

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## RECOMMENDATION

### Administrative Adjudication by State Agencies

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January 1995

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

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This report will appear in Volume 25 of the Commission's *Reports, Recommendations, and Studies*.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Adjudication  
by State Agencies

January 1995

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

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

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January 26, 1995

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation proposes revision of the law governing administrative adjudication by state agencies. It would be the first comprehensive revision of state agency administrative procedure in the fifty years since enactment of the Administrative Procedure Act.

The proposed revision has three major aspects:

(1) It requires all state adjudicative proceedings to adhere to a fundamental "administrative adjudication bill of rights." These rights include such basic matters of due process and fairness as an accessible procedure, a public hearing, a neutral presiding officer, a prohibition on *ex parte* communications, and a written decision based on the record.

(2) It adds flexibility and economy to existing agency procedures by authorizing such options as alternative dispute resolution, an informal hearing procedure, an emergency decision procedure, and a declaratory decision procedure.

(3) It modernizes the existing formal Administrative Procedure Act (applicable mainly in licensing hearings) by such devices as consolidation of proceedings, administrative resolution of discovery disputes, telephonic hearings and voting, electronic reporting, and simplified procedures for correction of errors.

The recommendation is the product of a study begun by the Law Revision Commission in 1990, and is the result of a number of different drafts and approaches explored by the Commission with the

input of hundreds of persons, agencies, and organizations, many of whom regularly attended Commission meetings and commented on proposals. The Commission appreciates their substantial participation, which is recognized in the Acknowledgments set out in this recommendation.

The Commission particularly appreciates the major contribution of its principal consultant on this study, Professor Michael Asimow of UCLA Law School. Professor Asimow prepared the four background studies from which this recommendation evolved, and provided the Commission with invaluable advice at public meetings where the matter was considered. The first three background studies are published as Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992). This article is reprinted in this report, along with the fourth study, Asimow, *The Adjudication Process*.

The Commission also wishes to thank the following persons who agreed to serve as consultants to give the Commission additional private sector perspective on many issues that arose throughout the course of this study:

Mark Levin, Los Angeles  
Gene Livingston, Sacramento  
James Mattesich, Sacramento  
Preble Stoltz, University of California, Berkeley, Law School  
Robert Sullivan, Sacramento  
Richard Turner, Sacramento

The Commission is also grateful for the regular and substantial contributions of Karl S. Engeman of the Office of Administrative Hearings and Herb Bolz of the Office of Administrative Law during the study.

This recommendation is submitted pursuant to authority of 1987 Cal. Stat. res. ch. 47, as continued in 1994 Cal. Stat. res. ch. 81.

Respectfully submitted,

Colin W. Wied  
*Chairperson*

## ACKNOWLEDGMENTS

The Law Revision Commission developed this recommendation with the input of hundreds of individuals, agencies, and organizations, many of whom regularly attended Commission meetings and commented on Commission drafts. The Commission appreciates their substantial involvement and contributions. The participation of a broad spectrum of experts and other persons interested in administrative adjudication aids the Commission in preparing a better recommendation. The Commission benefits greatly from the public service performed by these individuals, agencies, and organizations.

Inclusion of the name of an individual, agency, or organization should not be taken as an indication of the person's position or opinion on any part of the recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

## CONSULTANTS

The Commission is indebted to its principal consultant on this project, Professor Michael Asimow of UCLA Law School. Professor Asimow prepared the background studies from which this recommendation evolved, and provided the Commission with invaluable advice at public meetings where the matter was considered. The Commission also named several other persons as consultants to give the Commission additional private sector perspective on many issues that arose in the course of this study.

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## ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

### SUMMARY OF RECOMMENDATION

#### **Purpose of Revision**

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

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

The recommendation represents a balancing of agency costs and citizen rights.

#### **Effect on Existing Procedures**

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

### **Administrative Adjudication Bill of Rights**

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

- The agency must give notice and an opportunity to be heard, including the right to present and rebut evidence.
- The agency must make available a copy of its hearing procedure.
- The hearing must be open to public observation.
- The presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency.
- The presiding officer must be free of bias, prejudice, and interest.
- The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. Credibility determinations made by the presiding officer are entitled to great weight on review. A penalty may not be based on an agency “guideline” unless the agency has adopted the guideline as a regulation.
- The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.
- Ex parte communications to the presiding officer are prohibited.
- The agency must make available language assistance to the extent required by existing law.

### **Optional Provisions that Add Flexibility**

The proposed law would expand the hearing procedure options available to a state agency. The agency could use the agency’s regular hearing procedure, an informal hearing procedure, an emergency decision procedure, or a declaratory decision procedure. Other useful supplemental provisions include telephonic hearings, subpoena authority, provisions

for enforcement of orders and imposition of sanctions, intervention procedures, and alternative dispute resolution.

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

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

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

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

## **Modernization of 1945 California APA**

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

### **Costs**

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

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## ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

### BACKGROUND

#### **Introduction**

The Legislature in 1987 directed the California Law Revision Commission to study whether there should be changes to administrative law.<sup>1</sup> The Commission 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 report presents the Commission's recommendations concerning administrative adjudication by state agencies.

#### **History of Project**

The Commission initiated this project by retaining Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare background studies.<sup>2</sup> The Commission also collected and made extensive use of materials from other jurisdictions, as well as the Model State Administrative Procedure Act (1981) promulgated by the National Conference of

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

2. The first three studies prepared for the Commission have been revised and published as Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992), reprinted *infra*, 25 Cal. L. Revision Comm'n Reports 321 (1995) [hereinafter Asimow I].

The fourth study prepared for the Commission is Asimow, *The Adjudication Process*, printed *infra*, 25 Cal. L. Revision Comm'n Reports 447 (1995) [hereinafter Asimow II].

Commissioners on Uniform State Laws,<sup>3</sup> and the Federal Administrative Procedure Act.<sup>4</sup>

The Commission's consideration of policy issues and draft statutory language occurred at a series of public meetings between 1990 and 1994. The meetings were held primarily in Sacramento as a convenience to the many state agencies headquartered there and were well-attended by agency representatives. In order to help achieve balance in its deliberations, the Commission named several non-agency experts as volunteer consultants to provide the Commission the benefit of their knowledge and experience.<sup>5</sup> During this process colloquia on the proposed law were held at two State Bar Annual Meetings.

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

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3. 15 U.L.A. 1 (1990). The Model Act is referred to in this report as "1981 Model State APA."

4. The federal statute was originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. See 5 U.S.C. §§ 551-583, 701-706, 1305, 3105, 3344, 5372, 7521 (1988 & Supp. V 1993), and related sections. The federal statute is referred to in this report as "Federal APA."

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

## EXISTING CALIFORNIA LAW GOVERNING ADMINISTRATIVE ADJUDICATION<sup>6</sup>

California's Administrative Procedure Act<sup>7</sup> was enacted in 1945<sup>8</sup> in response to a study and recommendations by the Judicial Council.<sup>9</sup> The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.<sup>10</sup> The decision to limit coverage to licensing agencies was not based on a principled decision that an Administrative Procedure Act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other agencies were needed, but it was not prepared to make recommendations with respect to them.<sup>11</sup>

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6. The description of existing California law governing administrative adjudication is drawn from a report prepared for the Commission by its consultant. See Asimow I, *supra note 2*.

7. The Administrative Procedure Act appears at Government Code Sections 11340-11530. Adjudication is governed by Sections 11500-11530. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11373.3. The California statute is referred to in this report as "1945 California APA."

8. 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.

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

10. 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 10, 26-28 (1944). This statute was the precursor of present Code of Civil Procedure Section 1094.5.

11. Judicial Council of California, Tenth Biennial Report 10, 28-29 (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).

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

During that time, the provisions of the Administrative Procedure Act relating to adjudication have been little changed.<sup>12</sup> 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 expanded now.

The 1945 California APA prescribes a single and unvarying mode of formal, trial-type adjudicative procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.<sup>13</sup> The administrative law judge writes a proposed decision that the agency head can adopt, modify, or reject.<sup>14</sup> There is little or no flexibility in the system to accommodate the many differ-

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12. The Administrative Procedure Act now covers a few agencies engaged in prosecutorial 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. See Gov't Code §§ 11500(g), 11501.5, 11513(d)-(n), 11513.5.

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

13. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. *Compare* Gov't Code § 11503 (revocation or suspension) with § 11504 (grant, issuance, or renewal).

14. 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, adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act. The only known exception is the Alcoholic Beverage Control Appeals Board.

ing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only named agencies, and it covers only those proceedings specified by the agency's organic statute.<sup>15</sup> Many important California agencies are wholly or largely uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers' Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, the Unemployment Insurance Appeals Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.<sup>16</sup>

Adjudication in agencies not covered by the Administrative Procedure Act is subject to differing procedural rules. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicative 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.<sup>17</sup>

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15. Gov't Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovals. Bus. & Prof. Code §§ 485, 495. A partial list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice (Cal. Cont. Ed. Bar, Supp. 1994).

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

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

## PROPOSED REVISION OF ADMINISTRATIVE ADJUDICATION

### **Basic Hearing Procedures Unchanged**

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

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

**Administrative Adjudication Bill of Rights<sup>18</sup>**

The Commission recommends that existing state agency hearing procedures be subject to a set of fundamental public policy and due process requirements. These requirements, which constitute a kind of “administrative bill of rights,” are:

- Notice and an opportunity to be heard, including the right to present and rebut evidence.
- An accessible hearing procedure.
- A presiding officer free of bias, prejudice, and interest.
- An independent presiding officer, achieved by separating adjudicative from investigative, prosecutorial, and advocacy functions within an agency.
- Prohibition of ex parte communications.
- Open hearings.
- Language assistance.
- A written decision based on the record, including a statement of its factual and legal basis. Credibility determinations made by the presiding officer are given great weight on review. A penalty may be based on an agency “guideline” only if adopted as a regulation.
- Designation and indexing of precedent decisions.

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

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18. For a more detailed discussion, see “Administrative Adjudication Bill of Rights” *infra* p. 99 *et seq.*

## Flexibility in Hearing Procedures<sup>19</sup>

The 1945 California APA and many other agency hearing procedures provide a single, relatively formal type of adjudicative proceeding. This is a significant limitation. For many types of agency decisions, a less formal procedure or an expedited process is needed. The proposed law sets forth a range of procedures and allows an agency to select the type of procedure that is most appropriate for a particular decision. These options include:

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

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19. For a more detailed discussion, see "Flexibility in Hearing Procedures" *infra* p. 108 *et seq.*

tory decision structure in which agencies may do this. Other hearing procedures do not apply in this situation, since the declaratory decision is based on stipulated facts.

The proposed law also encourages alternative dispute resolution techniques and gives agencies clear authority to settle cases without a hearing. The proposed law also provides other procedural enhancements for all state agency hearings.

### **Modernization of 1945 California APA<sup>20</sup>**

In addition to the administrative adjudication bill of rights and the added flexibility in hearing procedures that would be applicable to all agencies, the proposed law includes modernization of the 1945 California APA. For example, the proposed law would add provisions for consolidation and severance, resolution of discovery disputes, settlement conferences, correction of mistakes in decisions, and electronic voting by agency members.

### **Transitional Provisions**

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

### **Cost Considerations**

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

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20. For a more detailed discussion, see "Modernization of 1945 California APA" *infra* p. 117 *et seq.*

agency hearing procedures, and modernizing and adding greater flexibility to state agency hearing procedures.

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

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

- (1) Existing basic procedural rules of agencies remain intact. The process for adopting regulations is simplified. Ample time is allowed for the transitional process.<sup>21</sup>
- (2) Existing agency practices regarding lay hearing officers are preserved. Neutral staff assistance to the presiding officer is recognized. The separation of functions requirement is waived where circumstances compel it.<sup>22</sup>

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

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

22. The overwhelming volume of drivers license cases, for example, requires an exemption from separation of functions. Other exemptions are provided. See discussion of "Neutrality of Presiding Officer" *infra*.

- Providing an informal hearing process as an alternative to the lengthy and costly formal hearing process required by existing law.
- Providing agency emergency decision procedures as an alternative to court proceedings currently required.
- Facilitating inexpensive alternative dispute resolution techniques.
- Resolving discovery disputes under the 1945 California APA administratively rather than judicially.
- Making telephonic hearings and conferences, electronic recording of proceedings, and other cost-saving innovations available to agencies under the 1945 California APA.
- Increasing the presiding officer's authority under the 1945 California APA to efficiently manage the conduct of proceedings, for example by limiting cumulative evidence or imposing sanctions.
- Expanding the options for summary administrative review under the 1945 California APA.

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

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

## APPLICATION OF STATUTE

### **Application to Hearings Required by Constitution or Statute**

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

The proposed law would provide procedures to govern all state agency decisions for which an evidentiary hearing for determination of facts is required by the state or federal constitution or by statute. For this purpose, a “decision” is an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Thus the proposed law does not apply to rulemaking since rules are of general rather than particular applicability. Likewise, because the proposed law governs only statutorily or constitutionally required hearings, it does not cover a large amount of informal adjudication in which agencies choose to provide hearings even though hearings are not legally required.

### **Definition of “State Agency”**

The proposed law applies to state agency, as opposed to local agency, administrative adjudication.<sup>23</sup> As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the

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23. 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.

result that it is unclear whether their administrative adjudications are to be governed by the proposed law. The proposed law deals with these situations so as to effect the broadest possible coverage:

- (1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the proposed law applies.<sup>24</sup>
- (2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the proposed law.<sup>25</sup>

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

### **Separation of Powers**

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs.<sup>26</sup>

*The Legislature.* The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its mem-

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

25. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501 with respect to certificated employees. See also Educ. Code §§ 44944, 44948.5, 87679.

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

bers and expulsion of members,<sup>27</sup> determination of ethics violations of members,<sup>28</sup> impeachment of state officers and judges,<sup>29</sup> and confirmation of gubernatorial appointments.<sup>30</sup> 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.

Excluding the Legislature from coverage of the proposed law would not frustrate the objective of a body of administrative procedural law applicable to all state agencies. The adjudicative decisions made by the Legislature do not affect the relations between the average citizen and the state bureaucracy.

*The Judicial Branch.* In addition to the court system,<sup>31</sup> the judicial branch of state government includes the Judicial Council,<sup>32</sup> the Commission on Judicial Appointments,<sup>33</sup> the Commission on Judicial Performance,<sup>34</sup> and the Judicial Criminal Justice Planning Committee.<sup>35</sup>

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

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27. Cal. Const. Art. IV, § 5.

28. Gov't Code §§ 8940-8956 (Joint Legislative Ethics Committee).

29. Cal. Const. Art. IV, § 18.

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

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

32. Cal. Const. Art. VI, § 6.

33. Cal. Const. Art. VI, § 7.

34. Cal. Const. Art. VI, § 8.

35. Penal Code § 13830.

- (1) The Judicial Council does not conduct constitutionally or statutorily required adjudicative hearings.
- (2) The Commission on Judicial Appointments conducts hearings to make judicial appointment confirmation decisions that are vested in the discretion of the commission. The administrative adjudication provisions of the proposed law would be inappropriately applied to them.
- (3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the commission.<sup>36</sup>
- (4) The Judicial Criminal Justice Planning Committee does not conduct constitutionally or statutorily required adjudicative hearings.

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

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

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36. Cal. Const. Art. VI, § 18(i).

nor and Governor's office by exempting it from application of the act.<sup>37</sup>

### **University of California**

Article IX, Section 9 of the California Constitution makes the University of California independent and free of legislative control.<sup>38</sup> Although the Commission's fundamental recommendation is that the proposed administrative procedures should apply to all agencies of the state, it does not appear that the University may be subjected to the proposed law under this provision.<sup>39</sup>

Basic due process constraints apply to rulemaking and adjudicative 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 University of California not be subject to the proposed law.

Nonetheless, the proposed law is reasonable, flexible, and satisfies basic due process constraints. The Commission

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37. 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.").

38. 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.

39. *Cf. Scharf v. Regents of the Univ. of Cal.*, 234 Cal. App. 3d 1393 (1991).

believes the proposed law is suitable for the University of California's adjudicative proceedings. The proposed law makes clear that the University may voluntarily adopt the procedures. Adoption of the procedures by the University would promote the important objective of a uniform body of law applicable throughout the state. It would also make the University's internal governance consistent with the procedures the University must follow in its external relations with the rest of state government.

### **Executive Branch Agencies**

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

The Commission recommends exemptions from the proposed law for the following types of hearings:

*Agricultural Labor Relations Board: election certification.* The collective bargaining election certification provisions administered by the Agricultural Labor Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.<sup>40</sup>

*Alcoholic Beverage Control Appeals Board: appeals from ABC decisions.* The Alcoholic Beverage Control Appeals Board is a review tribunal for appeals from decisions of the Department of Alcoholic Beverage Control. The Constitution provides procedural rules for these appeals that cannot be altered by statute.<sup>41</sup>

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

41. Cal. Const. Art. XX, § 22.

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

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

*Public Employment Relations Board: election certification.* The collective bargaining election certification provisions administered by the Public Employment Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.<sup>42</sup>

*Public Utilities Commission: hearings under the Public Utilities Act.* The Public Utilities Commission is a constitutional agency that is authorized to establish its own procedures, subject to statute and due process.<sup>43</sup> In addition to special constitutional provisions, there is an extensive body of special statutory rules governing hearings under the Public Utilities Act. As a practical matter, application of the proposed law would have little effect other than to add complexity to the law.

*Commission on State Mandates: resolution of disputes over state mandated local programs.* The Commission on State

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

43. Cal. Const. Art. XII, § 2.

Mandates hears and decides applications from local government for reimbursement from the State for state-mandated programs that impose costs on local government.<sup>44</sup> This is an intergovernmental relations matter that has little in common with ordinary administrative hearings and does not affect the public.

All other statutorily or constitutionally required hearings of executive branch agencies should generally remain subject to the proposed law. However, there are special statutes applicable to particular decisions of agencies and these special provisions should ordinarily be preserved in conforming changes as reflective of a legislative policy determination.

## CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

### Background

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges employed by the Office of Administrative Hearings in the Department of General Services.<sup>45</sup> However, most of the major state agencies employ their own administrative law judges and hearing officers.<sup>46</sup> 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

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44. See Gov't Code §§ 17525-17571.

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

46. 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, Department of Industrial Relations, Department of Social Services, Public Utilities Commission, Unemployment Insurance Appeals Board, Workers' Compensation Appeals Board.

Hearings. Even this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

The Commission has given lengthy and serious consideration to 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 concludes, for the reasons outlined below, 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 have a central panel of hearing officers to hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.<sup>47</sup> 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

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47. Judicial Council of California, Tenth Biennial Report 10, 11 (1944).

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."<sup>48</sup>

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

### No Expansion of California Central Panel Proposed

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

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48. *Id.* at 14.

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.<sup>49</sup>

First, there does not appear to be a compelling case for a general removal of hearing officers to the central panel. The Commission's investigation disclosed some concern among private practitioners about fairness, and the appearance of fairness, where the hearing is conducted by an employee of the agency prosecuting the matter. However, the concern was

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49. Among the concerns that various state agencies have expressed regarding expansion of the central panel, the following are common:

- (1) The agency deals in a specialized area for which special knowledge and expertise is necessary, which could not be maintained in a central panel setting.
- (2) The agency has a high volume operation that must deal with cases in a way far different from the typical central panel administrative law judge hearing.
- (3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.
- (4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.
- (5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.
- (6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.
- (7) The agency's hearing procedure is constitutionally exempt from legislative control.
- (8) The purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.
- (9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.
- (10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.
- (11) The agency conducts informal hearings; it would be undesirable to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

directed to a few problem areas, insufficient to warrant a fundamental change in the existing hearing officer structure for all agencies and all proceedings.

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

Third, most of the agencies that employ a significant number of in-house judges are themselves purely adjudicating agencies rather than agencies with a mixture of prosecutory and adjudicative functions. Therefore, there is much less need to make their judges independent. This is true, for example, of the State Personnel Board, the Unemployment Insurance Appeals Board, and the Workers' Compensation Appeals Board. The same principle applies to 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 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.<sup>50</sup> There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law judges serve several functions, acting as legal advisors as well as hearing officers;

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

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

Finally, the benefits of an independent hearing officer can be achieved without disruption of existing personnel structures by ensuring fairness and due process through the basic requirement of impartiality of the decisionmaker. The proposed law codifies fundamental elements of impartiality for all state agency hearings: the decision should be based exclusively on the record in the proceeding, credibility determinations made by the presiding officer should be given great weight on review, the decisionmaker should be free of bias, ex parte communications to the decisionmaker should be prohibited, adversarial functions should be separated from decisionmaking functions within the agency, and decisionmaking functions should be insulated from adversarial command influence within the agency.<sup>51</sup>

## ADMINISTRATIVE ADJUDICATION BILL OF RIGHTS

The proposed law includes an “administrative adjudication bill of rights” that prescribes fundamental due process and public policy protections for persons involved in administra-

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51. See discussion of “Administrative Adjudication Bill of Rights” *infra*.

tive adjudication by state agencies. These provisions are described below.

### **Notice and an Opportunity To Be Heard**

Notice to the person that is the subject of agency proceeding and an opportunity for the person to be heard are fundamentals of due process of law. The proposed law codifies this principle and makes clear that the opportunity to be heard includes the right of the person to present and rebut evidence.

### **Accessibility of Procedures**

A major problem under the existing California law governing administrative adjudication is that the law setting forth the hearing procedures of an individual agency may be relatively inaccessible. It is common to find an agency's procedure governed by a combination of general procedural statutes, special statutes applicable to the particular agency, regulations adopted by the agency, rules of procedure that have not been adopted by regulation, and unwritten practices followed by the agency.<sup>52</sup> This situation makes it difficult for a person having to deal with the administrative procedures of that agency to know what to expect and how to proceed.

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

### **Open Hearings**

Existing California law is generally silent on whether an administrative hearing is open to the public. The general assumption is that hearings are open, and there is authority

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52. Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1077-78, reprinted *infra* pp. 331-32.

that this is a matter of due process.<sup>53</sup> The proposed law makes clear that a state agency hearing is generally open to the public, subject to special statutes such as those protecting trade secrets or other confidential or privileged matters, or those protecting child victims and witnesses.

### **Neutrality of Presiding Officer**

Existing California statutes and case law on separation of the adjudicative function from other functions within the agency is unclear.<sup>54</sup> To avoid prejudgment, the decisionmaker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. The proposed law codifies this principle.

As a practical matter, the separation of functions requirement could cripple an agency in a number of situations, due to staffing limitations.<sup>55</sup> The proposed law addresses these situations specifically:

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

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53. See Asimow II, *supra* note 2, at 532-33.

54. See Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1168-70, *reprinted infra* pp. 422-24.

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

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

### **Command Influence**

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

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

### **Bias**

The 1945 California APA makes clear that a decisionmaker may be disqualified if unable to “accord a fair and impartial hearing or consideration.”<sup>56</sup> The proposed law recodifies this standard in the more concrete traditional terms of “bias, prejudice, or interest,” and imports from the Code of Civil Procedure a few key criteria of particular relevance to administrative adjudication.<sup>57</sup> The disqualification provisions would

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

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 presented in the proceeding,

apply to any agency decisionmaker, not just hearing personnel under the 1945 California APA.

### **Exclusivity of Record**

Existing California case law requires that the decision be based on the factual record produced at the hearing.<sup>58</sup> Both the Federal APA<sup>59</sup> and the 1981 Model State APA<sup>60</sup> codify this aspect of due process, and the proposed law does the same for California.

### **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.<sup>61</sup> The statute is supplemented by the case-law requirement that the decision contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts.<sup>62</sup> The proposed law codifies the requirement that the decision state its factual and legal basis. This will force the decisionmaker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

Since the presiding officer at the hearing has had the opportunity to observe the witnesses, the presiding officer's credibility determinations based on observation of demeanor and

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and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2.

58. See, e.g., *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1126-27, reprinted *infra* pp. 380-81.

59. 5 U.S.C. § 556(e) (1988).

60. 1981 Model State APA § 4-215(d).

61. Gov't Code § 11518.

62. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

the like should be identified in the decision, and thereafter should be entitled to great weight on judicial review.<sup>63</sup>

It is common agency practice to use guidelines for imposition of penalties in agency proceedings. The Administrative Procedure Act precludes enforcement of these guidelines unless adopted and publicly-available as agency regulations.<sup>64</sup> The proposed law includes a specific application of this principle: the decisionmaker may not impose a penalty based on a disciplinary guideline that has not been promulgated as required by law.

### Precedent Decisions

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

The precedent decision provision recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although agency decisions are public records, they are inaccessible to the public except in

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63. The great weight requirement for credibility determinations would be applied only indirectly, as a factor in any judicial review of the administrative decision. This requirement would codify in California the general rule applied in federal cases, as well as in a number of state agencies. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (Federal APA); *Garza v. Workmen's Compensation Appeals Bd.*, 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (Workers' Compensation Appeals Board); *Millen v. Swoap*, 58 Cal. App. 3d 943, 947-48, 130 Cal. Rptr. 387 (1976) (Department of Social Services); *Apte v. Regents of Univ. of Cal.*, 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Lab. Code § 1148 (Agricultural Labor Relations Board).

64. Gov't Code § 11340.5(a) ("underground regulations").

the case of the few existing agencies that publish their decisions or designate precedent decisions.<sup>65</sup>

Extension of the precedent decision requirement to all agencies would make the decisions generally available and would benefit everyone, including counsel for both sides, as well as 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. Additionally, 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.

### **Ex Parte Communications**

The 1945 California APA and statutes governing a few other agencies are clear that factual inputs to the decision-maker must be on the record, but the rule as to other agency proceedings is not clear. Moreover, it is not clear whether ex parte contacts concerning law or policy are permissible.<sup>66</sup> Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of

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

The Office of Administrative Law has determined that an agency's designation of a decision as precedential violates Government Code Section 11340.5 (formerly Section 11347.5) unless the designation is made pursuant to rulemaking procedures, except where in accordance with Section 11346 the designation is expressly exempted by statute. 1993 OAL Determination No. 1. The Fair Employment and Housing Commission (Gov't Code § 12935(h)),, and the State Personnel Board (Gov't Code § 19582.5) the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409) designate and publish precedent decisions pursuant to express statutory authority, but only a designations by the State Personnel Board and the Unemployment Insurance Appeals Board are expressly exempted by statute from rulemaking procedures. The proposed law expressly exempts agency designation of precedent decisions from rulemaking procedures.

66. See generally Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1132-33, reprinted *infra* pp. 386-87.

Administrative Hearings, but is silent as to ex parte communications to agency heads, as well as to any decisionmaker in the great majority of administrative adjudications in California that do not fall under the 1945 California APA. In some state agencies ex parte contacts are tolerated or encouraged.<sup>67</sup>

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

- (1) Discussion of noncontroversial matters of practice or procedure is permissible.
- (2) The decisionmaker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decisionmaker is from personnel within the agency that is a party to the proceeding. The decisionmaker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.
- (3) Agency personnel, including prosecutorial personnel, must be able to advise the decisionmaker concerning aspects of a settlement proposed by the prosecution. The proposed law recognizes this situation.
- (4) The ban on ex parte communications would not apply in a nonprosecutorial proceeding that involves necessary technical advice or a decision by specified land use agencies. Although these nonprosecutorial proceedings are trial-like, they involve a substantial

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67. *Id.*, 39 UCLA L. Rev. at 1130, reprinted *infra* p. 384. Some, such as the Public Utilities Commission, have developed elaborate ex parte prohibitions tailored to their specific needs.

element of policy determination where it may be important that the decisionmaker consult more broadly than the immediate parties to the proceeding. The proposed law would allow policy advice to be given in these proceedings, provided it is summarized in the record and made available to all parties.

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

### **Language Assistance**

Existing provisions require interpreters for language-disabled parties<sup>68</sup> in proceedings before specified agencies. The proposed law preserves this requirement and extends it to language-disabled witnesses.

## **FLEXIBILITY IN HEARING PROCEDURES**

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

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

### Telephonic Hearings

The 1945 California APA and other agency hearing procedures contemplate a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical attendance at the hearing difficult. Moreover, an in-person hearing may require parties or witnesses to sit and wait for long periods of time. In such situations, it makes sense to take testimony telephonically. The Unemployment Insurance Appeals Board makes use of telephone hearings with a great amount of success.<sup>69</sup>

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 telephonic hearing may not be used if a party objects.

### Subpoenas

Under the 1945 California APA an agency has broad subpoena authority.<sup>70</sup> 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 give the respondent adequate time to prepare and help avoid the need for a continuance. To protect against hardship, the proposed law permits a custodian of subpoenaed documents to satisfy the subpoena by delivery of a copy or by making the documents

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69. See Asimow II, *supra* note 2, at 531.

70. See Gov't Code § 11510.

available for inspection and copying, in the manner allowed in court proceedings.

### **Enforcement of Orders and Sanctions**

The 1945 California APA provides that disobedience of orders or obstructive or contumacious behavior in an administrative adjudication proceeding may be certified to the superior court for contempt proceedings.<sup>71</sup> This authority is extended in the proposed law to all state agency adjudicative proceedings.

The proposed law also seeks to curb bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In civil actions, these are addressed by monetary sanctions,<sup>72</sup> and experience with such sanctions 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.

### **Intervention**

Existing law is not clear on the right of a third party to intervene in an administrative adjudication. Yet situations do arise where 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. The proposed law provides an intervention procedure that an agency may adopt to govern such situations. 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

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71. Gov't Code § 11525.

72. Code Civ. Proc. § 128.5.

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.

### **Settlement**

An agency has implied power to settle a case.<sup>73</sup> The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a settlement.<sup>74</sup> This resolves the difficulty that the agency head is required to approve a settlement but in many cases the agency head is a body of part-time appointees unable to meet and consider the settlement for a considerable period of time. The proposed law also makes clear that a settlement may be made before or after commencement of the proceeding, except in an occupational licensing case. To ensure that the disciplinary action is a matter of public record, an occupational licensing case may be settled only after commencement of the proceeding.

### **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. In recent years, federal administrative procedure has made effective use of alternative dispute resolution.<sup>75</sup> In 1990 Congress amended the Federal APA to require agencies to explore and use alter-

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73. Rich Vision Centers, Inc. v. Board of Medical Examiners, 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455 (1983).

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

75. See Asimow II, *supra* note 2, at 484-85.

native dispute resolution techniques in all agency functions.<sup>76</sup> Existing California law is generally silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.<sup>77</sup> 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,<sup>78</sup> 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.<sup>79</sup> The Office of Administrative Hearings is charged with responsibility to develop model regulations for alternative dispute resolution proceedings that govern disputes referred to alternative dispute resolution unless modified by the agency. The Commission believes these provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

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76. Administrative Dispute Resolution Act, Pub. L. No. 101-552, codified at 5 U.S.C. §§ 571-583 (Supp. V 1993).

77. See Asimow II, *supra* note 2, at 484.

78. Evid. Code § 1152.5.

79. Cf. Evid. Code § 703.5.

### Informal Hearing Procedure

The standard formal adjudicative hearing procedure under the 1945 California APA and other procedural statutes may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process.<sup>80</sup>

To address this concern, the proposed law permits agencies to resolve matters involving only a minor sanction or matters in which there is no factual dispute by means of an informal adjudicative hearing process, drawn from the 1981 Model State APA.<sup>81</sup> This process would also be available to an agency that specifies classes of cases where it would be appropriate, provided use of the informal process would not violate due process requirements for those cases.

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

The informal hearing may be particularly useful in a number of situations:<sup>83</sup>

- Where there is no disputed issue of fact but only a question of law, policy, or discretion.

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80. See Asimow II, *supra* note 2, at 518.

81. 1981 Model State APA §§ 4-401 to 4-403. Alternate adjudicative procedures are 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).

82. *Id.* at 522-24.

83. See Asimow II, *supra* note 2, at 520-21.

- A decision to deny a discretionary permit, grant, or license where a hearing is required by statute or due process of law.
- Various land use planning and environmental decisions.
- An individualized ratemaking case.
- Tax adjudications conducted by the State Board of Equalization.

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

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

### **Emergency Decision Procedure**

In some circumstances there is a need for an agency to take immediate action for the protection of the public. If there is serious abuse that causes immediate and irreparable physical or emotional injury to a ward in a child or elder care facility, for example, an agency may need to act quickly to remove the

ward or close the facility or temporarily suspend its license. Emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation, and this remedy has proved to be unsatisfactory in professional licensing cases where interim suspension is urgently needed to protect public safety.<sup>84</sup>

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.<sup>85</sup> Absent a specific authorization for an emergency procedure, existing administrative procedure statutes mandate full proceedings. 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

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84. *Id.* at 526.

85. See, e.g., Bus. & Prof. Code §§ 494 (order for interim suspension of licensee), 6007(c) (attorney), 10086(a) (real estate licensee); Educ. Code §§ 66017 (immediate suspension of disruptive student, teacher, staff member, or administrator), 94319.12 (emergency suspension or approval of private postsecondary institution to operate); Fin. Code § 8201(f) (immediate removal of officer or employee of savings association); Food & Agric. Code §§ 56535-56537 (farm products licensees); Gov't Code § 11529 (medical licensee); Health & Safety Code §§ 1550.5 (community care facilities), 1569.50 (residential care facilities for elderly), 1596.886 (child daycare facilities); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV licenses of manufacturers, transporters, and dealers).

feasible. The notice and hearing may be telephonic or by other electronic means.

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

### **Declaratory Decision Procedure**

Declaratory relief may be a useful means to obtain fully reliable information concerning application of agency regulations to a person's particular circumstances. The Federal APA provides for declaratory orders,<sup>86</sup> as do other modern statutes.<sup>87</sup> However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

The proposed law creates 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 the agency.

Under the proposed law, the general rules of administrative hearing practice are inapplicable, since there often will be no fact-finding involved — only application of laws or regulations to a prescribed set of facts. As to those facts, a declara-

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86. 5 U.S.C. § 554(e) (1988).

87. Cf. 1981 Model State APA § 2-103.

tory decision has the same status and binding effect as any other agency decision.

### **Conversion of Proceedings**

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

There are no provisions in the California statutes for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.<sup>88</sup> Under this procedure, the presiding officer or other agency official responsible for the proceeding may convert it to another type if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party. Notice to affected parties is required.

## **MODERNIZATION OF 1945 CALIFORNIA APA**

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

### **Prehearing Procedures**

*Consolidation and Severance.* The 1945 California APA contains no provisions allowing consolidation of related cases or severance of issues in a case that could be more economically handled in several parts. The proposed law follows the

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88. 1981 Model State APA § 1-107.

consolidation and severance procedures of the Code of Civil Procedure,<sup>89</sup> which have worked well in civil cases. Control of consolidation and severance issues is vested in the administrative law judge.

*Discovery.* The 1945 California APA provides for limited discovery in administrative adjudications.<sup>90</sup> 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.<sup>91</sup>

Under the 1945 California APA, discovery disputes between the parties are referred to the superior court for resolution and enforcement. To expedite the discovery process, the proposed law vests resolution of discovery disputes in the administrative law judge.

*Prehearing Conference.* The proposed law adds the following features designed to enhance the effectiveness of the pre-hearing process:

- (1) The conference may be conducted by telephone or other electronic means.
- (2) The conference should serve as a forum for exchange of discovery information, where appropriate.

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89. Code Civ. Proc. § 1048.

90. Gov't Code §§ 11507.5, 11507.6, 11507.7, 11511.

91. For example, case law has questioned the fairness and constitutionality of Government Code Section 11511, which provides that when a witness is unavailable for trial, the agency *may*, but need not necessarily, allow the respondent to depose the witness. *See Blinder, Robinson & Co. v. Tom*, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986). The proposed law addresses this point by allowing the presiding officer, if one has been appointed, to order a deposition.

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

The prehearing conference is conducted by the administrative law judge 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 administrative law judge to order a separate mandatory settlement conference, to be held before a different settlement judge, if one is available. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

### **Hearing Record**

The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improved 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 the administrative law judge to require electronic reporting; a party may require stenographic reporting at the party's own expense.

### **Evidence**

*Technical Rules of Evidence.* The proposed law codifies a few key exceptions to the general rule that any relevant evidence is admissible in an administrative adjudication if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.<sup>92</sup> Existing law permits the administrative law judge to exclude irrelevant and unduly

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92. Gov't Code § 11513(c).

repetitious evidence.<sup>93</sup> This authority should be broadened so that the administrative law judge also has discretion to exclude evidence that contributes little to the result but promotes delay and confusion. The proposed law adopts the standard of Evidence Code Section 352, which provides for exclusion of evidence whose probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

*Hearsay.* Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding.<sup>94</sup> This provision, known as the residuum rule, is desirable as a general matter because it forces the use of reliable evidence, which may be particularly important in an administrative adjudication in which the sanction is severe, such as a license revocation. The proposed law makes clear that the residuum rule can be raised either at the hearing or on reconsideration or other administrative review. Existing law is unclear on this matter.<sup>95</sup> It may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence.

*Review of Evidentiary Rulings.* It is not clear whether an administrative law judge's evidentiary rulings are subject to administrative review. Arguably, the rulings are conclusive.<sup>96</sup> The proposed law makes clear that the agency head may review evidentiary determinations of the administrative law judge. The adjudicative authority is vested in the agency

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93. Gov't Code § 11513(c).

94. Gov't Code § 11513(c).

95. See Asimow II, *supra* note 2, at 504.

96. See *id.* at 500.

head, and the agency head should be the ultimate administrative decisionmaker.

### **Decision**

*Voting by Agency Members.* The 1945 California APA permits agency members to vote by mail.<sup>97</sup> The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

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

### **Review of Decision**

*Administrative Review.* The proposed law continues the requirement that administrative review of a proposed decision be on the record, but adds a provision drawn from appellate practice enabling a record based on an agreed statement of the parties.<sup>98</sup> The proposed law also expands the ability of an agency head to adopt summarily a proposed decision without full administrative review. Under the proposed law, the agency head may summarily adopt the proposed decision with clarifying changes that do not affect the factual or legal basis of the decision. In addition, the agency head may summarily adopt the proposed decision with a change of legal basis, after offering the parties an opportunity to comment on the change.

*Judicial Review.* The proposed law generally leaves unchanged existing provisions governing judicial review.<sup>99</sup> This should not be taken as Law Revision Commission approval of the law. The Commission is currently studying the law governing judicial review of agency action and will

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97. Gov't Code § 11526.

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

99. See Gov't Code § 11523.

make a separate recommendation concerning it. The present recommendation does not address the matter.

# ADMINISTRATIVE ADJUDICATION

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### *I. Office of Administrative Law*

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#### CHAPTER 3.5. OFFICE OF ADMINISTRATIVE LAW

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

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

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

(2) In the interest of fairness, uniformity, and the expedition of business, submit its suggestions to the various agencies.

(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 provide access to records required by statute to be kept confidential.

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

## *II. Office of Administrative Hearings*

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### CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

#### **Gov't Code §§ 11370-11370.5 (article heading added). General provisions**

##### **Article 1. General Provisions**

**Comment.** Chapter 4 (commencing with Section 11370) is divided into articles for organizational purposes.

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

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

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

#### **Gov't Code § 11370.3 (amended). Personnel**

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~~ *any* other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may

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

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

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

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

**Comment.** Section 11370.5 is amended to limit the authority of the Office of Administrative Hearings to administrative adjudication. For authority of the Office of Administrative Law to study administrative

rulemaking, see Section 11340.4. Section 11370.5 is also amended to add language protecting confidentiality of records.

**Gov't Code §§ 11371-11373.3 (article heading added). Medical Quality Hearing Panel**

**Article 2. Medical Quality Hearing Panel**

**Comment.** Chapter 4 (commencing with Section 11370) is divided into articles for organizational purposes.

**Gov't Code § 11380 (added). State Agency Reports and Forms Appeals**

**Article 3. State Agency Reports and Forms Appeals**

**§ 11380. State agency reports and forms appeals**

11380. (a)(1) The office shall hear and render a decision on any appeal filed by a business, pursuant to subdivision (c) of Section 14775, in the event the business contests the certification by a state agency head that reporting requirements meet established criteria and shall not be eliminated.

(2) Before a business may file an appeal with the office pursuant to subdivision (c) of Section 14775, the business shall file a challenge to a form or report required by a state agency with that state agency. Within 60 days of filing the challenge with a state agency, the state agency shall either eliminate the form or report or provide written justification for its continued use.

(3) A business may appeal a state agency's written justification for the continued use of a form or report with the office.

(4) If a state agency fails to respond within 60 days of the filing of a challenge pursuant to paragraph (2), the business shall have an immediate right to file an appeal with the office.

- (b) No later than January 1, 1996, the office shall adopt procedures governing the filing, hearing, and disposition of appeals. The procedures shall include, but shall not be limited to, provisions that assure that appeals are heard and decisions rendered by the office in a fair, impartial, and timely fashion.
- (c) The office may charge appellants a reasonable fee to pay for costs it incurs in complying with this section.

**Comment.** Section 11380 continues former Section 11530 without change.

### *III. Administrative Adjudication: General Provisions*

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

## **CHAPTER 4.5. ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS**

### **Article 1. Preliminary Provisions**

#### **§ 11400. Administrative adjudication provisions of Administrative Procedure Act**

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

(b) A reference in any other statute or in a rule of court, executive order, or regulation, to a provision formerly found in Chapter 5 (commencing with Section 11500) that is superseded by a provision of this chapter, means the applicable provision of this chapter.

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

References in section Comments in this chapter and Chapter 5 to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws. See 15 U.L.A. 1 (1990). References to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-583, 701-706, 1305, 3105, 3344, 5372, 7521 (1988 & Supp. V 1993), and related sections (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237). A number of the

administrative adjudication provisions of the Administrative Procedure Act are drawn from the Federal APA.

### **§ 11400.10. Operative date**

- 11400.10. (a) This chapter is operative on July 1, 1997.
- (b) This chapter is applicable to an adjudicative proceeding commenced on or after July 1, 1997.
- (c) This chapter is not applicable to an adjudicative proceeding commenced before July 1, 1997, except an adjudicative proceeding conducted on a remand from a court or another agency on or after July 1, 1997.

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

### **§ 11400.20. Adoption of regulations**

11400.20. (a) Before, on, or after July 1, 1997, an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter.

(b) Except as provided in Section 11351:

(1) Interim regulations need not comply with Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5, but are governed by Chapter 3.5 (commencing with Section 11340) in all other respects.

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

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

**Comment.** Subdivision (a) of Section 11400.20 makes clear that an agency may act to adopt regulations under this division after enactment but before the division becomes operative. This will enable the agency to have any necessary regulations in place on the operative date. It should be noted that revisions of regulations that merely conform to the new law may be adopted by simplified procedures under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100.

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 11343-11344.9), and (3) regulations are subject to judicial review (Section 11350). Compliance with these provisions is not required for agencies exempted by statute. See Section 11351.

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

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

## Article 2. Definitions

### **§ 11405.10. Application of definitions**

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

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

### **§ 11405.20. Adjudicative proceeding**

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

**Comment.** Section 11405.20 is intended for drafting convenience.

### **§ 11405.30. Agency**

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

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

The last sentence of the section is in part derived from Federal APA § 551(1) (1988), 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.

An administrative unit of an agency that has no authority to issue decisions or take other action on behalf of the agency is not an “agency” within the meaning of this section.

#### **§ 11405.40. Agency head**

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

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

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

#### **§ 11405.50. Decision**

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

(b) Nothing in this section limits any of the following:

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

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

**Comment.** Section 11405.50 is drawn from 1981 Model State APA § 1-102(5). The definition of “decision” makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. See Section 13

(singular includes plural). “Person” includes legal entity and governmental subdivision. Section 11405.70 (“person” defined); see also Section 17 (“person” defined).

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

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a certain licensee, are decisions subject to this chapter. *Cf.* Federal APA § 551(4) (1988) (defining all rate making as rulemaking). On the other hand, rate making and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations under the Administrative Procedure Act. Section 11342 (“regulation” defined). However, some decisions may have precedential effect pursuant to Section 11425.60 (precedent decisions).

### § 11405.60. Party

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

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

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

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

division authorized to act on behalf of the agency may be a party under this chapter. See Section 11405.30 & Comment (“agency” defined).

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

### **§ 11405.70. Person**

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

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

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

### **§ 11405.80. Presiding officer**

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

**Comment.** Section 11405.80 is intended for drafting convenience.

## Article 3. Application of Chapter

### **§ 11410.10. Application to constitutionally and statutorily required hearings**

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

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

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

The coverage of this chapter is the same as coverage by the existing provision for administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section applies only where an agency has issued a final decision “as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency].” Numerous cases have applied Code of Civil Procedure Section 1094.5(a) broadly to administrative proceedings in which a statute requires an “administrative appeal” or some other functional equivalent of an evidentiary hearing for determination of facts — an on-the-record or trial-type hearing. See, e.g., *Eureka Teachers Ass’n v. Board of Educ. of Eureka City Schools*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher’s right to appeal grade change was right to hearing — Code Civ. Proc. § 1094.5 applies); *Chavez v. Civil Serv. Comm’n of Sacramento County*, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of “appeal” means hearing required — Code Civ. Proc. § 1094.5 available).

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in this section. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. This chapter does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: *Goss v. Lopez*, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); *Hewitt v. Helms*, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in administrative segregation — prisoner has right to

file written statement); *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 539 P. 2d 774, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job); *Wasko v. Department of Corrections*, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing — Code Civ. Proc. § 1094.5 inapplicable); *Marina County Water Dist. v. State Water Resources Control Bd.*, 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc. § 1094.5 inapplicable).

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

This chapter applies only to proceedings for issuing a "decision." A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Section 11405.50(a) ("decision" defined). Therefore this chapter does not apply to agency actions that do not determine a person's legal interests and does not apply to rulemaking, which is agency action of general applicability.

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

This section does not specify what type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing procedure under Chapter 5 (commencing with Section 11500), or may be a special hearing procedure provided by a statute applicable to the particular proceeding. This chapter also makes available the alternatives of an informal hearing, an emergency decision, or a declaratory decision, where appropriate under the circumstances. See Articles 10 (commencing with Section 11445.10), 13 (commencing with Section 11460.10), and 14 (commencing with Section 11465.10).

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

**§ 11410.20. Application to state**

11410.20. Except as otherwise expressly provided by statute:

- (a) This chapter applies to all agencies of the state.
- (b) This chapter does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

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

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

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

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

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

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

Alcoholic Beverage Control Appeals Board (Bus. & Prof. Code § 23083)

University of California (Educ. Code § 92001)

Public Employment Relations Board (Gov't Code §§ 3541.3, 3563)

Commission on State Mandates (Gov't Code § 17533)

Agricultural Labor Relations Board (Lab. Code § 1144.5)

Military Department (Mil. & Vet. Code § 105)

Department of Corrections, Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Evaluation Authority (Pen. Code § 3066; Welf. & Inst. Code §§ 1788, 3158)

Public Utilities Commission (Pub. Util. Code § 1701)

This chapter is not applicable to the State Bar of California. Bus. & Prof. Code § 6001.

Nothing in this chapter precludes an agency from electing to have an exempt proceeding governed by this division. Section 11410.40.

### **§ 11410.30. Application to local agencies**

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

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

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

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

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

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

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

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

See also Sections 11410.50 (application where formal hearing procedure required), 11501 (application of chapter).

### **§ 11410.40. Election to apply administrative adjudication provisions**

11410.40. Notwithstanding any other provision of this article, by regulation, ordinance, or other appropriate action an agency may adopt this chapter 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 chapter.

**Comment.** Section 11410.40 is new. An agency may elect to apply this chapter even though the agency would otherwise be exempt or the particular action taken by the agency would otherwise be exempt. See Sections 11410.20 & Comment (application to state) and 11410.30 (application to local agencies); Section 11410.10 (application to constitutionally and statutorily required hearings).

#### **§ 11410.50. Application where formal hearing procedure required**

11410.50. This chapter applies to an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) unless the statutes relating to the proceeding provide otherwise.

**Comment.** Section 11410.50 makes clear that the provisions of this chapter supplement the formal hearing provisions of Chapter 5. See also Section 11501(c) (application of chapter). Thus if an agency is required by statute to conduct a hearing under Chapter 5, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of this chapter. Likewise, the general provisions of this chapter restricting ex parte communications, regulating precedent decisions, and the like, apply to a hearing under Chapter 5.

### **Article 4. Governing Procedure**

#### **§ 11415.10. Applicable procedure**

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

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

**Comment.** The first sentence of subdivision (a) of Section 11415.10 is drawn from Section 11501(a) (formal hearing procedure applies to

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

Subdivision (b) makes clear that the provisions of this chapter supplement the applicable hearing procedure. Some provisions of this chapter are optional, e.g., the informal hearing procedure (Article 10 (commencing with Section 11445.10)), the emergency decision procedure (Article 13 (commencing with Section 11460.10)), and the declaratory decision procedure (Article 14 (commencing with Section 11465.10)). The agency determines whether to use any of the optional provisions. The optional provisions do not replace any other agency procedures that serve the same purpose. For example, the informal hearing procedure provided in this chapter does not replace an agency's own informal hearing procedure, but offers a supplemental alternative. Likewise, the emergency decision procedure does not replace an agency's own procedures for interim suspension or other immediate action, but provides an alternative means of proceeding that an agency may wish to use.

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

### **§ 11415.20. Conflicting or inconsistent statute controls**

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

**Comment.** Section 11415.20 makes clear that the provisions of this chapter are not intended to override a conflicting or inconsistent statute or applicable federal law that governs a particular matter. It should also be noted that if application of a provision of this chapter would cause loss or delay of federal funds, the Governor may suspend the provision. Section 11415.30.

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

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

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

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

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

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

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

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

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

#### **§ 11415.40. Waiver of provisions**

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

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

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

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

#### **§ 11415.50. When adjudicative proceeding not required**

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

(b) An adjudicative proceeding is not required for informal factfinding or an informal investigatory hearing, or a decision

to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

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

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

#### **§ 11415.60. Settlement**

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

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

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

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

Subdivision (a) is analogous to Section 11420.30 (confidentiality of communications in alternative dispute resolution). The parties are, of course, free to make a stipulation concerning confidentiality of offers of compromise or settlement that goes beyond or otherwise varies the protection of this section.

Section 11415.60 is subject to a specific statute to the contrary governing the matter. Section 11415.20 (conflicting or inconsistent statute controls). Subdivision (c) recognizes that some other statutes provide for agency approval of a settlement. See, e.g., Gov't Code § 18681 (authority of State Personnel Board to approve settlements), Lab. Code §§ 98.2(d) (approval in labor standards enforcement), 5001 (approval of workers' compensation settlement), Pub. Res. Code § 6107 (approval by Governor of settlement by State Lands Commission), Rev. & Tax. Code §§ 7093.5, 9271, 19442, 30459.1, 32471, 40211, 41171, 43522, 45867, 50156.11, 55332 (approval of tax settlements).

## Article 5. Alternative Dispute Resolution

### § 11420.10. ADR authorized

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

(1) Mediation by a neutral mediator.

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

(3) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the

agency head a party requests that the agency conduct 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 insofar as applicable in the adjudicative proceeding.

(b) If another statute requires mediation or arbitration in an adjudicative proceeding, that statute prevails over this section.

(c) This section does not apply in an adjudicative proceeding to the extent an agency by regulation provides that this section is not applicable in a proceeding of the agency.

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

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

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

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

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

## **§ 11420.20. Regulations governing ADR**

11420.20. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations for alternative dispute resolution under this article. The model regulations govern alternative dispute resolution by an agency under this article, except to the extent the agency by regulation provides inconsistent rules or provides that the model regulations are not applicable in a proceeding of the agency.

(b) The model regulations shall include provisions for selection and compensation of a mediator or arbitrator,

qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding.

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

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

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

### **§ 11420.30. Confidentiality and admissibility of ADR communications**

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

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

(b) No reference to nonbinding arbitration proceedings, a decision of the arbitrator that is rejected by a party's request for a de novo adjudicative proceeding, the evidence produced, or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator or arbitrator is competent to testify in a subsequent administrative or civil proceeding as to any

statement, conduct, decision, or order occurring at, or in conjunction with, the alternative dispute resolution.

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

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

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

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

## Article 6. Administrative Adjudication Bill of Rights

### § 11425.10. Administrative adjudication bill of rights

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

(1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.

(2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding.

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

(4) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30.

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

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

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

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

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

(b) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of a person to which the agency action is directed than, the requirements of this section.

**Comment.** Section 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter).

Under subdivision (b), this section is self-executing — it is part of the governing procedure by which an agency conducts an adjudicative proceeding whether or not regulations address the matter. The section does not, however, override conflicting or inconsistent state statutes, or federal statutes or regulations. Section 11415.20 (conflicting or inconsistent statute controls). If the governing procedure includes regulations that are at variance with the requirements of this section, it is desirable, but not necessary, that the agency revise the regulations; the requirements of this section apply regardless of the regulations. Conforming regulations may be adopted by a simplified procedure under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100. Nothing in this section

precludes the agency from adopting additional or more extensive requirements than those prescribed by this section.

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

Subdivision (a)(9), relating to language assistance, is limited to agencies listed in Sections 11018 (state agency not subject to Chapter 5) and 11435.15 (application of language assistance provisions).

### **§ 11425.20. Open hearings**

11425.20. (a) A hearing shall be open to public observation. Nothing in this subdivision limits the authority of the presiding officer to order closure of a hearing or make other protective orders to the extent necessary or proper for any of the following purposes:

(1) To satisfy the federal or state Constitution, statute, or other law, including but not limited to laws protecting privileged, confidential, or other protected information.

(2) To ensure a fair hearing in the circumstances of the particular case.

(3) To conduct the hearing, including the manner of examining witnesses, in a way that is appropriate to protect a minor witness or a witness with a developmental disability, as defined in Section 4512 of the Welfare and Institutions Code, from intimidation or other harm, taking into account the rights of all persons.

(b) To the extent a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity to do both of the following:

(1) At reasonable times, hear or inspect the agency’s record, and inspect any transcript obtained by the agency.

(2) Be physically present at the place where the presiding officer is conducting the hearing.

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

**Comment.** Section 11425.20 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. It should be noted that under the open meeting law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). And under the open meeting law, a settlement proposal may be considered by the agency in closed session if it sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting. Section 11126(d), (q).

Subdivision (a) codifies existing practice. See 1 G. Ogden, California Public Agency Practice § 37.03 (1994).

Statutory protection of trade secrets and other confidential or privileged information is covered by subdivision (a)(1). See, e.g., Evid. Code §§ 1060-1063; Fin. Code §§ 1939, 16120, 18496.

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

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

### **§ 11425.30. Neutrality of presiding officer**

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

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

(2) The person is subject to the authority, direction, or discretion of a person who has served as investigator,

prosecutor, or advocate in the proceeding or its pre-adjudicative stage.

(b) Notwithstanding subdivision (a):

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

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

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

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

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

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

This provision, dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 11430.10, which prohibits certain ex parte communications. The policy issues in Section 11430.10 regarding ex parte communication between two persons differ from the policy issues in subdivision (b) regarding the participation by one individual in two

stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper *ex parte* communications. See Sections 11430.60 (disqualification of presiding officer), 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).

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

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

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

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

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

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

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

**Comment.** Section 11425.40 applies in all administrative adjudications subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter). It supersedes a provision formerly found in Section 11512(c) (formal hearing). Section 11425.40 applies whether the presiding officer serves alone or with others. For separation of functions requirements, see Section 11425.30.

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

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

#### **§ 11425.50. Decision**

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

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

(c) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

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

(e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general

application or other rule unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

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

Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P. 2d 12, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of the basis for the decision is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision (see Section 11425.60), and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings. The decision must only explain its actual basis. It need not eliminate other possible bases that could have been, but were not, relied upon as the basis for the decision. Thus, for example, if the decision imposes terms and conditions, it need not explain why other terms and conditions were not imposed.

Subdivision (a) requires the decision to contain a statement of the "factual ... basis for the decision," while former Section 11518 required the decision to contain "findings of fact." The new language more accurately reflects case law, and is not a substantive change. See *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, *supra*; *Swars v. Council of the City of Vallejo*, 33 Cal. 2d 867, 872-73, 206 P.2d 355 (1949).

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

Subdivision (b) adopts the rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., *Garza v. Workmen's Compensation Appeals Bd.*, 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (Workers' Compensation Appeals Board); *Millen v. Swoap*, 58 Cal. App. 3d 943, 947-48, 130 Cal. Rptr. 387 (1976)

(Department of Social Services); Apte v. Regents of Univ. of Cal., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Unemp. Ins. App. Bd., Precedent Decisions P-B-10, P-T-13, P-B-57; Lab. Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1114 (1992), reprinted in 25 Cal. L. Revision Comm'n Reports 321, 368 (1995).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. This requirement is derived from Washington law. See Wash. Rev. Code Ann. §§ 34.05.461(3), 34.05.464(4) (West 1990). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness. Even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (b) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

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

Subdivision (e) is consistent with the rulemaking provisions of the Administrative Procedure Act. See Section 11340.5 ("underground regulations"). A penalty based on a precedent decision does not violate subdivision (e). Section 11425.60 (precedent decisions). If a penalty is based on an "underground rule" — one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act — a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to

set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the *only* reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. See *Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978).

### **§ 11425.60. Precedent decisions**

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

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

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

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

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

The first sentence of subdivision (b) recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Sections 12935(h) (Fair Employment and Housing Commission), 19582.5 (State Personnel Board); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 11425.60 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis.

Under the second sentence of subdivision (b), this section applies notwithstanding Section 11340.5 (“underground regulations”). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates former Government Code Section 11347.5 [now 11340.5] unless made pursuant to rulemaking procedures). The provision is drawn from Government Code Section 19582.5 (expressly exempting the State Personnel Board’s precedent decision designations from rulemaking procedures). See also Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

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

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

## Article 7. Ex Parte Communications

### **§ 11430.10. Ex parte communications prohibited**

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

(b) Nothing in this section precludes a communication, including a communication from an employee or

representative of an agency that is a party, made on the record at the hearing.

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

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

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

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

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

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

Subdivision (c) defines the pendency of a proceeding to include any period between the time an application for a hearing is made and the time the agency's pleading is issued. Treatment of communications made to a

person during pendency of the proceeding but before the person becomes presiding officer is dealt with in Section 11430.40 (prior ex parte communication).

### **§ 11430.20. Permissible ex parte communications generally**

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

- (a) The communication is required for disposition of an ex parte matter specifically authorized by statute.
- (b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

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

This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

### **§ 11430.30. Permissible ex parte communications from agency personnel**

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

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

furnish, augment, diminish, or modify the evidence in the record.

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

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

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

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

**Comment.** The exceptions to the prohibition on ex parte communications provided in Section 11430.30 are most likely to be useful in hearings where the presiding officer is employed by an agency that is a party. This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person).

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

The first sentence of subdivision (a) is drawn from 1981 Model State APA § 4-214(a)-(b). The second sentence is drawn from 1981 Model State APA § 4-213(b). Under this provision, a person has “served” in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The limitation is intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation

intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. Thus a person who merely participated in a preliminary determination in an adjudicative proceeding or its pre-adjudicative stage would ordinarily be able to assist or advise the presiding officer in the proceeding. *Cf.* Section 11425.30 (neutrality of presiding officer). For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by this section.

This provision is not limited to agency personnel, but includes participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the agency head or other person delegated the power to hear or decide at the final decision level, except with respect to settlement matters. Subdivision (b).

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

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

#### **§ 11430.40. Prior ex parte communication**

11430.40. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all

parties an opportunity to address it in the manner provided in Section 11430.50.

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

#### **§ 11430.50. Disclosure of ex parte communication**

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

- (1) If the communication is written, the writing and any written response of the presiding officer to the communication.
- (2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

- (1) The party shall be allowed to comment on the communication.
- (2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

**Comment.** Section 11430.50 is drawn from former Section 11513.5(d). This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person). See also Section 11440.20 (notice).

### **§ 11430.60. Disqualification of presiding officer**

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

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

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

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

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

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

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

**§ 11430.80. Communications between presiding officer and agency head**

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

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

**Comment.** Section 11430.80 is a special application of a provision of former Section 11513.5(a), which precluded a presiding officer from communicating with a person who presided in an earlier phase of the proceeding. Section 11430.80 extends the ex parte communications limitation of Section 11430.70 (application of provisions to agency head or other person) to include communications with an agency or non-agency presiding officer as well.

This section enforces the general principle that the presiding officer should not be an advocate for the proposed decision to the agency head, including a person or body to which the power to act is delegated. See Section 11405.40 (“agency head” defined). The decision of the agency head should be based on the record and not on off-the-record discussions from which the parties are excluded. Nothing in this section restricts on-the-record communications in between the presiding officer and the agency head. Section 11430.10(b).

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

## Article 8. Language Assistance

### **§ 11435.05. “Language assistance”**

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

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

### **§ 11435.10. Interpretation for hearing-impaired person**

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

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

### **§ 11435.15. Application of article**

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

Agricultural Labor Relations Board

Department of Alcohol and Drug Abuse

State Athletic Commission

California Unemployment Insurance Appeals Board

Board of Prison Terms

State Board of Barbering and Cosmetology

State Department of Developmental Services

Public Employment Relations Board

Franchise Tax Board

State Department of Health Services

Department of Housing and Community Development

Department of Industrial Relations  
State Department of Mental Health  
Department of Motor Vehicles  
Notary Public Section, Office of the Secretary of State  
Public Utilities Commission  
Office of Statewide Health Planning and Development  
State Department of Social Services  
Workers' Compensation Appeals Board  
Department of the Youth Authority  
Youthful Offender Parole Board  
Bureau of Employment Agencies  
Department of Insurance  
State Personnel Board  
California Board of Podiatric Medicine  
Board of Psychology

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

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

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

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

The application of this article is limited to adjudicative proceedings in which, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of a decision. Section 11410.10. This continues

the general effect of the first paragraph of former subdivision (f) of Section 11500 (“adjudicatory hearing” defined).

In addition to the proceedings listed in this section, language assistance is also required of state agencies whose hearings are not governed by Chapter 5. Section 11018.

### **§ 11435.20. Provision for interpreter**

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

(b) If a party or the party’s witness does not proficiently speak or understand English 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.

**Comment.** Section 11435.20 continues the first sentence of former subdivision (d) of Section 11513 and extends it to witnesses as well as parties. See Section 11435.05 (“language assistance” defined).

### **§ 11435.25. Cost of interpreter**

11435.25. (a) 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 by 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 workers’ compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers’ Compensation Appeals Board or the Administrative Director of the Division of Workers’ Compensation, as appropriate.

**Comment.** Section 11435.25 continues the fourth sentence and the second paragraph of former subdivision (d) of Section 11513 without substantive change.

### **§ 11435.30. Certification of hearing interpreters**

11435.30. (a) The State Personnel Board shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 11435.40. Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures.

(b) Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this section.

**Comment.** Section 11435.30 continues former subdivision (e) of Section 11513 without substantive change.

### **§ 11435.35. Certification of medical examination interpreters**

11435.35. (a) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 11435.40.

(b) Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to Section 11435.30 shall be deemed certified for purposes of this section.

**Comment.** Section 11435.35 continues former Section 11513(f) without substantive change.

**§ 11435.40. Designation of languages for certification**

11435.40. (a) The State Personnel Board shall designate the languages for which certification shall be established under Sections 11435.30 and 11435.35. The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages.

(b) The language designations shall be based on the following:

- (1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.
- (2) The cost of developing a language examination.
- (3) The availability of experts needed to develop a language examination.
- (4) Other information the board deems relevant.

**Comment.** Section 11435.40 continues former subdivision (g) of Section 11513 without substantive change.

**§ 11435.45. Certification fees**

11435.45. (a) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this article. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance.

(b) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of the certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(c) If the amount of money collected in fees is not sufficient to cover the costs of carrying out this article, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

**Comment.** Section 11435.45 continues former subdivisions (h) and (i) of Section 11513 without substantive change.

#### **§ 11435.50. Decertification**

11435.50. The State Personnel Board may remove the name of a person from the list of certified interpreters if any of the following conditions occurs:

- (a) The person is deceased.
- (b) The person notifies the board that the person is unavailable for work.
- (c) The person does not submit a renewal fee as required by Section 11435.45.

**Comment.** Section 11435.50 continues former subdivision (j) of Section 11513 without substantive change.

#### **§ 11435.55. Unavailability of certified interpreter**

11435.55. (a) An interpreter used in a hearing shall be certified pursuant to Section 11435.30. However, if an interpreter certified pursuant to Section 11435.30 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and use another interpreter.

(b) An interpreter used in a medical examination shall be certified pursuant to Section 11435.35. However, if an interpreter certified pursuant to Section 11435.35 cannot be present at the medical examination, the physician provisionally may use another interpreter if that fact is noted in the record of the medical evaluation.

**Comment.** Section 11435.55 continues the second and third sentences of former subdivision (d) and former subdivision (k) of Section 11513 without substantive change.

**§ 11435.60. Duty to advise party of right to interpreter**

11435.60. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

**Comment.** Section 11435.60 continues former subdivision (l) of Section 11513 without substantive change.

**§ 11435.65. Confidentiality and impartiality of interpreter**

11435.65. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding shall apply to any interpreter in the hearing or medical examination, whether or not the rules so state.

(b) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

**Comment.** Section 11435.65 continues former subdivisions (m) and (n) of Section 11513 without substantive change.

## Article 9. General Procedural Provisions

**§ 11440.10. Delegation of review authority**

11440.10. (a) The agency head may do any of the following with respect to a decision of the presiding officer or the agency:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(b) By regulation an agency may mandate review, or may preclude or limit review, of a decision of the presiding officer or the agency.

**Comment.** Section 11440.10 is drawn from Section 11500(a) (power to act may be delegated by agency) and 1981 Model State APA § 4-216(a)(1)-(2). This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. Section 11415.20 (conflicting or inconsistent statute controls). See, e.g., *Greer v. Board of Educ.*, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Educ. Code § 13443). See also Section 11500(a) (power to act may not be delegated where action required by “agency itself” under formal hearing procedure).

### § 11440.20. Notice

11440.20. Service of a writing on, or giving of a notice to, a person in a procedure provided in this chapter is subject to the following provisions:

(a) The writing or notice shall be delivered personally or sent by mail or other means to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative. If a party is required by statute or regulation to maintain an address with an agency, the party's last known address is the address maintained with the agency.

(b) Unless a provision specifies the form of mail, service or notice by mail may be by first class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.

**Comment.** The application of Section 11440.20 is limited to the procedures in this chapter. It does not apply to Chapter 5 (formal hearing), which includes its own notice and service provisions. See Section 11505.

Subdivision (b) authorizes delivery by a commercial delivery service as well as by the United States Postal Service. Proof of service under subdivision (b) may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ.

Proc. § 1013a; Cal. R. Ct. 2008(e) (proof of service by facsimile transmission).

### **§ 11440.30. Hearing by electronic means**

11440.30. (a) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects.

**Comment.** Subdivision (a) of Section 11440.30 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. The opportunity to observe exhibits includes a reasonable opportunity to examine and object to exhibits before or at the hearing. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants.

### **§ 11440.40. Evidence of sexual conduct**

11440.40. (a) In any proceeding under subdivision (h) or (i) 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 subject to all of the following limitations:

(1) The evidence is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (b). This paragraph is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed by statute.

(2) The evidence is not admissible at the hearing unless offered to attack the credibility of the complainant as provided for under subdivision (b). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(b) 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.

(c) 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.

**Comment.** Section 11440.40 expands the application of provisions formerly limited to proceedings under Chapter 5 (commencing with Section 11500) to apply in all cases covered by this chapter. Subdivision (a) restates former subdivision (g) of Section 11507.6 and the unnumbered paragraph formerly located between subdivisions (c) and (d) of Section 11513, correcting the reference to Section 12940(h) and (i). Subdivision (b) restates former subdivision (o) of Section 11513. Subdivision (c) restates former subdivision (p) of Section 11513.

#### **§ 11440.50. Intervention**

11440.50. (a) This section applies in adjudicative proceedings of an agency if the agency by regulation provides that this section is applicable in the proceedings.

(b) The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(1) The motion is submitted in writing, with copies served on all parties named in the agency's pleading.

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

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

(4) The 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.

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

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

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

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

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

(d) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying the motion for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant and to all parties.

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

(f) Nothing in this section precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 7 (commencing with Section 11430.10) of Chapter 4.5.

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

Subdivision (b)(1) is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (b)(3) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities will be substantially affected by the proceeding." *Cf. Horn v. County of Ventura*, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (right to notice and hearing if agency action will constitute substantial deprivation of property rights). However, subdivision (b)(4) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact that the proceeding will have on the legal rights of the applicant for intervention (subdivision (b)(3)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (b)(4)).

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

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

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

## Article 10. Informal Hearing

### **§ 11445.10. Purpose of informal hearing procedure**

11445.10. (a) Subject to the limitations in this article, an agency may conduct an adjudicative proceeding under the informal hearing procedure provided in this article.

(b) The Legislature finds and declares the following:

(1) The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than hearing procedures otherwise required by statute, for use in appropriate circumstances.

(2) The informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer.

(3) The informal hearing procedure provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without appearing or intervening as a party.

**Comment.** Section 11445.10 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure is appropriate are provided in Section 11445.20 (when informal hearing may be used). The simplified procedures are outlined in Section 11445.40 (procedure for informal hearing).

Basic due process and public policy protections of the administrative adjudication bill of rights are preserved in the informal hearing. Sections 11445.40(a) (procedure for informal hearing), 11425.10 (administrative adjudication bill of rights). Thus, for example, the presiding officer must be free of bias, prejudice, and interest; the presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency; the hearing must be open to public observation; the agency must make available language assistance; ex parte communications are restricted; the decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and the agency must designate and index significant decisions as precedent.

Reference in this article to the “presiding officer” is not intended to imply unnecessary formality in the proceeding. The presiding officer may be the agency head, an agency member, an administrative law judge, or another person who presides over the hearing. Section 11405.80 (“presiding officer” defined).

#### **§ 11445.20. When informal hearing may be used**

11445.20. Subject to Section 11445.30, an agency may use an informal hearing procedure in any of the following proceedings, if in the circumstances its use does not violate another statute or the federal or state Constitution:

- (a) A proceeding where there is no disputed issue of material fact.
- (b) A proceeding where there is a disputed issue of material fact, if the matter is limited to any of the following:
  - (1) A monetary amount of not more than one thousand dollars (\$1,000).
  - (2) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.
  - (3) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.
  - (4) A disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than 5 days. Nothing in this

section precludes an agency from imposing a stayed revocation or a stayed suspension of a license in an informal hearing.

(c) A proceeding where, by regulation, the agency has authorized use of an informal hearing.

(d) A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state Constitution may require a hearing.

**Comment.** Subdivision (a) of Section 11445.20 permits the informal hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared, e.g., a power plant siting proceeding in which the power company and the Energy Commission have agreed on all material facts. However, if consumers intervene and dispute material facts, the proceeding may be subject to conversion from an informal hearing procedure to a formal or other type of hearing procedure in accordance with Sections 11470.10-11470.50.

Subdivision (b) permits the informal hearing to be used, even if a disputed issue of material fact has appeared or if the amount or other stake involved is relatively minor. The reference to a "licensee" in subdivision (b)(4) includes a certificate holder. Under subdivision (b), an informal hearing procedure may be used if the sanction imposed in the decision falls within the limitations of the subdivision, even though a greater penalty may result if a party fails to comply with the sanction imposed in the decision.

Subdivision (c) imposes no limits on the authority of the agency to adopt the informal hearing by regulation, other than the general limitation that use of the informal hearing procedure is subject to statutory and constitutional due process requirements. Thus, an agency by regulation may authorize use of the informal hearing procedure in a case where the amount in issue or sanction exceeds the amount provided in subdivision (b), so long as use of the informal hearing procedure would not contravene other statutes or due process of law.

Each subdivision in this section provides an independent basis for conducting an informal hearing. For example, if there is no issue of material fact, an agency may conduct an informal hearing under subdivision (a) whether or not a disciplinary sanction that exceeds the limits of subdivision (b) may result from the hearing.

Nothing in this section implies that this procedure is required in a proceeding in which a hearing is not statutorily or constitutionally required, including an agency's authority in minor disciplinary matters to

make an investigation with or without a hearing as it deems necessary. Sections 11410.10 (application to constitutionally and statutorily required hearings), 11415.50 (when adjudicative proceeding not required).

### **§ 11445.30. Selection of informal hearing**

11445.30. (a) The notice of hearing shall state the agency's selection of the informal hearing procedure.

(b) Any objection of a party to use of the informal hearing procedure shall be made in the party's pleading.

(c) An objection to use of the informal hearing procedure shall be resolved by the presiding officer before the hearing on the basis of the pleadings and any written submissions in support of the pleadings.

**Comment.** Section 11445.30 provides a procedure for resolving objections to use of the informal hearing procedure in advance of the hearing. See also Section 11511.5 (prehearing conference). However, conversion to a formal hearing or other type of hearing may be appropriate if during the course of the hearing circumstances indicate the need for it. See Sections 11445.50 (cross-examination), 11445.60 (proposed proof).

### **§ 11445.40. Procedure for informal hearing**

11445.40. (a) Except as provided in this article, the hearing procedures otherwise required by statute for an adjudicative proceeding apply to an informal hearing.

(b) In an informal hearing the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.

**Comment.** Section 11445.40 is drawn from 1981 Model State APA § 4-402. The section indicates that the informal hearing is a simplified version of a formal hearing. The informal hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties. However, it is intended to permit agencies to allow public

participation where appropriate. Section 11445.10 (purpose of informal hearing procedure).

#### **§ 11445.50. Cross-examination**

11445.50. (a) The presiding officer may deny use of the informal hearing procedure, or may convert an informal hearing to a formal hearing after an informal hearing is commenced, if it appears to the presiding officer that cross-examination is necessary for proper determination of the matter and that the delay, burden, or complication due to allowing cross-examination in the informal hearing will be more than minimal.

(b) An agency, by regulation, may specify categories of cases in which cross-examination is deemed not necessary for proper determination of the matter under the informal hearing procedure. The presiding officer may allow cross-examination of witnesses in an informal hearing notwithstanding an agency regulation if it appears to the presiding officer that in the circumstances cross-examination is necessary for proper determination of the matter.

(c) The actions of the presiding officer under this section are not subject to judicial review.

**Comment.** Subdivision (a) of Section 11445.50 gives the presiding officer discretion to limit availability of the informal hearing in situations where it appears that substantial cross-examination will be necessary. For provisions on conversion, see Sections 11470.10-11470.50.

Subdivision (b) permits an agency to specify types of informal hearings in which cross-examination will be precluded. In recognition of the possibility that on occasion a case may demand cross-examination for proper determination of a matter, the presiding officer has limited authority to depart from the general procedure for cases of that type.

#### **§ 11445.60. Proposed proof**

11445.60. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present

proof if the proceeding were converted to a formal or other applicable hearing procedure. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or the federal or state Constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain the facts if the proceeding were converted to a formal or other applicable hearing procedure.

**Comment.** Section 11445.60 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 11470.10-11470.50.

## Article 11. Subpoenas

### § 11450.10. Subpoena authority

11450.10. (a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with Section 1561 of the Evidence Code.

**Comment.** Subdivision (a) of Section 11450.10 supersedes a portion of former Section 11510(a). This article gives subpoena power to all adjudicating agencies, presiding officers, and attorneys for parties. See Section 11450.20 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also makes clear that a subpoena duces tecum may be issued to provide documents at any reasonable time and place as well as at the hearing.

Subdivision (b) provides an alternative means of satisfying a subpoena duces tecum without the custodian's appearance. This is analogous to the procedure available in court proceedings. See Code Civ. Proc. § 2020. A custodian of subpoenaed documents who fails to comply with the subpoena may be compelled to appear and produce the documents. See Section 11455.10 (misconduct in proceeding).

This article incorporates privacy protections from civil practice. Section 11450.20(a).

### **§ 11450.20. Issuance of subpoena**

11450.20. (a) Subpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied

with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

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

**Comment.** Section 11450.20 restates a portion of former Section 11510(a)-(b), and expands it to include issuance by an attorney and to incorporate civil practice privacy protections. See Code Civ. Proc. §§ 1985-1985.4. See also Sehlmeyer v. Department of Gen. Serv., 17 Cal. App. 4th 1072, 21 Cal. Rptr. 2d 840 (1993). For enforcement of a subpoena, see Sections 11455.10-11455.20.

Subdivision (a) requires a subpoena or subpoena duces tecum to be issued in accordance with Sections 1985-1985.4 of the Code of Civil Procedure. For a subpoena duces tecum, this includes the requirement of an affidavit showing good cause for production of the matters and things described in the subpoena. Code Civ. Proc. § 1985.

### **§ 11450.30. Motion to quash**

11450.30. (a) A person served with a subpoena or a subpoena duces tecum may object to its terms by a motion for a protective order, including a motion to quash.

(b) The objection shall be resolved by the presiding officer on terms and conditions that the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy.

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

**Comment.** Section 11450.30 addresses matters not previously covered by statute but covered by regulation in some agencies. See, e.g., 20 Cal. Code Regs. § 61 (Public Utilities Commission).

### **§ 11450.40. Witness fees**

11450.40. A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the

appearance the following mileage and fees, to be paid by the party at whose request the witness is subpoenaed:

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

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

**Comment.** Section 11450.40 supersedes former Section 11510(c). Its coverage is extended to a subpoena duces tecum and is conformed to the mileage and fees applicable in civil cases. See Sections 68092.5-68093 (mileage and fees in civil cases); see also Sections 68096.1-68097.10 (witness fees of public officers and employees).

## Article 12. Enforcement of Orders and Sanctions

### **§ 11455.10. Misconduct in proceeding**

11455.10. A person is subject to the contempt sanction for any of the following in an adjudicative proceeding before an agency:

(a) Disobedience of or resistance to a lawful order.

(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.

(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.

(2) Breach of the peace, boisterous conduct, or violent disturbance.

(3) Other unlawful interference with the process or proceedings of the agency.

(d) Violation of the prohibition of ex parte communications under Article 7 (commencing with Section 11430.10).

(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena,

or other order of the presiding officer, or moving, without substantial justification, to compel discovery.

**Comment.** Section 11455.10 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

### **§ 11455.20. Contempt**

11455.20. (a) The presiding officer or agency head may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Upon service of the order and a copy of the certified statement, the court has jurisdiction of the matter.

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

**Comment.** Section 11455.20 restates a portion of former Section 11525, but vests certification authority in the presiding officer or agency head. For monetary sanctions for bad faith actions or tactics, see Section 11455.30.

### **§ 11455.30. Monetary sanctions for bad faith actions or tactics**

11455.30. (a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

**Comment.** Section 11455.30 permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. A person who requests a hearing without legal grounds would not be subject to sanctions under this section unless the request was made in bad faith and frivolous or solely intended to cause unnecessary delay. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

For authority to seek the contempt sanction, see Section 11455.20.

## Article 13. Emergency Decision

### § 11460.10. Application of article

11460.10. Subject to the limitations in this article, an agency may conduct an adjudicative proceeding under the emergency decision procedure provided in this article.

**Comment.** Section 11460.10 makes available an emergency decision procedure for decisions in which an adjudicative proceeding is required. See Section 11410.10 (application to constitutionally and statutorily required hearings). The emergency decision procedure does not apply to an agency decision to seek injunctive relief. See Section 11415.50 (when adjudicative proceeding not required). The decision whether to use the emergency procedure, if available, is in the discretion of the agency.

This article supplements and does not replace other statutes that provide for interim suspension orders or other emergency orders. See Section 11415.10 & Comment (applicable procedure). For other statutes on interim suspension orders and other emergency orders, see Bus. & Prof. Code §§ 494 (order for interim suspension of licensee), 6007(c) (attorney), 10086(a) (real estate licensee); Educ. Code §§ 66017 (immediate suspension of disruptive student, teacher, staff member, or administrator), 94319.12 (emergency suspension of approval of private postsecondary institution to operate); Fin. Code § 8201(f) (immediate removal of officer or employee of savings association); Food & Agric.

Code §§ 56535-56537 (farm products licenses); Health & Safety Code §§ 1550.5 (community care facilities), 1569.50 (residential care facilities for the elderly), 1596.886 (child daycare facilities); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV licenses of manufacturers, transporters, and dealers).

### **§ 11460.20. Agency regulation required**

11460.20. (a) An agency may issue an emergency decision for temporary, interim relief under this article if the agency has adopted a regulation that provides that the agency may use the procedure provided in this article.

(b) The regulation shall elaborate the application of the provisions of this article to an emergency decision by the agency, including all of the following:

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

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

(3) Prescribe the procedures that will be available before and after issuance of an emergency decision under this article. The procedures may be more protective of the person to which the agency action is directed than those provided in this article.

(c) This article does not apply to an emergency decision, including a cease and desist order or temporary suspension order, issued pursuant to other express statutory authority.

**Comment.** Section 11460.20 requires specificity in agency regulations that adopt an emergency decision procedure. Notwithstanding this article, a statute on emergency decisions, including cease and desist orders and temporary suspension orders, applicable to a particular agency or proceeding prevails over the provisions of this article. Section 11415.20 (conflicting or inconsistent statute controls).

### **§ 11460.30. When emergency decision available**

11460.30. (a) An agency may only issue an emergency decision under this article in a situation involving an

immediate danger to the public health, safety, or welfare that requires immediate agency action.

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

(c) An emergency decision issued under this article is limited to temporary, interim relief. The temporary, interim relief is subject to judicial review under Section 11460.80, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding pursuant to Section 11460.60.

**Comment.** Section 11460.30 is drawn from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is available only if the agency has adopted an authorizing regulation. Section 11460.20.

The authority for an emergency decision to avoid immediate danger to the public health, safety, or welfare includes avoiding adverse effects on the environment, such as to fish and wildlife.

