

CALIFORNIA ADMINISTRATIVE PROCEDURE ACT



A compilation of statutes and regulations
affecting administrative adjudication in California

Office of Administrative Hearings
State of California

**CALIFORNIA
ADMINISTRATIVE
PROCEDURE ACT**

Administrative Adjudication

Completely updated as of January 2008

See Table of Updates at www.oah.dgs.ca.gov for a list of amended statutes and regulations since January 2008



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Office of Administrative Hearings

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2008

ADMINISTRATIVE PROCEDURE ACT

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CHAPTER 4: OFFICE OF ADMINISTRATIVE HEARINGS

ARTICLE 1: General Provisions

§ 11370. Chapters constituting Administrative Procedure Act

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.

HISTORY:

Added Stats 1947 ch 1425 § 1. Amended Stats 1961 ch 2048 § 2; Stats 1981 ch 714 § 176, operative until July 1, 1997; Stats 1995 ch 938 § 16.5 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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).

§ 11370.1. "Director"

As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

HISTORY:

Added Stats 1961 ch 2048 § 3. Amended Stats 1971 ch 1303 § 2.

§ 11370.2. Office of Administrative Hearings in Department of General Services; Director

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

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

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

HISTORY:

Added Stats 1961 ch 2048 § 4. Amended Stats 1963 ch 1786 § 13, operative October 1, 1963; Stats 1971 ch 1303 § 3; Stats 1985 ch 324 § 13.

§ 11370.3. Appointment and assignment of administrative law judges and other personnel

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 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 to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. Any administrative law judge 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 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.

HISTORY:

Added Stats 1961 ch 2048 § 5. Amended Stats 1971 ch 1303 § 3.5; Stats 1979 ch 199 § 2; Stats 1984 ch 1005 § 2; Stats 1985 ch 324 § 14; Stats 1995 ch 938 § 17 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

§ 11370.4. Determination and collection of costs

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

HISTORY:

Added Stats 1961 ch 2048 § 6. Amended Stats 1963 ch 1553 § 1; Stats 1965 ch 462 § 1; Stats 1971 ch 1303 § 4.

§ 11370.5. Recommendations on administrative adjudication

(a) The office is authorized and directed to study the subject of administrative 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. 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.

(b) The office may adopt rules and regulations to carry out the functions and duties of the office under the Administrative Procedure Act. The regulations are subject to Chapter 3.5 (commencing with Section 11340).

HISTORY:

Added Stats 1961 ch 2048 § 7. Amended Stats 1995 ch 938 § 18 (SB 523), operative July 1, 1997. Stats 2002 ch 370 § 3 (AB 2283).

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11370.5 is amended to limit the authority of the Office of Administrative Hearings to administrative adjudication. For authority of the Office of Administrative Law to study administrative rulemaking, see Section 11340.4. Subdivision (a) is also amended to add language protecting confidentiality of records.

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

ARTICLE 2: Medical Quality Hearing Panel

§ 11371. Members of panel; Published decisions; Experts

(a) There is within the Office of Administrative Hearings a Medical Quality Hearing Panel, consisting of no fewer than five full-time administrative law judges. The administrative law judges shall have medical training as recommended by the Division of Medical Quality of the Medical Board of California and approved by the Director of the Office of Administrative Hearings.

(b) The director shall determine the qualifications of panel members, supervise their training, and coordinate the publication of a reporter of decisions pursuant to this section. The panel shall include only those persons specifically qualified and shall at no time constitute more than 25 percent of the total number of administrative law judges within the Office of Administrative Hearings. If the members of the panel do not have a full workload, they may be assigned work by the Director of the Office of Administrative Hearings. When the medically related case workload exceeds the capacity of the members of the panel, additional judges shall be requested to be added to the panels as appropriate. When this workload overflow occurs on a temporary basis, the Director of the Office of Administrative Hearings shall supply judges from the Office of Administrative Hearings to adjudicate the cases.

(c) The administrative law judges of the panel shall have panels of experts available. The panels of experts shall be appointed by the Director of the Office of Administrative Hearings, with the advice of the Medical Board of California. These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross-examination by all parties, and Section 11430.30 does not apply in a proceeding under this section. The administrative law judge may award reasonable expert witness fees to any person or persons serving on a panel of experts, which shall be paid from the Contingent Fund of the Medical Board of California upon appropriation by the Legislature.

