provided in this article, so long as the restrictions ensure that the content of an ex parte communication is disclosed on the record and all parties have an opportunity to comment on the communication.

Comment. Under subdivision (a) Section 648.510 an agency may adopt more stringent requirements if appropriate to its hearings. Subdivision (b) permits different approaches in the case of nonprosecutorial adjudications. See, e.g., Cal. P.U.C. R. 84-12-0128.

Nothing in this article limits the authority of the presiding officer to conduct an in camera examination of proffered evidence. *Cf.* Section 645.330 (lodging discovery matters with court).

§ 648.520. Ex parte communications prohibited

648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, between the following persons without notice and opportunity for all parties to participate in the communication:

(1) Between the presiding officer and a party or the attorney or other authorized representative of a party, including an employee of an agency that is a party.

(2) Between the presiding officer and an interested person outside an agency that is a party.

(b) A communication otherwise prohibited by this section is permissible in any of the following circumstances:

(1) The communication is for the purpose of assistance and advice to the presiding officer by an employee of the agency that is a party or the attorney or other authorized representative of the agency, provided the assistance or advice does not violate Section 643.320 (separation of functions).

(2) The proceeding is nonprosecutorial in character, provided the content of the communication is disclosed in the manner prescribed in Section 648.540 and all parties are given an opportunity to comment on it.

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

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

Comment. Subdivision (a) of Section 648.520 is drawn from subdivisions (a) and (b) of former Section 11513.5. See also 1981 Model State APA § 4-213(a), (c). This provision also applies to the reviewing authority. Section 649.230 (review procedure). Subdivision (a) applies to communications initiated by the presiding officer as well as communications initiated by others.

Subdivision (a) is not intended to apply to communications made to or by a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service. Subdivision (b)(4). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case. However, it should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.340 (staff assistance for presiding officer).

Subdivision (a) does not preclude ex parte contacts between the agency head making a decision and any person who presided at a previous stage of the proceeding. This reverses a provision of former Section 11513.5(a).

The reference in subdivision (a)(1) to the attorney or representative of a party is consistent with Section 613.340 (authority of attorney or other representative of party).

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

Subdivision (b)(1) qualifies the provision of this section that otherwise would preclude a presiding officer from obtaining advice from expert agency personnel even though not involved in the matter under adjudication.

§ 648.530. Prior ex parte communication

648.530. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication in the manner prescribed in Section 648.540 and all parties shall be given an opportunity to comment on it.

Comment. Section 648.530 is drawn from former Section 11513.5(c), but is limited to communications received during pendency of the proceeding. See also 1981 Model State APA § 4-213(d). This provision also applies to the reviewing authority. Section 649.230

(review procedure). A proceeding is pending on issuance of an initial pleading. Section 642.310 (proceeding commenced by initial pleading).

§ 648.540. Disclosure of ex parte communication received

648.540. (a) A presiding officer who receives a communication in violation of this article shall make all of the following a part of the record of the proceeding:

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

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

(b) If in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings an agency regulation requires disclosure on the record by a party that makes an ex parte communication rather than by the presiding officer, the presiding officer shall review the disclosure for accuracy before it is made a part of the record of the proceeding.

(c) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record. A party that requests an opportunity to comment on the communication within ten (10) days after notice of the communication shall be allowed to comment.

Comment. Section 648.540 is drawn from former Section 11513.5(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure). It should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.340 (staff assistance for presiding officer).

See also Section 613.230 (extension of time).

§ 648.550. Disqualification of presiding officer

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

Comment. Section 648.550 is drawn from former Section 11513.5(e). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Section 648.550 permits the disqualification of a presiding officer if necessary to eliminate the effect of an ex parte communication. For the disqualification procedure, see Section 643.230.

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

§ 648.610. Misconduct in proceeding

648.610. A person is subject to the contempt sanction for any of the following in a proceeding before an agency under this part:

(a) Disobedience of or resistance to a lawful order.

(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.

(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.

(2) Breach of the peace, boisterous conduct, or violent disturbance.

(3) Other unlawful interference with the process or proceedings of the agency.

(d) Violation of the prohibition of ex parte communications under Section 648.520.

(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer under Chapter 4 (commencing with Section 645.110), or moving, without substantial justification, to compel discovery.

Comment. Section 648.610 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

§ 648.620. Contempt

648.620. (a) The presiding officer or reviewing authority may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Section 648.620 restates a portion of former Section 11525 of the Government Code, but vests certification authority in the presiding officer or reviewing authority. For monetary sanctions for bad faith tactics, see Section 648.630. For enforcement of discovery orders, see Sections 645.310-645.360.

§ 648.630. Monetary sanctions for bad faith actions or tactics

648.630. (a) The presiding officer or agency may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to administrative and judicial review in the same manner as a decision in the proceeding, and is enforceable by writ of execution, by the contempt sanction, or by other proper process.

Comment. Section 648.630 is new. It permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

For authority to seek the contempt sanction, see Section 648.620. For enforcement of discovery orders, see Sections 645.310-645.360.