#### **§ 11460.40. Emergency decision procedure**

11460.40. (a) Before issuing an emergency decision under this article, the agency shall, if practicable, give the person to which the agency action is directed notice and an opportunity to be heard.

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

**Comment.** Section 11460.40 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For the conduct of a hearing in the manner of an informal hearing, see Section 11445.40 (procedure for informal hearing).

By regulation the agency may prescribe the emergency notice and hearing procedure. *Cf.* Transitional Rules of Procedure of the 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 of the person to which the agency action is directed than the provisions of this article. Section 11460.20 (agency regulation required).

### **§ 11460.50. Emergency decision**

11460.50. (a) The agency shall issue an emergency decision, including a brief explanation of the factual and legal basis and reasons for the emergency decision, to justify the determination of an immediate danger and the agency's emergency decision to take the specific action.

(b) The agency shall give notice to the extent practicable to the person to which the agency action is directed. The emergency decision is effective when issued or as provided in the decision.

**Comment.** Section 11460.50 is drawn from 1981 Model State APA § 4-501(c)-(d). Under this section the agency has flexibility to issue its emergency decision orally, if necessary to cope with the emergency.

### **§ 11460.60. Completion of proceedings**

11460.60. (a) After issuing an emergency decision under this article for temporary, interim relief, the agency shall conduct an adjudicative proceeding under a formal, informal, or other applicable hearing procedure to resolve the underlying issues giving rise to the temporary, interim relief.

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

**Comment.** Section 11460.60 is drawn from 1981 Model State APA § 4-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances.

**§ 11460.70. Agency record**

11460.70. The agency record consists of any documents concerning the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

**Comment.** Section 11460.70 is drawn from 1981 Model State APA § 4-501(f).

**§ 11460.80. Judicial review**

11460.80. (a) On issuance of an emergency decision under this article, the person to which the agency action is directed may obtain judicial review of the decision in the manner provided in this section without exhaustion of administrative remedies.

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

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

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

(3) A party, on written request to another party, before the proceedings for review and within 10 days after issuance of the emergency decision, is entitled to appropriate discovery.

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

**Comment.** Section 11460.80 is drawn from Section 11529(h) (interim suspension of medical care professional).

## Article 14. Declaratory Decision

### § 11465.10. Application of article

11465.10. Subject to the limitations in this article, an agency may conduct an adjudicative proceeding under the declaratory decision procedure provided in this article.

**Comment.** Article 14 (commencing with Section 11465.10) creates, and establishes all of the requirements for, a special proceeding to be known as a “declaratory decision” proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person’s particular circumstances.

It should be noted that an agency not governed by this chapter nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973).

The declaratory decision procedure provided in this article applies only to decisions subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required), 11501 (application of chapter). See also Section 11410.10 (application to constitutionally and statutorily required hearings).

### § 11465.20. Declaratory decision permissive

11465.20. (a) A person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency.

(b) The agency in its discretion may issue a declaratory decision in response to the application. The agency shall not issue a declaratory decision if 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.

(3) The decision involves a matter that is the subject of pending administrative or judicial proceedings.

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

**Comment.** Subdivisions (a) and (b) of Section 11465.20 are drawn from 1981 Model State APA § 2-103(a). For the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation, see Sections 11347-11347.1. Unlike the model act, issuance of a declaratory decision under Section 11465.20 is discretionary with the agency, rather than mandatory.

Under subdivision (a), a declaratory decision may determine whether the subject of the proceeding is or is not within the agency's primary jurisdiction. See *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 302-03, 109 P.2d 942 (1941); *United Ins. Co. of Chicago v. Maloney*, 127 Cal. App. 2d 155, 157-58, 273 P.2d 579 (1954).

Subdivision (b)(2) prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be a necessary party, and who does not consent to the determination of the matter by a declaratory decision proceeding. A necessary party is one that is constitutionally entitled to notice and an opportunity to be heard — a flexible concept depending on the nature of the competing interests involved. *Horn v. County of Ventura*, 24 Cal. 3d 605, 612, 617, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979). Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicative proceeding to which the person would be entitled.

Subdivision (c) makes clear that application for a declaratory decision is not a necessary part of the administrative process. A person may seek judicial review of an agency action after other administrative remedies have been exhausted; the person is not required to seek declaratory relief as well. Nothing in this subdivision authorizes judicial review without exhaustion of other applicable administrative remedies.

### **§ 11465.30. Notice of application**

11465.30. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the

application to all persons to which notice of an adjudicative proceeding is otherwise required, and may give notice to any other person.

**Comment.** Section 11465.30 is drawn from 1981 Model State APA § 2-103(c). See also Section 11440.20 (notice).

#### **§ 11465.40. Applicability of rules governing administrative adjudication**

11465.40. The provisions of a formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory decision except to the extent provided in this article or to the extent the agency so provides by regulation or order.

**Comment.** Section 11465.40 is drawn from 1981 Model State APA § 2-103(d). It makes clear that the specific procedural requirements for adjudications imposed by the formal hearing procedure or other applicable hearing procedure on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 11465.70. The reason for exempting a declaratory decision from usual procedural requirements for adjudications is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

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

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

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

Public Records Act). A declaratory decision may be given precedential effect, subject to the provisions governing precedent decisions. See Section 11425.60 (precedent decisions).

### **§ 11465.50. Action of agency**

11465.50. (a) Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing:

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

(2) Set the matter for specified proceedings.

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

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

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

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

**Comment.** Subdivision (a) of Section 11465.50 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail or other means to the last known address of the person to which the agency action is directed. Section 11440.20 (notice).

The decision by an agency not to issue a declaratory decision is within the absolute discretion of the agency and is therefore not reviewable.

Subdivision (a)(4). See also Section 11465.20 & Comment (declaratory decision permissive).

### **§ 11465.60. Declaratory decision**

11465.60. (a) A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion.

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

**Comment.** Section 11465.60 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

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

The requirement in subdivision (a) 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 for persons interested in the decision because of its possible precedential effect.

### **§ 11465.70. Regulations governing declaratory decision**

11465.70. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations under this article that are consistent with the public interest and with the general policy of this article to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following:

- (1) A description of the classes of circumstances in which an agency will not issue a declaratory decision.
- (2) The form, contents, and filing of an application for a declaratory decision.
- (3) The procedural rights of a person in relation to an application.

- (4) The disposition of an application.
- (b) The regulations adopted by the Office of Administrative Hearings under this article apply in an adjudicative proceeding unless an agency adopts its own regulations to govern declaratory decisions of the agency.
- (c) This article does not apply in an adjudicative proceeding to the extent an agency by regulation provides inconsistent rules or provides that this article is not applicable in a proceeding of the agency.

**Comment.** Section 11465.70 is drawn from 1981 Model State APA § 2-103(b). An agency may choose to preclude declaratory decisions altogether.

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

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

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

## Article 15. Conversion of Proceeding

### § 11470.10. Conversion authorized

11470.10. (a) Subject to any applicable regulation adopted under Section 11470.50, at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

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

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

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

**Comment.** Section 11470.10 is drawn from 1981 Model State APA § 1-107(a)-(b). A reference in this section to a “party,” in the case of an adjudicative proceeding means “party” as defined in Section 11405.60, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. Agency proceedings covered by this article include a rulemaking proceeding as well as an adjudicative proceeding. The conversion provisions may be irrelevant to some types of proceedings by some agencies, and in that case this article would be inapplicable.

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

The further limitation in subdivision (a)(1) — that the conversion may not substantially prejudice the rights of a party — must also be satisfied. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice. The concept includes both the right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. Of course, even if the rights of a party are substantially prejudiced by a conversion, the party may voluntarily waive them. Section 11415.40.

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

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

Within the limits of this section, an agency should be authorized to use procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency this flexibility. For example, an agency that wants to convert a formal hearing into an informal hearing, or an informal hearing into a formal hearing, may do so under this provision if the conversion is appropriate and in the public interest, if adequate notice is given, and if the rights of the parties are not substantially prejudiced.

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

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

**§ 11470.20. Presiding officer**

11470.20. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the agency head shall appoint a successor to preside over or be responsible for the new proceeding.

**Comment.** Section 11470.20 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

**§ 11470.30. Agency record**

11470.30. To the extent practicable and consistent with the rights of parties and the requirements of this article relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding.

**Comment.** Section 11470.30 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the applicable statute governing the hearing procedure.

**§ 11470.40. Procedure after conversion**

11470.40. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

- (a) Give additional notice to parties or other persons necessary to satisfy the statutory requirements relating to the new proceeding.
- (b) Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the statutory requirements relating to the new proceeding.
- (c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the statutory requirements

relating to the new proceeding, and allow the parties a reasonable time to prepare for the new proceeding.

**Comment.** Section 11470.40 is drawn from 1981 Model State APA § 1-107(e).

#### **§ 11470.50. Agency regulations**

11470.50. An agency may adopt regulations to govern the conversion of one type of proceeding to another. The regulations may include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

**Comment.** Section 11470.50 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

## *IV. Administrative Adjudication: Formal Hearing*

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**Gov't Code §§ 11500-11530 (chapter heading amended).**  
**Administrative adjudication: formal hearing**

### **CHAPTER 5. ADMINISTRATIVE ADJUDICATION: FORMAL HEARING**

#### **§ 11500 (amended). 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 the 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.** Subdivision (a) of Section 11500 is amended to reflect the deletion of the enumeration of agencies formerly found in Section 11501. The application of this chapter to the hearings of an agency is determined by the statutes relating to the agency. Section 11501.

Former subdivision (f) is superseded by Sections 11410.10 (application to constitutionally and statutorily required hearings), 11410.20 (application to state), 11405.50 ("decision" defined), 11425.50 (decision), and 11435.15 (language assistance).

Former subdivision (g) is superseded by Section 11435.05 ("language assistance" defined).

### **§ 11501 (amended). 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  
Architectural Examiners, California Board of  
Attorney General  
Auctioneer Commission, Board of Governors of  
Automotive Repair, Bureau of  
Barbering and Cosmetology, State Board of  
Behavioral Science Examiners, Board of  
Boating and Waterways, Department of  
Cancer Advisory Council  
Cemetery Board  
Chiropractic Examiners, Board of  
Security and Investigative Services, Bureau of  
Community Colleges, Board of Governors of the  
California  
Conservation, Department of  
Consumer Affairs, Department of  
Contractors' State License Board  
Corporations, Commissioner of  
Court Reporters Board of California  
Dental Examiners of California, Board of  
Education, State Department of  
Electronic and Appliance Repair, Bureau of  
Engineers and Land Surveyors, State Board of  
Registration for Professional  
Fair Political Practices Commission  
Fire Marshal, State  
Food and Agriculture, Director of  
Forestry and Fire Protection, Department of  
Funeral Directors and Embalmers, State Board of  
Geologists and Geophysicists, State Board of Registration  
for  
Guide Dogs for the Blind, State Board of  
Health Services, State Department of  
Highway Patrol, Department of the California

Home Furnishings and Thermal Insulation, Bureau of  
Horse Racing Board, California  
Housing and Community Development, Department of  
Insurance Commissioner  
Labor Commissioner  
Landscape Architects, State Board of  
Medical Board of California, Medical Quality Review  
Committees and Examining Committees  
Motor Vehicles, Department of  
Nursing, Board of Registered  
Nursing Home Administrators, Board of Examiners of  
Optometry, State Board of  
Osteopathic Medical Board of California  
Pharmacy, California State Board of  
Pediatric Medicine, Board of  
Psychology, Board of  
Public Employees' Retirement System, Board of  
Administration of the  
Real Estate, Department of  
San Francisco, San Pablo and Suisun, Board of Pilot  
Commissioners for the Bays of  
Savings and Loan Commissioner  
School Districts  
Secretary of State, Office of  
Social Services, State Department of  
Statewide Health Planning and Development, Office of  
Structural Pest Control Board  
Tax Preparers Program  
Teacher Credentialing, Commission on  
Teachers' Retirement System, State  
Transportation, Department of, acting pursuant to the State  
Aeronautics Act  
Veterinary Medicine, Board of Examiners in

~~Vocational Nurse and Psychiatric Technician Examiners  
of the State of California, Board of~~

*This chapter applies to an adjudicative proceeding of an agency created on or after July 1, 1997, unless the statutes relating to the proceeding provide otherwise.*

*(c) Chapter 4.5 (commencing with Section 11400) applies to an adjudicative proceeding required to be conducted under this chapter, unless the statutes relating to the proceeding provide otherwise.*

**Comment.** Section 11501 is amended to make this chapter the default procedure, absent a contrary statute, for agencies created after the operative date of the amendment.

This chapter is supplemented by the general provisions on administrative adjudication found in Chapter 4.5 (commencing with Section 11400), which apply to proceedings under this chapter. See subdivision (c). See also Section 11410.50 (application where formal hearing procedure required). Thus if an agency is required by statute to conduct a hearing under this chapter, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of Chapter 4.5. Likewise, the general provisions of Chapter 4.5 restricting ex parte communications, regulating precedent decisions, and the like, apply to a hearing under this chapter. See also Section 11502 (use of administrative law judges under Chapter 4.5).

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

**§ 11501.5 (repealed). Language assistance; provision by state agencies**

~~11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:~~

~~Agricultural Labor Relations Board~~

~~State Department of Alcohol and Drug Abuse~~

~~Athletic Commission~~

~~California Unemployment Insurance Appeals Board~~

Board of Prison Terms  
State Board of Barbering and Cosmetology  
State Department of Developmental Services  
Public Employment Relations Board  
Franchise Tax Board  
State Department of Health Services  
Department of Housing and Community Development  
Department of Industrial Relations  
State Department of Mental Health  
Department of Motor Vehicles  
Notary Public Section, office of the Secretary of State  
Public Utilities Commission  
Office of Statewide Health Planning and Development  
State Department of Social Services  
Workers' Compensation Appeals Board  
Department of the Youth Authority  
Youthful Offender Parole Board  
Bureau of Employment Agencies  
Department of Insurance  
State Personnel Board  
Board of Podiatric Medicine  
Board of Psychology

(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.

**Comment.** Former Section 11501.5 is restated in Section 11435.15 (application of article).

**§ 11502 (amended). Administrative law judges**

11502. (a) All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. *This subdivision applies to a hearing required to be conducted under this chapter that is conducted under the informal hearing or emergency decision procedure provided in Chapter 4.5 (commencing with Section 11400).*

(b) The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 of the Government Code. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

**Comment.** Section 11502 is amended to make clear that where use of an administrative law judge employed by the Office of Administrative Hearings is required for an adjudicative proceeding under this chapter, such use is also required in informal and emergency proceedings under Chapter 4.5 (administrative adjudication: general provisions). An administrative law judge employed by the Office of Administrative Hearings is not required for a declaratory decision or for alternative dispute resolution under Chapter 4.5.

**§ 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 (no change). Accusation**

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

**Note.** No change is recommended in Section 11503. It is set out here for completeness.

### **§ 11504 (no change). Statement of issues**

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by

producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

**Note.** No change is recommended in Section 11504. It is set out here for completeness.

**§ 11504.5 (no change). References to accusations include statements of issues**

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

**Note.** No change is recommended in Section 11504.5. It is set out here for completeness.

**§ 11505 (amended). Service on respondent**

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation

any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon *him the respondent* of the accusation, and that failure to do so will constitute a waiver of *his the respondent's* right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

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

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency *or, if an administrative law judge has been assigned to the hearing,*

*the Office of Administrative Hearings*, within 10 working days after you discover the good cause. Failure to ~~notify~~ the agency *give notice* within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to *the* 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 *the* respondent to file his *the respondent's* address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to *the* respondent at the latest address on file with the agency.

**Comment.** Section 11505 is amended to correct the portion of the statement to the respondent relating to postponement of the hearing. See Section 11524 (continuances).

#### **§ 11506 (amended). 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~~ *the respondent* may:

(1) Request a hearing.

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

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

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

(5) Present new matter by way of defense.

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

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

(b) (c) The respondent shall be entitled to a hearing on the merits if he *the respondent* files a notice of defense, and any such *the* notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such a notice *of defense* 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.

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

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

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

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

#### **§ 11507 (no change). Amended accusation**

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be

notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

**Note.** No change is recommended in Section 11507. It is set out here for completeness.

### **§ 11507.3 (added). Consolidation and severance**

11507.3. (a) When proceedings that involve a common question of law or fact are pending, the administrative law judge on the judge's 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 administrative law judge may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) The administrative law judge on the judge's own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

**Comment.** Section 11507.3 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding. See also Section 13 (singular includes plural).

### **§ 11507.5 (no change). Discovery provisions exclusive**

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

**Note.** No change is recommended in Section 11507.5. It is set out here for completeness.

#### **§ 11507.6 (amended). Discovery**

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

- (a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;
- (b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;
- (c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;
- (d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;
- (e) Any other writing or thing which is relevant and which would be admissible in evidence;
- (f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having

personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

**Comment.** Former subdivision (g) of Section 11507.6 is restated in Section 11440.40 (evidence of sexual conduct).

#### **§ 11507.7 (amended). Motion to compel discovery**

11507.7. (a) Any party claiming his *the party's* request for discovery pursuant to Section 11507.6 has not been complied with may serve and file a verified petition *with the administrative law judge a motion* to compel discovery *in the superior court for the county in which the administrative*

hearing will be held, naming as respondent the party refusing or failing to comply with Section 11507.6. The petition motion shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why such *the* matter is discoverable under this *that* section, *that a reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made*, and the ground or grounds of respondent's refusal so far as known to petitioner moving party.

(b) The petition motion shall be served upon respondent party and filed within 15 days after the respondent party first evidenced his failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, *or within another time provided by stipulation*, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.

(c) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition. *The hearing on the motion to*

*compel discovery shall be held within 15 days after the motion is made, or a later time that the administrative law judge may on the judge's own motion for good cause determine.* The respondent party shall have the right to serve and file a written answer or other response to the petition and order to show cause motion before or at the time of the hearing.

(d) The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.

(e) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that such *the* matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under such *those* provisions, the court administrative law judge may order lodged with it such matters as are provided in subdivision (b) of Section 915 of the Evidence Code and examine such *the* matters in accordance with the *its* provisions thereof.

(f) The court (e) *The administrative law judge* shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and such oral argument and additional evidence as the court administrative law judge may allow.

(g) (f) Unless otherwise stipulated by the parties, the court administrative law judge shall no later than 30 15 days after the filing of the petition file hearing make its order denying or granting the petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days motion. The order of the court shall be in writing setting forth the matters or parts thereof the petitioner *the moving party* is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the clerk

*administrative law judge* upon the parties. Where the order grants the petition *motion* in whole or in part, such *the* order shall not become effective until 10 days after the date the order is served ~~by the clerk~~. Where the order denies relief to the petitioning *moving* party, the order shall be effective on the date it is served ~~by the clerk~~.

(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.

(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.

**Comment.** Section 11507.7 is amended to provide for proceedings to compel discovery before the administrative law judge rather than the superior court. An order of the administrative law judge compelling

discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 11455.10-11455.20. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The administrative law judge may also impose monetary sanctions for bad faith tactics, which are reviewable in the same manner as the decision in the proceeding. Section 11455.30.

### **§ 11508 (amended). Time and place of hearing**

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District, and *other than the County of Imperial or San Diego*, in the County of Sacramento if the transaction occurred or the respondent resides within the Third or Fifth Appellate District, *and in the County of San Diego if the transaction occurred or the respondent resides 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, the agency may select the county appropriate for either district.

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

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

(c) *The respondent may move for, and the administrative law judge has discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing shall be made within 10 days after service of the notice of hearing on the respondent.*

**Comment.** Subdivision (a) of Section 11508 is amended to recognize creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) codifies practice authorizing a motion for change of venue. See 1 G. Ogden, California Public Agency Practice § 33.02[4][d] (1994). Grounds for change of venue include selection of an improper county and promotion of the convenience of witnesses and ends of justice. *Cf.* Code Civ. Proc. § 397. In making a change of venue determination the administrative law judge may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing.

### **§ 11509 (amended). Notice of hearing**

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the \_\_\_ day of, 19\_\_\_, at the hour of \_\_\_, upon the charges made in the accusation served upon you. *If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of the hearing.* You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books,

documents or other things by applying to [here insert appropriate office of agency].

**Comment.** Section 11509 is amended to include notification of the right to seek change of venue. See Section 11508 (time and place of hearing).

### **§ 11510 (repealed). Subpoenas**

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. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, 1985.2, and 1985.3 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 may be served in person in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to his or her date of birth and his or her driver's license number or Department of Motor Vehicles identification number, or, the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section shall have the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and

the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for his or her appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day, shall be entitled, in addition to fees and mileage, to a per diem compensation of three dollars (\$3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

**Comment.** Former Section 11510 is superseded by Sections 11450.10-11450.40 (subpoenas).

### **§ 11511 (amended). Depositions**

11511. On verified petition of any party, an *administrative law judge or, if an administrative law judge has not been appointed, an agency* may order that the testimony of any material witness residing within or without the State *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 *the* 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. *The petitioner shall serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing.* Where the witness resides outside the State *state* and where the *administrative law judge or* agency has ordered the taking of his *the* testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

**Comment.** Section 11511 is amended to extend to the administrative law judge the authority to order a deposition, and to provide for notice of the petition.

#### **§ 11511.5 (amended). Prehearing conference**

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) *Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.*

(10) *Motions for intervention.*

(11) *Exploration of the possibility of using alternative dispute resolution provided in Article 5 (commencing with Section 11420.10) of, or the informal hearing procedure provided in Article 10 (commencing with Section 11445.10) of, Chapter 4.5, and objections to use of the informal hearing procedure.*

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

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

(d) *With the consent of the parties, the prehearing conference may be converted immediately into alternative dispute resolution or an informal hearing. With the consent of the parties, the proceeding may be converted into alternative dispute resolution to be conducted at another time. With the consent of the agency, the proceeding may be converted into an informal hearing to be conducted at another time subject to the right of a party to object to use of the informal hearing procedure as provided in Section 11445.30.*

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

**Comment.** Subdivision (a) of Section 11511.5 is amended to reflect the practice of the administrative law judge, rather than the agency, giving the required notice.

Subdivision (b)(9) is not intended to provide a new discovery procedure. If a party has not availed itself of discovery within the time periods provided by Section 11507.6, it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

Subdivision (b)(10) implements Section 11440.50 (intervention).

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

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii), expanded to include alternative dispute resolution.

### **§ 11511.7 (added). Settlement conference**

11511.7. (a) The administrative law judge may order the parties to attend and participate in a settlement conference. The administrative law judge shall set the time and place for the settlement conference, and shall give reasonable written notice to all parties.

(b) The administrative law judge at the settlement conference shall not preside as administrative law judge at the hearing unless otherwise stipulated by the parties. The administrative law judge may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

**Comment.** Under Section 11511.7 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur).

Attendance and participation in the settlement conference is mandatory. Communications made in settlement negotiations are protected. Section 11415.60 (settlement).

### **§ 11512 (amended). Presiding officer**

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing. *A ruling of the administrative law judge admitting or excluding evidence is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding.*

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing — or — consideration there are grounds for disqualification, including disqualification under Section 11425.40. *The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record.* Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a

fair and impartial hearing cannot be accorded *the administrative law judge or agency member is disqualified.* Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case, *except that a substitute qualified to act may be appointed by the appointing authority.*

(d) The proceedings at the hearing shall be reported by a phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically. *stenographic reporter or electronically, as determined by the administrative law judge. If the administrative law judge selects electronic reporting of proceedings, a party may at the party's own expense require stenographic reporting.*

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall render a proposed decision in accordance with subdivision (b) of Section 11517 of the Government Code.

**Comment.** Subdivision (b) of Section 11512 is amended to overrule any contrary implication that might be drawn from the language of subdivision (b).

Grounds for disqualification under subdivision (c) include bias, prejudice, or interest of presiding officer (Section 11425.40) and receipt of ex parte communications (Section 11430.60). A waiver of disqualification is a voluntary relinquishment of rights by the parties. The administrative law judge need not accept a waiver; the waiver is effective only if accepted by the administrative law judge. The provision for appointment of a substitute for an agency member is drawn from 1981

Model State APA § 4-202(e). In cases where there is no appointing authority, e.g., the agency member is an elected official, the “rule of necessity” still applies and the agency member shall not withdraw or be disqualified. See 1 G. Ogden, California Public Agency Practice § 36.14 (1994).

Subdivision (d) is amended to liberalize use of electronic reporting.

### **§ 11513 (amended). 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.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but *over timely objection* shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. *An objection is timely if made before submission of the case or on reconsideration or other administrative review.*

(e) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the

hearing, and irrelevant and unduly repetitious evidence shall be excluded.

(f) *The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.*

In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (o). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(d) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter. Except as provided in subdivision (k), interpreters utilized in hearings shall be certified pursuant to subdivision (e). Except as provided in subdivision (k), interpreters utilized in medical examinations shall be certified pursuant to subdivision (f). The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.

The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except

with respect to hearings before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to workers' 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 from 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 or medical examination, 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 shall become operative on July 1, 1995.

**Comment.** The "irrelevant and unduly repetitious" standard formerly found in Section 11513 is replaced in subdivision (f) by the general standard of Evidence Code Section 352.

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

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

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

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

Former subdivision (q) is deleted as obsolete.

### **§ 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 accusation, 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 accusation, 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 communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

**Comment.** Subdivisions (a) and (b) of former Section 11513.5 are restated in Section 11430.10 (ex parte communications prohibited), omitting the prohibition on the presiding officer communicating with others. The limitation on communications with a person who presided at a previous stage of the proceeding is applied as between the presiding officer and agency head in Section 11430.80. Subdivision (c) is restated in Section 11430.40 (prior ex parte communication) but is limited to communications received during the pendency of the proceeding.

Subdivision (d) is restated in Section 11430.50 (disclosure of ex parte communication). Subdivision (e) is restated in Section 11430.60 (disqualification of presiding officer).

### **§ 11514 (no change). Affidavits**

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

**Note.** No change is recommended in Section 11514. It is set out here for completeness.

**§ 11515 (no change). Official notice**

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

**Note.** No change is recommended in Section 11515. It is set out here for completeness.

**§ 11516 (no change). Amendment of accusation after submission of case**

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

**Note.** No change is recommended in Section 11516. It is set out here for completeness.

**§ 11517 (amended). Decision in contested cases**

11517. (a) If a contested case is heard before an agency itself, the *all of the following provisions apply:*

(1) *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*

(2) No member thereof who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(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 a 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.

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*Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency. The agency itself may do any of the following:*

(1) Adopt the proposed decision in its entirety.

(2) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(3) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(4) Change the legal basis of the proposed decision and adopt the proposed decision with that change as the decision. Before acting under this paragraph the agency shall provide the parties an opportunity to comment on the proposed change in legal basis.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, *or an agreed statement of the parties*, with or without taking additional evidence, or may refer the case to the same administrative law judge *if reasonably available, otherwise to another administrative law judge*, to take additional evidence. *A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.* By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence. *The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.*

(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 (i) the agency *notifies the parties that the proposed decision is not adopted as provided in subdivision (b)* and commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or (ii) the agency refers the case to the

administrative law judge to take additional evidence. 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 *commences proceedings to decide the case upon the record and* 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 for 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 Section 11517 is amended to add a provision formerly located in subdivision (d).

Subdivision (b) is amended to add authority to adopt with changes. This supplements the general authority of the agency under Section 11518.5 (correction of mistakes and clerical errors in the decision). Mitigation of a proposed remedy under subdivision (b)(2) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity. The authority in subdivision (b)(4) to adopt with change of the legal basis is subject to the proviso that the parties be afforded an opportunity to comment on the proposed change. The agency head may specify the time and manner of comment, e.g. written comment within 10 days.

Subdivision (b) is also amended to make clear that the agency is not accountable for the administrative law judge's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a decision.

Subdivision (c) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation. The addition of the provision for an agreed statement of the parties in subdivision (c) is drawn from Rule 6 of the California Rules of Court (agreed statement).

Remand under subdivision (c) is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the

officer would not be reasonably available, and remand need not be made to that particular person.

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

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

### **§ 11518 (amended). 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 first two sentences of Section 11518 are superseded by Section 11425.50 (contents of decision).

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

### **§ 11518.5 (added). Correction of mistakes and clerical errors in decision**

11518.5. (a) Within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the agency for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking judicial review.

(b) The agency may refer the application to the administrative law judge who formulated the proposed

decision or may delegate its authority under this section to one or more persons.

(c) The agency may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency does not dispose of it within 15 days after it is made or a longer time that the agency provides by regulation.

(d) Nothing in this section precludes the agency, on its own motion or on motion of the administrative law judge, from modifying the decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the decision.

(e) The agency shall, within 15 days after correction of a mistake or clerical error in the decision, serve a copy of the correction on each party on which a copy of the decision was previously served.

**Comment.** Section 11518.5 is drawn from 1981 Model State APA § 4-218. “Party” includes the agency that is a party to the proceedings. Section 11500(b) (“party” defined).

The section is intended to provide parties a limited right to remedy mistakes in the decision without the need for judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the decision. This supplements the authority in 11517 of the agency head to adopt a proposed decision with technical or other minor changes.

**§ 11519 (amended). Effective date of decision; stay of execution; notification; restitution**

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 *the* 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 *the* amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

(e) *The person to which the agency action is directed may not be required to comply with a decision unless the person has been served with the decision in the manner provided in Section 11505 or has actual knowledge of the decision.*

(f) *A nonparty may not be required to comply with a decision unless the agency has made the decision available for public inspection and copying or the nonparty has actual knowledge of the decision.*

(g) *This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Article 13 (commencing with Section 11460.10) of Chapter 4.5.*

**Comment.** Subdivision (d) of Section 11519 is amended to simplify and broaden the application of the restitution provisions.

Subdivisions (e)-(g) are drawn from 1981 Model State APA § 4-220(c)-(d). They distinguish between the effective date of a decision and the time when it can be enforced.

The requirement of “actual knowledge” in subdivisions (e) and (f) is intended to include not only knowledge that a decision has been issued, but also knowledge of the general contents of the decision insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of a decision, this must be resolved in the same manner as other fact questions.

The binding effect of a decision on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues a decision revoking the license of a particular dealer, this decision is binding on any wholesaler who has actual knowledge of it, even before the decision is made available for public inspection and copying; the decision binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

### **§ 11520 (amended). Defaults**

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

(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation. *Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties. If the agency and administrative law judge make conflicting orders under this subdivision, the agency’s order takes precedence. The administrative law judge may order the respondent, or the respondent’s attorney or other authorized representative, or*

*both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the respondent's failure to appear at the hearing.*

*(c) Within seven 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. As used in this subdivision, good cause includes, but is not limited to, any of the following:*

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

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

**Comment.** Subdivision (a) of Section 11520 is amended to make clear that either failure to respond or to appear is a default.

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

Subdivision (b) parallels Section 11506(c), with the addition of the provision enabling the administrative law judge to waive a default and impose costs, and requiring reasonable notice.

Subdivision (c) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

### **§ 11521 (no change). Reconsideration**

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may

grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

**Note.** No change is recommended in Section 11521. It is set out here for completeness.

#### **§ 11522 (no change). Reinstatement of license or reduction of penalty**

11522. A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

**Note.** No change is recommended in Section 11522. It is set out here for completeness.

**§ 11523 (amended). Judicial review**

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The *On request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request,* shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days *after the request,* which time shall be extended for good cause shown, after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of

the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

**Comment.** Section 11523 is amended to clarify how long the agency must wait for the petitioner to designate a part of the record before it may proceed on the assumption that the complete record is required. This revision is intended to reduce confusion and delay encountered in the appeal process.

#### **§ 11524 (amended). Continuances**

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the ~~administrative law judge in charge~~ *presiding judge* of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial,

make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

**Comment.** Section 11524 is amended to reflect current practice.

**§ 11525 (repealed). Contempt**

11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

**Comment.** Former Section 11525 is restated in Sections 11455.10 (misconduct in proceeding) and 11455.20 (contempt), with certification authority vested in the presiding officer or agency head.

**§ 11526 (amended). Voting by agency member**

11526. The members of an agency qualified to vote on any question may vote by mail *or another appropriate method.*

**Comment.** Section 11526 is broadened to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote when a contested case is heard before the agency itself if the agency member did not hear the evidence. Section 11517(a).

Under the open meeting law, deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d).

**§ 11527 (no change). Charge against funds of agency**

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

**Note.** No change is recommended in Section 11527. It is set out here for completeness.

**§ 11528 (no change). Oaths**

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

**Note.** No change is recommended in Section 11528. It is set out here for completeness.

**§ 11529 (amended). Interim orders**

11529. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 11371 may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health

profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

- (1) To be represented by counsel.
- (2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.
- (3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a superior court judge to

permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the court *administrative law judge* shall grant the interim order where, in the exercise of its discretion, it *the administrative law judge* concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and an accusation is not filed and served pursuant to Sections 11503 and 11505 within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the accusation the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in this chapter. If the licensee requests a hearing on the accusation, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the division *Division of Medical Quality* for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by this chapter, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing on the accusation.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.

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

**§ 11530 (repealed). Appeal of reports and forms requirements**

~~11530. (a)(1) The office shall hear and render a decision on any appeal filed by a business, pursuant to subdivision (c) of Section 14775, in the event the business contests the certification by a state agency head that reporting requirements meet established criteria and shall not be eliminated.~~

~~(2) Before a business may file an appeal with the office pursuant to subdivision (c) of Section 14775, the business shall file a challenge to a form or report required by a state agency with that state agency. Within 60 days of filing the challenge with a state agency, the state agency shall either eliminate the form or report or provide written justification for its continued use.~~

~~(3) A business may appeal a state agency's written justification for the continued use of a form or report with the office.~~

(4) If a state agency fails to respond within 60 days of the filing of a challenge pursuant to paragraph (2), the business shall have an immediate right to file an appeal with the office.

(b) No later than January 1, 1996, the office shall adopt procedures governing the filing, hearing, and disposition of appeals. The procedures shall include, but shall not be limited to, provisions that assure that appeals are heard and decisions rendered by the office in a fair, impartial, and timely fashion.

(c) The office may charge appellants a reasonable fee to pay for costs it incurs in complying with this section.

**Comment.** Former Section 11530 is continued without change in Section 11380 (state agency reports and forms appeals).

## CONFORMING REVISIONS

### Department of Consumer Affairs

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

124. (a) Notwithstanding subdivision (c) of Section 11505 of the Government Code, and *subject to subdivision (b)*, whenever written notice, including a notice, order, or document served pursuant to the Administrative Procedure Act (~~Ch. Chapter 3.5~~ (commencing with Section 11340), ~~Ch. Chapter 4~~ (commencing with Section 11370), and ~~Ch. Chapter 5~~ (commencing with Section 11500), ~~Gov. C.~~ of Part 1 of Division 3 of Title 2 of the Government Code, is required to be given by any board in the department, the notice may be given by regular mail addressed to the last known address of the licentiate or by personal service, at the option of the board.

(b) *A notice, order, or document served or given pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code shall be served or given as provided in Section 11440.20 of the Government Code.*

**Comment.** Section 124 is amended to add subdivision (b). In addition to notice by personal delivery or regular mail to the person's last known address, Government Code Section 11440.20 permits service or notice by mail delivery service, facsimile transmission, or by such other electronic means as is provided by agency regulation. The procedures to which Government Code Section 11440.20 applies include alternative dispute resolution, informal hearing, emergency decision, declaratory decision, and conversion of the proceeding to another type of proceeding. See Gov't Code § 11440.20 (introductory clause).

### California State Board of Pharmacy

#### **Bus. & Prof. Code § 4160 (technical amendment). Application of California Hazardous Substances Act**

4160. (a) The California Hazardous Substances Act, Chapter 13 (commencing with Section 28740) of Division 21 of the Health and Safety Code, applies to pharmacies and pharmacists and any other person or place subject to the jurisdiction of the board.

(b) The board may enforce that act when necessary for the protection of the health and safety of the public if prior regulatory notice is given in accordance with the *rulermaking provisions of the* Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of *Part 1 of* Division 3 of Title 2 of the Government Code, as amended). Board enforcement shall focus on those hazardous substances which relate significantly to or overlap the practice of pharmacy.

(c) "Poison," as used elsewhere in this chapter, shall reference a category of hazardous substances defined in Section 28743 of the Health and Safety Code which the board may by regulation make more specific.

**Comment.** Section 4160 is amended to delete the former reference to Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code. The provisions for regulatory notice are contained in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

The former reference to the statutory provisions "as amended" is omitted as surplus. See Gov't Code § 9.

## Real Estate Commissioner

### **Bus. & Prof. Code § 10175.2 (technical amendment). Monetary penalties**

10175.2. (a) If the Real Estate Commissioner determines that the public interest and public welfare will be adequately served by permitting a real estate licensee to pay a monetary penalty to the department in lieu of an actual license suspension, the commissioner may, on the petition of the licensee, stay the execution of all or some part of the suspension on the condition that the licensee pay a monetary penalty and the further condition that the licensee incur no other cause for disciplinary action within a period of time specified by the commissioner.

(b) The commissioner may exercise the discretion granted to him under subdivision (a) either with respect to a suspension ordered by a decision after a contested hearing on an accusation against the licensee or by stipulation with the licensee after the filing of an accusation, but prior to the rendering of a decision based upon the

accusation. In either case, the terms and conditions of the disciplinary action against the licensee shall be made part of a formal decision of the commissioner which satisfies the requirements of Section 11518 of the Government Code.

(c) If a licensee fails to pay the monetary penalty in accordance with the terms and conditions of the decision of the commissioner, the commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the licensee shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the department under the terms of the decision.

(d) The amount of the monetary penalty payable under this section shall not exceed two hundred fifty dollars (\$250) for each day of suspension stayed nor a total of ten thousand dollars (\$10,000) per decision regardless of the number of days of suspension stayed under the decision.

(e) Any monetary penalty received by the department pursuant to this section shall be credited to the Recovery Account of the Real Estate Fund.

**Comment.** Section 10175.2 is amended to delete the former reference to Section 11518 of the Government Code. The former requirements of Government Code Section 11518 for contents of a decision are now in Government Code Section 11425.50, which applies to adjudicative proceedings of all state agencies. See Gov't Code § 11425.10.

### Alcoholic Beverage Control Appeals Board

#### **Bus. & Prof. Code § 23083 (amended). Determination of appeal**

23083. (a) The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall fix a time and place for argument. The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

*(b) Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to the determination.*

**Comment.** Section 23083 is amended to add subdivision (b). Subdivision (b) makes the general administrative adjudication provisions

of the Administrative Procedure Act inapplicable to determination of an appeal by the Alcoholic Beverage Control Appeals Board. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 23083 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to determination of an appeal by the Alcoholic Beverage Control Appeals Board. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 23083 excuses compliance with procedural protections required by due process of law.

## State Board of Education, California Community Colleges, and California State University

### **Educ. Code § 232 (technical amendment). Issuance of regulations**

232. The State Board of Education, the Board of Governors of the California Community Colleges, and the Trustees of the California State University shall issue regulations pursuant to Chapter 3.5 (commencing with Section 11340) and Chapter 5 (commencing with Section 11500) of *Part 1 of Division 3 of Title 2 of the Government Code*, commonly referred to as *the rulemaking provisions of the Administrative Procedure Act*, to implement the provisions of this chapter.

The Regents of the University of California may issue regulations to implement the provisions of this chapter. If the Regents of the University of California choose to issue regulations it may issue them pursuant to Chapter 3.5 (commencing with Section 11340) and Chapter 5 (commencing with Section 11500) of *Part 1 of Division 3 of Title 2 of the Government Code*, commonly referred to as *the rulemaking provisions of the Administrative Procedure Act*.

**Comment.** Section 232 is amended to delete the references to the administrative adjudication provisions of the Administrative Procedure Act. Regulations are issued pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

## University of California

### **Educ. Code § 92001 (added). Provisions inapplicable**

92001. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing conducted by the University of California.

**Comment.** Section 92001 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to hearings of the University of California. The section 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, subject to limited legislative control, and independent in administration of its affairs). Nothing in Section 92001 excuses compliance with procedural protections required by due process of law. See also Section 232 (Regents may issue regulations pursuant to rulemaking provisions of Administrative Procedure Act).

Although Section 92001 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a hearing conducted by the University of California. *Cf.* Gov't Code § 11501 (application of chapter).

## Council for Private Postsecondary and Vocational Education

### **Educ. Code § 94323 (amended). Notice and hearing**

94323. (a) This section establishes the procedure for notice and hearing required under this chapter and, except as provided in Sections 94319.12 and 94322, may be used in lieu of other notice or hearing requirements provided in this chapter.

(b) If notice of administrative action is required by this chapter, the council shall serve notice stating the following:

(1) The action, including the penalties and administrative sanctions sought.

(2) The grounds for the action with sufficient particularity to give notice of the transactions, occurrences, violations, or other matters on which the action is based.

(3) The right to a hearing and the time period within which the party subject to the notice may request a hearing in writing. The time period shall not be less than 15 days after service of the notice unless a longer period is provided by statute.

(4) The right to be present at the hearing, to be represented by counsel, to cross-examine witnesses, and to present evidence.

(5) The administrative action set forth in the notice will be taken and shall become final if the party subject to the notice does not request a hearing in writing within the time period expressed in the notice.

(c) If a party subject to a notice provided pursuant to subdivision (b) requests a hearing in writing within 10 days of receiving the notice, the council shall schedule a hearing. The hearing shall be held in a location determined pursuant to Section 11508 of the Government Code. The council shall serve reasonable notice of the time and place for the hearing at least 10 days before the hearing. The council may continue the date of the hearing upon a showing of good cause.

(d)(1) Any party, including the council, may submit a written request to any other party before the hearing to obtain the names and addresses of any person who has personal knowledge, or who the party receiving the request claims to have personal knowledge, of any of the transactions, occurrences, violations, or other matters that are the bases of the administrative action. In addition, the requesting party shall have the right to inspect and copy any written statement made by that person and any writing, as defined by Section 250 of the Evidence Code, or thing that is in the custody, or under the control, of the party receiving the request and that is relevant and not privileged. This subdivision shall constitute the exclusive method for prehearing discovery. However, nothing herein shall affect the council's authority, at any time, to investigate, inspect, monitor, or obtain and copy information under any provision of this chapter.

(2) The written request described in paragraph (1) shall be made before the hearing and within 30 days of the service of the notice described in subdivision (b). Each recipient of a request shall comply with the request within 15 days of its service by providing the names and addresses requested and by producing at a reasonable time at the council's office or another mutually agreed reasonable place the requested writings and things. The council may extend the time for response upon a showing of good cause.

(3) Except as provided in this paragraph, no party may introduce the testimony or statement of any person or any writing or thing into evidence at the hearing if that party failed to provide the name

and address of the person or to produce the writing or thing for inspection and copying as provided by this subdivision. A party may introduce the testimony, statement, writing, or thing that was not identified or produced as required herein only if there is no objection or the party establishes that the person, writing, or thing was unknown at the time when the response was made to the written request, the party could not have informed other parties within a reasonable time after learning of the existence of the person, writing, or thing, and no party would be prejudiced by the introduction of the evidence.

(e) Before the hearing has commenced, the council shall issue subpoenas at the written request of any party for the attendance of witnesses or the production of documents or other things in the custody or under the control of the person subject to the subpoena. Subpoenas issued pursuant to this section shall be subject to *Section 11510 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.*

(f)(1) The council shall designate an impartial hearing officer to conduct the hearing. The hearing officer may administer oaths and affirmations, regulate the course of the hearing, question witnesses, and otherwise investigate the issues, take official notice according to the procedure provided in Division 4 (commencing with Section 450) of the Evidence Code of any technical or educational matter in the council's special field of expertise and of any matter that may be judicially noticed, set the time and place for continued hearings, fix the time for the filing of briefs and other documents, direct any party to appear and confer to consider the simplification of issues by consent, and prepare a statement of decision.

(2) ~~Neither a hearing officer nor any person who has a direct or indirect interest in the outcome of the hearing shall communicate directly or indirectly with each other regarding any issue involved in the hearing while the proceeding is pending without notice and opportunity for all parties to participate in the communication. A hearing officer who receives any ex parte communication shall immediately disclose the communication to the council and all other parties. The council may disqualify the hearing officer if necessary to eliminate the effect of the ex parte communication. If In addition to the sanctions provided in Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of~~

*Title 2 of the Government Code, if the council finds that any party willfully violated, or caused the violation of, this paragraph that article,* the council shall enter that party's default and impose the administrative sanction set forth in the notice provided pursuant to subdivision (b).

(g)(1) Each party at the hearing shall be afforded an opportunity to present evidence, respond to evidence presented by other parties, cross-examine, and present written argument or, if permitted by the hearing officer, oral argument on the issues involved in the hearing. The council may call any party as a witness who may be examined as if under cross-examination.

(2) Each party may appear through its representative or through legal counsel.

(3) The technical rules relating to evidence and witnesses shall not apply. However, only relevant evidence is admissible.

(4) Oral evidence shall be taken only upon oath or affirmation. The hearing shall be conducted in the English language. The proponent of any testimony to be offered by a witness who is not proficient in English shall provide, at the proponent's cost, an interpreter proficient in English and the language in which the witness will testify.

(5) The hearing shall be recorded by tape recording or other phonographic means unless all parties agree to another method of recording the proceedings.

(6)(A) At any time 10 or more days before the hearing, any party may serve on the other parties a copy of any declaration which the party proposes to introduce in evidence.

(B) The declaration shall be accompanied by a notice indicating the date of service of the notice and stating that the declarations will be offered into evidence, the declarants will not be called as witnesses, and there will be no right of cross-examination unless the party receiving the notice requests the right to cross-examine, in writing, within seven days of the service of the declarations and notice.

(C) If no request for cross-examination is served within seven days of the service of the declarations and notice described in subparagraph (B), the right to cross-examine is deemed waived and the declaration shall have the same effect as if the declarant testified orally. Notwithstanding this paragraph, a declaration may be admitted as hearsay evidence without cross-examination.

(7) Disposition of any issues involved in the hearing may be made by stipulation or settlement.

(8) If a party fails to appear at a hearing, that party's default shall be taken and the party shall be deemed to have waived the hearing and agreed to the administrative action and the grounds for that action described in the notice given pursuant to subdivision (b). The council shall serve the party with an order of default including the administrative action ordered. The order shall be effective upon service or at any other time designated by the council. The council may relieve a party from an order of default if the party applies for relief within 15 days after the service of an order of default and establishes good cause for relief. An application for relief from default shall not stay the effective date of the order unless expressly provided by the council.

(h)(1) At any time before the matter is submitted for decision, the council may amend the notice provided pursuant to subdivision (b) to set forth any further grounds for the originally noticed administrative action or any additional administrative action and the grounds therefor. The statement of the further grounds for the originally noticed administrative action, or of the grounds for any additional administrative action, shall be made with sufficient particularity to give notice of the transactions, occurrences, violations, or other matters on which the action or additional action is based. The amended notice shall be served on all parties. All parties affected by the amended notice shall be given reasonable opportunity to respond to the amended notice as provided in this section.

(2) The council may amend the notice after the case is submitted for decision. The council shall serve each party with notice of the intended amendment and shall provide the party with an opportunity to show that the party will be prejudiced by the amendment unless the case is reopened to permit the party to introduce additional evidence. If prejudice is shown, the council shall reopen the case to permit the introduction of additional evidence.

(i)(1) Within 30 days after the conclusion of the hearing or at another time established by the council, the hearing officer shall submit a written statement of decision setting forth a recommendation for a final decision and explaining the factual and legal basis for the decision as to each of the grounds for the

administrative action set forth in the notice or amended notice. *The written statement of decision shall be made as provided in Section 11425.50 of the Government Code.* The council shall serve the hearing officer's statement of decision on each party and its counsel within 10 days of its submission by the hearing officer.

(2) The council shall make the final decision which shall be based exclusively on evidence introduced at the hearing. The final decision shall be supported by substantial evidence in the record. The council shall also issue a statement of decision explaining the factual and legal basis for the final decision as to each of the grounds for the administrative action set forth in the notice or amended notice *as provided in Section 11425.50 of the Government Code.* The council shall issue an order based on its decision which shall be effective upon service or at any other time designated by the council. The council shall serve a copy of the final decision and order, within 10 days of their issuance, on each party and its counsel.

(3) The council may hold a closed session to deliberate on a decision to be reached based upon evidence introduced at the hearing.

(4) The council shall serve a certified copy of the complete record of the hearing, or any part thereof designated by a party, within 30 days after receiving the party's written request and payment of the cost of preparing the requested portions of the record. The complete record shall include all notices and orders issued by the council, a transcript of the hearing, the exhibits admitted or rejected, the written evidence and any other papers in the case, the hearing officer's statement of decision, and the final decision and order.

(j) The council shall serve all notices and other documents that are required to be served by this section on each party by personal delivery, by certified mail, return receipt requested, or by any other means designated by the council.

(k)(1) Any party aggrieved by the council's final decision and order may seek judicial review by filing a petition for a writ of mandate pursuant to Section 1085 of the Code of Civil Procedure within 30 days of the issuance of the final decision and order. If review is not sought within that period, the party's right to review shall be deemed waived.

(2) The aggrieved party shall present the complete record of the hearing or all portions of the record necessary for the court's review of the council's final decision and order. The court shall deny the petition for a writ of mandate if the record submitted by the party is incomplete. The court shall not consider any matter not contained in the record. The factual bases supporting the final decision set forth in the council's statement of decision shall be conclusive if supported by substantial evidence on the record considered as a whole.

(3) The final order shall not be stayed or enjoined during review except upon the court's grant of an order on a party's application after due notice to the council and the Attorney General. The order shall be granted only if the party establishes the substantial likelihood that it will prevail on the merits and posts a bond sufficient to protect fully the interests of the students, the council, and the Student Tuition Recovery Fund, from any loss.

(l) The council may adopt regulations establishing alternative means of providing notice and an opportunity to be heard in circumstances in which a full hearing is not required by law.

(m) For purposes of this section, "good cause" shall require sufficient ground or reason for the determination to be made by the council.

**Comment.** Subdivision (e) of Section 94323 is amended to correct the reference to the provisions of Administrative Procedure Act relating to subpoenas. Subdivision (f)(2) is amended to recognize that the ex parte communications provisions of the Administrative Procedure Act apply to hearings of the council under this section. Gov't Code § 11425.10(a)(8).

Paragraphs (1) and (2) of subdivision (i) are amended to delete the requirement that the decision explain its factual and legal basis as to each of the grounds for the administrative action set forth in the notice or amended notice, and replace it with a reference to Section 11425.50 of the Government Code. This change is nonsubstantive, since Government Code Section 11425.50 requires the decision to be in writing and to include a statement of the factual and legal basis for the decision. In any event, Government Code Section 11425.50 applies to all agency adjudicative proceedings under Government Code Section 11425.10.

## General Law

### **Evid. Code § 755.5 (technical amendment). Interpreter's presence in medical examination**

755.5. (a) During any medical examination, requested by an insurer or by the defendant, of a person who is a party to a civil action and who does not proficiently speak or understand the English language, conducted for the purpose of determining damages in a civil action, an interpreter shall be present to interpret the examination in a language that the person understands. ~~Commencing January 1, 1994, the~~ *The* interpreter shall be certified pursuant to ~~Section 11513 Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.~~

(b) The fees of interpreters ~~utilized~~ *used* under subdivision (a) shall be paid by the insurer or defendant requesting the medical examination.

(c) The record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.

(d) This section does not prohibit the presence of any other person to assist a party.

(e) In the event that interpreters certified pursuant to ~~Section 11513 Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code~~ cannot be present at the medical examination, upon stipulation of the parties the requester specified in subdivision (a) shall have the discretionary authority to provisionally qualify and ~~utilize~~ *use* other interpreters.

**Comment.** Section 755.5 is amended to correct references to the Administrative Procedure Act. The former reference in subdivision (a) to January 1, 1994, is deleted as obsolete.

### Public Employment Relations Board (election certification)

### **Gov't Code § 3541.3 (amended). Powers and duties of board**

3541.3. The board shall have all of the following powers and duties:

- (a) To determine in disputed cases, or otherwise approve, appropriate units.
- (b) To determine in disputed cases whether a particular item is within or without the scope of representation.
- (c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and to certify the results of the elections.
- (d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall these lists include persons who are on the staff of the board.
- (e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.
- (f) Within its discretion, to conduct studies relating to employer-employee relations, including the collection, analysis, and making available of data relating to wages, benefits, and employment practices in public and private employment, and, when it appears necessary in its judgment to the accomplishment of the purposes of this chapter, recommend legislation. The board shall report to the Legislature by October 15 of each year on its activities during the immediately preceding fiscal year. The board may enter into contracts to develop and maintain research and training programs designed to assist public employers and employee organizations in the discharge of their mutual responsibilities under this chapter.
- (g) To adopt, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.
- (h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction. *Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.*
- (i) To investigate unfair practice charges or alleged violations of this chapter, and take such *any* action and make such *any*

determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

(j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(k) To delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it, and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(l) To decide contested matters involving recognition, certification, or decertification of employee organizations.

(m) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(n) To take such *any* other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

**Comment.** Section 3541.3 is amended to make the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings of the Public Employment Relations Board under this chapter, except hearings to determine unfair practice charges. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3541.3 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Public Employment Relations Board under this chapter. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3541.3 excuses compliance with procedural protections required by due process of law.

**Gov't Code § 3563 (amended). Powers and duties of board**

3563. This chapter shall be administered by the Public Employment Relations Board. In administering this chapter the board shall have all of the following rights, powers, duties and responsibilities:

- (a) To determine in disputed cases, or otherwise approve, appropriate units.
- (b) To determine in disputed cases whether a particular item is within or without the scope of representation.
- (c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and to certify the results of the elections.
- (d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall *such* the lists include persons who are on the staff of the board.
- (e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.
- (f) To adopt, pursuant to Chapter 4.5 3.5 (commencing with Section 11371 11340) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.
- (g) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction, except for those records, books, or papers confidential under statute. *Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this section, except a hearing to determine an unfair practice charge.*
- (h) To investigate unfair practice charges or alleged violations of this chapter, and to take *such* *any* action and make *such* *any* determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.
- (i) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging

that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(j) To delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(k) To decide contested matters involving recognition, certification, or decertification of employee organizations.

(l) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(m) To take such *any* other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

**Comment.** Section 3563 is amended to make the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings of the Public Employment Relations Board under this chapter, except hearings to determine unfair practice charges. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3563 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Public Employment Relations Board under this chapter. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3563 excuses compliance with procedural protections required by due process of law.

## Milton Marks Commission on California State Government Organization and Economy

### **Gov't Code § 8541 (technical amendment). Enumeration of powers**

8541. In carrying out its duties and responsibilities, the commission shall have all of the following powers:

- (a) To meet at such times and places as it may deem proper.
- (b) As a body or, on the authorization of the commission, as a subcommittee composed of one or more members, to hold hearings at such times and places as it may deem proper.
- (c) To issue subpoenas to compel the attendance of witnesses and the production of books, records, papers, accounts, reports, and documents.
- (d) To administer oaths.
- (e) To employ, pursuant to laws and regulations governing state civil service, a secretary and such clerical, legal, and technical assistants as may appear necessary.
- (f) To contract with such other agencies, public or private, as it deems necessary, for the rendition and affording of such services, facilities, studies and reports to the commission as will best assist it to carry out its duties and responsibilities.
- (g) To co-operate with and to secure the co-operation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of its duties and responsibilities, and to direct the sheriff of any county or any marshal to serve subpoenas, orders, and other process.
- (h) To certify to the superior court of any county in which proceedings are held, the facts concerning the disobedience or resistance, by any person, of any lawful order, or the refusal of any person to respond to a subpoena, to take the oath or affirmation as a witness, or to be examined, or the misconduct of any person during a hearing; and to receive the assistance of the court in enforcing orders and process, in the manner prescribed by ~~Section 11525 of this code Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2.~~
- (i) To co-operate with every department, agency, or instrumentality in the state government; and to secure directly from every department, agency, or instrumentality full co-operation, access to its records, and access to any information, suggestions, estimates, data, and statistics it may have available.
- (j) To authorize its agents and employees to absent themselves from the State where necessary for the performance of their duties.
- (k) To do any and all other things necessary or convenient to enable it fully and adequately to perform its duties and to exercise the powers expressly granted it, notwithstanding any authority

expressly granted to any officer or employee of the executive branch of state government.

**Comment.** Section 8541 is amended to correct the reference to the Administrative Procedure Act. A number of provisions formerly found in Government Code Sections 11500-11530 are now located in general provisions on administrative adjudication, which apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions).

## General Law

### **Gov't Code § 11018 (technical amendment). Language assistance in administrative hearings**

11018. Every state agency which is authorized by any law to conduct administrative hearings but is not subject to Chapter 5 (commencing with Section 11500) shall nonetheless comply with subdivision (d) of Section 11513 *Sections 11435.20, 1435.25, and 11435.55* relative to the furnishing of language assistance at any such *the* hearing.

**Comment.** Section 11018 is amended to correct references to the Administrative Procedure Act.

## State Agencies Generally

### **Gov't Code § 11125.7 (amended). Opportunity for public to address state body**

11125.7. (a) Except as otherwise provided in this section, the state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item. This section is not applicable if the agenda item has already been considered by a committee composed exclusively of members of the state body at a public meeting where interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the state body.

(b) The state body may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public comment on particular issues and for each individual speaker.

(c) This section is not applicable to closed sessions held pursuant to Section 11126.

(d) This section is not applicable to decisions regarding proceedings held pursuant to Chapter 5 (commencing with Section 11500), relating to administrative adjudication, or to the conduct of those proceedings.

(e) This section is not applicable to hearings conducted by the State Board of Control pursuant to Sections 13963 and 13963.1.

(f) This section is not applicable to agenda items which involve decisions of the Public Utilities Commission regarding adjudicatory hearings held pursuant to Chapter 9 (commencing with Section 1701) of Part 1 of Division 1 of the Public Utilities Code. ~~For the purposes of this subdivision, “adjudicatory hearing” has the same meaning as defined in subdivision (f) of Section 11500 of the Government Code.~~ For all other agenda items, the commission shall provide members of the public, other than those who have already participated in the proceedings underlying the agenda item, an opportunity to directly address the commission before or during the commission’s consideration of the item.

**Comment.** Subdivision (f) of Section 11125.7 is amended to delete the second sentence. “Adjudicatory hearing” is no longer defined in the Administrative Procedure Act.

## Fair Employment and Housing Commission

### **Gov't Code § 12935 (amended). Functions, powers, and duties of commission**

12935. The commission shall have the following functions, powers and duties:

(a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (3) to carry out all other functions and duties of the commission pursuant to this part.

(b) To conduct hearings pursuant to Sections 12967 and 12981.

- (c) To establish and maintain a principal office within the state.
- (d) To meet and function at any place within the state.
- (e) To appoint an executive secretary, and any attorneys and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.
- (f) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.
- (g) To create or provide financial or technical assistance to any advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and to empower them to study the problems of discrimination in all or specific fields of human relationships or in particular instances of employment discrimination on the bases enumerated in this part or in specific instances of housing discrimination because of race, religious creed, color, national origin, ancestry, familial status, disability, marital status, or sex, and to foster, through community effort or otherwise, good will, cooperation, and conciliation among the groups and elements of the population of the state and to make recommendations to the commission for the development of policies and procedures in general. These advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.
- (h) With respect to findings and orders made pursuant to this part, to establish a system of published opinions which shall serve as precedent in interpreting and applying the provisions of this part. *Commission findings, orders, and opinions in an adjudicative proceeding are subject to Section 11425.60.*
- (i) To issue publications and results of inquiries and research which in its judgment will tend to promote good will and minimize or eliminate unlawful discrimination. These publications shall include an annual report to the Governor and the Legislature of its activities and recommendations.
- (j) Notwithstanding Sections 11370.3 and 11502, to appoint hearing officers, as it may deem necessary, to conduct hearings. Each hearing officer shall possess the qualifications established by the State Personnel Board for the particular class of position involved.

**Comment.** Section 12935 is amended to make findings, orders, and opinions in an adjudicative proceeding of the Fair Employment and Housing Commission subject to the precedent decision provision of the Administrative Procedure Act. Under the Administrative Procedure Act, the commission may not expressly rely on an opinion as precedent unless it has been designated as a precedent decision. Gov't Code § 11425.60

## Commission on State Mandates

### **Gov't Code § 17533 (added). Provisions inapplicable**

17533. Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 does not apply to a hearing by the commission under this part.

**Comment.** Section 17533 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to hearings of the Commission on State Mandates under this part. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 17533 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Commission on State Mandates under this part. Cf. Gov't Code § 11501 (application of chapter).

Nothing in Section 17533 excuses compliance with procedural protections required by due process of law.

## State Personnel Board

### **Gov't Code § 19582.5 (amended). Functions, powers, and duties of commission**

19582.5. The board may designate certain of its decisions as precedents. ~~Precedential decisions shall not be subject to Chapter 3.5. (commencing with Section 11340) of Part 1 of Division 3.~~ *Decisions of the board are subject to Section 11425.60.* The board may provide by rule for the reconsideration of a previously issued decision to determine whether or not it shall be designated as a precedent decision. All decisions designated as precedents shall be published in a manner determined by the board.

**Comment.** Section 19582.5 is amended to make decisions of the State Personnel Board subject to the precedent decision provision of the

Administrative Procedure Act. Under the Administrative Procedure Act, the board may not expressly rely on a decision as precedent unless it has been designated as a precedent decision. Gov't Code § 11425.60.

The substance of the former second sentence of Section 19582.5 (precedential decisions not subject to rulemaking provisions of Administrative Procedure Act) is continued in subdivision (b) of Section 11425.60.

## Municipal Hospitals

### **Gov't Code § 37624.2 (technical amendment). Subpoenas**

37624.2. The governing body or the hearing officer, if one is appointed, shall have the same power with respect to the issuance of subpoenas and subpoenas duces tecum as that granted to any agency or hearing officer pursuant to *Section 11510 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2*. Any subpoena or subpoena duces tecum issued pursuant to this section shall have the same force and effect and impose the same obligations upon witnesses as that provided in *Section 11510 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2*.

**Comment.** Section 37624.2 is amended to correct references to the Administrative Procedure Act.

## Judicial Council

### **Gov't Code § 68560.5 (technical amendment). Definitions**

68560.5. As used in this article:

(a) "Court proceeding" means a civil, criminal, or juvenile proceeding, excluding a small claims proceeding, and a deposition.

(b) "Interpreter" does not include (1) an interpreter qualified under Section 754 of the Evidence Code to interpret for deaf or hard-of-hearing persons, or (2) an interpreter qualified for administrative hearings or noncourt settings under *Section 11513 Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2*.

**Comment.** Section 68560.5 is amended to correct the reference to the Administrative Procedure Act.

## Office of Statewide Health Planning and Development

### **Health & Safety Code § 443.37 (technical amendment). Review**

443.37. (a) Any health facility affected by any determination made under this part by the office may petition the office for review of the decision. This petition shall be filed with the office within 15 business days, or within such a greater time as the office, with the advice of the commission, may allow, and shall specifically describe the matters which are disputed by the petitioner.

(b) A hearing shall be commenced within 60 calendar days of the date on which the petition was filed. The hearing shall be held before an employee of the office, a hearing officer *an administrative law judge* employed by the Office of Administrative Hearings, or a committee of the commission chosen by the chairperson for this purpose. If held before an employee of the office or a committee of the commission, the hearing shall be held in accordance with such procedures as the office, with the advice of the commission, shall prescribe. If held before a hearing officer *an administrative law judge* employed by the Office of Administrative Hearings, the hearing shall be held in accordance with Chapter 5 (commencing with Section 11500) of *Part 1 of Division 3 of Title 2 of the Government Code*. The employee, hearing officer *administrative law judge*, or committee shall prepare a recommended decision including findings of fact and conclusions of law and present it to the office for its adoption. The decision of the office shall be in writing and shall be final. The decision of the office shall be made within 60 calendar days after the conclusion of the hearing and shall be effective upon filing and service upon the petitioner.

(c) Judicial review of any final action, determination, or decision may be had by any party to the proceedings as provided in Section 1094.5 of the Code of Civil Procedure. The decision of the office shall be upheld against a claim that its findings are not supported by the evidence unless the court determines that the findings are not supported by substantial evidence.

(d) The employee of the office, the hearing officer *administrative law judge* employed by the Office of Administrative Hearings, the Office of Administrative Hearings, or the committee of the commission, may issue subpoenas and subpoenas duces tecum in a

manner and subject to the conditions established by Section 11510 Article 11 (*commencing with Section 11450.10*) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

**Comment.** Section 443.37 is amended to correct references to the Administrative Procedure Act. A hearing held in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code is also subject to Chapter 4.5 (administrative adjudication general provisions) of that part, division, and title. Gov't Code §§ 11410.50, 11501.

**Note.** The part in which Section 443.37 appears has a sunset provision, and is repealed on January 1, 1997. See Section 443.46. This is addressed in the operative date provision at the end of these conforming revisions.

## State Department of Health Services

### **Health & Safety Code § 1551.5 (technical amendment). Witness fees**

1551.5. Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code. In addition to the witness fees and mileage provided by Government Code Section 11450.40, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

**Comment.** Section 1551.5 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under Section 1551, hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

### **Health & Safety Code § 1568.065 (technical amendment). Conduct of proceedings**

1568.065. (a) Proceedings for the suspension, revocation, or denial of a license under this chapter shall be conducted in

accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all those powers granted by the provisions. In the event of conflict between this chapter and those provisions of the Government Code, this chapter shall prevail.

(b) In all proceedings conducted in accordance with this section, the standard of proof to be applied shall be by the preponderance of the evidence.

(c) If the license is not temporarily suspended pursuant to Section 1568.082, the hearing shall be held within 90 calendar days after receipt of the notice of defense, unless a continuance of the hearing is granted by the department or the administrative law judge. When the matter has been set for hearing, only the administrative law judge may grant a continuance of the hearing. The administrative law judge may, but need not, grant a continuance of the hearing, only upon finding the existence of any of the following:

(1) The death or incapacitating illness of a party, a representative or attorney of a party, a witness to an essential fact, or of the parent, child, or member of the household of such person, when it is not feasible to substitute another representative, attorney, or witness because of the proximity of the hearing date.

(2) Lack of notice of hearing as provided in Section 11509 of the Government Code.

(3) A material change in the status of the case where a change in the parties or pleadings requires postponement, or an executed settlement or stipulated findings of fact obviate the need for hearing. A partial amendment of the pleadings shall not be good cause for continuance to the extent that the unamended portion of the pleadings is ready to be heard.

(4) A stipulation for continuance signed by all parties or their authorized representatives, including, but not limited to, a representative, which is communicated with the request for continuance to the administrative law judge no later than 25 business days before the hearing.

(5) The substitution of the representative or attorney of a party upon showing that the substitution is required.

(6) The unavailability of a party, representative, or attorney of a party, or witness to an essential fact due to a conflicting and required appearance in a judicial matter if when the hearing date

was set, the person did not know and could neither anticipate nor at any time avoid the conflict, and the conflict with request for continuance is immediately communicated to the administrative law judge.

(7) The unavailability of a party, a representative or attorney of a party, or a material witness due to an unavoidable emergency.

(8) Failure by a party to comply with a timely discovery request if the continuance request is made by the party who requested the discovery.

(d) Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code. In addition to the witness fees and mileage provided by Government Code Section 11450.40, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

(e)(1) The withdrawal of an application for a license or a special permit after it has been filed with the department shall not deprive the department of its authority to institute or continue a proceeding against the applicant for the denial of the license or a special permit upon any ground provided by law or to enter an order denying the license or special permit upon any such ground.

(2) The suspension, expiration, or forfeiture by operation of law of a license issued by the department, or its suspension, forfeiture, or cancellation by order of the department or by order of a court of law, or its surrender, shall not deprive the department of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground.

(f)(1) If an application for a license indicates, or the department determines during the application review process, that the applicant previously was issued a license under this chapter or under Chapter 1 (commencing with Section 1200), Chapter 2 (commencing with Section 1250), Chapter 3 (commencing with Section 1500), Chapter 3.3 (commencing with Section 1569), Chapter 3.4

(commencing with Section 1596.70), Chapter 3.5 (commencing with Section 1596.90), or Chapter 3.6 (commencing with Section 1597.30) and the prior license was revoked within the preceding two years, the department shall cease any further review of the application until two years shall have elapsed from the date of the revocation. The cessation of review shall not constitute a denial of the application for purposes of Section 1568.062, this section, or any other provision of law.

(2) If an application for a license indicates, or the department determines during the application review process, that the applicant had previously applied for a license under any of the chapters listed in paragraph (1) and the application was denied within the last year, the department shall cease further review of the application under either of the following circumstances:

(A) In cases where the applicant petitioned for a hearing, the department shall cease further review of the application until one year has elapsed from the effective date of the decision and order of the department upholding a denial.

(B) In cases where the department informed the applicant of his or her right to petition for a hearing as specified in Section 1568.063 and the applicant did not petition for a hearing, the department shall cease further review of the application until one year has elapsed from the date of the notification of the denial and the right to petition for a hearing.

(3) The department may continue to review the application if it has determined that the reasons for the denial of the application were due to circumstances and conditions which either have been corrected or are no longer in existence.

**Comment.** Subdivision (d) of Section 1568.065 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under subdivision (a), hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

**Health & Safety Code § 1569.515 (technical amendment). Witness fees**

1569.515. Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code. In addition to the witness fees and mileage provided by Government Code Section 11450.40, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

**Comment.** Section 1569.515 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under Section 1569.51, hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

**Health & Safety Code § 1596.8875 (technical amendment). Witness fees**

1596.8875. Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code. In addition to the witness fees and mileage provided by Government Code Section 11450.40, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

**Comment.** Section 1596.8875 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under Section 1596.887, hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative

Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

## State Department of Alcohol and Drug Programs

### **Health & Safety Code § 11834.37 (technical amendment). Conduct of proceedings**

11834.37. (a) Proceedings for the suspension, revocation, or denial of a license under this chapter shall be conducted in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted by those provisions. In the event of conflict between this chapter and the Government Code, the Government Code shall prevail.

(b) In all proceedings conducted in accordance with this section, the standard of proof to be applied shall be by the preponderance of the evidence.

(c) The department shall commence and process licensure revocations under this chapter in a timely and expeditious manner. ~~Notwithstanding Section 11502.1 of the Government Code, the~~ *The Office of Administrative Hearings shall give priority calendar preference to licensure revocation hearings pursuant to this chapter, particularly revocations where the health and safety of the residents are in question.*

**Comment.** Section 11834.37 is amended to delete the reference to former Section 11502.1 of the Government Code, which has been repealed. A proceeding conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code is also subject to the provisions of Chapter 4.5 (administrative adjudication general provisions) of that part, division, and title. Gov't Code §§ 11410.50, 11501.

## Building Standards Commission

### **Health & Safety Code § 18949.6 (technical amendment). Building standards**

18949.6. (a) The commission shall adopt regulations setting forth the procedure for the adoption of building standards and

administrative regulations that apply directly to the implementation or enforcement of building standards.

(b) Regulatory adoption shall be accomplished so as to facilitate the triennial adoption of the specified model codes pursuant to Section 18928.

(c) The regulations shall allow for the distribution of proposed building standards and regulatory changes to the public for review in compliance with the requirements of the *rulemaking provisions of the* Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) and for the acceptance of responses from the public.

**Comment.** Section 18949.6 is amended to correct the reference to the Administrative Procedure Act.

## Department of Toxic Substances Control

### **Health & Safety Code § 25149 (amended). Endangerment to health and environment**

25149. (a) Notwithstanding any other provision of law, except as provided in Section 25149.5 or 25181 of this code or Section 731 of the Code of Civil Procedure, no city or county, whether chartered or general law, or district may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit relating to an existing hazardous waste facility so as to prohibit or unreasonably regulate the disposal, treatment, or recovery of resources from hazardous waste or a mix of hazardous and solid wastes at that facility, unless, after public notice and hearing, the director determines that the operation of the facility may present an imminent and substantial endangerment to health and the environment. However, nothing in this section authorizes an operator of that facility to violate any term or condition of a local land use permit or any other provision of law not in conflict with this section.

(b) The director shall, pursuant to subdivision (c), conduct the hearing specified in subdivision (a) to determine whether the operation of an existing hazardous waste facility may present an imminent and substantial endangerment to health and the environment whenever any of the following occurs:

(1) A state or federal public agency requires any person to evacuate a residence or requires the evacuation of a school, place of employment, commercial establishment, or other facility to which the public has access, because of the release of a hazardous substance from the facility.

(2) For more than five days in any month, the air emissions from the facility result in the violation of an emission standard for a hazardous air pollutant established pursuant to Section 7412 of Title 42 of the United States Code or the threshold exposure level for a toxic air contaminant, as defined in Section 39655.

(3) A state or federal public agency requires that the use of a source of drinking water be discontinued because of the contamination of the source by a release of hazardous waste, hazardous substances, or leachate from the facility.

(4) A state agency, or the board of supervisors of the county in which the facility is located, upon recommendation of its local health officer, makes a finding that the public health has been affected by a release of hazardous wastes from the facility. The finding shall be based on statistically significant data developed in a health effects study conducted according to a study design, and using a methodology, which are developed after considering the suggestions on study design and methodology made by interested parties and which are approved by the Epidemiological Studies Section in the Epidemiology and Toxicology Branch of the department before beginning the study.

(5) The owner or operator of the facility is in violation of an order issued pursuant to Section 25187 which requires one or both of the following:

(A) The correction of a violation or condition that has resulted, or threatens to result, in an unauthorized release of hazardous waste or a constituent of hazardous waste from the facility into either the onsite or offsite environment.

(B) The cleanup of a release of hazardous waste or a constituent of hazardous waste, the abatement of the effects of the release, and any other necessary remedial action.

(6) The facility is in violation of an order issued pursuant to Article 1 (commencing with Section 13300) of, or Article 2 (commencing with Section 13320) of, Chapter 5 of Division 7 of the Water Code or in violation of a temporary restraining order, preliminary injunction, or permanent injunction issued pursuant to

Article 4 (commencing with Section 13340) of Chapter 5 of Division 7 of the Water Code.

(c) Whenever the director determines that a hearing is required, as specified in subdivision (b), the director shall immediately request the Office of Administrative Hearings to assign a ~~hearing officer~~ *an administrative law judge* to conduct the hearing, pursuant to this subdivision.

(1) After ~~a hearing officer~~ *an administrative law judge* is assigned by the Office of Administrative Hearings, the director shall transmit to the ~~hearing officer~~ *administrative law judge* and to the operator of the existing hazardous waste facility, all relevant documents, information, and data that were the basis for the director's determination. The director shall also prepare a notice specifying the time and place of the hearing. The notice shall also include a clear statement of the reasons for conducting the hearing, a description of the facts, data, circumstances, or occurrences that are the cause for conducting the hearing, and the issues to be addressed at the hearing. The hearing shall be held as close to the location of the existing hazardous waste facility as is practicable and shall commence no later than 30 days following the director's request to the Office of Administrative Hearings to assign a ~~hearing officer~~ *an administrative law judge* to the case.

(2) The hearing specified in paragraph (1) shall be conducted in accordance with Article 8 (*commencing with Section 11435.05*) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and Sections 11510 ~~11511~~ to 11515, inclusive, and ~~Section 11525~~, of, the Government Code. The ~~hearing officer's~~ *administrative law judge's* proposed decision shall be transmitted to the director within 30 days after the case is submitted.

(3) The director may adopt the proposed decision of the ~~hearing officer~~ *administrative law judge* in its entirety or may decide the case upon the record, as provided in Section 11517 of the Government Code. The director's decision shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision is subject to judicial review in accordance with Section 11523 of the Government Code.

**Comment.** Section 25149 is amended to reflect the repeal of Sections 11510 and 11525 of the Government Code. A number of provisions formerly found in Government Code Sections 11500-11515 are now located in general provisions on administrative adjudication, which apply

to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions).

In paragraph (2) of subdivision (c) a reference is added to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

#### **Health & Safety Code § 25229 (technical amendment). Decision and findings of fact**

25229. (a) If, after the hearing, the director makes the decision that the subject land should not be designated a hazardous waste property or border zone property, the director shall issue that decision in writing and serve it in the manner provided in subdivision (c).

(b) If, after the hearing, the director makes the decision, upon a preponderance of the evidence, including any evidence developed at any time prior to the hearing, that the land should be designated a hazardous waste property or a border zone property, the director shall issue that decision in writing, which shall identify the subject land, or portion thereof, by street address, assessor's parcel number, or legal description and the name of the owner of record, contain findings of fact based upon the issues presented, including the reasons for this designation, the substances on, under, or in the land, and the significant existing or potential hazards to present or future public health and safety, and order every owner of the designated land to take all of the following actions:

(1) Execute before a notary a written instrument which imposes an easement, covenant, restriction, or servitude, or any combination thereof, as appropriate, upon the present and future uses of the land pursuant to Section 25230. The written instrument shall also include a copy of the director's decision.

(2) Return the executed instrument to the director within 30 days after the decision is delivered or mailed. Within 10 days after receiving the instrument, the director shall execute the written instrument and return the instrument to the owner.

(3) Record the written instrument pursuant to Section 25230 within 10 days after receiving the written instrument executed by the director, as specified in paragraph (2).

(4) Return the recorded written instrument to the director within 10 days after the owner records the instrument, as specified in paragraph (3).

(c) Copies of the determination shall be delivered or sent by certified mail to the owner of the property, the legislative body of the city or county in whose jurisdiction the land is located, and any other persons who were served pursuant to Section 25222 or who were permitted to intervene in the proceeding pursuant to Section 25226.

(d) Failure or refusal to comply with any order issued pursuant to this section shall be treated in the manner provided by *Section 11525 Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code*.

**Comment.** Section 25229 is amended to correct the reference to the Administrative Procedure Act. A number of provisions formerly found in Government Code Sections 11500-11530 are now located in general provisions on administrative adjudication, which apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions).

## State Water Resources Control Board

### **Health & Safety Code § 25299.59 (technical amendment). Procedure before board (operative until Jan. 1, 2005)**

25299.59. (a) Except as specified in subdivision (b), the procedures in *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and in Section 11513 of, the Government Code* apply to the proceedings conducted by the board pursuant to this article.

(b) Notwithstanding subdivision (a), Sections 801, 802, 803, 804, and 805 of the Evidence Code apply to the proceedings conducted by the board pursuant to this article.

(c) This article does not require any person to pursue a claim against the board pursuant to this article before seeking any other remedy.

(d) If the board has paid out of the fund for any costs of corrective action, the board shall not pay any other claim out of the fund for the same costs.

(e) Notwithstanding Sections 25299.57 and 25299.58, the board shall not reimburse or authorize prepayment of any claim in an aggregate amount exceeding nine hundred ninety thousand (\$990,000) for a claim arising from the same event or occurrence.

(f) The board may conduct an audit of any corrective action claim honored pursuant to this chapter. The claimant shall reimburse the state for any costs disallowed in the audit. A claimant shall preserve, and make available, upon request of the board or the board's designee, all records pertaining to the corrective action claim for a period of three years after the final payment is made to the claimant.

**Comment.** Section 25299.59 is amended to add the reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

## State Board of Control

### **Health & Safety Code § 25375.5 (technical amendment). Procedure and rules of evidence (operative until July 1, 1996)**

25375.5. (a) Except as specified in subdivision (b), the procedures specified in *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and in Section 11513 of,* the Government Code apply to the proceedings conducted by the board pursuant to this article.

(b) Notwithstanding subdivision (a), Sections 801, 802, 803, 804, and 805 of the Evidence Code apply to the proceedings conducted by the board pursuant to this article.

(c) The board may consider evidence presented by any person against whom a demand was made pursuant to subdivision (c) of Section 25372. The evidence presented by that person shall become a part of the record upon which the board's decision shall be based.

**Comment.** Section 25375.5 is amended to add the reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of

Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

## Local Hospital Districts

### **Health & Safety Code § 32154 (technical amendment). Subpoenas**

32154. The board or the hearing officer, if one is appointed, shall have the same power with respect to the issuance of subpoenas and subpoenas duces tecum as that granted to any agency or hearing *presiding* officer pursuant to ~~Section 11510 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2~~ of the Government Code. Any such subpoena or subpoena duces tecum issued pursuant to this section shall have the same force and effect and impose the same obligations upon witnesses as that provided in ~~Section 11510 Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2~~ of the Government Code.

**Comment.** Section 32154 is amended to correct references to the Administrative Procedure Act.

## Air Resources Board

### **Health & Safety Code § 40843 (technical amendment). Superior court proceedings**

40843. Upon receipt of a report submitted pursuant to Section 40842, the superior court shall proceed as specified in Section ~~11525 11455.20~~ of the Government Code.

**Comment.** Section 40843 is amended to correct the reference to the Administrative Procedure Act.

## Occupational Safety and Health Standards Board

### **Lab. Code § 146 (technical amendment). Conduct of hearings**

146. In the conduct of hearings related to permanent variances, the board and its representatives are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct the hearings in accordance with the provisions of Article 8 (*commencing with Section 11435.05*) of

*Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and Section 11513 of, the Government Code. A full and complete record shall be kept of all proceedings.*

**Comment.** Section 146 is amended to add the reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

## Agricultural Labor Relations Board (election certification)

### **Lab. Code § 1144.5 (added). Provisions inapplicable**

1144.5. (a) Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing by the board under this part, except a hearing to determine an unfair labor practice charge.

(b) Notwithstanding Sections 11425.30 and 11430.10 of the Government Code, in a hearing to determine an unfair labor practice charge, a person who has participated in a determination of probable cause, injunctive or other pre-hearing relief, or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or as a supervisor of the presiding officer or may assist or advise the presiding officer in the same proceeding.