HISTORY:

Added Stats 1993 ch 1267 § 51 (SB 916). Amended Stats 1994 ch 1206 § 27 (SB 1775); Stats 1995 ch 938 § 19.5 (SB 523), operative July 1, 1997; Stats 1998 ch 878 § 56 (SB 2239), operative until January 1, 2003; Stats 2002 ch 1085 § 31 (SB 1950); Stats 2005 ch 674 § 21 (SB 231), effective January 1, 2006.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (d) of Section 11371 is amended to make certain ex parte communications exceptions inapplicable in proceedings under this section.

§ 11372. Conduct of hearing by administrative law judge

(a) Except as provided in subdivision (b), all adjudicative hearings and proceedings relating to the discipline or reinstatement of licensees of the Medical Board of California, including licensees of affiliated health agencies within the jurisdiction of the Medical Board of California, that are heard pursuant to the Administrative Procedure Act, shall be conducted by an administrative law judge as designated in Section 11371, sitting alone if the case is so assigned by the agency filing the charging pleading.

(b) Proceedings relating to interim orders shall be heard in accordance with Section 11529.

HISTORY:

Added Stats 1990 ch 1597 § 32 (SB 2375). Amended Stats 1993 ch 1267 § 52 (SB 916).

§ 11373. Conduct of proceedings under Administrative Procedure Act

All adjudicative hearings and proceedings conducted by an administrative law judge as designated in Section 11371 shall be conducted under the terms and conditions set forth in the Administrative Procedure Act, except as provided in the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code).

HISTORY:

Added Stats 1990 ch 1597 § 33 (SB 2375). Amended Stats 1993 ch 1267 § 53 (SB 916).

§ 11373.3. Facilities and support personnel for review committee panel

The Office of Administrative Hearings shall provide facilities and support personnel for the review committee panel and shall assess the Medical Board of California for facilities and personnel, where used to adjudicate cases involving the Medical Board of California.

HISTORY:

Added Stats 1990 ch 1597 § 34 (SB 2375). Amended Stats 1991 ch 1091 § 44 (AB 1487).

ARTICLE 3: State Agency Reports and Forms Appeals

§ 11380. Appeal filed by business

(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.

HISTORY:

Added Stats 1995 ch 938 § 20 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11380 continues former Section 11530 without change.

CHAPTER 4.5: ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS

ARTICLE 1: Preliminary Provisions

§ 11400. Administrative Procedure Act; References to superseded provisions

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

Law Revision Commission Comments:

(1995) Section 11400 makes clear that references to the administrative adjudication provisions of the Administrative Procedure Act include both this chapter (general provisions) and Chapter 5 (formal hearing). The formal hearing provisions of Chapter 5 apply to an adjudicative proceeding as determined by the statutes relating to the proceeding. Section 11501. The general provisions of this chapter apply to all statutorily and constitutionally required state agency adjudicative proceedings, including proceedings under Chapter 5. See Section 11410.10 and sections following.

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

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

§ 11400.10. Operative date of chapter; Applicability

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

Law Revision Commission Comments:

(1995) 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 interim or permanent regulations

(a) Before, on, or after July 1, 1997, an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter or Chapter 5 (commencing with Section 11500). Nothing in this section authorizes an agency to adopt regulations to govern an adjudicative proceeding required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, except to the extent the regulations are otherwise authorized by statute.

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997. Amended Stats 1996 ch 390 § 5 (SB 794), effective August 19, 1996, operative July 1, 1997.

Law Revision Commission Comments:

(1995) 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.

(1996) Subdivision (a) of Section 11400.20 is amended to permit use of the procedure provided in this section for adoption of interim or permanent regulations under the formal hearing procedure, Chapter 5 (commencing with Section 11500).

Subdivision (a) makes clear that the authority of an agency to adopt regulations governing its hearings does not apply to hearings required to be conducted for it by the Office of Administrative Hearings, unless there is express statutory authority for the regulations. Examples of express statutory authority include:

- Section 11420.10 (alternative dispute resolution)
- Section 11425.50 (penalty guidelines)
- Section 11440.10 (administrative review)
- Section 11440.50 (intervention)
- Sections 11445.20 and 11445.50 (informal hearing procedure)
- Section 11460.20 (emergency decision)
- Section 11518.5 (correction of mistakes and clerical errors in decision)

It should be noted that the provision of Section 11425.40(d) allowing an agency that conducts an adjudicative proceeding to provide by regulation for peremptory challenge of the presiding officer applies to the Office of Administrative Hearings and not the agency for which the Office of Administrative Hearings is conducting the proceeding. See Comment to Section 11425.40(d).