CHAPTER 9. DECISION

Article 1. Issuance of Decision

§ 649.110. Proposed and final decisions

649.110. (a) If the presiding officer is the agency head, the presiding officer shall issue a final decision within 100 days after the case is submitted, or other time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) If the presiding officer is not the agency head, the presiding officer shall deliver a proposed decision to the agency head within 30 days after the case is submitted, or other time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, and make proof of delivery. Failure of the presiding officer to deliver a proposed decision within the time required does not prejudice any rights of the agency in the case.

(c) A proposed decision becomes a final decision at the time provided in Section 649.150.

Comment. Subdivision (a) of Section 649.110 restates the second sentence of former Section 11517(d), with the addition of authority for an agency to provide a different decision period in an exempt proceeding. See also 1981 Model State APA § 4-215(a).

The first sentence of subdivision (b) restates the first sentence of former Section 11517(b), with the addition of authority for an agency to provide a different decision period in an exempt proceeding. The second sentence makes clear that the agency is not accountable for the presiding officer's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a proposed decision.

A case is submitted for purposes of this section when the hearing record is closed, in the sense that evidence has been taken and briefs submitted, or as otherwise specified in agency regulations.

The time limits in this section may be modified by another statute or by agency regulation in an exempt proceeding. See Section 612.150 (contrary express statute controls).

For the form and contents of a decision, whether proposed or final, see Section 649.120.

Either a proposed or final decision may be subject to administrative review. Section 649.210 (availability and scope of review). See also Section 610.310 ("decision" defined). Errors in a final decision may be corrected under Section 649.170 (correction of mistakes in final decision). A proposed decision becomes final unless it is subjected to administrative review under Article 8 (commencing with Section 649.210).

§ 649.120. Form and contents of decision

649.120. (a) A proposed decision or final decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

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

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

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

Comment. Section 649.120 supersedes the first two sentences of former Sections 11500(f)(4) and 11518. Under Section 649.120, the form and contents of a proposed decision and final decision are the same. *Cf.* former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of the basis for the decision is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision, see Article 3 (commencing with

Section 649.310), and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings.

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

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Rev. Code Wash. Ann. §§ 34.05.461(3) and 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the observed demeanor, manner, or attitude of the witness that supports the determination. Code Civ. Proc. § 1094.5 (administrative mandamus). The observed manner of a witness includes observed actions of the witness.

The first sentence of subdivision (c) codifies existing California case law. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn from the first sentence of 1981 Model State APA § 4-215(d). The second sentence codifies existing practice in some agencies. Third sentence is drawn from 1981 Model State APA § 4-215(d).

§ 649.130. Issuance of proposed decision

649.130. (a) Within 30 days after delivery of a proposed decision to the agency head, or other time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, the agency head shall issue the proposed decision as a public record and serve a copy of the proposed decision on each party.

(b) Issuance and service under this section is not an adoption of a proposed decision by the agency head. Nothing in this section limits the time within which a proposed decision becomes a final decision under Section 649.150.

Comment. Subdivision (a) of Section 649.130 restates the second paragraph of former Section 11517(b) and extends it to an exempt hearing, along with the authority of the agency to vary the time allowed for issuance. Service on a party is accomplished by service on the party's attorney or authorized representative if the party has an attorney or authorized representative of record in the proceeding. Section 613.210 (service).

Subdivision (b) makes clear the distinction between the issuance requirement for a proposed decision (this section) and the time within which the agency must act before a proposed decision becomes final (Section 649.150). The time within which a proposed decision must be issued does not affect the time the agency has for acting on the proposed decision.

§ 649.140. Adoption of proposed decision

649.140. (a) Within 100 days after delivery of the proposed decision to the agency head, or other time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, the agency head may summarily do any of the following:

(1) Adopt the proposed decision in its entirety as a final decision.

(2) Make technical or other minor changes in the proposed decision and adopt it as a final decision. Action by the agency head under this paragraph is limited to

a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(3) Reduce or otherwise mitigate a proposed remedy and adopt the balance of the proposed decision as a final decision.

(b) In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

Comment. Section 649.140 is drawn from the second paragraph of former Section 11517(b). The authority in subdivision (a)(2) to adopt "with changes" supplements the general authority of the agency head under Section 649.170 (correction of mistakes and clerical errors in final decision).

Mitigation of a proposed remedy under subdivision (a)(3) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity.

It should be noted that the adoption procedure is available to an agency as an alternative to review procedures under Article 8 (commencing with Section 649.210) (administrative review of proposed decision).

The agency may not by regulation provide another time under this section unless the adjudicative proceeding is exempt by statute from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

§ 649.150. Time proposed decision becomes final

649.150. Unless adopted as a final decision under Section 649.140 or reviewed under Article 8 (commencing with Section 649.210), a proposed decision becomes a final decision at the earliest of the following times:

(a) If pursuant to Section 649.210 by regulation the agency precludes administrative review, at the time the proposed decision is issued by the presiding officer.

(b) If pursuant to Section 649.210 by regulation the agency limits administrative review, at the time limited in the regulation.

(c) If the agency head in the exercise of discretion denies administrative review, at the time administrative review is denied.