**Comment.** Subdivision (a) of Section 1144.5 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings of the Agricultural Labor Relations Board under this part, except hearings to determine unfair labor practice charges. Nothing in Section 1144.5 excuses compliance with procedural protections otherwise required by due process of law. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 1144.5 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Agricultural Labor Relations Board under this part. Cf. Gov't Code § 11501 (application of chapter).

Subdivision (b) provides a broader exception for the Agricultural Labor Relations Board than the comparable provisions in the Administrative Procedure Act. See Gov't Code §§ 11425.30(b) (when separation not required), 11430.10 (ex parte communications prohibited).

## Division of Workers' Compensation — Workers' Compensation Appeals Board

### **Lab. Code § 4600 (technical amendment). Responsibility of employer**

4600. Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his or her neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee may be treated by a physician of his or her own choice or at a facility of his or her own choice within a reasonable geographic area. However, if an employee has notified his or her employer in writing prior to the date of injury that he or she has a personal physician, the employee shall have the right to be treated by that physician from the date of injury. If an employee requests a change of physician pursuant to Section 4601, the request may be made at any time after the injury, and the alternative physician or chiropractor shall be provided within five days of the request as required by Section 4601. For the purpose of this section, "personal physician" means the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, who has previously directed the medical treatment of the employee, and who retains the employee's medical records, including his or her medical history.

Where at the request of the employer, the employer's insurer, the administrative director, the appeals board, or a workers' compensation judge, the employee submits to examination by a physician, he or she shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for the examination, together with one day of temporary disability

indemnity for each day of wages lost in submitting to the examination. Regardless of the date of injury, "reasonable expenses of transportation" includes mileage fees from the employee's home to the place of the examination and back at the rate of twenty-one cents (\$0.21) a mile or the mileage rate adopted by the Director of the Department of Personnel Administration pursuant to Section 19820 of the Government Code, whichever is higher, plus any bridge tolls. The mileage and tolls shall be paid to the employee at the time he or she is given notification of the time and place of the examination.

Where at the request of the employer, the employer's insurer, the administrative director, the appeals board, a workers' compensation judge, an employee submits to examination by a physician and the employee does not proficiently speak or understand the English language, he or she shall be entitled to the services of a qualified interpreter in accordance with conditions and a fee schedule prescribed by the administrative director. These services shall be provided by the employer. For purposes of this section, "qualified interpreter" means a language interpreter certified, or deemed certified, pursuant to *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or Section 11513 or 68566 of, the Government Code*.

**Comment.** Section 4600 is amended to correct the reference to the Administrative Procedure Act.

#### **Lab. Code § 5278 (amended). Disclosure of settlement offers**

5278. (a) No disclosure of any offers of settlement made by any party shall be made to the arbitrator prior to the filing of the award.

(b) ~~There shall be no ex parte communication by counsel or the parties with Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code applies to a communication to the arbitrator or a potential arbitrator except for the purpose of scheduling the arbitration hearing or requesting a continuance.~~

**Comment.** Section 5278 is amended to make arbitration proceedings under this part subject to the ex parte communications provisions of the Administrative Procedure Act. In any event, the ex parte communications provisions of the Administrative Procedure Act would apply to arbitration proceedings under Government Code Sections 11425.10 (requirements apply to "adjudicative proceeding") and 11405.20

(“adjudicative proceeding” means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision).

Formerly subdivision (b) of Section 5278 applied to ex parte communications “with” the arbitrator or potential arbitrator. The ex parte communications provisions of the Administrative Procedure Act apply only to communications “to” the presiding officer. Gov’t Code § 11430.10. Thus the arbitrator may initiate an ex parte communication with a party. See the Comment to Gov’t Code § 11430.10.

The former “except” clause in subdivision (b), permitting ex parte communications for the purpose of scheduling the arbitration hearing or requesting a continuance, is continued in substance in Government Code Section 11430.20(b).

### **Lab. Code § 5710 (technical amendment). Depositions**

5710. (a) The appeals board, a workers’ compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state. To that end the attendance of witnesses and the production of records may be required. Depositions may be taken outside the state before any officer authorized to administer oaths. The appeals board or a workers’ compensation judge in any proceeding before the appeals board may cause evidence to be taken in other jurisdictions before the agency authorized to hear workers’ compensation matters in those other jurisdictions.

(b) Where the employer or insurance carrier requests a deposition to be taken of an injured employee, or any person claiming benefits as a dependent of an injured employee, the deponent is entitled to receive in addition to all other benefits:

(1) All reasonable expenses of transportation, meals and lodging incident to the deposition.

(2) Reimbursement for any loss of wages incurred during attendance at the deposition.

(3) A copy of the transcript of the deposition, without cost.

(4) A reasonable allowance for attorney’s fees for the deponent, if represented by an attorney licensed by the state bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by,

the appeals board, but shall be paid by the employer or his or her insurer.

(5) A reasonable allowance for interpreter's fees for the deponent, if interpretation services are needed and provided by a language interpreter certified or deemed certified pursuant to *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or Section 11513 or 68566 of*, the Government Code. The fee shall be in accordance with the fee schedule set by the administrative director and paid by the employer or his or her insurer. Payment for interpreter's services shall be allowed for deposition of a non-English-speaking injured worker, and for such other deposition-related events as permitted by the administrative director.

**Comment.** Section 5710 is amended to correct the reference to the Administrative Procedure Act.

#### **Lab. Code § 5811 (technical amendment). Fees and costs**

5811. (a) No fees shall be charged by the clerk of any court for the performance of any official service required by this division, except for the docketing of awards as judgments and for certified copies of transcripts thereof. In all proceedings under this division before the appeals board, costs as between the parties may be allowed by the appeals board.

(b) It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter. A qualified interpreter is a language interpreter who is certified, or deemed certified, pursuant to *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or Section 11513 or 68566 of*, the Government Code.

Interpreter fees which are reasonably, actually, and necessarily incurred shall be allowed as cost under this section, provided they are in accordance with the fee schedule set by the administrative director.

A qualified interpreter may render services during the following:

- (1) A deposition.
- (2) An appeals board hearing.
- (3) During those settings which the administrative director determines are reasonably necessary to ascertain the validity or

extent of injury to an employee who cannot communicate in English.

**Comment.** Section 5811 is amended to correct a reference to the Administrative Procedure Act.

## Occupational Safety and Health Appeals Board

### **Lab. Code § 6603 (technical amendment). Rules of practice and procedure**

6603. (a) The rules of practice and procedure adopted by the appeals board shall be consistent with *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and Sections 11507, 11507.6, 11507.7, 11510, 11513, 11514, 11515, and 11516, and 11525 of, the Government Code, and shall provide affected employees or representatives of affected employees an opportunity to participate as parties to a hearing under Section 6602.*

(b) The superior courts shall have jurisdiction over contempt proceedings, as provided in *Section 11525 Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.*

**Comment.** Section 6603 is amended to correct references to the Administrative Procedure Act. Former Section 11510 of the Government Code is superseded by Sections 11450.10-11450.40 of the Government Code (subpoenas). Former Section 11525 of the Government Code is superseded by Sections 11455.10-11455.30 of the Government Code (enforcement of orders and sanctions). Rules of practice and procedure adopted by the appeals board must be consistent with these provisions, and with all other general provisions governing administrative adjudication found in Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

The reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance, is added in subdivision (a). This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

## Military Department

### **Mil. & Vet. Code § 105 (added). Provisions inapplicable**

105. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing conducted by the Military Department under this code.

**Comment.** Section 105 exempts California Military Department hearings under this code from the general administrative adjudication provisions of the Administrative Procedure Act. The hearings are a hybrid of federal and special state provisions that are unique and involve primarily matters of military classification and discipline. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 105 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to hearings of the California Military Department under this code. *Cf.* Gov't Code § 11501 (application of chapter).

## Department of Corrections and Related Entities

(Part 1: Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation Authority)

### **Pen. Code § 3066 (added). Provisions inapplicable**

3066. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a parole hearing or other adjudication concerning rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms.

**Comment.** Section 3066 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3066 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a parole hearing or other adjudication of rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3066 excuses compliance with procedural protections required by due process of law.

## State Mining and Geology Board

### **Pub. Res. Code § 663.1 (technical amendment). Ex parte communications on matters within board's jurisdiction**

663.1 (a) For the purposes of this section, "ex parte communication" means any oral or written communication between a member of the board and an interested person about a matter within the board's jurisdiction that does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.

(b) For purposes of this section, "a matter within the board's jurisdiction" means any action on a reclamation plan or financial assurance appealed pursuant to subdivision (e) of Section 2770, any review of an order setting administrative penalties pursuant to Section 2774.2, or any review of an appeal pursuant to Section 2775.

(c)(1) A board member or any person, other than a staff member of the board, department, or any other state agency, who is acting in his or her official capacity and who intends to influence the decision of the board on a matter within the board's jurisdiction, shall not conduct an ex parte communication, unless the board member or the person who engages in the communication with the board member discloses that communication in one of the following ways:

(A) The board member or the person fully discloses the communication and makes public the ex parte communication by providing a full report of the communication to the executive officer or, if the communication occurs within seven days of the next board hearing, to the board on the record of the proceeding of that hearing.

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

(d)(1) The board shall adopt standard disclosure forms for reporting ex parte communications which shall include, but not be limited to, all of the following information:

(A) The date, time, and location of the communication.

(B) The identity of the person or persons initiating and the person or persons receiving the communication.

(C) A complete description of the content of the communication, including the complete text of any written material that was part of the communication.

(2) The executive officer shall place in the public record any report of an ex parte communication.

(e) Communications shall cease to be ex parte communications when fully disclosed and placed in the board's official record.

(f) In addition to any other applicable penalty, a board member who knowingly violates this section is subject to a civil fine, not to exceed seven thousand five hundred dollars (\$7,500). Notwithstanding any law to the contrary, the court may award attorneys' fees and costs to the prevailing party.

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

**Comment.** Section 663.1 is amended to make clear that the ex parte communications provisions of the Administrative Procedure Act do not apply to proceedings of the State Mining and Geology Board under this code.

## State Energy Resources Conservation and Development Commission

### **Pub. Res. Code § 25513.3 (added). Permissible assistance or advice**

25513.3. Notwithstanding Sections 11425.30 and 11430.10 of the Government Code, unless a party demonstrates other statutory grounds for disqualification, a person who has served as investigator or advocate in an adjudicative proceeding of the commission under this code may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if 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.

**Comment.** Section 25513.3 is added to provide an exception to the separation of functions and ex parte communications provisions of the Administrative Procedure Act necessary to ensure efficient operation of the commission.

## California Coastal Commission

### **Pub. Res. Code § 30329 (added). Provisions inapplicable**

30329. Notwithstanding Section 11425.10 of the Government Code, the ex parte communications provisions of the Administrative Procedure Act (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the California Coastal Commission under this division.

**Comment.** Section 30329 is added to make clear that the ex parte communications provisions of the Administrative Procedure Act do not apply to proceedings of the California Coastal Commission. This article continues to apply to proceedings of the Coastal Commission under the California Coastal Act.

## California Integrated Waste Management Board

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

40412. (a) For the purposes of this section, "ex parte communication" means any oral or written communication

concerning matters, other than purely procedural matters, *Subject to subdivision (c), Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code applies to matters* under the board's jurisdiction which are subject to a rollcall vote pursuant to Section 40510.

(b) No board member or any person, excepting a staff member of the board acting in his or her official capacity, who intends to influence the decision of a board member on a matter before the board, shall conduct an ex parte communication, except as follows:

(1) If an ex parte a communication *in violation of this section* occurs, the board member shall notify the interested party that a full disclosure of the ex parte communication shall be entered in the board's record.

(2) Communications cease to be ex parte communications when

(c) *It is not a violation of this section if either of the following occurs:*

(A) (1) The board member or the person who engaged in the communication with the board member fully discloses the communication and requests in writing that it be placed in the board's official record of the proceeding.

(B) (2) When two or more board members receive substantially the same written communication, or are party to the same oral communication, from the same party on the same matter, and a single board member fully discloses the communication on behalf of the other board member or members who received the communication and requests in writing that it be placed in the board's official record of the proceeding.

**Comment.** Section 40412 is amended to apply the ex parte communications provisions of the Administrative Procedure Act to matters under the jurisdiction of the California Integrated Waste Management Board which are subject to a rollcall vote under Section 40510.

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

40413. (a) Any person who violates Section 40411 or 40412 is punishable by a fine of not more than fifty thousand dollars (\$50,000) or by imprisonment for not more than one year in the county jail or in the state prison, or by both that fine and imprisonment.

(b) In addition to the sanctions provided in Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, any person who violates Section 40412 is punishable by a fine of not more than fifty thousand dollars (\$50,000) or by imprisonment for not more than one year in the county jail or in the state prison, or by both that fine and imprisonment.

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

## Public Utilities Commission

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

1701. (a) All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

(b) Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing by the commission under this part.

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

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

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

## State Board of Equalization

### **Rev. & Tax. Code § 1636 (technical amendment). Hearing officers**

1636. The county board of supervisors may appoint one or more assessment hearing officers or contract with the Office of Administrative Procedure Hearings for the services of a hearing officer *an administrative law judge* pursuant to Chapter 14 (commencing with Section 27720) of Part 3 of Division 2 of Title 3 of the Government Code to conduct hearings on any assessment protests filed under Article 1 (commencing with Section 1601) of this chapter and to make recommendations to the county board of equalization or assessment appeals board concerning such *the* protests. Only persons meeting the qualifications prescribed by Section 1624 may be appointed as an assessment hearing officer.

**Comment.** Section 1636 is amended to correct a reference to the Office of Administrative Hearings. See Gov't Code §§ 11370.2, 27727 (Office of Administrative Hearings).

## Unemployment Insurance Appeals Board

### **Unemp. Ins. Code § 409 (amended). Assignment and determination of cases; contents and publication of decisions**

409. The chairperson shall assign cases before the board to any two members of the board for consideration and decision. Assignments by the chairperson of members to the cases shall be rotated so as to equalize the workload of the members, but with the composition of the members so assigned being varied and changed to assure that there shall never be a fixed and continuous composition of members. Except as otherwise provided, the decision of the two members assigned the case shall be the decision of the appeals board. In the event that the two members do not concur in the decision, the chairperson or another member of the board designated by the chairperson shall be assigned to the panel and shall resolve the impasse. A case shall be considered and decided by the appeals board acting as a whole at the request of any member of the appeals board.

The appeals board shall meet as a whole when the chairperson may direct to consider and pass on any matters that the chairperson may bring before it, and to consider and decide cases that present

issues of first impression or that will enable the appeals board to achieve uniformity of decisions by the respective members.

The appeals board, acting as a whole, may designate certain of its decisions as precedents. ~~Precedent decisions shall not be subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of the Government Code.~~ The appeals board, acting as a whole, may, on its own motion, reconsider a previously issued decision solely to determine whether or not the decision shall be designated as a precedent decision. Decisions of the appeals board acting as a whole shall be by a majority vote of its members. The director and the appeals board administrative law judges shall be controlled by those precedents except as modified by judicial review.

~~The decisions of the appeals board shall contain a statement of the facts upon which the decision is based, and a statement of the decision itself and the reasons for the decision.~~ If the appeals board issues decisions other than those designated as precedent decisions, anything incorporated in those decisions shall be physically attached to and be made a part of the decisions. ~~The appeals board shall maintain an index of significant legal and policy determinations made in precedent decisions.~~ The index shall be updated at least annually, unless no precedent decision has been designated since the most recent update. The appeals board may make a reasonable charge as it deems necessary to defray the costs of publication and distribution *of its precedent decisions and index of precedent decisions.*

**Comment.** Section 409 is amended to recognize that decisions of the Unemployment Insurance Appeals Board are subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code. Gov't Code § 11410.20 (application to state). Thus, for example, decisions of the Unemployment Insurance Appeals Board are subject to Government Code Sections 11425.50 (decision shall be in writing and include statement of factual and legal basis as to each principal controverted issue) and 11425.60 (board may not expressly rely on decision as precedent unless designated as a precedent decision; board shall maintain an index of significant legal and policy determinations made in precedent decisions). Language that duplicates provisions in Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code is deleted from Section 409. The former second sentence of the third paragraph of Section 409 (precedent decisions not subject to rulemaking provisions of Administrative

Procedure Act) is continued in substance in subdivision (b) of Section 11425.60. The last sentence of Section 409 is consistent with Government Code Section 6257 (state agency may charge fee covering direct costs of duplicating public records).

## Department of Motor Vehicles

### **Veh. Code § 3066 (technical amendment). Hearings on protests**

3066. (a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of the order, and place of hearing, and shall send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. Except in any case involving a franchisee who deals exclusively in motorcycles, the board or its secretary may, upon a showing of good cause, accelerate or postpone the date initially established for a hearing, but in no event shall the hearing be rescheduled more than 90 days after the board's initial order. For the purpose of accelerating or postponing a hearing date, "good cause" includes, but is not limited to, the effects upon, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Sections 11507.6, 11507.7, ~~except subdivision (e),~~ 11510, 11511, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish that there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, any matter involving a protest filed pursuant to this article.

**Comment.** Section 3066 is amended to correct the reference to the Administrative Procedure Act. A number of provisions formerly found in Government Code Sections 11500-11530 are now located in general provisions on administrative adjudication, which apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions). See also Gov't Code § 11435.15 (language assistance requirement applicable to Department of Motor Vehicles).

**Veh. Code § 11728 (technical amendment). Penalties as part of settlement agreement**

11728. As part of a compromise settlement agreement entered into pursuant to Section 11707 or 11808.5, the department may assess a monetary penalty of not more than two thousand five hundred dollars (\$2,500) per violation and impose a license suspension of not more than 30 days for any dealer who violates subdivision (r) of Section 11713. The extent of the penalties shall be based on the nature of the violation and effect of the violation on the purposes of this article. Except for the penalty limits provided for in Sections 11707 and 11808.5, all the provisions governing compromise settlement agreements for dealers, salesmen, and wholesalers apply to this section, *and Section 11415.60 of the Government Code does not apply.*

**Comment.** Section 11728 is amended to make the settlement provisions of the Administrative Procedure Act inapplicable to this section.

**Veh. Code § 14112 (amended). Exemption from separation of functions**

14112. (a) All matters in a hearing not covered by this chapter shall be governed, as far as applicable, by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) Subdivision (a) of Section 11425.30 of the Government Code does not apply to a proceeding for issuance, denial, revocation, or suspension of a driver's license pursuant to this division. The Department of Motor Vehicles shall study the effect of that subdivision on proceedings involving vehicle operation certificates and shall report to the Legislature by December 31, 1999, with recommendations concerning experience with its application in those proceedings.

**Comment.** Subdivision (b) is added to Section 14112 in recognition of the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Subdivision (b) makes separation of functions requirements inapplicable in drivers' licensing cases, including license classifications and endorsements. However, the separation of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus and ambulance operation certificate hearings, on which the department is required to report.

### Department of Corrections and Related Entities

(Part 2: Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation Authority)

#### Welf. & Inst. Code § 1778 (added). Provisions inapplicable

1778. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a parole hearing or other adjudication concerning rights of a person committed to the control of the Youth Authority conducted by the Youth Authority or the Youthful Offender Parole Board.

**Comment.** Section 1778 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of a ward conducted by the Youth Authority or the Youthful Offender Parole Board. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 1778 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a parole hearing or other adjudication of rights of a

ward conducted by the Youth Authority or the Youthful Offender Parole Board. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 1778 excuses compliance with procedural protections required by due process of law.

#### **Welf. & Inst. Code § 3158 (added). Provisions inapplicable**

3158. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a release hearing or other adjudication concerning rights of a person committed to the custody of the Director of Corrections conducted by the Narcotic Addiction Evaluation Authority.

**Comment.** Section 3158 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of a civil addict conducted by the Narcotic Addiction Evaluation Authority. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3158 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a parole hearing or other adjudication of rights of a civil addict conducted by the Narcotic Addiction Evaluation Authority. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3158 excuses compliance with procedural protections required by due process of law.

#### Department of Developmental Services

#### **Welf. & Inst. Code § 4689.5 (technical amendment). Conduct of proceedings**

4689.5. (a) Proceeding for the termination, or denial of vendorization as a family home agency or family home pursuant to Section 4689.4 shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the State Department of Developmental Services shall have all the powers granted by Chapter 5. In the event of conflict between this section and Chapter 5, Chapter 5 shall prevail.

(b) In all proceedings conducted in accordance with this section, the standard of proof to be applied shall be a preponderance of the evidence.

(c) The hearing shall be held within 90 calendar days after receipt of the notice of defense, unless a continuance of the hearing is granted by the department or the administrative law judge. When the matter has been set for hearing, only the administrative law judge may grant a continuance of the hearing. The administrative law judge may grant a continuance of the hearing, but only upon finding the existence of one or more of the following:

(1) The death or incapacitating illness of a party, a representative or attorney of a party, a witness to an essential fact, or of the parent, child, or member of the household of that person, when it is not feasible to substitute another representative, attorney, or witness because of the proximity of the hearing date.

(2) Lack of notice of hearing as provided in Section 11509 of the Government Code.

(3) A material change in the status of the case where a change in the parties or pleadings requires postponement, or an executed settlement or stipulated findings of fact obviate the need for hearing. A partial amendment of the pleadings shall not be good cause for continuance to the extent that the unamended portion of the pleadings is ready to be heard.

(4) A stipulation for continuance signed by all parties or their authorized representatives that is communicated with the request for continuance to the administrative law judge no later than 25 business days before the hearing.

(5) The substitution of the representative or attorney of a party upon showing that the substitution is required.

(6) The unavailability of a party, representative, or attorney of a party, or witness to an essential fact due to a conflicting and required appearance in a judicial matter if when the hearing date was set, the person did not know and could neither anticipate nor at any time avoid the conflict, and the conflict with request for continuance is immediately communicated to the administrative law judge.

(7) The unavailability of a party, a representative or attorney of a party, or a material witness due to an unavoidable emergency.

(8) Failure by a party to comply with a timely discovery request if the continuance request is made by the party who requested the discovery.

(d) ~~Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this section who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code. In addition to the witness fees and mileage provided by 11450.40 of the Government Code, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.~~

**Comment.** Subdivision (d) of Section 4689.5 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under subdivision (a), hearings under this section are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

## O P E R A T I V E D A T E

### **Uncodified. Operative date**

- (a) Except as provided in subdivision (b), this act shall be operative on July 1, 1997.
  - (b) If Section 443.37 of the Health and Safety Code is repealed before July 1, 1997, then Section [ ] of this act shall not become operative.
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## BACKGROUND STUDIES

- Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*,  
39 UCLA L. Rev. 1067 (1992)\* ..... 321
- Asimow, *The Adjudication Process* (October 1991) ..... 447



## TOWARD A NEW CALIFORNIA ADMINISTRATIVE PROCEDURE ACT: ADJUDICATION FUNDAMENTALS

Michael Asimow\*

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## INTRODUCTION

California's Administrative Procedure Act (APA) was enacted in 1945, a year before the federal act and before that of almost any other state. It was a visionary statute, far ahead of its time. Forty-seven years later, the adjudication provisions of the APA have fallen badly out of date and need wholesale revision.

This Article arose out of studies prepared by the author as a consultant for the California Law Revision Commission.<sup>1</sup> It addresses issues relating to California administrative adjudication, as opposed to rulemaking or judicial review, and contends that California needs a new APA. The adjudication provisions of a new APA should cover all administrative adjudication, not just the

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1. The Legislature authorized the Commission to engage in a study of administrative procedure. Res. ch. 47(24), 1987 Cal. Stat. 5897, 5899. The Commission has tentatively adopted most of the recommendations in my four completed studies and is in the process of preparing draft statutory language for presentation to the Legislature. Nevertheless, the opinions, conclusions, and recommendations contained in this article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, and recommendations of the Commission.

The completed studies are entitled: "Administrative Adjudication: Structural Issues" (1989), "Appeals Within the Agency" (1990), "Administrative Impartiality" (1991), and "The Adjudication Process" (1991). This Article consists of material contained in the first three of these studies, but does not include numerous procedural issues (such as discovery, evidence, or findings) covered in the fourth study. Copies of the reports are available from the California Law Revision Commission, 4000 Middlefield Rd., Suite D-2, Palo Alto, CA 94303.

small fraction governed by existing law, and its provisions should reflect administrative law developments and scholarship since 1945.

## I. THE NEED FOR A MODERN AND COMPREHENSIVE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT

### A. *The Original California APA is Obsolete*

California's APA<sup>2</sup> was enacted in 1945<sup>3</sup> in response to a study and recommendations by the Judicial Council.<sup>4</sup> Because of severe limitations of time and budget, the Judicial Council studied only occupational licensing agencies, and the statute originally covered only the adjudications conducted by those agencies.<sup>5</sup> The study's recommendation that the Act should cover only licensing agencies was not based on a principled decision that an APA was inappropriate for other agencies. Quite the contrary: the Judicial Council thought that improvements in the procedures of other agencies were needed but was not prepared to make recommendations with respect to them.<sup>6</sup>

The Judicial Council's report and the resulting legislation were pioneering efforts. No comparable APAs then existed. Indeed, the entire concept of an administrative procedure code applicable to agencies in general was untried and controversial. In New York, for example, the Benjamin Commission recommended in 1942 that no such statute be enacted, believing that the variation in adjudica-

2. The APA is contained in CAL. GOV'T CODE §§ 11,340–11,529 (West 1980 & Supp. 1992). For the portion of the APA concerned with adjudication, see *id.* §§ 11,500–11,529. For the provisions relating to the Office of Administrative Hearings (OAH), see *id.* §§ 11,370–11,370.5.

3. Ch. 867, 1945 Cal. Stat. 1626. The provisions on rulemaking were added in 1947, Ch. 1425, 1947 Cal. Stat. 2984, and were heavily amended in 1979. Ch. 567, 1979 Cal. Stat. 1978. The adjudication sections have been amended only in relatively insignificant ways since 1945.

4. JUDICIAL COUNCIL OF CAL., TENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE OF 1944, at 8–30 (1944) [hereinafter TENTH BIENNIAL REPORT]; see *Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 393–94, 184 P.2d 323, 329 (1947); Clarkson, *The History of the California Administrative Procedure Act*, 15 HASTINGS L.J. 237 (1964).

5. The Report recommended a scheme of judicial review applicable to all administrative adjudications, not just those of licensing agencies. See TENTH BIENNIAL REPORT, *supra* note 4, at 26. The resulting judicial review statute was the precursor of present CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1992).

6. TENTH BIENNIAL REPORT, *supra* note 4, at 9–10, 28–29. 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 left uncovered because of practical limitations on the resources of the Judicial Council, not because their procedures were ideal. See Kleps, *California's Approach to the Improvement of Administrative Procedure*, 32 CALIF. L. REV. 416, 419 (1944).

tory practice among the state's administrative agencies made it inadvisable or even impossible.<sup>7</sup> At the federal level, the majority of the Attorney General's Committee on Administrative Procedure had recommended enactment of a federal statute whose provisions on adjudication had quite limited scope.<sup>8</sup> The federal APA was not enacted until 1946, one year after the California Act.<sup>9</sup>

Thus it is not surprising that the Judicial Council and the legislature moved as cautiously as they did. Indeed, it is surprising that the Act accomplished as much as it did. For example, the Act created a central panel of hearing officers—an idea that was far ahead of its time. In the four decades since the APA was enacted, the regulatory and social welfare responsibilities of state government have broadened enormously. Yet the adjudication and judicial review provisions of the once-revolutionary APA have remained largely constant.<sup>10</sup>

Today the Act regulates adjudicatory procedure in about sixty-five named agencies.<sup>11</sup> It provides for a single, unvarying mode of formal trial-type procedure conducted by an independent administrative law judge (ALJ) assigned by the Office of Administrative Hearings (OAH). But the Act is of limited scope; its adjudication provisions fail to cover a large number of important agencies that engage in adjudication: the Public Utilities Commission, the Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and numerous

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7. I R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 35-36 (1942).

8. U.S. ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 191-92 (1941) [hereinafter ATTORNEY GENERAL'S COMMITTEE REPORT].

9. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946), *recodified as* Administrative Procedure Act of 1966, Pub. L. No. 89-554, 80 Stat. 381. The federal APA is now codified at 5 U.S.C. §§ 551-559, 3105, 7521 (1988).

10. The APA now covers a few nonlicensing agencies engaged in prosecutory functions (such as the Fair Employment and Housing Commission) and certain personnel decisions of local school boards and community colleges. The APA has been amended to include provision for interpreters, for limited forms of discovery, for language assistance to non-English speakers, to rename hearing officers as administrative law judges, and to ban ex parte contacts with ALJs. CAL. GOV'T CODE §§ 11,370.3, 11,500(g), 11,501.5, 11,507.5 to 11,507.7, 11,513(d) to (i), 11,513.5 (West 1980 & Supp. 1992).

11. *Id.* § 11,501. More precisely, the Act covers only those matters which an agency's enabling statute requires to be decided under the APA. A handy list of agencies covered by the APA, broken down into covered and uncovered functions, is found in CONTINUING EDUC. OF THE BAR, CALIFORNIA ADMINISTRATIVE HEARING PRACTICE 31-95 (Supp. 1990).

others.<sup>12</sup> These non-APA agencies probably conduct at least 95% of the adjudications occurring each year at the state level in California, leaving less than 5% of the adjudications for agencies covered by the APA. Of course, adjudication in non-APA agencies is subject to procedural rules outside of the Act. There are statutes, regulations, and unwritten practices that prescribe the adjudicatory procedures of each non-APA agency. These procedures vary enormously from formal adversarial combat all the way down to informal meetings. The only unifying theme among them is that adjudication in these agencies is not conducted by an ALJ assigned by OAH. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.

### B. *The Argument for a Comprehensive Act*

California needs a comprehensive APA that would cover all legally required administrative adjudicatory hearings. Such an act would cover a huge and varied array of administrative proceedings,<sup>13</sup> including ratemaking for utilities and insurance companies, land use planning, discretionary grants of permission, high-volume dispute resolution about government benefits, and the granting of parole. In addition, the Act would govern the hearings provided to resolve tax, labor, environmental, and government employment controversies. These hearings obviously serve very different functions. Nevertheless, it is hardly radical to suggest that there should be a single APA to cover most or all of them; the federal government accomplished this feat in its APA more than forty years ago, and virtually every state other than California has a comprehensive APA. By the same token, comprehensive statutes now lay down procedural requirements that nearly all California agencies must follow in connection with rulemaking,<sup>14</sup> open meetings,<sup>15</sup> and freedom of information.<sup>16</sup>

The proposition that California should adopt a comprehensive APA is highly controversial. Numerous non-APA agencies have argued to the Law Revision Commission that the present system

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12. Some agencies are partially covered by the APA, but major areas of their adjudication remain uncovered. For example, the APA covers only certain adjudicatory functions of the Departments of Insurance and Corporations, the Department of Motor Vehicles, and the Horse Racing Board.

13. The problem of defining the exact scope of the adjudication provisions of a comprehensive statute is discussed *infra* section II.A.

14. CAL. GOV'T CODE §§ 11,340–11,445 (West 1980 & Supp. 1992).

15. *Id.* §§ 11,120–11,132 (West 1980 & Supp. 1992).

16. *Id.* §§ 6250–6268 (West 1980 and Supp. 1992).

works well, that any reforms should proceed on a piecemeal, agency-by-agency basis, and that introducing a comprehensive adjudicatory procedure code would do more harm than good.

### 1. Piecemeal Procedural Reform Is Impractical

Improved procedure could be achieved through piecemeal reform, either through agency-specific legislation or through individual agency initiative.<sup>17</sup> In theory, it would be possible to study each non-APA agency separately and recommend a menu of procedural reforms for each of them. This approach, however, would be a tedious and costly affair. It would require reformers to assume the burden of establishing that familiar statutory provisions, rules, and customs should be superseded. Satisfying this burden would require an in-depth study of each of scores of agencies. Even if such studies were somehow produced, it would be difficult to achieve the momentum to actually implement the reforms. Unless agencies were themselves persuaded by the study to make the changes, it would be necessary to draft and pass through the legislature, over each agency's determined opposition, numerous detailed procedural reform bills. Because there would be little general public interest in these bills, organized support for them would be unlikely. Thus, it would not be difficult for agencies or members of the private bar to obstruct passage of this sort of legislation.

It is also unlikely that much procedural reform would occur as a result of agency initiatives. The reasons are obvious. Inertia supports the status quo. The agency staff is comfortable with the traditional ways in which business is done; these seem efficient and familiar, while new approaches might consume scarce manpower. Certainly any changes would involve transition costs and would upset some staff members or professionals who practice before the

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17. Another approach to procedural reform might be to authorize a state agency, such as the Attorney General, OAH, or the Office of Administrative Law (OAL), to adopt rules that govern the adjudicatory procedures of all agencies. Such rules might be more flexible and more easily modified than legislation. See MODEL STATE ADMIN. PROCEDURE ACT OF 1981 § 2-105, 15 U.L.A. 31 (Supp. 1991) [hereinafter 1981 MSAPA], which provides that the state attorney general should adopt model procedural rules (consistent, of course, with the broad procedural rules otherwise provided by the MSAPA). The adoption of a code of model rules that could be used by all state agencies (unless they have persuasive reasons to depart from the model) makes good sense, regardless of whether a new statute is adopted, particularly since a comprehensive APA must give agencies latitude to adopt procedural rules. However, the adoption of such a code of model rules is no substitute for legislative adoption of an APA which commits the entire state administrative hierarchy to certain fundamental procedural norms.

agency. Agency heads are political appointees without a broad background in administrative procedure; they typically accept the procedural status quo. The attorneys and other professionals who practice before an agency and the persons or entities it regulates are also accustomed to its procedures; they are unlikely to upset the apple cart by challenging familiar practices.

Nor are the courts likely to initiate significant procedural reform. In the rare instances in which questionable procedural practices come before the courts, the judges may lack the background in administrative law to develop practical alternatives<sup>18</sup> and, more importantly, they may lack the authority to require changes in procedure.<sup>19</sup>

In contrast, a new code providing for fair administrative procedures across the board would mobilize wide support among legislators, the State Bar, and the general public. As a result, proposed legislation to adopt such a code might be difficult for one or a few agencies to block.<sup>20</sup> Of course, an agency might be able to make a persuasive case to the legislature that a particular reform should not apply to it. For example, an agency might argue that the benefits to regulated parties from the reform would be at best modest and would be clearly outweighed by additional cost, inefficiency, delay, and frustration of the agency's regulatory program. In such cases the legislature would be free to except that agency from that particular reform. Thus, the new code would allocate to the *agency* the burden of justifying an idiosyncratic procedure. If the agency does

18. Most of the judicial review of administrative decisions occurs in unreported and unappealed superior court judgments arising out of applications for writs of mandate under CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1992).

19. Under the federal rule, unless a procedure offends due process, a court cannot order an agency to adopt a different procedure without a statutory basis for doing so. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2679-81 (1990); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978). These cases preclude lower federal courts from mandating improved rulemaking and adjudication procedures beyond the statutory minima provided by the federal APA.

On the other hand, California courts have often mandated improved administrative procedures across the board. See *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 513-15, 522 P.2d 12, 16-17, 113 Cal. Rptr. 836, 840-41 (1974) (requiring agencies to make detailed findings and reasons); *Shively v. Stewart*, 65 Cal. 2d 475, 479, 421 P.2d 65, 67, 55 Cal. Rptr. 217, 219 (1966) (discovery in license revocation cases); *Walker v. City of San Gabriel*, 20 Cal. 2d 879, 881-82, 129 P.2d 349, 351 (1942) (findings cannot be supported by hearsay alone). Thus California courts may have greater common lawmaking powers in the field of administrative law than do federal courts.

20. The successful enactment of the rulemaking reforms in 1979 over agency opposition illustrates the feasibility of passage of this sort of legislation. See *supra* note 3.

not win an exception—a likely outcome given a legislature's natural reluctance to make exceptions to a comprehensive statute—the agency would have to conform its practice to the demands of the statute.

## 2. A Cost-Benefit Analysis of Adopting a Comprehensive Code

The process of drafting a comprehensive adjudicatory code and enacting it into law is an arduous one. In deciding whether it is worth the effort, one should try to evaluate the benefits of having such a code and compare them to the costs of making a transition.

Certainly, change is not cost-free. All agencies will have to thoroughly reconsider and revise their procedures and will have to engage in procedural rulemaking. Rulemaking, under California practice, can be quite costly.<sup>21</sup> The transitional period will be confusing and agencies will make mistakes that will trigger judicial reversals. In addition, a comprehensive statute will probably impose some procedural changes that fail, forcing the legislature to amend the law by creating exceptions for those situations.

However, in my view, the benefits of a relatively uniform and comprehensive code outweigh these costs. To place these benefits in perspective, one should consider the history of procedural reforms in the litigation process. At one time, there was a different system of civil procedure for every cause of action. Under the writ system, one proceeded differently in a case of contract, tort, bailment, or real property. Similarly, there was a different procedure depending on whether a plaintiff sought a legal or an equitable remedy. Most people would agree that the states moved in the right direction when they abolished the writ system, merged law and equity, and adopted a single unified code of civil procedure to govern all civil cases. This reform eliminated a large amount of complexity with a single stroke and significantly demystified the system of civil litigation.<sup>22</sup> The same was true when the Supreme Court adopted the Federal Rules of Civil Procedure, thus supplanting the requirement that federal courts use, as far as possible, the procedural codes of the states in which they sat.<sup>23</sup>

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21. See Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992).

22. See LOOMIS, GRAHAM & FIELD, *FIRST REPORT OF THE NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS* 67-87 (1848).

23. "The chorus of approval [for the Federal Rules] by judges, lawyers, and commentators has been virtually unanimous, unstinted, and spontaneous." 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1008, at 47 (2d ed. 1987); see also Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883

What happened when the writ system was abolished in favor of a unified code, law and equity merged, and the Federal Rules were adopted? The enacting body was compelled to design a universal system of procedure that was flexible enough to accommodate major differences in application. Courts then refined the new system by constructing a web of precedents drawn from all the branches of civil litigation. That was progress. The same kind of progress has yet to be achieved in much of California administrative law.

A uniform code would facilitate the representation of clients by nonexpert practitioners before agencies that are not covered by the existing APA. The attorney (or other adviser) cannot function professionally in this environment without first steeping him or herself in an unfamiliar procedural code that is likely to be quite different, in important ways, from the APA. This re-education process is a nuisance and is costly for clients.

Indeed, the most important elements of an agency's procedural code are often not written down at all.<sup>24</sup> 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.

Thus the present system confers an unwarranted advantage on agency staff and on persons who already know the ropes because they have often dealt with a particular agency or are former staff members or agency heads. They know about unwritten procedures and precedents and traditional ways of resolving issues. They know about the unwritten exceptions and the ways of avoiding obstacles. Such a system seriously disfavors inexperienced advocates and the clients they represent, particularly community or public interest or-

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(1989); Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1 (1988).

24. See, e.g., 3 G. OGDEN, CALIFORNIA PUBLIC AGENCY PRACTICE § 140.12[3] (1991) (California Horse Racing Board has no rules of practice governing the conduct of its non-APA hearings).

ganizations who do not have access to the few experts in the procedure of a particular agency.

Uncodified procedure causes problems far beyond that of unfairly favoring people who know the ropes. Because staff members may be less accountable for violations of uncodified procedures, they may apply them unevenly or arbitrarily. Since nobody is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

Still another benefit of a comprehensive code relates to judicial review. Under present law, courts reviewing the actions of non-APA agencies must find the answer to procedural questions in precedents relating only to that agency, if there are any.<sup>25</sup> Frequently, the particular problem is dealt with by the APA and by court decisions interpreting the APA. However, those authorities are not relevant, except perhaps by analogy, to procedural issues involving non-APA agencies. Consequently, reviewing courts in such cases must fumble toward an appropriate result while wearing blinders.<sup>26</sup> If a single statute covered the adjudication of all agencies, precedents relating to one agency would be applicable to all of them. This body of precedent would greatly enhance the quality of judicial review of agency decisions.

There is a final advantage to adopting a uniform APA: It would deepen and broaden the field of administrative law in California. Now, only professionals who deal with licensing see themselves as administrative lawyers. After adoption of such a law, the many practitioners who now view themselves as workers' compensation, welfare, public utilities, labor, or environmental lawyers would dis-

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25. Most judicial review of agency action occurs in mandamus proceedings in superior court under CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1992). Such decisions are unreported.

26. Numerous cases could be chosen to illustrate the point that the law would be improved if a single procedural statute were applicable, rather than countless enabling acts containing carelessly drawn or idiosyncratic provisions. See, e.g., California Standardbred Sires Stakes Comm. v. California Horse Racing Bd., 231 Cal. App. 3d 751, 756-59, 282 Cal. Rptr. 656, 658-60 (1991) (statute provides no tolling of period to appeal even though APA provides for tolling); Brown v. State Personnel Bd., 166 Cal. App. 3d 1151, 1164, 213 Cal. Rptr. 53, 61-62 (1985) (charge cannot be amended even though APA provides for amendment); Fremont Indem. Co. v. Workers' Comp. Appeals Bd., 153 Cal. App. 3d 965, 971-74, 200 Cal. Rptr. 762, 766-68 (1984) (ex parte contact to judge—statute contains no explicit provision even though APA does); Skip Fordyce, Inc. v. Workers' Comp. Appeals Bd., 149 Cal. App. 3d 915, 926, 197 Cal. Rptr. 626, 633 (1983) (inconsistent treatment of hearsay evidence between workers' compensation and APA cases); Stout v. Department of Employment, 172 Cal. App. 2d 666, 671-73, 342 P.2d 918, 921-23 (1959) (same).

cover that they are administrative lawyers too. There could be books on administrative law covering all agencies, not just a few.<sup>27</sup> There could be continuing education programs on administrative law that would attract large numbers of people, not just the few engaged in licensing. Thus, California administrative law would become a true professional specialty.

Some opponents of comprehensive reform have argued that whatever uniformity a new APA might achieve would be illusory. Since the code would have to allow agencies to enact rules to cover unique situations, administrative practice would remain diverse. Indeed, diversity of practice might increase if the statute permitted (as it should) greater flexibility for the APA agencies than exists under the present statute.

This objection can only be answered in the context of the specific proposals found in the balance of this Article. I believe it is possible to draft a code that is flexible enough to accommodate the vast differences between agencies and between the various cases agencies must decide, yet rigid enough to provide a minimum structure of fair procedure for administrative adjudication. Such a code would prescribe only the bare bones of procedure for agencies to supplement with appropriate rules tailored to their own situation. The net result of a comprehensive statute, plus appropriate agency-specific rules, should be a clear improvement over the existing hodgepodge.

### 3. The 1981 Model State APA

If there is to be a single comprehensive APA, it makes sense to start with the 1981 Model Act (1981 MSAPA).<sup>28</sup> The 1981 Model Act covers not only adjudication, rulemaking, and judicial review, but also executive and legislative oversight of agency action. Its adjudication provisions cover all agency actions of particular applicability that determine legal rights or interests of specific persons. A significant innovation in the Model Act is its provision for procedural models of varying degrees of formality. These models range from the formal trial-type model provided by existing APAs to a highly abbreviated summary procedure.

The 1981 MSAPA supplants several earlier Model APAs that had been endorsed by the Commissioners on Uniform State Laws.

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27. G. OGDEN, *supra* note 24, is a heroic attempt to cover the entire waterfront. However, by necessity the authors of the various chapters in this work discuss practice under the APA and trail off into brief comments about a few non-APA agencies.

28. The 1981 MSAPA is printed in 15 U.L.A. 1 (1990 & Supp. 1991).

The 1961 Model Act (which is fairly similar in its adjudicatory provisions to the Federal APA) was adopted in more than half of the states.<sup>29</sup> So far, the 1981 MSAPA has been adopted in substantial part in Kansas<sup>30</sup> and Washington,<sup>31</sup> and significant parts of the Act have been enacted in New Hampshire,<sup>32</sup> Tennessee,<sup>33</sup> Utah,<sup>34</sup> and Arizona.<sup>35</sup> California should consider following the example of these states.

The 1981 Act is a state-of-the-art product, based on decades of experience with previous statutes (both Model Acts and innovations from many states), as well as on countless court decisions and academic studies. It will certainly require modification to meet some of the problems of California agencies, and one may legitimately disagree with some of its provisions. Nevertheless, the provisions of the Model Act furnish an excellent starting point for consideration of APA reform, whether one prefers comprehensive statutory reform or only piecemeal changes.

There are a number of important advantages in following Model Act provisions as closely as possible in a new California statute. Most importantly, following the 1981 MSAPA allows California to take a free ride on the massive investment made by the Commissioners in producing the Act as well as the studies made by the several legislatures that have already adopted parts of it. It is often better to build on the drafting efforts of others than to start from scratch.

In addition, California agencies will be able to draw on the experience of agencies in other states as they put the provisions of the 1981 MSAPA into practice (and as they seek to amend provisions that do not work out well). California courts will be able to draw on precedents from other states that construe the MSAPA provisions. Because there are often only scattered precedents on state administrative law issues, the Model Act will deepen the pool of precedents which our courts can consult.

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29. *See id.* at 137.

30. KAN. STAT. ANN. §§ 77-415 to -627 (1989 & Supp. 1990); *see Leben, Survey of Kansas Law: Administrative Law*, 37 U. KAN. L. REV. 679 (1989).

31. WASH. REV. CODE ANN. § 34.05 (Supp. 1991) (effective July 1, 1989); *see Andersen, The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781 (1989).

32. 5 N.H. REV. STAT. ANN. §§ 541-A:1 to :22 (Supp. 1990).

33. 2A TENN. CODE ANN. §§ 4-5-101 to -324 (1985 & Supp. 1990).

34. 7A UTAH CODE ANN. § 63-46b (1989 & Supp. 1991); *see Thorup, Recent Developments in State Administrative Law: The Utah Experience*, 41 ADMIN. L. REV. 465, 465-66 (1989).

35. 12A ARIZ. REV. STAT. ANN. §§ 41.1001 to .1066 (Supp. 1990).

#### 4. Criteria to Evaluate Reforms

Before presenting specific proposals for reform of adjudicative procedure, this section of the Article will introduce the criteria to be used in evaluating these proposals. Administrative law commentators have identified certain fundamental process values that can be applied to any procedural proposal. These criteria are accuracy, efficiency, and acceptability to the parties.<sup>36</sup> Accuracy means reaching a result that is factually correct as well as consistent with the public interest and with the objectives that the legislature sought to achieve in creating the regulatory scheme. Efficiency means reaching the result rapidly with minimum cost to the parties and to the state. Acceptability means that the process provides persons with the feeling that they have been dealt with fairly. Each criterion represents an important value to which administrative procedure should aspire, but these values often conflict. This Article will analyze each proposal for reform by applying and balancing these three criteria.

### II. THE SCOPE OF THE APA AND THE NEED FOR INFORMAL MODELS OF ADJUDICATION

#### A. *The Definition of Adjudication*

A new APA must resolve the fundamental question of the definition of adjudication and thus the scope of its adjudication provisions. The existing APA applies only to named agencies and to specific adjudicating functions that they perform.<sup>37</sup> Of all the approaches taken by state and federal APAs to defining coverage, California's is probably the narrowest and most primitive.<sup>38</sup> Under the federal APA and the 1961 Model Act (adopted in more than half of the states), formal adjudication procedures apply to all cases where a statute or possibly the constitution requires an on-the-record hear-

36. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-93 (1978).

37. CAL. GOV'T CODE §§ 11,500(a), 11,501 (West Supp. 1992). There is one exception to the narrow approach described in the text: APA notice and hearing are required in all cases of denial of an application for a license required under the Business and Professions Code or of sanctions that include public reproof of a licensee under that Code. CAL. BUS. & PROF. CODE §§ 485, 491 (West 1990).

38. In view of the relatively ancient vintage of the California APA, it is not surprising that the drafters took the most cautious possible approach to defining coverage. See Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285, 339 n.200 (1977) (pointing out that only California and Connecticut use this approach).

ing. But these acts prescribe no procedures for the vast array of adjudication that is not subject to the legal requirement of an on-the-record hearing.

California has three choices in defining adjudication and fixing the scope of a comprehensive APA: (1) the "minimum" approach, under which the APA would apply only where some other statute requires an on-the-record hearing, (2) the "intermediate" approach, under which the APA would come into play wherever another statute or due process require an on-the-record hearing, or (3) the "maximum" approach, under which the APA would apply to every case of an agency order of particular applicability that affects a person's legal interests, regardless of whether another statute or due process requires an on-the-record hearing.

### 1. The "Minimum" Approach—Hearings Required by Statute

A new statute might provide procedures only for those hearings required by *some other statute* to be conducted on the basis of an exclusive record. This is the approach apparently taken by the federal APA and the 1961 Model Act.<sup>39</sup> Under the minimum approach, the APA, on its own, would not require any adjudicatory hearings. Rather, it would be necessary to refer to some statute external to the APA to find the mandate for a hearing. Thus, the APA would not cover hearings required by due process, nor would it cover so-called informal adjudication where no statute requires an on-the-record hearing.

This minimum approach has the virtue of relative simplicity and certainty of application. As compared to the intermediate approach (which sweeps in some or all due process cases), or to the maximum approach (which covers every individualized dispute), one can predict with some confidence which disputes between persons and agencies will be covered by the APA. Even under the minimum approach, of course, it will often be necessary to construe a statute to see whether the proceeding it calls for is an on-the-record hearing, as opposed to something else involving an oral process.<sup>40</sup> For example, a statute that calls only for an investigatory

39. 5 U.S.C. § 554(a) (1988) (Federal Administrative Procedure Act); MODEL STATE ADMIN. PROCEDURE ACT OF 1961 § 1(2), 15 U.L.A. 148 (1990) [hereinafter 1961 MSAPA]. It is unclear whether these statutes actually embody the "intermediate" approach discussed below, rather than the "minimum" approach. See *infra* notes 60–64 and accompanying text.

40. Few California statutes actually use the words "on the record." Compare CAL. HEALTH & SAFETY CODE § 25,845(a) (West 1984) with *id.* § 25,845(b). The former subsection calls for a "hearing on the record" in connection with granting licenses for

hearing,<sup>41</sup> a legislative-type hearing,<sup>42</sup> an informal proceeding without an exclusive record,<sup>43</sup> an inspection or examination, or a public meeting should not trigger the procedural protections of the APA.

California law already draws a distinction between a hearing on the record and other oral proceedings. The "administrative mandamus" provision, section 1094.5 of the Code of Civil Procedure, prescribes the rules for judicial review of almost all adjudication by state or local agencies. It applies only to review "of a proceeding in which by law a hearing is required to be given": the section appears to refer to a trial-type hearing with an exclusive record.<sup>44</sup> Thus the adjudication provisions of a new APA using the minimum approach would probably cover the same group of cases that are presently subject to section 1094.5—those in which an on-the-record hearing is required by statute.<sup>45</sup>

nuclear facilities; the latter subsection calls for a hearing under the APA in connection with revoking such licenses. Under a minimum approach, both application and revocation proceedings would be under the APA.

41. See CAL. GOV'T CODE §§ 11,180–11,191 (West 1980 & Supp. 1992) for provisions relating to agency investigations and investigatory hearings; see also *id.* § 11,500(f) ("adjudicatory hearing" does not include any "informal factfinding or informal investigatory hearing"). The investigation-adjudication distinction is well established in administrative law. At the federal level, see *Hannah v. Larche*, 363 U.S. 420, 441–42 (1960) (no right to cross-examine accusers in hearing conducted by Civil Rights Commission to gather information to advise Congress and executive branch). In California, see, e.g., *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 4 Cal. Rptr. 2d 837 (1992) (due process inapplicable to prosecution decision); *Alexander D. v. State Bd. of Dental Examiners*, 231 Cal. App. 3d 92, 95–97, 282 Cal. Rptr. 201, 203–04 (1991) (due process inapplicable to requirement that licensee take psychiatric examination).

42. See *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 234–35 (1973) (requirement of hearing in rulemaking does not mean hearing on the record—formal rulemaking not required); *Lowe v. State of Calif. Resources Agency*, 1 Cal. App. 4th 1140, 2 Cal. Rptr. 2d 558 (1991) (hearing to establish appropriate salary is quasi-legislative rather than quasi-adjudicative); *Rivera v. Division of Indus. Welfare*, 265 Cal. App. 2d 576, 584–89, 71 Cal. Rptr. 739, 748–51 (1968) (statutory requirement of hearing in connection with setting minimum wages).

43. See, e.g., *City of W. Chicago v. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644–45 (7th Cir. 1983) (statutory requirement of "hearing" does not mean hearing on the record). *Contra Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876–80 (1st Cir.), cert. denied, 439 U.S. 824 (1978).

44. CAL. CIV. PROC. CODE § 1094.5(a) (West 1980 & Supp. 1992). This section applies to "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." *Id.*

45. Generally, courts have interpreted statutes so as to bring particular agency decisions under § 1094.5. See, e.g., *Eureka Teachers Ass'n v. Board of Educ.*, 199 Cal. App. 3d 353, 361–64, 244 Cal. Rptr. 240, 243–45 (1988) (a statutory "right of appeal" entails a right to trial-type hearing and to § 1094.5 review); *Chavez v. Civil Serv. Comm'n*, 86 Cal. App. 3d 324, 331–32, 150 Cal. Rptr. 197, 200 (1978) (same). But see

One issue in implementing a minimum approach is whether the APA should come into play where agency rules (but not a statute) call for a trial-type hearing. Such rules are generally enforceable against the agency<sup>46</sup> and the decisions resulting from such hearings are apparently reviewable under section 1094.5.<sup>47</sup> However, my view is that hearings required only by rule should not trigger the APA if the statute follows the minimum approach to defining adjudication. The reason for this approach is that agencies should be encouraged to adopt rules that provide some procedural protection even where none is provided by statute. If the proceeding is swept under the APA whenever an agency adopts a few procedural protections by rule, there would be a significant deterrent to their adopting such rules.<sup>48</sup>

## 2. The "Intermediate" Approach—Hearings Required by Statute Plus Federal and California Constitutions

### a. *Due Process Under Federal and State Law*

The intermediate approach to defining adjudication extends the procedural provisions of the statute to on-the-record hearings required by procedural due process. Essentially, procedural due process under the federal and California constitutions assures appropriate notice, hearing, and an unbiased decisionmaker before government deprives a person of certain protected interests.

Under federal law,<sup>49</sup> due process is triggered by a governmental deprivation of liberty or property; the words "liberty" and

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Wasko v. California Dep't of Corrections, 211 Cal. App. 3d 996, 1001, 259 Cal. Rptr. 764, 767 (1989) (prisoner's "right to appeal" does not trigger hearing rights); Royal Convalescent Hosp. v. State Bd. of Control, 99 Cal. App. 3d 788, 793, 160 Cal. Rptr. 458, 460 (1979) (hospital's right to appeal Medi-Cal determination—no right to hearing).

Section 1094.5 probably applies if the trial-type hearing is required by the state or federal constitution. See Taylor v. State Personnel Bd., 101 Cal. App. 3d 498, 502-05, 161 Cal. Rptr. 677, 678-80 (1980). Whether the APA should apply to constitutionally required hearings is discussed *infra* at section II.A.2.

46. See Layton v. Merit Sys. Comm'n, 60 Cal. App. 3d 58, 63, 131 Cal. Rptr. 318, 321-22 (1976); Healdsburg Police Officers Ass'n v. City of Healdsburg, 57 Cal. App. 3d 444, 450, 129 Cal. Rptr. 216, 219 (1976).

47. See Keeler v. Superior Court, 46 Cal. 2d 596, 599-600, 297 P.2d 967, 969-70 (1956) (dictum); Jean v. Civil Serv. Comm'n, 71 Cal. App. 3d 101, 110-11, 139 Cal. Rptr. 303, 307-08 (1977).

48. See Bonfield, *supra* note 38, at 308-12.

49. A detailed discussion of the federal law of procedural due process is beyond the scope of this Article. For an in-depth analysis of federal due process, see generally J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 663-768 (2d ed. 1988).

"property" have far broader meanings than the uninitiated might expect. The word "property" includes not only traditional forms of property but also entitlements provided by state law or custom.<sup>50</sup> The word "liberty" similarly covers a great range of interests.<sup>51</sup> Once a particular interest is determined to be liberty or property, a court must determine the precise elements of the process that is due and when it must be provided. These issues are resolved by application of a balancing test that weighs the strength of the plaintiff's interest, the utility of the procedure being used and of the procedure which the plaintiff urges, and the strength of the government's interest in resisting the procedure.<sup>52</sup> It should be obvious from this brief sketch of federal procedural due process that the issues of whether, when, and how an agency must supply due process are politically sensitive questions of exquisite difficulty with highly unpredictable results.<sup>53</sup>

In California, federal due process is far from the whole story. Procedural due process under the California constitution is *much more inclusive* than due process under the federal constitution. As

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50. See *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972). These cases establish that a professor's right under statute or contract to retain a tenured position is an interest in property and thus protected by procedural due process. Professional licenses are also "property" under this definition. *Barry v. Barchi*, 443 U.S. 55, 64 (1979). A whole range of less significant entitlements are also treated as property. See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260-61 (1987) (employer's contractual right to discharge employee for cause); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982) (right to sue under antidiscrimination law); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (right to continued service from municipal utility); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (10-day suspension from public school).

51. Liberty interests include not only freedom from bodily restraint but also the right to contract, engage in a profession, acquire useful knowledge, marry, establish a home, bring up children, worship freely, and "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Roth*, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Thus "liberty" includes numerous interests of prisoners, such as freedom from prison discipline or solitary confinement and securing parole or good-time credits—at least when these various interests are provided under relatively nondiscretionary standards set forth in a statute or regulation. See *Hewitt v. Helms*, 459 U.S. 460, 469-72 (1983). Liberty also covers the rights protected by the Bill of Rights, the ability to practice one's profession, and the right to be free from stigmatic injury in connection with a discharge from employment (even where the state can discharge the employee at will). See *Paul v. Davis*, 424 U.S. 693, 709-10 (1976).

52. *Mathews v. Eldridge*, 424 U.S. 319, 347-49 (1976).

53. For a good example of the struggle to come up with the appropriate procedure by ad hoc balancing, see *Coleman v. Department of Personnel Admin.*, 52 Cal. 3d 1102, 1118-23, 805 P.2d 300, 309-12, 278 Cal. Rptr. 346, 355-58 (1991), which establishes the procedures to be followed when a permanent state employee is treated as having resigned because of being absent without leave for more than five days.

just mentioned, "property" under the federal constitution requires a deprivation of some traditional form of property or an entitlement. To some degree, "liberty" (particularly of prisoners) also turns on the presence of an entitlement.<sup>54</sup> For this purpose, an entitlement means a protected status or benefit that the state cannot deny or remove absent a nondiscretionary reason for doing so.<sup>55</sup>

California has rejected the federal approach. Procedural due process under the California constitution covers a much wider range of cases than does federal due process. The California Supreme Court's decision in *Saleeby v. State Bar* highlights this difference.<sup>56</sup> The court there held that due process covered the Bar's decision to deny a defrauded client's application for reimbursement from the Client Security Fund. Because the statute at issue in *Saleeby* explicitly left this decision to the discretion of the Bar, federal due process clearly would not have required a hearing. In contrast, due process under the California constitution may require a hearing even in the context of wholly discretionary decisions to deny benefits. The California Supreme Court has held that the government may not deprive a person of due process protection simply by specifying that a decision is discretionary, regardless of the grievous nature of the loss. Freedom from arbitrary adjudicative procedures is itself a liberty interest protected by due process.<sup>57</sup> A procedural interaction with the decisionmaker is vital to protect an individual's dignity regardless of whether it might affect the ultimate outcome. Thus, in California, due process safeguards are required for protection of an individual's "statutory interests."

Under California's approach to due process, the court must apply a four-part balancing test to decide whether the liberty interest

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54. See *supra* note 51.

55. For example, federal law distinguishes between the discharge of tenured and untenured state employees. If an employee can be discharged in the state's discretion, there is no right to a hearing in connection with a nonstigmatic discharge. See *Board of Regents v. Roth*, 408 U.S. 564, 573–78 (1972). It is not clear whether a person is deprived of property when his application for a benefit or status is denied (as opposed to cases in which the person already has the benefit and the state is taking it away). See *Griffeth v. Detrich*, 603 F.2d 118, 120 (9th Cir. 1979) (an applicant for general relief is entitled to due process when the application is denied), *cert. denied*, 445 U.S. 970 (1980). *But see* 445 U.S. 970 (Rehnquist, J., dissenting) (lower court had taken a significant step that merits plenary consideration by the Court).

56. 39 Cal. 3d 547, 565, 702 P.2d 525, 535, 216 Cal. Rptr. 367, 377–78 (1985).

57. *People v. Ramirez*, 25 Cal. 3d 260, 268, 599 P.2d 622, 627, 158 Cal. Rptr. 316, 320 (1979). This case explicitly refused to follow federal constitutional law. There are no dissents from the broad application of due process in *Saleeby*, but in *Ramirez*, two concurring justices expressed reservations about extending California due process protection past the limits set by federal law.

in freedom from arbitrary administrative procedure can be invoked, as well as the precise ingredients of the procedure that must be provided. A court must balance these factors: the individual's interest, the risk of error in the given procedure and the value of substituted procedure, *the dignitary interests in providing notice and hearing to the individual*, and the government's interests (including fiscal and administrative burdens).

Note that the California due process cases stress the dignitary interest of *individuals*; consequently, it remains unclear to what extent this interest applies to business entities. However, other California due process cases in the land use area have aggressively expanded due process protection to persons whose economic interests would be substantially affected by the grant or denial of a land-use application.<sup>58</sup> In the regulatory area, one recent case indicated that state due process standards (but not federal due process standards) apply to a licensing board's investigatory procedures.<sup>59</sup>

### *b. Determining the Process Required*

Suppose, then, that a court has made the often-difficult decision that state or federal due process applies to a particular governmental decision. The next question is precisely what process is due and when it is due. In making this decision, a court would have two possible avenues: it could trigger the state APA or it could decide the case using constitutional law.

#### *i. Triggering the State APA*

In 1950, in the *Wong Yang Sung* case,<sup>60</sup> the United States Supreme Court held that the federal APA applied to deportation cases. Noting that deportation is a deprivation of liberty, it decided that all of the formal adjudication provisions of the federal APA should apply. Those provisions literally apply only where a *statute*

58. See *Horn v. County of Ventura*, 24 Cal. 3d 605, 614-15, 596 P.2d 1134, 1138, 1140, 156 Cal. Rptr. 718, 722, 724 (1979) (approval of subdivision map by local planning agency is adjudicatory; neighbors who suffer significant deprivation of property values are entitled to procedural due process). In *CEEED v. California Coastal Zone Conserv. Comm'n*, 43 Cal. App. 3d 306, 329-30, 118 Cal. Rptr. 315, 331-32 (1974), the court held that the system for coastal zone permits did not deny due process to applicants for permits.

59. *Smith v. Board of Medical Quality Assurance*, 202 Cal. App. 3d 316, 326-29, 248 Cal. Rptr. 704, 710-12 (1988). The court held that under a balancing test the Board's investigative procedures satisfied state due process standards.

60. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51, *modified on other grounds*, 339 U.S. 908 (1950).

requires an on-the-record hearing,<sup>61</sup> and there was no such statute in deportation cases. The Court reached this result by attributing to Congress an intention to provide at least as much procedural protection for a constitutionally protected interest as it would for a mere statutory interest.<sup>62</sup> It is likely that the principle articulated in *Wong Yang Sung* also applies in states that have adopted the 1961 Model Act.<sup>63</sup>

Thus, by analogy to *Wong Yang Sung*, a California court might apply the state APA in cases where due process requires a trial-type hearing. It would hold that the legislature would surely wish to provide at least as much protection in the case of an interest protected by state or federal due process as it routinely provides for interests protected by APA procedures. I believe, however, that the *Wong Yang Sung* approach is crude and unsatisfactory. If the APA contained only a formal adjudication procedure, all of those procedures would apply in every due process case; yet these formal provisions often would require vastly more formality than due process would require.<sup>64</sup> For example, an APA hearing appropriate for the revocation of a professional license is inappropriate when considering a disciplinary sanction against a prisoner.

## ii. Deciding the Case as a Matter Solely of Constitutional Law

Using this approach, the court must engage in ad hoc balancing of the four due process factors that must be considered under California law<sup>65</sup> to arrive at a procedure for the particular situa-

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61. 5 U.S.C. § 554(a) (1988).

62. This prediction turned out to be wrong. Congress immediately overturned *Wong Yang Sung* by providing that the federal APA was not to apply in deportation cases. The Court sustained the constitutionality of this statute. *Marcello v. Bonds*, 349 U.S. 302, 306-10 (1955).

63. 1961 MSAPA, *supra* note 39, § 1(2), defines "contested case" as one in which legal rights are "required by law to be determined by an agency after an opportunity for hearing." The word "law" in this section probably refers to constitutional as well as statutory law. *See Cunningham v. Department of Civil Serv.*, 69 N.J. 13, 25-26, 350 A.2d 58, 64 (1975).

64. *See generally Bonfield*, *supra* note 38, at 340-47. For this reason, lower federal courts have refused to follow *Wong Yang Sung* where the interest affected was less significant than deportation. They have thus required procedures much less demanding than those provided in the federal APA. *See Clardy v. Levi*, 545 F.2d 1241, 1244-47 (9th Cir. 1976) (discipline in federal prison); *Note, The Requirement of Formal Adjudication Under Section 5 of the APA*, 12 HARV. J. ON LEGIS. 194, 218-41 (1975).

65. *People v. Ramirez*, 25 Cal. 3d 260, 269, 599 P.2d 622, 628, 158 Cal. Rptr. 316, 321 (1979) adds to the *Eldridge* factors an additional one: the individual's dignitary

tion.<sup>66</sup> This approach is unsatisfactory because it is unpredictable and it consumes a lot of judicial and administrative effort. This uncertainty may impel an agency to provide much more procedural protection than would be legally required since it cannot anticipate what a court will do on appeal.<sup>67</sup> Such an outcome would be costly and inefficient.

### *c. Providing Appropriate Procedure*

A better approach to determining the process required would be to enact a statute providing an appropriate measure of process for making decisions that are (or might be) covered by due process—not too much (which would be inefficient) or too little (which would provide inadequate constitutional protection). Under this “intermediate” approach, the APA would provide the procedure in all cases in which an on-the-record hearing is required either by a statute or by due process.

In order to accommodate the range of cases in which due process applies, a new APA should contain an array of procedural formats, as opposed to the existing federal and state acts that contain only a single, formal adjudication model. As discussed below,<sup>68</sup> the 1981 MSAPA provides such an array, so that the formality of the procedure can be geared to what the constitution would probably require, given the importance of the particular private interest, the nature of the issues in dispute, and the government’s interest. It

interest in being informed of the nature and consequences of the government action and of letting the person tell his side of the story.

66. For examples of ad hoc balancing to come up with appropriate procedure under California’s due process clause, see *Conway v. State Bar of Cal.*, 47 Cal. 3d 1107, 1113–23, 767 P.2d 657, 660–67, 255 Cal. Rptr. 390, 393–400 (1989) (suspension of attorneys pending disciplinary hearing); *Saleeby v. State Bar*, 39 Cal. 3d 547, 762 P.2d 525, 216 Cal. Rptr. 367 (1985); *Van Atta v. Scott*, 27 Cal. 3d 424, 434–46, 613 P.2d 210, 214–22, 166 Cal. Rptr. 149, 153–61 (1980) (release of prisoners on own recognizance); *Civil Serv. Ass’n v. City of San Francisco*, 22 Cal. 3d 552, 558–65, 586 P.2d 162, 165–70, 150 Cal. Rptr. 129, 132–37 (1978) (4-3 decision) (short-term suspensions); *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1245–47, 273 Cal. Rptr. 84, 89–91 (1990) (revocation of license to carry concealed firearm—no right to hearing under California due process); *Anderson v. Superior Court*, 213 Cal. App. 3d 1321, 1330–31, 262 Cal. Rptr. 405, 411–12 (1989) (procedure for imposition of job search requirement on welfare recipient violated due process); *Smith v. Board of Medical Quality Assurance*, 202 Cal. App. 3d 316, 327–29, 248 Cal. Rptr. 704, 710–12 (1988) (Board’s investigatory procedures satisfy *Ramirez* balancing).

67. Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546–47 (1978) (if courts can add steps to rulemaking process required under federal APA, agencies will overjudicialize process to avoid risk of judicial invalidation of rules).

68. See *infra* section II.B.

seems likely that a court would defer to this sort of legislative judgment about appropriate procedure, rather than engage in its own balancing act.

### 3. The "Maximum" Approach—All Adjudication

Under either the minimum or intermediate approaches, the statute would prescribe no procedures to be followed in resolving a vast array of individualized agency decisions affecting legal rights. In these cases, no statutory or constitutional law requires an agency to conduct an on-the-record hearing to resolve the dispute. These cases receive what is generally referred to as "informal adjudication," and they are subject to virtually no statutory procedural rules under either the federal APA or the 1961 Model Act.

In contrast, the 1981 MSAPA takes a radically different approach.<sup>69</sup> In this respect, the 1981 MSAPA follows the lead of several state APAs adopted before 1981.<sup>70</sup> It requires an agency to conduct an "adjudicative proceeding"<sup>71</sup> as the process for formulating and issuing an "order."<sup>72</sup> Thus the key term is "order," which is defined as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons."<sup>73</sup> Thus the 1981

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69. In this respect, the new Utah APA follows the Model Act. UTAH CODE ANN. § 63-46b-1(1)(a), -2(1)(a) (1989 & Supp. 1991). The Utah statute exempts numerous specific agency functions from its otherwise all-inclusive coverage. As recently amended, the Kansas statute takes an inclusionary approach to defining adjudication, although it also requires that a specific agency's statutory provision adopt the APA, which most of them do. See Leben, *supra* note 30, at 683. While Washington has adopted many provisions of the 1981 MSAPA, it has not adopted an all-inclusive approach to defining adjudication. However, Washington has provided that every case of licensing and ratemaking is covered by the adjudication provisions. WASH. REV. CODE ANN. § 34.05.010(1) (1990).

70. See DEL. CODE ANN. tit. 29, §§ 10102(3), 10121 (1983); FLA. STAT. ANN. § 120.57 (West Supp. 1991) (and A. ENGLAND & H. LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL chs. 11-12 (1979 & Supp. 1986)); IND. CODE ANN. § 4-21.5 (Burns 1990 & Supp. 1991); N.C. GEN. STAT. § 150B-2(2), -22 (1987); OKLA. STAT. ANN. tit. 75, §§ 250.3(6), 309, 314 (West 1987 & Supp. 1992); WIS. STAT. ANN. § 227.42 (West Supp. 1991).

71. However, as discussed *infra* at section II.B., the adjudicatory proceeding required is not necessarily a formal trial. The 1981 MSAPA provides several models of adjudicatory proceedings that call for much less formality than a trial-type proceeding.

72. 1981 MSAPA, *supra* note 17, § 4-101.

73. *Id.* § 1-102(5). There are exceptions for decisions to issue or not issue a complaint or similar accusation, or to initiate or not initiate an investigation, prosecution, or other proceeding. *Id.* § 4-101(a). This provision would preserve existing law that distinguishes investigation from adjudication. See *Smith v. Board of Medical Quality Assurance*, 202 Cal. App. 3d 316, 322-24, 248 Cal. Rptr. 704, 707-08 (1988) (no hearing required before requiring physician to take competency exam because procedure is in-

MSAPA's definition of adjudication is intended to be very comprehensive and to put aside any question of whether an external statute or due process requires a hearing.

This approach would bring a vast number of previously unregulated and sometimes relatively trivial state governmental actions within the coverage of the APA. For example, the maximum approach would sweep under the APA every decision by a state agency not to issue a permit; to reject a student's application for admission to a university; to hire, discipline, or fire an employee who is not protected by tenure or civil service; to impose a change in status on a state prisoner or person in a state mental hospital; or to acquire or dispose of government property or make an election under a contract.<sup>74</sup> In the process of formulating and issuing such an order, an appropriate adjudicatory process would be required whenever a detrimentally affected party requests it.

This Article agrees with the 1981 MSAPA and recommends the maximum approach: when government acts in a way that is individualized and detrimental to a person's legal interests, government should be required—upon request of the person adversely affected—to provide at least minimal or "summary" procedure.<sup>75</sup> It should, at the least, inform the person what it is doing and why, give that person an opportunity to explain his or her point of view, briefly explain an adverse decision, and provide a way for the decision to be summarily reviewed.<sup>76</sup> Summary procedure provides an effective avenue of protest against perceived injustice and abuse of discretion by the government, and it assures respect for personal

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vestigatory); *Miller v. Alcoholic Beverages Control Comm'n*, 340 Mass. 33, 34–35, 162 N.E.2d 656, 657 (1959) (probable cause hearing not a "contested case" under APA); *Bonfield*, *supra* note 38, at 296–300. Similarly, by referring to action of "particular applicability," the definition excludes rulemaking and other action of general application. 1981 MSAPA, *supra* note 17, § 4-101(b). Finally, a range of ordinary administrative decisions that do not themselves determine the legal interests of particular persons (such as a decision to adopt a general plan, build or close a highway, or open or close a college campus) would not trigger adjudicatory procedures even though they might be viewed as particular rather than general. See *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 258 Cal. Rptr. 762 (1989) (decision of county to contract out hospital service is not adjudication for judicial review purposes).

74. No external statute or due process requires an on-the-record hearing to resolve these disputes between the state and an individual or entity.

75. Summary procedure is discussed *infra* at section II.B.3.

76. The California Law Revision Commission did not agree with this recommendation. It chose the intermediate approach described above. The commissioners were concerned that it would be politically infeasible to sweep large numbers of relatively trivial disputes under the APA and that doing so might have unpredictable and perhaps costly results.

dignity.<sup>77</sup> Because the government has acted in a way that has *particular applicability*, detrimentally affected parties may feel that they have been singled out for unfair treatment. In most cases, such persons cannot turn to any group for support and cannot take advantage of the political process for protection. The summary procedure that would be required to redress this problem is so cheap, simple, and quick that it would not interfere with efficient government; indeed, it is likely that the procedure already exists in virtually all cases—if someone asks for it.

The case for adopting a comprehensive definition of adjudication is similar to the case for covering all agencies under the APA.<sup>78</sup> The “maximum” approach is the only way to address the problem of informal adjudication across the board.<sup>79</sup> There are such a vast number of adjudicatory decisions taken by the state, but not covered by the existing APA or any procedural statute, that no study could scrutinize more than a small fraction and no statute could ever list them all (or keep up to date as new functions emerge). If

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77. There is a vast literature that emphasizes the obligation to decide cases in a manner that protects both the interests of the government in efficient decision-making and the dignitary interests of the individual affected. See L. TRIBE, *supra* note 49, § 10-7:

Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.

*Id.* at 666. As discussed *supra* in the text accompanying notes 54–59, a person’s dignitary interest must be weighed in the balance when deciding whether a hearing is required by procedural due process under the California constitution.

78. See *supra* section I.

79. This is the general consensus of the scholars that have written about the informal administrative process. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976), concludes that a baseline procedure of notice, opportunity to comment, and a statement of reasons should apply to all adjudication. After a survey of numerous informal adjudication processes at the federal level, Verkuil concluded that at least this much procedure is already provided in almost all cases. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 13 (2d ed. 1979), urges that agencies generally adopt a requirement of “fair informal procedure” consisting of notice, comment, and statement of reasons in all cases where adjudicative facts are in issue. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 ADMIN. L. REV. 155 (1972) [hereinafter Gardner I], recommends a generally applicable procedure for consultation with adversely affected persons. However, Gardner (Chair of the Informal Action Committee of the Administrative Conference) was more cautious in a later article. See Gardner, *The Informal Actions of the Federal Government*, 26 AM. U.L. REV. 799 (1977).

the legislature must identify the adjudications to which the APA applies, it will miss many of them and those adjudications will continue to be subject to no procedural rules<sup>80</sup> or to variable procedure under due process analysis.<sup>81</sup>

Of course, the legislature might well be persuaded that particular forms of adjudication should not be subjected to any required procedure at all. In that case, the legislature can and should exempt the particular function from the APA. It is correct, I believe, to place the burden on an agency to persuade the legislature that even a bare-bones summary procedure is inappropriate when an agency adversely affects a person's legal interests. This is better than present law, which places the burden on the legislature to identify the adjudicatory functions in which some form of procedure is appropriate.<sup>82</sup>

80. Courts might attempt to improve procedures in informal adjudication through administrative common law. For example, the California Supreme Court required agencies to provide findings and explanation so that courts could evaluate the reasonableness of agency action. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974) (local planning commission must make findings before granting zoning variance). Similarly, a court can imply a hearing requirement from vague language in a statute or rule, thus triggering the APA procedural provisions. *See Chavez v. Civil Serv. Comm'n*, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (rule called for "appeal"—this means a hearing).

The United States Supreme Court precludes the creation of common law requiring extra-statutory agency procedures in informal adjudication. *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668 (1990). This case applies the same rule to informal adjudication that the Court had already decreed for rulemaking. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court held that courts lacked power to prescribe rulemaking procedures beyond those required by the APA. Two persuasive rationales for that decision were the unpredictability of ad hoc judicial procedural rulemaking and concern that agencies, fearing reversal, would overproceduralize their decision-making. *Id.* at 546–47. The LTV case probably invalidates a number of federal cases that sought to impose procedural requirements in informal adjudication. *See, e.g., American Trading Transp. Co. v. United States*, 841 F.2d 421, 424–45 (D.C. Cir. 1988); *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 922–26 (D.C. Cir. 1982).

81. If the intermediate approach to defining adjudication is taken, as discussed *supra* at section II.A.2, the statute would probably not attempt to prescribe procedure for all of the cases covered by due process. Probably it would not reach the cases in which due process requires some kind of consultation but not an on-the-record hearing. *See Goss v. Lopez*, 419 U.S. 565 (1975) (suspended student entitled to informal notice and opportunity to confer with disciplinarian). Thus, courts would continue to prescribe procedures in these cases by means of ad hoc balancing.

82. In response to the U.S. Supreme Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), the legislature enacted a statute spelling out exactly what process is due in school expulsion and suspension situations. *See CAL. EDUC. CODE §§ 48,900, 48,911, 48,918* (West 1978 & Supp. 1992); *John A. v. San Bernardino City Unified School Dist.*, 33 Cal. 3d 301, 654 P.2d 242, 187 Cal. Rptr. 472 (1982). This is the right way to deal

Thus I recommend that a new APA employ a comprehensive definition of adjudication and that its provisions describe an appropriate model for every case of adjudication. The next section of this Article describes the array of different sorts of hearings provided by the 1981 MSAPA, including a bare-bones summary procedure to take care of most relatively trivial adjudications.

### B. *Informal Trial Models*

The California APA now provides for only one model of adjudication: a fairly formal trial with testimony under oath, examination and cross-examination of witnesses, representation by counsel, and a formal decision.<sup>83</sup> Although the proceeding may be informal in some respects (such as relaxed rules of evidence), the ingredients in an APA adjudication are pretty much the same as those in a superior court trial. In my view, a modern APA needs to contain a menu of procedural modes, rather than a single, unvarying set of formal procedures. If the APA were to follow the maximum approach to defining adjudication,<sup>84</sup> it would be imperative to provide a system of summary adjudication to handle the universe of relatively small disputes that would be swept under the APA. Similarly, if California were to take the intermediate approach,<sup>85</sup> the statute should provide for informal adjudication; formal adjudication would be inappropriate and inefficient for many cases to which due process applies. Even under a minimum approach, formal adjudication would be unnecessary in many situations even though an on-the-record hearing is required by statute. Indeed, there are probably numerous cases decided by agencies covered by the existing APA which could be fairly disposed of with less formality.<sup>86</sup>

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with the problem, but it is not practicable to enact a specially tailored statute to cover every such instance.

83. CAL. GOV'T CODE § 11,500(f) (West 1980 & Supp. 1992).

84. See *supra* section II.A.3.

85. See *supra* section II.A.2.

86. There may be cases that agencies covered by the existing APA would like to press but cannot because of the high costs of conducting formal APA hearings. For example, an agency might have power to deal with minor violations of law by assessing a civil penalty or entering a cease-and-desist order. Yet it might hesitate to do so because of the resource commitment that would be involved. Suppose, however, that a less formal hearing mode were available for cases involving relatively minor penalties. Perhaps the agency could then address minor law enforcement problems that otherwise it could not afford to pursue.

## 1. Adjudicatory Procedures Under the 1981 MSAPA

The 1981 MSAPA provides for a menu of hearing procedures of varying degrees of formality. Under this approach, formal adjudication is the default, but agencies would be entitled to employ conference, summary, and emergency hearing models under certain circumstances. The MSAPA's proposal for a choice of models is an ingenious answer to the criticism that the broadened coverage of a new act would require inappropriate formality in the universe of cases to which it would apply.<sup>87</sup> By providing models that dispense with unnecessarily judicialized procedures and adversary styles, the MSAPA responds to complaints that the administrative process has become too judicialized<sup>88</sup> or too imbued with adversary behavior.

A reform that provides for a range of procedural formats should satisfy the three relevant adjudicatory process criteria of acceptability, efficiency, and accuracy. Although formal procedures may be congenial to trial lawyers, they can be intimidating and unpleasant to lay people. I believe lay people would prefer more informal procedures, provided that the procedures allow them sufficient opportunity to have their say. Certainly, procedures that take less time would save lay people attorney's fees, which would be most welcome. Moreover, less formal procedures would clearly be more efficient for agencies to conduct than formal trials. Finally, a properly designed informal procedure should produce as accurate and appropriate an outcome as one which includes unnecessary formality.