Nothing in subdivision (a) precludes regulations governing matters peripheral to administrative adjudication proceedings, such as a requirement that a person maintain an address with the agency for the purpose of notice.

ARTICLE 2: Definitions

§ 11405.10. Definitions governing construction of chapter

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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"

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11405.20 is intended for drafting convenience.

§ 11405.30. "Agency"

"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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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"

"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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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"

(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).

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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"

"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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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"

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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"

"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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11405.80 is intended for drafting convenience.

ARTICLE 3: Application of Chapter

§ 11410.10. Decision requiring evidentiary hearing

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.*, 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*, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of "appeal" means hearing required—Code Civ. Proc. 1094.5 available).

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in this section. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. In other cases, the hearing called for by the statute is informal and investigative in nature, and any decision that results is not final but is subject to a full administrative hearing at a higher agency level. See, e.g., *Rev. & Tax. Code §§ 19044, 19084* (statutory oral hearing available, with opportunity for full administrative hearing before State Board of Equalization). This chapter does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: *Goss v. Lopez*, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); *Hewitt v. Helms*, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in administrative segregation—prisoner has right to file written statement); *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job); *Wasko v. Department of Corrections*, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing—Code Civ. Proc. 1094.5 inapplicable); *Marina County Water Dist. v. State Water Resources Control Bd.*, 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing discretionary, not mandatory—Code Civ. Proc. 1094.5 inapplicable).

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

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

This chapter does not apply where agency regulations or practice, rather than a statute or the constitution, call for a hearing. For example, an agency may provide an informal "hearing" as part of its process for deciding whether to issue a license or for deciding whether a particular educational program meets requirements established by regulation for continuing education credits; if a statute does not require a hearing in such a case, this chapter does not apply. Agencies are encouraged to provide procedural protections by regulation even though not required to do so by statute or the constitution. An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is not required. Section 11415.50 (when adjudicative proceeding not required).

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

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

§ 11410.20. Applicability to agencies

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 (Ed Code § 92001)

Public Employment Relations Board (Gov Code §§ 3541.3, 3563)

Commission on State Mandates (Gov 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. Applicability to local agencies

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Adoption of chapter by exempt agency

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Applicability to specified proceedings

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

§ 11410.60. Quasi-public entity

(a) As used in this section, "quasi-public entity" means an entity, other than a governmental agency, whether characterized by statute as a public corporation, public instrumentality, or otherwise, that is expressly created by statute for the purpose of administration of a state function.

(b) This chapter applies to an adjudicative proceeding conducted by a quasi-public entity if all of the following conditions are satisfied:

(1) A statute vests the power of decision in the quasi-public entity.

(2) A statute, the United States Constitution, or the California Constitution, requires an evidentiary hearing for determination of facts for formulation and issuance of the decision. Nothing in this section is intended to create an evidentiary hearing requirement that is not otherwise statutorily or constitutionally imposed.

(3) The decision is not otherwise subject to administrative review in an adjudicative proceeding to which this chapter applies.

(c) For the purpose of application of this chapter to a decision by a quasi-public entity:

(1) "Agency," as defined in Section 11405.30, also includes the quasi-public entity.

(2) "Regulation" includes a rule promulgated by the quasi-public entity.

(3) Article 8 (commencing with Section 11435.05), requiring language assistance in an adjudicative proceeding, applies to a quasi-public entity to the same extent as a state agency under Section 11018.

(d) This section shall be strictly construed to effectuate the intent of the Legislature to apply this chapter only to a decision by a quasi-public entity that is expressly created by statute for the purpose of administration of a state function.

(e) This section shall not apply to a decision made on authority of an approved plan of

operations of a quasi-public entity that is subject to the regulation or supervision of the Insurance Commissioner.

HISTORY:

Added Stats 1997 ch 220 § 9 (SB 68), effective August 4, 1997.

LAW REVISION COMMISSION COMMENTS:

(1997) Section 11410.60 applies this chapter to adjudicative decisions of quasi-public entities for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required. A typical decision of this type might involve resolution of a membership assessment protest or a hearing on a claim that has been denied (provided the statute or Constitution requires a hearing for a decision of that type). Cf. Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person). This chapter does not apply to legislative actions such as an election or negotiation and adoption of a health and welfare benefits plan, pension trust, or collective bargaining agreement by an industry or labor organization.