(d) One hundred days after delivery of the proposed decision to the agency head, or longer time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 649.150 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b). The time within which a proposed decision becomes final is not affected by the time within which a copy of the proposed decision must be issued by the agency as a public record. See Section 649.130 & Comment (issuance of proposed decision).

An agency that wishes to reject a proposed decision must do so through the administrative review procedure. *Cf.* Section 649.240 (decision or remand).

The 100-day period after which a proposed decision becomes final may not be extended by agency regulation in a hearing required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

§ 649.160. Service of final decision on parties

649.160. (a) The agency shall serve a copy of the final decision in the proceeding on each party within 10 days after the final decision is issued. The final decision shall state its effective date and shall be accompanied by a statement of the time within which judicial review of the decision may be initiated. Failure to state the time within which judicial review may be initiated extends the time to six months after service of the decision.

(b) If a proposed decision is issued and served on the parties in the proceeding and the agency head adopts the proposed decision as a final decision under Section 649.140 or the proposed decision becomes a final decision by operation of law under Section 649.150, the agency may satisfy subdivision (a) by service of a notice that states the effective date and judicial review period and that the proposed decision is the final decision or, if the final decision makes technical or other minor changes in the proposed decision, that the proposed decision is the final decision, with specified changes. A notice under this subdivision may be served simultaneously with service of a copy of the proposed decision under Section 649.130.

(c) The final decision shall be issued immediately by the agency as a public record.

Comment. Section 649.160 supersedes the third sentence of former Section 11517(b), former Section 11517(e), and the third sentence of former Section 11518. For the manner of service (including service on a party's attorney or authorized representative of record instead of the party), see Section 613.210.

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

§ 649.170. Correction of mistakes and clerical errors in final decision

649.170. (a) Within 15 days after service of a copy of a final decision on a party, but not later than the effective date of the decision, the party may apply to the agency head for correction of a mistake or clerical error in the final decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking administrative or judicial review.

(b) The agency head may refer the application to the presiding officer who formulated the proposed or final decision or may delegate its authority under this section to one or more persons.

(c) The agency head may deny the application, grant the application and modify the final decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency head does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency head, on its own motion or on motion of the presiding officer, from modifying a final decision to correct a

mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the final decision.

(e) The agency head shall, within 15 days after correction of a mistake or clerical error in a final decision, serve a copy of the correction on each party on whom a copy of the final decision was previously served.

(f) By regulation the agency may provide a period longer than 15 days for proceedings under this section in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, except that the regulation shall not permit proceedings under this section after initiation of administrative or judicial review.

Comment. Section 649.170 supersedes former Section 11521 (reconsideration). It is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 610.460 ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the final decision without the need for administrative or judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the final decision. This supplements the authority in Section 649.140(a)(2) of the agency head to adopt a proposed decision with technical or other minor changes.

For general provisions on notices to parties, see Sections 613.210 (service) and 613.220 (mail). The times provided in this section are extended in the case of service by mail or other means. Section 613.230 (extension of time).

Article 2. Administrative Review of Decision

§ 649.210. Availability and scope of review

649.210. (a) Subject to subdivision (b), an agency may review a proposed or final decision on its own motion or on petition of a party. In the exercise of discretion under this subdivision, the agency head may do any of the following with respect to administrative review of the proposed or final decision:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(b) By regulation an agency may mandate administrative review, or may preclude or limit administrative review, of a proposed or final decision.

Comment. Section 649.210 is drawn from 1981 Model State APA § 4-216(a)(1)-(2). A proposed decision that is not reviewed becomes final at the time specified in Section 649.150.

This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. See, e.g., Greer v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Education Code § 13443). See Section 641.130 (modification or inapplicability of statute by regulation).

§ 649.220. Initiation of review

649.220. (a) On service of a copy of a proposed or final decision that is subject to review under Section 649.210, but not later than the effective date of the

decision stated in the decision or if the effective date is not stated in the decision not later than 30 days after service:

(1) A party may petition the agency head for administrative review of the proposed or final decision. The petition shall state the basis for review.

(2) The agency head on its own motion may give written notice of administrative review of the proposed or final decision. The notice shall be served on each party and, if review is limited to specified issues, shall identify the issues for review.

(b) By regulation an agency may provide a different period for initiation of administrative review than that provided in this section.

Comment. Section 649.220 supersedes a portion of the first sentence of former Section 11517(d). See also 1981 Model State APA § 4-216(b)-(c). For the manner of service, see Section 613.210. See also Section 613.230 (extension of time).

§ 649.230. Review procedure

649.230. (a) The reviewing authority shall decide the case on the record, including a transcript or a summary of evidence, a recording of proceedings, or other record used by the agency, of the portions of the proceeding under review that the reviewing authority considers necessary. A copy of the record shall be made available to the parties. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

(b) The reviewing authority shall allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority.

(c) The reviewing authority may remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed decision, if reasonably available.

(d) The reviewing authority is subject to the same provisions governing qualifications, separation of functions, ex parte communications, and substitution that would apply to the presiding officer in the hearing.

Comment. Section 649.230 restates the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence (except evidence unavailable at the hearing before the presiding officer). *Cf.* Code Civ. Proc. § 1094.5(e); see also 1981 Model State APA § 4-216(d)-(f). The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

Subdivision (a) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation.