An important element of the MSAPA approach is the default status of formal procedure; an agency that wishes to use less formal models must first adopt rules authorizing it to do so. This rulemaking process will engage each of the constituents (inside and outside of government) with which the agency deals. Through the rulemaking process, an agency will have to address the difficult issue of just how much formality is appropriate in its decisionmaking. I believe that this rulemaking process would be a healthy one, for it would compel agencies to confront an issue that is seldom considered in the daily routine of law enforcement.<sup>89</sup> And it should produce a set of regulations that, for the first time, will accurately describe the actual adjudicatory procedures of each agency. Ide-

87. See Bonfield, *Administrative Procedure Acts in an Age of Comparative Scarcity*, 75 IOWA L. REV. 845, 855-58 (1990).

88. See, e.g., Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 461-64.

89. See Verkuil, *supra* note 79, at 745, 792-93.

ally, the exercise will result in a set of agency procedures properly matched to the need for formality. Because the MSAPA provides for a few models with which all agency procedures must comply, the MSAPA approach should enable California for the first time to have a true administrative law with some consistency of procedure across all of its agencies.

The MSAPA leaves a critical choice to the states in implementing a system of variable process.<sup>90</sup> Under one approach (referred to as the "constraint" approach) the APA would define precisely which types of matters are suitable for each of the hearing models. Under the second (or "choice") approach, agencies would pick whichever model they considered appropriate for the different types of matters that they adjudicate. The constraint approach would probably be too rigid when applied across the entire universe of administrative adjudication: it would create numerous interpretive problems and would fail to include situations in which less formal procedures would be appropriate. The choice approach would probably work better: the Act would provide for a specific array of procedural models and allow agencies to select by rule the appropriate model for each type of adjudication that they conduct. But, I repeat, without adoption of a rule that calls for less formal procedure, the agency must use full-fledged formal adjudication. This provides great incentive for agencies to address the problem of procedural formality and to adopt an appropriate set of rules.

## 2. Conference Hearings

The 1981 MSAPA modeled its provision for conference hearings<sup>91</sup> on provisions in a number of other pre-existing state statutes<sup>92</sup> and particularly on the provision for informal hearings in the

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90. See 1981 MSAPA, *supra* note 17, § 4-401 (bracketed material); *id.* § 4-502(3) (bracketed material).

91. *Id.* §§ 4-401 to 4-403. Kansas adopted the conference hearing and, under recent amendments, permits use of that format even without the prior adoption of rules. KAN. STAT. ANN. § 77-533 (1989); Leben, *supra* note 30, at 682 n.13. Utah law provides for "informal" adjudicative proceedings that are a cross between conference and summary proceedings. UTAH CODE ANN. § 63-46b-5 (1989). The conference approach is inspired by the seminal work of Paul Verkuil, who identified it as the core administrative law procedure, applicable to both adjudication and rulemaking. Verkuil, *supra* note 36, at 258.

92. Virginia provides for informal fact-finding in any case where no statute requires a formal hearing. The "conference-consultation procedure" involves informal presentation of factual data or argument, a prompt decision, and written statement of reasons. This procedure can also be used as a method of settlement or pre-trial before a formal hearing. VA. CODE ANN. § 9-6.14:11 (1989). Delaware, which has an all-inclusive definition of adjudication, provides for fact-finding by informal conference or consultation,

Florida statute. Florida employs an all-inclusive definition of adjudication,<sup>93</sup> but it allows some hearings to be informal rather than formal if there is no disputed issue of material fact.<sup>94</sup>

Under the MSAPA approach, a conference hearing dispenses with certain elements of a formal hearing. In particular, there is no pre-hearing conference, no subpoenas or discovery, no formal presentation of evidence or cross examination, and no right of non-parties to participate. In place of these procedures, the parties can testify, present written exhibits, and offer comments on the issues. Some elements of a formal hearing are retained: the requirements of notice, an unbiased decisionmaker, separation of functions, limits on ex parte contacts, a statement of findings and reasons, and agency review all remain the same as in a formal hearing.<sup>95</sup>

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 decision-maker (such as the agency heads). The conference hearing would be particularly useful in the case of hearings required by federal or California due process, if the intermediate approach were pursued; in the case of many disputes covered by due process, a full-fledged trial-type procedure is not required, but some form of structured hearing is necessary.<sup>96</sup> It is imperative that the statute

but only where the parties so agree. DEL. CODE ANN. tit. 29, § 10123 (1983). Another model is the Montana statute, which allows an agency to adopt rules embodying a conference format. MONT. CODE ANN. § 2-4-604 (1987).

93. FLA. STAT. ANN. §§ 120.57 (West 1982 & Supp. 1991) (hearings required in all proceedings in which the substantial interests of a party are determined by an agency).

94. *Id.* § 120.57(2) (West 1982 & Supp. 1991). In an informal hearing, an agency is required to give reasonable notice, give affected persons an opportunity to present written or oral evidence or a written statement, and provide a written explanation within seven days. See 2 A. ENGLAND & H. LEVINSON, *supra* note 70, ch. 12.

95. OAH ALJs would preside at a conference hearing and prepare a proposed decision if they would do so in the case of a formal hearing. 1981 MSAPA, *supra* note 17, § 4-402.

96. For example, a probationary employee fired for stigmatic reasons is entitled to a hearing purely to clear his name. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Heger v. City of Costa Mesa*, 231 Cal. App. 3d 42, 282 Cal. Rptr. 341 (1991); *Lubey v. City of San Francisco*, 98 Cal. App. 3d 340, 159 Cal. Rptr. 440 (1979).

Another example is the constructive resignation of a state employee who has been absent for five days without leave. Due process requires written notice and pre-termination conference before a neutral decisionmaker. *Coleman v. Department of Personnel Admin.*, 52 Cal. 3d 1102, 805 P.2d 300, 278 Cal. Rptr. 346 (1991). Similarly, California due process applies to a wide range of cases to which federal due process does not. See

provide for less formal models to deal with constitutionally required hearings for cases in which a full-fledged trial-type hearing is not required.

A revised APA would allow conference procedures to be used in any circumstance defined by agency rules,<sup>97</sup> unless, of course, conference hearings would violate some other statute or constitutional due process.<sup>98</sup> Some cases decided under the existing APA could lend themselves to conference procedure. For example, where there is no disputed issue of fact but only a question of law, policy, or discretion (such as severity of penalty), conference procedure would be quite appropriate.<sup>99</sup>

In addition, conference procedure would be appropriate for a range of adjudications presently conducted by California agencies outside of the APA. Adversary, trial-type process is not necessary or even desirable to settle a wide range of disputes between government and the public. One large group of cases that could be resolved by conference hearings are decisions to grant or deny

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*supra* Section II.A.2. For example, in *Saleeby v. State Bar*, 39 Cal. 3d 547, 562-68, 702 P.2d 525, 533-37, 216 Cal. Rptr. 367, 375-80 (1985), the Supreme Court held that the Bar must provide an appropriate but informal hearing when considering claims for purely discretionary payments from the client security fund. Conference procedure would fill the bill in each of these situations.

New Jersey cases have struggled with defining the ground rules for hearings required by due process which require fact finding but not of the sort that would require a trial-type hearing. Conference hearings would work perfectly in such situations. *See High Horizons Dev. Co. v. New Jersey Dep't of Transp.*, 120 N.J. 40, 575 A.2d 1360 (1990) (application for highway access); *Cunningham v. Department of Civil Serv.*, 69 N.J. 13, 350 A.2d 58 (1975) (comparability of two civil service jobs).

97. If the constraint alternative is used, *see supra* text following note 90, conference hearings would apply only in the case of relatively minor sanctions, such as monetary amounts not exceeding \$1000 or disciplinary sanctions against a student short of expulsion or suspension for more than ten days, or in matters where there is no disputed issue of material fact. 1981 MSAPA, *supra* note 17, § 4-401(1), (2)(i), (iii).

98. Conference hearings could not be used when some other statute mandates trial-type hearings, as in the case of workers' compensation claims. Similarly, due process generally requires confrontation and cross-examination when an agency imposes a serious sanction, factual issues are central to the decision, and those issues turn on credibility. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Conference proceedings could not be used in such cases either. However, courtroom drama is not necessary when no such issues must be resolved. Thus, cross-examination is not needed in a variety of preliminary determinations or when the agency needs to resolve broad questions of legislative fact, much less issues of law and policy.

99. Federal cases now recognize the importance of providing for a streamlined procedure when there is no factual issue, for example, in the case of summary judgment or where the issues have been settled by rules. *See American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539 (1991); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

discretionary permissions, grants, or licenses, where an informal hearing process is required by statute or by federal or California due process.<sup>100</sup>

The various land-use planning and environmental decisions made by state agencies provide yet another opportunity to consider the use of the conference format.<sup>101</sup> One example is the grant or revocation of permits by the Coastal Commission to engage in construction near the beach. The agency operates like a local planning and zoning agency. After the staff studies the application for permit and issues a report, there is a relatively brief, argument-type hearing before the entire twelve-member Commission.<sup>102</sup> Nonparties, such as objecting neighbors, can also take part. Here again, the conference hearing format would be appropriate.<sup>103</sup>

Conference hearings might also be useful in individualized ratemaking cases. For example, PUC ratemaking cases are now heard by ALJs in a trial-type mode with extensive cross-examination of experts. These cumbersome proceedings could be simplified through the adoption of generic rules. To the extent that issues are not resolved through rulemaking, the agency should have discretion to dispense with trial-type formality and use less formal and more

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100. See *Weiss v. State Bd. of Equalization*, 40 Cal. 2d 772, 775, 256 P.2d 1, 2 (1953) (applicant for liquor license has same rights as if license is revoked); *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 269-71, 246 P.2d 656, 661-63 (1952) (denial of license to conduct amusement business); *Andrews v. State Bd. of Registration*, 123 Cal. App. 2d 685, 267 P.2d 352 (1954) (denial of state professional license on grounds of lack of experience).

101. For example, see the provisions for hearings by the Director of Conservation in cases of unreasonable waste of natural gas and by the Department of Health Services for the siting of nuclear facilities. CAL. PUB. RES. CODE §§ 3301-3314, 3350-3353 (West 1984); CAL. HEALTH & SAFETY CODE § 25,845(a) (West 1984).

The Water Resources Control Board uses a workshop procedure which resembles a conference hearing. The workshop procedure was highly praised by private attorneys who practice before the board. It allows the issues in a pending case (either an appeal to the Board from a decision of one of its regional Boards or a matter within the Board's original jurisdiction) to be discussed informally by the litigants, the staff, and the Board members. The matter then returns to the Board in a brief formal hearing where a final vote of the Board members is taken. Various proceedings conducted by the Energy Commission also closely resemble the conference model. The Workers' Compensation Appeals Board rules also provide for conference hearings. CAL. CODE REGS. tit. 8 § 10,541 (1991).

102. The Commission should consider the delegation of the hearing function to administrative judges. *See infra* section III.A.

103. The conference format would be inappropriate to the extent that it would exclude participation by non parties. However, I believe that agencies should have the power to determine in their rules whether nonparty participation would be permitted in conference hearings.

efficient approaches, such as conference hearing procedures<sup>104</sup> that would permit informal participation by all interested parties.<sup>105</sup>

Finally, the conference procedure could lend itself to tax adjudications now conducted by the State Board of Equalization, either in appeals from Franchise Tax Board determinations or in appeals from the Board's own business tax decisions. While a few tax cases involve credibility determinations (as to which traditional cross-examination is appropriate), the majority involve issues of statutory interpretation and application of the law and regulations to stipulated facts. A conference would be most appropriate for resolving this kind of case.

### 3. Summary Adjudicative Proceedings

The 1981 MSAPA provides for an abbreviated, bare-bones procedure called a summary proceeding.<sup>106</sup> This model simply requires notice and an opportunity for a party to explain his position to a presiding officer named by the agency.<sup>107</sup> The officer must furnish a brief statement of findings and reasons.<sup>108</sup> On request, the aggrieved party can obtain an administrative review of a decision

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104. See Brown, *The Overjudicialization of Regulatory Decisionmaking*, 5 NAT. RESOURCES & ENV'T 20 (1990) (criticizing judicialization of utility ratemaking proceedings).

105. As in the case of the Coastal Commission, a conference hearing at the PUC should permit participation by nonparties.

106. 1981 MSAPA, *supra* note 17, § 4-502 to -506. Washington's new APA provides for a "brief adjudicative procedure." Brief adjudicative procedure can be used in any situation where the agency, by rule, has provided for it, if the public interest does not require the involvement of nonparties and if "the issue and interests involved in the controversy do not warrant" use of more formal procedure. Also, brief procedure cannot be used in public assistance and food stamp programs. WASH. REV. CODE § 34.05.482 (1990). Utah's new APA provides for "informal" procedure, which is a cross between conference and summary procedures. UTAH CODE ANN. § 63-46b-5 (1989). Kansas also adopted summary hearings. KAN. STAT. ANN. §§ 77-537, 77-542 (1989 & Supp. 1990); see Leben, *supra* note 30, at 682 n.13, 685 n.27. See generally Comment, *Experiments in Agency Justice: Informal Adjudicatory Procedures in Administrative Procedure Acts*, 58 WASH. L. REV. 39, 55 (1982) (concluding that the MSAPA model was better than informal procedures in various state laws).

The summary model might have been inspired by *Goss v. Lopez*, 419 U.S. 565 (1975). *Goss* holds that a student threatened by a ten-day suspension from school is entitled to notice of the charges against him, an explanation of the evidence the authorities have if he denies the charges, and an opportunity to present his side of the story. In essence, the Court held that due process required a conversation between the student and the disciplinarian.

107. There is no requirement that the presiding officer be a person uninvolved in the dispute, much less an ALJ from OAH. Any person exercising authority over the matter is the presiding officer. 1981 MSAPA, *supra* note 17, § -503(a).

108. Except in monetary cases, the order can be oral or written. *Id.* § 4-503(c).

taken through summary adjudication.<sup>109</sup> In short, summary procedure entitles a person subject to an adverse agency decision to have appropriate notice, a chance to state his or her point of view, an explanation of an adverse decision, and an administrative review of the decision,<sup>110</sup> but without the formality of an on-the-record, trial-type hearing. It lacks the various adjudicatory safeguards spelled out in the MSAPA for formal or conference proceedings, such as the requirements for counsel, cross-examination, and separation of functions.

Summary procedure is designed as an escape valve to avoid unnecessary formality in the many relatively minor disputes that would be bought under the APA by the maximum approach to defining adjudication.<sup>111</sup> For example, consider interim suspensions pending a formal hearing of a licensee from practice or a state employee from a job. Some sort of abbreviated and informal process, far short of an on-the-record hearing, is required to establish whether there is probable cause for such a suspension.<sup>112</sup> Similarly, disputes about license applications that could be resolved by an inspection or examination are appropriate for summary procedure.<sup>113</sup> The summary procedure provides a simple set of ground rules; thus courts avoid due process analysis, which requires tedious and unpredictable ad hoc balancing to derive the precise elements of informal procedures.

Although summary procedure is abbreviated, it provides significant protection. Any standard of civilized conduct between gov-

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109. However, reconsideration can be prohibited by any provision of law. *Id.* §§ 4-504 to -505.

110. None of the other MSAPA provisions relating to adjudication are applicable unless agency rules cause them to apply. *Id.* § 4-201(2).

111. This problem does not arise under the intermediate approach. Under that approach, only on-the-record hearings required by due process are brought under the APA. Consequently, there might be no need for summary procedure if the statute embraced only the minimum or intermediate approach to defining adjudication. Under a maximum approach, however, a whole array of disputes in which due process requires something short of an on-the-record hearing would be brought under the APA.

112. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (suspension from job); *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975) (pretermination procedures for permanent civil service employee).

113. See, e.g., *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 269-71, 246 P.2d 656, 661-63 (1952) (application for amusement license). In *Fascination*, a city denied an application for a license to conduct an amusement business because the business involved a game of chance rather than skill. The California Supreme Court held that notice and hearing was required, reaching this conclusion by "interpreting" the ordinance. The court suggested that the hearing requirement might have been satisfied by an inspection of the game by the chief of police and an opportunity for the applicant to state his case. This is a perfect situation to apply summary procedure.

ernment and the individual should provide at least this much procedure for the relatively few people who will request it.<sup>114</sup> Prof. Verkuil studied forty-two informal administrative procedures in four federal agencies. He found that a level of procedural protection at least approximating summary hearings was provided as a matter of rule or practice in virtually every situation.<sup>115</sup> No doubt, California agencies also, as a matter of practice, extend at least this much procedural protection.

#### 4. Emergency Procedure

The existing California statute contains no general provision for emergency adjudication (although it does provide for emergency rulemaking). However, the 1981 MSAPA<sup>116</sup> and the law of some states<sup>117</sup> contain such provisions and emergency action is well recognized by due process cases.<sup>118</sup> California law should contain a

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114. See Gardner I, *supra* note 79, at 162-63. Gardner, the Chair of the Administrative Conference's Informal Action Committee, suggested universal requirements of notice, opportunity to contest agency conclusions and statement of reasons, and opportunity to apply for reconsideration.

Verkuil and his co-authors have argued:

The [federal] APA should be amended to require agencies to provide in all informal adjudications, other than those that rely on physical inspection, the minimum procedural safeguards of notice, an opportunity to present views orally or in writing, a brief statement of reasons, and an impartial decision-maker. Such an amendment would provide agencies helpful guidance concerning the procedures appropriate for informal adjudication and would eliminate the need for agencies and reviewing courts to attempt the difficult task of determining procedures appropriate for hundreds of types of adjudications through ad hoc application of the *Mathews v. Eldridge* constitutional test of procedural adequacy.

R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 338-39 (1985).

115. Verkuil, *supra* note 79, at 757-79. For a California example, see CAL. EDUC. CODE § 87,031 (West 1989) (right to review and comment on derogatory information placed in community college teacher's personnel file). The Superintendent of Banks provides for notice of denial of a banking application and a meeting with the Superintendent, although no adequate statement of reasons is provided if the applicant does not prevail. Similarly, the UCLA Law School provides an opportunity for a rejected applicant to meet with the Dean of Admissions, make an argument for why he or she should be admitted, and receive a brief oral explanation. There is also a procedure for reconsideration by the admissions committee if the applicant wishes to pursue it.

116. 1981 MSAPA, *supra* note 17, § 4-501.

117. For example, the new statutes of Kansas, Utah, and Washington, all modeled on the 1981 MSAPA, contain provisions for emergency adjudicative procedure. KAN. STAT. ANN. § 77-536 (1989); UTAH CODE ANN. § 63-46b-20 (1989); WASH. REV. CODE § 34.05.479 (1990).

118. See, e.g., FDIC v. Mallen, 486 U.S. 230 (1988) (suspension of banking executive under indictment for felony involving dishonesty); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (immediate closure of dangerous mine).

generic provision for emergency procedure. Emergencies do occur and must be dealt with quickly yet fairly. For example, emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public.

If the new APA applies in all situations in which due process requires a hearing, there is a clear need for an emergency provision in the statute. In numerous situations, due process requires a hearing before an agency acts; absent some specific provision for emergency procedure, the APA would then mandate full-fledged formal procedure which could thwart the agency in dealing with an emergency situation. The new APA should contain a specific provision that allows the agency to take emergency action with abbreviated procedure.

A generic provision for emergency action would be a useful addition to California law. In most cases, agencies must now go to court to seek immediate relief in emergency situations. This remedy has proved to be unsatisfactory in professional licensing cases, where interim suspension is urgently required to protect public safety,<sup>119</sup> and in cases of threatened violation of environmental and developmental regulations.<sup>120</sup> The law already contains provisions for interim suspension of both medical licensees and attorneys, as well as for some other licensing situations,<sup>121</sup> such as health facil-

119. See Fellmeth, *Physician Discipline in California: A Code Blue Emergency*, 9 CAL. REG. L. REP., Spring 1989, at 1, 5-6, 15. Under prior law, the Medical Board was empowered to seek temporary restraining orders in court, but it sought and obtained only three in 1986-87 and none at all in 1987-88. See CAL. BUS. & PROF. CODE §§ 125.7, 2311 (West 1990). I was informed that the low number of TROs resulted from reluctance by the attorney general's staff to seek them because of a well-founded belief that trial judges would refuse to grant them.

120. The Coastal Commission, for example, must seek a judicial injunction in cases in which a developer is violating permit restrictions. By the time such relief is obtained, the environment may be irreparably damaged.

121. CAL. GOV'T CODE § 11,529 (West Supp. 1992) (medical licensee's violations endanger public health, safety, or welfare); CAL. BUS. & PROF. CODE § 6007(c) (West 1990) (suspension of attorney from practice if conduct poses a substantial threat of harm to clients or the public and on other grounds). The provision for interim suspension of attorneys was upheld by the Supreme Court. Conway v. State Bar, 47 Cal. 3d 1107, 767 P.2d 657, 255 Cal. Rptr. 390 (1989). Under § 6007(c) and the State Bar rules, there is an expedited hearing; either party has subpoena power, but the usual provisions for discovery and evidence do not apply. Instead, evidence can be taken by affidavit. The State Bar Court does not review interim suspensions; they are judicially reviewable, but the suspension goes into effect pending review. The Real Estate Commissioner has power to order a licensee to desist and refrain from illegal activity immediately with a hearing granted within 30 days. CAL. BUS. & PROF. CODE § 10,086(a) (West 1987).

ties and day care centers.<sup>122</sup> Other provisions for emergency action are scattered through the statute books, but they may well authorize summary action that would violate due process.<sup>123</sup> All agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest. At the same time, the law should confine the power to take summary action to genuine emergencies and should provide appropriate procedural protections both before and after the summary action.

The 1981 MSAPA provides that emergency adjudicative procedure can be used "in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action."<sup>124</sup> The agency can take only such action as is necessary to avoid the immediate danger. The agency must provide practicable notice and a brief statement of findings, conclusions, and policy reasons for the decision if it is an exercise of discretion. After issuing the order, the agency must then proceed as quickly as possible to complete proceedings that would be required if there were no emergency.<sup>125</sup>

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The PUC has power to suspend trucking licenses before granting a hearing. CAL. PUB. UTIL. CODE § 1070.5 (West Supp. 1992). The DMV has power to suspend certain licenses pending a hearing if the public interest so requires. CAL. VEH. CODE § 11,706 (West 1987).

122. See CAL. HEALTH & SAFETY CODE §§ 1550 (last paragraph), 1569.50, 1596.886 (West 1990). These provisions are used 150–200 times per year. They allow the agency to suspend a facility's license ex parte, without any prior procedure, but require a hearing within 30 days after receipt of the suspension notice and a decision within 30 days after completion of the hearing. Emergency action was upheld in *Habrun v. Department of Social Servs.*, 145 Cal. App. 3d 318, 193 Cal. Rptr. 340 (1983). I was informed that licensees frequently manage to stay open by securing a temporary restraining order against the department's suspension order; the trial court grants a hearing to the facility at the preliminary injunction stage.

123. See CAL. FOOD & AGRIC. CODE § 12,961 (West 1986) (allowing seizure of "economic poisons" (i.e., pesticides) that are "adulterated, or misbranded, or detrimental to agriculture or to the public health, or which is otherwise not in conformity with any provision of this chapter."). In *Leslie's Pool Mart v. Department of Food & Agric.*, 223 Cal. App. 3d 1524, 273 Cal. Rptr. 373 (1990), the state seized an inventory of swimming pool chemicals under this section because the owner had not paid the state tax on pesticides (there was a good faith dispute about whether the tax applied). As the court held, this was an inappropriate rationale for emergency action.

124. 1981 MSAPA, *supra* note 17, § 4-501(a). Unlike conference or summary adjudication, emergency procedure can be used even though the agency has not previously provided for it by a rule. I differ with the MSAPA on this point, as discussed below.

125. *Id.* § 4-501(b) to (e). The Supreme Court indicated that post-termination proceedings must follow reasonably promptly after conclusion of an interim suspension. *Conway v. State Bar*, 47 Cal. 3d 1107, 1120–23, 767 P.2d 657, 665–67, 255 Cal. Rptr. 390, 398–400 (1989).

Thus a new California statute could be modelled on the MSAPA provision. However, I have some additional suggestions. Unless it is infeasible, there should be provision for an expedited and streamlined hearing before an agency employee, as is provided in the legal interim suspension statutes,<sup>126</sup> at which the party at least has an opportunity (orally or in writing) to rebut the charges against him or persuade the agency not to take emergency action.<sup>127</sup> Immediate judicial review should be provided, but the emergency action should not be stayed pending judicial review unless a court so orders.<sup>128</sup> Finally, emergency action should be authorized by agency rules, as conference and summary proceedings would have to be; the MSAPA does not require authorizing rules for emergency procedure. Such regulations would define the circumstances in which emergency action can be taken, the nature of the interim relief which the agency can obtain, and the procedures that will be accorded before and after the emergency action (which could be more protective than those that the statute provides as a default).

### III. APPEALS WITHIN THE AGENCY: THE RELATIONSHIP BETWEEN AGENCY HEADS AND ADMINISTRATIVE JUDGES

This section addresses a number of issues that concern the relationship between the individual who conducts the initial hearing in

126. Unfortunately, the provision for interim suspension of medical licensees provides for more than an expedited and streamlined hearing. It allows the licensee to call, examine, and cross-examine witnesses and to present and rebut evidence determined to be relevant. CAL. GOV'T CODE § 11,529(d) (West Supp. 1992). Thus, the suspension hearing could consume weeks rather than hours or a day or two. I am informed that this has not occurred in the few interim suspension hearings that have occurred so far, but obviously it could occur.

127. Ordinarily, some sort of brief conference is feasible. But one can imagine a leaking toxic chemical tank where the owner is away on vacation and cannot be contacted, yet immediate action is needed to protect the public. The statutes calling for suspension of the licenses of day-care centers, elderly-care centers, and health facilities allow the facilities to be shut down without any prior procedure. This seems unnecessarily draconian. These statutes should be conformed to emergency procedure if a new APA is adopted. It is my belief that the Department of Social Services and the Department of Health Services can provide at least a brief conference with licensees before shutting them down.

128. CAL. BUS. & PROF. CODE § 6083(b) (West 1990) provides for immediate judicial review of a Bar decision to place a member on interim suspension. CAL. GOV'T CODE § 11,529(h) (West Supp. 1992) provides for immediate judicial review of a Medical Board interim suspension. In cases involving suspension by the Departments of Health and Social Services, which under present law can be done without any prior procedure, licensees have succeeded in obtaining delays from the courts. The courts should not delay the agency from putting an interim suspension into effect if the agency has followed the procedures spelled out in its regulations, nor should the court grant a hearing to the licensee which supplants the procedures that the agency must provide.

an administrative case and the head or heads of the agency that has ultimate statutory responsibility for making a decision in that case. Essentially the same rules should apply to all hearings conducted by administrative judges—whether they are employed by OAH or by the agency that makes the ultimate decision.<sup>129</sup>

#### A. *Delegation of Power to Hear a Case*

Under the prevailing adjudicative model, in both APA and non-APA agencies, agency heads have the power to hear a case initially, but they very rarely do so. Almost always, the initial hearing is conducted by an administrative judge. Agency heads review a proposed decision written by the administrative judge.

This model works well. However, I believe that a new APA should provide for a range of options to assure that adjudicating agencies can use the procedure that provides the best possible combination of fairness, efficiency, and acceptability.<sup>130</sup> It is necessary to have a range of possible procedures because administrative adjudicating functions vary enormously; the matters that even a single agency considers may differ dramatically in terms of their difficulty and importance.<sup>131</sup>

While most agencies use some variation of the APA model described above, not all of them do. Some environmental and land-use planning agencies hear every matter en banc at the agency head

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129. See *infra* section IV.E (discussion of whether non-OAH judges should be transferred from agencies to a central panel).

130. There is much literature on the allocation of adjudicative responsibilities between hearing officers and agency heads. For discussions of the literature, see the excellent article by Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1 (1986). My suggestion that agencies be given the maximum discretion to design their own review structures is informed by Cass' conclusions that empirical research fails to demonstrate a clear superiority for any one model on the criteria of efficiency, accuracy, and acceptability. According to Cass, other situational variables (such as the difficulty of cases handled by the agency or the adjudicatory caseload) are more helpful in understanding agency review structures.

131. The Administrative Conference of the United States concluded:

In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.

1 C.F.R. § 305.68-6 (1991).

level. In some cases, their understanding is that this procedure is required by existing law.

The Coastal Commission, for example, hears every matter en banc and does not employ hearing officers. The result is a crushing agenda consisting of some trivial matters and other extremely important ones. The Commission tends to hear anyone who wishes to speak (such as members of the affected communities). Frequently, time limitations preclude full consideration of the matters heard.<sup>132</sup> The agency members (who are part-timers) cannot possibly familiarize themselves with the enormous files. As a result, everyone involved feels frustrated, and there may be an undue transfer of decision-making authority from the agency members to the staff.

Similarly, the Board of Equalization hears income and franchise tax cases en banc without any prior hearing officer decision.<sup>133</sup> Some attribute this inefficient procedure to the fact that the Board is elected and wishes to demonstrate its responsiveness to the voters by hearing every case regardless of importance. The result is a clogged agenda, rushed proceedings, and a perception among tax professionals that the decisions are made by staff rather than Board members.<sup>134</sup>

I believe that the agencies that hear cases en banc should have the power to continue this method of decision-making, if they so choose.<sup>135</sup> But I also believe that the statute should give such agencies clear authority to delegate the task of holding the hearing and writing an initial decision to hearing officers employed by the

132. See *Reed v. California Coastal Zone Conserv. Comm'n*, 55 Cal. App. 3d 889, 895-96, 127 Cal. Rptr. 786, 790 (1975) (ten minute limit to hear case does not violate due process—given Commission's caseload it is necessary and inevitable that such reasonable time limitations be placed on applicants).

133. The Board of Equalization deals with two different tax structures. In one class of cases (income and franchise taxes), it decides disputes between the Franchise Tax Board and taxpayers. It hears these cases by granting a trial-type hearing before the full Board. There is no hearing officer decision. In cases involving business taxes administered by the Board itself, disputes are heard by hearing officers and appeals are taken to the Board. See CAL. CODE REGS. tit. 18, § 5053 (1990). Under currently proposed regulations, this hearing will be downgraded into an informal discussion between the taxpayers and a staff attorney independent of the assessing branches. In any event, the entire matter is reheard in an evidentiary hearing before the full board. *Id.* § 5056.

134. I made no effort to find out whether this perception was valid, but the perception exists. It is one of the strongest reasons for pressure by tax professionals for an independent tax court. See *infra* note 334 and accompanying text.

135. Some agencies, such as the Water Resources Control Board, the San Francisco Bay Conservation and Development Commission, and the Energy Commission, split their members into panels for purposes of hearing certain types of cases. The panel writes a proposed decision which can be appealed to the full board. This approach seems to work well in these agencies, which have relatively small adjudicative caseloads.

agency. This statute should allow agencies to adopt rules providing for delegation of the hearing function in all cases, or certain classes of cases, or certain individual cases designated by the agency heads. I believe that this change would enhance the quality of Coastal Commission and Board of Equalization decision-making on all three axes: fairness, acceptability, and especially efficiency.

### B. *Review by the Agency Heads*

#### 1. Models for Appellate Procedure

The prevailing model allows in many cases for automatic review by agency heads of all decisions proposed by administrative judges. In most other cases, it guarantees either party an appeal from an unfavorable initial decision by an administrative judge to the agency heads.<sup>136</sup> I believe that agencies (whether or not covered by the existing APA) should have access to a greater range of possible appeal models. If a particular appellate structure fails to yield the ideal mix of accuracy, efficiency, and acceptability, it can be readily changed by amending the rules.

If an agency wants to review all proposed decisions or to allow appeals as of right to the agency heads, these options should remain available. But these should not be the only options. An agency should be empowered to adopt rules under which an initial decision would be (1) final, (2) subject only to a discretionary rather than a mandatory appeal to the agency heads, (3) appealable only to subordinate appellate officers (such as a judicial officer or an employee review board) rather than to the agency heads, or (4) appealable as of right to subordinate appellate officers with discretionary appeal to the agency heads. In addition, an agency should be permitted to split itself into panels for the purpose of considering and deciding appeals. The procedural rules that define an agency's ap-

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Assuming agencies are permitted to hear cases en banc, they should also be permitted by statute to hear cases in panels.

Under the APA, when agency heads hear a case, an ALJ presides at the hearing and is present to give advice during consideration of the case. CAL. GOV'T CODE §§ 11,512(a)-(b), 11,517(a) (West 1980 & Supp. 1992). This procedure makes sense for agencies that employ OAH ALJs but not for non-OAH agencies that might not even employ any hearing officers. Thus, agencies that are not required to use OAH ALJs and who choose to hear a case en banc should decide for themselves whether or not to have a hearing officer preside at the hearing.

136. The term "appeal" is used here in a generic sense to cover a variety of procedures called by different names in different agencies. For example, the Workers' Compensation Appeals Board refers to its appeal procedure as "reconsideration" by the agency heads. The discussion in the text is intended to refer to agency head consideration of hearing officer decisions regardless of what the procedure is called.

pellate process could provide that a particular option would apply to (1) all cases decided by the agency, (2) all cases within a described class of cases, or (3) individual cases so designated by the agency at the time the matter is first set for hearing.<sup>137</sup>

Agency review of initial decisions made by administrative judges is costly. It occupies the time of the staff members who process the appeals and of the agency heads who must decide whether to affirm summarily or to hear arguments and receive briefs in the cases. The consideration of appeals in individual cases may distract agency heads from other important business, such as making enforcement policy, supervising the enforcement staff, considering proposed rules or proposed legislation, or engaging in economic analysis of the future of the industry that the agency is supposed to regulate. The burden of deciding adjudicative appeals may be substantial, especially where the agency heads are part-timers.

Moreover, the agency appeal stage can be quite time-consuming; it can delay a final decision by months or years, with possible damage either to public or to private interests. Thus, it would seem that both the effectiveness of regulatory programs and the efficiency with which an agency discharges its functions could be promoted by diminishing the number of appeals with which the agency heads must contend. Yet most APA agencies and the State Personnel Board give some consideration to every proposed decision; other agencies make agency-level review available as a matter of right if either party requests it.

Of course, many cases are difficult and important enough to merit plenary review. Such cases should be reviewed by the agency heads. However, if a case (or a particular class of cases) is relatively unimportant (in terms of the regulatory program), involves no significant issues of policy or discretion, or presents purely factual issues, it might be a wiser allocation of agency resources to supply only a fair initial hearing without an agency appeal.<sup>138</sup> Alterna-

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137. A party should be permitted to move, before the hearing, that a case be transferred from the ALJ-final docket to the agency-appeal docket because it presents important issues that might call for agency legal interpretation or policymaking. An agency's exercise of discretion to treat a case as ALJ-final should not be judicially reviewable.

138. ALJs of the Department of Social Services (DSS) are empowered to make final decisions in cases involving welfare, food stamps, and certain Medi-Cal disputes. However, either party can request a rehearing which, if granted, is provided before a different ALJ.

If an ALJ disagrees with established DSS policy (and in certain other situations), the ALJ prepares a proposed decision that is appealed to the ALJ's supervisor (and, in certain cases, to the Director). The decision to delegate final authority to ALJs occurred because of heavy time pressures and court orders mandating quicker decisions.

tively, there might be a review remedy by one or more of the agency heads rather than en banc.<sup>139</sup> In addition to increasing efficiency, such approaches aid the cause of fairness. Appeals in such relatively minor cases are unlikely to be successful, so that losing an appeal remedy should not be, and should not seem, unfair to litigants; instead, dispensing with agency head review will speed up the administrative process, avoid the need to pay attorneys to engage in a probably fruitless exercise, and allow truly disgruntled litigants to get to court more quickly.

Agencies should also be free to make appeals discretionary rather than available as a matter of right. Under a discretionary appeal regime, the litigant who is dissatisfied with an initial decision would have to request a hearing before the agency. If the agency heads felt that the case did not merit their review, they would simply deny it. Thus, agency appeal would resemble the California Supreme Court's practice of granting hearings only in a small percentage of the cases in which a hearing is sought.<sup>140</sup>

Finally, agencies should explore the option of using subordinate employees to hear appeals (such as judicial officers or employee review boards).<sup>141</sup> Subordinate appellate officers might discharge either of two functions. First, the appellate officers might furnish the only appeal to which a litigant is entitled in a given class of cases.<sup>142</sup> Second, the officers might supply an appeal as of right with a subsequent discretionary appeal to the agency heads.<sup>143</sup> In the latter type of case, the discretionary appeals would be limited to cases in which important questions of law and policy are at issue.

These subordinate appellate officers would be employees serving as professional hearers of appeals and would be entitled to the same protections from outside influence as are administrative

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139. The Unemployment Insurance Appeals Board and Workers' Compensation Appeals Board hear cases in panels, except for unusually important matters.

140. This option is similar to an existing procedure: summary affirmance of an initial decision. See *infra* section II.B.3. The summary affirmance option should be retained and should be available whether or not the agency adopts rules taking advantage of the various procedural options discussed herein.

141. See 1981 MSAPA, *supra* note 17, § 4-216(a)(2)(ii) to (iii) (agency can delegate final review power or intermediate review power to one or more persons). See generally Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969).

142. Employee reviewers make final decisions in driver's license cases conducted by the Department of Motor Vehicles. See CAL. VEH. CODE § 14,105.5 (West 1987 & Supp. 1992).

143. The review board might also be useful in considering interlocutory appeals on such questions as evidence, privilege, joinder, discovery, disqualification of the hearing officer, and similar procedural disputes.

judges. Indeed, it might be possible for personnel to rotate between service as trial and appellate judges, thus providing a more varied professional experience for administrative judges. The quality of review provided by subordinate appellate officers could well be superior to that provided by the agency heads, who are frequently not qualified or experienced in dealing with legal materials and procedures, are often part-timers, are necessarily distracted by other regulatory tasks, and who may delegate part or all of the reviewing or opinion-writing function to anonymous staff members.<sup>144</sup>

Of course, there is a disadvantage to the use of subordinate appellate officers: they are not qualified to be policymakers. Where a case presents important issues of law or policy, the agency heads may wish to have the last word. In such cases, an optimal solution might be to give litigants an appeal as of right to subordinate employees with a discretionary appeal to the agency heads, to be exercised only in the infrequent case in which the decision will serve as a significant precedent.

## 2. Retain Summary Approval

Under the existing APA, agency heads can summarily accept an ALJ's proposed decision in its entirety or they can reduce the proposed penalty and adopt the balance of the proposed decision.<sup>145</sup> In summary affirmance situations, a respondent receives a copy of the ALJ's proposed decision within thirty days after the agency receives it. However, the agency is not required to give the parties any opportunity to file briefs or make arguments before the agency supporting or opposing the ALJ's decision.<sup>146</sup> There is no requirement that a transcript be prepared or that the agency heads familiarize themselves with the ALJ's decision, let alone the record in the case.<sup>147</sup>

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144. Cass' study showed that review by subordinate appellate officers tended to be quicker than agency head review and to produce fewer judicial appeals than agency head review. Cass, *supra* note 130, at 17.

145. CAL. GOV'T CODE § 11,517(b) (West 1980 & Supp. 1992). Unless an agency commences proceedings to decide the case upon the record within 100 days after a proposed decision is delivered to the agency heads, the proposed decision is deemed adopted. *Id.* § 11,517(d).

146. *Stoumen v. Munro*, 219 Cal. App. 2d 302, 314, 33 Cal. Rptr. 305, 312 (1963); *Dami v. Department of Alcoholic Beverage Control*, 176 Cal. App. 2d 144, 147, 154, 1 Cal. Rptr. 213, 216, 219 (1959).

147. See *Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 184 P.2d 323 (1947) (the leading case upholding this procedure and ruling that the agency heads need not familiarize themselves with the record). The full hearing provided by the ALJ satisfies the require-

I favor the retention of the summary approval procedure and its extension to all California agencies that will be covered by a broadened APA because it serves important objectives of economy and efficiency. It should be available in any case in which an appeal is provided as a matter of right or in which an agency automatically reviews each proposed decision.<sup>148</sup> Summary affirmance avoids the need to prepare a transcript and dispenses with briefing and argument on the merits before the agency heads. Preparation of transcripts is costly; argument before the agency heads delays the process and consumes a considerable amount of their time. If the agency heads are satisfied with the proposed decision, they should be allowed to terminate the case without further proceedings. The parties in such case would have received one complete hearing before an administrative judge. No principle of due process requires that they be given an appeal, or a new hearing, if the agency chooses not to conduct one. The next stop for the dissatisfied person is the courthouse.<sup>149</sup>

In addition to summary affirmance (or affirmance with reduction in penalty), an agency should have the ability to make minor or technical changes in the proposed decision and then summarily adopt it as a final decision. Under present law, the agency must trigger the time-consuming process of rejection, ordering a transcript, hearing argument, and making a final decision even though it wishes only to make nonsubstantive changes or to clean up minor errors in the proposed decision.

One aspect of the existing APA procedure is problematic: the parties do not see the ALJ's proposed decision in time to file briefs pointing out errors in the decision and requesting plenary consideration of the case. It can be argued that the parties should have some input into the agency head's decision whether to summarily affirm the proposed decision.<sup>150</sup> It may seem unfair that the

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ment that "he who decides must hear." *Morgan v. United States*, 298 U.S. 468 (1936); *see also TENTH BIENNIAL REPORT*, *supra* note 4, at 24.

148. This recommendation is similar to one made above: that agencies be authorized to adopt rules making appeal in all cases, or in certain cases, discretionary rather than mandatory. The § 11,517(b) procedure should apply whether or not agencies have adopted rules providing for a system of discretionary appeals.

149. This proposal follows the 1981 MSAPA, *supra* note 17, §§ 4-215(h), 4-216. These provisions require the service of ALJ decisions on all parties but permit the agency, by rule, to retain discretion to review some—but not all—issues, or to not exercise any review.

150. This argument is animated by one of the most famous state administrative law cases, *Mazza v. Cavicchia*, 15 N.J. 498, 105 A.2d 545 (1954). *Mazza* involved a New Jersey procedure in which the findings and conclusions of a "hearer" in a license revo-

agency's consideration of the initial decision could occur in the absence of some kind of adversarial presentation of views by the Attorney General, the agency staff, or any affected private parties.

The contrary argument, which the Law Revision Commission accepted, is based on efficiency. Agencies can quickly and summarily affirm the vast majority of proposed decisions without devoting significant resources to the decision and without becoming subject to pressures from the parties to review the case. If the decision whether to grant plenary review is itself a decision on which the parties would furnish input, agencies believe they would have to devote more time to the decision, stretching out the decisional process for an additional period of several months, and, in many cases, agency heads would feel compelled to order transcripts.<sup>151</sup>

### 3. Agency Rejection of Proposed Decision: Deference to ALJ Credibility Findings

#### a. Present Law

If agency heads reject an ALJ's proposed decision, the existing APA permits the agency to decide the case upon the record, with or without taking additional evidence.<sup>152</sup> Although the parties receive a copy of the ALJ's proposed decision,<sup>153</sup> the proposed decision has

cation case were transmitted to the agency head for final decision but were never shown to the licensee. The court said:

The hearer may have drawn some erroneous conclusions in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative proceedings; indeed, the whole process of judicial review in both fields is designed to guard against them. But if a party has no knowledge of the secret report or access to it, how is he to protect himself? An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to such mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert.

*Mazza*, 15 N.J. at 575-76, 105 A.2d at 555; see B. SCHWARTZ, ADMINISTRATIVE LAW § 7.23 (2d ed. 1984).

151. Under present law, parties can request reconsideration of an agency decision, including a summary affirmation. See CAL. GOV'T CODE § 11,521 (West 1980 & Supp. 1992). The right to seek reconsideration provides at least some protection against a poorly considered summary affirmation.

152. CAL. GOV'T CODE § 11,517(c) (West 1980 & Supp. 1992). The agency can also refer the case back to the ALJ to take additional evidence. *Id.* It can then either summarily affirm or reject the second ALJ decision. *Strode v. Board of Medical Examiners*, 195 Cal. App. 2d 291, 15 Cal. Rptr. 879 (1961).

153. CAL. GOV'T CODE § 11,517(b) (West 1980 & Supp. 1992) provides that the proposed decision becomes a public record thirty days after it is received by the agency. The court of appeals indicated in a questionable dictum that parties might not have the

no further importance in the case.<sup>154</sup> However, the parties have an opportunity to present oral or written argument before the agency heads.<sup>155</sup> The agency heads are free to make their own determination of any issue, including credibility, even though they take no evidence and never see or hear the witnesses. Apparently, a reviewing court does not consider the reversal of the administrative judge's decision as a relevant factor in deciding whether to affirm or set aside the agency decision.<sup>156</sup>

I believe that this provision of existing law is unsatisfactory. Although California has an outstanding corps of administrative

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right to receive a proposed decision that has been rejected by the agency before the case is briefed and argued before the agency heads. *Compton v. Board of Trustees of Mt. San Antonio College*, 49 Cal. App. 3d 150, 157-58, 122 Cal. Rptr. 493, 498 (1975) ("[I]t is clear that from the moment of the agency's rejection thereof, [the proposed decision] serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof."). *But see Dami v. Department of Alcoholic Beverage Control*, 176 Cal. App. 2d 144, 149-50, 1 Cal Rptr. 213, 218-19 (1959) (assuming that a respondent should have access to the proposed decision before argument to the agency in a § 11,517(c) case). Whether *Compton* is correctly decided or not, it graphically indicates the irrelevance of a rejected proposed decision under existing California law.

154. Indeed, in non-APA cases, there may be no right to receive a copy of the judge's decision. *See Travelers Indem. Co. v. Gillespie*, 50 Cal. 3d 82, 102-03, 785 P.2d 500, 513-14, 266 Cal. Rptr. 117, 130-31 (1990). In this non-APA case, a hearing officer held a hearing and wrote a recommended decision; the Insurance Commissioner then wrote a final decision, refusing to disclose the hearing officer's decision. Because there were no credibility issues, and because there was no allegation that the Commissioner had acted arbitrarily, the insurance companies were unable to prove any prejudice from non-disclosure of the report. Indeed, citing *Compton*, 49 Cal. App. 3d at 158, 122 Cal. Rptr. at 498, the California Supreme Court stated that "the hearing officer's recommended decision, once rejected, ceased to have any legal significance in this case." *Travelers*, 50 Cal. 3d at 103, 785 P.2d at 514, 266 Cal. Rptr. at 131.

I believe that parties should always have access to an administrative judge's rejected decision without any need to prove prejudice. *See Mazza v. Cavicchia*, 15 N.J. 498, 105 A.2d 545 (1954), discussed at *supra* note 150.

155. Thus the agency can dispense with oral argument. *McGraw v. Department of Motor Vehicles*, 165 Cal. App. 3d 490, 211 Cal. Rptr. 620 (1985). In light of the heavy workload of some agencies and the limited time available to agency heads, the statute should probably continue to provide agencies with the option to choose either oral or written argument.

156. I found no case that squarely reaches this holding. Some people I interviewed believe that reviewing courts do in fact pay close attention to the credibility determinations in rejected proposed decisions. *But see Compton*, 49 Cal. App. 3d at 158, 122 Cal. Rptr. at 498-99 (stating in dictum that a rejected proposed decision has no identifiable function on judicial review); *National Auto. & Casualty Co. v. Industrial Accident Comm'n*, 34 Cal. 2d 20, 27-30, 206 P.2d 841, 844-46 (1949) (suggesting that the fact that an agency reversed the credibility determinations of its referee is entitled to no special significance on judicial review).

judges<sup>157</sup> who are professional triers of fact, their decisions often turn out to be of little importance. An agency that is dissatisfied with a proposed decision simply rejects it and makes its own determinations of fact, law, and policy from the cold record. Since agency heads are frequently part-time appointees who have little time to give to their agency responsibilities, the actual determination of rejection (and the preparation of a new opinion) is done by agency staff. This cavalier treatment of proposed decisions sharply detracts from the vitally important function of administrative judges as a check on the possible institutional bias of the agency heads or staff.

A revised act that gives greater weight to a judge's credibility findings than does present law should satisfy all three relevant criteria of acceptability, efficiency, and accuracy. The reform would strongly enhance the acceptability of the decision process; persons who have engaged in a hearing before a judge resent a substitution of credibility findings by agency heads who never heard the witnesses testify. Such persons tend to be more trusting of administrative judges who are relatively independent and insulated from contact with adversary staff members. Moreover, efficiency is served by giving greater finality to the judge's findings rather than encouraging agency heads to reject the judge's findings and substitute their own. Finally, I believe that a judge who has lived with a case, often for days or weeks, and heard and saw all of the witnesses, is more likely to reach accurate credibility findings than are persons whose only contact with the case is a relatively brief exposure to a written transcript.<sup>158</sup>

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157. Here I refer both to the judges who work for OAH and the much greater number of judges who work for specific agencies.

158. An administrative judge's assessment of credibility is to be preferred to the assessment of people who have read the transcript but have not heard and seen the witnesses. Needless to say, any assessment of whether an individual is telling the truth is relatively unreliable, but probably a judge's assessment is less unreliable than that of someone who makes the decision from a cold record.

This premise can be challenged. See Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075 (1991). Wellborn cites numerous psychological studies indicating that ordinary people do a better job in deciding who is telling the truth when they read transcripts than when they hear the same material presented orally. The cues we receive from voice and body language are distracting and not helpful in reaching correct decisions.

Wellborn's studies do not indicate whether the same conclusions apply to professional factfinders like administrative judges, as opposed to ordinary people. Nor do his studies indicate whether immersion in a case helps a factfinder to distinguish truth, as opposed to someone who observes a subject for a brief time in a psychological test. I believe that administrative judges can do a better job than ordinary people, or than a transcript reader, in deciding truth-telling, partly because of the judge's professional

*b. Proposed Reform*

A new APA should provide greater finality for credibility findings of an administrative judge based on the judge's observations of demeanor. This recommendation would not give greater finality to credibility determinations based on factors other than demeanor, such as evaluation of the qualifications of an expert witness or the inherent implausibility of the testimony. Nor would it accord greater finality for other sorts of determinations by a judge, such as the drawing of nontestimonial inferences from the evidence, predictions, applications of the law to the facts, legal interpretation, discretion, or policymaking.<sup>159</sup> The challenge, then, is to design a system that will provide a reasonable degree of finality for credibility determinations based on demeanor without stripping agencies of too much of their adjudicatory power and without creating a confusing, litigation-breeding standard.

I recommend that a new California APA adopt the approach now taken in California workers' compensation cases. In these cases, the credibility determinations of a Workers' Compensation Judge (WCJ) are entitled to "great weight" on judicial review. This means that they must be taken quite seriously by courts that review final Workers' Compensation Appeals Board (WCAB) decisions under the "substantial evidence" test. Where the WCAB rejects a WCJ's findings based on solid, credible evidence, the amount of evidence required to sustain its findings under the substantial evidence

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experience but mostly because the judge has spent a substantial amount of time on the case hearing all the witnesses. *But see* Ekman & O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913 (1991). Ekman and O'Sullivan measured the ability of professional lie-catchers (including judges and police) and found that they did only slightly better than chance and only slightly better than a control group of college students in deciding whether subjects in videotapes were lying. Secret Service agents did much better than others in this test.

159. An agency is not free simply to ignore a judge's findings and conclusions on issues other than credibility. As part of its obligation to find facts and state reasons for its decision, and to avoid arbitrary and capricious decisions, the agency must explain its departure from well-supported findings and conclusions contained in the judge's decision. *See, e.g.*, Reyes v. Bowen, 845 F.2d 242, 245 (10th Cir. 1988) (Social Security Appeals Council may reject ALJ recommendation, but cannot ignore it—must articulate its reasons); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); Retail Store Employees Union v. NLRB, 360 F.2d 494, 495 (D.C. Cir. 1965) (whether certain actions constituted a "conspiracy"—Board failed to explain its rejection of ALJ conclusion that conspiracy existed); Beaty v. Minnesota Bd. of Teaching, 354 N.W.2d 466, 472 (Minn. Ct. App. 1984) (agency must explain reasons for deviation from hearing officer's findings).

test is greater than would normally be the case.<sup>160</sup> Thus, if this model is given general applicability in a new APA, it would logically be placed in the judicial review section of the statute rather than in the provisions prescribing adjudicatory procedure.<sup>161</sup>

The well-established federal rule, formulated in *Universal Camera Corp. v. NLRB*,<sup>162</sup> is quite similar to the California workers' compensation rule.<sup>163</sup> Under *Universal Camera*, reviewing courts applying the substantial evidence rule discount agency findings that overturn a judge's credibility determinations but not

160. *Lamb v. Workmen's Comp. Appeals Bd.*, 11 Cal. 3d 274, 281, 520 P.2d 978, 983, 113 Cal. Rptr. 162, 167 (1974); *Garza v. Workmen's Comp. Appeals Bd.*, 3 Cal. 3d 312, 318, 475 P.2d 451, 456, 90 Cal. Rptr. 355, 360 (1970); *Rubalcava v. Workers' Comp. Appeals Bd.*, 220 Cal. App. 3d 901, 909-10, 269 Cal. Rptr. 656, 661 (1990); *Western Elec. Co. v. Workers' Comp. Appeals Bd.*, 99 Cal. App. 3d 629, 160 Cal.Rptr. 436 (1979).

The California workers' compensation rule has occasionally been applied to judicial review of other non-APA California agencies. *Apte v. Regents of Univ. of Cal.*, 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312, 316-17 (1988) (Chancellor's decision overturning a hearing committee); *Millen v. Swoap*, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387, 390 (1976) (Department of Social Services).

161. The existing judicial review statute is CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1992). Administrative law reform should certainly include an overhaul of this confusing and antiquated judicial review provision. The language suggested in the text can be inserted into the existing provision or any modernized version.

162. 340 U.S. 474 (1951).

163. In *Universal Camera*, the Court held that the evidence supporting agency findings based on credibility is less substantial when an examiner who has observed the witnesses has drawn conclusions different from the agency's. *Id.* at 492-97. In a subsequent case, the Court rejected a formulation under which the agency could not overrule its hearing officer on a credibility finding without a very substantial preponderance in the evidence supporting such reversal. This went too far in the direction of treating the examiner like a special master or like a trial judge. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). Thus, the Supreme Court's test preserves an agency's power to overturn the fact findings of its ALJs, even on credibility issues, but requires a more persuasive showing in such cases to meet the substantial evidence standard.

The Ninth Circuit summarized the *Universal Camera* rule as follows:

[W]e have found no decision . . . sustaining a finding of fact by the [Labor] Board which rests *solely* on testimonial evidence discredited . . . by the administrative law judge. . . . [E]ven when the record contains independent, credited evidence supportive of the Board's decision . . . 'the Board's supporting evidence . . . must be stronger than would be required in cases where the findings are accepted . . . .'

*Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1076, 1078 (9th Cir. 1977) (quoting *NLRB v. Interboro Contractors, Inc.* 388 F.2d 495, 499 (2d Cir. 1967)).

An agency may disagree with an ALJ's credibility finding "but only if there is substantial evidence undercutting the reliability of the testimony, evidence which 'a reasonable mind might accept as adequate to support a conclusion' that the administrative law judge was wrong about the credibility of the witness, in spite of the advantage of having heard the testimony and lived with the case." *Beavers v. Secretary of Health, Educ. & Welfare*, 577 F.2d 383, 388 (6th Cir. 1978) (quoting *Consolidated Edison Co. v. NLRB*, 365 U.S. 197, 229 (1938)).

agency findings based on expertise, policy, economic analysis, or discretion.<sup>164</sup> A number of states have adopted the *Universal Camera* approach.<sup>165</sup>

In conjunction with the judicial review provision, it might also be a good idea to require administrative judges to explain on what basis they resolved testimonial conflicts, so that agency heads and reviewing courts could ascertain whether the judge's determination was based on assessments of demeanor. Another alternative approach, contained in the recently adopted Washington APA, requires the judge to identify "any findings based substantially on credibility of evidence or demeanor of witnesses."<sup>166</sup> Either approach requires the judge to highlight findings that are credibility-based and reminds the agency of its obligation to give great weight to such findings.<sup>167</sup>

If these recommendations are enacted, the agency heads will seldom overturn a judge's credibility findings based on observation

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164. For examples of ALJ findings to which the agency was not required to defer, see AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968) (whether parties had bargained to an impasse); Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965) (whether various business arrangements represented a transfer of control), *cert. denied*, 383 U.S. 967 (1966). In the latter case, the court remarked:

We are satisfied, however, that the Board's decision does not rest on a divergent view of credibility of witnesses as to evidentiary facts so much as a different overall judgment as to the proper inferences to be drawn from the largely undisputed evidence concerning the salient ultimate fact. The Examiner also has expertise and experience in this field. But the statute gives the final say, assuming support in the record, to the collegial conclusion of the Board members, who likewise have particular expertise, and also, presumptively, a judgment enhanced by the perspective of experience in affairs and a breadth of gauge that warranted a Presidential nomination to high office and Senate confirmation.

*Id.* at 628.

165. See, e.g., *Gregory v. Bernardi*, 125 Ill. App. 3d 376, 465 N.E.2d 1052 (1984); *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 586-88, 538 A.2d 794, 800 (1988); *Simpson v. Wolansky*, 38 N.Y.2d 391, 343 N.E.2d 274, 380 N.Y.S.2d 630 (1975).

166. WASH. REV. CODE § 34.05.461(c)(3) (1990); see *Andersen, The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 816 (1989). The statute also calls upon the judge to comment on the demeanor of witnesses. WASH. REV. CODE § 34.05.461(c)(2) (1990). In addition, the Washington statute requires reviewers to "give due regard to the [judge's] opportunity to observe the witnesses." *Id.* § 34.05.464(4). This part of the Washington provision would be superfluous if California adopts the *Universal Camera*-workers' compensation approach suggested in the text.

167. If either suggested provision were adopted, it should be made clear that an agency need not agree with the ALJ that a particular finding is, or is not, based substantially on credibility or demeanor. Regardless of whether the ALJ or the agency heads were right or wrong in labelling the findings, the ultimate question remains the substantiality of the evidence supporting a particular result, giving great weight to the ALJ's determinations based on credibility and demeanor.

of a witness' demeanor. Their disregard of a judge's credibility determinations would seriously jeopardize their prospects for success on appeal. However, an agency would remain free to reject findings that are not based on credibility of witnesses if it explained its reasoning.<sup>168</sup> Even as to findings of credibility drawn from observation of demeanor, an agency might persuasively reject an ALJ's findings because, relying on its expertise in the field, it could explain to the satisfaction of a reviewing court that certain testimony accepted by an ALJ is inherently implausible.

This reform is carefully limited to credibility determinations based on demeanor, yet it does not require agencies or courts to draw a bright line between findings that are or are not based on credibility or demeanor. As discussed below, it is sometimes difficult to decide whether a finding is inherently based on a credibility determination or on some other factor. The recommendation only requires agencies (and courts reviewing agency decisions) to give great weight to ALJ determinations where that weight is justified. The courts should have no difficulty applying it on a case-by-case basis, simply discounting appropriately to the extent that an agency has rejected ALJ credibility-based determinations. There is plenty of relevant authority, both in California workers' compensation cases, and in federal law, on which courts can draw.

Consistent with the above recommendation, a revised act should discard the provision in existing law<sup>169</sup> that allows the agency heads to reject an ALJ decision and rehear the case themselves.<sup>170</sup> Instead, in cases where an agency wishes to reject an initial decision, it should have the power to remand a case to the same ALJ (if available)<sup>171</sup> with instructions for further proceedings.<sup>172</sup>

168. See *Power v. Workers' Comp. Appeals Bd.*, 179 Cal. App. 3d 775, 224 Cal. Rptr. 758 (1986) (Board's power to choose between expert witnesses about connection between stress and obesity); *see supra* note 159 (obligation to explain deviation from the judge's non-credibility-based findings).

169. CAL. GOV'T CODE § 11,517(c) (West 1980 & Supp. 1992); *see also* CAL. WELF. & INST. CODE § 10,959 (West 1991).

170. This recommendation (prohibiting agencies from rehearing cases heard by ALJs) obviously does not apply when a statute requires the agency heads to decide certain issues themselves. *See Greer v. Board of Educ.*, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (dismissal of probationary teachers—certain issues are decided by the ALJ, but other issues are reserved to the school board). Also, it probably should not prohibit the agency from taking testimony that, with reasonable diligence, could not have been presented at the hearing before the administrative judge. Cf. CAL. CIV. PROC. CODE § 1094.5(e) (West 1980 & Supp. 1992) (reviewing court can take evidence that with reasonable diligence could not have been produced at the hearing).

171. A requirement that the remand go to the same ALJ who rendered the initial decision, if that judge is available, will tend to prevent judge shopping. *See Chatterjee v.*

This permits an agency sufficient flexibility to deal with perceived flaws in an ALJ decision.

If the statute allowed an agency to reject a judge's decision and rehear the case en banc from scratch, it would open an avenue whereby agency heads could avoid the requirement that they give great weight to a judge's credibility determinations. Moreover, such a procedure would confront a reviewing court with conflicting credibility determinations, which would create serious difficulties in applying the statute. This provision also serves the cause of efficiency, for it would be cumbersome and time-consuming for busy agency heads to rehear cases en banc, and it seems unlikely that they would often find the time to do so. In addition, such retrials before the agency heads would impose significant and costly burdens on private parties.

One puzzle in applying the "great weight" test involves independent judgment review by courts. Under the idiosyncratic California judicial review provision, where a nonconstitutional agency decision deprives a person of a vested, fundamental right, the reviewing trial court reviews agency fact findings by exercising its independent judgment instead of applying the conventional substantial evidence test.<sup>173</sup> Under the independent judgment standard, a reviewing court ordinarily does not hear live witnesses, but based upon a cold record it reweighs the evidence considered by the agency, including its credibility determinations.<sup>174</sup> My suggestion would be that in independent judgment cases, a court should con-

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Kizer, 231 Cal. App. 3d 1348, 1357-61, 283 Cal. Rptr. 60, 64-67 (1991) (agency head remands case twice until third judge rejects Medi-Cal application).

172. See 1981 MSAPA, *supra* note 17, § 4-216(g). Present California law requires that in the case of a remand for additional evidence, the ALJ should prepare a proposed decision and the parties will have a chance to argue to the agency before the agency acts (even to approve the proposed decision). CAL. GOV'T CODE § 11,517(c) (West 1980 & Supp. 1992); TENTH BIENNIAL REPORT, *supra* note 4, at 24.

Under the Florida statute discussed in *infra* notes 182-185 and accompanying text, an agency cannot rehear a case assigned to a judge or even remand it for additional proceedings to the judge, except in exceptional circumstances. *Henderson Signs v. Florida Dep't of Transp.*, 397 So. 2d 769 (Fla. Dist. Ct. App. 1981). This probably goes too far in the direction of giving finality to the decisions of administrative judges.

173. CAL. CIV. PROC. CODE § 1094.5(c) (West 1980 & Supp. 1992). This Article takes no position on whether the independent judgment test should be repealed. Ultimately, the Law Revision Commission and the legislature must confront this fundamental issue.

174. *Pittsburg Unified School Dist. v. Commission on Prof. Competence*, 146 Cal. App. 3d 964, 977, 194 Cal. Rptr. 672, 679-80 (1983); *Guymon v. Board of Accountancy*, 55 Cal. App. 3d 1010, 1013-15, 128 Cal. Rptr. 137, 139-40 (1976) (stressing that the trial court is just as able as the agency heads to decide credibility questions since neither heard the witnesses testify).

sider the judge's proposed decision along with the agency final decision, giving whatever weight to either decision it finds appropriate. Naturally, the court is likely to be more impressed by credibility findings of the judge who heard the witnesses rather than those made by agency heads who did not hear the witnesses.<sup>175</sup>

c. *Other Models for Increasing the Deference Given to Judges' Credibility Determinations*

State and federal law offer a number of other approaches to the problem of how to increase the deference given to the credibility determinations of administrative judges. These models generally target agency heads rather than reviewing courts, as suggested above. In some cases, these techniques would be ineffective; in other cases, they would create more problems than they would solve.

Some states permit agency heads to reject the judge's findings but require them to explain in writing why they did so.<sup>176</sup> Thus a court is assured that the decision of the agency to reject the judge's fact findings was at least reasoned and deliberate. However, this approach does not solve the problem. The judge's credibility determinations should ordinarily be preferred to those of the agency heads who make their decisions on a cold record. An agency should not be permitted to override a judge's credibility findings simply by making explicit findings that it prefers to believe a witness the judge disbelieved or vice versa.

The Labor Department's Benefits Review Board must accept ALJ findings supported by substantial evidence in cases arising under the Longshoremen's and Harbor Workers' Compensation

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175. See *Guymon*, 55 Cal. App. 3d at 1015-16, 128 Cal. Rptr. at 139-40 (trial court is equally qualified with agency heads to determine credibility since neither heard the witnesses testify); Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262, 284 (1956) (in independent judgment cases, trial courts more likely to follow hearing examiner's credibility determination than agency's). The issue was raised but not decided in *Gore v. Board of Medical Quality Assurance*, 110 Cal. App. 3d 184, 191 n.1, 167 Cal. Rptr. 881, 884 n.1 (1980).

176. See *Beaty v. Minnesota Bd. of Teaching*, 354 N.W.2d 466, 472 (Minn. Ct. App. 1984) (agency must explain reasons for deviation from hearing officer's findings); *Public Advocate Dep't v. Public Util. Bd.*, 189 N.J. Super. 491, 501, 460 A.2d 1057, 1062 (N.J. Super. Ct. App. Div. 1983) (explanation for rejecting ALJ's findings assures reasoned consideration); *Pieper Elec., Inc. v. Labor & Indus. Review Comm'n*, 118 Wis. 2d 92, 346 N.W.2d 464 (1984) (agency must explain disagreement with examiner's personal impression of material witnesses).

Act and the Black Lung Benefits Act.<sup>177</sup> As interpreted by the courts, that model requires the Board to sustain ALJ findings that are supported by substantial evidence in the record as a whole.<sup>178</sup> Thus the fact findings of the Board are of no importance, even if it delivers a full opinion and its findings are supported by substantial evidence; on review, the only issue is whether the ALJ's findings are supported by substantial evidence.<sup>179</sup> This provision has greatly demeaned the importance of the Benefits Review Board. Its legal and policy decisions are given no deference by reviewing courts.<sup>180</sup> The agency heads are reduced to mere brief writers.<sup>181</sup>

The Florida statute<sup>182</sup> also requires agency heads to accept a judge's findings that are supported by competent substantial evidence. This provision draws a bright line between findings based on credibility (where the findings of the trier of fact must be sustained if the finding is supported) and other findings (where the trier of fact

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177. The Longshoremen's provision is 33 U.S.C. § 921(b) (Supp. 1991). It is made applicable to the Black Lung Benefits Act by 30 U.S.C. § 932(a) (1988). The California Unemployment Insurance Appeals Board has also held that the "findings of the trier of fact who heard the evidence and observed the witnesses in the tribunal below will be disturbed only if arbitrary or against the weight of the evidence." *Hamlett v. ITT Cannon Elec.*, Precedent Benefit Decision P-B-10, at 4 (1968) (citation omitted). Similarly, by statute, the Alcoholic Beverage Control Appeals Board must uphold findings of the Department of ABC that are supported by substantial evidence in the light of the whole record. CAL. BUS. & PROF. CODE § 23,084(d) (West 1985).

178. *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1137 (7th Cir. 1988). Reviewing courts review the Board's decision independently to ascertain whether the Board correctly applied the substantial evidence test to the ALJ's decision. See, e.g., *Container Stevedoring Co. v. Director, Office of Workers' Comp. Programs*, 935 F.2d 1544, 1546 (9th Cir. 1991); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985); *Bumble Bee Seafoods v. Director, Office of Workers' Comp. Programs*, 629 F.2d 1327 (9th Cir. 1980). This peculiar arrangement seems to have arisen accidentally when Congress amended the Longshoremen's statute in 1972 to substitute ALJs for the Deputy Commissioners who had formerly made the original decision (reviewable by the federal district court for substantial evidence) and inserted the Board as a new appellate level between the ALJs and the courts. The Longshoremen's procedure was then incorporated into the Black Lung statute.

179. *Kalaris v. Donovan*, 697 F.2d 376, 382-83 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

180. *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs*, 449 U.S. 268, 278 n.18 (1980); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 48-49 (2d Cir. 1976), *aff'd sub. nom. without discussion of this point*, *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977).

181. In a persuasive concurring opinion, Judge Cudahy attacked the case law that renders Benefits Review Board opinions of no greater importance than a party's brief. Cudahy deplored this result, since the Board consists of competent professional fact finders, its opinions are detailed and analytical, and its decisions may well reflect policy determinations. *Old Ben Coal*, 755 F.2d at 592-94.

182. FLA. STAT. ANN. § 120.57(1)(b) (West Supp. 1991). See generally 2 A. ENGLAND & H. LEVINSON, *supra* note 70, § 13.09.

need not be sustained regardless of whether it is supported). The cases that have wrestled with the Florida provision indicate that it is difficult to draw this line, and the necessity for doing so will produce much controversy and litigation.

Some Florida cases (the better reasoned in my view) successfully limit the statute to credibility determinations. Those cases distinguish findings based on credibility from findings based on opinion or those infused with policy considerations for which the agency has special responsibility.<sup>183</sup> Other cases indicate that the agency heads must accept any supported finding except for those relating to unique questions not susceptible to "ordinary methods of proof."<sup>184</sup> The distinctions required by either approach are difficult to draw on a case-by-case basis and have triggered much litigation. Because of this confusion, some courts have overturned agency decisions rejecting ALJ findings that seemed to turn both on policy considerations or expertise as well as on credibility.<sup>185</sup> I believe that

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183. *Holden v. Florida Dep't of Corrections*, 400 So. 2d 142 (Fla. Dist. Ct. App. 1981) (agency need not accept finding relating to the effect on prison security of a prisoner's marriage); *McDonald v. Department of Banking and Fin.*, 346 So. 2d 569 (Fla. Dist. Ct. App. 1977) (ALJ finding that new bank has a reasonable prospect of financial success need not be accepted by agency but it must explain its reasons for departing from the finding); *Boyette v. State Prof. Practice Council*, 346 So. 2d 598 (Fla. Dist. Ct. App. 1977) (agency need not accept conclusion that rape conviction would not impair a teacher's effectiveness). The statute was appropriately applied in *Tuveson v. Florida Governor's Council on Indian Affairs*, 495 So. 2d 790 (Fla. Dist. Ct. App. 1986), requiring an agency to accept a finding that an individual's action was motivated by racial discrimination.

184. For examples of cases in which agencies have been reversed because they rejected ALJ findings, see *Harac v. Department of Prof. Regulation*, Bd. of Architecture, 484 So. 2d 1333 (Fla. Dist. Ct. App. 1986) (clash of expert opinion about whether applicant passed the architecture licensing exam); *Nest v. Department of Prof. Regulation*, Bd. of Medical Examiners, 490 So. 2d 987 (Fla. Dist. Ct. App. 1986) (whether doctor once suspended for treating patients while drunk can now safely practice medicine); *Reese v. Department of Prof. Regulation*, Bd. of Medical Examiners, 471 So. 2d 601 (Fla. Dist. Ct. App. 1985) (same); *Johnson v. Department of Prof. Regulation*, Bd. of Medical Examiners, 456 So. 2d 939 (Fla. Dist. Ct. App. 1984) (whether doctor appropriately prescribed dangerous drugs); *Lord Chumley's of Stuart, Inc. v. Department of Revenue*, 401 So. 2d 817 (Fla. Dist. Ct. App. 1981) (whether shareholder should be treated as having conveyed property to his corporation even though he failed to do so formally); *Cenac v. Florida State Bd. of Accountancy*, 399 So. 2d 1013 (Fla. Dist. Ct. App. 1981) (whether all of the tasks performed by corporation are generally performed by accountants); *Shablowski v. State Dep't of Envtl. Reg.*, 370 So. 2d 50 (Fla. Dist. Ct. App. 1979) (whether fill of river would interfere with marine life to such an extent as to be contrary to public interest—strong dissent).

Some of these cases appear to use the Florida statute as a surrogate for an independent judgment standard of judicial review (which does not exist in Florida), so that a greater quantum of evidence is needed to revoke a professional license. See, e.g., *Johnson*, 456 So. 2d 939.

185. See *supra* note 184.

this practice inappropriately intrudes on the adjudicatory responsibility of the agency heads.

The Florida statute seems too rigid: it forces courts to draw a bright line between issues requiring the use of expertise or the application of policy and those that do not, or between issues that are or are not susceptible to proof by ordinary methods. If the issue falls on one side of the line, the agency can freely overturn its judge; if it falls on the other side of the line, it cannot, and it has committed reversible error. The world of administrative adjudication is too unruly for such rigid distinctions. Many ALJ fact findings turn partly on credibility and demeanor conclusions, partly on intuitive and experiential determinations of whether testimony is plausible, and partly on policy determinations. Yet such distinctions must constantly be drawn under a statute like Florida's, and the result is a maze of confusing case law. In addition, the uncertainty of the provision might unduly inhibit agencies from overturning findings based both on the demeanor of witnesses and on nondemeanor determinations. As a result, I do not recommend it as a model for California.

The approach used in *Universal Camera* and in workers' compensation cases seems better. It requires a reviewing court to weigh in the substantial evidence or independent judgment balance the fact that the agency has rejected the findings of the trier of fact. Such a reversal would have great significance to the degree that the court perceives that the finding was based on credibility, but relatively little significance if the court perceives that the finding was based on nontestimonial inferences, prediction, policy, or discretion. This sort of flexible, case-by-case standard seems better than more rigid approaches that require a yes-no classification of findings that often resist such classification. At the same time, it will compel agency heads to defer to findings that are wholly or almost completely derived from assessments of credibility and demeanor. The statute should do this much but it should not try to do more.

#### IV. IMPARTIAL ADJUDICATION

The process of administrative adjudication superficially resembles litigation in court, but the differences between the systems are fundamental. Trial and appellate judges are independent and isolated and perform no tasks other than judging. In contrast, administrative adjudication is only one facet of the regulatory process by which an agency carries out a legislative mandate. In many situations, the same people who function as adjudicative decision-makers

or their advisers also have responsibilities inconsistent with judging and which may result in strong policy opinions. In addition, these nonadjudicatory tasks inevitably expose them to communications from regulated parties and agency staff that may impact on cases they must decide. In most cases, administrative judges work for the agency that makes the final decision, and their decisions are subject to broader review by agency heads than are trial court decisions by appellate courts. Yet adjudicative impartiality and decision on an exclusive record are fundamental due process values that must be protected. A new administrative procedure act must grapple with these intractable problems.

Administrative law has wrestled with these dilemmas from the very beginning. Typically, arguments about such questions as separation of function or institutional bias proceed from two sharply conflicting starting points. Some people think that administrative adjudication should resemble litigation in court as closely as possible; this is the "judicial model." Others think that administrative litigation should be viewed as another form of regulation and that adjudicative decisions should be viewed as a corporate product of the entire agency staff. Specialists and reviewers, working together with adjudicators, can produce the best possible product. Under this "institutional model,"<sup>186</sup> it is argued, adjudicators should be no more constrained than business executives making business decisions. The two models are diametrically opposed.

Issues relating to impartiality often bring the relevant criteria into conflict. Generally, measures to enhance impartiality improve the acceptability of the decision process to outsiders. But such measures often entail significant costs in efficiency and accuracy. Obviously compromises are necessary: administrative adjudicators cannot and should not be as isolated as judges, but they need not and should not be as unconstrained as executives.

This portion of the Article focuses specifically on five sometimes overlapping problems of administrative adjudication that relate to decisional independence and impartiality:

1. Exclusive record
2. Ex parte communications
3. Bias
4. Separation of functions
5. Independent administrative judges.

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186. 3 K. DAVIS, *supra* note 79, § 17.1.

### A. *Exclusive Record*

The principle of record exclusivity is relatively noncontroversial. It requires that all of the *factual* inputs that decision-makers consider be drawn from the record produced at the hearing. Where a hearing is required by procedural due process, record exclusivity is a well-understood constitutional imperative.<sup>187</sup> It is also inherent in the word "hearing" where a trial-type hearing is required by statute.

California case law has frequently stressed the importance of record exclusivity. Thus, in one recent decision,<sup>188</sup> the Court of Appeal declared:

A decisionmaker such as the City Manager, who is required by city ordinance to make a determination after a requested hearing cannot act upon his own information, and nothing can be considered as evidence that was not introduced at a hearing of which petitioner had notice or at which he was present. . . . 'A contrary conclusion would be tantamount to requiring a hearing in form but not in substance. . . . [T]he requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced.'

Of course, the requirement of record exclusivity must be placed into context: while the facts on which a decision-maker relies must be based exclusively on evidence in the record and material which has been officially noticed, an adjudicator can (indeed must) evaluate that material by using his or her own experience and technical ability. Clearly, the process by which an adjudicator evaluates evidence cannot itself be forced onto the record.<sup>189</sup>

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187. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing."); *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 274-76, 269 Cal. Rptr. 404, 409-10 (1990).

188. *Vollstedt*, 220 Cal. App. 3d at 274-75, 269 Cal. Rptr. at 409-10 (quoting *English v. City of Long Beach*, 35 Cal. 2d 155, 159, 217 P.2d 22, 24 (1950)). In this case, the Civil Service Commission decided not to discharge an employee; the city manager, who made the final decision, discussed the facts *ex parte* with the personnel director before deciding to discharge the employee. The court made clear that this fundamental error was not cured by the trial court's power to make an independent judgment of the factual basis for the decision.

189. See 1981 MSAPA, *supra* note 17, § 4-215(d) ("The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence."). In some cases such as public utility regulation or environmental cases, the adjudicator's experience and specialized knowledge may relate directly to the subject matter of the case, since the same litigants and subjects often appear over and over again. Clearly, the adjudicators should be able to make use of knowledge that arose from a prior case but they should do so consistent with the rules of official notice—by

The exclusive record principle is well articulated in 1981 MSAPA section 4-215(d), which provides:

Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

I recommend adoption of this provision which is consistent with existing California case law.

#### B. *Ex Parte Communications*

For purposes of this Article, an *ex parte* communication is an off-the-record communication between a person *outside* the agency and an agency decision-maker. The problems of communications to decision-makers by people *within* the agency (or a related agency), or by the Attorney General's office, are discussed in the section on internal separation of functions.<sup>190</sup> A prohibition on *ex parte* contact is not co-extensive with the exclusive record principle discussed above,<sup>191</sup> because an *ex parte* contact might concern an issue of discretion, law, or policy in addition to an issue of fact.<sup>192</sup>

The rationale for a prohibition on *ex parte* contact is familiar to all lawyers: it is deeply offensive in an adversary system that any litigant should have an opportunity to influence the decision-maker outside the presence of opposing parties. The parties may spend weeks or months conducting a detailed adjudicatory hearing and an administrative judge may prepare a painstakingly detailed proposed decision. Yet all this can be set at naught by a few well chosen words whispered into the ear of an agency head or the agency head's adviser. *Ex parte* contacts frustrate judicial review since the decisive facts and arguments may not be in the record or the decision. Finally, *ex parte* contacts contribute to an attitude of cynicism in the minds of the public that adjudicatory decisions are based more on politics and undue influence than on law and discretion exercised in the public interest.

informing the parties that they have done so and providing a chance to rebut the information. *See id.* § 4-212(f).

190. *See infra* section IV.D.2.

191. *See supra* section IV.A.

192. For example, if a litigant suggested to an adjudicator off-the-record that the agency should interpret a statute in some particular way, this would be an *ex parte* contact, but it would not offend the exclusive record principle. On the other hand, a prohibition on *ex parte* contacts extends only to certain people outside the agency, not to the entire world; whereas the exclusive record principle covers factual inputs regardless of the source.

In short, a prohibition on ex parte contacts strongly serves the goals of acceptability and accuracy. In some instances, however, an overbroad prohibition can be inefficient. Consequently, my legislative recommendation suggests certain compromises to minimize inefficiencies.

### 1. Existing California Law and Practice

An amendment to the California APA in 1986 added section 11,513.5, which prohibits certain ex parte contacts.<sup>193</sup> But ex parte contacts in non-APA agencies remain unregulated. Moreover, section 11,513.5 apparently prohibits contacts only with ALJs employed by OAH, not with other adjudicators such as agency heads or the decisional advisers to agency heads.<sup>194</sup> The statutory prohibitions on ex parte contact in both the federal APA<sup>195</sup> and the 1981 MSAPA<sup>196</sup> are much broader in scope.

Apart from the APA provision, California case law leaves unclear whether ex parte contacts that do not involve a violation of the exclusive record principle are prohibited,<sup>197</sup> but the federal case law

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193. CAL. GOV'T CODE § 11,513.5 (West Supp. 1992). The section prohibits off-the-record contacts between "presiding officers" and any party or person who has a direct or indirect interest in the outcome of the proceeding. It also prohibits contacts between presiding officers and any employee of the agency that filed an accusation. The issues arising out of communications between agency staff and decisionmakers are discussed *infra* under internal separation of functions in section IV.D.2. As discussed in *infra* note 342, the version of CAL. GOV'T CODE § 11,513.5 that passed the Assembly contained an explicit separation of functions provision, but it was struck out in the Senate.

194. The section prohibits contacts with "presiding officers," which in context apparently means ALJs, not agency heads, although this conclusion is debatable. Generally the term "presiding officer" means ALJ in the California APA. See CAL. GOV'T CODE § 11,512(a) (West 1980 & Supp. 1992). Moreover, if the term "presiding officer" included agency heads, the agency heads would be prohibited by § 11,513.5(a) from talking to their own decisional advisers, which is an improbable result.

On the other hand, § 11,513.5 is poorly drafted since it uses both the terms "presiding officer" and "administrative law judge," which suggests that "presiding officer" means something other than "administrative law judge." Compare *id.* §§ 11,513.5(b)–(e) (use of the term ALJ) with *id.* § 11,513.5(a) (use of the term "presiding officer"). Moreover, the prohibition against a presiding officer communicating with "any person who presided at a previous stage of the proceeding" at least suggests that the term presiding officer refers to agency heads.

The legislative counsel's digest of A.B. 3482 explains the section as follows: "This bill revised the APA to . . . prohibit most ex parte communication between the person conducting a hearing . . ." This suggests that the legislature only meant to preclude communications to ALJs, not to agency heads.

195. 5 U.S.C. § 557(d) (1988).

196. 1981 MSAPA, *supra* note 17, § 4-213.

197. See *Fremont Indem. Co. v. Workers' Comp. Appeals Bd.*, 153 Cal. App. 3d 965, 200 Cal. Rptr. 762 (1984) (decision reversed because ALJ phoned expert witness

and that of other states vigorously condemns such contacts in a wide variety of adjudicative settings.<sup>198</sup> Numerous federal agencies prohibit ex parte contacts by rule even though no statutory prohibition applies.<sup>199</sup> Finally, it is unethical for an attorney to engage in ex parte contacts with agency adjudicators.<sup>200</sup>

for further explanation of his position—input concerned “correct legal principles”); *Gore v. Board of Medical Quality Assurance*, 110 Cal. App. 3d 184, 167 Cal. Rptr. 881 (1980) (board member asks physician friends if certain conduct was gross negligence—serious breach of duty but did not infect other members when case was reheard); *Guilbert v. Regents of Univ. of Cal.*, 93 Cal. App. 3d 233, 155 Cal. Rptr. 583 (1979) (apparently distinguishing nonfactual from factual ex parte communication, but communication was nonprejudicial). See generally Alperin, *When Parties Talk to Adjudicators: Ex Parte Contacts in the Administrative Arena*, *PUB. L. NEWS*, Spring, 1989, at 3.

198. In *United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519, 536–43 (D.C. Cir. 1978), nonfactual ex parte contacts required reversal in a case of informal adjudication not subject to due process or the APA, but subject to a statutory requirement of a “hearing.” The court held that ex parte contacts violate the norms implicit in a “hearing” and also made effective judicial review of the agency order impossible since that order would be based on nonrecord arguments.

See also *National Small Shipments Traffic Conf. v. ICC*, 590 F.2d 345, 350–51 (D.C. Cir. 1978) (ratemaking tainted by nonfactual ex parte contact); *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir.) (“Surreptitious efforts to influence an official . . . eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision.”), cert. denied, 368 U.S. 841 (1961); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (violation of “basic fairness” in rulemaking proceeding that involved resolution of conflicting private claims); *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659–60 (D.D.C. 1978) (reversal of agency decision granting discretionary exemption for use of pesticide); *Jarrott v. Scrivener*, 225 F. Supp. 827 (D.D.C. 1964) (reversal of zoning board decision to grant variance to build Soviet embassy in R-1 zone); *E & E Hauling v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 451 N.E.2d 555 (1983), aff'd, 107 Ill. 2d 33, 481 N.E.2d 664 (1985) (ex parte contacts in connection with approval of landfill permit violate “fundamental fairness” statute).

199. Detailed rules of the Federal Communications Commission cover many proceedings other than formal APA adjudication. 47 C.F.R. §§ 1.1200–1.1216 (1990). Additional agency rules which take different approaches to the problem of ex parte contacts include those of the Nuclear Regulatory Commission, 10 C.F.R. § 2.780 (1991); Consumer Product Safety Commission, 16 C.F.R. §§ 1012.1–7 (1991); Department of Transportation, 14 C.F.R. §§ 300.2–3 (1991); and Federal Energy Regulatory Commission (FERC), 18 C.F.R. § 385.2201 (1991). The FERC regulations are of particular interest since that agency engages in public utility ratemaking, like the PUC, but finds it possible to prohibit ex parte communication.

200. See CAL. RULES OF PROFESSIONAL CONDUCT 5-300(B) (“A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except in open court . . . .”). In a formal ethics opinion rendered in 1984, the Bar opined: “A lawyer representing either a state agency or an interested party in a pending administrative proceeding may not communicate ex parte with the hearing officer on the merits of the matter or with the agency head if the agency itself is hearing the case . . . . The hearing officer or agency head hearing the case is a ‘judicial officer’ within the meaning of the ethics rule prohibiting ex parte communications.” The ethics opinion also prohibits ex

Adjudicatory ex parte contacts are tolerated, sometimes encouraged, in several California agencies. Contacts between outsiders and agency heads (many of whom are part-timers and most of whom are nonlawyers) concerning pending cases certainly occur from time to time.<sup>201</sup> Historically, perhaps the most important example is Public Utilities Commission practice. Some commissioners allowed litigants outside the Commission (both utilities and consumers) to communicate with them ex parte, but the nature and content of these written or oral communications were never disclosed. These communications concerned the merits of pending individualized ratemaking cases that were the subject of a trial-type adjudicatory process. In my interviews with PUC staff, I found widespread discomfort, even embarrassment, with the PUC's prior ex parte practice.<sup>202</sup>

For years the PUC emphatically opposed legislative attempts to impose curbs on its ex parte practice,<sup>203</sup> although it occasionally

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part communications to the agency heads during the time they are considering a proposed decision. CAL. COMPENDIUM ON PROF. RESPONSIBILITY, State Bar Formal Op. No. 1984-82.

201. An anecdote: A former attorney on the Attorney General's staff recounts that a colleague was incensed when the agency heads drastically reduced a penalty proposed by an ALJ in a case he had tried. This followed shortly after a luncheon between the agency head and the defense lawyer, who had known each other for years. The colleague later asked the agency head about the luncheon and whether the case was discussed. The agency head exclaimed, "Of course—what else would we talk about?"

202. I have been informed that the Texas Railroad Commission, which makes rates for transportation providers and pipelines in Texas, strictly prohibits ex parte contact in connection with its ratemaking activity.

203. See *Interim Hearing on PUC Process Proposals—Ex Parte and Administrative Law Judge Reform: S.B. 1125 and 1126 Before Senate Comm. on Energy and Pub. Util.* 26–30 (Dec. 15, 1989) (statement by PUC President Mitchell G. Wilk). Wilk said: "We cannot establish regulatory policy in a vacuum. California deserves better and deserves informed decisions and an open decisionmaking process. Given the complexity and broad impact of our decisions, anything less, I fear, would be a travesty for ratepayers' utilities and California's economy as a whole." *Id.* at 28.

These hearings contain numerous statements by utility representatives in favor of free ex parte access to commissioners during contested individualized ratemaking cases. For example, a representative of the California Cable Television Association said:

Now, we had the opportunity for ex parte contacts and we did, in fact, employ them. . . . And the commissioners were very forthcoming in giving us an opportunity to listen because, you know, as a practical matter the commissioners don't read the record . . . . So having the ex parte contact for us meant that at least our concern was heard by the people who are making the decision because they wouldn't normally read the briefs, they wouldn't normally see the record, and so they wouldn't normally hear about what we want them to be concerned about. And frankly, I don't think there's anything wrong with that.

*Id.* at 73–74.

barred such contacts in sensitive cases. However, a new era recently dawned at the PUC with its adoption of a rule regulating ex parte contacts.<sup>204</sup> This rule does not prohibit such contacts, but it requires disclosure of all oral ex parte contacts in ratemaking cases.<sup>205</sup> The new rule's disclosure obligation should discourage many oral ex parte communications and will place the remaining communications on the record, where they can be rebutted by other parties. While I applaud this sharp break from prior PUC culture, I do not believe that the PUC went far enough; it should have entirely prohibited oral ex parte contacts during individualized ratemaking proceedings.

In defense of the prior practice, as well as its decision in the new rule to permit oral ex parte contacts (but require them to be disclosed), the PUC argues that its ratemaking proceedings are "legislative,"<sup>206</sup> not adjudicative, even though they are resolved through trial-type hearings before ALJs with appeal to the PUC agency heads.<sup>207</sup> However, this rationale is dubious; procedural due

204. California Pub. Util. Comm'n, Decision 91-07-074 (July 31, 1991).

205. The disclosure rule applicable to ratemaking goes into effect at the time of commencement of the proceeding. It requires the party making the communication to file within three days a notice of the contact disclosing the party's (but not the decision-maker's) communication and its content. The prohibition applies equally to outsiders and to the Commission's Division of Ratepayer Advocates. Significantly, however, the rule does not inhibit communications between the parties and the Commission Advisory and Compliance Division (CACD); CACD staff members are available to advise the Commission and, therefore, could serve as a conduit of undisclosed ex parte communication between outside parties and Commission decision-makers. The rule also bans all ex parte contacts in enforcement cases.

206. The courts have labelled ratemaking as legislative for numerous purposes. See Colorado Interstate Gas Co. v. Federal Power Comm'n, 324 U.S. 581, 589 (1945) (freedom of agency to establish formulas for cost allocation); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) (ratemaking is legislative so not reviewable as judicial decision); Camp Meeker Water Sys., Inc. v. Public Util. Comm'n, 51 Cal. 3d 845, 852 n.3, 799 P.2d 758, 761 n.3, 274 Cal. Rptr. 678, 681 n.3 (1990) (determination of property rights in ratemaking proceeding is *not res judicata*); Consumers Lobby Against Monopolies v. Public Util. Comm'n, 25 Cal. 3d 891, 909-12, 603 P.2d 41, 51-54, 160 Cal. Rptr. 124, 134-36 (1979) (inappropriate and impractical to award attorney's fees to intervenors in ratemaking cases); Wood v. Public Util. Comm'n, 4 Cal. 3d 288, 481 P.2d 823, 93 Cal. Rptr. 455 (1971) (ratepayer has no due process right to hearing when PUC adopts credit rule proposed by utility); Southern Pac. Co. v. Railroad Comm'n, 194 Cal. 734, 231 P. 28 (1924) (statute prohibiting rate reductions does not apply to reparation proceedings).

However, in Horn v. County of Ventura, 24 Cal. 3d 605, 612-15, 596 P.2d 1134, 1137-39, 156 Cal. Rptr. 718, 721-23 (1979), the court held that a county's approval of a subdivision map was adjudicative, not legislative, so that adjacent landowners had the right to notice and fair hearing. The parallel to individualized ratemaking is obvious.

207. I do not defend the PUC's decision to use trial-type procedure, with unlimited cross-examination of witnesses, to resolve all issues in ratemaking cases. Many of the

process requires trial-type hearings for resolution of disputed issues of fact in cases of individualized ratemaking,<sup>208</sup> and the legislature clearly intended that such hearings occur.<sup>209</sup>

The PUC argues that many of the issues resolved during ratemaking proceedings are questions of discretion or policy rather than ascertainment of fact. Yet the Commission uses adjudicatory procedure rather than rulemaking procedure to resolve those issues. It is quite typical for agencies to make policy through adjudication,<sup>210</sup> yet when they do so they must respect adjudicative forms by limiting policy communications from the parties to briefs and arguments.

The commissioners also argue that they are isolated and need ex parte contacts to obtain information about the realities of the industry to help them regulate properly. Of course, no one favors placing the commissioners in an ivory tower. They can and should gather information and hear the views of anybody they want to hear

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issues in such cases could be more efficiently resolved through nontrial processes including generic rulemaking. *See generally* Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21 (making many suggestions for streamlining adjudicative ratemaking). Similarly, such issues might be resolved in conference hearings. *See supra* section II.B.2. Conference hearings are particularly appropriate where there is no disputed issue of adjudicative fact, but only issues of legislative fact or policy, such as questions relating to permissible rate of return or ratemaking methodology. However, even if the conference format is used in individualized ratemaking, ex parte contact should not be permitted. *See* 1981 MSAPA, *supra* note 17, § 4-402.

208. *See* Morgan, *supra* note 207, at 54. In *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245-46 (1973), the Supreme Court distinguished generalized from individualized ratemaking:

[T]hese decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other. . . . No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances . . . [so a trial-type hearing was not required].

Numerous cases have applied procedural due process standards to the determination of factual issues in individualized ratemaking. *See, e.g., Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548 (1945) (due process not violated by PUC's use of expertise in drawing conclusions); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937) (violation of exclusive record principle by taking judicial notice of price trends without opportunity to rebut); *Morgan v. United States*, 298 U.S. 468 (1936); *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 91-94 (1913) (Commission cannot resolve factual issue on its own knowledge).

*Horn v. County of Ventura*, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) is quite relevant. It holds that approval of a subdivision map is adjudicative, not legislative, thus triggering due process rights for both the applicant and surrounding affected landowners.

209. CAL. PUB. UTIL. CODE §§ 311, 454-55, 1704-05 (West 1975 & Supp. 1992).

210. *See infra* section IV.D.1.

in the course of performing their numerous functions, such as generalized rulemaking, planning, budgeting, policymaking, or dealing with the legislature and the governor. Nevertheless, when the commissioners set out to make the rates for a single utility through a structured adjudicatory decision-making process, they should be limited to on-the-record submissions. Anyone who wants to influence them with respect to that matter can do so by offering testimony at the hearing or submitting a brief. There is no need for the commissioners to get their information or arguments in a form that does not allow other interested parties to know of these inputs and, if they wish, to rebut them. The process of adjudication is degraded if decision-makers rely on untested submissions and arguments that may well be false, incomplete, irrelevant, or fallacious. Ex parte contacts can make a mockery of the hearing process because they provide a conduit for litigants to whisper into the ears of the commissioners arguments that might never survive the crucible of an adversary hearing.

The virtual unreviewability of PUC decisions<sup>211</sup> only emphasizes further the need for a fair hearing process. Although the California Supreme Court has yet to address the question of the permissibility of ex parte contacts with PUC commissioners in individualized ratemaking, it seems likely that the Court would regard such contacts in a negative light, as have the federal courts and courts in other states.<sup>212</sup>

211. PUC decisions are reviewed only by petition directly to the California Supreme Court which summarily affirms the vast majority of such cases. The scope of review is also very limited. CAL. PUB. UTIL. CODE §§ 1756-57 (West 1975 & Supp. 1992).

212. For federal cases, see *supra* note 208. The New Hampshire Supreme Court condemned a decision against a utility made on the basis of an ex parte contact. It said: "Due process requires members of the PUC to refrain from *ex parte* communications if such an agency is not only to be, but also to appear to be, impartial." *In re Public Serv. Co.*, 122 N.H. 1062, 1074, 454 A.2d 435, 442 (1982).

In *In re Minnesota Pub. Util. Comm'n*, 417 N.W.2d 274, 280-83 (Minn. Ct. App. 1987), *cert. denied*, 488 U.S. 849 (1988), the court treated contacts by the utility with two commissioners as equivalent to "fraud on the court" and upheld the PUC's power (despite the lack of any statutory authority) to set aside its own decision increasing rates that had been tainted by ex parte contacts. See also *In re Northern States Power Co.*, 414 N.W.2d 383 (Minn. 1987); *Cascade County Consumers Ass'n v. Public Serv. Comm'n*, 144 Mont. 169, 185-93, 394 P.2d 856, 864-69 (1964) (ex parte communication of evidentiary facts by utility to commissioners denied due process—defect cured when court took evidence about meeting), *cert. denied*, 380 U.S. 909 (1965); *Seebach v. Public Serv. Comm'n*, 97 Wis. 2d 712, 717-24, 295 N.W.2d 753, 757-60 (Wis. Ct. App. 1980) (ex parte contact by legislators to PSC improper but not prejudicial); ADMIN. CONFERENCE OF THE U.S., FINAL REPORT, Recommendation 16 (1962) (prohibition on ex parte contacts should extend to ratemaking).

The PUC's new rule that permits oral ex parte contacts but requires them to be disclosed does not go far enough, although it is a vast improvement over a regime of unregulated contacts. The problem with the rule is that a written notice of ex parte communication, prepared by the outsider who communicates with a decision-maker, simply cannot convey the real substance of a lengthy conversation. The notice relates only what the outsider said to the Commissioner—not what the Commissioner responded; thus the notice will contain only half of what transpired. Even if a notice is candid about what the outsider said—a heroic assumption—the notice will surely will be as succinct as possible. A brief summary of what the outsider said during a lengthy meeting cannot include the vital and persuasive details of the presentation or the advocacy techniques that were employed. Such a notice would be difficult to rebut effectively, yet it can leave a lasting impression on the decision-maker who hears it.<sup>213</sup>

## 2. Legislative Recommendation

I recommend that California adopt the 1981 MSAPA provision on ex parte communications<sup>214</sup> with several changes. This provision prohibits adjudicative decision-makers from communicating ex parte with outsiders as well as outsiders from communicating with adjudicators.<sup>215</sup> It allows staff assistance to adjudicators if the assistants do not receive prohibited ex parte communications or violate the exclusive record principle.<sup>216</sup> The section calls for disclosure of prohibited communications<sup>217</sup> (or of communications received by adjudicators before starting to serve<sup>218</sup>) and an opportunity for other parties to rebut them.<sup>219</sup> The balance of this section

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213. Moreover, the rule does not require disclosure of communications between parties and CACD, the commission's advisory staff, thus leaving open a broad avenue of unregulated communication.

214. 1981 MSAPA, *supra* note 17, § 4-213. Variations of this provision have been adopted in Kansas, Tennessee and Washington. KAN. STAT. ANN. § 77-525 (1989); TENN. CODE ANN. § 4-5-304 (1985); WASH. REV. CODE ANN. § 34.05.455(2) (1990).

215. 1981 MSAPA, *supra* note 17, § 4-213(c).

216. *Id.*

217. *Id.* § 4-213(e) requires all written communications to be placed into the record together with responses to the communications. It also requires a memorandum in the record (presumably prepared by the adjudicatory official, not by the outsider) stating the substance of all oral communications received, all responses made, and the identity of each person from whom the adjudicator received a communication. All parties should be advised that these matters have been placed into the record.

218. *Id.* § 4-213(d).

219. *Id.* § 4-213(e).

contains a discussion of some of the policy problems that the drafters of new legislation must resolve.

#### *a. Adjudicators Covered*

The 1981 MSAPA imposes restrictions on "presiding officers," a term which in context is clearly meant to refer to adjudicators at all levels: the officer who conducts the initial hearing (whether or not called an ALJ) and agency employees or agency members who consider appeals from the initial decision.<sup>220</sup>

The difficult issue concerns communications by outsiders with decisional advisers to the adjudicators. The MSAPA permits communications from staff assistants to adjudicators if the "assistants do not (i) receive ex parte communications of a type that the [adjudicator] would be prohibited from receiving or (ii) furnish, augment, diminish, or modify the evidence in the record."<sup>221</sup> The effect of this provision is to prohibit ex parte contacts to decisional advisers as well as adjudicators, since a staff member who has received an ex parte communication is disqualified from serving as an adviser.<sup>222</sup>

This provision could pose significant problems if a party makes an apparently proper ex parte communication to a staff member who is not an adjudicator if that staff member is later tapped as a decisional adviser to an ALJ or to the agency heads. It could then be argued that the staff member is disqualified as an adviser by reason of having received the ex parte communication.<sup>223</sup>

I suggest that this argument should be rejected. Disqualification in such a case might render a badly needed adviser unavailable. As discussed below in the section on internal separation of func-

220. *Id.* § 4-216(d), which refers to the "presiding officer for the review of an initial order," indicates that the term presiding officer means adjudicators at all levels. I suggest that a California statute use the term "presiding officer" to refer only to the person who conducts the initial hearing, which is a more natural meaning for the phrase. The statute should then be drawn so that the prohibition on ex parte contact covers presiding officers, agency heads, and any other person engaged in making adjudicatory decisions.

221. *Id.* § 4-213(b).

222. The federal statute explicitly prohibits ex parte contacts to any "employee who is or may reasonably be expected to be involved in the decisional process." 5 U.S.C. § 557(d)(1)(A) (1988). The recently adopted rules of the PUC permit undisclosed ex parte communications between outsiders and the staff that advises the Commission; this allows outsiders to use the advisers as a conduit to the commissioners and opens a significant loophole in the rule.

223. See Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME L. REV. 351, 377-80 (1981).

tions,<sup>224</sup> it is essential that the APA not unduly constrict advisory resources to adjudicators, especially in complex cases seriously affecting the public interest. Moreover, a party could cause the disqualification of a staff member as an adviser by making an ex parte communication to him; such tactics should not be countenanced. The answer to this problem is that an adviser (like an adjudicator) should disclose any ex parte communications received both while advising on the case and before becoming an adviser.<sup>225</sup> I suggest that the comment to the provision reflect this understanding but also make clear that agency rules could go further and prohibit the participation of a staff adviser who previously received ex parte contacts.<sup>226</sup>

#### *b. Proceedings Covered*

The MSAPA provision prohibits ex parte communications in all cases of adjudication except summary adjudicative proceedings.<sup>227</sup> Therefore, its coverage will vary depending on whether the statute adopts the minimum, intermediate, or maximum approaches to defining adjudication. Under any of those approaches, however, the statute would prohibit ex parte communications in many of the agencies where they now sometimes occur: individualized ratemaking by the PUC, tax adjudications by the Board of Equalization, and individualized land-use and environmental determinations. However, the provision would not apply to rulemaking nor, depending on the approach taken to defining adjudication, to many instances of informal adjudication.<sup>228</sup>

#### *c. Outsiders Covered*

The statute should identify the persons outside the agency who are prohibited from making off-the-record contacts with adjudica-

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224. See *infra* section IV.D.2.

225. 1981 MSAPA, *supra* note 17, § 4-213(d)-(e).

226. In some agencies, cases may last for many years or cases may be related to rulemaking proceedings that occurred years before. In such situations, it might be necessary to limit the period within which communications must be disclosed. For example, the statute might provide that an adviser need not disclose communications received more than one year before being tapped as a decisional adviser.

227. See *supra* section II.B.3.

228. An agency could appropriately adopt rules that expand its prohibition on ex parte contact to certain matters not covered by the APA adjudication sections. Certain rulemaking proceedings can involve adversarial struggles between particular entities, and a prohibition on ex parte contact may be appropriate. See *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). Similarly, the agency may find a prohibition on ex parte contacts appropriate in its informal adjudication.

tory personnel. Under the MSAPA, those persons are any party or "any person who has a direct or indirect interest in the outcome of the proceeding."<sup>229</sup> The term "party" creates few problems: it covers the person to whom the agency action is directed, any person named as a party, or any person allowed to intervene or participate as a party.<sup>230</sup> However, the phrase "direct or indirect interest in the outcome" presents difficulties. Clearly it means something more than being "interested" in the colloquial sense, which would include mere curiosity, academic interest, or abstract political concern. No one would bother to make an ex parte communication without at least that level of "interest." Since the provision clearly did not intend to proscribe communications by everyone in the world, the phrase must mean more than interest in the colloquial sense.

In *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority (PATCO)*,<sup>231</sup> the court interpreted the corresponding provision in federal law ("no interested person outside the agency") in accordance with its legislative history. According to the court, the phrase covers "any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person to [sic] be a party to, or intervenor in, the agency proceeding . . . ."<sup>232</sup>

The agency involved in *PATCO* had decertified a federal government employee union that engaged in an illegal strike. One of the agency heads received an ex parte contact from Albert Shanker, the president of a New York public-sector employees' union. Shanker had no personal financial interest in the case, but he had a strong political interest. He had been making speeches about the case, and his union had an economic interest in the question of the severity of sanctions against unions for illegal strikes. The court held that Shanker was an "interested person outside the agency" because his interest was obviously greater than that of a member of the public at large.<sup>233</sup> The *PATCO* definition, covering any person with an interest beyond that of a member of the general public,

229. The MSAPA also prohibits communications by lower-level adjudicators such as ALJs with agency heads. This provision is addressed *infra* section IV.D.2.e.v. under internal separation of functions.

230. 1981 MSAPA, *supra* note 17, § 1-102(6).

231. 685 F.2d 547 (D.C. Cir. 1982) [hereinafter *PATCO*].

232. *Id.* at 562.

233. *Id.* at 569-70.

seems like the correct approach<sup>234</sup> and might be inserted in the comment to the statute.

It is also important to understand that "direct or indirect interest" is not limited to a monetary interest but includes any degree of involvement whereby the communicator is distinguished from the general public. Thus if the communicator is a friend of a party and makes the communication as a favor, this relationship of friendship would differentiate the communicator from the public; the communication would be prohibited. Similarly, if the issue is environmental and the communicator is involved with an environmental group (whether as staff or volunteer), that involvement would distinguish the individual from the general public.

In *PATCO*, the court reached beyond the APA and, in dictum, created federal administrative common law.<sup>235</sup> It prohibited any contact, by any person, with an adjudicator that is an attempt to directly influence the decision in a pending case.<sup>236</sup> While agencies could adopt rules that prohibit all contacts by anyone, I would not suggest that the statute go that far. A statute banning all ex parte contacts might be too rigid in light of the diversity of proceedings to be covered by the APA. Other considerations include the fact that most contacts from the general public are unlikely to have any significant impact on an agency decision, the need of adjudicators to do research on questions of law and policy, and the burden on adjudicators to log every insignificant phone call or innocent social conversation. If the ex parte contact from a noninterested person concerned facts, it would violate the exclusive record principle; but if it concerned only law, policy, or discretion it should not trigger the various procedures and sanctions attendant on prohibited ex parte contacts (unless an agency rule so requires).<sup>237</sup>

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234. The prohibition should clearly apply to state officials outside the agency in question, including the governor's office or legislators. See generally Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 982, 987-89 (1980) (ex parte presidential involvement should be permissible in rulemaking but not in adjudication).

235. The validity of this dictum is dubious in light of the Supreme Court's admonition to courts not to supplement the APA's adjudication provisions. *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2680 (1990).

236. *PATCO*, 685 F.2d at 570. The Tennessee ex parte statute bans ex parte contacts by "any person." TENN. CODE ANN. § 4-5-304(a) (1991).

237. See Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233, 243-50 (1962).

*d. Communications Covered*

The statute should specify the matters that cannot be the subject of an ex parte communication; it cannot and should not prohibit all contacts between outsiders and agency adjudicators. Realistically, there will always be chance or social encounters; as long as issues in the pending adjudication are not discussed, such contacts are harmless. More importantly, an agency may well have other matters underway with respect to which such contacts are perfectly proper. For example, there might be a pending rulemaking proceeding involving issues of interest to parties who are also engaged in a pending adjudication before the agency. Clearly, a party should not be precluded from participating in the rulemaking proceeding. The ex parte provision is intended not to put adjudicators (especially agency heads) into an ivory tower, but to shield them from communications that could affect a pending adjudication.

The MSAPA seems to adequately identify prohibited contacts. It forbids communications "regarding any issue in the proceeding."<sup>238</sup> This provision allows communications concerning other agency business or social encounters, but prohibits communications too closely tied to the specific issues to be adjudicated. A more difficult problem might arise where the identical issue of law or policy is involved in both a pending adjudication and in a pending rulemaking or other agency function. In such cases, the parties to the adjudication must refrain from making ex parte contacts to adjudicators in the nonadjudicatory matter, but they could still make appropriate communications that would be placed on the rulemaking record. Such communications should also be placed in the adjudicatory record and, if appropriate, served on all parties thereto.<sup>239</sup>

The comment to the MSAPA provision provides that the prohibition on ex parte contact is not intended to apply to "noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service; such topics are not regarded as 'issues,' provided they appear to be non-

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238. 1981 MSAPA, *supra* note 17, § 4-213(a). Similarly, the federal statute prohibits communications "relevant to the merits of the proceeding," and the California provision prohibits communications "upon the merits of a contested matter." 5 U.S.C. § 557(d)(1)(A) (1988); CAL. GOV'T CODE § 11,513.5(a) (West Supp. 1992).

239. Obviously, this problem of overlapping matters is difficult to deal with by a single statutory formula and could present difficult issues in practice. Common sense solutions are in order. See Peck, *supra* note 237, at 248-50.

controversial in context of the specific case.”<sup>240</sup> There should be a similar comment to a new California provision, but the comment might also indicate that agency rules could prohibit even this sort of ex parte contact.<sup>241</sup>

The comment to this section might also cover requests for continuances; I have been told that attorneys frequently make ex parte requests for a continuance on the eve of hearings, and that the judges grant them on a showing of good cause. It is not always practicable, the judges say, to set up a conference call on very short notice to discuss the matter with all parties. Similarly, the judges sometimes communicate with attorneys ex parte to explore such nonsubstantive matters as how long a case will take to try; this helps in arranging the judge’s schedule, particularly if the judge must travel to hear the case.

Finally, agencies should be allowed to make appropriate exceptions to the ex parte prohibition statute to cover problems that are specific to that agency’s practice. For example, in some situations it may be appropriate for adjudicators to take part in settlement negotiations during which ex parte communications are made in confidence. While it may be better practice for settlement negotiations to be conducted by a mediator other than the judge who will hear the case or the agency heads,<sup>242</sup> this approach may not always be practicable.

The federal ex parte statute does not apply to “requests for status reports on any matter or proceeding covered by [the statute].”<sup>243</sup> This provision was intended to protect the ability of members of Congress or their staff to make “status inquiries” on behalf of constituents about pending adjudications.<sup>244</sup> At the same time, the legislative history reveals concern that status inquiries might be used as a subtle method to influence the substantive outcome of a case; in doubtful cases, therefore, the agency official should treat a

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240. See *Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) (letters concerning noncontroversial procedural question not prohibited ex parte communication because did not concern merits).

241. An agency is likely to have nondecision-making personnel who can answer such questions. Consequently, ex parte contact with decision-makers is not essential.

242. The general practice of OAH is to assign a settlement ALJ to a case; if the case is not settled, a different judge will hear the case. However, in non-OAH agencies, this may not always be practical. Moreover, agency heads may participate in settlement negotiations and they should not be disqualified from then deciding the case or even be required to disclose statements made ex parte during the negotiations.

243. 5 U.S.C. § 551(14) (1988).

244. See Peck, *supra* note 237, at 262–66.

status inquiry as an ex parte contact to protect the integrity of the decision-making process.<sup>245</sup>

My preference would be to ban legislative "status inquiries" to adjudicators.<sup>246</sup> Legislative status inquiries distract agency personnel and unfairly turn their attention to the matter inquired about as compared to other matters on the docket. They seem inherently dangerous, since agency heads must be attentive to the wishes of influential legislators and might be influenced even by the hint of legislative interest in a case.<sup>247</sup> Besides, status inquiries to adjudicators serve no useful purpose, except to give legislators a way to do favors for constituents. The same information could be obtained easily from someone other than an adjudicator (such as a docket clerk). I therefore suggest that the comment to the section explicitly treat legislative status inquiries to adjudicators as prohibited ex parte contacts.

#### *e. When the Ban Goes into Effect*

An ex parte contacts provision must clearly state when it goes into effect. Parties may legitimately negotiate off-the-record with adjudicators—such as agency heads—about the settlement of a dispute before it is set for a hearing. It should be equally permissible to conduct such negotiations after the adjudication process is complete (for example, negotiations concerning remedies or judicial appeal).

Both the California APA and 1981 MSAPA provisions apply "while the proceeding is pending," and both provisions require adjudicators to place into the record communications received before serving that could not have been properly received while serving.<sup>248</sup> Presumably, a proceeding is "pending" when it has "commenced"

245. See *PATCO*, 685 F.2d 547, 563, 565 n.38, 568 (D.C. Cir. 1982).

246. See 3 K. DAVIS, *supra* note 79, § 18.7. Status inquiries by others, such as parties, would be permissible under the exception for "noncontroversial matters of procedure and practice," discussed above. See *Raz Inland Navigation Co. v. ICC*, 625 F.2d 258 (9th Cir. 1980). However, it would be permissible for agency rules to prohibit status inquiries to adjudicators, on the grounds that such inquiries are both unnecessary (since they can be addressed to persons other than adjudicators) and might be viewed as a method to influence a decision. See *PATCO*, 685 F.2d at 568; *supra* text accompanying note 243.

247. That argument would suggest a ban on legislative status inquiries even to non-adjudicators, such as docket clerks. However, such a ban would probably go too far in restricting normal and legitimate legislative activities on behalf of constituents.

248. 1981 MSAPA, *supra* note 17, § 4-213(c)-(d). Thus, if the agency heads engaged in settlement negotiations or other ex parte contacts before the proceeding began, they should place into the record all written communications and a memo stating the

by appropriate notice to the parties.<sup>249</sup> I believe that the MSAPA adequately deals with the timing problem; in this respect it would not alter the California APA.<sup>250</sup>

*f. Sanctions for Violation*

The 1981 MSAPA provision specifies certain sanctions for violation of the ex parte communication provision: disclosure of written and oral communications,<sup>251</sup> possible disqualification of the adjudicator,<sup>252</sup> and reporting of willful violators for disciplinary proceedings.<sup>253</sup> It also encourages agencies to provide by rule for additional sanctions, including default.<sup>254</sup> The federal APA provides that the adjudicator "may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of [the] violation."<sup>255</sup>

In *PATCO*,<sup>256</sup> which is the leading federal case on ex parte contacts, the court of appeals experienced great difficulty in determining an appropriate sanction. As in numerous earlier cases, the court remanded the case for a hearing before a specially appointed

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substance of all oral proceedings, unless agency rules contain an exception for settlement negotiations. *See supra* note 242 and accompanying text.

The federal statute provides that the ban goes into effect when the agency designates, but in no case later than the time the proceeding is noticed for hearing, unless the person responsible knows it will be noticed, in which case it applies beginning at the time he acquires such knowledge. 5 U.S.C. § 557(d)(1)(E) (1988).

249. *See* 1981 MSAPA, *supra* note 17, § 4-102(d) (explaining when an adjudicatory proceeding commences).

250. The timing problem is illustrated by *Vandygriff v. First Sav. & Loan Ass'n*, 617 S.W.2d 669 (Tex. 1981). In *Vandygriff*, the applicants for a bank charter made an ex parte contact to the adjudicator after their application had been dismissed. They then filed a new application that the agency granted. The lower court invalidated the grant because of ex parte contacts. 605 S.W.2d 740 (Tex. Civ. App. 1980). It held that the proceeding was "just one ongoing application." *Id.* at 742. But the Texas Supreme Court held that no proceeding was pending at the time of the ex parte contact. 617 S.W.2d at 672. The 1981 MSAPA, *supra* note 17, § 4-213(a) & (d), would not prohibit the contact or invalidate the proceeding in such a case, but would require disclosure of the contact upon commencement of the new application proceeding.

251. 1981 MSAPA, *supra* note 17, § 4-213(e).

252. *Id.* § 4-213(f). In such case, it is permissible to issue a protective order that seals the portion of the record pertaining to the communication.

253. *Id.* § 4-213(g).

254. *Id.*

255. 5 U.S.C. § 557(d)(1)(D) (1988). The existing California APA provides only for disclosure and possible disqualification of the ALJ. CAL. GOV'T CODE § 11,513.5(d)-(e) (West Supp. 1992).

256. *PATCO*, 685 F.2d 547 (D.C. Cir. 1982).

judge to ascertain the nature and extent of the prohibited contacts. That hearing, at which adjudicators had to recount and justify their every conversation, plus the pungent criticism in the appellate decision, were themselves significant sanctions. However, it seemed pointless to the court to remand for an entirely new proceeding because the contacts were designed to assist the party (a union) that lost the case. In addition, there was no reasonable likelihood that the contacts had influenced the vote of any of the adjudicators.

I believe that the MSAPA provision is sufficiently explicit in providing for sanctions. It would be difficult for an ex parte provision to be more explicit, due to the range of adjudicatory matters that it would cover and the diversity of situations in which it would arise (as illustrated by *PATCO*).<sup>257</sup> It makes sense to encourage each agency, as the MSAPA does, to provide by rule for its own set of sanctions beyond those spelled out in the APA. This approach leaves appellate courts free to order sanctions that they find appropriate for a particular case, including remand for a special hearing on the nature and extent of the contacts, remand for a new hearing or a new agency appeal, or default, disqualification, or downgrading of an applicant.

### C. Bias

#### 1. Existing California Law and Practice

An essential element of adjudication is that a decision-maker be impartial.<sup>258</sup> Historically, a decision-maker has been found to be biased if he or she had a pecuniary interest in the decision,<sup>259</sup> was

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257. For discussion of criminal or civil sanctions for ex parte contact, see Peck, *supra* note 237, at 268–73. I would not favor an across-the-board criminal or civil sanction (such as removal from office or disbarment from practice before an agency) for ex parte contacts, in light of the great diversity of matters to be covered by the APA. However, stronger sanctions might be appropriate with respect to specific agencies where the APA provisions and professional ethical standards fail to serve as a sufficient disincentive. For example, an agency should have power by rule to sanction persons appearing before it for prohibited ex parte contacts by suspending or disbarring them from practice before that agency. Of course, the practitioner would be entitled to a fair trial-type process before such a sanction goes into effect.

258. See 3 K. DAVIS, *supra* note 79, § 19; Maloney, *Disqualification of Administrative Law Judges in California*, 16 U.S.F. L. REV. 229, 243–59 (1982); Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D.L. REV. 551 (1991); Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 1010–27 (1990).

259. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (decision in case would enhance prospects in judge's own separate lawsuit); Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 828, 623 P.2d 165, 178, 171 Cal.Rptr. 604, 617 (1981) (arbitrator required to be member of union that was party to arbitration—fails to provide 'minimum levels

personally embroiled in the dispute,<sup>260</sup> had a familial relation to a party, prejudged the facts in issue<sup>261</sup> or had some personal animus against a party.<sup>262</sup> Factual prejudgment must be distinguished from permissible prejudgment of law or policy<sup>263</sup> or of commonly accepted legislative facts, such as whether segregated education is harmful to children or noise pollution exists at an airport near the judge's home.<sup>264</sup>

The disqualification of biased decision-makers clearly renders the process more acceptable to the parties. It also serves the cause of accuracy, since by hypothesis a biased judge may not produce the right decision. However, the provisions relating to disqualification for bias must be carefully designed; certain alternatives may result in confusion and delay which would reduce efficiency.

California's existing APA<sup>265</sup> calls for voluntary disqualification of either an ALJ or an agency member who cannot "accord a fair and impartial hearing or consideration."<sup>266</sup> The Act allows the bias issue to be raised by any party by filing a particularized affidavit

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of integrity'); University Chrysler-Plymouth, Inc. v. New Motor Vehicle Bd., 179 Cal. App. 3d 796, 224 Cal. Rptr. 908 (1986) (mandatory membership of new car dealers on board). Existing statutory law and agency conflict of interest codes provide adequate protection against financial bias of state or local decision-makers. See CAL. GOV'T CODE §§ 87,100, 87,103, 87,300 (West 1987).

260. See Gray v. City of Gustine, 224 Cal. App. 3d 621, 631-32, 273 Cal. Rptr. 730, 736 (1990) (city manager was personally involved in dispute with police chief); Mennig v. City Council, 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (1978) (city council embroiled in dispute).

261. See, e.g., Perlman v. Shasta Joint Junior College Dist., 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970).

262. See Comment, *Countering Prejudice in an Administrative Decision*, 5 U.C. DAVIS L. REV. 45 (1972).

263. Andrews v. Agricultural Labor Relations Bd., 28 Cal. 3d 781, 789-91, 623 P.2d 151, 155-56, 171 Cal. Rptr. 590, 594-95 (1981) (permissible for adjudicator to have crystallized view about law or policy); City of Fairfield v. Superior Court, 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975) (permissible for city council members to prejudge issue of discretion and public interest); CEEED v. California Coastal Zone Conserv. Comm'n, 43 Cal. App. 3d 306, 328-29, 118 Cal. Rptr. 315, 330-32 (1974) (commitment to halting coastline development is not bias).

264. See 3 K. DAVIS, *supra* note 79, § 19.2; Strauss, *supra* note 258, at 1013-16.

265. CAL. GOV'T CODE § 11,512(c) (West 1980 & Supp. 1992).

266. Many non-APA agencies make similar provision by regulation. See Maloney, *supra* note 258, at 229, 234-35, 271-90.

prior to the taking of evidence<sup>267</sup> and it provides for a rule of necessity.<sup>268</sup>

## 2. Legislative Recommendation

I recommend adoption, with some important modifications, of the 1981 MSAPA provision on disqualification for bias.<sup>269</sup> The following material discusses some of the policy problems in drafting a provision relating to challenges for bias.

### *a. Grounds for Disqualification*

The MSAPA provision states that a presiding officer is disqualified for "bias, prejudice, interest, or any other cause provided in this act." In comparison, the existing California APA calls for disqualification if an ALJ or agency member "cannot accord a fair and impartial hearing or consideration,"<sup>270</sup> a standard that has been interpreted to mean about the same thing as the MSAPA terms "bias, prejudice, or interest." It would appear that the MSAPA language furnishes somewhat better guidance to those who must decide whether to disqualify for bias.

The MSAPA adds that the presiding officer can be disqualified for any cause for which a judge is or may be disqualified.<sup>271</sup> Whether the new California APA should follow the judicial disqualification standards presents a difficult issue. In my view, it should not, because the application of the judicial disqualification statute<sup>272</sup> to agency adjudicators is likely to cause difficulty and confusion.<sup>273</sup> An APA which must cover the vast field of adminis-

267. For discussion of procedure in seeking disqualification for bias, see CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA ADMINISTRATIVE HEARING PRACTICE § 3.15 (1984).

268. "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." CAL. GOV'T CODE § 11,512(c) (West 1980 & Supp. 1992).

269. 1981 MSAPA, *supra* note 17, § 4-202(b)-(e). Tennessee recently adopted this provision. TENN. CODE ANN. § 4-5-302 (1991) (prohibiting the questioning of an agency member about grounds for disqualification unless the member agrees to such questions). Kansas also adopted a version of this provision. KAN. STAT. ANN. § 77-514 (1989).

270. CAL. GOV'T CODE § 11,512(c) (West 1980 & Supp. 1992); *see also* 1981 MSAPA, *supra* note 17, § 4-202(b).

271. The recently adopted Kansas statute is modeled on the MSAPA, but does not contain a cross-reference to judicial disqualification standards. KAN. STAT. ANN. § 77-514 (1989).

272. CAL. CIV. PROC. CODE § 170.1(a) (West Supp. 1992).

273. *See, e.g.*, Schweiker v. McClure, 456 U.S. 188, 197 n.11 (1982) (refusing to apply judicial disqualification standards in administrative context).

trative adjudication should not be too rigid. It must set an appropriate standard for adjudicators who have other responsibilities besides judging, who have legitimately played multiple roles in the case, or who may have recently worked in different capacities.

For example, the judicial disqualification statute recuses a person who has personal knowledge of disputed evidentiary facts concerning the proceeding.<sup>274</sup> If applied to administrative adjudicators, this provision would require agencies and courts to draw difficult distinctions. They would have to distinguish between "evidentiary" and other "facts"<sup>275</sup> and would have to find a way to permit judging by adjudicators who obtained personal knowledge of the facts while carrying out legitimate administrative functions, such as serving as an administrative judge in a previous case involving similar issues, making preliminary determinations to order an investigation or hold a hearing, or engaging in rulemaking or testifying before the legislature.<sup>276</sup>

Similarly, under the judicial disqualification statute, a judge who has served as a lawyer in the proceeding is disqualified. This category includes service in any other proceeding involving the same issues and the same party or giving advice to any party on a matter involved in the proceeding.<sup>277</sup> It is not clear how this requirement might affect an adjudicator who previously served as an attorney for the agency or another agency and worked on a different matter involving the same party and similar issues. The PUC, environmental agencies, and various benefit-disbursing agencies work on cases that involve the same parties over and over again, and adjudicators who worked in different roles in earlier cases should not

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274. CAL. CIV. PROC. CODE § 170.1(a)(1) (West Supp. 1992). The judge is deemed to have personal knowledge if the judge, the judge's spouse, or a person within the third degree of relationship to either of them, is likely to be a material witness in the proceeding.

275. See Strauss, *supra* note 258, at 1013–16 (distinction between adjudicative and legislative facts).

276. See *id.* at 1013–14, 1020–22.

277. CAL. CIV. PROC. CODE § 170.1(a)(2) (West Supp. 1992). If the judge served as a lawyer or officer of a public agency which is a party, he is deemed to have served as a lawyer if he personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding. *Id.* The federal judicial disqualification statute reaches a result that is more acceptable in the administrative context. It disqualifies a federal judge "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(3) (1988). Thus the only disqualifying governmental service would be activity relating to the particular case being adjudicated.

be disqualified. Here again the judicial disqualification statute would probably cause confusion and possible inconvenience.

One provision in the judicial disqualification statute might be suitable for transplantation into the administrative arena. A judge is to be disqualified where a reasonable person would entertain a doubt regarding the ability of the judge to be impartial.<sup>278</sup> This provision would conflict with existing California administrative law, which disqualifies an adjudicator only upon proof of actual bias rather than mere appearance of bias.<sup>279</sup>

The argument for using an appearance of bias standard is that actual bias is difficult to prove (absent some careless statement that betrays it).<sup>280</sup> If objective factors indicate that a reasonable person would doubt the adjudicator's impartiality,<sup>281</sup> disqualification might

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278. CAL. CIV. PROC. CODE § 170.1(a)(6)(C) (West Supp. 1992). Bias toward a lawyer or toward a witness can also be grounds for disqualification. *Id.* § 170.1(a)(6); *In re Henry C.*, 161 Cal. App. 3d 646, 653, 207 Cal. Rptr. 751, 755 (1984). The California provision is similar to the federal judicial standard: "Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1988).

See *United Farm Workers v. Superior Court*, 170 Cal. App. 3d 97, 216 Cal. Rptr. 4 (1985). This case refused to disqualify a judge in a lawsuit by a grower against a union arising out of a strike because the judge's wife had worked for the grower during the strike. The case points out the close similarity of the California and federal standards for disqualification of judges.

279. See *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal. 3d 781, 792-93, 623 P.2d 151, 156-58, 171 Cal. Rptr. 590, 595-96 (1981). The *United Farm Workers* case points out the inconsistency of CAL. CIV. PROC. CODE § 170.1(a)(6)(C) (West Supp. 1992) with *Andrews*.

280. It is improper to voir dire an adjudicator to develop evidence of bias. *Feist v. Rowe*, 3 Cal. App. 3d 404, 414, 83 Cal. Rptr. 465, 471 (1970).

281. See *United Farm Workers*, 170 Cal. App. 3d at 104, 216 Cal. Rptr. at 10 (citing federal cases for the position that the test is how the "average person on the street" views a judge's participation in a case").

be appropriate,<sup>282</sup> even though only an appearance of bias, rather than actual bias, is shown.<sup>283</sup>

My view is that the appearance of bias standard is too fuzzy to be applied in the administrative context.<sup>284</sup> As a result, it would encourage litigation. For example, consider the problem of professional licensing boards. Most members of such boards are themselves practitioners in the licensed profession and many are active members of trade associations consisting of members of the profession. It is not difficult to contrive arguments that they or their organizations might have some pecuniary interest in a given case.

A line of Washington cases illustrates these problems. That state adopted an appearance of fairness standard in administrative law (particularly in local zoning cases), forcing its courts to decide an unending stream of close and difficult cases.<sup>285</sup> Similarly, the

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282. In *Andrews*, 28 Cal. 3d 781, 623 P.2d 151, 171 Cal. Rptr. 590, a pro tempore ALJ came from a law firm that seemed to have a heavy commitment toward the rights of Hispanic workers. He sat in a case involving the interests of the United Farm Workers union, which represented the interests of farm workers who are mostly Hispanic. Then the ALJ returned to his practice after acting as a judge in that one case. A reasonable person might question the judge's impartiality since a decision in the case might have a substantial positive or negative effect on his law practice. The California Supreme Court held that these facts did not establish actual bias and upheld the ALRB's decision not to disqualify the pro tem ALJ. *Id.* at 794, 623 P.2d at 158, 171 Cal. Rptr. at 597. The dissenting judges in *Andrews* argued that the ALJ's impartiality could reasonably be questioned. *Id.* at 801, 623 P.2d at 162, 171 Cal. Rptr. at 601 (Clark, J., dissenting). The standard applicable to judges in CAL. CIV. PROC. CODE § 170.1(a)(6)(C) (West Supp. 1992) could mandate disqualification in such a case.

283. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (emphasis added) (citations omitted):

This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both *the appearance and reality of fairness*, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

284. On this issue the Law Revision Commission has voted to disagree with me and to include the judicial disqualification provision in the APA draft that it will present to the legislature.

285. See Alkire, *Washington's Super-Zoning Commission*, 14 GONZ. L. REV. 559 (1979); Vache, *Appearance of Fairness: Doctrine or Delusion?*, 13 WILLAMETTE L. REV. 479 (1977); Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533 (1986). The Washington courts have struggled mightily to apply the appearance of fairness doctrine. For a sampling of the cases, all of which reversed

federal standard has been held to require disqualification of a judge even though the judge was unaware of the facts creating the appearance of impropriety.<sup>286</sup> The costs of trying to impose the judicial system, in my view, would outweigh the benefits.

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agency action under the appearance of fairness doctrine, see *Zehring v. City of Bellevue*, 99 Wash. 2d 488, 663 P.2d 823 (1983) (member bought 1000 shares of stock in publicly traded permit applicant after approval of application), *vacated on other grounds*, 103 Wash. 2d 588, 694 P.2d 638 (1985); *Save a Valuable Env't v. City of Bothell*, 89 Wash. 2d 862, 576 P.2d 401 (1978) (members were active in Chamber of Commerce which supported application); *Chicago, Mil., St. P. & Pac. R.R. v. Washington State Human Rights Comm'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976) (member of hearing panel had job application on file with Commission); *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974) (one member worked for a bank that held mortgage on rezoned property); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972) (member employed by applicant two days after voting on application); *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 480 P.2d 489 (1971) (one commission member accepted a free trip, one was friendly with one of the applicants, one had taken a position on the merits before being appointed, but disqualified himself from the decision); *Fleck v. King County*, 16 Wash. App. 668, 558 P.2d 254 (1977) (spouses on the board voted the same way—marriage is an “entangling influence”).

As one concurring opinion put it:

[T]he appearance of fairness doctrine has outworn its utility and should be abandoned . . . . The scope of appearance of fairness has been vague and uncertain. Under the best of circumstances, “appearance of fairness” is a totally subjective standard. . . . [O]ur attempts at objective standards have resulted in creating distinctions which give the appearance of being more oriented toward result than fairness. . . . “[T]he court has premised judicial decision entirely on matters having no more reality than the shadows in Plato’s cave.”

*Westside Hilltop Survival Comm. v. King County*, 96 Wash. 2d 171, 181–82, 634 P.2d 862, 867–68 (1981) (Dolliver, J., concurring) (citations omitted).

286. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988). In this case, a federal judge was a member of the board of trustees of a university that would benefit if litigation before the judge was decided favorably to one of the parties. The judge had forgotten about the university’s interest in the matter, but was reminded by a communication from the university *after* he had already decided the case. The Court held that the error could not be considered harmless, that the judgment must be vacated, and that the case had to be retried before a different judge. *But see Leland Stanford Junior Univ. v. Superior Court*, 173 Cal. App. 3d 403, 219 Cal. Rptr. 40 (1985) (judge who had been active in Stanford’s alumni affairs not disqualified under appearance of bias standard from hearing case involving university). *Liljeberg* and *Stanford* illustrate that cases under the “appearance of bias” standard are highly fact-specific. Particularly if interpreted so that the judge need not be aware of the circumstances, the standard will invite many litigants to make claims that a judge must be disqualified for bias. The resolution of these claims, which are wholly peripheral to the merits, will consume considerable resources.

*b. The Rule of Necessity*

Existing California law allows a biased decision-maker to act if disqualification would prevent the agency from acting.<sup>287</sup> Nevertheless, it is undesirable to allow a decision by a biased decision-maker. The MSAPA contains a clever solution to this problem which allows it to abolish the rule of necessity: the "appointing authority" can appoint a substitute to hear the case. Thus, if a majority of the agency heads were disqualified, and if the governor appoints the members of that agency, the governor must appoint a person or persons to act in the case.<sup>288</sup> This seems like an excellent provision, although it might not work in the case of the Insurance Commissioner, who is elected.<sup>289</sup>

*c. Who Decides Disqualification Motions*

In many cases, a challenged adjudicator voluntarily withdraws from the case. If the adjudicator decides not to disqualify him or herself, however, an important issue is whether the disqualification motion should be decided by the challenged person or by a different adjudicator. The California and federal APAs and the MSAPA all allow challenged judges to decide whether to disqualify themselves.<sup>290</sup> If an agency head is challenged, the issue is determined by the other members of the agency under the California APA but by the challenged adjudicator under the MSAPA.<sup>291</sup>

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287. CAL. GOV'T CODE § 11,512(c) (West 1980 & Supp. 1992). See, e.g., Caminetti v. Pacific Mut. Life Ins. Co., 22 Cal. 2d 344, 366, 139 P.2d 908, 919-20, *cert. denied*, 320 U.S. 802 (1943) (insurance commissioner is only official who can reorganize insurance company even though he owns a policy written by the company); Feist v. Rowe, 3 Cal. App. 3d 404, 414, 83 Cal. Rptr. 465, 417 (1970) (disqualification of school board members would prevent Board from acting); Gonsalves v. City of Dairy Valley, 265 Cal. App. 2d 400, 404-05, 71 Cal. Rptr. 255, 258-59 (1968) (councilmen owned stock in corporation to which they awarded conditional use permit).

288. 1981 MSAPA, *supra* note 17, § 4-202(e)-(f); see International Harvester Co. v. Bowling, 72 Ill. App. 3d 910, 391 N.E.2d 168 (1979); *In re Rollins Envtl. Serv., Inc.*, 481 So. 2d 113 (La. 1985) (upholding statutes that allow the governor to replace an agency head who is disqualified for bias).

289. The MSAPA appointment provision should not present problems for the Board of Equalization, even though it is elected, since the disqualification of a single member or several members would not disable the Board from acting.

290. CAL. GOV'T CODE § 11,512(c) (West 1980 & Supp. 1992). In the infrequent case in which an ALJ sits with the agency heads to hear a case, the agency heads make the decision.

291. In the case of judges, a disqualification motion is decided by a different judge. CAL. CIV. PROC. CODE § 170.3(c)(5)-(6) (West Supp. 1992).

Ideally, no adjudicator should decide whether he or she is biased since this makes such persons judges in their own case.<sup>292</sup> Yet if the matter must be assigned to a different judge for decision, a bias challenge creates an easy technique for achieving delay. As a result, it is probably better to allow judges to decide whether or not to disqualify themselves. After all, that decision will be reviewable upon appeal to the agency heads and again on judicial review.<sup>293</sup> As for challenges to agency members in agencies with several heads, I prefer the existing California rule that allows the other members to make the decision, rather than the MSAPA approach, which allows the agency head to decide whether to disqualify him or herself.<sup>294</sup>

#### *d. Peremptory Challenges*

California law allows one peremptory challenge of a judge for prejudice.<sup>295</sup> It can be argued that such a procedure is appropriate in administrative law as well because of the difficulty of establishing

292. Disqualification motions sometimes raise factual controversies, such as whether a judge actually made a particular statement evidencing prejgment or animus. In *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal. 3d 781, 789, 623 P.2d 151, 155, 171 Cal. Rptr. 590, 594 (1981), the ALRB regulation in question required the judge to accept the factual statement in the movant's affidavit. *See also* 28 U.S.C. § 144 (1988). Where the adjudicator must pass on the disqualification motion him or herself, it makes sense to require the judge to accept the facts stated rather than to conduct a mini-hearing about whether a particular statement was ever made. However, it is troubling that a movant could disqualify an adjudicator by making patently false factual statements.

293. However, in agencies with a large staff of in-house judges, there might be no problem in allowing a different judge to make the decision. Therefore, the statute should allow an agency with in-house judges to adopt rules whereby disqualification decisions could be assigned to a different judge than the one sought to be disqualified. Seven California agencies provide that agency heads or supervising judges decide disqualification motions. Maloney, *supra* note 258, at 263 n.164. In such situations, it should be possible to conduct an actual hearing on the truthfulness of the factual statements made in the affidavit. *See supra* note 292. In the case of OAH ALJs, however, I believe that the judge should make the initial decision whether to disqualify him or herself.

294. Of course, the California version of the statute raises the specter of agency members voting to disqualify their colleague because of some difference in policy rather than because of bias. However, this still seems better than allowing the challenged member to decide whether he is biased. In agencies headed by a single person, there is nobody to decide whether the person should be disqualified other than the agency head himself.

295. CAL. CIV. PROC. CODE § 170.6 (West 1982 & Supp. 1992). This provision was criticized in Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1469–80 (1981).

bias.<sup>296</sup> In fact, the Workers' Compensation Appeals Board has such a provision.<sup>297</sup>

However, such a system can also be criticized as allowing litigants to judge shop. It can also encourage blanket challenges to a particular judge. In smaller agencies with few judges, an automatic right of disqualification could cause serious difficulties. Such a right would inevitably provide a strategy to obtain delay.<sup>298</sup> Therefore, I do not believe that the statute should require all agencies to provide for peremptory challenges. However, the statute should empower agencies to provide for a peremptory challenge procedure by their own rules.

#### D. *Separation of Functions*

Separation of functions in administrative law refers to structural arrangements that lodge responsibility for prosecution and advocacy in one group of agency personnel (the "adversaries") and responsibility for adjudicatory decision-making in a different group of agency personnel ("the adjudicators"). There are two fundamentally different approaches to separation of functions. An external separation removes the adversaries entirely from agencies that have adjudicating responsibilities. Internal separation leaves these functions within the same agency but prevents the same people from discharging both adversary and adjudicatory functions. This Article rejects external separation of functions as a general principle but favors a statutory requirement of internal separation.

##### 1. External Separation of Functions

Whether to separate the judicial function from the law enforcement function is an issue that has long been debated at the federal level.<sup>299</sup> Numerous California agencies are already structured in a way that separates the adjudicatory function from the functions of

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296. Maloney, *supra* note 258, at 268.

297. CAL. CODE REGS. tit. 8, § 10,453 (1990).

298. The Workers' Compensation Appeals Board received 1400 peremptory challenges in a single year. Maloney, *supra* note 258, at 269 n.185.

299. Such separation was squarely rejected by the seminal Attorney General's Committee. ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 8, at 56-58. It was repeatedly proposed during the 1950's and 1960's and just as often criticized. See L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 186-87 (3d ed. 1968); Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 979-85 (1991); Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1118-21 (1990). One respected commentator urges that the issue be reconsidered. See Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 267-72.

law enforcement, investigation, and prosecution.<sup>300</sup> However, most licensing agencies combine all of these functions. For example, the Contractors State Licensing Board adopts rules relating to contractors, employs investigators who prepare cases against licensees alleged to have violated the rules, determines whether there is probable cause to believe that a licensee has violated the rules, engages an ALJ from OAH to hear the case and render a proposed decision, and ultimately decides whether or not to revoke a contractor's license. Thus the agency is legislator, investigator, prosecutor, and judge all in the same case. Many informed observers of California administrative law contend that an external separation should occur in professional licensing cases.

#### *a. Techniques to Achieve External Separation*

An external separation could be achieved in several different ways. First, the APA could make the decision of an independent ALJ final. If either the private party or the agency objected to an ALJ's decision, the next step would be judicial review. Second, the APA could provide for a separate administrative court consisting of judges appointed by the governor and protected from removal without cause. The administrative court would hear appeals from ALJ decisions by both private parties and agencies. Such an administrative court might be specialized, so that it heard appeals only from a single licensing agency.<sup>301</sup> Alternatively, the court might be unspecialized, hearing appeals from the decisions of many or even all licensing agencies. A third approach would be to create an administrative court to hear appeals from the adjudicatory decisions of agency heads.<sup>302</sup> In all cases, the administrative court's de-

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300. In the licensing area, the Alcoholic Beverage Control Appeals Board and the State Bar Court are independent adjudicating agencies. Similarly, the Fair Employment and Housing Commission is separate from the agency that enforces antidiscrimination laws. The Occupational Safety and Health Review Commission is separate from CAL-OSHA, which enforces the worker safety law. The State Personnel Board is independent of the agencies that are parties in civil service employment disputes. In income tax cases, the State Board of Equalization is largely independent of the Franchise Tax Board, which enforces the law (however, in business tax cases, the SBE merges all functions). The Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, and (to a great extent) the Department of Social Services are independent adjudicating agencies.

301. See *supra* note 300.

302. This is the pattern employed in Alcoholic Beverage Control adjudication. The initial decision is by an ALJ, the second decision is by the agency head, the third decision is by the Alcoholic Beverage Control Appeals Board. The fourth decision is by the court of appeals (rather than the usual pattern in which judicial review occurs in superior court).

cision would be subject to judicial review on petition of either party.<sup>303</sup>

*b. Analysis of the Arguments for External Separation*

i. Acceptability

The primary benefit of external separation is that a private party is more likely to perceive that it has received an impartial adjudicatory decision. Neither regulated parties nor their advocates seem to trust the impartiality of decision-makers who have drafted the rules, hired investigators, determined that probable cause exists to suspect a violation of law, and then decided the case on the merits. They suspect the agency heads of having excessive regulatory zeal that causes them often to disregard ALJ findings and conclusions; they believe that the agency heads are often puppets of the staff. Often, advocates for consumers or for environmental or other public values are equally mistrustful of regulators whom they suspect have been captured by the industry they regulate. Some ALJs who are members of the central panel argue forcefully that little is gained by making the initial decision-maker independent when the final agency decision-maker is not independent.

I do not accept the characterizations of institutional bias put forward by those who advocate external separation. While there is no way to prove or disprove such assertions, my research has led me to believe that, by and large, licensing agency decision-makers can be committed to the regulatory scheme they enforce and yet remain capable of deciding individual cases impartially. Of course, there must be some agency heads who decide unfairly because of excessive regulatory zeal or industry capture or who are unwilling to second-guess the views of their staff. But I do not believe that such cases are the norm in California administrative agencies. However, whether or not these assertions of institutional bias or passivity toward staff views are correct, the fact remains that a system of combined functions gives rise to the appearance of bias. Only a

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303. If a party has already received an appeal as of right from an independent administrative court, it would make sense to simplify the judicial review process by cutting out review in the superior court and going directly to the court of appeals. It might also be argued that court of appeals review should be discretionary rather than mandatory in such cases. This is presently the case with petitions for review from the Alcoholic Beverage Control Appeals Board to the court of appeals or from the Public Utilities Commission to the state supreme court.

separation of law enforcement from adjudication can overcome this perceptual problem.<sup>304</sup>

Nevertheless, an external separation might not always enhance the satisfaction of regulated parties with the fairness of agency procedures. My research did not indicate that practitioners were particularly satisfied with the existing California models of separated functions.<sup>305</sup> If an administrative court were specialized (so that it heard only appeals from a specific agency), people might perceive that the judges were as institutionally biased as the agency heads whose functions they would replace.<sup>306</sup> Moreover, a private party might find a separated system less satisfactory than the existing combined model. Under a separated system, the staff could freely appeal a judge's decision in the private party's favor to the separate administrative court;<sup>307</sup> if the staff lost there, it could seek judicial review. Thus private parties might find such an adjudicative process to be more arduous and expensive than the existing one.

304. The arguments in favor of external separation would be much stronger if the same individuals performed law enforcement and adjudicatory functions. In some states, apparently, the agency heads carry out all functions of investigation, prosecution, and adjudication. In California, however, the heads of licensing agencies do not engage in investigation and prosecution; such functions are always handled by separate staff members.

Maine removed adjudicatory functions from licensing agencies to an Administrative Court. ME. REV. STAT. ANN. tit. 4, §§ 1151–1158, tit. 5, § 10051(1) (1989 & Supp. 1990). Little information about Maine procedure is available; a 1966 article justified the separation because small state agencies had no staff or hearing examiners to make initial decisions. Thus agency heads (usually part-time appointees) personally performed the investigation and prosecution functions. Comment, *The Quest for Justice in Maine Administrative Procedure: The Administrative Code in Application and Theory*, 18 ME. L. REV. 218, 224–25, 241–43 (1966). The California situation is hardly analogous.

305. These agencies include the Alcoholic Beverage Control Appeals Board, the State Personnel Board, the Fair Employment and Housing Commission, and the State Board of Equalization (in its function of reviewing Franchise Tax Board cases). Practitioners find fault with the adjudicatory systems of each of these agencies, even though none of them combine the functions of adjudication with investigation and prosecution. However, my interviews indicate a high level of practitioner satisfaction with the independent benefit-disbursing agencies (Workers' Compensation Appeals Board, Unemployment Insurance Appeals Board, and the Department of Social Services). Early returns indicate a high level of satisfaction with the State Bar Court. Hall & Leland, *The State Bar Court: One Year Later*, CAL. LAW., Dec. 1990, at 30, 30–32.

306. See Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 341 (1991) (excessive specialization of administrative courts risks capture by parties on one side of dispute).

307. Under the existing system, the vast majority of the decisions of OAH ALJs are summarily affirmed by the agency heads. See *supra* section III.B.2. The advocates for the agency position generally play no role in this process.

## ii. Efficiency

Conceivably a separation of law enforcement from adjudication could serve the cause of efficiency. External separation would free the agency head or heads from the onerous burden of hearing and deciding appeals in individual cases. Liberated from the slavery of their caseload, the agency heads could concentrate on planning for the regulated industry's future and establishing general policies to implement through rulemaking. Many agency members (and particularly those who serve part-time) might welcome an escape from the drudgery of reading transcripts, hearing argument, and writing decisions.

Moreover, external separation might speed up the regulatory process. The process of professional discipline is often extremely sluggish, so that professionals who are not qualified to practice continue to do so for years while the agency disciplinary process grinds slowly ahead.<sup>308</sup> If the only agency-level decision was a final ALJ decision, for example, the license of an unfit professional could be removed many months or even years sooner. However, if the only change were to substitute an appeal to an administrative court in place of the decision by the agency heads, there might not be much time saved and the process could well be even slower than under the existing system.<sup>309</sup> If the administrative court decision were superimposed as a new level after the final agency-head decision but before judicial review, the process would be slowed even more.<sup>310</sup>

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308. See Fellmeth, *supra* note 119, at 4 (it takes from six to ten years to revoke a physician's license).

309. Since either party could appeal from an ALJ decision to the administrative court, the number of cases given plenary consideration would increase sharply. See *supra* note 307 and accompanying text. Moreover, if either party could seek judicial review of the decision of the administrative court, the number of cases taken to court might also increase sharply. However, the administrative court decision might supplant the existing review in superior court, in which case the judicial review process could be streamlined.

310. As in Maine, see *supra* note 304, Missouri has stripped most of its agencies of adjudicatory power; the Administrative Hearing Commission (AHC) renders the final adjudicatory decision in most cases. MO. ANN. STAT. § 621.015-.205 (Vernon 1988 & Supp. 1991). However, in licensing cases, if the AHC decides that disciplinary action is warranted, it can recommend but not decide on the appropriate punishment. Instead, the case is returned to the licensing agency for another formal hearing to determine punishment. The inefficiencies of such an approach are obvious. See Project, *Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission*, 37 MO. L. REV. 410, 451-66 (1972); Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389, 404-08.

In practice, therefore, it is not at all clear that external separation would increase efficiency,<sup>311</sup> because of the significant practical difficulties involved. For example, under present law the agency heads summarily affirm most ALJ decisions without ordering a transcript.<sup>312</sup> If the external reviewing body increased the number of cases given full-scale review, however, the cost of preparing many more transcripts would be quite significant.

If a specialized appellate body were created to hear appeals from the decisions of each agency, there would be a bewildering proliferation of new administrative structures. Staffing and budgeting for these new boards would pose real problems. It would be important to staff the appellate boards with qualified administrative judges; unqualified judges would make any benefits from external separation unlikely. However, it might be difficult to attract good people to administrative courts of such narrow jurisdiction, particularly because in many cases the work would be quite sporadic (most of the licensing boards generate relatively few cases). Not only would this proposal increase the size of the regulatory bureaucracy, it would also necessitate paying the judges well to attract competent people. Thus there would be a significant cost increase for the state and, perhaps, a significant depletion of the present pool of administrative trial judges.

Similar problems would attend the creation of a unified appellate body to hear appeals from many or all of the professional licensing agencies. Because both the agencies and private parties could appeal to this board from adverse ALJ decisions, the body almost certainly would attract a heavy volume of business and become severely backlogged.<sup>313</sup> Quite a large number of persons would be required to staff such a body and again I fear a significant increase in bureaucratic cost and a depletion of the present ranks of qualified trial judges who would be needed to staff the administra-

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311. See Cass, *supra* note 130, 17-23. Cass compared different structures for conducting intra-agency review of ALJ decisions at the federal level. His findings were that no particular approach to intra-agency review seemed clearly preferable from an efficiency standpoint.

312. For the California rules governing an agency's options in responding to an ALJ's proposed decision, see CAL. GOV'T CODE § 11,517(b)-(d) (West 1980 & Supp. 1992), discussed *supra* at section III.B.3.

313. This is exactly what occurred in the Missouri AHC described *supra* note 310. The Commission received 2395 review petitions in fiscal 1991 alone. Jordan, *Administrative Hearing Commission: Understanding Its Role*, 47 MO. B.J. 415 (1991); see also Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U.L. REV. 199, 303-05 (1990) (overwhelming caseload swamps Social Security Appeals Council).

tive court. Moreover, the decisions of the various judges of an administrative court would inevitably conflict with each other; for example, different judges might impose different penalties upon similar behavior.

Many of these efficiency costs would not apply to a scheme that simply made the decisions of independent judges final (subject, of course, to judicial review).<sup>314</sup> However, as discussed below, a system that stripped agency heads of final responsibility over the exercise of discretion and of adjudicatory law and policymaking might serve the criterion of accurate decision-making quite poorly. These concerns would be exacerbated by a system that lodged the ultimate administrative decision about the exercise of discretion or about important issues of law and policy in administrative trial judges.

### iii. Accuracy

I believe that an across-the-board system of external separation would not serve the cause of accurate decision-making. The most important consequence of an external separation of functions is that regulatory agencies would lose the ability to make law and set policy through the process of case-by-case adjudication. They could make law and policy only through rulemaking. To focus this inquiry, consider a typical licensing statute. Given vague statutory terms like "unprofessional conduct," or "public convenience and necessity," or "affect the public welfare and morals," or "moral turpitude," an agency lacking adjudicatory power would be required to adopt rules that flesh out the concepts. If no such rules were adopted, or if the rules failed to cover a particular application, the agency heads would be abdicating their law and policymaking role to the trial judge or to an independent administrative court.

In some ways, forcing agencies to adopt rules that construe vague provisions of law could be beneficial. Compared with the ex-

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314. All agencies should have the power to delegate the power to administrative judges to make final decisions. This would be appropriate in classes of cases that are likely to present no serious issues of law, policy, or discretion. Similarly, agencies should have power to delegate the review function or to make agency-head review discretionary rather than mandatory. See *supra* section III.B. Central panel ALJs make final decisions (sitting alone or in panels with other decisionmakers) in cases involving discharge of teachers employed by school boards or community colleges. Since these cases seldom involve precedents, and since there is no single state-wide agency to which such discharge cases would be appealed, it makes sense to let the initial decision be final, subject, of course, to judicial review. Department of Social Service judges also make final decisions in many welfare cases.

isting system of lawmaking through case-by-case adjudication, such rules or guidelines might furnish better guidance about precisely what sort of conduct is acceptable or unacceptable. Thus, adjudicating decisions might be more consistent and less likely to have an unfair retroactive effect.

But this approach could also be detrimental. An agency engaged in implementing a regulatory program sometimes needs to make law and policy through case-by-case adjudication. Everyone agrees that it is desirable for agencies to resolve as many issues as possible through rules.<sup>315</sup> However, it is not always feasible or practicable to answer every interpretive or policy problem through rulemaking. When an agency is newly created, or when its statute is newly amended, the agency may be quite unable to anticipate the problems it will face; it must fumble along from case to case for awhile. Even after the regulatory task of the agency has become routinized, there are always new problems, variations on old problems, unanticipated deviations from the norm, and connections overlooked by the general rules. In these situations, the agency must simply "muddle through" on a case-by-case basis.<sup>316</sup> Not every case, obviously, will be the vehicle to establish new policy or make a fresh legal interpretation; many, perhaps most, cases will be routine applications of well established law and policy, but there will always be difficult cases that require policymaking.<sup>317</sup>

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315. Indeed, 1981 MSAPA, *supra* note 17, § 2-104(3)-(4), would require the agency to do so by embodying its precedents into rules "as soon as feasible and to the extent practicable." In a surprisingly neglected statutory provision, California already requires each board engaged in professional licensing to "develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates." CAL. BUS. & PROF. CODE § 481 (West 1990) (enacted in 1974). A court might use this provision to hold that an agency cannot deny a license or discipline a licensee except pursuant to rules that flesh out vague terms in the statute. See *Megdal v. Oregon State Bd. of Dental Examiners*, 288 Or. 293, 320-21, 605 P.2d 273, 287 (1980) (discipline for "unprofessional conduct" set aside because board failed to adopt rules spelling out meaning of the term); *Bonfield, Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. PUB. L. 161 (1988).

316. See Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79 (1959). Some statutory standards may not lend themselves to rulemaking at all; every situation must be evaluated ad hoc. For example, water law practitioners said that issues of appropriation under sections 1243 and 1257 of the Water Code simply defy statements of general rules. See CAL. WATER CODE §§ 1243, 1257 (West 1971 & Supp. 1992). These statutes, administered by the Water Resources Control Board, require a balancing of the relative benefit from all uses of water.

317. An example: The Board of Pharmacy used adjudication to establish its policy toward discipline of licensees who failed to verify the validity of prescriptions for dangerous drugs. The Board's decision was affirmed in *Vermont & 110th Medical Arts Pharmacy v. Board of Pharmacy*, 125 Cal. App. 3d 19, 25-26, 177 Cal. Rptr. 807, 810

There are also serious institutional constraints on an agency's ability to use rulemaking to confine its discretion or interpret the law. Under present conditions, California agencies are subject to extreme budgetary stringency; they may lack the staff resources needed to update rules. Moreover, the California rulemaking process is much more costly and cumbersome than rulemaking under federal administrative law. The California process requires the agency to jump through many procedural hoops, including scrutiny by the Office of Administrative Law (OAL) regarding the necessity for the rule.<sup>318</sup> Consequently, the costs and delays of California-style rulemaking must be taken into account in assessing whether agencies should lose their ability to make law and policy through adjudication.

It therefore seems necessary for agencies to retain the ability to make law and policy through adjudication.<sup>319</sup> As compared to a generalist third-party adjudicator (such as an independent ALJ or an administrative court) who has no back-up support from a staff, the agency heads and their advisory staffs are better equipped to interpret the law and to make policy. The staff, and sometimes the agency heads, have accumulated experience and knowledge through their participation in the legislative, rulemaking, and investigatory processes, as well as their constant exposure to the whole range of problems of a particular industry.<sup>320</sup> Of course, some agencies may depart from this model. In agencies with very heavy caseloads, individual cases cannot serve as the vehicle for interpreting law and making policy; the agency must engage in rulemaking to control its

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(1981), despite the lack of any guidelines to set forth the nature of the pharmacist's duty and the factors that should cause a licensee to question the validity of a facially valid prescription. I was told by a Board member that the Board tried to handle the problem by rulemaking, but simply could not come up with a rule that provided adequate guidance.

318. See Asimow, *supra* note 21.

319. See Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1254-64 (1974). Strauss details the inability of the Secretary of the Interior to make policy under the mining law since adjudication occurs in an independent agency. Strauss argues that because much law and policy are made through adjudication, the division of responsibility leads to fragmented and incoherent policy.

320. See *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1176-78 (1991) (structural advantages of regulatory agency, over separate adjudicating agency, in rendering authoritative interpretations); Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 WIS. L. REV. 183; Cass, *supra* note 130, at 29-30.

adjudicators. In such cases, it may be wise to separate the adjudicatory function from the law-enforcement function.<sup>321</sup>

In addition to the problem of making and interpreting law and setting policy, there nearly always remains an element of discretion to be exercised in adjudicating cases, even routine ones. This residue of discretion is something that even the most clear-cut rules cannot and should not eliminate. In their adjudicatory decisions, the agency heads constantly strike and restrike a balance between greater and lesser regulation, between severity and leniency, between protection of the public and protection of regulated parties. For example, setting a licensee's penalty for violation of statutory norms—license revocation? suspension for 10 days?—necessarily involves the exercise of discretion and cannot be properly performed without sensitivity to the problems of regulation of the industry in question. Where similar situations recur, violators should receive similar penalties.<sup>322</sup> Another example is a request for a waiver of a rule, which also raises a question of discretion; in the case of almost every rule, situations arise in which an exception should be made. Wooden, inflexible application of regulations can be the worst kind of administration.<sup>323</sup> The exercise of discretion is an important administrative function and it should be exercised in a manner that furthers general agency policy and ensures that like cases are treated alike. If, for example, the final administrative decision about penalties were vested in any of dozens of ALJs, there would be little consistency and the severity of a penalty would depend on which judge a regulated party happened to draw.

An additional problem with external separation is that policy differences will inevitably emerge between the law enforcement agency and the judicial agency. Experience at the federal level has revealed a recurring tendency for independent adjudicators to develop policies that conflict with those of the rulemaking-law enforcement agency in ways that are detrimental to effective

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321. See Gifford, *supra* note 299, at 992–1000. Gifford defends the use of independent adjudicatory agencies when the adjudicators have such massive caseloads that the agency heads cannot personally involve themselves in deciding cases and cannot use individual cases as policymaking vehicles.

322. Under the Missouri procedure discussed in *supra* notes 310 and 313, if the independent AHC finds that an accusation against a licensee has been proved, the case goes back to the agency for determination of the proper sanction. This clumsy procedure is designed to assure consistency of penalty, but only at the cost of considerable inefficiency.

323. See generally E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

administration. Such policy conflicts have emerged in the regulation of worker safety, mining safety, and public lands.<sup>324</sup> The resulting conflicts impeded the effectiveness of the regulatory programs.<sup>325</sup> The same conflict has arisen in Missouri, where administrative law enforcement and adjudication are separated.<sup>326</sup> Similarly, agency structures that isolate the prosecution function have led to counterproductive turf wars.<sup>327</sup>

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324. See Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987); Shapiro & McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 59-62 (1989); Strauss, *supra* note 319, at 1264; Sullivan, *Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 ADMIN. L. REV. 177, 183-94 (1979); Note, *Begging to Defer: OSHA and the Problem of Interpretive Authority*, 73 MINN. L. REV. 1336, 1348-52 (1989).

325. For example, Shapiro and McGarity state:

[A case in which the Review Commission imposed a high burden of proof on OSHA] demonstrates how the split-enforcement model hobbles OSHA's authority. It has spawned countless disagreements between OSHA and OSHRC, requiring OSHA to spend its limited resources constantly litigating to preserve the policies it would like to establish. Additionally, these disagreements have subjected employers and employees to endless confusion concerning their respective rights and liabilities. . . . OSHRC is the creature of a failed experiment with the split-enforcement model. Whatever slight degree of additional fairness it provides to employers is more than offset by the disabling effect that independent review of legal and policy questions by an Agency not competent to address those questions has on OSHA's implementation of its statutory mission.

Shapiro & McGarity, *supra* note 324, at 61-62.

Where the two entities render different interpretations of the statute and regulations, there is confusion over which interpretation a reviewing court owes deference to. For example, in *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1176 (1991), the Supreme Court held that in OSHA cases the courts should defer to the interpretive views of the law enforcement wing (even though developed for purposes of the particular case), rather than to the adjudicators. Although I agree that courts should defer to the rulemaking and enforcement branch rather than the adjudicatory branch, I am troubled by giving deference to views not previously articulated in rules or developed in the adjudication of cases. This problem would not occur if law enforcement and adjudication are merged into a single agency.

326. See *supra* notes 310, 313, & 322. Missouri courts permit AHC to invalidate the regulations of state agencies. *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204 (Mo. Sup. Ct. 1990); see *Benton, The AHC: A New Power Over Administrative Regulations*, 47 MO. B.J. 411 (1991). Court decisions also evidence policy disagreements between AHC and regulatory agencies. *State Bd. of Registration for the Healing Arts v. Finch*, 514 S.W.2d 608, 612-13 (Mo. Ct. App. 1974) (AHC orders rehabilitated murderer to be licensed as a physician over protest of medical licensing board).

327. The NLRB's general counsel is independent of the Board in making prosecuting decisions. In the past, this separation has resulted in sharp differences of enforcement policy between the general counsel and the board, to the detriment of effective labor law regulation. See *Klaus, The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 379-82 (1958).

Policy conflicts of this sort have become evident in California agencies with divided functions. For example, in civil rights cases, the Department of Fair Employment and Housing is the prosecuting arm and the Fair Employment and Housing Commission is the rulemaking and adjudicating arm. Sharp conflicts over policy have emerged between the two agencies, with the Department refusing to prosecute classes of cases over which the Commission asserts that it has jurisdiction, and the Department implementing a prescreening policy to which the Commission objects. The tension between the two agencies, and the bifurcation of responsibility for making law, appear to hamper antidiscrimination law enforcement and lawmaking.<sup>328</sup>

A similar pattern has emerged in the area of alcoholic beverage control (ABC). The ABC Appeals Board is an independent appellate body that hears appeals from decisions of the Department of ABC.<sup>329</sup> The two bodies have often differed over policy. For example, they differed over whether to issue a liquor license to a store in Isla Vista shortly after student riots occurred there. The California Supreme Court split 4-3, with the majority agreeing with the Department's policy and the dissenters siding with the Appeals Board.<sup>330</sup> In my view, a system that encourages policy differences between law enforcement and adjudicatory bodies does not serve the cause of accurate adjudicatory decision-making. A judicial decision that required the adjudicatory body to defer to the regulatory agency in the case of any differences over law or policy might alleviate

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328. The problems in antidiscrimination law enforcement appear to predate the split between the Department and the Commission. See Tobriner, *The California Fair Employment Practices Commission—the Frustration of Potential*, 10 U.S.F. L. REV. 37, 54–56 (1975).

329. *See supra* note 302.

330. *Kirby v. Alcoholic Beverage Control Appeals Bd.*, 7 Cal. 3d 433, 498 P.2d 1105, 102 Cal. Rptr. 857 (1972). Similar splits about important policy issues occurred in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978) (conflict between fair trade laws and Sherman Act); *California Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal. 3d 402, 487 P.2d 745, 96 Cal. Rptr. 297 (1971) (how to apply statutes prohibiting licensees from selling at both retail and wholesale level).