Subdivision (d) extends to the reviewing authority the provisions of this part governing qualifications (Sections 643.210-643.230), separation of functions (Sections 643.310-643.340), ex parte communications (Sections 648.510-648.550), and substitution (Section 643.130), that are applicable to the presiding officer.

If further proceedings are required, they may be obtained on remand under Section 649.240.

§ 649.240. Decision or remand

649.240. (a) Within 100 days after presentation of briefs and arguments, or if a transcript is ordered, after receipt of the transcript, or other time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, the reviewing authority shall do one of the following:

(1) Issue a final decision disposing of the proceeding.

(2) Remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed or final decision, if reasonably available.

(3) Reject the proposed or final decision, without remand. The reviewing authority shall dispose of the proceeding within a reasonable time after rejection.

(b) The time under subdivision (a) may be waived or extended with the written consent of all parties or for good cause. Disposition of the proceeding under subdivision (a) shall only be pursuant to the procedure provided in Section 649.230 (review procedure).

(c) A final decision or a remand for further proceedings shall be in writing and shall include, or incorporate by express reference to the original proposed or final decision, all the matters required by Section 649.120 (form and contents of decision). A remand for further proceedings shall specify the ground for remand and shall include precise instructions to the presiding officer of the action required.

(d) The reviewing authority shall cause a copy of the final decision or remand for further proceedings to be served on each party.

Comment. Section 649.240 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j). Disposition of the proceeding under this section must be done pursuant to Section 649.230, which provides for either review on the record or remand; the reviewing authority may not hear the matter de novo.

Remand is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

Specification of the ground for remand must be precise, but need not include the same details of explanation as a final decision would contain. The specification may include such matters as the need for additional proceedings resulting from newly discovered evidence.

The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.210.

§ 692.250. Procedure on remand

692.250. (a) On remand, the reviewing authority may order authorized and appropriate temporary relief.

(b) The presiding officer shall prepare a revised proposed or final decision on remand based on the additional evidence and the record of the prior hearing.

(c) The revised proposed or final decision on remand shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original proposed or final decision.

Comment. Subdivision (a) of Section 692.250 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) restate the third and fourth sentences of former Section 11517(c). For the record in the proceeding, see Section 649.230 (review procedure). For the manner of service, see Section 613.210.

Article 3. Precedent Decisions

§ 649.310. Precedential effect of decision

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

Comment. Section 649.310 is new.

§ 649.320. Designation of precedent decision

649.320. (a) An agency shall designate as a precedent decision a final decision or part of a final decision that contains a significant legal or policy determination of general application that is likely to recur.

(b) Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, relating to rulemaking.

(c) An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

Comment. Section 649.320 recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Section 12935(h) (Fair Employment and Housing Commission); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 649.320 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.

This section applies notwithstanding any contrary implication in Section 11347.5 ("underground regulations"). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

§ 649.330. Index of precedent decisions

649.330. (a) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update.

(b) The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

Comment. The index required by Section 649.330 is a public record, available for public inspection and copying.

§ 649.340. Article not retroactive

649.340. (a) This article applies to final decisions issued on or after January 1, 1996.

(b) Nothing in this article precludes an agency from designating as a precedent decision a final decision issued before January 1, 1996.

Comment. Section 649.340 minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

CHAPTER 10. IMPLEMENTATION OF DECISION

§ 650.110. Effective date of decision

650.110. (a) The decision is effective on the date stated in the decision or, if the effective date is not stated in the decision, 30 days after it becomes final, unless:

(1) The agency head orders that the decision becomes effective sooner.

(2) The agency head orders that enforcement of the decision shall be stayed.

(b) A party may not be required to comply with a final decision unless the party has been served with or has actual knowledge of the final decision.

(c) A nonparty may not be required to comply with a final decision unless the agency has made the final decision available for public inspection and copying or the nonparty has actual knowledge of the final decision.

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Sections 641.310-641.370 (emergency decision).

Comment. Subdivision (a) of Section 650.110 restates subdivision (a) and a portion of the first sentence of subdivision (b) of former Section 11519, with the addition of the provision for statement of the effective date in the decision. The remainder of the section is drawn from 1981 Model State APA § 4-220(c)-(d). The section distinguishes between the effective date of a decision and the time when it can be enforced. For provisions on stays, see Section 650.120.

The requirement of "actual knowledge" in subdivisions (b) and (c) is intended to include not only knowledge that an order has been issued, but also knowledge of the general contents of the order insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of an order, this must be resolved in the manner that other fact questions are resolved.

The binding effect of an order on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues an order revoking the license of a particular dealer, this order is binding on any wholesaler who has actual knowledge of it, even before the order is made available for public inspection and copying; the order binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 650.120. Stay

650.120. A stay of enforcement may be included in the decision or may be ordered at any time before the decision becomes effective.

Comment. Section 650.120 restates the first sentence of former Section 11519(b).

§ 650.130. Probation

650.130. (a) A stay of enforcement may be accompanied by an express condition that the respondent comply with specified terms of probation. Specified terms of probation shall be just and reasonable in the light of the findings and decision.