Currently there is a dispute between the Unemployment Insurance Appeals Board (UIAB), which is purely adjudicative, and the Department of Economic Development (EDD), which administers unemployment compensation, over whether the EDD can adopt a rule that would override the UIAB's "precedent decisions." This again illustrates the policy splits that inevitably arise between independent adjudicators and regulatory agencies that litigate before them.

ate this problem.<sup>331</sup> Even if this rule emerged, it is likely that the two bodies would continue to differ over numerous issues regarding the application of law or the proper exercise of discretion.

Another way to think about accurate decision-making is to compare the political accountability of a unified structure and a separated structure. The legislature delegated responsibility to a given agency to implement a specific legislative program in order to protect the public or carry out some other defined purpose. That responsibility can be adequately discharged, and the agency can fairly be held accountable for its successes and failures, only if it has at its disposal all the tools of regulation including the power to make law and policy through adjudication. Splitting up responsibility for decision seriously undercuts the ability to hold anyone accountable.

#### iv. Conclusion

The accuracy criterion thus strongly points away from external separation of functions. The criterion of acceptability to the parties provides the best support for separation, but there are significant ways in which regulated parties might find a separated system less acceptable. The efficiency criterion is at best neutral and probably negative. For these reasons, I believe the case for an across-the-board external separation of adjudication from rulemaking and law enforcement is quite weak.

Nevertheless, I believe that a good case for external separation can be made in some specific situations where careful study shows that a unified system is working badly.<sup>332</sup> For example, there are strong arguments in favor of separating the adjudication of medical disciplinary cases from the existing regulatory board.<sup>333</sup> Similarly, good arguments exist for creating a separate tax court in place of the existing muddled and unsatisfactory system of state tax adju-

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331. See *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1176-78 (1991) (courts should defer to the views of the regulatory agency, not the adjudicatory body, in cases in which the two disagree).

332. See, e.g. Fallon, *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389, 417-22 (1991) (adjudication of civil penalties should be transferred from the Federal Aviation Administration to the National Transportation Safety Board). Fallon's reasons are largely specific to this particular enforcement scheme and do not justify a wholesale separation.

333. See Commentary, *Is This Really Necessary? The Need for a New APA*, CAL. REG. L. RPTR., Summer 1989, at 6-7; Fellmeth, *supra* note 119, at 4. Apparently, the separated State Bar Court is working well. See *supra* note 305. Perhaps the same approach should be followed in connection with medical discipline.

cation.<sup>334</sup> In such cases, external separation merits careful consideration.

## 2. Internal Separation of Functions

A system of internal separation prohibits "adversary" personnel in a case, such as prosecutors, investigators, or advocates, from participating or advising in the decision of that case. However, unlike a system of external separation, this approach leaves the agency heads in charge of the adversary staff members and allows the agency heads to make final adjudicatory decisions.

### a. *Constitutional Basis for Internal Separation of Functions*

Internal separation of functions clearly has a constitutional dimension.<sup>335</sup> The United States Supreme Court has made it clear that the typical mixing of functions at the agency head level is constitutional;<sup>336</sup> thus, there is no constitutional mandate for external separation. Yet the Court has also indicated that procedural due process may prohibit the same individual from wearing both adversary and adjudicatory hats. As a result, internal separation of functions is constitutionally required in some situations.

The constitutional law relating to combination of adjudicatory and adversary functions remains largely undefined and often requires a delicate balancing of the private interest, the government's

334. Approximately 21 states (including New York as of 1987) have an independent administrative tax court structure; six more have a judicial tax court. Only three states (California, Nevada, Wyoming) combine the functions of tax collection and adjudication in the same agency and only California elects the people who do it. Letter from W. Scott Thomas, Chair of the State Bar Tax Section, to State Senator John Garamendi (Aug. 1, 1988). At the federal level, the United States Tax Court is universally acknowledged as a success.

To put it charitably, California's present arrangement for adjudicating tax cases is a patchwork that can be understood only as a series of historic accidents; to put it less charitably, the system is a mess. Under that system, the Franchise Tax Board and State Board of Equalization have overlapping membership, SBE has adjudicatory power both over the income and franchise taxes imposed by FTB and over the business taxes imposed by itself, SBE members are elected and must solicit campaign contributions, and judicial review of SBE decisions is available only after a taxpayer pays the tax and sues for a refund. The initial hearing in franchise tax cases is before the SBE, en banc; the initial hearing in business tax cases is before a hearing officer whose powers and responsibilities are presently in sharp dispute.

335. See Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 779-88 (1981); Shulman, *supra* note 223, 380-404.

336. *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Withrow v. Larkin*, 421 U.S. 35 (1975).

interest, and the risk of error.<sup>337</sup> Perhaps a fair generalization is that a mixture of functions in a single individual, which is not necessary for the agency to function, which presents a high risk of erroneous deprivation of a constitutionally-protected interest, and which lacks a convincing justification, will violate due process.<sup>338</sup>

*b. Analysis of the Arguments for Internal Separation*

i. Acceptability

A system lacking at least internal separation is likely to be unacceptable to regulated parties. The reasons for this attitude are not difficult to discover and arise from common-sense insights. An adversary is committed intellectually and psychologically to a particular outcome. This commitment is likely to produce a will to win which may cause the adversary to perceive the issues through a lens that distorts perception. Adversaries are unlikely to adjudicate the case (or advise an adjudicator) by rejecting their own arguments as unpersuasive, since this would concede that their time had been wasted and their judgment faulty. Thus, there is a reasonably high

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337. *Mathews v. Eldridge*, 424 U.S. 319, 355 (1976).

338. *Washington v. Harper*, 494 U.S. 210, 233-35 (1990), concerns due process for the involuntary administration of antipsychotic drugs to mentally ill prisoners. The Court imposed a separation of functions requirement; while it allowed properly qualified prison officials to make the decision to medicate prisoners, it made clear that none of them could have been previously involved in the particular case. *Harper* illustrates the point in the text: due process often requires that adversaries be screened from adjudication when this can be done without undue disruption of the administrative scheme in question.

The same point appears in numerous due process cases. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), involving termination of welfare payments, states that a decision-maker could not have previously participated in making the decision under review (but might have some prior involvement in the matter). See also *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980); *Parham v. J.R.*, 442 U.S. 584, 605-07, 611-13 (1979); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrisey v. Brewer*, 408 U.S. 471, 497-98 (1972).

Some recent cases holding that separation of functions is a due process essential include *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991) (decision-maker functioned as City's advocate in related case); *Utica Packing Co. v. Block*, 781 F.2d 71, 77-78 (6th Cir. 1986) (prosecutors replace agency adjudicator after he renders decision with which they disagree); *Sullivan v. Department of Navy*, 720 F.2d 1266, 1270-74 (Fed. Cir. 1983) (adversary communicates with decision-maker and his advisers, citing many earlier cases); *Pelaez v. Waterfront Comm'n*, 88 A.D.2d 443, 454 N.Y.S.2d 132 (1982) (former general counsel cannot serve as hearing officer); *Scalzi v. City of Altoona*, 111 Pa. Commw. 479, 481-85, 533 A.2d 1150, 1152-53 (1987), *appeal denied*, 520 Pa. 592, 551 A.2d 218 (1988) (mayor cannot prefer charges against policeman, then sit on council to adjudicate charges—citing numerous other Pennsylvania cases); *Medical Disciplinary Bd. v. Johnston*, 99 Wash. 2d 466, 478-81, 663 P.2d 457, 464-65 (1983) (improper for same attorney to prosecute medical revocation case, then advise Board— violates appearance of fairness doctrine).

probability that adjudication or advice from such persons will be biased, or at least so it would seem to outside parties to the dispute.

Where there is no external separation of functions, the involvement of staff adversaries in advising decision-makers is a legitimate cause for concern. While APAs meticulously structure the initial hearing process, they say very little about the process whereby the agency heads render a final decision. The agency heads can use whatever process they wish, including heavy reliance on advisers. Thus, it is important that such advisers be persons who lack a personal commitment to find for a particular party.

In addition to concerns about biased advisers, there are additional reasons for internal separation. First, adjudication or advice by adversaries could compromise the exclusive record principle because they might rely on nonrecord factual data which the adversary knows or suspects but which was never introduced into evidence (or was excluded from evidence by the initial decision-maker).<sup>339</sup> Second, a system in which adversaries can judge or advise judges is fundamentally inconsistent with an adversary system of adjudication. An essential prerequisite of an adversarial system is that a decision should be forged by a neutral arbiter from on-the-record adversarial presentations—not off-record submissions by either side.

## ii. Efficiency and Accuracy

Against these benefits, it is necessary to balance the real efficiency costs of a system of separation of functions.<sup>340</sup> Separation of functions tends to rigidify an agency by requiring formal categorization of personnel and perhaps requiring duplication of specialized staff members. It can prevent agency heads from exerting desirable controls over pending litigation and create confusion about what communications are permissible.

Separation of functions can also be costly in terms of reduced accuracy of decision. It can disqualify capable advisers needed by decision-makers and thus produce an inferior decision or delay a case while new advisers familiarize themselves with it. Thus, a stat-

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339. See *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220-21 (9th Cir. 1980) (commissioner's adviser, who was exposed to factual information before case is set for hearing, is disqualified as an ALJ).

340. See Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 V.A. L. REV. 991 (1978) (penetrating study urging abandonment of separation of functions in nonaccusatory cases involving difficult technical or economic issues).

ute requiring a system of internal separation of functions must be drafted with great care lest its costs outweigh its benefits.<sup>341</sup>

*c. Existing California Law and Practice*

My research indicates that separation of functions is the norm in formal agency adjudication conducted by California agencies, but that the principle has often been ignored or fudged, especially in understaffed agencies, in agencies where informal procedures prevail, or in nonaccusatory cases involving utility regulation, environmental, and land-use issues.

The existing California case law concerning internal separation of functions is inconsistent and unclear. The ex parte provision of the California APA<sup>342</sup> prohibits contacts between a presiding officer (apparently meaning an ALJ from the Office of Administrative Hearings) and employees of the agency that filed an accusation. Obviously, this provision covers only a small part of the total problem. The separation of functions provision in federal law<sup>343</sup> goes much further and the provision in the 1981 MSAPA goes further still.<sup>344</sup>

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341. In some situations, it may be necessary to completely exempt certain agency proceedings from a separation of functions provision. One apparent example is the adjudication of drivers' license suspensions and revocations conducted by the Department of Motor Vehicles (DMV). In these cases, hearings are conducted by DMV hearing officers who are charged both with the task of presenting the agency's case and also deciding the case. Obviously, such a situation is less than ideal, but the cost of adding another person to prosecute the case would be prohibitive, considering that DMV holds several hundred thousand hearings per year at more than one hundred locations. The problem could also be solved by allowing DMV hearings to fall under the APA provisions for summary adjudicative procedure, with respect to which separation of functions does not apply. *See supra* Part II.B.3.

342. CAL. GOV'T CODE § 11,513.5(a) (West Supp. 1992). Interestingly, the Assembly bill from which § 11,513.5 was enacted contained a separation of functions provision. Section 11,517(d) would have provided:

No agency official, representative, or attorney who participated in the investigation, the decision to proceed with an administrative action, or the prosecution of the action, shall provide information or advise or participate in any way in deciding the case or in deciding a petition for reconsideration. Nothing in this subdivision shall be construed to apply to the director of an agency, or his or her designee, who merely approves in his or her supervisory capacity a recommendation to proceed with an administrative action or the prosecution of the action.

This provision was first amended, then struck out of the version that passed the Senate, and the Assembly concurred. The legislative history does not explain why this provision perished, but it seems likely that it ran into strong agency opposition.

343. 5 U.S.C. § 554(d) (1988).

344. 1981 MSAPA, *supra* note 17, § 4-214(a).

California case law on separation of functions is mixed. Like federal law, the state decisions confirm that a single agency can engage in rulemaking, investigation, prosecution, and adjudication, and the agency heads as individuals can engage in some or all of these functions.<sup>345</sup> In deciding whether to launch a formal proceeding or to set a case for a hearing, the agency heads can engage in prehearing, off-the-record meetings in which they come into contact with an investigator's version of the facts.<sup>346</sup> Other sorts of intra-agency communications and combined functions are generally permissible,<sup>347</sup> but in a few cases the courts have found due process violations where the particular combination of functions was egregious and reversal did not contravene the principle of necessity.<sup>348</sup>

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345. *Kloepfer v. Commission on Judicial Performance*, 49 Cal. 3d 826, 833–35, 782 P.2d 239, 241–43, 264 Cal. Rptr. 100, 102–04 (1989).

346. *Griggs v. Board of Trustees*, 61 Cal. 2d 93, 97, 389 P.2d 722, 725–26, 37 Cal. Rptr. 194, 197–98 (1964) (preliminary determination that there was good cause for dismissal); *Wisuri v. Newark School Dist.*, 247 Cal. App. 2d 239, 243, 55 Cal. Rptr. 490, 492–93 (1966) (school board members entitled to have personal knowledge of facts); cf. *Aluisi v. County of Fresno*, 178 Cal. App. 2d 443, 451–53, 2 Cal. Rptr. 779, 783–84 (1960) (retrial when commissioners decided on previous hearing that party was lying).

347. See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 118 Cal. App. 3d 720, 173 Cal. Rptr. 582 (1981). This case holds that a disciplined licensee cannot obtain access to communications between agency prosecutors and agency decision-makers at the time the latter are considering whether to accept or reject the decision of an ALJ. The language of the decision suggests that such communications are permissible. *Id.* at 727–28, 173 Cal. Rptr. at 586.

348. Invalidating administrative decision because of combination of functions: *Union Pac. R.R. v. State Bd. of Equalization*, 231 Cal. App. 3d 983, 1000–01, 282 Cal. Rptr. 745, 755–56 (1991) (same attorney advocated staff's position, then advised Board—procedure is fundamentally unfair); *Applebaum v. Board of Directors*, 104 Cal. App. 3d 648, 659–60, 163 Cal. Rptr. 831, 838 (1980) (some of the same doctors sat on both the investigatory and hearing panels and other facts indicated that hearing panel was not impartial); *Midstate Theatres, Inc. v. County of Stanislaus*, 55 Cal. App. 3d 864, 872–76, 128 Cal. Rptr. 54, 59–61 (1976) (county counsel represented assessor and also advised Board on procedural matters); *Nider v. Homan*, 32 Cal. App. 2d 11, 20, 89 P.2d 136, 138–41 (1939) (official who filed charges cannot sit on board that adjudicates them); see also *Universal Consol. Oil Co. v. Byram*, 25 Cal. 2d 353, 361, 153 P.2d 746, 751 (1944) (due process violation for decisionmakers to rely on advice of staff advocate—dictum) (citing *Morgan v. United States*, 304 U.S. 1, 19–20 (1937)).

In one recent case, the court held that the County Counsel could advise an adjudicative board even though a deputy county counsel had been an adversary in the same case—but only if the County Counsel were screened from any prior communications about the case. The County Counsel would be disqualified as an adviser unless he met the burden to show that a proper screening system was in place. *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 1586–87, 5 Cal. Rptr. 2d 196, 203–04 (1992).

Upholding administrative decision despite combination of functions: *Griggs*, 61 Cal. 2d at 98–99, 389 P.2d at 726, 37 Cal. Rptr. at 198 (school superintendent provided technical assistance to board, but withdrew before deliberations began); *Burrell v. City of Los Angeles*, 209 Cal. App. 3d 568, 579, 257 Cal. Rptr. 427, 433 (1989) (permissible for official who recommended discipline to have final say on the penalty after decision

A California Bar ethics opinion holds that it is improper for an agency trial attorney to make any ex parte contact either with an ALJ or agency head in cases governed by the existing APA. The rule prohibits such communications to agency heads whether they hear the case themselves or whether their role is to consider a proposed decision by ALJs.<sup>349</sup>

*d. Separation of Functions: An Illustration*

In order to illustrate the legislative recommendations that follow, it might be helpful to provide a brief sketch of what a scheme of internal separation of functions actually entails. Essentially, it requires that agency employees be divided into three categories: (1) adversaries in a case, (2) adjudicators and adjudicatory advisers in that case, and (3) everyone else. A staff member is recharacterized for the purposes of each case; thus, that person could be an adversary in one case and a decisional adviser in a second case.<sup>350</sup>

Separation of functions means that once an adjudicatory proceeding begins, a curtain drops: adversaries cannot serve as adjudicators nor assist adjudicators in that case. If adjudicators require additional assistance, they may tap anybody in the third category—everyone else.

Thus, suppose that Alan applies for a license from Licensing Board, a state agency. Staff member Sally investigates Alan's application and concludes that it should be denied because Alan is un-

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by independent commission that evidence sustained discipline); *Rhee v. El Camino Hosp. Dist.*, 201 Cal. App. 3d 477, 493, 247 Cal. Rptr. 244, 253 (1988) (same law firm represented medical staff and hospital's board of directors); *Rowen v. Workers' Compensation Appeals Bd.*, 119 Cal. App. 3d 633, 641, 174 Cal. Rptr. 185, 189 (1981) (permissible for one staff member to prosecute and another to advise but not for one person to discharge both functions); *Greer v. Board of Educ.*, 47 Cal. App. 3d 98, 119-20, 121 Cal. Rptr. 542, 556 (1975) (school board can be advised by same lawyer who represented the school district in the hearing before the ALJ); *Ford v. Civil Serv. Comm'n*, 161 Cal. App. 2d 692, 697, 327 P.2d 148, 151 (1958) (civil service commission can be advised by lawyer from county counsel's office when city is represented by another lawyer from the same office); *Chosick v. Reilly*, 125 Cal. App. 2d 334, 337-38, 270 P.2d 547, 549 (1954) (APA case—Board member can be advised by staff assistants who had prosecuted the case—permissible as long as no off-record factual inputs). See generally Davis, *Case Commentary: Withrow v. Larkin and the "Separation of Functions" Concept in State Administrative Proceedings*, 27 ADMIN. L. REV. 407 (1975).

349. CAL. COMPENDIUM ON PROFESSIONAL RESPONSIBILITY, State Bar Formal Op. No. 1984-82 (1984).

350. When a member of the Attorney General's staff assumes prosecuting or investigating functions in a case, that person should clearly be classified as a staff adversary even though, technically speaking, that person is not on the agency's staff. However, other members of the Attorney General's staff would not be classified as adversaries in that case.

qualified. Alan requests a hearing, to which he is entitled by statute. There is a trial-type hearing before Harold, an administrative judge. Sally appears at the hearing and explains why Alan should not receive the license. Laura, a lawyer for the agency or the Attorney General's office, argues the staff position before Harold. Nevertheless, Harold's proposed decision holds that Alan should receive the license. Bob, the head of Licensing Board, rejects Harold's decision. Bob consults Trina, a member of the technical staff of the agency who has not been involved in Alan's case. Bob reverses Harold's decision and denies the license to Alan.

The effect of separation of functions is that neither Sally nor Laura (the "adversaries") can serve as an administrative trial judge or as final adjudicator and neither of them can give off-record advice or assistance to either Harold or Bob (the "adjudicators"). The required insulation of adversaries from judging can be achieved in either of two ways: by separating Sally or Laura for purposes of this particular case (allowing them to serve as advisers in other cases) or by placing them in a permanently separated investigation and trial staff.

Similarly, neither Harold nor Bob is permitted to have participated as a prosecutor, investigator, or advocate in the case. However, Harold and Bob may receive assistance and advice from Trina or any other staff member of Licensing Board who has not played an adversary role in Alan's case ("everyone else").

As this illustration reveals, a system of internal separation of functions is not coterminous with a prohibition on *ex parte* contacts; agency adjudicators are permitted to receive off-the-record advisory communications from nonadversary agency staff members but not from interested persons outside the agency.<sup>351</sup> Indeed, it is essential that adjudicators at all levels have the ability to receive advice from nonadversary reviewers or staff specialists, particularly in complex economic, technical, or scientific cases.<sup>352</sup>

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351. 1981 MSAPA, *supra* note 17, § 4-214(a) mandates separation of functions and bars an adversary from advising an adjudicator. However, § 4-213(b) states: "[a]ny presiding officer may receive aid from staff assistants if the assistants do not (i) receive *ex parte* communications of a type that the presiding officer would be prohibited from receiving or (ii) furnish, augment, diminish, or modify the evidence in the record." It is possible that ALJs under the federal statute cannot receive staff assistance, even from nonadversaries. See 5 U.S.C. § 554(d)(1) (1988), construed in *Butz v. Economou*, 438 U.S. 478, 514 (1978). This interpretation is criticized in 3 K. DAVIS, *supra* note 79, § 17.9, and in Asimow, *supra* note 335, at 762-64.

352. See Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L.J. 107 (1987). PUC judges, for ex-

*e. Legislative Recommendations*

I recommend that California adopt the 1981 MSAPA provision on separation of functions, section 4-214,<sup>353</sup> but with some modifications. The following are the policy issues that should be considered in connection with the adoption of an internal separation of functions provision.

*i. Staff Members with Organizational Links to Adversaries*

One important issue is whether persons with institutional links to adversaries should themselves be treated as adversaries and thus precluded from serving as adjudicators or from giving advice to adjudicators.<sup>354</sup> Section 4-214 gives a mixed answer to this question.

A comment to section 4-214 indicates that a person who is a supervisor or colleague of an adversary can be in the "adjudicator-adviser" category or the "everyone else" category and is not placed into the "adversary" category merely because of the organizational link.<sup>355</sup> However, if the person has actually engaged in an adversary function, by taking an active role in investigation, prosecution, or advocacy, he or she would be disqualified. To illustrate by returning to the example, suppose that Gene is the general counsel of Licensing Board and is the direct supervisor of Laura who served as counsel in Alan's case. If Gene did not get personally involved in supervising Laura's work in the case, he could serve as an adviser to Harold or Vincent.<sup>356</sup>

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ample, frequently receive technical assistance from members of the Commission's advisory staff.

353. Similar provisions were recently enacted in North Carolina, Washington, and Tennessee. N.C. GEN. STAT. § 150B-40(d) (1987) (exception for staff members trained in accounting, actuarial science, economics, or financial analysis if case involves financial practices or conditions); TENN. CODE ANN. § 4-5-303 (1985); WASH. REV. CODE § 34.05.455(1), 458 (1986). A provision comparable to that in the federal APA was recently adopted in New York by an Executive Order. It contains exceptions for initial licenses and public utility ratemaking. Exec. Order No. 131, Dec. 4, 1989.

354. See Asimow, *supra* note 335, at 773-76.

355. "The term 'a person who has served' in any of the capacities mentioned in this section 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." 1981 MSAPA, *supra* note 17, § 4-214, commentary at 90.

356. Similarly, if Laura is on the Attorney General's staff and Gene is the Attorney General (or a member of the Attorney General's staff), Gene would not be disqualified from serving as an adviser. See *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 1586-87, 5 Cal. Rptr.2d 196, 203-04 (1992). This decision allows the County Counsel to advise an adjudicative board even though a deputy county counsel had been an adversary in the same case—but only if the County Counsel were screened from any prior

It can be argued that superiors and colleagues of adversaries should be disqualified from participating as adjudicators or as advisers. Persons who supervise advocates, for example, might feel that they must back up a member of their staff who has gone out on a limb. Agencies may well agree with this argument and go further than the statute would require, screening off everyone in the investigation or advocacy department from playing any role in the decision, including both supervisors and colleagues of adversaries. In cases involving accusation of wrongdoing, it might be good policy to separate from adjudication all persons with institutional links to adversaries.

Nevertheless, the MSAPA comment is correct in not requiring such separation in every case. Some agencies are simply too small to be so rigidly compartmentalized. Supervisors and colleagues of adversaries must be available as advisers or there might be nobody who could serve as an adviser.<sup>357</sup> Even more important, in cases that are complex, technical, or vital to the public interest, it is essential that adjudicators have available to them the richest possible mix of advisers. There might be only a single staff person competent to give advice on some important technical, scientific, or economic point, yet that person might also have institutional links to adversaries. It is essential to the public interest that such a person be available to give advice, so that the agency can produce the best possible decision.

Somewhat inconsistently, section 4-214(b) bars the subordinate of an adversary from serving as an adjudicator or assisting an adjudicator. The theory must be that subordinates might feel that they must support their boss' position. Evidently, the drafters of the MSAPA felt that the argument for disqualifying a subordinate was compelling, while the argument for disqualifying a supervisor or colleague of an adversary was not compelling.

I agree with the provision in section 4-214(b) that disqualifies a subordinate of an adversary as an *adjudicator*.<sup>358</sup> However, for the reasons just discussed, I disagree with section 4-214(b) insofar as it

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communications about the case. The County Counsel would be disqualified as an advisor unless he met the burden of showing that a proper screening system was in place.

357. Thus, one deputy attorney general may prosecute a case and another deputy attorney general may advise the agency heads. This expedient is necessary in agencies that have no qualified advisory staff members.

358. This is generally referred to as the problem of "command influence." An adjudicator should be organizationally independent of the prosecuting branch of an agency. Generally that means that the administrative judges would be responsible directly to the agency heads, not to the general counsel or other official with adversary responsibilities.

invariably disqualifies subordinates from serving as decisional *advisers*.<sup>359</sup> Of course, an agency might choose to adopt a rule disqualifying subordinates of adversaries from playing advisory roles. But, especially in a small agency, disqualification of subordinates as advisers might cast too wide a net and be too costly (because it would preclude too many people from serving as decisional advisers).

## ii. Nature of Adversarial Involvement

In applying a separation of functions provision, it is often necessary to decide whether particular work renders a person an adversary.

### (a) *Trivial Participation*

Merely marginal or trivial participation in a case should not disqualify a person as a matter of law.<sup>360</sup> To return to the previous example, suppose that Gene is the general counsel who supervises Laura, who was the prosecuting attorney. Bob, the agency head, wants to obtain advice from Gene. Suppose that Gene advised Laura to read a particular article to help her prepare her brief in Alan's case or gave her some advice on a minor procedural point. Perhaps the two had a superficial conversation about the progress of the case while having lunch. Perhaps Gene signed a document prepared by Laura without otherwise being involved in its preparation.<sup>361</sup> This insignificant participation should not disqualify Gene from being available as an adviser. The only sort of participation that should be disqualifying is meaningful participation, of a sort that is likely to imbue an individual with a commitment to a particular result in the case—a will to win. Needless to say, no statutory provision can define all the ways in which a person could participate in a matter, but the comment to the statute should make clear that

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359. See *Utica Packing Co. v. Block*, 781 F.2d 71, 76 (6th Cir. 1986) (subordinate of adversary can serve as decisional adviser provided he has no ex parte information about the case).

360. Asimow, *supra* note 335, at 776–77; see, e.g., *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 779 (D.C. Cir. 1983) (judicial officer in license revocation case not disqualified even though he signed preliminary order).

361. The Alcoholic Beverage Control Appeals Board has decided that an agency adjudicatory decision should be overturned because the Chief Counsel who had played a prosecutorial role later signed the agency heads' decision but had not given any advice to the agency heads. The signature was a purely ministerial act. *Accusation Against Montejano*, AB-5990 at 8–9 (Cal. Alcoholic Beverage Control Appeals Bd., Dec. 12, 1990). While individual agencies should have the ability to go beyond legal minima in order to assure the appearance of justice, such a rule should not be generally applied.

only meaningful involvement in investigation, prosecution, or advocacy should disqualify a person.

*(b) Neutral Roles*

It should be possible for a staff member to play a meaningful but neutral role in a case without becoming an adversary.<sup>362</sup> Thus a staff member might preside at a fact-gathering workshop,<sup>363</sup> or serve as a witness on some technical point, yet avoid any commitment to a particular result. Such a person thus would remain available to serve as an adviser to the agency heads when they make the final decision.<sup>364</sup> Similarly, in benefit cases, an ALJ can legitimately present evidence for either side.<sup>365</sup>

*(c) Preliminary Conferences*

As section 4-214(c) makes clear, it is permissible for adjudicators and their advisers to participate in preliminary conferences with adversaries without being disqualified from playing adjudicatory roles in the case.<sup>366</sup> For example, it is permissible for adjudicators or their advisers to engage in determinations about whether to start or continue an investigation, set a case for a hearing, expand an ongoing case, issue subpoenas,<sup>367</sup> seek preliminary judicial relief,

362. See Pedersen, *supra* note 340, at 1018–20, 1032–33. But see Shulman, note 223, at 415–18.

363. I am informed that the Water Resources Control Board uses workshops effectively in connection with appeals of complex cases from its regional boards to the state board.

364. See *Nationwide Mut. Ins. Co. v. Insurance Comm'r*, 67 Md. App. 727, 741–42, 509 A.2d 719, 726 (1986) (neutral staff assistant can question witnesses and assist hearing officer).

365. See 3 K. DAVIS, *supra* note 79, § 18.5, pointing out that the problem has been solved at the federal level by *Richardson v. Perales*, 402 U.S. 389, 410 (1971). That case upheld inquisitorial methods by Social Security ALJs without mentioning the APA provision that prohibits a combination of prosecuting and judging.

366. My interviewing suggests that such preliminary involvement by agency heads is not frequent, especially in agencies covered by the existing APA, but it does occur routinely in some non-APA agencies. In the Department of Real Estate, a supervising attorney makes an initial review of a case before it is assigned to the attorney who handles it; that supervisor then sometimes advises the Real Estate Commissioner when the latter renders the ultimate decision. Provided that the supervising attorney's involvement is no greater than a "determination of probable cause or other equivalent preliminary determination," it would not violate the MSAPA provision. However, if the supervisor goes further and advises the attorney who tries the case, the supervisor should be disqualified from later advising the Commissioner.

367. See *Blinder, Robinson & Co. v. Tom*, 181 Cal. App. 3d 283, 296–97, 226 Cal. Rptr. 339, 347–48 (1986) (rejecting due process challenges to involvement of prosecutor in agency head's decision to refuse to allow respondent to take an out-of-state deposition—but indicating doubt about the result).

settle a case, and make other, similar preliminary determinations.<sup>368</sup> To make such decisions, it is obviously necessary that adversaries such as investigators or prosecutors engage in off-the-record and uninhibited communications with adjudicators or their advisers. Such contacts are simply inherent in the structure of administrative agencies with multiple functions.<sup>369</sup> Despite the fact that participants in such conferences are exposed to ex parte informational inputs, they should not be disqualified from playing subsequent adjudicatory roles.<sup>370</sup> Nevertheless, agencies should consider structuring their decision-making process to reduce or eliminate such contacts.

#### *(d) Nonadjudicatory Functions*

It is important to recognize that agencies, unlike courts, perform many functions besides adjudication. Agency heads or staff may be simultaneously engaged in rulemaking, informal adjudication, planning for the future, advising the public, negotiating with the governor or the legislature over budget or legislative changes, or numerous other chores. In many instances, these activities may involve the same legal issues and even the same parties that are also involved in pending adjudicatory disputes before the agency. An individual should not be viewed as becoming an adversary in a particular case simply because that person has engaged in nonadjudicatory activity involving the same issues or the same persons. Only investigation, prosecution, or advocacy in a specific adjudicatory case should render the individual an adversary with respect to that adjudication and that adjudication only.

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368. Such preliminary involvement is validated by existing California case law. See *supra* note 346. For non-California cases, see Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104 (D.C. Cir. 1988) (SEC agency heads can seek judicial preliminary injunction, consider and reject settlement offer, then adjudicate case); Finer Foods Sales Co. v. Block, 708 F.2d 774, 779 (D.C. Cir. 1983) (judicial officer signed preliminary reparation order); Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292, 1305 (D.C. Cir. 1975) (permissible for prosecutors to discuss broadening of issues in ongoing case against new parties or existing parties); *In re Crushed Rock, Inc.*, 557 A.2d 84, 90 (Vt. 1988) (agency heads can seek preliminary injunction, then decide case).

369. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980) (nonreviewability of preliminary determination by agency heads that there was "reason to believe" respondent had violated the statute).

370. Thus, 1981 MSAPA, *supra* note 17, § 4-214(c) rejects the rule in *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980), that a commissioner's adviser, who actively participates in conferences with adversaries about a case before the case is set for hearing, is disqualified to serve as an ALJ in the same case. The *Grolier* rule is accepted by the Tennessee statute. TENN. CODE ANN. § 4-5-303(c) (1985).

*(e) Additional Contacts*

Comments to the new section could spell out some additional permissible contacts on the grounds that the benefits of such contacts would outweigh the costs. For example, under the rules of some federal agencies, adjudicators can have off-the-record contacts with adversaries as well as with outsiders for the purpose of providing guidance in settlement negotiations of a pending case.<sup>371</sup> Because they are important to facilitate settlements, such contacts have clear benefits.

iii. Agency Heads

An important policy issue is the extent to which a separation of functions provision should constrain the agency heads. The federal APA contains an exception for agency heads,<sup>372</sup> but the exception is of uncertain scope. Despite the apparent breadth of the APA language, the authoritative attorney general's manual indicates that staff adversaries may not communicate with agency heads at the time the heads are conducting agency review of proposed decisions.<sup>373</sup> The manual is surely correct on this point, for any other result would trivialize the separation of functions. Advice given by adversaries to agency heads, during the time that the final agency decision is under consideration, would subvert the adversary system.<sup>374</sup>

In contrast, the 1981 MSAPA contains no exception for agency heads, except for the provision in § 4-214(c) already discussed.<sup>375</sup> Thus, under the MSAPA an agency head (or an adviser to the agency head) cannot personally participate in the process of

371. See *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1437 (9th Cir. 1986) (agency rules permit conferences regarding settlement if disclosed to parties); *PATCO*, 685 F.2d 547, 566 n.39, 568 n.45 (D.C. Cir. 1982); *NLRB v. Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981).

372. "This subsection [§ 554(d)] does not apply . . . (C) to the agency or a member or members of the body comprising the agency." 5 U.S.C. § 554(d)(C) (1988).

373. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 56-57 (1947). But see Peck, *supra* note 237, at 256-60 (arguing that agency heads are completely outside the separation of functions scheme of § 554(d)).

374. Thus, the "agency heads" exception in the federal APA is intended to allow agency heads to personally engage in conflicting functions—personally investigating or prosecuting a case—and then participate in the final adjudication of the case. But it is not intended to allow communications between adversaries and adjudicators at the time of the final decision.

375. That provision allows an individual to participate in a determination of probable cause or other equivalent preliminary determination and then serve as a presiding officer (or assist a presiding officer) in the same proceeding.

investigation or prosecution of a case, or serve as an advocate in the case. The agency head must delegate all such functions. Although the legislature may discover some need for exceptions, I am not aware of any California adjudicating agencies that would encounter difficulty by reason of this provision. Generally, the agency heads who render final determinations in adjudicatory cases do not become personally involved in those cases (aside from making permissible preliminary determinations), but delegate all the functions of investigation, prosecution, and advocacy.

#### iv. Exceptions to Separation of Functions

The federal APA contains numerous important exceptions to its separation of functions requirement: it does not apply to initial licensing, public utility regulation, or on-the-record rulemaking.<sup>376</sup> The MSAPA contains no such exceptions.

The drafters of the federal APA thought that such proceedings were more like rulemaking<sup>377</sup> than adjudication and that separation of functions might interfere with decision-making. However, in practice, federal agencies that conduct trial-type adjudications to resolve initial licensing or ratemaking disputes have adopted rules that separate their functions, even though they are not required by statute to do so.<sup>378</sup> In California, the Public Utilities Commission has instituted separation of functions for its ratemaking.<sup>379</sup> In vol-

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376. In *Hercules, Inc. v. EPA*, 598 F.2d 91, 127 (D.C. Cir. 1978), the court expressed discomfort with EPA's failure to separate functions in a formal rulemaking proceeding. It called upon Congress to reconsider the exemption.

377. The courts have squarely rejected arguments that separation of functions should apply in informal rulemaking. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1207 (D.C. Cir.), *cert. denied*, 453 U.S. 913 (1981).

378. Asimow, *supra* note 335, at 804-20. For example, the Federal Energy Regulatory Commission, which like the PUC engages in utility ratemaking, has a strict separation of functions provision. 18 C.F.R. § 385.2202 (1991). See 3 K. DAVIS, *supra* note 79, § 18.6 (strongly criticizing the federal APA's exemption of individualized ratemaking from separation of functions).

379. The Division of Ratepayer Advocates engages in prosecution and advocacy and the Commissioner's Advisory and Compliance Division staff advises the Commissioners. However, the PUC has not adopted rules that formalize this practice and has not separated functions in connection with water utility regulation because of a shortage of qualified staff.

Similarly, the Water Resources Control Board (which handles a large volume of initial licensing cases involving water rights and pollution discharges) separates functions so that staff members that have played adversary roles in particular cases are not used to advise the Board in the same case. The Water Board has a much smaller staff than the PUC and therefore does not split its attorneys into separate staffs; the separation is done on a case-by-case basis. Thus, an attorney may play an adversary role in one case but an advisory role in a second.

unitarily adopting these systems, regulators have apparently accepted the notion that separation of functions is necessary to protect the legitimacy of the adjudicative function in an adversary system.

It can be argued that the statute should not require separation of functions in cases that do not involve any accusation of wrongdoing, such as initial licensing, public utility regulation, approval of financial transactions, or decisions on market entry and exit.<sup>380</sup> In these cases, an agency frequently engages in difficult problems of economic and technical analysis and prediction and has need for the maximum degree of staff assistance. Often the agency must resolve important issues of public policy. Staff members who have performed advocacy roles in such matters may be less committed to a particular result than in more prosecution-oriented accusatory cases. Also, it may be more difficult to classify staff members as adversaries or nonadversaries than in accusatory cases. Moreover, particular cases may last for many years,<sup>381</sup> and separation of functions may seriously interfere with management's ability to redeploy staff to fill personnel vacancies, deal with changing workload demands, or optimize staff development. Thus, an important policy issue is whether to follow the federal statute and provide an exception from mandatory separation of functions for nonaccusatory cases.<sup>382</sup>

I recommend no broad exemption from separation of functions for nonaccusatory cases. If an adversary adjudicatory hearing is employed to resolve the dispute,<sup>383</sup> separation of functions is essential. Section 4-214 is drafted so as not to interfere unduly with agency access to staff advisory resources. As discussed above, it should be construed to allow persons to advise adjudicators even though those persons have institutional links to adversaries, have participated in related proceedings such as rulemakings or other adjudications, or have participated in the particular adjudication in ways that do not render them adversaries. However, if there are agencies in which even this diluted form of separation would impose

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380. See Pedersen, *supra* note 340 (making this argument forcefully).

381. The PUC observed that its ratemaking case against Pacific Bell began in 1985 and was still continuing in March, 1991. *In Re Pacific Bell*, Investigation No. 85-03-678 (filed March 20, 1985).

382. If there were no statutory requirement of separation of functions, agencies would be free to impose whatever degree of separation they wished (as the PUC has already done informally).

383. That is, such a hearing is required by statute or by the federal or state constitution and the issues have not been resolved through rulemaking.

too high a cost, those agencies should make their case to the legislature for an exception to the statute.<sup>384</sup>

#### v. Communications by Administrative Judges with Agency Heads

One issue which is related to separation of functions remains to be discussed. Should the administrative judge who heard the case and wrote the proposed decision be permitted to advise the ultimate decision-makers? Of course, the judge is not, properly speaking, an "adversary," so the issue is distinct from separation of functions. Nevertheless, many of the same concerns that animate separation of functions also apply to ALJ-agency head communications.

Section 4-213(a) of the 1981 MSAPA prohibits off-the-record communications between adjudicators and persons who have presided at a previous stage of the proceeding. This provision is generally sound, since administrative judges may have a psychological commitment toward defending their own decisions. Thus, the statute or agency rules should, as a general matter, prohibit such consultations.

However, in a narrow band of complex, nonaccusatory cases, the benefits of consultations between an ALJ and the agency heads may outweigh the costs of such consultations.<sup>385</sup> As a result, I would suggest deleting this provision from the new California statute.<sup>386</sup> Present practice at the PUC permits agency heads and their advisors to consult the judges who wrote proposed decisions, in the course of rendering the final decision. My interviews at the PUC

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384. Thus, the PUC has stated that it lacks the staff necessary to separate functions in its water utility regulation. The same people must engage in both advocacy and advice-giving. Similarly, the Water Resources Control Board assigns only a single attorney to meetings of its nine regional boards and occasionally these attorneys play both advisory and advocacy roles.

It may be necessary to carve out exceptions for specific types of nonaccusatory agency adjudications if agencies persuade the legislature that they simply lack the staff to separate functions. Such exceptions should be made with reluctance, however, lest the statute be devitalized, and should be as narrowly drawn as possible. A better solution might be to provide extra time for transition to the new system, so that agencies could develop the necessary staff expertise to permit functions to be separated. Federal agencies engaged in highly complex economic regulation have managed to separate functions, and I believe that California agencies can do the same.

385. For discussion of the propriety of allowing ALJ-agency head communications in the context of complex licensing determinations, see Shulman, *supra* note 223, at 401-04, concluding that the benefits of such consultations may outweigh the risks.

386. The Tennessee statute, otherwise based on MSAPA, permits consultations by ALJs with agency members if the exclusive record principle is not violated. TENN. CODE ANN. § 4-5-304(b) (1985).

indicated that this was a defensible practice. PUC proceedings are so lengthy and the records so massive that the judge (who may have lived with the case for months or years) may be the only person who really knows what is in the record. As a result, the judge's participation can be very helpful in crafting a final decision that is faithful to the record. Yet the judge is neutral as between the parties; therefore, his or her participation in the final opinion-writing process creates a relatively small risk of error.<sup>387</sup> Other agencies besides the PUC may also have a similar need to involve their judges in the final decision process. I favor allowing this practice.

#### E. *Independence of Administrative Judges*

California's APA pioneered the independent ALJ corps, an idea now adopted in a significant number of other states.<sup>388</sup> The 1981 MSAPA contains a provision for a central panel,<sup>389</sup> and the

387. Participation by judges is particularly important because outsiders can make oral ex parte contacts to the commissioners of the PUC. Under a recently adopted rule, such communications must be disclosed. See *supra* text accompanying notes 203-213. Such contacts pose the risk that commissioners will be persuaded to adopt a result that is not faithful to the record made at the hearing. Even in the absence of outsider ex parte contacts, participation by judges may be helpful in light of the overwhelming records that the agency heads and their decisional advisers must confront in writing the final decision.

388. Colorado, Florida, Iowa, Massachusetts, Maryland, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Tennessee, Texas, Washington, and Wisconsin. Levinson, *News from the States*, ADMIN. L. NEWS, Fall 1991, at 9, 15. Some of the central panel states make the use of independent ALJs voluntary so that agencies have a choice whether or not to utilize them. New York City also recently adopted a central panel, and several other states have pilot programs in process. In none of these states, however, does the central panel include all the ALJs in the state; as in California, the central panels cover less than all the ALJs. New Jersey has probably gone further than any other state. For example, it places the ALJs engaged in public utility regulation under its central panel, but not those engaged in tax, parole, and public employee labor disputes.

A New York State Bar Association task force concluded that New York should not adopt a central panel. N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON ADMIN. ADJUDICATION 234-35 (1988). Nevertheless, the legislature has repeatedly voted to establish one, but the governor has vetoed the legislation every time. An Oregon task force decided that no panel was needed in that state. COMM'N ON ADMIN. HEARINGS, REPORT OF THE SUBCOMMITTEE ON COMPARABLE LAW AND PRACTICES (1988) [hereinafter OREGON STUDY].

389. The 1981 MSAPA allows the states to choose between a mandatory and a voluntary central panel approach. 1981 MSAPA, *supra* note 17, §§ 4-202(a), 4-301. Under the voluntary approach, an agency could choose to utilize a central panelist or designate any other person as a presiding officer. Between 1945 and 1961, California agencies had a similar choice. This "hybrid central panel" system was ineffective because it allowed licensing agencies to maintain their own staff of hearing officers and it provided a perverse incentive for central panel ALJs to make pro-agency decisions in order to get business. SENATE INTERIM COMM. ON ADMIN. REGULATIONS AND AD-

idea has been repeatedly proposed (but never adopted) at the federal level.<sup>390</sup>

In California, the Office of Administrative Hearings (OAH) employs a panel of about forty ALJs<sup>391</sup> and supplies panelists to agencies covered by the APA that wish to hold hearings,<sup>392</sup> as well as to other agencies and to local governments that request them. The central panel, however, represents only a small fraction of the administrative trial judges in California. The vast majority of such judges and hearing officers (between 400 and 800 depending on who is counted) work for the agencies whose cases they hear.<sup>393</sup> These are the people who conduct the hearings in workers' compensation and unemployment appeals, Cal-OSHA appeals, business tax cases, drivers' license suspensions, state personnel cases, public utilities cases, labor law cases, parole revocations, welfare cases, university and state college disputes, and a great variety of other disputes between private parties and state agencies.

By general consensus, California's central panel system has worked well, as have the systems in other states.<sup>394</sup> The legislature

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JUDICATIONS, THE USE OF INDEPENDENT HEARING OFFICERS FOR ADMIN. ADJUDICATIONS 117-18 (1957), reprinted in 1 APPENDIX TO THE JOURNAL OF THE SENATE (Regular Session 1957); Abrams, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV. 487, 496-97 (1977).

390. See E. THOMAS, ADMINISTRATIVE LAW JUDGES: THE CORPS ISSUE, National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Assoc. (1987); Litt & Simeone, *An Administrative Law Judge Corps: Its Value and Relation to the Traditional Justice System*, 11 WHITTIER L. REV. 569 (1989). This article provides a concise history of the efforts at the federal level to establish a corps and also states the rationale for it. It also includes a bibliography of some of the numerous published materials concerning this subject. Litt and Simeone's arguments for a corps at the federal level are quite strong; however, these arguments are less persuasive in California which already has a central panel deciding cases brought by almost all of the agencies that engage in conflicting functions.

391. CAL. GOV'T. CODE §§ 11,370-11,370.4 (West Supp. 1992). The general acceptance of the concept is evidenced by legislative provision for independent county hearing officers. *Id.* § 27,720-27,728.

392. Sixty-five agencies are now required to utilize central panel ALJs. *Id.* § 11,501(b).

393. In 1977, the Department of Finance identified more than 70 state agencies and nearly 500 hearing officers conducting quasi-judicial hearings outside the APA (a term which the report defined quite precisely). CAL. DEPT' OF FINANCE, PROGRAM EVALUATION UNIT, CENTRALIZED VS. DECENTRALIZED SERVICES, PHASE II: ADMINISTRATIVE HEARINGS (1977) [hereinafter PROGRAM EVALUATION UNIT]. Needless to say, the numbers have increased greatly since 1977.

394. See generally M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES (1983); NEW JERSEY GOVERNOR'S COMM. ON THE OFFICE OF ADMIN. LAW, REPORT TO THE GOVERNOR (Aug. 31, 1984). The favorable New Jersey evaluation must be considered in light of the situation that existed before its panel was created—many hearing officers worked

has expanded the panel's jurisdiction to a few nonlicensing agencies<sup>395</sup> and to certain personnel disputes from local school boards and community colleges.<sup>396</sup> Non-APA agencies and local governments frequently draw on OAH even though they are not legally required to do so.<sup>397</sup> While agencies sometimes grumble about central panel ALJ decisions, the agency heads retain power to make the final decision, so that disagreement with ALJs is not perceived as a serious problem.

The issue is whether some or all of the non-OAH judges should become independent and be formed into an ALJ corps, employed by OAH or some successor agency. It seems clear that an ALJ corps would have to consist of specialized panels, because much of the work of non-OAH agencies is specialized and technical. Thus workers' compensation judges, for example, would continue to hear workers' compensation cases, but they would be hired, controlled by, and assigned to the Workers' Compensation Appeals Board by some independent agency. Again, this proposal will be evaluated under the criteria of accuracy, efficiency, and acceptability. In addition, the results of an ALJ questionnaire will be considered. This section concludes that the current system should not be significantly changed.

### 1. Acceptability

The main argument in favor of expanding the central panel is based on the criterion of acceptability. There is an appearance of bias when a judge works for the agency that makes the ultimate decision. That judge may well be imbued with the agency's culture and his or her career path may theoretically be affected by a decision that the agency heads or senior staff dislike. Lay people under-

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only part-time or per diem while engaged in private business. There were huge backlogs. Many other hearing officers were reviewing their own prior decisions. *Id.* at 2-3. The New Jersey report fails to evaluate specifically whether central panel judges should be deciding public utility ratemaking cases. See *infra* notes 405, 406, & 409.

395. For example, panel ALJs hear cases from the Fair Employment and Housing Commission and Fair Political Practices Commission and some disputes relating to corporate securities. CAL. GOV'T CODE § 11,501 (West Supp. 1992). In addition, the panel hears certain cases relating to disability retirement of state employees and to health planning and certificates of need for health facilities. See generally OFFICE OF ADMIN. HEARINGS, OUTLINE OF ADMINISTRATIVE PRACTICE BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS (March 1989).

396. CAL. EDUC. CODE §§ 44,944(b) (West Supp. 1992), 87,678, 87,740(c)(3) (West 1989).

397. CAL. GOV'T CODE § 11,370.3 (West Supp. 1992). For example, the Superintendent of Banks uses OAH ALJs to decide cases about licensing financial transmitters, although not required to do so.

stand the model of the criminal court judge who is totally independent of the district attorney. They would no doubt like to see this model applied in administrative law as well.

There is a compelling argument for independent ALJs in the case of agencies that play prosecutorial roles, such as professional licensing boards, but the panel already exists for almost all of those agencies. With few exceptions, the agencies that employ significant numbers of in-house judges are not prosecutorial; they are *already independent* of the law-enforcement branch of state or local government whose cases they decide. For example, the benefit-disbursing agencies in the fields of workers' compensation, unemployment insurance, and welfare are independent.<sup>398</sup> The State Personnel Board is independent of the agencies that employ civil service workers; the Public Employment Relations Board is independent of the contending parties before it; the Cal-OSHA Appeals Board is independent of the OSHA law enforcement staff; the general counsel of the Agricultural Labor Relations Board is independent of the Board itself; and the Board of Prison Terms is independent of the Department of Corrections.

Judges themselves are sometimes fearful that their independence may be compromised when they work for the agency whose cases they decide. Certainly this is more than a theoretical possibility. At the federal level, the Social Security Administration and its ALJs had a rancorous dispute when the agency tried to increase the productivity of its ALJs and, in the opinion of some observers, to increase the number of anti-applicant decisions.<sup>399</sup> At the state level, no instances of objectionable interference with the independence of administrative judges have come to my attention, but some judges told me that they felt intimidated in expressing substantive views on pending legislation or on the qualification of persons nominated to be agency heads. Seldom, however, have these fears been based on anything concrete.<sup>400</sup>

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398. See *Rauber v. Herman*, 229 Cal. App. 3d 942, 948-49, 280 Cal. Rptr. 785, 788-89 (1991) (independence of Department of Social Services in welfare hearings).

399. See *Gifford*, *supra* note 299, at 1005-19. But see *Nash v. Bowen*, 869 F.2d 675, 680-81 (2d Cir.) (no showing that decisional independence of Social Security ALJs had been interfered with), *cert. denied*, 493 U.S. 813 (1989).

400. One judge told me that he thought he was subjected to disciplinary sanctions because of a public position he took in opposition to an appointment to his agency. One judge from the State Personnel Board stated to the Law Review Commission that the judges at that agency had been pressured to decide cases a certain way. No specifics were provided. The Public Utilities Commission assigns a commissioner to each case and PUC judges have complained of pressures from the assigned commissioner to de-

A final argument suggests that independent judges may be more acceptable to the public. Often cases before non-OAH agencies are quite technical. The staff and the judge share the same technical vocabulary and nonexperts may feel frozen out. If the case were heard by a generalist judge, the staff would have to present the case in nontechnical terms and spell out difficult concepts. As a result, the process might be demystified to the benefit of interested members of the public and regulated parties. This argument illustrates nicely the conflict between acceptability and efficiency—while the public might find such hearings more accessible, the extra costs and delays inherent in educating the generalist judge could be quite substantial.

On the whole, I find the argument based on acceptability quite weak in the unique context of California, where a central panel already exists. Very few of the agencies that employ in-house judges combine the functions of prosecution and adjudication; these agencies are already independent of the contending parties. Moving their judges to a corps would simply add a second layer of independence. In my interviewing, I found practitioners strongly in favor of independent judges only in the case of the State Personnel Board, and not in other agencies that employ in-house judges. This sentiment suggests that the pressure for an independent corps comes largely, although not entirely, from the judges themselves (both OAH and non-OAH judges) who perceive that they might benefit from such a change in terms of status, prestige, and perhaps compensation.<sup>401</sup>

## 2. Efficiency

Proponents of a central panel often make arguments based on efficiency and economy. These arguments are persuasive in a situation where a large number of agencies each employ a small number of judges who hear cases when they are needed.<sup>402</sup> These ALJs tend

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cide cases a certain way. However, it seems clear that PUC judges are free to decide cases as they like.

401. Administrative judges presently fall into a number of different salary classifications. If they were merged into the central panel, it is likely that many would be upgraded in terms of compensation.

402. Thus many of the central panel states report significant economies from their switch to the central panel. For a summary, see *OREGON STUDY*, *supra* note 388, at 4–6. But the basis of these comparisons is to a prior system in which each of many agencies employed one or a few judges, many of whom worked part-time. Often, a judge had to travel to remote parts of the state to hear a single case. In other states, private lawyers were hired to hear cases *pro tempore*. These are not valid comparisons to the present California situation.

to be underutilized or, if the agency gets busy, hopelessly overloaded. Clearly there would be benefits in this situation from moving to a central panel where personnel can be efficiently deployed. But California does not fit this profile and would not have any significant gains in efficiency from moving in-house judges to a central panel.<sup>403</sup> The non-OAH agencies are extremely busy; their judges are efficiently used and already well distributed throughout the state. It is unlikely that any of these agencies can spare personnel to help other agencies experiencing overloads. Moreover, assuming that judges in the panel will have to specialize, it is doubtful whether nonspecialized judges would be very helpful in alleviating the crunch at non-OAH agencies.

Another possible efficiency advantage is relief of the burnout that judges sometimes experience from hearing the same sorts of cases every day. They might welcome some variation. Again, however, if specialization is required, the degree to which judges can switch agencies is obviously limited. In-house judges cannot be spared from hearing the cases they hear currently, and unspecialized judges are not an adequate substitute. To some degree, however, a system of voluntary switching could alleviate the burnout problem inherent in a system of in-house judges. OAH or some other agency could administer an exchange system that matched up judges who desired a furlough from their agency with agencies that could use them—perhaps in simpler cases that did not require specialized knowledge.

On the whole, the case for an administrative judge corps, based on efficiency grounds, seems unpersuasive. In 1977, a State Department of Finance study was unable to conclude that there would be any significant fiscal savings from adopting a broader central panel.<sup>404</sup> In reality, there would be significant inefficiencies associated with the transition to such a system, and I believe that the proposal would be quite costly, both during the transitional period and over the long term. In my opinion, an expanded central panel

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403. Abrams, *supra* note 389, at 514-16.

404. PROGRAM EVALUATION UNIT, *supra* note 393.

would entail significant delays,<sup>405</sup> extra costs,<sup>406</sup> loss of experienced judges,<sup>407</sup> and other practical difficulties.

### 3. Accuracy

The strongest argument against an expanded corps is based on the criterion of accuracy. Accuracy suffers as specialization and expertise decline. In the case of workers' compensation, for example, the judges hear a high volume of cases and must approve every settlement. Everyone I interviewed—judges, Appeals Board staff, attorneys for applicants and defense—agreed that it takes years to become a competent judge. The compensation bar is intensely specialized and it expects its judges to be equally knowledgeable. Everyone feared inexperienced judges who could not correctly evaluate settlements or the testimony of physicians, who would take too long to decide cases, or who would render decisions that were out of line.

Another example is provided by unemployment cases. These cases are simpler and the arguments for expertise are not as strong as in the case of workers' compensation. But the volume of unemployment appeals is immense. OAH judges, for example, are accustomed to taking far more time on each case; they would have difficulty accommodating to the quite different work style required of unemployment judges. Much the same is true of welfare cases heard by the Department of Social Services. The volume is large,

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405. For example, it is more difficult to schedule hearings quickly when an agency must request judges from a central panel since each agency competes with all other users of the panel resources. For that reason, delays in scheduling hearing are likely to worsen. For example, I was told by the New Jersey Public Utilities Commission that there were significant delays once they lost their in-house judges and had to resort to a central panel. And this could be a great problem in the case of programs, such as unemployment and welfare, required by federal agencies to complete appeals within a designated time period. Similarly, in banking regulation, it is often necessary to produce a cease and desist order against a problem bank under very tight time constraints. See 12 U.S.C. § 1818(b)-(d) (Supp. 1990).

406. If the judges were housed separately from the agencies, there would be difficulties in docketing cases, finding files, scheduling hearings, etc.—problems that already exist in high-volume agencies even under unified administration. In agencies like the PUC or the Energy Commission, the cases sometimes take years to complete. The hearings may go on for months, then break for several months, then start again; it would be difficult for the judges to handle such cases if they had to accommodate responsibilities to other agencies.

407. It is unlikely that nonlawyers could be used as corps judges, but the nonlawyer PUC judges are said to be quite valuable in certain kinds of cases. Most Department of Motor Vehicles hearing officers are nonlawyers, and several of the State Board of Equalization, Board of Prison Terms, and Department of Social Services (DSS) judges are nonlawyers as well. Getting rid of experienced nonlawyer judges who are well-qualified to perform their particular tasks seems inefficient.

the law is technical, the stakes in each case are small (although not, of course, to the welfare recipient), and most appellants, unrepresented by counsel, require the judge to guide them through the maze of regulations.<sup>408</sup> Thus, these hearings are very different from the formal trials conducted by OAH ALJs in licensing cases.

The arguments for placing Department of Motor Vehicles (DMV) hearing officers into an independent agency also seem weak. DMV hearing officers are usually not lawyers and are experts only in motor vehicle law. They hear relatively simple cases in very high volume; other judges might have little interest in such cases. By the same token, DMV hearing officers are not qualified by training or experience to hear cases from other agencies. Thus the case for independence for DMV hearing officers is not compelling, even though this agency combines prosecutorial and adjudicatory functions.

Similarly, nonspecialists should not be judges in Public Utilities Commission cases. Most of the cases decided by PUC judges involve forward-looking ratemaking, although there are some licensing and penalty cases in which the agency combines prosecutorial and adjudicatory functions. A PUC judge who must sit for many months in a ratemaking case must have expertise in public utility economics. It will not do to educate the judge from scratch.<sup>409</sup> The stakes are too high—both for the public and for the industry. The decision must be absolutely the best decision possible. That requires expertise and experience.<sup>410</sup>

I was also impressed by the PUC's custom of involving its judges in writing the final agency decision. In light of the great complexity and public importance of PUC cases, that system makes

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408. One letter to me from a DSS judge said that "At Social Services the best ALJs have a little bit of the heart of a social worker (but not a bleeding heart) . . . The outstanding ALJ at Social Services will patiently listen to the claimant and provide helpful advice . . . ."

409. New Jersey is among the few states that use central panel judges for PUC ratemaking. I was informed that most of the judges who hear such cases are already specialists in public utility law; several with utility backgrounds were hired as temporary judges. However, it has sometimes been necessary to use nonspecialists. The nonspecialists must be painstakingly educated in regulatory law and economics, starting with easy cases and working up to harder ones.

410. Proposition 103 allows the Insurance Commissioner to use central panel ALJs or to hire his own. CAL. INS. CODE § 1861.08 (West Supp. 1992). Unsurprisingly, the Commissioner has taken the latter option. In light of the exceptional difficulty of regulating the price of almost all lines of insurance on a company-by-company basis, the use of expert and specialized ALJs is clearly justified.

sense, but it would be hard to maintain if the PUC judges worked for a separate agency.<sup>411</sup>

#### 4. Administrative Judge Questionnaire

Because the judges have been in the forefront of the movement for expansion of the central panel, I expected to find that they would strongly support the idea. I sent a questionnaire to all of the PUC and workers' compensation judges and got an excellent response.<sup>412</sup> The results did not confirm my expectations. The only question was whether the respondent strongly supported, supported, was neutral, opposed, or strongly opposed the idea of becoming independent of the agency for which he or she now worked, while retaining his or her specialization. Of the workers' compensation judges, fifteen strongly supported the idea and twelve supported it; eleven were neutral; fourteen opposed it and twenty-five strongly opposed it. Thus those who opposed outnumbered those in support by thirty-nine to twenty-seven. Of the PUC judges, seven strongly supported the idea and three supported it; two were neutral; two opposed it and six strongly opposed it. Thus the PUC judges supported the idea by the rather narrow margin of ten to eight.

The results seem surprising because the lot of the workers' compensation judges had not been happy in the years prior to the time the survey occurred. Because of political struggles relating to substantive compensation issues, the governor refused to allow funding increases for staff. The backlog of cases per judge increased sharply, and the judges complained, quite justifiably, of inadequate support staff and services.<sup>413</sup> Although the PUC has not suffered similar difficulties, many PUC judges resent the PUC's system of assigning commissioners to the judges with whom the judges must consult and negotiate in deciding their cases; therefore, it might be expected that most of them would support independent status.

Most responses contained detailed comments on the corps proposal. Workers' compensation judges repeatedly cited the problem of expertise and specialization; they thought that cases should never be heard by inexperienced judges. Those who supported the corps idea voiced three themes: the need for independence, the possibility

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411. See *supra* notes 385-387 and accompanying text.

412. Of 128 workers' compensation judges, 76 responded (59%). Of 29 PUC judges, 20 responded (69%).

413. At some WCAB offices, there was a huge backlog of unopened mail because the staff was so short that they could not even keep up with the incoming mail.

that a change would improve their working conditions, and their desire to hear different sorts of cases occasionally.

PUC judges also mentioned the need for specialization and expertise. Some also mentioned the importance of having readily available PUC staff members to assist them and of being available to assist the commissioners in writing final decisions. PUC judges who supported the proposal also said they would like to hear different cases sometimes and thought that separation would give them more protection from *ex parte* contacts both by outsiders and from the staff.

I did not systematically poll judges at other agencies, but I held a hand vote on the subject at a meeting of Unemployment Insurance Appeals Board judges. A clear majority of those voting opposed a shift to a corps in which they would continue to specialize in unemployment cases.<sup>414</sup>

##### 5. Selective Rather Than Across-the-Board Transfer

On the whole, it seems to me that the arguments for transferring the in-house judges at the many California agencies that employ them to a central panel are not very persuasive. Mainly, the benefit is an enhanced perception of fairness on the part of outside parties, but since most of the agencies are themselves independent of law enforcement control, the case for transfer is not compelling. On the cost side, there would be significant, though manageable, transitional costs and some additional delays in scheduling hearings, as well as some loss of specialization and expertise. If panelists continued to specialize in the sorts of cases they now decide, the losses in accuracy would not be significant. To me, a balance of only modest benefits weighed against manageable costs fails to make a sufficiently compelling case for working such a fundamental and disruptive change in the organization of California administrative adjudication.

However, I recommend that the legislature continue to transfer appropriate sorts of cases to the existing central panel, as it has already done on numerous occasions. The cases that should be transferred are those in which more or less formal hearings are required by statute or constitutional law; the hearings are provided by full-

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414. The vote was about even when the judges were asked whether they favored transfer to a central panel and could hear other than unemployment cases. A letter to the Law Revision Commission from three ALJs of the Agricultural Labor Relations Board also opposed centralization. I interviewed a number of Department of Social Services ALJs who were split on the proposal, with several passionately opposed.

time agency hearing officers; the agency heads retain authority to make a final decision; and the agency combines the functions of prosecution and adjudication.<sup>415</sup>

## CONCLUSION

Once California led the nation in administrative procedure reform. But that was long ago, and the existing system—in which the APA covers only a tiny percentage of the state's administrative adjudication—falls far behind what has been achieved under the federal APA, the APAs of most other states, and the 1981 MSAPA. California should aspire to no less than the cutting edge in administrative procedure.

This Article has discussed numerous important issues that must be faced in designing a new system of administrative adjudication for California agencies. It has not addressed every point that would be covered in a new APA, but has sought to treat fairly the arguments for and against proposals advanced in my reports and by others. At each point, I have tried to bring the criteria of accuracy, efficiency, and acceptability to bear on the unruly reality of California administrative adjudication. My recommendations represent my best effort; because each involves a complex and intuitive balancing, readers are likely to differ with many of them.

Administrative adjudication includes a vast array of proceedings that range from straightforward adjudications that are made quickly and informally, through intensely adversarial proceedings involving professional discipline, to complex and lengthy proceedings involving environmental regulation or utility ratemaking. A new APA must take account of this variation, yet it must provide for uniform procedures where that is feasible. It must cover a mul-

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415. One example may involve prosecutorial disputes in the horse racing industry that are not presently heard by central panelists. These involve exclusion from racetracks and suspension of licenses. See *Morrison v. California Horse Racing Bd.*, 205 Cal. App. 3d 211, 219–20, 252 Cal. Rptr. 293, 297–98 (1988); *Aroney v. California Horse Racing Bd.*, 145 Cal. App. 3d 928, 932–33, 193 Cal. Rptr. 708, 710 (1983); *Jones v. Superior Court*, 114 Cal. App. 3d 725, 730, 170 Cal. Rptr. 837, 840 (1981); *Mukai, Regulation of the Horse Racing Industry*, in 3 G. OGDEN, *supra* note 24, ch. 140.

Another candidate might be the powers of the Superintendent of Banks and the Insurance Commissioner to issue cease and desist orders.

There may also be a good case for transferring State Board of Equalization (SBE) hearing officers to an independent agency if it proves infeasible to establish a Tax Court that would take over the Board's adjudicating functions. See *supra* note 334. There are approximately eight SBE hearing officers who make the initial decision in business tax cases. The SBE and its hearing officers have been engaged in litigation about the judges' status and salary classification.

titude of agencies that have operated for decades under their own statutes, rules, and policies and, for obvious reasons, are resistant to change.

It is my hope that this Article will persuade the reader, and ultimately the California legislature, that the existing system is flawed, and that a new one could be designed so as to produce a clear net benefit to all concerned.

# THE ADJUDICATION PROCESS\*

by Michael Asimow

October 1991

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# THE ADJUDICATION PROCESS

by Michael Asimow\*

## I. INTRODUCTION

This is the fourth report prepared by the author for the California Law Revision Commission<sup>1</sup> on the subject of administrative adjudication. The governing assumptions are that California agencies that adjudicate cases will continue to do so, and that agencies that employ their own administrative law judges (ALJs) will also continue to do so. There will be a new Administrative Procedure Act (APA) that will govern the adjudication procedure of all agencies (unlike the existing APA that covers only a small percentage of the total number of agency adjudications). This act will provide the ground rules for all cases of adjudication where a hearing on the record is required by statute or by constitutional due process.

This report covers all the remaining topics relating to adjudication that were not covered in the prior reports.<sup>2</sup> It is organized

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1. The earlier reports are: "Administrative Adjudication: Structural Issues" (Oct. 1989); "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs" (Aug. 1990); and "Impartial Adjudicators: Bias, Ex Parte Contacts, and Separation of Functions" (Jan. 1991). These reports have been published in revised form as Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992), which is reprinted, *supra*, at 321.

2. I decided not to make recommendations on certain topics that might logically have been included in this study. These topics are laches, administrative res judicata and collateral estoppel, and administrative equitable estoppel. These are subjects that are now dealt with largely through case law; the rules tend to resist statutory generalization. In addition, I considered whether to draft recommendations concerning agency remedies; for example, whether agencies generally should have power to award compensatory damages or

chronologically into topics relating to the prehearing stage, the hearing stage, and the post-hearing stage. Because a new APA must be flexible enough to regulate the adjudications of vastly different agencies, the statute must contain relatively bare-bones provisions. These statutory provisions must be fleshed out by agency regulations. In many but not all situations, I will recommend statutory provisions that will function as defaults; agency regulations can depart from them but, in the absence of contrary regulations, the default rule controls.

Because such an act will require a significant rulemaking exercise by all adjudicating agencies, I want to make some observations about this process. The statute will certainly have an effective date far enough in the future to allow agencies ample time to study the problems, consult their constituencies, draft and redraft proposed rules, go through the public comment process, and pass the rules through the Office of Administrative Law, all before the new law will go into effect. I also suggest that the statute require the Office of Administrative Hearings (OAH) to draft a set of model rules which any agency can use.<sup>3</sup> These should significantly simplify the task of agency rulemakers and will also promote uniformity of procedure where that is feasible.

I believe the rulemaking process that is required by this approach will be a healthy one. The rulemaking process requires participation of all constituencies that deal with the agency (both in and outside of government). It requires agencies to take a fresh look at procedures that may have been unexamined for years. Agencies

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restitution or should be able to assess civil penalties. However, the existing statutes relating to remedies are highly agency-specific and there are substantial constitutional limitations on administrative remedies. Even these tend to resist generalization. *See McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 261 Cal. Rptr. 318 (1989).

3. The recently adopted Washington statute provides that the Chief ALJ of the state is responsible for drafting a set of model rules appropriate for as many agencies as possible. Agencies adopting rules of procedure that differ from the model rules shall include in the order of adoption a finding stating the reasons for variance. Wash. Rev. Code Ann. § 34.05.250 (1990). In New Jersey the central panel has drafted model rules for all state agencies.

might decide to move to a model like that of the APA agencies, retain existing patterns, or adopt new approaches that can optimize the values of efficiency, fairness, and participant satisfaction. In many cases, the existing procedures are not stated in regulations (or stated only in a sketchy and incomplete form); they exist mostly in the institutional memories of the staff and experienced practitioners.

Here is a summary of the matters covered in this report and my recommendations:

#### THE PREHEARING STAGE

*A. Notice and pleadings.* The present APA provisions would serve as defaults. The pleadings called "accusations" and "statements of issues" would be renamed "complaints." Responsive pleadings, if required, would be called "answers." The APA provisions for amendment of pleadings would apply to all agencies. The right of private prosecution apparently permitted by the APA would be abolished. Directory provisions for time limits in responding to applications would be adopted.

*B. Intervention.* The APA should contain a provision allowing intervention in an ongoing hearing where the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. The order allowing intervention can place various conditions on intervention.

*C. Discovery and subpoenas.* The civil discovery rules should not be applicable in administrative law. The present limited discovery provisions in the APA should remain binding on agencies that use OAH ALJs. Those rules would also become applicable to all agencies unless a statute calls for greater discovery rights or agency rules call for different discovery rights. The provision for subpoenas duces tecum should make such subpoenas answerable at the time and place stated rather than at the hearing. The provisions for quashing and enforcing subpoenas should be improved.

*D. Prehearing conference.* The existing APA provision for pre-hearing conference should remain applicable to agencies that will

use OAH ALJs and should be the default for all other adjudication. In the ALJs discretion, the conference could be held by electronic means and there should be a sanction for parties who fail to show up. Finally, the conference could be converted immediately to a conference and the case could be resolved then and there.

*E. Declaratory orders.* The APA should provide that all agencies must issue declaratory orders on request, but can place certain areas off-limits to declaratory orders.

*F. Consolidation and severance.* Agencies should have power to consolidate related cases or sever cases.

*G. Settlement and alternate dispute resolution.* The statute should facilitate settlements by providing that all disputes can be settled on any terms the parties deem appropriate. Agency heads should have the power to delegate the approval of settlements. Agencies should assign settlement judges to cases and, with consent of all parties, should have power to refer cases for mediation or arbitration. The confidentiality of communications during ADR proceedings must be protected.

## THE HEARING PROCESS

*A. Evidence.* The rules of the Evidence Code should not be adopted in administrative proceedings. However, the *Kelly-Frye* test (relating to scientific methodologies that are not generally accepted) should be adopted. Provisions relating to written evidence in the Model State Administrative Procedure Act (MSAPA) should be adopted. ALJs should have broader powers to exclude evidence whose probative value is outweighed by the amount of time it would consume or confusion it would produce. And the residuum rule (providing that a finding must be supported by some evidence other than hearsay) should be retained in agencies that use OAH ALJs but made optional for other agencies.

*B. Burden of proof.* The preponderance of the evidence standard should be used in preference to the “clear and convincing evidence to a reasonable certainty” standard now used in professional license revocation cases.

*C. Official notice.* The official notice provision should be broadened so that agencies can take notice of technical or scientific matters within their specialized knowledge, whether or not "generally accepted." However, the right of an opposing party to rebut such material must be protected.

*D. Representation.* A party should have a right to be represented by anyone, whether or not an attorney, unless agency regulations provide the contrary.

*E. Informal trial models.* Agencies should be authorized to adopt regulations under which they can discharge any adjudicatory responsibilities by using a conference adjudicative proceeding (where such does not conflict with a statute or due process). Similarly, agencies should be empowered to adopt regulations providing for emergency action in cases where the public health, safety, or welfare requires immediate action.

*F. Other trial issues.* Presiding officers in all agencies should have the power to administer oaths and shall take testimony under oath or affirmation unless regulations provide the contrary. Agencies should be empowered to tape record proceedings instead of being required to have a reporter present. Agencies should be authorized to take testimony by telephone or other electronic methods in appropriate cases. The provisions for interpreters should be streamlined and applied to hearing-impaired parties or witnesses. Hearings should be open to the public unless both parties agree they should be closed or a statute requires closed hearings.

## POSTHEARING PROCESS

*A. Findings.* The APA should contain a more detailed findings provision along the lines of the MSAPA but should not adopt the "statement of decision" approach used in civil litigation.

*B. Precedent decisions.* All agencies should be required to designate their adjudicatory decisions that contain new law or policy as precedential and maintain an index of such decisions.

## II. THE PREHEARING PROCESS

### A. NOTICE AND PLEADINGS

An APA must contain general provisions for notice and pleadings. Because of the great variety of adjudicatory matters that must be covered by a new APA, it would be inadvisable to mandate a single set of notice and pleading requirements. Hence the details about the nomenclature of pleadings, as well as their timing and form, should be left to regulations.

1. *Present California law.* There are two broad categories of initial notice: hearing procedures that result from agency initiatives (such as sanctions against regulated persons or termination of employment or benefits) and hearing procedures that result from initiatives by outsiders (such as applications that have been rejected by the agency for licenses, employment, benefits, or waivers).

In the first category (agency initiatives), the existing APA provides for the filing of an “accusation” in cases where an agency proposes to revoke, suspend, limit or condition a right, authority, license or privilege. An accusation must set forth the relevant acts or omissions in ordinary and concise language. It shall specify the statutes and rules alleged to have been violated but shall not consist merely of charges phrased in the language of such statutes and rules. Case law requires that the pleading must give notice sufficient to allow a respondent to prepare a defense and it limits the agency to the items charged in its accusation.<sup>4</sup> However, at any

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4. Subject to the rule of prejudicial error, a person cannot be disciplined for reasons not spelled out in the accusation. *See, e.g., Stearns v. Fair Employment Practice Comm'n*, 6 Cal. 3d 205, 212-15, 98 Cal. Rptr. 467 (1971) (non-prejudicial variance); *McFaddin San Diego 1130, Inc. v. Stroh*, 208 Cal. App. 3d 1384, 257 Cal. Rptr. 8 (1989), *hearing denied* (prejudicial variance); *Linda Jones General Builder v. Contractors' State Licensing Bd.*, 194 Cal. App. 3d 1320, 1327, 240 Cal. Rptr. 180 (1987); *Wheeler v. State Bd. of Forestry*, 144 Cal. App. 3d 522, 527, 192 Cal. Rptr. 693 (1982) (findings not based on accusation); *Vallerga v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 313, 320-21, 1 Cal. Rptr. 494 (1959) (prejudicial variance); *Cooper v. Board of Medical Examiners*, 49 Cal. App. 3d 931, 941-42, 123 Cal. Rptr. 563 (1975) (pleading sufficiently specific to give notice); *Dyment v. Board of Medical Examiners*, 57 Cal. App. 260, 207 P. 409 (1922), *aff'd* on this ground by

time before a matter is submitted for decision, the agency may file an amended or supplemental accusation.<sup>5</sup>

The accusation must be served on the respondent personally or by registered mail (unless the respondent files a notice of defense or otherwise appears).<sup>6</sup> The accusation must include a postcard or other form whereby the respondent can acknowledge service and file a notice of defense.<sup>7</sup> The accusation also indicates that the respondent must request a hearing within 15 days after service or waive the hearing.<sup>8</sup> It must also advise the respondent of discovery rights.

The APA provides that within 15 days after service of an accusation, the respondent may file<sup>9</sup> a notice of defense asserting one or

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Supreme Court, 57 Cal. App. 266 (pleading in language of statute insufficient). *See generally* California Administrative Hearing Practice §§ 2.2, 2.6 (Cal. Cont. Ed. Bar 1984) [hereinafter CEB].

5. Gov't Code § 11507. If the amended or supplemental accusation presents new charges, the respondent is entitled to a reasonable opportunity to prepare his defense. He shall not be required to file a further pleading unless the agency in its discretion so orders. The rules about amendments of accusations also apply to statements of issues. Gov't Code § 11504.5; *Button v. Board of Admin.*, 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218 (1981) (PERS can amend its statement of issues in response to application for a pension).

6. Registered mail service is effective if the respondent is required to file his address with the agency and notify it of any change. Gov't Code § 11505(c). The statute makes clear that in the latter situation, service by registered mail is effective if addressed to the respondent at the latest address on file with the agency.

7. Gov't Code § 11505(a).

8. Gov't Code §§ 11505(b), 11506(b). Apparently only the agency, not a presiding officer, can waive a failure to timely request a hearing. CEB, *supra* note 4, § 2.40. I would favor allowing either the presiding officer or the agency to waive a default.

9. File means delivered or mailed to the agency. Gov't Code § 11506(e). 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. If no notice of defense is filed, a streamlined default proceeding is conducted. If the burden of proof is on respondent (as occurs in the case of applications), no default proceeding needs to be conducted (but a notice of default should be mailed out). *See Gov't Code § 11520; Bobby, An Introduction*

more of the following: (1) request a hearing, (2) object to the accusation on 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 grounds that it is too indefinite or uncertain,<sup>10</sup> (4) admit the accusation in whole or in part, (5) present new matter by way of defense, or (6) object that compliance with the requirement of a regulation would result in violation of a regulation enacted by another department.<sup>11</sup>

Slightly different notice and pleading procedures apply in the case of agency proceedings triggered by rejected applications (outsider initiatives).<sup>12</sup> A hearing to determine whether a right, authority, license, or privilege shall be granted, issued or renewed, is initiated by filing a “statement of issues.”<sup>13</sup> Statements of issues

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*to Practice and Procedure Under the California Administrative Procedure Act*, 15 Hastings L.J. 258, 264 (1964); CEB, *supra* note 4, §§ 2.39-2.40.

10. Failure to object on this ground waives all objections to the form of the accusation. Gov’t Code § 11506(b). However, a failure to raise other objections in the notice of defense should not be treated as a waiver of such objections. See CEB, *supra* note 4, §§ 2.31-2.36. Of course, such objections should be raised at the hearing to avoid a possible failure to exhaust administrative remedies.

11. Gov’t Code § 11506(a). Respondent may file a statement by way of mitigation even if he does not file a notice of defense, an option which the new law should retain. Gov’t Code § 11506(d); see *Bobby*, *supra* note 9, at 263 (purpose of statement of mitigation is apparently to admit allegations but claim an excuse).

12. Generally, there is a right to a hearing upon the denial of an application where a statute limits administrative discretion to deny the application. *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 269-71, 246 P.2d 656 (1952); *Andrews v. State Bd. of Registration*, 123 Cal. App. 2d 685, 692-96, 267 P.2d 352 (1954). These cases are based on construction of the statutes requiring a license. Due process will also guarantee a hearing in many cases of applications, even if the decision is left to administrative discretion. See *Saleeby v. State Bar*, 39 Cal. 3d 547, 216 Cal. Rptr. 367 (1985) (application for payments from client security fund — based on the California constitution).

13. Gov’t Code § 11504; Bus. & Prof. Code § 485. The agency files the statement either together with its denial of an application or in response to a request for hearing after denial of the application. See *Bobby*, *supra* note 9, at 261.

The statement of issues specifies the statutes and rules with which the respondent must show compliance by producing proof at the hearing and in

are sometimes vague which places respondents (who have the burden of proof) at a disadvantage.<sup>14</sup>

Apart from discovery proceedings,<sup>15</sup> the next pleading stage consists of a notice of hearing which is delivered or mailed by the agency to all parties at least ten days prior to the hearing.<sup>16</sup> The notice spells out the time and place of the hearing and provides that parties may represent themselves or be represented by an attorney (but are not entitled to the appointment of an attorney at public expense). It also provides that the party can present any relevant evidence, will be given full opportunity to cross-examine adverse witnesses, and can subpoena witnesses and documents.<sup>17</sup>

The provisions for notice and pleadings at non-APA agencies are quite disparate. They involve different nomenclature,<sup>18</sup> specific disclosures, different time periods, and different requirements for responsive pleading.

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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. It is served in the same manner as an accusation.

14. CEB, *supra* note 4, § 2.9. The requirements of specificity should be the same for both accusations or statements of issues regardless of the burden of proof. The existing APA provides that a respondent who has requested a hearing is not required to file a statement of issues. It is ambiguous with respect to whether a respondent must file a notice of defense where the agency simultaneously denies an application and files a statement of issues. *Id.* at § 2.25.

15. Discovery is discussed in Part I.C. [The Prehearing Stage], *supra* at 453.

16. Gov't Code § 11509. See *Cooper v. Board of Medical Examiners*, 49 Cal. App. 3d 931, 942, 123 Cal. Rptr. 563 (1975) (in counting ten day period, exclude first day, include the last day; service by mail is complete at time of deposit in mailbox). If the notice is mailed, an additional five days must be provided. Code Civ. Proc. § 1013(a). This should probably be made explicit in the APA. Governing Bd. v. Felt, 55 Cal. App. 3d 156, 163-64, 127 Cal. Rptr. 381 (1976), correctly holds that errors in postage or mailing address do not invalidate a notice of hearing if respondent is not prejudiced.

17. The APA also provides for the venue of the hearing and permits the parties to agree to a different venue. Gov't Code § 11508; CEB, *supra* note 4, § 2.53. This section might appropriately be amended to permit a party to move for a change of venue.

18. For example, "appeals," "notice of adverse action," "petition for hearing."

2. *MSAPA provisions.* Under the 1981 Model State APA (MSAPA), where an agency initiates a proceeding to detrimentally affect a license, it must first give notice and an opportunity for hearing.<sup>19</sup> The Act does not state how much notice is required or what form the notice should take. It makes no specific provision for responsive pleadings.<sup>20</sup> Where a proceeding is initiated on the application of a person other than the agency, and the agency is required to hold a hearing, it must respond to the application within 30 days<sup>21</sup> and either approve the application or commence the hearing process within 90 days.<sup>22</sup> The Act then provides in much greater detail for the contents of the notice of a prehearing conference and of the notice of hearing.<sup>23</sup>

3. *Recommendations.* I suggest that the revised APA build on the established principles of the existing APA which seem easily generalizable to all agencies. There seems to be no particular reason to substitute the MSAPA provisions for an existing regime which appears to be working well. The existing APA notice and pleading provisions would remain applicable to agencies that use OAH ALJs;<sup>24</sup> as to other agencies, they would serve as default provisions that could be varied by regulations.<sup>25</sup>

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19. MSAPA § 4-105. The 1981 Model State Administrative Procedure Act is printed in 15 U.L.A. 1 (1990).

20. MSAPA § 4-207(a) provides that a presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections, and offers of settlement.

21. Within this period, the agency must examine the application, notify the applicant of any apparent errors or omissions, request additional information, and notify the applicant of the name, title, address, and phone number of the person who should be contacted regarding the application.

22. MSAPA § 4-104. If the application is for subject matter that is not available when the application is filed but may be available in the future (such as housing or employment), the agency must make a determination of eligibility within the 90 days period and maintain the application on file. *Id.* § 4-104(a)(3).

23. *Id.* §§ 4-204(a)(3), 4-206(c).

24. However, those agencies may wish to present testimony to the Commission that indicates a need for greater flexibility; perhaps all agencies, including those covered by the existing APA, should be allowed to customize

I suggest a change in nomenclature to make the existing APA provisions more easily generalizable. The terms “accusation,” and “statement of issues” might both be renamed “complaint” so that they can more readily apply to proceedings that do not involve licensing. The term “complaint” is familiar from the world of civil litigation and is more generic than the existing terms “accusation” or “statement of issues.” It simply refers to the pleading that initiates litigation. Similarly, a responsive pleading should be called an “answer” instead of a notice of defense.

The provisions relating to the contents of a complaint filed by the agency, method of service, the postcard which constitutes a notice of defense (including a request for hearing and an opportunity to raise certain defenses), venue, timing, and similar provisions of the APA all should be stated as default provisions that would remain binding on existing-APA agencies and could be varied by regulation by other agencies.

The existing APA appears to be defective in not imposing any time restrictions on the agency in considering applications.<sup>26</sup> I suggest that California adopt the provision in the MSAPA which imposes a 30-day period to respond and a 90-day period to either grant or deny the application.<sup>27</sup>

The APA allows pleadings to be freely amended both before and after a matter is submitted for decision, but requires the provision

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their notice and pleading practice. The Commission should be alert to opportunities to make the practice of existing-APA agencies more efficient.

25. This report will frequently suggest that one standard apply to the existing-APA agencies; that standard would apply to all other agencies unless they adopt different rules. This approach is responsive to two sorts of arguments: (1) a new APA should not unnecessarily create diversity where there is presently uniformity among APA agencies, and (2) a new APA should not force non-APA agencies into a mold that is appropriate for licensing but inappropriate or inefficient for other sorts of functions. It forces agencies that wish to depart from the default to conduct a rulemaking provision at which all constituencies would have an opportunity for input. No doubt many agencies will accept the default provisions; thus there should be greater uniformity of practice than now exists. As suggested *supra* in text accompanying note 3, the director of OAH should promulgate a model set of rules that all agencies can draw upon to facilitate this process.

Of course, this approach may encourage agencies to adopt rules providing more efficient but less protective procedures than the existing-APA agencies will be required to provide. However, such procedures must survive a rulemaking process in which the private bar will call the problem of inadequate procedures to the agency's attention.

26. The existing statute does provide a 60-day period within which the applicant can request a hearing and requires that the hearing be held within 90 days (with limited provisions for extensions). Bus. & Prof. Code §§ 485, 487.

In addition, the requirement of specificity should be the same for pleadings resulting from agency and outsider initiatives; statements of issues under present practice are sometimes vague. See *supra* text accompanying notes 4, 14.

27. However, this provision should explicitly be directory, not mandatory, so that an agency would not be disabled from denying an application if it does not or cannot meet the deadlines. *See Woods v. Department of Motor Vehicles*, 211 Cal. App. 3d 1265, 259 Cal. Rptr. 885 (1989), which discusses numerous cases and concludes that a court must analyze legislative intent to decide whether a time period is directory or mandatory, even if it is stated in mandatory terms. Of course, this provision should be subject to other statutes that give agencies more or less time to respond.

of additional time if needed to prepare a defense.<sup>28</sup> Responsive pleadings should also be freely amendable.<sup>29</sup> There is some doubt about the propriety of amendment of pleadings before non-APA agencies,<sup>30</sup> and this doubt should be removed. There is no reason to deny either party the ability to amend a pleading based on newly discovered evidence or to conform to proof or because counsel has been hired or for any other reason.<sup>31</sup>

The existing APA might provide for a right of private prosecution whereby a third party could compel an agency to hold a hearing even though the agency does not wish to discipline a licensee or deny an application.<sup>32</sup> A new APA should abolish the right of private prosecution if it now exists. It is difficult to justify private prosecution in light of the heavy caseload of most agencies, particularly licensing agencies. And private prosecution for wrongdoing

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28. Gov't Code §§ 11507, 11516.

29. It should be possible to raise any defense, including objections to form of pleadings and affirmative defenses, by amendments to the notice of defense. Existing Gov't Code § 11506(b) might mean that objections to form cannot be raised by amendment. *See* Ogden, California Public Agency Practice § 31.03[6][g] (1991).

30. Cook v. Civil Service Commission, 178 Cal. App. 2d 118, 127, 2 Cal. Rptr. 836 (1960), *hearing denied*, appears to broadly validate amendments. *But see* Brooks v. State Personnel Bd., 222 Cal. App. 3d 1068, 1074-75, 272 Cal. Rptr. 292 (1990); Brown v. State Personnel Bd., 166 Cal. App. 3d 1151, 213 Cal. Rptr. 53 (1985), *hearing denied*. The latter two cases hold that California State University and College System cannot amend a Notice of Dismissal to add additional charges of misconduct, because the Education Code fails to provide for amendments. These cases are an excellent example of a pointless difference between the administrative procedure of different agencies.

31. Judicial Council of California, Tenth Biennial Report 72 (1944); Button v. Board of Admin., 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218 (1981).

32. The language of Section 11503 suggests that a third party complainant can file an accusation or a statement of issues and thus trigger a hearing, even though the agency does not wish to discipline the licensee or to deny an application. *See* Humane Society v. Merrill, 199 Cal. App. 2d 115, 120 n.1, 18 Cal. Rptr. 701 (1962); *but see* Hogen v. Valley Hospital, 147 Cal. App. 3d 119, 195 Cal. Rptr. 5 (1983); Spear v. Board of Medical Examiners, 146 Cal. App. 2d 207, 212-13, 303 P.2d 886 (1956).

seems as inappropriate in administrative law as in criminal law where it has long since been abandoned.<sup>33</sup>

## B. INTERVENTION

If a person intervenes, that person becomes an additional party to the adjudication (in addition to the agency and the private party or parties who are disputing with the agency or with each other). Intervention is useful both to protect the interests of the intervening party and to assure that the agency receives input from and considers all of the interests affected by its decision. But intervention may also complicate a proceeding by adding one or more parties whose interests conflict with the other parties and who are entitled to engage in discovery, present witnesses, cross-examine witnesses, and so on.

*1. Present California law.* The present APA leaves issues of intervention unclear: it does not explain when or whether a person has a right to be admitted as a party (mandatory intervention) or when or whether the presiding officer has discretion to admit a person as a party (permissive intervention).<sup>34</sup> An Attorney General's

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33. MSAPA does not require an agency to hold a hearing, even if an outsider-complainant insists on one. MSAPA §§ 4-101(a)(1)-(2), 4-102(b)(2), 4-103. This seems like the correct call. The preclusion of private prosecution should be subject to specific statutory provisions designed to provide initiation rights to third parties. For example, environmental statutes sometimes explicitly enable third parties to force agencies to hold a hearing. *See also* Bus. & Prof. Code § 24203, which provides that accusations against liquor licensees can be filed by various public officials. Similarly, such a provision could not override constitutional protections of notice and hearing to third persons who suffer deprivation of liberty or property by reason of the agency action. *Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979) (adjoining landowner has right to notice and hearing before approval of subdivision of adjacent property); *Endler v. Schutzbank*, 68 Cal. 2d 162, 65 Cal. Rptr. 297 (1968) (employee harmed by action against licensee-employer has right to a hearing).

Although private prosecution should be precluded, it is important to distinguish the issue of public participation in ongoing proceedings. Once a proceeding has been properly initiated, outsider intervention (and other forms of participation) should be legitimated. See discussion of intervention in Part I.B. [The Prehearing Stage], *supra* at 453.

34. Gov't Code § 11500(b) defines "party" to include any person who has been allowed to appear or participate in the proceeding. However, it gives no

opinion states that there is no right of intervention in non-APA proceedings unless specifically conferred by the legislature,<sup>35</sup> but intervention does exist in numerous non-APA agencies.<sup>36</sup>

It should be emphasized that there are numerous ways, all clearly acceptable under existing law, whereby a person can have an impact on an ongoing adjudication without intervening as a party. The person can file an amicus brief, write a letter to the agency, testify as a witness, or contribute to the fees of a party. These techniques may be sufficient to transmit the person's views without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties.<sup>37</sup>

2. *MSAPA*. The MSAPA<sup>38</sup> contains detailed provisions on intervention. A presiding officer must grant a petition for intervention (mandatory intervention) if it states facts demonstrating that the petitioner's legal interests may be substantially affected by the proceeding *and* the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.<sup>39</sup> MSAPA also provides

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clue to the standards whereby someone should be allowed to appear or participate. The federal APA is similarly unclear. 5 U.S.C. § 555(b) (1988).

35. 32 Ops. Cal. Att'y Gen. 297 (1959) (protestants to application to Cemetery Board to establish new cemetery are not entitled to intervene; Board may but need not consider their written submissions). *But see Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979), indicating that adjoining landowners may have a constitutional right to intervene in land use proceedings; Note, 47 Cal. L. Rev. 747 (1959) (criticizing Attorney General opinion).

36. The Public Utilities Commission routinely grants applications to intervene (absent unreasonable broadening of issues) and administers a system of intervenor funding. Pub. Util. Code §§ 1801-1808; 20 Cal. Code Regs. §§ 53, 54, 76.51-76.62. The PUC's Public Adviser's Office does an outstanding job of assisting public intervenors. *See California Public Utilities Commission, Guide for PUC Intervenors* (1989). Similarly, intervention is allowed in Insurance Commissioner rate cases (including a system of intervenor funding) and in banking cases. 10 Cal. Code Regs. Arts. 14, 15; 10 Cal. Code Regs. § 5.5005.

37. Agency regulations should spell out these alternatives to intervention.

38. MSAPA § 4-209.

39. MSAPA § 4-209(a).

for permissive intervention: the presiding officer *may* grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.<sup>40</sup>

The presiding officer can place *conditions* on intervention, in order to facilitate reasonable input by intervenors without subjecting the proceedings to unreasonably burdensome or repetitious presentations.<sup>41</sup> The conditions may include limiting the intervenor's participation to designated issues; limiting the intervenor's use of discovery, cross-examination, and other procedures; and requiring two or more intervenors to combine their presentations.<sup>42</sup>

*3. Recommendations.* The Model Act's approach seems appropriate.<sup>43</sup> It broadly validates the concept of intervention in administrative law by persons (including other government agencies) who want to participate and have something to add because their point of view is being inadequately presented. Yet, regardless of the strength of the applicant's interest in the case, the MSAPA allows

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40. MSAPA § 4-209(b). The new Washington statute is similar, but it combines the provisions for mandatory and permissive intervention into a single standard based on the interests of justice and impairment of the orderly and prompt conduct of the proceeding. Wash. Rev. Code Ann. § 34.05.443 (1990). The new Connecticut statute requires an intervenor to demonstrate that his legal rights, duties or privileges shall be affected by the agency's decision and also requires a demonstration that participation is in the interests of justice and will not impair the orderly conduct of the proceeding. Conn. Gen. Stat. Ann. § 4-177a (Supp. 1991).

41. MSAPA § 4-209 comment.

42. MSAPA § 4-209(c). The Advisory Committee's notes to Federal Rules of Civil Procedure 24 also authorizes a court to condition intervention rights. It seems better to place the authority in the statute itself rather than in the comment. On conditional intervention, see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 752-56 (1968). The Public Utilities Commission, which allows virtually unlimited intervention and apparently unconditional rights for intervenors to participate might consider the imposition of conditions on intervention to limit the complexity of its proceedings.

43. In providing for both mandatory and permissive intervention, it loosely parallels the intervention rules in the Federal Rules and in the California Code of Civil Procedure. Fed. R. Civ. P. 24, Code Civ. Proc. § 387.

the presiding officer to balance that interest against the possible negative impact that intervention may have on the proceeding.<sup>44</sup> However, I would suggest a merger of the mandatory and permissive intervention standards; unless a person is entitled to intervene by reason of some other statute, intervention should always depend on the balance of the strength of the intervenor's interest against the impact on the proceedings.<sup>45</sup>

The Model Act makes clear that intervention can be limited to certain issues or that intervenors can be restricted in their participation or may be required to join with similarly situated intervenors. This provision significantly lessens the risk that intervention (especially by multiple parties) can seriously bog down a proceeding. Although not mentioned by the Model Act, it might sometimes be appropriate to limit the participation of or even exclude intervenors from settlement negotiations.

The Model Act correctly rejects any necessary link between intervention and standing to initiate an administrative proceeding or to bring a lawsuit or to seek judicial review; any person can intervene without regard to that person's legal interest.<sup>46</sup> It is important that standing and intervention not become synonymous

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44. *Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979), holds that a landowner suffers deprivation of property by reason of approval of a subdivision on adjacent property and is thus entitled to notice and hearing. If *Horn* means that the adjacent landowner has a right to intervene, it could conflict with Section 4-209(a) which allows a presiding officer to refuse intervention based on the balancing of interest standard set out in the statute.

However, due process requires a balancing of the interests of all parties and an assessment of the costs and benefits of the particular form of process sought. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Section 4-209 balancing appears consistent with *Mathews*. Therefore, there should be no absolute right to intervene, even in a *Horn* situation, if intervention would unduly complicate the hearing or delay a decision.

45. See the recently adopted Washington statute discussed *supra* note 40.

46. Some federal cases hold that a person has a right to intervene because that person would have standing to seek judicial review (or that a person cannot intervene unless he meets criteria for standing). *See, e.g.*, *National Welfare Rights Org. v. Finch*, 429 F.2d 725 (D.C. Cir. 1970); *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Note*, 1990 U. Ill. L. Rev. 605, 636 (arguing that the two doctrines should be wholly disentangled).

because they present sharply differing policy concerns. Intervention may be refused because it would unduly complicate a proceeding, but at least that proceeding is already ongoing. Granting a person standing to initiate an administrative proceeding or a lawsuit or seek review, on the other hand, allows a proceeding or an appeal to take place that (by hypothesis) otherwise would not take place. Standing to seek review has separation of powers dimensions and is designed to exclude certain cases from the courts. In contrast, intervention should be largely prudential and is intended to include (rather than to exclude) persons who have something to add to litigation.<sup>47</sup>

### C. DISCOVERY AND SUBPOENAS<sup>48</sup>

1. *Present California law.* The present APA contains a limited and exclusive provision for pre-hearing discovery.<sup>49</sup> These statutes codify the landmark case of *Shively v. Stewart*<sup>50</sup> in which Justice Traynor created a common law right of discovery in license revocation proceedings that parallels criminal discovery.<sup>51</sup>

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47. However, in some situations, there is a necessary link: if judicial review is limited to those who were “parties” to the administrative proceeding, a denial of intervention would be tantamount to barring the person from seeking review. In such situations, it is important for an agency to permit intervention. By the same token, a person that has been allowed to intervene as a party at the administrative level normally should have standing to seek review of the agency decision.

48. This report does not address agency investigatory techniques, including investigatory hearings, inspections, warrant requirements, or defenses against judicial enforcement of investigatory subpoenas. See Gov’t Code §§ 11180 *et seq.*; *Craib v. Bulmash*, 49 Cal. 3d 475, 261 Cal. Rptr. 686 (1989) (required records doctrine).

49. Gov’t Code §§ 11507.5 (exclusive method of discovery), 11507.6 (what is discoverable), 11507.7 (petition to compel discovery), 11511 (deposition of witness who will be unable or cannot be compelled to attend hearing). See *State v. Superior Court*, 16 Cal. App. 3d 87, 93 Cal. Rptr. 663 (1971) (post-hearing discovery not permitted).

50. 65 Cal. 2d 475, 55 Cal. Rptr. 217 (1966).

51. *Shively* involved revocation of the licenses of physicians alleged to have performed illegal abortions. The Court held that respondents had a common law right to discovery of the statements of the women and their husbands describing

Discovery under the APA occurs upon a written request by any party to another party made prior to the hearing and within 30 days after service of the initial pleading.<sup>52</sup> Any party is entitled to obtain from any other party the names and addresses of witnesses known to the other party<sup>53</sup> and to inspect and make a copy of any of the following:<sup>54</sup>

- (a) Statements<sup>55</sup> of persons named in pleadings when it is claimed that the respondent's act or omission as to such person is the basis for the administrative proceeding;
  - (b) Statements pertaining to the subject matter made by any party to another party or person;
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their care. They also had a right to copies of their own bills, letters and documents with respect to that treatment. Although they could not simply subpoena all other reports and documents gathered by the Board's investigators, they could take the depositions of the Board's attorney and executive secretary to determine whether there was good cause for the production of other documents that would not be privileged or work product. *See also* Nightingale v. State Personnel Bd., 7 Cal. 3d 507, 518, 102 Cal. Rptr. 758 (1972) (interrogatories did not meet good cause standard). Earlier the Supreme Court had applied the civil discovery rules to attorney discipline matters, stating these were *sui generis*. Brotsky v. State Bar, 57 Cal. 2d 287, 300-02, 19 Cal. Rptr. 153 (1962).

The *Shively* case seems to follow logically from *Jencks v. United States*, 353 U.S. 657 (1957) (although not its subsequent codification). *Jencks* required the prosecution in a federal criminal case to provide to the defense all prior statements by prosecution witnesses in the possession of the prosecution. The *Horn* rule does not extend to the taking of depositions or interrogatories since these devices are not part of criminal discovery. *Everett v. Gordon*, 266 Cal. App. 2d 667, 72 Cal. Rptr. 379 (1968).

52. Gov't Code § 11507.6, first sentence. The request can also occur 15 days after service of an additional pleading.

53. Including but not limited those intended to be called to testify at the hearing.

54. The statute protects legal privileges including work product. Gov't Code § 11507.6 (last sentence).

55. For this and other purposes under Section 11507.6, a "statement" includes a written statement signed by the person making it, a recording or transcript thereof of oral statements, or written reports or summaries of such oral statements.

- (c) Statements of witnesses proposed to be called by the party or of other persons having personal knowledge of the matter;
- (d) All writings (including mental, physical, and blood examinations) and things that the party proposes to offer in evidence;
- (e) Any other writing or thing that is relevant and would be admissible in evidence;
- (f) Investigative reports.<sup>56</sup>

The APA then provides a detailed scheme for the enforcement of discovery requests through a petition to the superior court.<sup>57</sup> Another provision provides for depositions from any material witness who will be unable or cannot be compelled to attend, including a witness residing outside the state.<sup>58</sup>

Some non-APA agencies provide a discovery practice.<sup>59</sup> It is unclear whether the *Shively* case would require non-APA agencies

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56. Gov't Code § 11507.6.

57. Gov't Code § 11507.7. See CEB, *supra* note 4, §§ 2.61-2.71; Ogden, *supra* note 29, § 32.06, 32.08. Failure to utilize this procedure waives rights of discovery. *Lax v. Board of Medical Quality Assurance*, 116 Cal. App. 3d 669, 172 Cal. Rptr. 258 (1981).

58. Gov't Code § 11511. Unlike the other discovery and subpoena provisions, the right to take the deposition of an unavailable witness is discretionary with the agency which must decide whether the witness' testimony would be "material." The constitutionality of this provision was questioned in *Blinder, Robinson & Co. v. Tom*, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986), *hearing denied*. The court was troubled that a prosecutor could decide what evidence a party would later be able to present before an ALJ. The court reluctantly upheld the provision, based on separation of powers precedents, and, more importantly, because the decision would ultimately be reviewable under an independent judgment standard.

59. State Bar disciplinary proceedings employ the full panoply of civil discovery. State Bar Rule 315. Civil discovery rules apply to termination of permanent teachers. Educ. Code § 44944. Workers compensation practice includes depositions and required medical examinations. Lab. Code §§ 4050-4055, 5710. The State Personnel Board must allow employees against whom adverse action is taken to inspect any relevant documents possessed by the appointing authority and to interview other employees having knowledge of the acts or omissions on which the adverse action was based. Gov't Code §§ 19574.1, 19574.2. Depositions and interrogatories can be ordered in the discretion of an Unemployment Insurance Appeals Board ALJ; also the Department of Employment is required to make its files available to a claimant. Unemp. Ins. Code § 1953; 22 Cal. Code Regs. § 5038(d); 5040, 5041(e). I am

to provide for discovery of witness lists and documents. To the extent that an agency proceeding that is not covered by the existing APA entails a fact-based determination and a remedy with serious repercussions for a private party (such as denial of a license, disapproval of a merger, loss of livelihood, or a civil penalty), it might be expected that the courts would follow *Shively*.

The APA also provides for the automatic issuance of pre-hearing subpoenas and subpoenas duces tecum at the request of any party.<sup>60</sup> During the hearing, however, the issuance of subpoenas is discretionary with the ALJ. The process extends to all parts of the state.<sup>61</sup>

2. *Model Act.* The MSAPA provisions on discovery and subpoenas appear to merge agency procedures with those of courts in civil litigation. The Act provides alternative versions, leaving states to

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informed that depositions and data requests are extensively used in Public Utilities Commission practice but the PUC rules say nothing about discovery. See Pub. Util. Code § 1794 (providing that a commissioner or any party may take a deposition). In insurance rate cases arising under Proposition 13, “discovery shall be liberally construed and disputes determined by the ALJ.” Ins. Code § 1861.08.3. The discovery regulations of the Superintendent of Banks are patterned on the APA model. 10 Cal. Code Regs. § 5.5104.

60. Gov’t Code § 11510. The standards of Code Civ. Proc. Sections 1985, 1985.1, and 1985.2 relating to subpoenas duces tecum and protections of privacy must be complied with. As to non-APA agencies, the Public Utilities Commission provides for subpoenas issued in blank. 20 Cal. Code Regs. Art. 15. The Department of Social Services in benefit cases provides for subpoenas requiring the presence of any witness whose expected testimony has been shown to be relevant and not cumulative or unduly repetitious. DSS Rule § 22-051.4. However, I was informed that DSS ALJs in welfare or MediCal cases are extremely reluctant to compel doctors to attend a hearing. The issuance of subpoenas is discretionary with the ALJ in appeals heard by the Unemployment Insurance Appeals Board. Unemp. Ins. Code § 1953; 22 Cal. Code Regs. § 5030(c). The Coastal Commission is not empowered to issue subpoenas.

61. Gov’t Code § 11511.5. See Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, 95-103 (conference becomes discovery device where parties exchange witness lists and evidentiary exhibits). The prehearing conference is discussed in Part I.D. [The Prehearing Stage], *supra* at 453.

decide whether the issuance of discovery orders and subpoenas are automatic or discretionary with the presiding officer.<sup>62</sup>

### *3. Recommendations*

*a. Civil discovery rules.* The main issue that the Commission should consider is whether to require some or all agencies to adopt the civil discovery rules, particularly those providing for depositions and written interrogatories.<sup>63</sup> I believe this would be a mistake. Civil discovery has become a long, tedious and costly process; perhaps prodded by possible malpractice exposure, attorneys feel that they must do exhaustive discovery in every case in which the client can pay for it. While the extensive use of depositions and interrogatories no doubt is effective in preventing surprises, encouraging settlement, and clarifying the issues to be tried, the costs may well outweigh the benefits. And unfortunately discovery is sometimes misused to exhaust an opponent, run up bills, or delay an ultimate resolution.<sup>64</sup>

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62. MSAPA § 4-210. The Comment observes that discovery and subpoena rights of interveners can be limited. See *supra* text accompanying note 42. The federal APA allows ALJs to permit depositions to be taken when the ends of justice would be served, § 556(c)(4), and permits agency rules to condition the issuance of subpoenas on a showing of general relevance and reasonable scope of the evidence sought, § 555(d).

63. An early recommendation of the Administrative Conference favors adoption by federal agencies of most of the discovery provisions in the Federal Rules, although with numerous modifications and provisions for agencies to tailor the rules to their own situation. See Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, which discusses the ACUS recommendation in detail. The Florida APA adopted civil discovery rules. Fla. Stat. Ann. § 120.58(1)(b) (West Supp. 1991). See also Comment, *Discovery in State Administrative Adjudication*, 56 Cal. L. Rev. 756 (1968) (urging adoption of discovery in range of adjudications); Comment, *Discovery Prior to Administrative Adjudications — A Statutory Proposal*, 52 Cal. L. Rev. 823 (1964) (suggesting flexible provision whereby ALJ in any agency could order appropriate discovery).

64. The empirical support for these assertions comes from accounts of those in the trenches. See *A Report on the Conduct of Depositions*, 131 F.R.D. 613 (1990); *Putting the Rocket in the Docket*, 76 A.B.A.J. 32 (Oct. 1990); *Discovery*, 15 Litigation 7 (Fall, 1988); Solovy & Byman, *Hardball Discovery*, *id.* at 8; Stein, *The Discoverers*, *id.* at 46; *Judges Identify Causes of Delay in Civil Litigation*, 14 Litigation News 3 (Dec. 1988) (survey of state and federal judges

Administrative adjudication was always intended to be quicker, simpler, more informal, and cheaper than litigation in court. The public interest demands that agency adjudication move as rapidly as possible, consistent with due process, and without undue technicality. Moreover, every California agency now experiences budget stringency and the Commission should be wary of recommending anything that would increase agency costs, increase the duties of agency enforcement staff or ALJs, require additional rulings before the hearing by ALJs or by courts, delay proceedings, or provide technical bases for reversal on judicial review. In my view, discovery would increase the costs of all sides — both respondents and agencies — and markedly delay the resolution of cases.<sup>65</sup> For example, lawyers for agencies or the Attorney General would have

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indicates that discovery abuse is most important cause of delay in civil litigation); Sherman & Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 246 (1983); Brazil, *The Adversary Character of Civil Discovery*, 31 Vand. L. Rev. 1295 (1978). See also Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2031-43 (1989) (attempts to limit discovery abuse in federal cases).

Contrary evidence comes from two empirical studies that concluded that discovery was not abused over a broad range of routine cases. However, the conclusions may be dated. Trubek *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA. L. Rev. 72, 89-90 (1983) (using 1978 data); Rosenberg, *The Impact of Procedure-Impact Studies on the Administration of Justice*, 51 Law & Contemp. Probs. 13, 25-27 (Summer 1988) (discussing study that used 1962 data).

65. An example is the apparently simple discovery statute applicable to the State Personnel Board. Gov't Code §§ 19574.1-19574.2. This provision allows employees to inspect relevant documents and interview other employees with knowledge of the events leading to an adverse action. Yet my interviews indicate that this section has caused protracted discovery disputes and delayed hearings. The problem, especially in disparate impact cases, is that the employee wants to inspect more documents than the appointing agency is willing to disclose. Also there are numerous disputes about evidentiary privileges. Similarly, I was told by Public Utilities Commission ALJs that discovery practice there has consumed large amounts of their time and effort.

Depositions seem well accepted in workers compensation practice. Note, however, that the dispute is between the employee and an insurance company; agency personnel need not be present. While deposition practice may be costly to the compensation system as a whole, at least the adjudicating agency does not have to pay those costs.

to sit through lengthy depositions of witnesses and would have to answer interrogatories. In addition, discovery would unduly favor respondents represented by counsel over unrepresented ones.

Yet the benefits of moving from the existing system of discovery to the civil system are dubious. Respondents already get to see witnesses statements in APA cases. And respondents are themselves in possession of a good deal of information about the events in question.<sup>66</sup> Perhaps discovery would help parties prepare better for trial, avoid surprising testimony from witnesses, and marginally improve the accuracy and fairness of the process. Nevertheless, the benefits are only incremental, since the existing system reveals most relevant information. Yet this change would carry heavy efficiency costs and has the potential, in the hands of a well-heeled litigant, to tie an agency in knots. Administrative discovery may be an example of the familiar motto that the best is the enemy of the good.

*b. Non-APA agencies.* As mentioned above, some non-APA agencies do provide for rudimentary discovery and some provide for a system that approximates the civil litigation model. However, even APA-style discovery of documents in the agency's file or other rudimentary techniques might be inappropriate or unnecessary in some of the adjudicative matters that would be covered by a revised APA. Consequently, I propose that the existing APA provisions continue to be applicable to agencies required to use OAH ALJs. These agencies could provide, by rule, for greater discovery rights than are provided by the present APA but not less. Moreover, the APA procedures would also apply to all other agency adjudication covered by the new Act unless the agency provides for a different scheme (or for no discovery at all) in regulations.<sup>67</sup>

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66. Moreover, as discussed below, respondents have subpoena duces tecum power. I suggest below that this discovery device be expanded so that the subpoenaed documents are available before the hearing. This will make them more useful for trial preparation.

67. This provision would not pre-empt statutes calling for a different discovery scheme, as in the case of workers' compensation or insurance commission ratemaking.

Similarly, the automatic subpoena provision in the APA<sup>68</sup> should continue to be applicable to all agencies required to use OAH ALJs. It should also be treated as a default provision; it will apply to other agencies that have a statutory subpoena power unless their rules provide a different approach.<sup>69</sup> However, all adjudicating agencies should have a subpoena power.<sup>70</sup>

c. *Revisions in the APA.* I suggest only a few minor revisions in the existing APA provisions. The existing provision for subpoenas duces tecum provides that the subpoenaed materials or documents will be available only at the hearing itself.<sup>71</sup> Private lawyers have complained that this gives them inadequate time to prepare; it may also require a continuance to be granted.<sup>72</sup> The agency, of course, has broad power to compel depositions and subpoena documents at

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The new Washington statute, which is modeled in large part on MSAPA, takes a slightly different approach. It allows agency rules to determine discovery rights but, unless otherwise provided in such rules, the presiding officer may decide whether to permit the use of all civil litigation discovery techniques. The statute provides guidance to the presiding officer for the exercise of such discretion. Wash. Rev. Code Ann. § 34.05.446(2)-(4) (1990). I did not follow this model because of concern that it would impose a substantial extra burden on ALJs, particularly since an ALJ may not have been designated at the time that the parties engage in discovery.

68. Gov't Code § 11510.

69. Thus agencies could provide that subpoenas will not issue unless the party seeking them first establishes the relevance of the evidence sought. Or it could have different standards for subpoenas compelling the attendance of witnesses and subpoenas duces tecum.

70. The Coastal Commission lacks subpoena power at present.

71. Gov't Code § 11510(a); *Gilbert v. Superior Court*, 193 Cal. App. 3d 161, 238 Cal. Rptr. 220 (1987).

72. Letter from Kenneth L. Freeman to California Law Revision Commission (Jan. 16, 1991). Freeman explained that in some cases the documents provided by the agency under Section 11507.6 are incomplete; the complete records can only be obtained from witnesses by the use of a subpoena duces tecum. Yet these materials would be available only at the hearing itself which provides inadequate time to analyze them before using them in the examination or cross examination of witnesses. Similarly, a party's expert witnesses do not have adequate time to prepare if they cannot review documents in advance of the hearing.

any time as part of its investigatory powers,<sup>73</sup> so there is a considerable discrepancy between the powers of the two sides.

I suggest that the successor to Section 11510 permit subpoenas duces tecum that require documents to be produced at any reasonable time and place, rather than only at the hearing.<sup>74</sup> This should not pose any additional burden to persons who must supply documents; they must simply supply them earlier than is presently the case. Nor would it burden the agency or its staff; it would not expand a party's discovery rights against the agency. If the subpoena is not honored, the party who issued it should be able to petition for judicial relief under the same provision presently used to compel discovery.<sup>75</sup>

Another minor change concerns the existing APA provision that concerns depositions of witnesses who will be unavailable to testify at the hearing.<sup>76</sup> The agency can refuse to authorize such depositions upon a finding that the testimony would not be material. A recent case questioned the fairness and constitutionality

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73. Gov't Code § 11180 *et seq.*; *Brovelli v. Superior Court*, 56 Cal. 2d 524, 15 Cal. Rptr. 630 (1961).

74. This proposal is similar to an Administrative Conference Recommendation. See Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, 124-39. It would thus convert the subpoena duces tecum provision into a discovery tool. Therefore, Section 11507.5 should be correspondingly amended (it states that Section 11507.6 is the exclusive discovery provision).

75. Gov't Code § 11507.7. Alternatively, the contempt provision in Gov't Code § 11525 could be amended to permit respondents to seek enforcement of the subpoena in the superior court. See *Gilbert v. Superior Court*, 193 Cal. App. 3d 161, 238 Cal. Rptr. 220 (1987) (requester of subpoena can petition for enforcement).

Such judicial enforcement provisions might be abused to achieve delay of a hearing. I can imagine a situation in which the recipient of a subpoena duces tecum might refuse to supply documents so that the issuer of the subpoena would have to seek judicial enforcement, and the pendency of the enforcement proceeding could be used as an excuse for continuing the hearing before the ALJ. Therefore, it should be provided that the pendency of a judicial enforcement action against a party other than the agency itself would not be good cause to continue the hearing. See Gov't Code § 11524(a). If the subpoenaed material has not yet been produced, it would have to be produced at the hearing as under present law.

76. Gov't Code § 11511.

of this provision where the decision denying the application was made by an adversary.<sup>77</sup>

One approach to the issue would be to give any party an automatic right to take the deposition of a party who will be unavailable to testify. However, such a provision might be abused since the recipients of the subpoena might be unsophisticated and submit to the deposition even though they would be available at the hearing. Probably the ability to take a pre-hearing deposition should continue to be discretionary, but the decision whether to allow the deposition should be made by an ALJ, if one has been assigned, or by an agency staff member or agency head who has not been involved in the case as an adversary.

There should be a clear provision whereby the recipient of a subpoena can move before an ALJ to quash it, whether issuance of the subpoena was mandatory or discretionary with the agency.<sup>78</sup> There is some doubt about whether an agency has the power to quash its own subpoena that was issued as a matter of right;<sup>79</sup> this doubt should be removed. It should also be made clear that any party who has issued a subpoena can petition the court for enforcement (the statute suggests that only the agency can do so).<sup>80</sup> Prior to any recourse to a court arising out of a discovery dispute, the parties must make a good faith attempt to resolve the matter.<sup>81</sup> Finally, the

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77. Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 290, 226 Cal. Rptr. 339 (1986), *hearing denied* (decision made by senior corporation counsel who also was chief prosecutor).

78. For example, the Public Utilities Commission regulations provide for such a proceeding. 20 Cal. Code Regs. § 61. *See also* Florida APA, Fla. Stat. Ann. § 120.58(2) (West Supp. 1991) (any person on timely petition may request hearing officer to invalidate subpoena on ground it was not lawfully issued, is unreasonably broad in scope, or requires production of irrelevant material).

79. CEB, *supra* note 4, § 2.96.

80. Gov't Code § 11525; Gilbert v. Superior Court, 193 Cal. App. 3d 161, 167, 238 Cal. Rptr. 220 (1987) allows the requester to go directly to court despite the literal language of the statute. The result of the Gilbert case should be confirmed.

81. *See* Code Civ. Proc. § 2025(i): Motion for a protective order shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

statute providing that a person who fails to respond to a subpoena can be held in contempt should be clarified so that the person has the opportunity to respond after the court has upheld the subpoena.<sup>82</sup>

#### D. PREHEARING CONFERENCE

1. *Present California law.* As amended in 1986, the APA provides for a prehearing conference to be held on motion of either party or by order of the ALJ.<sup>83</sup> The 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 proffer 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.

The ALJ shall issue a prehearing order incorporating the matters determined at the prehearing conference (or direct one or more of the parties to do so).

Some non-APA agencies also employ prehearing conferences.<sup>84</sup>

2. *Model Act.* MSAPA contains detailed provisions on prehearing conferences.<sup>85</sup> It permits the prehearing conference to be converted directly into a conference or a summary hearing, thus

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82. The language of Gov't Code Section 11525 implies that a person might be automatically in contempt for refusing to comply with the subpoena if the court upholds the subpoena. A better model is Gov't Code Section 11188.

83. Gov't Code § 11511.5.

84. These include the Public Utilities Commission, Water Resources Control Board, and State Personnel Board.

85. MSAPA §§ 4-204, 4-205.

obviating any further hearing.<sup>86</sup> It makes clear that a party who fails to attend or participate in the prehearing conference may be held in default. It also states that the presiding officer can conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant has an opportunity to participate in the proceeding.

*3. Proposals.* The prehearing conference now provided for by the APA is an excellent innovation.<sup>87</sup> It is generally presided over by the same ALJ who will conduct the hearing, so that it is an efficient case management device. It should speed up the actual hearing by clearing away procedural issues in advance. Thus the prehearing conference should continue to be required in hearings presided over by OAH ALJs. It should also constitute the default provision applicable to all agency adjudication unless an agency adopts regulations dispensing with it or changing it.

I have a few suggestions for improvement of the APA provision. First, the provision in the MSAPA allowing the prehearing conference to occur by electronic means, such as a conference telephone call, seems like a good idea. It must be a hardship for respondents and their counsel who live in remote parts of the state to come to a prehearing conference. Second, the MSAPA makes clear that a party must attend a prehearing conference or be found in default; this also seems like a good idea and should be part of the California act. Third, the prehearing conference could serve as an informal discovery technique. Therefore, the ALJ should be permitted to require an exchange of witness lists and of evidentiary exhibits.<sup>88</sup> Finally, if the Law Revision Commission decides to

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86. Conference and summary hearings are discussed in Part III.E., *infra* at 519, 523.

87. See 3 K. Davis, *Administrative Law Treatise* § 14.8 (1980).

88. See Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, 95-103. Tomlinson suggests that the ALJ have power to issue orders to protect a witness from intimidation.

There is a possible conflict between the discovery provision of the APA, discussed previously, and the suggestion that provision for exchange of witness lists and of exhibits that can be required at the prehearing conference. The discovery provisions contain strict time limits. If a party has not availed itself of

adopt various informal hearing models (such as conference hearings), the MSAPA provision that allows a prehearing conference to be converted directly into a conference hearing seems appropriate, so long as the parties are given notice that such can occur.

## E. DECLARATORY ORDERS

Persons subject to the regulatory authority of administrative agencies frequently need reliable advice about the application to them of the agency's enabling statute, its rules, or its case law.<sup>89</sup> They need this information for planning purposes, even though there is no pending administrative proceeding (such as an accusation or an application) involving them. Generally, they can get sufficiently reliable advice simply by asking agency staff for it and receiving a written advice letter. However, if the issue is uncertain the staff may be unwilling to provide such guidance, and, in any event, the reliability of the letter is not absolutely assured. Therefore, such persons sometimes need a more binding expression of the agency's views about the issue.

In the judicial system, this requirement is satisfied by the declaratory judgment procedure. A declaratory order is the administrative law equivalent of a declaratory judgment.<sup>90</sup> Essentially, a declaratory order petition asks an agency to declare how the law would apply to assumed facts. Therefore, no hearing is necessary since the facts are stated in the petition.<sup>91</sup> The declaratory order has the same legal effect as any other adjudicatory order. Thus it is res judicata and the order (or an agency refusal to issue an order) is

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discovery within those time periods, it should not be permitted to use the prehearing conference as a substitute. The pre-hearing conference should not be a substitute for statutory discovery and should be limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

89. See M. Asimow, *Advice to the Public from Federal Administrative Agencies* (1973).

90. See generally Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. 731, 805-24 (1975).

91. The conference hearing format discussed in Part III.E would be appropriate to resolve declaratory order cases. See *infra* at 519.

subject to judicial review. Modern APAs generally contain a provision authorizing declaratory orders<sup>92</sup> and I suggest that the California APA follow suit.

1. *Model Act.* Because the concept was virtually unknown in 1945,<sup>93</sup> there is no declaratory order provision in the California APA.<sup>94</sup> The federal APA contains a skeletal provision on declaratory orders that makes their issuance wholly discretionary with the agency.<sup>95</sup> The 1981 MSAPA contains a provision that reflects modern thinking on the subject.<sup>96</sup> Essentially that provision requires the agency to issue a declaratory order<sup>97</sup> unless the agency's rules provide that no such order will be issued in that particular class of circumstances.<sup>98</sup>

2. *Proposals.* I suggest that California adopt a provision for declaratory orders that parallels the MSAPA approach. As under MSAPA, an agency's rules concerning declaratory orders must permit third party intervention, but otherwise can make the various adjudicatory provisions of the Act inapplicable. For example,

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92. See, e.g., Conn. Gen. Stat. Ann. § 4-176 (1991 Supp.); Fla. Stat. Ann. § 120.565 (West Supp. 1991); Bonfield, note 90 (Iowa statute); Wash. Rev. Code Ann. § 34.05.240 (1990) (leaving issuance of orders discretionary with agency).

93. By then, however, the judicial declaratory judgment was well recognized. See *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933).

94. The absence of a provision in the existing statute raises the question of whether agencies can issue binding declaratory orders absent statutory authority. Scholarly opinion is that they can; the power is implied from the power to adjudicate. See Asimow, *supra* note 89, at 121-22.

95. The federal APA, 5 U.S.C. § 554(e) (1988), provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." See Comment, *Declaratory Orders — Uncertain Tools to Remove Uncertainty*, 21 Admin. L. Rev. 257 (1969).

96. MSAPA § 2-103.

97. Unless the declaratory order would substantially prejudice the rights of another person who has not consented to the proceeding. MSAPA § 2-103(a).

98. MSAPA § 2-103(b). The recently adopted Washington and Connecticut statutes largely track MSAPA but do not make the issuance of a declaratory order mandatory. Conn. Gen. Stat. Ann. § 4-176(e) (Supp. 1991); Wash Rev. Code § 34.05.240 (1990).

cross-examination is unnecessary since the petition establishes the facts on which the agency should rule. Oral argument could also be dispensed with. The rules should also provide all necessary procedural details, including a suggested form for a declaratory ruling petition. The rules should require a clear and precise presentation of facts, so that the agency will not be required to rule on the application of law to unclear or excessively general facts. If the facts are not sufficiently precise, the agency's rule should make clear that the agency can require additional facts or a narrowing of the petition.

One argument against providing for declaratory orders (especially a mandatory provision like the one in 1981 MSAPA) is that it could pose an additional burden for agencies. Moreover, the burden would be difficult to anticipate; an agency can largely control its own caseload by deciding how many accusations to issue but it could not control petitions for declaratory orders (except by adopting rules that preclude such orders in designated classes of cases). However, the burden on the agency of issuing the order is not severe because no trial is involved; there need be no proceeding before an ALJ. The matter can simply be resolved by briefs and oral argument, so the burden should not be substantial. And if a particular situation is generating an unmanageably large demand for declaratory orders, that situation could be placed off limits by the rules. Or the Commission may decide to handle the problem by leaving the issuance of declaratory orders discretionary, as was done in several recently adopted statutes.<sup>99</sup>

Another argument against declaratory orders is that they may allow requesters to find out exactly where the line is located between legal and illegal conduct, so they can skate to the edge of what is legally permissible. Agencies may believe that it is desirable to maintain a certain ambiguity about what is legal. In general, I disagree; if it is possible to state clearly where the line is located, people are entitled to know this. If this knowledge permits people to engage in undesirable behavior, the rule should be changed to move the line. In any event, however, if the agency does not wish

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99. See *supra* note 98.

to provide guidance on a particular point, for this or any other sound reason, it can so declare in its rules and then decline declaratory order requests.

The arguments against a declaratory order provision are not persuasive. In light of the utility of the procedure to private parties who need absolutely reliable guidance on legal questions, I recommend adoption of a provision similar to the MSAPA provision on declaratory orders.<sup>100</sup>

#### F. CONSOLIDATION AND SEVERANCE

The existing APA contains no provisions allowing agencies to consolidate related cases or to sever a single case that could be more economically handled in several parts, although I understand that ALJs have assumed they had such power. Some agencies have regulations allowing consolidation.<sup>101</sup> The consolidation and severance provisions in the Code of Civil Procedure<sup>102</sup> are virtually identical to those in the Federal Rules.<sup>103</sup> It has been suggested that such provisions should appear in a new APA, so that a presiding officer can require either consolidation or severance of cases to promote efficient decisionmaking or avoid prejudice.<sup>104</sup>

One well established administrative law principle that requires consolidation concerns “comparative hearings”: application cases should be heard together when they are competitive and fewer than all can be granted.<sup>105</sup> With appropriate modifications of terminol-

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100. The comment should point out that agencies have power to issue declaratory orders even without statutory authority to do so. See *supra* note 94. Otherwise, the enactment of this provision might be interpreted to deny that power to agencies or to adjudications that are not covered by the new APA.

101. The Public Utilities Commission and Unemployment Insurance Appeals Board have consolidation rules. 20 Cal. Code Regs. § 55 (cases with common questions of law or fact can be consolidated); 22 Cal. Code Regs. § 5032 (any number of cases can be joined to dispose of all of the issues).

102. Code Civ. Proc. § 1048.

103. Fed. R. Civ. P. 42.

104. Letter from Gregory L. Ogden to Michael Asimow (Feb. 26, 1990).

105. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). In *Bostick v. Martin*, 247 Cal. App. 2d 179, 55 Cal. Rptr. 322 (1966), *hearing denied*,

ogy to adapt it to administrative law, the consolidation-severance provision in the Code of Civil Procedure should work well. These provisions should be broad enough so that related cases brought before several agencies could be consolidated into a single proceeding<sup>106</sup> and so that class action procedures can be employed in the agency's discretion.<sup>107</sup>

## G. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

*1. The ADR movement.* In both civil litigation and in all facets of administrative law, the alternative dispute resolution (ADR) movement has won powerful support.<sup>108</sup> The legislature has broadly declared support for ADR at all levels of dispute resolution, including local government and administrative agencies.<sup>109</sup>

Virtually everyone agrees that mechanisms should be in place to facilitate and encourage settlement of many kinds of disputes. A negotiated settlement is far preferable in most situations to the costly, slow, zero-sum and emotionally exhausting process of

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applications of two competing savings and loans were heard comparatively. This approach was approved by the appellate court.

106. See Ogden, *supra* note 29, § 33.02[1][a] (filing of fraudulent MediCal claims by physician could trigger proceedings before both Department of Health Services and Board of Medical Quality Assurance).

107. See Ramos v. County of Madera, 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421 (1971) (no provision for class actions in welfare statutes); Rose v. City of Hayward, 126 Cal. App. 3d 926, 935-37, 179 Cal. Rptr. 287 (1981) (APA does not authorize class actions).

108. The ADR movement is the subject of a vast literature. See, e.g., Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution (1987), which is over 1000 pages long. Shannon, *The Administrative Procedure and Texas Register Act and ADR*, 42 Baylor L. Rev. 705 (1990) summarizes state law developments. The details of the different techniques of ADR, or of the procedures of any given federal or state agency, are beyond the scope of this report. My purpose is to validate ADR in administrative adjudication and to require agencies to establish mechanisms so that it can evolve.

109. Bus. & Prof. Code Section 465(d) declares "Courts, prosecuting authorities, law enforcement agencies, and administrative agencies should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved."

adjudication and judicial review. In this era of backlogged dockets, staggering litigation costs on both the private and public side, and diminishing resources available to agencies, ADR takes on enhanced importance. Agencies and private attorneys cannot be compelled to develop a culture that favors settlement over adversary struggle, but an APA can help by legitimating various ADR techniques (so that their legality cannot be questioned) and encouraging agencies to put in place feasible mechanisms to facilitate settlements.<sup>110</sup>

In 1990, Congress amended the federal APA in order to require agencies to explore and utilize ADR techniques in all agency functions, including adjudication and rulemaking.<sup>111</sup> The federal APA now empowers a presiding officer to use ADR techniques and to require the attendance of parties at settlement conferences. It also requires the presiding officer to inform the parties as to the availability of ADR techniques and to encourage their use.<sup>112</sup> In addition, the statute authorizes and encourages agencies to use the whole range of ADR techniques: settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration.<sup>113</sup> The statute makes clear that these techniques are voluntary

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110. In the civil litigation system, court-ordered arbitration and settlement conferences are now routine. *See, e.g.*, Fed. R. Civ. P. 16 (providing for sanctions for refusal to participate in good faith in settlement conferences). Federal judges have pioneered numerous other ADR strategies including various forms of mediation and minitrials.

111. Administrative Dispute Resolution Act, Pub. L. No. 101-552. The Act is concisely summarized in S. Rep. 101-543, 6 U.S.C.C.A.N. 3931 (1990). The Act requires agencies to appoint a dispute resolution specialist and provide training for all employees engaged in implementing an ADR program. Pub. L. No. 101-552, § 3(b). It provides for confidentiality of communications made in the course of ADR proceedings. 5 U.S.C. § 574 (Supp. V 1993). In 1990, Congress also passed a related piece of legislation, the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, to foster ADR techniques in rulemaking.

112. 5 U.S.C. § 556(c)(6)-(8) (Supp. V 1993).

113. The most detailed provisions concern arbitration. 5 U.S.C. §§ 575-581 (Supp. V 1993). To allay constitutional concerns, the head of an agency is authorized to terminate an arbitration proceeding after the arbitrator makes an award but before it becomes final.

and not always appropriate (for example, where an authoritative resolution of a matter is required to establish a precedent).<sup>114</sup>

At the federal level, even before the 1990 adoption of the Alternate Dispute Resolution Act, much had been done to encourage and facilitate negotiation, mediation, and arbitration.<sup>115</sup> The 1990 statutory amendments should greatly accelerate this trend. Elaborate mediation structures are already in place and a variety of creative mediation techniques have been developed, including factfinding and minitrials.<sup>116</sup>

The California APA contains a provision for prehearing conferences, one purpose of which is “exploration of settlement possibilities.”<sup>117</sup> The prehearing conference should be strengthened and made universally applicable,<sup>118</sup> but it has limitations as a case settlement device. If the ALJ who conducts the prehearing conference is the same person who will conduct the hearing, the judge can do relatively little to mediate the dispute or push the parties toward settlement without compromising judicial impartiality or receiving ex parte contacts.

I am informed that OAH will, on request and in relatively lengthy cases, make a settlement judge available.<sup>119</sup> My information is that this judge can be quite effective in causing the parties to reevaluate their positions and move toward settlement. Several

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114. 5 U.S.C. § 572(b) (Supp. V 1993).

115. Various Administrative Conference resolutions were instrumental in encouraging ADR. See 1 C.F.R. § 305.86-3, 87-11, 88-5. See generally Pou, *Federal Agency Use of “ADR”: The Experience to Date*, in Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 101-13 (1987); Smith, 1984 Mo. J. Disp. Resol. 9.

116. It is important to establish a system of mediator confidentiality, insofar as this is legally possible. See Harter, *Neither Cop nor Collection Agent: Encouraging Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315 (1989) (this article has a good discussion of EPA’s successful mediation in Superfund cases).

117. Gov’t Code § 11511.5(b)(1); see also 20 Cal. Code Regs. § 51.1(b) (PUC settlement conferences).

118. See Part I.D. [The Prehearing Stage], *supra* at 453.

119. The State Personnel Board also makes settlement judges available.

federal agencies also make settlement judges available routinely, with excellent results.<sup>120</sup>

Apparently a deterrent to settlement of cases under the APA is that only the agency heads have the authority to approve a settlement; a deal negotiated by the parties, perhaps with the help of a settlement judge, cannot be finalized until it is passed on by the agency heads. No other agency staff has authority to agree to a settlement.

2. *Proposals.* The APA should contain a variety of provisions that will clearly validate ADR techniques and will encourage agencies to create routine mechanisms to encourage settlement. I suggest the following:

a. The statute should make clear that administrative adjudicatory disputes can be settled upon any terms the agency and the parties deem appropriate,<sup>121</sup> before or after an accusation is issued.<sup>122</sup> The

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120. See ACUS Rec. 88-5, 1 C.F.R. § 305.88-5; Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 Admin. L.J. 571 (1989-90). Joseph & Gilbert discuss the well established practice at FERC and OSHRC employing settlement judges. One disadvantage of settlement judges, aside from the fact that assignment of judges to settlement takes them away from trying cases, is the fact that the judge's efforts to settle one case might be viewed as compromising the judge's impartiality when later trying a similar case or one involving some of the same parties.

121. See *Rich Vision Centers, Inc. v. Board of Medical Examiners*, 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983), *hearing denied*. This case holds broadly that a licensing agency has implied power to settle cases, including an agreement that imposes the agency's litigation and investigation costs on the licensee. The *Rich Vision* decision was a case of first impression and it would be desirable to codify the result.

Of course, such a provision would be precluded by more specific legislation. Workers' compensation settlements must be approved by the Board or a workers' compensation judge. See Lab. Code § 5001; California Workers' Compensation Practice, ch. 13 (Cal. Cont. Ed. Bar 1985).

122. Present law may be unclear as to whether an agency can settle a licensing case without filing an accusation. See Cooper, *Resolving Real Estate Disciplinary Matters Prior to Hearing*, 47 Cal. St. B.J. 331, 363 (1972). I am told that agencies are reluctant to settle a case before an accusation is filed, lest they be accused of concealing serious wrongdoing. My feeling is that settlements should be facilitated; if a dispute can be settled by an agreement satisfactory to all sides before a complaint is issued, so much the better.

statute should also empower agencies to delegate the power to approve settlements.<sup>123</sup>

*b.* Unless agency rules otherwise provide, an agency should put in place a system of settlement judges, whereby a judge of comparable status to the judge who will hear the case will be made available to help mediate a settlement. A settlement judge should be routinely assigned on request of either party or by decision of the chief ALJ of the agency. The chief ALJ should decide, in each case, whether the proceeding is suspended pending termination of settlement negotiations. The agencies should have power to impose sanctions on parties that fail to participate in good faith in settlement negotiations with the settlement judge or fail to send someone with authority to settle to the conference

*c.* The statute should make clear that all agencies have power to refer cases for mediation by outside mediators with the consent of all parties.<sup>124</sup> Such mediators should have the ability to utilize any mediation technique. The agencies should be required to adopt rules to implement this statute. Such rules would include provisions explaining how mediators are selected and compensated, their qualifications, and for confidentiality of the mediation proceeding.

*d.* The statute should make clear that all agencies have power to refer cases for binding or non-binding arbitration with the consent

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123. Thus the agency heads should be able to empower a staff member, such as the executive officer, to definitively approve a settlement. At present, the general understanding is that settlements must be approved by the agency heads, but the heads are typically part-time appointees who may not be able to meet and consider the settlement for a considerable period of time. Power to settle licensing cases before the Department of Social Services has been delegated so that settlements can be approved on the spot.

124. Perhaps OAH could maintain a roster of mediators who would be available for dispute settlement in all administrative agencies, whether or not they use OAH ALJs. The federal Administrative Dispute Resolution Act requires the Administrative Conference to maintain a roster of neutrals who can serve as mediators or arbitrators.

of the parties.<sup>125</sup> Again, agency rules would provide for the qualifications of the arbitrators and for the ways in which they would be chosen and paid. In the case of binding arbitration, the arbitrator's decision would bind both parties and would be subject to only the limited judicial review customarily accorded to arbitrations.<sup>126</sup> In the case of non-binding arbitration, the party who chose to continue litigating must pay the other party's costs if the ultimate result is not better for him than the arbitrator's decision.

e. The statute should provide a clear provision protecting the confidentiality of communications made during the course of ADR proceedings.<sup>127</sup>

### III. THE HEARING PROCESSES

#### A. EVIDENCE

1. *Present California law.* The APA provides that "technical rules" of evidence and witnesses are not applicable to administrative hearings. Instead, "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."<sup>128</sup> The APA also provides that "irrelevant and unduly

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125. Prior to enactment of the Administrative Dispute Resolution Act in 1990, *supra* note 111, there were serious doubts about whether federal agencies could engage in binding arbitration.

126. It could be argued that such arbitration should be open to judicial review by persons who were not parties to the arbitration but were adversely affected by it. See newly adopted federal APA provision, 5 U.S.C. § 581 (Supp. V 1993).

127. Confidentiality of the negotiating process is critical. Thus any statements made or documents produced in the course of settlement negotiations should not be admissible during subsequent proceedings. See Harter, *supra* note 116. The federal statute now contains a detailed provision protecting communications to a mediator. 5 U.S.C. § 574 (Supp. V 1993).

128. Gov't Code § 11513(c). The Judicial Council's report stated:

There are several reasons which led the Council to favor a continuance of the present informal evidence rules in administrative hearings. Many of the court rules of evidence were devised to prevent certain types of evidence

repetitious evidence shall be excluded.”<sup>129</sup> In addition, the rules of privilege are recognized.<sup>130</sup> There is an additional provision on affidavits as evidence.<sup>131</sup>

Notwithstanding the APA’s broad command to dispense with the rules of evidence, my understanding is that OAH ALJs typically apply the rules of the Evidence Code. Some of them exclude hearsay evidence that would be inadmissible in civil cases, while others admit it.

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from reaching an untrained lay jury selected for one case. The Council concluded that these exclusionary safeguards are not necessary when the decision is to be made by experts in a particular field .... More important, perhaps, is the fact that many litigants in agency hearings are not represented by counsel, and they would be penalized if the court rules were applied .... A final consideration leading to a relaxation of the court rules of evidence in agency proceedings stems from the criticism of these rules as applied in the courts. Courts frequently recognize that the rules are too restrictive, and particularly when the case is tried without a jury the tendency is to admit all relevant evidence which will contribute to an informed result ....

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

129. Gov’t Code § 11513(c). It is not clear whether this provision requires the application of relevance standards in the law of evidence. *See Coburn v. State Personnel Bd.*, 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134 (1978), *hearing denied*, which suggests that the Evidence Code rules on admission of prior convictions apply to administrative proceedings.

130. The APA provides: “The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing ....” This might suggest that the rules of privilege are inapplicable unless a statute requires them to be observed in administrative proceedings. Notwithstanding this ambiguity, the rules of privilege are recognized in administrative hearings. *Ogden*, *supra* note 29, § 38.05.

131. Gov’t Code § 11514. This provision requires a party that wishes to introduce an affidavit to deliver a copy to the opposing party at least ten days before the hearing. At least seven days before the hearing, the opponent must deliver to the proponent a request to cross-examine the affiant or the opponent waives cross-examination and the affidavit will be given the same effect as if the affiant had testified orally. However, if an opportunity to cross-examine the affiant is not afforded after request, the affidavit may be introduced but will be treated as hearsay. This means it cannot be the sole support for findings under the residuum rule, discussed below. Affidavits can be freely used in default cases. Gov’t Code § 11520.

The APA's provision on the introduction of evidence parallels the rules applicable to non-APA agencies<sup>132</sup> and indeed is the general rule in state and federal administrative law: civil evidence rules do not control the admission of evidence in administrative proceedings but the presiding officer has the discretion to exclude evidence of little probative value.

The APA imposes the "residuum rule," meaning that findings cannot be supported exclusively by hearsay.<sup>133</sup> It provides: "Hearsay evidence may be used for the purpose or 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."<sup>134</sup> The residuum rule is also a part of California administrative common law. Under *Walker v. City of San*

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132. See, e.g., Lab. Code § 5708 (workers compensation judges "shall not be bound by the common law or statutory rules of evidence and procedure").

In contrast, the State Personnel Board may be required to follow the more demanding rules of the Evidence Code in discharge cases. Gov't Code Section 19578 states the Board should follow Gov't Code Section 11513 "except that ... the parties may submit all proper and competent evidence ...." Coburn v. State Personnel Bd., 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134 (1978), indicates the word "competent" may incorporate all admissibility rules of the law of evidence. I believe this interpretation is erroneous.

State Bar Rule 556 (applicable to disciplinary proceedings) requires adherence to evidence rules. The Agricultural Labor Relations Board must apply provisions of the Evidence Code "so far as practicable." Lab. Code § 1160.2. This peculiar provision tracks a statute governing the NLRB, which has caused much uncertainty at the federal level and was criticized by the Administrative Conference. Rec. 82-6, 1 C.F.R. § 305.82-6. See Davis, *supra* note 87, § 16.13; Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 7-9, 16 (1987). In its only application in California, it generated a 2-1 split in the Court of Appeals. Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd., 153 Cal. App. 3d 262, 201 Cal. Rptr. 371 (1984), *hearing denied*.

133. "[I]n the end there must be a residuum of legal evidence to support the claim before an award can be made" and "[s]uch hearsay evidence is no evidence." *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507, 509 (1916). In *Carroll*, the workers compensation board had made an award based solely on a declaration of the employee just prior to his death that the injury was job-related.

134. Gov't Code § 11513(c).

*Gabriel*,<sup>135</sup> a reviewing court will set aside a decision based solely on hearsay because such a decision is an abuse of discretion or is lacking in substantial evidence.<sup>136</sup> This rule does not seek to evaluate the actual reliability of the hearsay; if a finding is supported solely by evidence that would be excludable in court under the hearsay rule, it cannot support a decision.

California law contains several other variations on this theme. In unemployment cases, contradicted hearsay cannot support a finding.<sup>137</sup> PERB follows the residuum rule in unfair labor practice cases but not representation cases.<sup>138</sup> In workers' compensation cases, the residuum rule is not followed,<sup>139</sup> but a finding based solely on *unreliable* hearsay flunks the substantial evidence test on judicial review.<sup>140</sup> Thus the worker's compensation rule is quite different from the APA and the California common law residuum rule, which require rejection of findings supported only by hearsay regardless of the reliability of the particular hearsay evidence.

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135. 20 Cal. 2d 879, 129 P.2d 349 (1942).

136. See also *Layton v. Merit System Comm.*, 60 Cal. App. 3d 58, 131 Cal. Rptr. 318 (1976); *Kinney v. Sacramento City Employees' Retirement Sys.*, 77 Cal. App. 2d 779, 176 P.2d 775 (1947). See *Collins, Hearsay and the Administrative Process*, 8 Sw. U. L. Rev. 577, 591-95 (1976). The *Walker* decision clearly states that the residuum rule can be altered by statute. 20 Cal. 2d at 881 (majority), 882 (concurring opinion). Thus it is not a constitutional rule.

137. See *Stout v. Dept. of Employment*, 172 Cal. App. 2d 666, 673, 342 P.2d 918 (1959) (dictum); see also *Silver v. California Unemployment Ins. Appeals Bd.*, 129 Cal. Rptr. 411 (1976), *reh'g granted*, but no later decision reported.

138. 8 Cal. Code Regs. §§ 32175, 32176.

139. Lab. Code § 5709: "No order ... shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure."

140. *Skip Fordyce, Inc. v. Worker's Compensation Appeals Bd.*, 149 Cal. App. 3d 915, 926-27, 197 Cal. Rptr. 626 (1983), *hearing denied* (double hearsay was not the sort of evidence on which reasonable persons customarily rely in conduct of serious affairs, so finding of exposure to asbestos lacked substantial evidence); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 47 Cal. App. 2d 494, 499-500, 118 P.2d 334 (1941) (hearsay must be evidence of a substantial character from which commission may deduce a reasonable inference).

Finally, in State Bar interim suspension cases, findings can be supported wholly by affidavits.<sup>141</sup>

There is also a constitutional dimension to this problem. Due process requires an opportunity to confront and cross-examine adverse witnesses.<sup>142</sup> By definition, hearsay evidence is an out of court statement by a declarant offered to prove the truth of the statement. Thus reliance on hearsay could deny due process, because an unavailable declarant's testimony cannot be tested by cross-examination. What is required by due process cannot be stated in absolute terms; it depends on a case-specific balancing of the private interest at stake, the likelihood that the questioned procedure would produce an incorrect result, and the state's interest in using the challenged procedure.<sup>143</sup> Where the private interest is strong, the veracity of the declarant is critical, and the state could have rendered the declarant available for cross examination, a court might find that a finding supported only by uncorroborated hearsay violated due process.<sup>144</sup>

2. *Model and Federal Acts.* MSAPA provides that the presiding officer can exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of recognized evidentiary privilege.<sup>145</sup> It explicitly rejects the residuum rule.<sup>146</sup> It also provides that any part of the

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141. The constitutionality of this provision was upheld in *Conway v. State Bar*, 47 Cal. 3d 1107, 255 Cal. Rptr. 390 (1989).

142. *Goldberg v. Kelly*, 397 U.S. 154 (1970).

143. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

144. See, e.g., *Carlton v. Department of Motor Vehicles*, 203 Cal. App. 3d 1428, 250 Cal. Rptr. 809 (1988) (serious due process problem if DMV could revoke driver's license solely on basis of computer key stroke — triple hearsay involved); *Snelgrove v. Department of Motor Vehicles*, 194 Cal. App. 3d 1364, 240 Cal. Rptr. 281 (1987) (reliance on hearsay does not violate due process since respondent had opportunity to subpoena declarant but failed to do so). See *Collins*, *supra* note 136, at 615-43.

145. MSAPA § 4-212(a).

146. "Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil

evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.<sup>147</sup> Similarly it allows documentary evidence to be received in the form of a copy or excerpt.<sup>148</sup>

The evidence provision in the federal APA is similar to California's.<sup>149</sup> The residuum rule is not recognized in federal administrative law,<sup>150</sup> but a finding based exclusively on unreliable hearsay might be set aside because it does not meet the substantial evidence test. However, if the hearsay is reliable, it can satisfy the substantial evidence test.

### *3. Recommendations*

*a. Adoption of Evidence Code.* Although some observers favor adoption of the rules of evidence in formal administrative hear-

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trial.” MSAPA § 4-215(d). The Comment to Section 4-215 makes clear that this language is intended to reject the residuum rule.

147. MSAPA § 4-212(d). MSAPA contains no parallel to Gov’t Code Section 11514 which requires ten days notice of a proposed affidavit and seven days notice of demand to cross examine the affiant.

148. MSAPA § 4-212(e). On request, parties must be given an opportunity to compare the copy with the original if available.

149. APA § 556(d):

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

150. Richardson v. Perales, 402 U.S. 389 (1971). The *Perales* case reinterpreted an earlier decision, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938), which had been understood to mandate the residuum rule. Davis observes that post-*Perales* federal administrative cases treat the residuum rule as dead. However, this is not absolutely clear, since *Perales* can be distinguished on the basis of waiver — the applicant could have subpoenaed the declarant but failed to do so. Davis, *supra* note 87, § 16.8. Thus it is conceivable that the residuum rule could still be applied in federal administrative law if a declarant were unavailable.

ings,<sup>151</sup> I believe this would be an error. In 1944, the Judicial Council decided that these rules would be inappropriate in the new APA and its reasoning on this point remains persuasive.<sup>152</sup>

Rejection of civil evidence standards (particularly the rule against opinion evidence and the hearsay rule and its numerous exceptions) is in line with decades of criticism from administrative law scholars who argue that these rules have no place in administrative law.<sup>153</sup> I agree with that analysis for a number of reasons. First, if the Evidence Code rules were transplanted into administrative adjudication, very considerable modification would be required. Creation of a new Administrative Evidence Code would be a substantial project.<sup>154</sup>

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151. The Federal Bar Association Administrative Law Section encourages agencies to examine whether they should adopt rules patterned on the Federal Rules of Evidence, but would not require them to do so. Resolution 91-5 (Apr. 13, 1991). The Administrative Law Section of the ABA concurs with this suggestion. However, the National Conference of ALJs of the ABA has recommended legislation requiring that the Federal Rules of Evidence apply to administrative adjudications, with some ability for agency rules to vary the Federal Rules. (Report of April 1991). At this writing, the ABA House of Delegates has not resolved the conflict. See Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. Ill. L.F. 353 (urging adoption of Federal Rules of Evidence in administrative proceedings).

152. See *supra* note 128.

153. The Administrative Conference recommends that civil evidence rules not be applied in administrative proceedings. Rec. 86-2, 1 C.F.R. § 305.86-2. See Pierce, *supra* note 132, at 1, 16-22 (1987); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 Duke L.J. 1, 12-17. The withering criticism in Davis, *supra* note 87, § 16.6, is particularly noteworthy.

154. The Department of Labor has adopted the Federal Rules of Evidence but found it necessary to make numerous modifications and to add five new hearsay exceptions to reflect the reality of administrative practice. See Graham, *supra* note 151, at 373-82; 29 C.F.R. § 18.803. The NLRB and ALRB follow the rules of evidence "so far as practicable." The quoted phrase has caused great difficulties of application. See *supra* note 87. Although individual agencies may wish to go through this sort of exercise, by adopting rules that incorporate some civil evidence rules, I do not believe that agencies in general should be required to do so.

Maintenance of the hearsay rule insures countless close calls as to whether an item is hearsay at all or whether such hearsay exceptions as business records or public records might apply.<sup>155</sup> In order to introduce evidence under a hearsay exception, it is often necessary to lay a careful foundation; this may take more time than just admitting the evidence. Administrative hearings (especially those not covered by the existing APA) are often conducted by non-lawyer ALJs and one or both parties are often not represented by counsel. Thus the niceties of the hearsay rule cannot be sorted out at the hearing. Adoption of the rules of evidence would constantly bring ALJ evidentiary rulings before the courts on judicial review with the likelihood of frequent reversals.

The reality is that the hearsay rule was largely intended to keep evidence from juries, not from professional factfinders who are well able to gauge its inherent reliability.<sup>156</sup> Some hearsay evidence is quite trustworthy (as is evidenced by the fact that it is admissible in civil proceedings if not objected to), and all of us rely upon it to make serious decisions in our daily lives. Some items of hearsay evidence are inherently untrustworthy, but then so is a lot of evidence that is legally admissible under hearsay exceptions or otherwise. In short, the existing APA's standard — calling for admission of relevant evidence of the sort that responsible persons rely on in the conduct of their serious affairs — seems far more appropriate than the Evidence Code standards.

*b. Unreliable scientific evidence.* One recent decision, *Seering v. Department of Social Services*,<sup>157</sup> declares that an ALJ should have

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155. See, e.g. Stearns v. Fair Employment & Housing Comm'n, 6 Cal. 3d 205, 210 n.2, 98 Cal. Rptr. 467 (1971) (evidence of out of court statement not hearsay); Snelgrove v. Department of Motor Vehicles, 194 Cal. App. 3d 1364, 240 Cal. Rptr. 281 (1987) (public records exception applies to police officer's statement about failure to submit to test); Carlton v. Department of Motor Vehicles, 203 Cal. App. 3d 1428, 250 Cal. Rptr. 809 (1988) (no exception applies to police officer's accident report).

156. Davis points out that the testimony of an expert witnesses is admissible, even though based on hearsay; yet the residuum rule prevents an expert factfinder from relying on hearsay. Davis, *supra* note 87, § 16.6.

157. 194 Cal. App. 3d 298, 306-13, 239 Cal. Rptr. 422 (1987). *Seering* involved the revocation of the license of a day care center because of alleged

excluded evidence of child molestation offered by a psychiatrist based upon the “child sexual abuse accommodation syndrome” because such evidence must be excluded in civil litigation. The rationale was the *Kelly-Frye* rule, which requires a trial court to exclude evidence based on methods of proof that are not generally accepted as reliable in the scientific community. The concern is that such evidence would be uncritically accepted, despite the opponent’s right to rebut it, because of the “aura of infallibility” borne by scientific evidence. In *Seering*, the court declared that the *Kelly-Frye* rule applies to administrative adjudication despite the provision in the APA which states that an administrative hearing “need not be conducted according to technical rules relating to evidence and witnesses.”<sup>158</sup>

Whether *Kelly-Frye* should apply in administrative law is a tough question. It can easily be argued that an ALJ and the agency heads should be precluded from considering evidence that a trial judge cannot consider because of its scientific unreliability.<sup>159</sup> The issue here is quite different from whether the rules of evidence should apply before administrative agencies. *Kelly-Frye* is not a rule that was designed to protect juries; it is a determination that factfinders (even expert ones) should not be compelled to weigh in each case the probative value of testimony that is based on methodologies not yet recognized as scientifically reliable. Moreover, exclusion of this sort of the evidence can be justified, even under

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child molestation. The court upheld the revocation because the DSS’ decision was supported by sufficient admissible evidence apart from the disputed scientific evidence. Therefore, the court’s statements about the application of *Kelly-Frye* in administrative law are dictum.

158. Similarly, see *Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983); *Department of Pub. Safety v. Scruggs*, 79 Md. App. 312, 556 A.2d 736 (1989) — both holding that the rule precluding courts from considering the results of polygraph tests is binding on agencies as well.

159. This argument is particular strong in the context of the child sexual abuse methodology involved in *Seering*, because earlier cases have held that family court judges cannot consider the same methodology in dependency cases. If these specialized trial courts who are charged with protection of children cannot consider the evidence, it would appear that less specialized OAH ALJs should also be precluded from considering it.

the existing APA, since by hypothesis it may not be the “sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.”

Yet there are strong public interest arguments in favor of allowing the scientific evidence to be admitted in administrative adjudication (of course, subject to scientific rebuttal).<sup>160</sup> *Seering* involved alleged child molestation by a licensee. Thus the protection of children was at stake along with the proprietor’s license. And the agency heads, if not the ALJ, should become relatively sophisticated about the methodology since the problem tends to be recurring. Another argument in favor of admission is that the scientific consensus on particular methodologies is constantly changing; consequently, proponents of the evidence can force the agency to reexamine the question of reliability every time a new piece of scientific evidence emerges. Therefore, why not just admit the evidence in all cases, subject to rebuttal?

My recommendation (a rather uncertain one) is to follow *Seering* and hold that the *Kelly-Frye* rule applies in administrative law.<sup>161</sup>

c. *Other evidence exclusion issues.* The existing APA provision is largely satisfactory<sup>162</sup> and I propose that it be the default rule for all agencies.<sup>163</sup> Agencies could, if they wish, adopt regulations that

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160. This argument would not justify the admission of evidence which the ALJ believes is plainly bogus or pseudo-scientific such as astrology. Such evidence is not the “sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.”

161. If *Kelly-Frye* were not followed, for example, the results of lie detector tests would be admissible in administrative cases even though they are excluded in civil litigation because of the unreliability of the methodology.

I approve of another holding in *Seering*. The small children who were the alleged victims of molestation were allowed to testify outside the presence of the respondent. The court upheld this practice. A new APA should contain explicit recognition that the ALJ has discretion to manage the hearing so as to protect children from intimidation.

162. The rules protecting sexual privacy in the APA seem satisfactory. See Gov’t Code § 11513(c) (last paragraph), (j), (k).

163. I suggest that the comment reject the rule in the *Coburn* case that the Evidence Code rules relating to excludability of evidence about prior

embody some or all of the provisions of the Evidence Code. The MSAPA provisions mentioned above on admission of evidence in written form (if its admission will expedite the hearing and can be received without substantial prejudice to any party), and for permitting copies of documents,<sup>164</sup> seem sound, and I would include them in a new APA, again subject to variation by regulations.<sup>165</sup>

A provision in the existing APA<sup>166</sup> allows the use of affidavits as evidence. It requires that the proponent of the affidavit notify the opponent at least ten days prior to the hearing; the opponent must demand the right to cross-examine the affiant within seven days after the notice is mailed or delivered. The affidavit provision seems useful and should be a default provision applicable to all agencies. However, the provision should be modified so that the notice that a proponent will introduce an affidavit must be mailed or delivered not more than thirty days prior to the hearing. Under the existing provision, the notice that the agency prosecutors intend to introduce an affidavit is often sent out with the accusation, before the respondent has retained counsel. As a result, the seven day period within which the respondent can request cross-examination runs out before counsel has an opportunity to make the demand.

*d. Case management.* The existing APA provision provides for exclusion of “irrelevant and unduly repetitious” evidence. This is not an adequate case management tool. It should be broadened to explicitly confer discretion to exclude evidence that contributes little to the result but promotes delay and confusion. Evidence Code Section 352 provides that a court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption

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convictions apply automatically in administrative cases. See *supra* notes 129, 132. Administrative fact finders should have access to this information and, unlike juries, should be able to place it in context.

164. MSAPA § 4-212(d), (e), cited *supra* in text accompanying notes 147-48.

165. See Gellhorn, *supra* note 153, at 37-42.

166. Gov’t Code § 11514.

of time or create substantial danger of confusing the issues.<sup>167</sup> Both the Administrative Conference and Federal Bar Associations have recommended that agencies adopt Federal Evidence Rule 403 which contains almost identical language.<sup>168</sup> Thus I propose that the APA include language similar to Section 352.<sup>169</sup>

*e. Exclusionary rule.* Another recurring evidence issue is whether the exclusionary rule should apply in administrative proceedings. The general rule is that it does not apply; illegally seized evidence (or confessions obtained in violation of *Miranda*) can be admitted because exclusion of such evidence would not deter officials from making unlawful searches or violating *Miranda*.<sup>170</sup> However, where the exclusionary rule would deter unlawful conduct by employees of the agency engaging in illegal conduct, it has been applied.<sup>171</sup> This principle seems adequately covered in case law; since it involves a case-by-case analysis of deterrent effect, it probably should not be codified in the APA.

*f. Power of agencies to reverse ALJ evidence rulings.* The general understanding, at least with respect to existing-APA agencies,

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167. Section 352 also permits exclusion if probative value is outweighed by substantial danger of undue prejudice or of misleading the jury. These criteria seem inappropriate in administrative proceedings.

168. See *supra* note 151; Pierce note 87 at 23-26. Pierce reports that the use of this standard by Department of Labor ALJs has worked out well. The ALJs report high satisfaction with the standard as a case management tool.

169. Pierce, *supra* note 132, at 24, gives this example: a party wishes to introduce a voluminous exhibit tangentially related to an issue in the case and based entirely on low quality hearsay. The ALJ is confident that neither the ALJ nor the agency will rely on the exhibit for any purpose. Yet if it is introduced it will prolong the hearing because opposing counsel will insist on extensive cross-examination and the introduction of opposing exhibits. Yet the exhibit cannot be excluded under the existing APA since it is neither irrelevant nor repetitious. The Rule 403 approach allows the ALJ to exclude the evidence as its probative value is substantially outweighed by its tendency to prolong the hearing.

170. Emslie v. State Bar, 11 Cal. 3d 210, 226-30, 113 Cal. Rptr. 175 (1974); Finkelstein v. State Personnel Bd., 218 Cal. App. 3d 271, 267 Cal. Rptr. 133 (1990). See CEB, *supra* note 4, §§ 3.28-3.34 (1984 & Supp. 1990); Ogden, *supra* note 29, §§ 38.06-38.07.

171. Dyson v. State Personnel Bd., 213 Cal. App. 3d 711, 262 Cal. Rptr. 112 (1989).

is that the agency heads cannot reject an ALJ's decision on a question of admission or exclusion of evidence.<sup>172</sup> This seems like the right result and should be confirmed by the new statute. ALJs are professional factfinders and experts on the conduct of trials, whereas agency heads are usually not lawyers. Moreover, the general thrust of my recommendations has been to increase the authority of ALJs vis a vis agency heads on matters that fall within the ALJs' special competence.<sup>173</sup> Thus an ALJ's rulings on the admission or exclusion of evidence should not be subject to reversal by the agency heads, whether the ALJ hears the case alone or sits with the agency heads to decide it.

*g. Residuum rule.* The major policy issue is whether to abolish the existing common law and statutory residuum rule. If the residuum rule is abolished, the alternative would be the MSAPA and California workers compensation model. Under this approach, a finding can be based exclusively on hearsay, but if the hearsay is unreliable the finding would be vulnerable on judicial review.<sup>174</sup> In an extreme case, such a finding could violate the due process right to confront an adverse witness.<sup>175</sup>

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172. The argument is based on Gov't Code Section 11512(b). Under this provision, when agency heads hear the case, an ALJ presides at the hearing and rules on the admission and exclusion of evidence. Therefore, it is argued, the ALJ's power over evidence should be no less when the ALJ hears the case alone (which, of course, the ALJ does in virtually all cases).

173. In my second report, I recommended that the statute limit the ability of agency heads to overturn ALJ factual determinations based on demeanor of witnesses.

174. Alternatively, a finding based on unreliable evidence (whether hearsay or otherwise) might violate the APA's responsible persons-serious affairs test.