(b) Specified terms of probation may include an order of restitution that requires the respondent to compensate the other party to a contract damaged as a result of a breach of contract by the respondent. In such a case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of the breach. If restitution is ordered and paid under this subdivision, the amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Subdivision (a) of Section 650.130 restates the last sentence of former Section 11519(b). Subdivision (b) restates former Section 11519(d).

CONFORMING REVISIONS AND REPEALS

Note. Only selected statutes are set out here. It is intended that, among other conforming revisions made throughout the codes, all conflicting and special provisions governing state agency adjudicative proceedings will be repealed. **If there is a special or unique provision of an agency that should be preserved, this should be called to the attention of the Law Revision Commission.** The conforming revisions will also make clear that any proceeding not now subject to the Administrative Procedure Act is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

BUSINESS AND PROFESSIONS CODE

Bus. & Prof. Code § 494 (added). Registration with public officer

494. If a person whose license has been revoked or suspended was required to register with a public officer, a notification of the suspension or revocation shall be sent to the officer after the decision has become effective.

Comment. Section 494 restates former Government Code Section 11519(c).

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

494.5. (a) A person whose license has been revoked or suspended may apply to the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.

(b) The agency shall give notice to the Attorney General of the application and the Attorney General and the applicant shall be given an opportunity to present either oral or written argument before the agency head.

(c) The agency head shall decide the application, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably determines are appropriate to impose as a condition of reinstatement.

(d) This section does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Section 494.5 restates former Government Code Section 11522.

ADMINISTRATIVE MANDAMUS

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

1094.5. ...

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole

record. In making a determination under this subdivision in a review of a decision under Division 3.3 (commencing with Section 600) of Title 1 of the Government Code, the court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness that supports the determination.

...

Comment. Subdivision (c) of Section 1094.5 is amended to adopt the rule of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), for proceedings under the Administrative Procedure Act, requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Labor Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1114 (1992).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. Gov't Code § 649.120(b) (form and contents of decision). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness.

Under subdivision (c), even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (c) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

ADMINISTRATIVE PROCEDURE ACT

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

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

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

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

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

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this

subdivision authorizes an agency to give access to records required by statute to be kept confidential.

Comment. Section 11340.4 is new. It delegates to the Office of Administrative Law authority formerly found in Section 11370.5 relating to the study of "administrative law" by the Office of Administrative Hearings. See also Section 610.190 ("agency" defined). Cf. Section 641.480 (authority of Office of Administrative Hearings to study administrative adjudication).

Gov't Code §§ 11370-11370.5 (repealed). Office of Administrative Hearings

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

§ 11370 (repealed). Administrative Procedure Act

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

Comment. Former Section 11370 is restated in Section 600 (short title).

§ 11370.1 (repealed). "Director"

11370.1. As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

Comment. Former Section 11370.1 is continued in Section 641.410(a) ("director" defined).

§ 11370.2 (repealed). Office of Administrative Hearings

11370.2. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

Comment. Former Section 11370.2 is restated in Section 641.420 (Office of Administrative Hearings).

§ 11370.3 (repealed). Personnel

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge or a hearing officer to conduct other administrative proceedings not arising under that chapter and shall

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

Comment. The first sentence of former Section 11370.3 is restated in subdivision (a) of Section 641.430 (administrative law judges). The second sentence is restated in Section 641.440 (and other personnel), deleting the reference to hearing officers and the limitation to shorthand reporters.

The first part of the third sentence is superseded by subdivision (a) of Section 641.450 (assignment of administrative law judges). The second part is restated in subdivision (b) of Section 641.450, deleting the reference to hearing officers. The third part is restated in subdivision (c) of Section 641.450.

The fourth sentence is omitted as unnecessary. See Section 641.450(a) (assignment of administrative law judges) and Bus. & Prof. Code § 22460.5.

The fifth sentence is restated in subdivision (d) of Section 641.450 (assignment of administrative law judges), deleting the reference to hearing officers.

The sixth sentence is restated in subdivision (e) of Section 641.450 (assignment of administrative law judges), deleting the reference to hearing officers.

§ 11370.4 (repealed). Costs

11370.4. The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Former Section 11370.4 is restated in Section 641.470.

§ 11370.5 (repealed). Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge of control.

Comment. Former Section 11370.5 is restated in Sections 610.190 ("agency" defined) and 641.480 (study of administrative law and procedure).

CHAPTER 5. ADMINISTRATIVE ADJUDICATION

§ 11500 (repealed). Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Administrative law judge" means an individual qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself or herself constitutes an agency.

(f) "Adjudicatory hearing" means a state agency hearing which involves personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. However, the procedures governing such a hearing shall include, but not be limited to, all of the following:

(1) Testimony under oath.

(2) The right to cross-examination and to confront adversary witnesses.

(3) The right to representation.

(4) The issuance of a formal decision.

For purposes of this subdivision, an "adjudicatory hearing" shall not be required to include any informal factfinding or informal investigatory hearing. However, nothing in this subdivision shall be construed to prohibit an agency from providing an interpreter during any such informal hearing.