175. Many of the California residuum rule cases would have been decided the same way on the basis of one of these rationales because the hearsay offered in support of the findings was unreliable. In the leading case of *Walker v. City of San Gabriel*, 20 Cal. 2d 879, 129 P.2d 548 (1942), a local government revoked the license of an auto wrecker based solely on a letter from the chief of police stating charges against the wrecker. In *Carlton v. Department of Motor Vehicles*, 203 Cal. App. 3d 1428, 250 Cal. Rptr. 809 (1988), the decision turned on a computer printout of a single number representing a policeman's assessment of who was at fault in an accident. The court remarked that this was triple hearsay and extremely unreliable for various reasons, including the possibility of

My initial preference was to suggest abolition of the residuum rule across the board.<sup>176</sup> My reasons for this proposal are the same as the reasons for not adopting the Evidence Code — the inappropriateness of those rules in administrative law. The residuum rule absolutely precludes findings based on evidence that may be quite reliable, and it leads to time-consuming disputes about the fine points of evidence law before the ALJ and on judicial review.<sup>177</sup> Moreover, it is unnecessary to protect private rights because a finding exclusively based on *unreliable* hearsay would be overturned on judicial review (either under the substantial evidence or independent judgment standards),<sup>178</sup> would violate the responsible

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computer keypunching error. In *Martin v. State Personnel Bd.*, 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972), *hearing denied*, a discharge was based on double hearsay, both declarants being felons.

176. See Davis, *supra* note 87, 16.6; Gellhorn, *supra* note 153, at 22-26. The recently adopted Washington statute abolished the residuum rule but it provides:

[T]he presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

Wash. Rev. Code Ann. § 34.05.461(4) (1990). If the Commission wished to abolish the residuum rule, this language would be an excellent substitute.

177. Similarly, there are frequent disputes about whether the hearsay is used “for the purpose of supplementing or explaining other evidence” as opposed to supporting a finding on its own. Gov’t Code § 11513(c). One agency staff member gave this example: the agency wishes to revoke a license based on misconduct toward person *A* and it presents non-hearsay concerning this misconduct. It also wishes to put on evidence that similar misconduct occurred toward *B* and *C*, to show that a pattern of misconduct exists. The only evidence relating to *B* and *C* is hearsay. His theory is that the residuum rule is not violated, because the evidence concerning *B* and *C* merely supports the finding that *A* committed misconduct. Yet ALJs frequently refuse to hear the evidence because they say that the misconduct towards *B* and *C* is a separate finding, it would be supported only by hearsay, and would thus violate the residuum rule.

178. The residuum rule seems extraneous where a reviewing court exercises independent judgment on the evidence. Code Civ. Proc. § 1094.5(c). Independent judgment applies when the agency has deprived a person of a vested, fundamental right, such as a professional license. A subsequent report will discuss whether the independent judgment standard should be retained. I

person-serious affairs test, and might violate due process in an extreme case. Administrative findings based on reliable evidence should stand; those based on unreliable evidence should fall.<sup>179</sup>

Nevertheless, I propose a compromise: the residuum rule should be retained for the agencies that use OAH ALJs. As far as I could determine, there is widespread support for the residuum rule on the part of the existing APA agencies, private attorneys, Attorney General's staff, and ALJs, and virtually no support for abolishing the rule. The best argument for the residuum rule is that it forces agency advocates to put on a better case; they cannot simply rely on a written report from *B* or accounts by *A* of what *B* said if there is no other evidence to support the finding. It is necessary to produce *B*. In light of the severe sanctions administered by agencies that use OAH ALJs, the sophistication of those ALJs, and the

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only point out here that the residuum rule issue is intertwined with the scope of review issue. It would seem that sufficient protection of private rights is provided by the judge's ability to reweigh the evidence. The judge would certainly take into account the fact that the evidence supporting the agency's decision was exclusively hearsay and would evaluate its inherent reliability. Thus if the Commission ultimately decides to retain the independent judgment test, it might wish to revisit the question of whether to abandon the residuum rule in cases in which the independent judgment test is applicable.

179. In deciding whether evidence is too unreliable to meet the substantial evidence standard, the court could take numerous factors into account. These would include the nature and quality of the evidence, indicia of reliability or unreliability of the evidence, which party has the burden of proof, whether better evidence was available, and the cost of acquiring the better evidence.

A federal hearsay exception that was not adopted in California could also be applied to assess the substantiality of evidence: under Federal Rules of Evidence 803(24) and 804(b)(5), hearsay that does not fall under any exception is admissible where it has equivalent circumstantial guarantees of trustworthiness and is more probative than any other evidence that can be produced through reasonable efforts and the interests of justice are served by admission of the evidence.

Another factor would be the importance of the interest of the party against whom the evidence was introduced. Thus it might be wholly appropriate to find that tenuous hearsay evidence is insubstantial when used to impose a serious sanction yet substantial in granting an application for benefits. For a discussion of factors measuring the reliability of hearsay, see Gellhorn, *supra* note 153, at 19-22; Davis, *supra* note 87, § 16.6; Collins, *supra* note 136, at 643-48.

strong political resistance that proposals to abolish the residuum rule would surely encounter, it is probably best to retain the rule.<sup>180</sup>

However, I suggest that the residuum rule not be binding on the other agencies that will come under a new APA, unless they choose to adopt it by regulations.<sup>181</sup> Outside the agencies that use OAH ALJs, there is opposition to the residuum rule.<sup>182</sup> Thus I would leave it to the agencies to consider whether the rule or some variation thereof makes sense in their own situations; the rulemaking process that would ensue would permit everyone who deals with the agency to submit input on this important issue.

The revised statute should clarify whether the residuum objection can be made for the first time on judicial review, an issue which is unresolved under present law.<sup>183</sup> I believe that an objec-

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180. Still another compromise is to apply the residuum rule in cases in which the state is terminating a status or benefit but not where the state denies an application for a status or benefit as in the case of a license application or an application for welfare or a job. Still another compromise would be to retain the residuum rule but expand the list of hearsay exceptions that would apply. See, e.g., Lab. Code § 5803; Fed.R. Evid. 803(24), 804(b)(5), discussed *supra* note 179; or the Federal Department of Labor regulations mentioned *supra* note 154. The proposal for acceptance of evidence in written form, discussed *supra* in text accompanying notes 147-48, could also be viewed as creating an additional hearsay exception that would allow a decision to survive the residuum rule.

181. The California common law residuum rule arose in cases reviewing the decisions of local government. Since a new APA would not impose any fair hearing rules on local government and the fairness of local government hearings is often in doubt, it could be argued that the residuum rule might be appropriate with respect to local government or to state government hearings not covered by the APA. Thus my proposal to abolish the residuum rule would apply only to agency hearings subject to the new APA (other than those in which an OAH ALJ is used).

182. The Public Utilities Commission staff indicated that they have never applied the residuum rule and would like to avoid hassles about hearsay in complex economic cases where proof is based on written reports and inter-company communications. The Workers Compensation Appeals Board does not currently apply the residuum rule and appears to be precluded by statute from applying it. See *supra* note 139.

183. Apparently, in non-APA cases, an objection is needed to preserve the issue, regardless of whether there is contrary evidence. Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd., 153 Cal. App. 3d 262, 270 n.5, 201 Cal.

tion should be required. The general rule of administrative law is that issues must first be raised at the hearing in order to preserve them for judicial review purposes.<sup>184</sup> The rules of evidence and the residuum rule should be no different.

There could be several criticisms of this suggestion. The first concerns unrepresented persons who cannot be expected to understand the vagaries of the hearsay and residuum rules. Such persons would probably fail to object to the hearsay, thus waiving their right to assert the residuum rule. However, the objection to the hearsay need not be in technical terms. It might, for example, simply be a protest that the particular hearsay evidence is unreliable, unfair, or whatever. But it seems unwarranted to make an exception to the general rule of exhaustion of remedies in the case of hearsay objections.

The second criticism is that the need to make objections to hearsay would slow down the hearing since hearsay is generally admissible. Yet only a single objection, at the end of the hearing, is needed, to the effect that the proponent has failed to introduce any evidence admissible over objection in civil actions. It is hard to see how this would obstruct the hearing.

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Rptr. 371 (1984), *hearing denied*; Fox v. San Francisco Unified Sch. Dist., 111 Cal. App. 2d 885, 891, 245 P.2d 603 (1952).

In APA cases, there is a split in authority. See Ogden, *supra* note 29, § 38.04[2]. One line of cases says that an objection is needed to preserve the issue, at least in cases where there is evidence contrary to the hearsay. Borror v. Department of Inv., 15 Cal. App. 3d 531, 545-46, 92 Cal. Rptr. 525 (1971), *hearing denied* (dictum); Kirby v. Alcohol Beverage Control Appeals Bd., 8 Cal. App. 3d 1009, 1018-20, 87 Cal Rptr. 908 (1970), *hearing denied*. In Kirby, the court held that if a respondent failed to object to hearsay, the hearsay shifted the burden of producing evidence to the respondent; thus the hearsay would be sufficient to support findings in the absence of contrary evidence. This approach was designed to protect the rights of an unrepresented party who would be unlikely to make a hearsay objection.

A second line of cases says that no objection is needed because of the absolute terms in which the residuum rule is stated in the statute. Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972), *hearing denied*.

184. E.g., Milligan v. Hearing Aid Dispensers Exam. Comm., 142 Cal. App. 3d 1002, 1008, 191 Cal. Rptr. 490 (1983).

## B. BURDEN OF PROOF

1. *Existing California law.* The APA contains no provisions on burden of proof but there are numerous cases as well as statutory and regulatory provisions.<sup>185</sup> The case law rules generally place the burden of producing evidence and the burden of persuasion on the proponent of an order.<sup>186</sup> Thus the applicant for a benefit has the burden,<sup>187</sup> whereas the agency has the burden when it seeks a sanction<sup>188</sup> or to discharge an employee.<sup>189</sup>

Ordinarily, a proponent must prove a case by a preponderance of the evidence. However, some decisions have held that in cases of revocation of professional licenses, an agency must prove its case “by clear and convincing proof to a reasonable certainty.”<sup>190</sup>

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185. See Ogden, *supra* note 29, § 39.03; CEB, *supra* note 4, §§ 3.58-3.66. For example, although applicants generally have the burden of proof, an employer has the burden to establish that an applicant did not have good cause to leave the job. Perales v. Department of Human Resources Dev., 32 Cal. App. 3d 332, 108 Cal. Rptr. 167 (1973).

186. See federal APA, 5 U.S.C. § 556(d) (1988): “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”

187. CEEED v. California Coastal Zone Conservation Comm’n, 43 Cal. App. 3d 306, 330, 118 Cal. Rptr. 315 (1974) (applicant for coastal zone permit has burden).

188. Daniels v. Department of Motor Vehicles, 33 Cal. 3d 532, 536, 189 Cal. Rptr. 512 (1983) (until agency meets burden of going forward with the evidence, licensee has no duty to rebut allegations or otherwise respond).

189. Skelly v. State Personnel Bd., 15 Cal. 3d 194, 204 n.19, 124 Cal. Rptr. 14 (1975); Pereyda v. State Personnel Bd., 15 Cal. App. 3d 47, 92 Cal. Rptr. 746 (1971), *hearing denied*.

190. Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982), *hearing denied*; Realty Projects, Inc. v. Smith, 32 Cal. App. 3d 204, 212, 108 Cal. Rptr. 71 (1973). These decisions relied heavily on Furman v. State Bar, 12 Cal. 2d 212, 229, 83 P.2d 12 (1938), which imposed a clear and convincing standard in disbarment cases on the theory that disbarment is quasi-criminal. See also McComb v. Commission on Judicial Performance, 19 Cal. 3d Spec. Trib. Supp. 1, 11, 138 Cal. Rptr. 459 (1977). But *Furman’s* reasoning is not persuasive; administrative licensee discipline cases are not quasi-criminal. See, e.g., Borror v. Department of Inv., 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525 (1971), *hearing denied*.

Only proof by a preponderance is required to discharge a teacher or a state employee, because such cases involves only the loss of a job rather than the loss

## 2. Proposals

I suggest a simple provision stating that the proponent of the order has the burden of production and persuasion. However, it should be clear that this allocation can be varied by other statutes or agency regulations.<sup>191</sup> It should also be made clear that the ALJ can dismiss a matter if the party who has the burden fails to show up.<sup>192</sup>

The rule that an agency must prove its case by “clear and convincing evidence” in order to revoke a license seems unwarranted and idiosyncratic.<sup>193</sup> In contrast, under the federal act, the burden

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of all professional opportunity. *See Gardner v. Comm'n on Professional Competence*, 164 Cal. App. 3d 1035, 210 Cal. Rptr. 795 (1985) (discharge of teacher on morals charges). This is unconvincing; a teacher or other professional who is fired because of serious misconduct will find it difficult or impossible to practice his or her profession.

191. In a letter to the Law Revision Commission dated Dec. 11, 1989, Gregory Thomas argued that the Commission should look closely at burdens of proof in environmental and resource disputes. He pointed out that the scientific and technical issues in such cases are so intractable that the party with the burden of proof usually loses. Problems that relate to adjudication in a specific area of regulatory practice (such as the burden of proof in environmental cases) cannot be treated in a study that is designed to produce a new APA for all agencies. However, it should be made clear that the ordinary rules of burden of proof can be varied either by statute or by agency regulation. Thus an environmental regulatory agency that chose to place the burden in some cases on resource consumers or dischargers could do so.

192. Gov't Code Section 11520(a) should, in other words, apply in all administrative cases. This was a suggestion made by a number of Unemployment Insurance Appeals Board referees when I addressed their annual meeting. Less clear is the question of whether an ALJ should have power to grant a nonsuit on the grounds that the party with the burden of proof has failed to make a *prima facie* case. *Frost v. State Personnel Bd.*, 190 Cal. App. 2d 1, 11 Cal. Rptr. 718 (1961), holds that an ALJ has no such power, pointing to various practical difficulties. The practical difficulties do not seem significant to me, and a nonsuit motion would appear to have as much utility in administrative law as in court. I suggest that agencies be given the power to adopt regulations under which an ALJ could grant a nonsuit, but I would not require them to do so.

193. See the lengthy and careful opinion by the New Jersey Supreme Court in *In re Polk*, 449 A.2d 7 (N.J. 1982), holding that the legislature did not intend and due process does not require the use of a clear and convincing standard in a proceeding to revoke a physician's license. Like California, New Jersey uses a

of proof is the preponderance test even in a case involving the imposition of sanctions against a broker for securities fraud.<sup>194</sup>

It is unclear whether the elevated standard of proof makes any difference in practice; some people I interviewed feel that it does. In some marginal cases, an ALJ will decide that the agency's proof cannot meet a clear and convincing standard although it could have met a preponderance standard. Granted, a professional license is enormously valuable and should be surrounded with due process protections. However, the clear and convincing burden of proof applicable in license revocation cases seems unjustified.<sup>195</sup> The public interest in weeding out unqualified or incompetent licensees seems just as compelling as the licensee's interest. A proper balance is achieved by returning to the preponderance rule.

## C. OFFICIAL NOTICE

1. *Existing California law.* The APA provides that an agency can take official notice either before or after submission of the case for decision and must inform parties present that it has done so and place the matters noticed in the record.<sup>196</sup> The decisionmaker can

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clear and convincing standard for attorney disbarments, but the *Polk* decision holds that this standard need not be extended to other professional licenses.

194. *Steadman v. SEC*, 450 U.S. 91 (1981). This is a strong holding because allegations of fraud in a contract case must be proved by clear and convincing evidence. Not so in an administrative case. Some federal decisions do manipulate the burden of proof in order to make it difficult for agencies to take particular action. *See Woodby v. INS*, 385 U.S. 276 (1966) (government must prove deportation case by "clear, unequivocal and convincing evidence.") However, such decisions are narrowly focused on situations of perceived injustice where the courts distrust the agency and its procedures. California administrative law provides more than adequate due process to licensees who face revocation; an elevated burden of proof is not necessary to protect their interests.

195. Another reason to question the elevated standard of proof is that the revocation of a professional license is reviewed under the independent judgment test by Superior Court. Thus the extra layer of protection conferred by the clear and convincing standard seems unnecessary. However, my view on this point would be the same regardless of whether the independent judgment test is retained.

196. Gov't Code § 11515.

notice matters that could be noticed by a court<sup>197</sup> or “generally accepted technical or scientific matter within the agency’s special field.” There must be 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.<sup>198</sup> Apparently, non-APA agencies can also take official notice of matters of which a court could take notice.<sup>199</sup>

In an important decision, the Supreme Court recognized that an agency makes use of official notice in finding disputable legislative facts; consequently, an opportunity to respond is essential. *Frantz v. Board of Medical Quality Assurance*<sup>200</sup> arose from an attempt by the Board to sanction a physician for gross negligence. The Board failed to introduce expert testimony about community standards with respect to two of the charges. The Court held that this gap could be filled by taking official notice of the applicable community standards, even though such information might be both disputable and not obvious to a lay judge.<sup>201</sup> The effect of *Frantz* is

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197. See Evid. Code §§ 451-452 for matters that must and may be noticed by courts. These include “facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute,” “facts and propositions that are of such common knowledge … that they cannot reasonably be the subject of dispute,” and “facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” Evid. Code §§ 451(f), 452(g)-(h).

198. Gov’t Code § 11515.

199. *Cantrell v. Board of Supervisors*, 87 Cal. App. 2d 471, 477-78, 197 P.2d 218 (1948) (county board can take notice of fact that presence of rats is detrimental to public health — tribunals partake of the nature of courts). The rules of the Public Utilities Commission and Board of Equalization limit official notice to matters that could be noticed by a court. 20 Cal. Code Regs. § 73 (PUC); 18 Cal. Code Regs. § 5006 (Board of Equalization). In welfare cases, the Department of Social Services takes notice of “any generally accepted technical fact relating to the administration of public social services.” DSS Rule § 22-050.43.

200. 31 Cal. 3d 124, 138-43, 181 Cal. Rptr. 732 (1982).

201. Note that the Medical Board contained some lay members; consequently, the Board as a whole — including some non-experts — were

that the agency can satisfy its burden of producing evidence on a critical point (community standards in a negligence case) without putting on testimony to that effect. Clearly, this holding goes beyond the existing APA's provision for taking official notice of any "generally accepted technical or scientific matter within the agency's special field ...."

The *Frantz* opinion has a second and equally important dimension. By recognizing that the Board had used official notice to ascertain community standards of medical practice, the court triggered a rebuttal right. The opponent of a disputable noticed fact should have two bites at this apple: (i) arguing that it is improper to officially notice the item, because it should be the subject of testimony, and (ii) disputing the correctness of the item after it has been noticed.<sup>202</sup>

2. *MSAPA provision.* MSAPA provides for a considerably wider scope of official notice than the California provision. It allows an agency to take notice of technical or scientific matters within the agency's specialized knowledge.<sup>203</sup> Thus such matters need not be "generally accepted" as under the California APA. MSAPA also provides a detailed scheme for rebuttal of noticed matters.<sup>204</sup>

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allowed to take judicial notice of a scientific or technical matter that was not generally accepted and could be disputable.

202. In *Frantz*, *supra* note 200, Justice Kaus' concurring opinion argues that a party should not be permitted to rebut an item once it has been officially noticed, because this is the rule of judicial notice. Evid. Code § 457. He argues that Gov't Code Section 11515 should be construed to reach the same result. I disagree. Where notice is taken of items that could be disputed, it is essential to allow the opponent an opportunity to dispute them. Gov't Code Section 11515 and MSAPA Section 4-212(f) seem explicit on this point and should not be construed as Kaus suggested. *See Davis*, *supra* note 87, §§ 15.13, 15.17.

203. MSAPA § 4-212(f). MSAPA also allows notice of the record of other proceedings before the agency and of codes or standards that have been adopted by an agency of the United States or of any state or by a nationally recognized organization or association.

204. MSAPA § 4-212(f):

Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source

*3. Recommendations.* I believe that official notice is a significant technique for improving the efficiency of the adjudication process without diminishing its fairness. It allows either party to prove items that are unlikely to be disputed without having to introduce testimony. Thus it can significantly shorten and simplify hearings.<sup>205</sup> Agencies should not be limited to matters that could be judicially noticed by courts. Moreover, when we recognize that an agency has taken official notice of facts, we impose a corresponding obligation to allow rebuttal. This enhances the fairness of the process and the likelihood that the facts will be found accurately.<sup>206</sup>

The *Frantz* decision<sup>207</sup> confirms my belief that the official notice standard should be broadened. An adjudicator should be allowed to take notice of technical or scientific material that is disputable, so long as it is within the agency's area of expertise.<sup>208</sup> The MSAPA provision would accomplish this since it allows notice of "technical or scientific matters within the agency's specialized knowledge."<sup>209</sup> I believe this provision should be adopted in California. Similarly, the MSAPA provision on rebuttal of noticed

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thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.

205. Rodriguez, *Official Notice and the Administrative Process*, 10 J. Nat'l Ass'n ALJs 47 (1991); Gellhorn, *supra* note 153, at 44. Gellhorn gives an example from FTC practice: after hearing evidence on the point in numerous prior cases, the FTC took judicial notice that consumers prefer American to foreign made goods. However, respondents would have the opportunity to show that this was not true in the particular case.

206. See the extensive discussion of official notice in Davis, *supra* note 87, ch. 15. Davis points out that agencies and courts constantly take notice of legislative facts, both in deciding individual cases and in making law and policy, but seldom provide a fair opportunity for the parties to dispute those facts.

207. Holding that the Medical Board can take judicial notice of community standards for practicing medicine but must allow rebuttal if the matter noticed is disputable. *See supra* notes 200-02.

208. *See* Davis, *supra* note 87, § 15.11; Rodriguez, *supra* note 205.

209. It also allows notice of records of other proceedings before the agency and of codes or standards. This also seems appropriate.

items<sup>210</sup> seems somewhat more protective than the California standard and I suggest that it be adopted also.<sup>211</sup> In addition, the statute or comment should make clear that the opponent should have the opportunity to contest the propriety of taking official notice as well as to rebut the factual material that has been noticed.

The proposal to allow official notice of technical or scientific material within the agency's specialized knowledge could be criticized on the grounds that it would allow an agency to put on a sloppy and incomplete case — as arguably it did in *Frantz* — and leave it to the respondent to protest and to put on expert testimony in rebuttal. Under present law, it is the agency's obligation to prove all the elements of its case, including technical material, by introducing appropriate expert testimony and exposing its experts to cross-examination. Perhaps it would be unfair to relax that obligation in any way.

However, I am not persuaded by this criticism. In many, if not most, cases, the noticed matter will not be disputed. Therefore, it is a great time saver to dispense with expert testimony to establish the matter. In the minority of cases in which the matter is disputed, the statute will provide the opportunity to challenge both the propriety of taking official notice and the noticed fact itself.<sup>212</sup> If the opponent does challenge the noticed fact by putting on evidence to the contrary, or even challenging the agency's reasoning through a written submission, the burden should shift back to the agency to prove the disputed fact by expert testimony. The only practical effect of the official notice procedure, therefore, is to shift the burden of producing evidence to the opponent; simply by mounting a challenge to the noticed fact, the opponent could compel the

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210. See *supra* note 204.

211. For example, MSAPA clearly defines the procedure for providing rebuttal opportunities when a matter is noticed for the first time in the ALJ's or the agency head's decision. *See Banks v. Schweiker*, 654 F.2d 637 (9th Cir. 1981) (requirement to provide rebuttal opportunity for matter noticed in ALJs decision). With respect to the great majority of factual assumptions (particularly indisputable ones), it is not possible to provide advance notification that the decisionmaker intends to take notice of them. *See Davis*, *supra* note 87, § 15.16.

212. See *supra* note 204.

agency to prove the fact. Thus the agency must be prepared to prove the noticed fact and, it seems to me, could not assume that it will get by with a sloppily prepared case.

While the opportunity to rebut an officially noticed fact is critical, there cannot be a response obligation with respect to every proposition of legislative fact or every judgmental or predictive fact that an agency decisionmaker finds.<sup>213</sup> Indeed, the *Frantz* decision held that a rebuttal opportunity was unnecessary with respect to one item which was based on common sense and thus unlikely to be disputable,<sup>214</sup> but it remanded to give the physician an opportunity to rebut another noticed item that was beyond lay comprehension and thus quite possibly disputable.<sup>215</sup> Certainly, it is good practice to allow an opportunity to rebut in all cases where it is likely that the opportunity could be productive.<sup>216</sup>

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213. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978) (refusing to require factual evidence in the record to provide support for Commission's predictions). As an extreme example, if an ALJ's decision states that Sacramento is in California, the ALJ does not need to offer a rebuttal opportunity to anybody.

214. The item noticed was that it is negligent to schedule high risk surgery in a hospital that lacks emergency facilities. The court's decision, in essence, is that the failure to give a rebuttal opportunity on this item was not prejudicial error. *See Market St. Ry. v. R.R. Comm'n*, 324 U.S. 548 (1945) (Commission consulted applicant's own reports in its files and failed to give notice and opportunity to respond — no prejudice).

215. The Board had found that it was gross negligence for a doctor to schedule surgery before selecting a surgeon. Official notice was proper but, because this item is not a matter of simple common sense, the physician is entitled to the right to respond.

*Frantz* indicated that due process would be violated by taking official notice of a disputable matter that required expertise without giving a rebuttal opportunity. 31 Cal. 3d at 140. Similarly, see *Ohio Bell Telephone v. Public Util. Comm'n*, 301 U.S. 292 (1937) (due process violated when agency took judicial notice of land values without giving notice and rebuttal opportunity).

216. The extended discussion in Davis, *supra* note 87, ch. 15, particularly §§ 15.13, 15.15, is largely devoted to this difficult problem. It is difficult to generalize, but the more disputable, critical, and specific a particular noticed fact is, the more likely that a court will insist that the opponent have an opportunity to respond, either under the applicable statute or under due process. Similarly, it is difficult to generalize on whether the opportunity to respond can be limited to written comments or whether trial-type process must be afforded. *Id.* § 15.18.

I also favor adoption of a related provision in the MSAPA: “The presiding officer’s experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.”<sup>217</sup> This provision confirms a well established distinction in administrative law between (i) receiving evidence, either through testimony or official notice, and (ii) evaluating the evidence that is already in the record.<sup>218</sup> Theoretically, an agency need not provide any prior notice or opportunity for rebuttal when it evaluates the evidence in the record, for example by deciding to reject the testimony of an expert, even though the evaluation rests on a variety of facts and intuitions in the mind of the decider.<sup>219</sup> Nevertheless, the distinction between taking official notice and evaluating evidence is not always clear-cut, and in doubtful situations the agency should provide prior notice and an opportunity to rebut.<sup>220</sup>

#### D. REPRESENTATION

The APA provides that parties have a right to be represented by an attorney but not to the appointment of counsel at the agency’s

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In *Harris v. Alcoholic Beverage Appeals Bd.*, 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965), the Supreme Court said that a reviewing court could take judicial notice of a bulletin issued by the director of the department even though it was not part of the record below and even though the agency had no opportunity to refute it. The court stated that the provision allowing opportunity for rebuttal was for the benefit of licensees, not the agency. This is troubling. The opportunity to rebut a matter that has been officially noticed should be available to either side.

217. MSAPA § 4-215(d).

218. See *Gellhorn*, *supra* note 153, at 42-43.

219. See *Frantz v. Board of Medical Quality Assurance*, 31 Cal. 3d 124, 139-40, 181 Cal. Rptr. 732 (1982) (adjudicator can use professional competence to reject opinion testimony that is found unpersuasive).

220. *Frantz* illustrates the difficulty of making the distinction. When the agency decided that the physician was grossly negligent, was it merely evaluating the evidence in the record or was it taking official notice of community standards of medical practice? In this marginal area, the Supreme Court appropriately required the agency to provide a response opportunity.

expense.<sup>221</sup> This provision should apply to all agencies covered by a new APA, whether or not due process applies.<sup>222</sup> However, it should allow all agencies to adopt regulations that impose qualification standards and disciplinary standards for lay representatives.<sup>223</sup>

Some non-APA agencies now allow parties to be represented by non-attorneys.<sup>224</sup> The Model Act takes no position on lay represen-

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221. Gov't Code § 11509. Due process does not require the appointment of counsel, even in a case of license revocation for conduct that could also be criminal. *See Borror v. Department of Inv.*, 15 Cal. App. 3d 531, 537-44 (1971), *hearing denied*. *See also White v. Board of Medical Quality Assurance*, 128 Cal. App. 3d 699, 707-08, 180 Cal. Rptr. 516 (1982), *hearing denied* (no defense of ineffective assistance of counsel in administrative cases). In a few administrative situations, due process does require the appointment of counsel. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole revocation — right to appointed counsel upon showing of need).

222. Generally if due process applies parties have a right to be represented by counsel. *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, an attorney's fee can be limited to \$10, thus making it impossible to retain counsel as a practical matter. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985). And in some situations in which due process applies, there is no right to counsel. *See Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal of cadet from Merchant Marine Academy).

The statute that allows representation should permit agencies to adopt regulations that make exceptions to the right to counsel for situations involving minor sanctions or in which counsel is otherwise inappropriate, such as a brief suspension from school. *See Perlman v. Shasta Joint Junior College Dist.*, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970).

223. Such regulations could contain provisions allowing agencies to establish qualification standards for lay representatives that require the representatives to meet standards of competency and character. The rules might also contain provisions for standards of conduct, including confidentiality, and disciplinary control, and for procedures to bar representatives guilty of violating the standards from future representation before the agency. *See Rose, Nonlawyer Practice Before Federal Administrative Agencies Should Be Encouraged*, 37 Admin. L. Rev. 363, 370-72 (1985) (ethical rules for non-lawyer advocates before Patent Office, ICC, and Treasury Department).

224. Unemployment Insurance Appeals Board (Unemp. Ins. Code § 1957); Workers Compensation Appeals Board (Lab. Code § 5700); Department of Social Services welfare cases (Welf. & Inst. Code § 10950); Board of Equalization (18 Cal. Code Regs. § 5056). In *Welfare Rights Org. v. Crisan*, 33 Cal. 3d 766, 190 Cal. Rptr. 919 (1983), the Court created a privilege for communications between welfare clients and lay representatives, by analogy to the

tation.<sup>225</sup> I believe that the APA should provide that a party can be represented by anyone of his choice, before any agency, whether or not a licensed attorney.<sup>226</sup> The prohibitive cost of legal services, and the very limited availability of legal services for the poor or pro bono representation, means that most parties to administrative proceedings cannot afford lawyers. Indeed, non-lawyer advocates may do a better job than lawyers in specialized tribunals such as tax or welfare cases or in cases raising scientific or technical issues.<sup>227</sup> As dispute settlement shifts from formal adjudication to alternate methods of dispute resolution<sup>228</sup> or to less formal modes,<sup>229</sup> non-attorney representation seems quite appropriate.<sup>230</sup>

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attorney client privilege. In *Eagle Indem. Co. v. Industrial Accident Comm'n*, 217 Cal. 244, 18 P.2d 341 (1933), the Court allowed a lay representative in a workers' compensation proceeding to collect a fee even though the fee statute referred only to attorneys.

225. MSAPA defers to other state law on the question. § 4-203(b) states that a person can be advised and represented, at his own expense, by counsel or, if permitted by law, other representative. The federal APA allows representation by "other qualified representative" if "permitted by the agency." 5 U.S.C. § 555(b) (1988).

226. It is unclear whether such a provision can be adopted by the legislature, as opposed to the Supreme Court. However, the legislature's power to authorize lay representation before the Workers' Compensation Appeals Board was squarely upheld in *Eagle Indem. Co. v. Industrial Accident Comm'n*, 217 Cal. 244, 18 P.2d 341 (1933). Other states have conflicting positions on this issue. See Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 B.Y.U. J. Pub. L. 219, 252-54 (1988); Comment, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings*, 43 Vand. L. Rev. 245 (1990); Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law*, 15 Val. U. L. Rev. 567 (1981). This issue is beyond the scope of this report.

227. In *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), the Court expressed strong approval for representation of claimants before the VA by non-attorney claims representatives employed by veterans' organizations.

228. See Part II.G., *supra* at 484.

229. See Part III.E., *infra* at 516.

230. The arguments in favor of non-lawyer representation in administrative proceedings are set forth in Rose, *supra* note 223, at 391. But see Heiserman, *Nonlawyer Practice before Federal Administrative Agencies Should be*

However, there are some complex and technical administrative cases that require attorneys; it would irresponsible to allow non-attorney representation. Consequently, I would allow all agencies, by regulation, to limit representation to licensed attorneys.

### E. INFORMAL TRIAL MODELS

*1. A menu of adjudicatory models.* The California APA now provides for only one model of adjudication: a fairly formal trial with examination and cross-examination of witnesses. Although the proceeding may be informal in some respects (such as relaxed rules of evidence), the ingredients of APA adjudication are pretty much the same as a trial in Superior Court.

The Commission has tentatively agreed that a new APA should cover all state agencies<sup>231</sup> required by state statute or by state or federal due process to hold an adjudicatory hearing on the record.<sup>232</sup> In many cases to which such an APA will apply, the formal trial type hearing model of the existing APA is inappropriate. In addition, there are probably numerous cases presently heard by agencies covered by the existing APA which could be fairly disposed of with less formality.<sup>233</sup>

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*Discouraged*, 37 Admin. L. Rev. 375, 385 (1985). This volume of the Administrative Law Review contains a stimulating discussion by numerous participants of the issue of non-attorney representation together with articles about the experience of various federal agencies that permit lay representation.

231. With a few exceptions, such as the University of California.

232. The Commission tentatively rejected my recommendation that the APA should cover *all* state agency adjudication, whether or not a statute or the constitution requires a trial type hearing. However, the Commission agreed to reconsider this issue before it finishes its recommendations on adjudication. This section of the report will assume that the Commission sticks to its decision. Therefore, it does not propose models suitable only for adjudications that are not required by statute or constitution to be conducted on the record.

233. In addition, there are probably a good many cases that an agency would like to bring to hearing but does not because of the relatively high cost of conducting a formal hearing before an OAH ALJ. These costs are charged back to the agency and must be absorbed in its budget. If the APA provided a mechanism for a shorter and simpler hearing, perhaps agency budgets could be stretched to cover more cases and thus improve law enforcement.

In my first report,<sup>234</sup> I suggested that California adopt a scheme similar to that in the 1981 MSAPA which provides for a menu of hearing procedures of varying degrees of formality. Under this approach, formal adjudication is the default, but agencies would be entitled to employ less formal models. The Commission deferred action on this proposal. It is now time to decide whether to adopt the idea of variable due process and to decide how many models the menu should contain and when they can be used.

The MSAPA's proposal for a choice of models is an ingenious answer to the criticism that a broadened act would call for more formality than is appropriate to resolve a broad range of disputes. It does so by providing for less formal models. Moreover, it responds to critics of the administrative process who complain that it has become too judicialized or too imbued with adversary behavior, by providing models whereby unnecessarily judicialized procedures and adversary styles can be dispensed with.

An important element of this suggestion is that formal procedure is the default; an agency that wishes to use less formal models must first adopt rules authorizing it to do so.<sup>235</sup> This rulemaking process will engage each of the constituents (inside and outside of government) that the agency deals with. The agency will be forced to confront the difficult issue of just how much formality is appropriate in its decisionmaking. I believe this rulemaking process would be a healthy one, for it would compel agencies to deal with an issue which is seldom considered in the daily routine.<sup>236</sup> And it would result in a set of regulations which, for the first time, will

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234. Asimow, "Administrative Adjudication: Structural Issues," pp. 66-82 (October 1989); set forth in revised form in Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1094-105 (1992), and reprinted, *supra* p. 321, at 348-59.

235. Under the MSAPA, emergency adjudicative procedure need not be authorized by a rule, whereas summary and conference adjudication procedure must first be authorized by rules. As discussed below, I disagree with the MSAPA on this point.

236. See Verkuil, *A Study of Informal Agency Procedures*, 43 U. Chi. L. Rev. 739, 745, 792-93 (1976).

accurately describe the actual adjudicatory procedures of each agency.

Ideally, the end result of the exercise will be a set of agency procedures properly matched to the needs for formality. Yet because the MSAPA provides for relatively few models, all agency procedures will fall into one slot or the other, thus enabling California for the first time to have a true administrative law with some consistency of procedure across all of its agencies. The essential ingredients of a conference hearing at one agency, for example, will be about the same in all agencies. This will permit attorneys who practice before every California agency to consider themselves administrative lawyers (as well as energy lawyers, or workers' compensation lawyers, or licensee defense lawyers) and allow the presentation of CEB courses applicable to all agencies. It will also permit the courts to build up a body of precedents applicable to all of the agencies.

The MSAPA leaves a critical choice to the states in adopting a system of variable process. Under one approach, the MSAPA defines precisely which types of matters are suitable for which hearing model. Under the second approach, agencies can pick whichever model they believe is appropriate for various situations or for different categories of their caseload. The first approach strikes me as too rigid when applied across the entire universe of administrative adjudication; it creates many interpretive problems and probably leaves out situations in which less formal procedures would be appropriate. Thus I prefer the second approach: the Act will provide for several models and agencies can select by rule which model will apply to each type of decision in their adjudicatory caseload and when it will apply. But, to repeat, without adoption of a rule that calls for less formal procedure, the agency must use full-fledged formal adjudication. Thus there is a great incentive for agencies to address this problem and adopt appropriate rules.

*2. Conference hearings.* The MSAPA modeled its provision for conference hearings<sup>237</sup> on the provision for informal hearings in

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237. Kansas adopted the conference hearing and, under recent amendments permits use of that format even without the prior adoption of rules. Kan. Stat.

the Florida statute. Florida employs an all-inclusive definition of adjudication<sup>238</sup> but allows some hearings to be informal rather than formal if there is no disputed issue of material fact.<sup>239</sup>

A conference hearing dispenses with certain elements of a formal hearing. In particular, there is no pre-hearing conference, no subpoenas and discovery, no formal presentation of evidence or cross examination, no right of non-parties to participate. Instead, the parties can testify and present written exhibits and offer comments on the issues. However, the requirements of notice, unbiased decisionmaker, separation of functions, ex parte contacts, statement of findings and reasons, and agency review remain the same as in a formal hearing. In addition, I believe that an OAH ALJ should preside at a conference hearing if one would do so in the case of a formal hearing.

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Ann. § 77-533 (Supp. 1988); Leben, *Survey of Kansas Law: Administrative Law*, 37 Kan. L. Rev. 679, 682, n.13 (1989). None of the other states that have adopted part or all of the MSAPA have adopted conference hearings, but the provision was drawn from the pre-existing statutes of numerous states. See *infra* notes 238-39. The conference approach is inspired by the seminal work of Paul Verkuil who identified it as the core administrative law procedure, applicable to both adjudication and rulemaking. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258 (1978).

238. Fla. Stat. Ann. §§ 120.52(10), 120.57 (West Supp. 1991) (hearings required in all proceedings in which the substantial interests of a party are determined by an agency).

239. Fla. Stat. Ann. § 120.57 (West Supp. 1991). In an informal hearing, an agency is required to give reasonable notice, give affected persons an opportunity to present written or oral evidence or a written statement, and provide a written explanation within 7 days. See England & Levinson, *Florida Administrative Practice Manual* ch. 12. (1979).

Similarly, Virginia provides for informal fact-finding in any case where no statute requires a formal hearing. The “conference-consultation procedure” involves informal presentation of factual data or argument, a prompt decision, and written statement of reasons. This procedure can also be used as a method of settlement or pre-trial before a formal hearing. Va. Code Ann. § 9.6.14:11 (1989). Delaware, which has an all-inclusive definition of adjudication, provides for fact-finding by informal conference or consultation, but only where the parties so agree. Del. Code Ann. tit. 29, § 10123 (1983). Another model is the Montana statute which allows an agency to adopt rules embodying a conference format. Mont. Code Ann. § 2-4-604.

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).<sup>240</sup> The conference hearing will be particularly useful in the case of hearings required by federal or California due process, where a full-fledged trial type procedure is not required but some form of structured on-the-record hearing is necessary.<sup>241</sup>

When can the conference procedure approach be used? As mentioned above, there are two alternatives (agency choice or constraint by statute). I recommend that conference procedure be used in any circumstance defined by agency rules (unless, of course,

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240. The Water Resources Control Board uses a workshop procedure which is quite like a conference hearing. The workshop procedure was highly praised by private attorneys who practice before the board. It allows the issues in a pending case (either an appeal to the Board from a decision of one of its regional Boards or a matter within the Board's original jurisdiction) to be discussed informally by the litigants, the staff, and the Board members. The matter then returns to the Board in a brief formal hearing where a final vote of the Board members is taken.

241. For example, due process often requires a hearing to vindicate a person's liberty interest in restoring his good name which has been stigmatized by agency action. Thus a probationary employee who is fired for stigmatic reasons is entitled to a hearing purely to clear his name. *See, e.g., Heger v. City of Costa Mesa*, 231 Cal. App. 3d 42, 282 Cal. Rptr. 341 (1991); *Lubey v. San Francisco*, 98 Cal. App. 3d 340, 159 Cal. Rptr. 440 (1979), *hearing denied*; *Board of Regents v. Roth*, 408 U.S. 564 (1977). A conference hearing might be well adapted for this purpose.

It is essential to realize that California due process is more inclusive than federal due process. *See Asimow, "Administrative Adjudication: Structural Issues," pp. 60-66 (Oct. 1989); set forth in revised form in Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1084-90 (1992), and reprinted, *supra* p. 321, at 338-44. For example, in *Saleeby v. State Bar*, 39 Cal. 3d 547, 562-68, 216 Cal. Rptr. 367 (1985), the Supreme Court held that the Bar must provide an appropriate but informal hearing when considering claims for purely discretionary payments from the client security fund. Again, it is imperative that the statute provide less formal hearing models to deal with such cases.

conference hearings would violate some other statute or constitutional due process).<sup>242</sup>

Some cases decided under the existing APA could lend themselves to conference procedure. For example, where there is no disputed issue of fact but only a question of law, policy, or discretion (such as severity of penalty), conference procedure would be quite appropriate.<sup>243</sup>

In addition, conference procedure would be appropriate for a range of adjudications presently conducted by California agencies outside the APA. Adversary, trial-type process is not necessary or even desirable to settle a wide range of disputes between government and the public. One large group of cases that could be resolved by conference hearings are decisions to deny discretionary permissions, grants, or licenses, where a hearing is required by statute or by federal or California due process.

The various land use planning and environmental decisions made by state agencies provide another opportunity to consider the use of the conference format.<sup>244</sup> One example is the grant or revocation

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242. If the constraint alternative under MSAPA is followed, conference hearings would apply to cases of minor sanctions and cases in which there is no disputed issue of material fact.

Conference hearings could not be used when some other statute mandates trial-type hearings, as in the case of workers' compensation claims. Similarly, due process generally requires confrontation and cross-examination when an agency imposes a serious sanction, factual issues are central to the decision, and those issues turn on credibility. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Conference proceedings could not be used in such cases either. However, courtroom drama is not necessary when no such issues must be resolved. Thus cross-examination is not needed in a variety of preliminary determinations (such as interim suspension) or when the agency needs to resolve broad questions of legislative fact or determine questions of law and policy.

243. Federal cases now recognize the importance of providing for a streamlined procedure when there is no factual issue, for example in the case of summary judgment or where the disputed issue has already been settled by a validly adopted rule. See *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539 (1991); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

244. Conference hearings would resemble the workshops used to excellent effect by the Water Resources Control Board. Various proceedings conducted by

of permits by the Coastal Commission to engage in construction near the beach. The agency operates rather like to a local planning and zoning agency. After the staff studies the application for permit and issues a report, there is a relatively brief, argument-type hearing before the entire twelve-member Commission.<sup>245</sup> Non-parties, such as objecting neighbors, can also take part. Here again, the conference hearing format appears appropriate.<sup>246</sup>

Conference hearings might also be useful in individualized ratemaking cases. For example, Public Utilities Commission ratemaking cases are now heard by ALJs in a trial-type mode with extensive cross-examination of experts. These cumbersome proceedings could be simplified through the adoption of generic rules.<sup>247</sup> To the extent that issues remain to be tried, the agency should have discretion to dispense with trial-type formality and use less formal and far more efficient approaches, such as conference

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the Energy Commission also closely resemble the conference model. The Workers Compensation Appeals Board rules also provide for conference hearings. 8 Cal. Code Regs. § 10541.

245. The Commission should consider the delegation of the hearing function to ALJs. See Asimow, "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs," pp. 7-9 (Aug. 1990); set forth in revised form in Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1106-08 (1992), and reprinted, *supra* p. 321, at 360-62.

246. The conference format would be inappropriate to the extent that it would exclude participation by non-parties. However, I believe that agencies should have the power to determine in their rules whether non-party participation would be permitted in conference hearings. On this point, I part company with the MSAPA if that statute would preclude agencies from adopting rules that would allow non-party participation.

247. When I study rulemaking procedure, I intend to suggest a provision to make clear that generic issues that arise in the course of adjudication can be split off from the pending adjudication and resolved through rulemaking.

hearing procedures<sup>248</sup> which would allow informal participation by all concerned parties.<sup>249</sup>

Finally, the conference procedure could lend itself to tax adjudications now conducted by the State Board of Equalization, either in cases of appeals from Franchise Tax Board determinations or in cases of appeals from the Board's own business tax decisions. While a few tax cases may involve credibility determinations (as to which traditional cross-examination may be appropriate), most of them turn on issues of statutory interpretation and application of the law and regulations to stipulated facts. A conference might be quite appropriate for resolving this kind of case.

3. *Summary adjudicative proceedings.* 1981 MSAPA provides for an abbreviated, bare-bones procedure called a summary proceeding.<sup>250</sup> As sketched in MSAPA, this model<sup>251</sup> simply requires notice and an opportunity for a party to explain his position to a

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248. See Brown, *The Overjudicialization of Regulatory Decisionmaking*, 5 Nat. Resources & Env't 20, 48 (1990), urging that ratemaking proceedings be much less formal and judicialized and that a workshop approach focused on the conflicting views of experts be substituted for trial-type combat.

249. As in the case of the Coastal Commission, a conference hearing at the Public Utilities Commission should permit participation by non-parties.

250. MSAPA § 4-502 to 4-506. Washington's new APA provides for a "brief adjudicative procedure." Brief adjudicative procedure can be used in any situation where the agency, by rule, has provided for it if the public interest does not require the involvement of non-parties and if "the issue and interests involved in the controversy do not warrant" use of more formal procedure. Also brief procedure cannot be used in public assistance and food stamp programs. Wash. Rev. Code Ann. § 34.05.482 (1990). Kansas also adopted summary hearings. Kan. Stat. Ann. § 77-537 (Supp. 1988), with amendments described in Leben, *supra* note 237, at 682 n.13, 685 n.27.

251. See generally Comment, *Experiments in Agency Justice: Informal Adjudicatory Procedures in Administrative Procedure Acts*, 58 Wash. L. Rev. 39, 55 (1982) (concluding MSAPA model was better than informal procedures in various state laws). The summary model might have been inspired by Goss v. Lopez, 419 U.S. 566 (1975). Goss holds that a student threatened by a ten-day suspension from school is entitled to notice of the charges against him, an explanation of the evidence the authorities have if he denies the charges, and an opportunity to present his side of the story. In essence, the Court held that due process required a conversation between the student and the disciplinarian.

presiding officer named by the agency.<sup>252</sup> The officer must furnish a brief statement of findings and reasons.<sup>253</sup> On request, the aggrieved party can obtain an administrative review of a decision taken through summary adjudication.<sup>254</sup> In short, summary procedure allows a person subject to an adverse agency decision appropriate notice, a chance to state his point of view, an explanation of an adverse decision, and an administrative review of the decision.<sup>255</sup>

My belief is that California need not adopt the summary adjudicative procedure in its new APA, assuming that the definition of adjudication is limited to hearings on the record required by statute or due process.<sup>256</sup> By definition, a summary hearing is not an on-the-record proceeding, so it should not be needed under a statute that provides ground rules only for on-the-record proceedings.<sup>257</sup>

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252. There is no requirement that the presiding officer be a person uninvolved in the dispute, much less an ALJ from OAH. Any person exercising authority over the matter is the presiding officer. MSAPA § 4-503(a).

253. Except in monetary cases, the order can be oral or written. MSAPA § 4-503(c).

254. However, reconsideration can be prohibited by any provision of law. MSAPA §§ 4-504, 4-505.

255. None of the other Model Act provisions relating to adjudication are applicable unless agency rules cause them to apply. MSAPA § 4-201(2).

256. As mentioned above, if the Commission wishes to reconsider its decision to limit the definition of adjudication, it will also have to consider adoption of the summary hearing model to deal with the large numbers of small-stakes cases that would be swept under the act.

257. In many situations, a statute or due process requires an agency to furnish a bare-bones type of procedure. For example, due process requires a procedure that falls short of an on-the-record hearing in the case of short suspensions of students or employees. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975) (10-day suspension from high school — student entitled to oral or written notice, explanation of evidence, and opportunity to present his side of the story); *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 124 Cal. Rptr. 14 (1975) (pre-termination procedures for permanent civil service employee — notice, statement of reasons, copy of charges, and right to respond orally or in writing).

Similarly, licensing statutes are often interpreted to provide for informal procedures before denial of the license. *See Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 269-71, 246 P.2d 656 (1952). The *Fascination* case involved an application for a license for an amusement business. The city denied it on the

Elimination of the summary hearing model simplifies the drafting of a new APA and also simplifies the task agencies face in deciding which model to employ for their various functions. Moreover, elimination of summary hearings eases concerns that agencies would opt for the summary model in their rules in cases that require more formalized proceedings.

Elimination of the summary hearing model does create a problem. Department of Motor Vehicle driver's license hearings, as presently constituted, cannot meet the standards for separation of functions that the Commission has decided to adopt. At the time of the Commission's discussion of this subject, I suggested that the problem could be solved by placing driver's license hearings into the summary hearing slot because separation of functions are not required for summary hearings. Consequently, it will apparently be necessary to write an exemption for the DMV from separation of functions.

*4. Emergency procedure.* The California statute contains no general provision for emergency adjudication (although it does provide for emergency rulemaking).<sup>258</sup> Yet emergencies do occur and must be dealt with. For example, emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public. In most cases, agencies must go to court to seek immediate relief in emergency situations. This remedy has proved to be

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basis that the business involved a game of chance rather than skill. The Supreme Court held that notice and hearing was required, reaching this conclusion by "interpreting" the ordinance. The court suggests that the hearing requirement might have been satisfied by an inspection of the game by the chief of police and an opportunity for the applicant to state his case.

258. Procedural due process cases recognize that in a significant class of cases, government can shoot first and ask questions afterward. *See, e.g., FDIC v. Mallen*, 108 S. Ct. 1780 (1988) (suspension of banking executive under indictment for felony involving dishonesty); *Hodel v. Virginia Surface Mining Ass'n*, 452 U.S. 264 (1981) (immediate closure of dangerous mine).

unsatisfactory in professional licensing cases where interim suspension is urgently required to protect public safety.<sup>259</sup>

If the new APA applies in all situations in which due process requires a hearing, there is a clear need for an emergency provision in the statute. In numerous situation, due process requires a hearing before an agency acts; absent some specific provision for emergency procedure, the APA would then mandate full-fledged formal procedure which could thwart the agency in dealing with an emergency situation. Thus there should be a specific provision that allows the agency to take emergency action with abbreviated procedure.

Moreover, a generic provision for emergency action would be a useful addition to the California APA. The law already contains provisions for interim suspension of both medical licensees and attorneys and some other licensing situations,<sup>260</sup> as well as for

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259. See Fellmeth, *Physician Discipline in California: A Code Blue Emergency*, 9 Cal. Reg. L. Rep. 1, 5-6, 15 (Spring 1989). Under prior law, the Medical Board was empowered to seek temporary restraining orders in court, but it sought and obtained only three in 1986-87 and none at all in 1987-88. See Bus. & Prof. Code §§ 125.7, 2311. I was informed that the low number of TROs resulted from reluctance by the attorney general's staff to seek them because of a well-founded belief that trial judges would refuse to grant them.

260. Gov't Code § 11529 (medical licensee's violations endanger public health, safety, or welfare); Bus. & Prof. Code § 6007(c) (suspension of attorney from practice if conduct poses a substantial threat of harm to clients or the public and on other grounds). The provision for interim suspension of attorneys was upheld by the Supreme Court. Conway v. State Bar, 47 Cal. 3d 1107, 255 Cal. Rptr. 390 (1989). Under Section 6007(c) and the State Bar rules, there is an expedited hearing; either party has subpoena power but the usual provisions for discovery and evidence do not apply. Instead, evidence can be taken by affidavit. The State Bar Court does not review interim suspensions; they are judicially reviewable but the suspension goes into effect pending review. The Real Estate Commissioner has power to order a licensee to desist and refrain from illegal activity immediately with a hearing granted within 30 days. Bus. & Prof. Code § 10086(a). The Public Utilities Commission has power to suspend trucking licenses before granting a hearing. Pub. Util. Code § 1070.5. The DMV has power to suspend certain licenses pending a hearing if the public interest so requires. Veh. Code § 11706.

health facilities and day care centers.<sup>261</sup> This indicates that such legislation is acceptable to the legislature and that all agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

The 1981 MSAPA provides that “emergency adjudicative procedure” can be used in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.” The agency can take only such action as is necessary to avoid the immediate danger.<sup>262</sup> The agency must provide practicable notice and a brief statement of findings, conclusions, and policy reasons for the decision if it is an exercise of discretion. After issuing the order, the agency must then proceed as quickly as possible to complete proceedings that would be required if there was no emergency.<sup>263</sup>

Thus a new California statute could be modeled on the MSAPA provision. However, I have some additional suggestions. Unless it is infeasible, there should be provision for an expedited and streamlined hearing before an agency employee, as is provided in the legal interim suspension statutes,<sup>264</sup> at which the party at least

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261. See Health & Safety Code §§ 1550 (last paragraph), 1569.50, 1596.886. These provisions are used 150-200 times per year. They allow the agency to suspend a facility’s license ex parte, without any prior procedure, but require a hearing within 30 days after receipt of the suspension notice and a decision within 30 days after completion of the hearing. This provision was upheld in *Habrun v. Department of Social Serv.*, 145 Cal. App. 3d 318, 193 Cal. Rptr. 340 (1983). I was informed that licensees frequently manage to stay open by securing a temporary restraining order against the department’s suspension order; the trial court grants a hearing to the facility at the preliminary injunction stage.

262. MSAPA § 4-501(a)-(b). Kansas adopted this provision. Kan. Stat. Ann. § 77-536 (Supp. 1988). Unlike conference or summary adjudication, emergency procedure can be used even though the agency has not previously provided for it by a rule. I differ with the MSAPA on this point, as discussed *infra*.

263. MSAPA § 4-501(c)-(e). The Supreme Court indicated that post-termination proceedings must follow reasonably promptly after conclusion of the interim suspension. *Conway v. State Bar*, 47 Cal. 3d 1107, 1120-23, 255 Cal. Rptr. 390 (1989).

264. Unfortunately, the provision for interim suspension of medical licensees provides for more than an expedited and streamlined hearing. It allows the

has an opportunity (orally or in writing) to rebut the charges against him or persuade the agency not to suspend him.<sup>265</sup> Immediate judicial review should be provided.<sup>266</sup> Finally, emergency action should be authorized by agency rules, just like conference and summary proceedings, something which MSAPA does not require. Such regulations would define the circumstances in which emergency action can be taken, the nature of the interim relief which the agency can obtain, and the procedures that will be accorded before and after the emergency action (which could be more protective than those that the statute provides as a default).

#### F. OTHER TRIAL ISSUES

*1. The oath.* The APA provides that testimony shall be taken only on oath or affirmation<sup>267</sup> and that is the general practice in

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licensee to call, examine, and cross-examine witnesses and to present and rebut evidence determined to be relevant. Thus the suspension hearing could consume weeks rather than hours or a day or two. Gov't Code § 11529(d). I am informed that this has not occurred in the few interim suspension hearings that have occurred so far, but obviously it could occur. I recommend that the provision for suspension of medical licensees be conformed to this recommendation.

265. Ordinarily, some sort of brief conference is feasible. But one can imagine a leaking toxic chemical tank where the owner is away on vacation and cannot be contacted, yet immediate action is needed to protect the public. The statutes calling for suspension of the licenses of day care centers, elderly care centers, and health facilities allow the facilities to be shut down without any prior procedure. I recommend that these statutes be conformed to the new APA. It is my belief that DSS and DHS can provide at least a brief conference with licensees before shutting them down.

266. Bus. & Prof. Code Section 6083(b) provides for immediate judicial review of a Bar decision to place a member on interim suspension. Gov't Code Section 11519(h) provides for immediate judicial review of a Medical Board interim suspension. In cases involving suspension by the Departments of Health and Social Services, which under present law can be done without any prior procedure, licensees have succeeded in obtaining delays from the courts. The courts should not delay the agency from putting an interim suspension into effect if the agency has followed the procedures spelled out in its regulations; nor should the court grant a hearing to the licensee which supplants the procedures that the agency must provide.

267. Gov't Code § 11513(a).

non-APA agencies as well.<sup>268</sup> Some doubt has been expressed about whether Board of Equalization hearing officers have the power to take testimony under oath. Consequently, it would be desirable if a new APA made clear that presiding officers have the power to administer oaths and shall take testimony only under oath or affirmation unless agency regulations provide the contrary.<sup>269</sup>

2. *Transcripts.* The APA provides that proceedings are reported by a phonographic reporter, except that on consent of all the parties, the proceedings may be reported electronically.<sup>270</sup> In my view, all agencies should have power to tape record their hearings, rather than use the much costlier method of having a reporter present, with or without the consent of the parties. Several agencies now tape their hearings and report no problems with transcribing the tapes when a transcript is needed.<sup>271</sup> With modern electronic reporting equipment (such as multi-track recorders), agencies may be able to achieve significant efficiencies and cost savings.<sup>272</sup> The

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268. See *Marlow v. County of Orange Human Serv. Agency*, 110 Cal. App. 3d 290, 167 Cal. Rptr. 776 (1980) (a “witness” under state law is a person who testifies under oath — failure to take testimony under oath a case involving dismissal from methadone maintenance program requires reversal).

269. In a case involving hotly contested facts, it may be that agency acceptance of unsworn testimony violates due process. See *Broussard v. Regents of Univ. of Cal.*, 131 Cal. App. 3d 636, 184 Cal. Rptr. 460 (1982), *hearing denied* (no due process violation where facts not disputed).

270. Gov’t Code § 11512(d). The section was amended in 1983 to provide for recording by consent to overrule an Attorney General’s opinion to the contrary. Op. 82-802, 65 Ops. Cal. Att’y Gen. 682 (1982).

271. The Unemployment Insurance Appeals Board tapes most hearings and reports very few problems of audibility. Similarly, the State Personnel Board tapes hearings involving relatively minor sanctions and reports few problems where good equipment is used.

272. In an early case involving primitive equipment, a reviewing court was confronted by a transcript of recorded testimony that had significant omissions. The court was compelled to remand for a new hearing because it could not apply the substantial evidence test to an incomplete transcript. *Aluisi v. County of Fresno*, 159 Cal. App. 2d 823, 324 P.2d 920 (1958); *Chavez v. Civil Serv. Comm’n*, 86 Cal. App. 3d 324, 332, 150 Cal. Rptr. 197 (1978), *hearing denied* (day’s tape defective). In *County of Madera v. Holcomb*, 259 Cal. App. 2d 226, 230-31, 66 Cal. Rptr. 428 (1968), *hearing denied*, the court found that a transcript from a taped hearing left much to be desired because some speakers

OAH reports that it is necessary to employ a monitor to confirm that the equipment is working properly and to maintain a log of speakers, but such a monitor is much less costly than having a court reporter present. Other agencies have managed to tape hearings successfully without a monitor.

The question of whether and when to tape record agency hearings should be left to agency regulations. The statute might provide for stenographic reporting as a default, but allow agencies to adopt regulations calling for electronic reporting in all cases or in designated classes of cases, with or without the consent of the parties.

3. *Telephone hearings.* Naturally, a hearing in which all the parties, witnesses, and the judge are in the same place at the same time is optimal, particularly where credibility determinations must be made. Nevertheless, there are many situations in which the time and money of the litigants and the agency could be conserved if the telephone (or other appropriate telecommunications equipment) were used instead to conduct the examination of a witness or even an entire hearing. The Unemployment Insurance Appeals Board makes use of hearings in which part or all of the testimony is taken by telephone where the location of the hearing is inconvenient for parties or witnesses.<sup>273</sup> A carefully done study indicated that more than two-thirds of UIAB referees were satisfied by this procedure and felt that it met due process guarantees.<sup>274</sup>

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did not identify themselves and others spoke at the same time, but found the transcript sufficient to conduct review. These sorts of problems should be almost completely removed as presiding officers become accustomed to taped hearings (they must admonish speakers to identify themselves and not to talk at the same time) and by the use of modern taping equipment.

273. 22 Cal. Code Regs. § 5041(c). I am informed that telephone testimony is taken in about 20% of UIAB hearings. See *Slattery v. Unemployment Ins. Appeals Bd.*, 60 Cal. App. 3d 245, 131 Cal. Rptr. 422 (1976), criticizing the Board for conducting simultaneous hearings before different referees when the problems could have been solved by a telephone hearing.

274. Corsi & Hurley, *Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience*, 31 Admin. L. Rev. 247 (1979); see also Corsi & Hurley, *Pilot Study of the Use of the Telephone in*

Probably explicit statutory sanction is needed to allow hearings by telephone if a party objects.<sup>275</sup> Where considerations of distance, illness, or other factors make the location of a hearing inconvenient for parties or witnesses, or where in-person hearings require parties or witnesses to sit and wait for long periods of time, I think that it makes sense to take testimony by phone. Thus the APA should allow agencies to adopt regulations that include provision for conducting part or all of adjudicatory procedures by conference telephone call or other appropriate telecommunications technology.

*4. Interpreters.* The present statute contains elaborate provisions for interpreters in both APA<sup>276</sup> and non-APA proceedings.<sup>277</sup> I have not heard of any problems with these provisions and they

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*Administrative Fair Hearings*, 31 Admin. L. Rev. 485 (1979), reporting a pilot project in New Mexico in the use of the telephone in unemployment and welfare cases, and reporting general satisfaction by both hearing officers and users.

275. See *Purba v. INS*, 884 F.2d 516 (9th Cir. 1989) (phone hearings are contrary to statute which requires testimony to be taken "before" immigration judge); *Detroit Based Coalition for Human Rights v. Department of Social Serv.*, 431 Mich. 172, 428 N.W.2d 335 (1988) (phone hearings violate regulations requiring in-person hearing). There is some authority that telephone hearings deny due process where a large percentage of the hearings turn on issues of credibility. *Gray Panthers v. Schweiker*, 716 F.2d 23, 34-38 (D.C. Cir. 1983). But see *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982). See generally Note, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due*, 1984 U. Ill. L.F. 445. Current conceptions of due process require a careful evaluation of both private and governmental interests, and of the actual risks of error posed by the challenged procedure. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). It is my belief that a well designed scheme of telephonic hearings would be upheld under contemporary due process analysis where significant savings to parties, witnesses, or the agency could be shown.

276. Gov't Code Section 11501.5(a) furnishes a list of agencies that must provide language assistance; Section 11501.5(b) allows other agencies to elect to do so. Section 11513(d) provides for appointment of interpreters, leaving it to the ALJ to decide whether the party or the agency should pay for them. Section 11513(e) provides that the State Personnel Board shall establish criteria for interpreters and compile lists of names. Section 11513(f)-(i) provides additional ground rules for interpreters. Section 11500(g) defines language assistance.

277. Gov't Code Section 11018 requires non-APA agencies to comply with Gov't Code Section 11513(d).

should be brought together (and simplified) in a single provision.<sup>278</sup> That provision should also make clear that a presiding officer has the power to provide an interpreter to translate the testimony of a witness who does not speak English even if the parties do speak English.<sup>279</sup> It should also make clear that language assistance provisions require provision of sign language assistance for hearing impaired parties or witnesses.

5. *Open hearings.* The APA contains no provision relating to open hearings,<sup>280</sup> but the general assumption is that hearings are open to the public.<sup>281</sup> The APA should make clear that hearings are open unless both parties agree that they should be closed or unless some other statute mandates closed hearings.<sup>282</sup> The MSAPA

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278. I am informed that the Judicial Council is currently trying to develop a new set of rules for interpreters. When this work is completed, it may be possible to incorporate it into the APA. I am also informed that the provision permitting agencies to establish special materials and examinations for interpreters is meaningless because none of the agencies have done so. Gov't Code § 11513(d)(2).

279. Ogden, *supra* note 29, § 37.04[1][b].

280. The Bagley-Keene Open Meeting Act, Gov't Code § 11120 *et seq.*, appears inapplicable to hearings before ALJs. It may be applicable when the agency heads conduct the hearing, although they are allowed to close it when they deliberate on the decision. *See Cooper v. Board of Medical Examiners*, 49 Cal. App. 3d 931, 948-49, 123 Cal. Rptr. 563 (1975). The Open Meeting Act also contains an exception for employee disciplinary matters. Gov't Code § 11126.

281. Ogden, *supra* note 29, § 37.03[1][a].

282. *See Mosk v. Superior Court*, 25 Cal. 3d 474, 488-501, 159 Cal. Rptr. 494 (1979) (constitutional provision for closed hearings); *McCartney v. Comm'n on Judicial Qualifications*, 12 Cal. 3d 512, 520-21, 116 Cal. Rptr. 260 (1974) (same); *Swars v. City Council of Vallejo*, 33 Cal. 2d 867, 873-74, 206 P.2d 355 (1949) (dissent argues that the rule of open trials should apply to local civil service commission).

OAH informs me that they now close hearings when minors must testify about matters which are, in the nature of the allegations, extremely embarrassing. This practice was upheld in *Seering v. Department of Social Serv.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). It should be confirmed by statute.

provides for open hearings,<sup>283</sup> and there is authority that an individual is entitled to an open hearing under due process.<sup>284</sup>

## IV. POSTHEARING PROCEDURES

### A. FINDINGS AND REASONS

1. *Present California law.* The APA provides that agency decisions 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.<sup>285</sup>

As in numerous other areas of state administrative law, the courts have created a common law of findings that expands on the APA and generalizes it to all administrative adjudication whether or not covered by the APA. According to the *Topanga* case,<sup>286</sup> administrative adjudicatory decisions must be supported by findings that

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283. MSAPA § 4-211(6): “The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure.” The section makes an exception for hearings conducted by electronic means.

284. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

285. Gov’t Code § 11518. Recall that the pleadings are in the form either of an accusation or a statement of issues. Part II.A., *supra* at 456. An accusation must be a reasonably detailed statement of the acts or omissions with which a person is charged. A statement of issues includes any particular matters that have come to the attention of the initiating party. Gov’t Code §§ 11503, 11504. Thus findings stated in the language of the pleadings probably would be somewhat more informative than a mere statement of ultimate facts.

286. *Topanga Ass’n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 514-18, 113 Cal. Rptr. 836 (1974) (zoning board must make findings when granting variance). The Court noted that a zoning board need not make findings with the formality required in judicial proceedings, but it disapproved of findings set forth solely in the language of the applicable legislation. Again, in *Saleeby v. State Bar*, 39 Cal. 3d 547, 566-68, 216 Cal. Rptr. 367 (1985), the Court imposed a findings requirement upon State Bar decisions concerning whether to make a discretionary grant from the client security fund. Absent such findings, it would be impossible to decide whether the Bar’s decision was an abuse of discretion. Thus the Bar must make findings both on the question of whether a reimbursable loss occurred and also on how that finding was translated into the actual award. *Id.* at 568 n.8.

bridge the analytic gap between the raw evidence and the ultimate decision. Thus *Topanga* requires more than a statement of who did what to whom plus a finding of ultimate fact. It requires the agency to articulate sub-conclusions that explain the reasoning whereby it moved from the evidence to ultimate facts.<sup>287</sup> In many cases, a mere restatement or incorporation by reference of the pleadings, as permitted by the APA, probably would not meet the *Topanga* requirements.<sup>288</sup>

The court's analysis in the *Topanga* decision is based on the language of California's judicial review statute which requires a reviewing court to determine whether substantial evidence supports the agency's findings and whether the findings support the decision.<sup>289</sup> Conceivably, *Topanga* might not be applicable where the

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287. See *Wheeler v. State Bd. of Forestry*, 144 Cal. App. 3d 522, 528-29, 192 Cal. Rptr. 693 (1982):

*Topanga* mandates there be a 'bridge' between evidence and findings and findings and decision. This requires a legally valid warrant of some kind [footnote omitted], which links the evidence to the findings and the findings to the order and which tells courts whether and to what extent the licensee's conduct has anything to do with the claimed ground of discipline.

Similarly, see *Medlock Dusters, Inc. v. Dooley*, 129 Cal. App. 3d 496, 502, 181 Cal. Rptr. 80 (1982), *hearing denied* (statement of incidents followed by conclusion that cause for discipline was established is inadequate).

288. Thus it is doubtful that *Swars v. City Council of Vallejo*, 33 Cal. 2d 867, 206 P.2d 355 (1949), would or should be followed. That case allowed the civil service commission to dispense with findings in discharging an employee because the commission "upheld the action taken by the city council" and the council had made specific charges against the employee. The Commission's action discharging the employee raised a presumption that the existence of the necessary facts was ascertained. The court held this procedure met the requirements of an ordinance that the commission make written findings and conclusions. *But see Respers v. University of Cal. Retirement Sys.*, 171 Cal. App. 3d 864, 870-73, 217 Cal. Rptr. 594 (1985), distinguishing and apparently rejecting *Swars* — there must be some clearly adoptive act before incorporation of prior documents can substitute for findings. Moreover, such incorporation is suspect since the person who drafted the prior documents did not hear the witnesses. *See also Farmer v. City of Inglewood*, 134 Cal. App. 3d 130, 139, 185 Cal. Rptr. 9 (1982), distinguishing *Swars*.

289. The findings requirement in *Saleeby*, *supra* note 286, was apparently based on California due process rather than on statutory construction.

court reviews the decision under the independent judgment test rather than the substantial evidence test.<sup>290</sup>

The *Topanga* decision is also based on strong considerations of policy. Without proper findings, the court cannot responsibly review the decision. In addition, a findings requirement minimizes the risk that an agency will act arbitrarily.<sup>291</sup> Finally, proper findings enable the parties to decide whether to seek review and help persuade the parties that the decision was careful, reasoned, and equitable.

The courts do not and should not impose these requirements woodenly. There must be a rule of prejudicial error.<sup>292</sup> When, for example, the ultimate facts are obvious from the basic facts, there is no separate requirement that the ultimate facts (or “determination of issues” in the language of the APA) be stated.<sup>293</sup> However, it is less likely that a court would infer basic facts where the agency states only an ultimate fact; unless matters are totally obvious, this would violate the reasoning of the *Topanga* decision.<sup>294</sup>

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290. See *Cooper v. Kizer*, 230 Cal. App. 3d 1291, 282 Cal. Rptr. 492 (1991) (ALJ not required to make findings regarding MediCal applicant’s back pain where court reviews decision under independent judgment test).

291. *Topanga* was a challenge to the approval of a zoning variance. The Court seemed suspicious of the variance granting process and argued that a proper findings requirement would help achieve the intended scheme of land use control.

292. See *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 787, 812-15, 30 Cal. Rptr. 668 (1963) (missing finding was necessary implication of other findings).

293. *Parkmerced Residents Org. v. San Francisco Rent Stabilization Bd.*, 210 Cal. App. 3d 1235, 258 Cal. Rptr. 774 (1989) (agency not required to state that there was “good cause” for a waiver or that it was “in the interests of justice” since such ultimate findings were obvious from the basic fact findings).

294. See *J. L. Thomas, Inc. v. County of Los Angeles*, 232 Cal. App. 3d 916, 283 Cal. Rptr. 815, 820-22 (1991); *Respers v. University of Cal. Retirement Sys.*, 171 Cal. App. 3d 864, 870-73, 217 Cal. Rptr. 594 (1985). Pre-*Topanga* cases do allow agencies to dispense with findings of basic fact where only one finding could have been made. *Savoy Club. v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1040-41, 91 Cal. Rptr. 198 (1970). But if this is not the case, the courts do require basic fact findings; findings of ultimate facts are not sufficient.

2. *MSAPA provision.* The MSAPA provides a detailed findings requirement applicable to formal adjudication.<sup>295</sup> An order must contain separately stated findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed. If the findings are set forth in language that merely repeats or paraphrases the relevant provisions of law, there must be a concise and explicit statement of the underlying facts of record. Much less onerous requirements apply to summary and emergency adjudication.<sup>296</sup>

3. *Recommendations.* I suggest that a new APA contain the MSAPA provision on findings.<sup>297</sup> The existing APA's findings requirement for formal adjudication seems too sketchy. For example, under the existing APA, there is no requirement that the

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California Motor Transp. Co. v. Public Util. Comm'n, 59 Cal. 2d 270, 28 Cal. Rptr. 868 (1963); Bostick v. Martin, 247 Cal. App. 2d 179, 55 Cal. Rptr. 322 (1966), *hearing denied*.

295. MSAPA § 4-215(c). The federal APA similarly requires a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. 5 U.S.C. § 557(c)(A) (1988). In informal adjudication not otherwise governed by the federal APA, there is a requirement that a notice of denial of a written application, petition, or other request shall be accompanied by a brief statement of the grounds for denial (except when affirming a prior denial or when the denial is self-explanatory). 5 U.S.C. § 555(e) (Supp. V 1993).

296. In summary adjudication involving a monetary matter or a sanction, the presiding officer must give each party a brief statement of findings of fact, conclusions of law, and policy reasons for the agency's discretion. Except in a monetary matter, the findings can be oral or written. In other cases, the agency need only furnish notification which includes a statement of the action and notice of any available review. MSAPA § 4-503(b)(2), (c), (d). In emergency action, the order shall contain a brief statement of findings of fact, conclusions of law, and policy reasons for the exercise of discretion. MSAPA § 4-501(c).

297. MSAPA appropriately sets out more relaxed findings requirements in emergency proceedings. MSAPA § 4-501(c). I recommend adoption of this provision also. If California adopts the summary hearing procedure, it should also adopt the MSAPA provisions that relax the findings requirement in such proceedings. See MSAPA § 4-503(b)(2).

agency state the reasons why it has selected a particular penalty;<sup>298</sup> MSAPA clearly requires reasons for all exercises of discretion, including the remedy prescribed. In addition, I would preserve the *Topanga* requirement that the order contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts. Perhaps this requirement should be articulated in a comment. And the findings requirement should be the same whether the decision is judicially reviewable under the substantial evidence or independent judgment tests.<sup>299</sup>

In civil litigation, the traditional requirements of findings and conclusions has been supplanted by the “statement of decision.”<sup>300</sup> I considered but rejected the idea of transplanting the statement of decision into administrative adjudication. Judicial decisions express confusion about whether the change had any real significance;<sup>301</sup> I see no need to cause administrative judges to struggle with a new concept. Moreover, if a change from findings and conclusions to statement of decision means that less specificity would be required, I would oppose making the change. The *Topanga* case establishes the norm for administrative findings and

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298. Williamson v. Board of Medical Quality Assurance, 217 Cal. App. 3d 1343, 266 Cal. Rptr. 520 (1990); Golde v. Fox, 98 Cal. App. 3d 167, 187-88, 159 Cal. Rptr. 864 (1979), *hearing denied* (no requirement that Board make findings on rehabilitation despite a statute requiring evidence of rehabilitation be taken into account).

299. As explained *supra* in text accompanying note 290, present law might not require administrative findings on issues reviewed by courts under the independent judgment test.

300. Code Civ. Proc. § 632; Cal. R. Ct. 232.

301. As one court said: “... the Legislature adopted what it thought would be a less formal method of stating the factual basis for a court decision. Whether the Legislature succeeded in implementing its intent is debatable. As many trial judges now realize, the labels may have changed, but the game is the same. There is little substantive difference between findings of fact and the statement of decision. Findings consisted of all issues of fact ‘material’ to the judgment; the statement of decision must include the factual and legal basis of each of the ‘principal contested issues.’” R.E. Folcka Constr. Co. v. Medallion Home Loan Co., 191 Cal. App. 3d 50, 54, 236 Cal. Rptr. 202 (1987).

it can be argued that a statement of decision might tolerate a greater level of generality than does *Topanga*.<sup>302</sup>

## B. PRECEDENT DECISIONS

Several California agencies designate important adjudicatory decisions as “precedent decisions.”<sup>303</sup> These agencies designate as precedents their adjudicatory decisions that contain significant legal or policy material. The precedent decisions are published, cited, and referred to in subsequent decisions. Other agencies are considering whether to adopt this practice. Still other agencies routinely publish all of their decisions.<sup>304</sup>

I recommend that a system of precedent decisions apply to all agencies covered by the adjudicatory provisions of a new APA. An earlier phase of my report strongly recommended that agencies retain their power to adjudicate; the Commission accepted this recommendation. One important reason for that recommendation was that agencies need the ability to make law and policy through adjudication as well as through rulemaking.<sup>305</sup> But if this is so, agencies have a responsibility to let the law and policy they make through their case law be generally known.<sup>306</sup>

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302. A statement of decision requires only findings of “ultimate” not “evidentiary” facts. *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164 (1984). Clearly, *Topanga* requires far more than findings of ultimate facts.

303. The Fair Employment and Housing Commission and the Unemployment Insurance Appeals Board designate and publish precedent decisions. *See Gov’t Code § 12935(h) (FEHC); Unemp. Ins. Code § 409 (UIAB).*

304. Agricultural Labor Relations Board, Public Utilities Commission, Public Employees Relations Board, Workers Compensation Appeals Board.

305. Traditionally in administrative law, lawmaking through adjudication is acceptable and of equal dignity with lawmaking through rules. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

306. Some people have argued to me that agencies are not making any significant law or policy through their adjudicatory decisions, simply finding facts. I doubt this. Every agency is confronted by vague statutory terms, such as “unprofessional conduct” or “moral turpitude” or “gross negligence.” Their decisions make law. They should be available and accessible to the public. In addition, agency decisions generally establish a pattern of appropriate sanctions. This information should also be generally known.

The reality is that although adjudicatory decisions of most California agencies are public records,<sup>307</sup> nobody knows about them. There is no convenient way to access them. Of course, the staff has an institutional memory of these precedents and counsel who practice constantly before an agency know about them. But this knowledge is unavailable to everyone else.

If precedent decisions were generally available, it would benefit everyone — counsel for both the agency and the parties and the ALJs and agency heads who make the final decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in adjudicatory decisions. And it is more efficient to cite an existing decision than to reinvent the wheel or, worse, decide inconsistently with a prior decision without knowing or without acknowledging that this has occurred.

My suggestion would be that each agency be required to designate significant adjudicatory decisions as precedential.<sup>308</sup> The statute would make clear that a decision to adopt a decision as precedential would not be rulemaking and would not require compliance with the rulemaking provisions of the APA.<sup>309</sup> Precedent decisions could include decisions written by agency heads as well as ALJ decisions that have been adopted by agencies. Agencies could, but would not be required to, designate decisions reached prior to the effective date of the Act as precedential. They would also be required to maintain a current index of the issues resolved in precedent decisions.<sup>310</sup> In all likelihood, publishers would col-

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307. Gov't Code § 6250 *et seq.* There is an exception for records pertaining to pending litigation to which the agency is a party but the exemption ends when the litigation is adjudicated or otherwise settled. Gov't Code § 6254(c).

308. Agencies that publish all of their decisions should be exempt from this provision.

309. See Ogden, *supra* note 29, § 20.06[4], which argues that precedential decisions might be treated as rulemaking. Similarly, the decision whether or not to designate a decision as precedential should not be judicially reviewable.

310. See Administrative Conference of the United States, Recommendation 89-8, 1 C.F.R. § 305.89-8 (agencies should index all significant adjudicatory decisions whether or not designated as precedential).

lect and sell precedent decisions<sup>311</sup> and could also issue an annotated California Code of Regulations.<sup>312</sup>

One observer criticized the suggestion that agencies be required to adopt a system of precedential decisions because it might encourage agencies to reject a greater number of ALJ decisions in order to rewrite and polish them as precedents. However, that has been no problem at the Unemployment Insurance Appeals Board and I do not believe it would be a problem generally. Only cases involving genuine precedential value would be designated as precedential decisions and it is likely that such cases would receive plenary agency consideration in any event.

One question is whether the agency itself or someone else should have the responsibility for selecting precedent decisions. It might be possible, for example, for the director of OAH to select the decisions of agencies covered by the existing APA.<sup>313</sup> While I would allow agencies and OAH to agree that OAH would take over the chore, I hesitate to mandate this and would be satisfied to leave the selection process to the agency heads. Under that approach, there would be no effective sanction if an agency failed to designate any of its decisions as precedential. However, I would anticipate that the public and perhaps the legislature would criticize an agency's failure to designate any of its decisions as precedential. This sort of criticism should be a sufficiently effective incentive to designate decisions.

## V. CONCLUSION

This report, like its three predecessors, has surveyed a large number of issues relating to administrative procedure. Many of them are of fundamental importance to realizing a scheme of

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311. See Thorup, *Recent Developments in State Administrative Law: The Utah Experience*, 41 Admin. L. Rev. 465, 476-79 (1989).

312. Barclays Law Publishers recently contracted with the state of New Jersey to publish its precedent decisions. Since Barclays also publishes the California Code of Regulations, it would be natural to integrate the two.

313. This is the practice in New Jersey.

administrative procedure that is fair, efficient, and satisfying to participants. It is not simple to design a system of procedure that will work for all of the adjudicating agencies of California, but I firmly believe that it is both possible and highly desirable. An overarching administrative procedure act is reality now in virtually all states and the federal government. California, once a pioneer of administrative procedure, has fallen far behind. With the collaboration of all who are interested in administrative law — private and government practitioners, agency heads and staff, administrative law judges, and scholars, the Law Revision Commission can design a new statute that could once more be pioneering. It is to that end that my work has been devoted.