(g) "Language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party who cannot speak or understand English or who can do so only with difficulty.

Comment. The introductory portion of former Section 11500 is restated in Section 610.010 (application of definitions).

Subdivision (a) is superseded by Sections 612.110 (application of division to state) and 610.250 ("agency head" defined). An agency may delegate the power of the agency head

to review a proposed decision in an administrative adjudication. Section 649.220 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

The substance of subdivision (b) is restated in Section 610.460 ("party" defined).

Subdivision (c) is superseded by Section 610.670 ("respondent" defined).

Subdivision (d) is superseded by Section 643.110 (presiding officer).

The substance of subdivision (e) is restated in Section 610.280 ("agency member" defined).

Subdivision (f) is superseded by Sections 612.110 (application of division to state), 610.310 ("decision" defined), 648.330 (oral and written testimony), 648.320 (presentation of testimony), 613.320 (representation by attorney), 649.120 (form and contents of decision), 641.110 (when adjudicative proceeding required), and 648.230 (language assistance).

Subdivision (g) is superseded by Section 648.210 ("language assistance" defined).

§ 11501 (repealed). Application of chapter

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

Accountancy, State Board of
Air Resources Board, State
Alcohol and Drug Programs, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California State Board of
Attorney General
Auctioneer Commission, Board of Governors of
Automotive Repair, Bureau of
Barber Examiners, State Board of
Behavioral Science Examiners, Board of
Boating and Waterways, Department of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Collection and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Director of
Contractors, Registrar of
Corporations, Commissioner of
Cosmetology, State Board of
Dental Examiners of California, Board of
Education, State Department of
Electronic and Appliance Repair, Bureau of
Engineers and Land Surveyors, State Board of Registration for Professional
Fair Political Practices Commission

Fire Marshal, State
Food and Agriculture, Director of
Forestry and Fire Protection, Department of
Funeral Directors and Embalmers, State Board of
Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of
Health Services, State Department of
Highway Patrol, Department of the California
Home Furnishings and Thermal Insulation, Bureau of
Horse Racing Board, California
Housing and Community Development, Department of
Insurance Commissioner
Labor Commissioner
Landscape Architects, State Board of
Medical Board of California, Medical Quality Review Committees and Examining Committees
Motor Vehicles, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Medical Board of California
Pesticide Regulation, Department of
Pharmacy, California State Board of
Public Employees' Retirement System, Board of Administration of the
Real Estate, Department of
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of
Savings and Loan Commissioner
School Districts
Secretary of State, Office of
Shorthand Reporters Board, Certified
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparer Program, Administrator
Teacher Credentialing, Commission on
Teachers' Retirement System, State
Toxic Substances Control, Department of
Transportation, Department of, acting pursuant to the State Aeronautics Act
Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of

Comment. Former Section 11501 is superseded by Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies).

§ 11501.5 (repealed). Language assistance; provision by state agencies

11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:

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

(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.

Comment. Former Section 11501.5 is restated in Section 648.230 (application of article).

§ 11502 (repealed). Administrative law judges

11502. All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office

of Administrative Hearings. The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 of the Government Code. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. The first sentence of former Section 11502 is superseded by Section 643.110 (designation of presiding officer by agency head). The second sentence is restated in subdivision (a) of Section 641.430 (administrative law judges). The third sentence is restated in subdivision (b) of Section 641.430.

§ 11502.1 (repealed). Health planning unit

11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Safety Code § 439.7 (1984 Cal. Stat. ch. 1745, § 14).

§ 11503 (repealed). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. The first sentence of former Section 11503 is superseded by Sections 610.350 ("initial pleading" includes accusation) and 642.310 (proceeding initiated by initial pleading). The remainder is superseded by Section 642.320 (contents of initial pleading).

§ 11504 (repealed). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Comment. The first sentence of former Section 11504 is superseded by Sections 610.350 ("initial pleading" includes statement of issues) and 642.310 (proceeding commenced by initial pleading). The remainder is superseded by Sections 642.320 (contents of initial pleading) and 642.330 (service of initial pleading).

§ 11504.5 (repealed). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Comment. Section 11504.5 is superseded by Section 610.350 ("initial pleading" includes accusation and statement of issues).

§ 11505 (repealed). Service on respondent

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within 10 working days after you discover the good cause. Failure to notify the agency within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

Comment. Section 11505 is superseded by Sections 643.230 (service of initial pleading and other information), 642.440 (notice of hearing), 642.340 (jurisdiction over respondent), 613.210 (service), and 613.220 (mail).

§ 11506 (repealed). Notice of defense

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

(1) Request a hearing.

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

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

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

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material

violation of another regulation enacted by another department affecting substantive rights.

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

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

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

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

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

Comment. Former Section 11506 is superseded by Sections 610.672 ("responsive pleading" defined), 642.350 (responsive pleading), 648.130 (default), and 613.210 (service).

§ 11507 (repealed). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Comment. Former Section 11507 is superseded by Section 642.360 (amended and supplemental pleadings).

§ 11507.5 (repealed). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Comment. Former Section 11507.5 is superseded by Section 645.110 (application of article).

§ 11507.6 (repealed). Discovery

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the

initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigate reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

Comment. Former Section 11507.6 is superseded by Sections 645.210 (time and manner of discovery), 645.220 (discovery of witness list), 645.230 (discovery or statements, writings, and reports), and 645.120 (discovery of evidence of sexual conduct).

§ 11507.7 (repealed). Petition to compel discovery

11507.7. (a) Any party claiming his request for discovery pursuant to Section 11507.6 has not been complied with may serve and file a verified petition to compel discovery in the superior court for the county in which the administrative hearing will be held, naming as respondent the party refusing or failing to comply with Section 11507.6. The petition shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why such matter is discoverable under this section, and the ground or grounds of respondent's refusal so far as known to petitioner.

(b) The petition shall be served upon respondent party and filed within 15 days after the respondent party first evidenced his failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.

(c) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition. The respondent party shall have the right to serve and file a written answer or other response to the petition and order to show cause.

(d) The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.

(e) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that such matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under such provisions, the court may order lodged with it such matters as are provided in subdivision (b) of Section 915 of the Evidence Code and examine such matters in accordance with the provisions thereof.

(f) The court shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and such oral argument and additional evidence as the court may allow.

(g) Unless otherwise stipulated by the parties, the court shall no later than 30 days after the filing of the petition file its order denying or granting the petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days. The order of the court shall be in writing setting forth the matters or parts thereof the petitioner is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the clerk upon the parties. Where the order grants the petition in whole or in part, such order shall not become effective until 10 days after the date the order is served by the clerk. Where the order denies relief to the petitioning party, the order shall be effective on the date it is served by the clerk.

(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.

(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.

Comment. Former Section 11507.7 is superseded by Sections 645.310-645.350 (compelling discovery) and 648.610-648.630 (enforcement of orders and sanctions).

§ 11508 (repealed). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate

District, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or fifth Appellate District.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides.

(3) The parties by agreement may select any place within the state.

Comment. Former Section 11508 is superseded by Sections 642.410 (time and place of hearing) and 642.430 (venue and change of venue).

§ 11509 (repealed). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the day of , 19_, at the hour of , upon the charges made in the accusation served upon you. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency].

Comment. Former Section 11509 is superseded by Sections 642.410 (time and place of hearing) and 642.440 (notice of hearing). See also Section 613.320 (representation by attorney).

§ 11510 (repealed). Subpoenas

11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

Comment. Former Section 11510 is superseded by Sections 645.410-645.440 (subpoenas).

§ 11511 (repealed). Depositions

11511. On verified petition of any party, an agency may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the State and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

Comment. Former Section 11511 is superseded by Section 645.130 (depositions).

§ 11511.5 (repealed). Prehearing conferences

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

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

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

Comment. Former Section 11511.5 is superseded by Article 6.5 (commencing with Section 646.110) (prehearing conference).

§ 11512 (repealed). Presiding officer

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing.

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall

render a proposed decision in accordance with subdivision (b) of Section 11517 of the Government Code.

Comment. The substance of the first sentence of subdivision (a) of former Section 11512 is restated in Section 643.120(a) (where administrative law judge required). The second sentence is restated in Section 643.120(b).

The first sentence of subdivision (b) is restated in Section 643.120(d)(1) and (2). The second sentence is restated in Section 643.120(c).

The first sentence of subdivision (c) of former Section 11512 is superseded by Section 643.220 (self disqualification). The second, third, and fourth sentences are superseded by Section 643.230 (procedure for disqualification of presiding officer). The fifth sentence is not continued: If disqualification would prevent the existence of a quorum qualified to act, a substitute presiding officer may be appointed under Section 643.130.

Subdivision (d) is superseded by Section 648.160 (report of proceedings).

Subdivision (e) is restated in Section 643.120(d)(3).

§ 11513 (repealed). Evidence

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

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

In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (j). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(d) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language, except that a party who does not proficiently speak or understand the

English language and who requests language assistance shall be provided an interpreter. Except as provided in subdivision (k), interpreters utilized in hearings shall be certified pursuant to subdivision (e). Except as provided in subdivision (k), interpreters utilized in medical examinations shall be certified pursuant to subdivision (f). The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.

The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except with respect to hearings before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to worker's compensation claims. With respect to these hearings, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.

(e) The State Personnel Board which shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures. Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this subdivision.

(f) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to subdivision (e) shall be deemed certified for purposes of this subdivision.

(g) The State Personnel Board shall designate the languages for which certification shall be established under subdivisions (e) and (f). The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages. The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

(h) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of his or her certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(i) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this section. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance. If the amount of money collected in fees is not sufficient to cover the costs of carrying out this section, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

(j) the State Personnel Board may remove the names of people form the list of certified interpreters if the following conditions occur:

(1) A person on the list is deceased.

(2) A person on the list notifies the board that he or she is unavailable for work.

(3) A person on the list does not submit a renewal fee as required by subdivision (h).

(k) In the event that interpreters certified pursuant to subdivision (e) cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters. In the event that interpreters certified pursuant to subdivision (f) cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.

(l) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

(m) The rules of confidentiality of the agency, if any, that may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing, whether or not the rules so state.

(n) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.

(o) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value

is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

(p) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.

(q) This section becomes operative on July 1, 1995.

Comment. Subdivision (a) of former Section 11513 is superseded by Section 648.330(a) (oral evidence).

Subdivision (b) is superseded by Section 648.320 (presentation of evidence).

The first two sentences of subdivision (c) are superseded by Section 648.410 (technical rules of evidence inapplicable). The third sentence is restated in Section 648.450 (hearsay evidence and the residuum rule). The fourth sentence is superseded by Sections 648.440 (privilege) and 648.420 (discretion of presiding officer to exclude evidence). The second paragraph is restated in Section 648.470(b).

Subdivisions (d)-(n) are restated in Sections 648.240-648.285.

Subdivision (o) is restated in Section 648.470(c).

Subdivision (p) is restated in Section 648.470(a).

§ 11513.5 (repealed). Ex parte communications

11513.5. (a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the complaint, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the complaint, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as administrative law judge, without notice and opportunity for all parties to participate in the communication.

(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the content of the communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters

have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

Comment. Subdivisions (a) and (b) of former Section 11513.5 are restated in Section 648.520 (ex parte communications prohibited), omitting the limitation on communications with a person who presided at a previous stage of the proceeding. Subdivision (c) is restated in Section 648.530 (prior ex parte communication) but is limited to communications received during the pendency of the proceeding. Subdivision (d) is restated in Section 648.540 (disclosure of ex parte communication received). Subdivision (e) is restated in Section 648.550 (disqualification of presiding officer).

§ 11514 (repealed). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any part may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Comment. Former Section 11514 is restated in Section 648.340 (affidavit evidence), except that the ten day period for service of notice of intent to produce affidavit evidence is changed to 30 days, and the seven day period to request cross-examination is changed to ten days.

§ 11515 (repealed). Official notice

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or

scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Comment. Former Section 11515 is superseded by Section 648.360 (official notice).

§ 11516 (repealed). Amendment of accusation after submission of case

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Comment. Former Section 11516 is superseded by Section 642.360 (amended and supplemental pleadings).

§ 11517 (repealed). Decision in contested cases

11517. (a) If a contested case is heard before an agency itself, the administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision. Thirty days after receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no

case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Comment. Subdivision (a) of former Section 11517 is restated in Section 643.120(d)(3) with the addition of a sentence that makes clear the agency head may make a final decision in the proceeding.

The substance of the first sentence of subdivision (b) is restated in Section 649.110(b) (proposed and final orders) and is superseded by Section 649.120 (form and contents of order). The second sentence is restated in Section 649.140 (adoption of proposed order). The third sentence is restated in Sections 613.210 (service) and 649.130 (filing of proposed decision).

The first and second sentences of subdivision (c) are restated in Section 649.240 (review procedure), except that the agency is precluded from taking additional evidence. The third and fourth sentences are restated in Section 642.860 (procedure on remand). The fifth and sixth sentences are superseded by Section 649.240 (review procedure).

The first sentence of subdivision (d) is superseded by Sections 649.150 (time proposed order becomes final) and 649.230 (initiation of review). The second sentence is restated in Section 649.110(a) (proposed and final orders). The third, fourth, and fifth sentences are restated in Section 649.230 (initiation of review).

Subdivision (e) is restated in Section 649.160 (delivery of order to parties).

§ 11518 (repealed). Decision

11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. The substance of the first two sentences of former Section 11518 is restated in Section 649.120 (contents of order). The third sentence is restated in Section 649.160 (delivery of order to parties).

§ 11519 (repealed). Effective date of decision; stay of execution; notification; restitution

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; provided, however, that the terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to such officer after the decision has become effective.

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

Comment. Former Section 11519 is restated in Chapter 12 (commencing with Section 650.120) (enforcement of decision) and Business and Professions Code Section 494.

§ 11520 (repealed). Defaults

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

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

Comment. Former Section 11520 is superseded by Section 648.130 (default).

§ 11521 (repealed). Reconsideration

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the

decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

Comment. Former Section 11521 is not continued. It is superseded by Section 649.170 (correction of mistakes in order).

§ 11522 (repealed). Reinstatement of license or reduction of penalty

11522. A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Former Section 11522 is restated in Business and Professions Code Section 494.5 (reinstatement of license or reduction of penalty).

§ 11523 (repealed). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining

balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Note. This section has not yet been disposed of.

§ 11524 (repealed). Continuances; grant time; good cause; denial; notice review

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the administrative law judge in charge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

Comment. Former Section 11524 is superseded by Section 642.420 (continuances). Subdivision (c) is not continued.

§ 11525 (repealed). Contempt

11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Former Section 11525 is restated in Sections 648.610-648.630 (enforcement of orders and sanctions).

§ 11526 (repealed). Voting by mail

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

Comment. Former Section 11526 is restated in Section 613.110 (voting by agency member).

§ 11527 (repealed). Charge against funds of agency

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

Comment. Section 11527 is not continued.

§ 11528 (repealed). Oaths

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

Comment. Former Section 11528 is restated in Section 613.120 (oaths, affirmations, and certification of official acts).