This section does not apply to an entity unless the entity was expressly created by statute for the purpose of administering a state function. Thus this chapter governs hearings required to be held by a statutory entity such as the Winegrowers of California Commission (Food & Agric. Code § 74061) or the Escrow Agents' Fidelity Corporation (Fin. Code § 17311). But the statute does not govern hearings of a private entity such as a licensed health care provider (Health & Safety Code § 1200 et seq.), a labor organization, or a board of trustees established pursuant to statute under an interindemnity, reciprocal, or interinsurance contract between members of a cooperative corporation (Ins. Code § 1280.7).

This section does not apply to the State Bar, including proceedings of the State Bar Court. See Bus. & Prof. Code § 6001.

The intent of this section is to provide fair hearing rules where a statute or the Constitution requires a hearing. This section is not intended to create any new hearing requirements. Thus, for example, this section does not apply to a decision of the Travel Consumer Restitution Corporation where the statute requires that the claim be decided on the written record, "with no hearing to be held." Bus. & Prof. Code § 17550.47.

Although subdivision (b) makes this chapter inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter. Cf. Section 11410.40 (election to apply administrative adjudication provisions).

ARTICLE 4: Governing Procedure

§ 11415.10. Determination of procedure

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Statute to prevail over provision of chapter

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Actions by Governor to avoid loss or delay of federal funds

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 right conferred by provisions

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Procedure for decision for which adjudicative proceeding not required

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11415.50 is subject to statutory specification of the applicable procedure for decisions not governed by this chapter. See Section 11415.20 (conflicting or inconsistent statute controls).

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

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

§ 11415.60. Decision by settlement

(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, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code. Nothing in this subdivision makes inadmissible any public document created by a public agency.

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997. Amended Stats 1996 ch 390 § 7 (SB 794), effective August 19, 1996, operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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., Govt 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).

(1996) Section 11415.60 is amended to protect conduct and statements made in settlement negotiations from admissibility, parallel to the protection provided in Section 1152 of the Evidence Code. This provision supplements the existing protection from admissibility of evidence of an offer of compromise or settlement (as opposed to evidence of conduct or statements made in settlement negotiations).

ARTICLE 5: Alternative Dispute Resolution

§ 11420.10. Mediation or arbitration

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) The introductory portion of subdivision (a) of Section 11420.10 makes clear that alternative dispute resolution is not mandatory, but may only be used if all parties consent. The relative cost of alternative dispute resolution is a factor an agency should consider in determining whether to refer a dispute for alternative resolution proceedings.

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

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

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

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

§ 11420.20. Model regulations for alternative dispute resolution

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Protection of communications

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.

(d) Evidence otherwise admissible outside of alternative dispute resolution under this article is not inadmissible or protected from disclosure solely by reason of its introduction or use in alternative dispute resolution under this article.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) The policy of Section 11420.30 is not to restrict access to information but to encourage dispute resolution. Subdivision (a) is analogous to Evidence Code Section 1152.5(a) (mediation). Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (b) protects confidentiality of a proposed decision in nonbinding arbitration that is rejected by a party; it does not protect a decision accepted by the parties in a nonbinding arbitration, nor does it protect an award in a binding arbitration. See also Section 11425.20 (open hearings).

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

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

ARTICLE 6: Administrative Adjudication Bill of Rights

§ 11425.10. Required procedures and rights of persons affected

(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 the person to which the agency action is directed than, the requirements of this section.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter).

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

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

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

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

§ 11425.20. Hearings open to the public; Order for closure

(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 United States Constitution, the California Constitution, federal or state 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Specified persons not to serve as presiding officer

(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 preadjudicative 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 preadjudicative 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 preadjudicative 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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

(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.

(d) An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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) (disqualification of presiding officer in formal hearing). Section 11425.40 applies whether the presiding officer serves alone or with others. For separation of functions requirements, see Section 11425.30.

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

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that, as a general principle, expression of a view on a legal, factual, or policy issue in the proceeding is not in itself bias, prejudice, or interest under Section 11425.40, expression of a view could be a basis for disqualification in conjunction with other acts of the presiding officer. Moreover, expression of a view concerning the particular proceeding before the presiding officer could be grounds for disqualification, and disqualification in such a situation might also occur under Section 11425.30 (neutrality of presiding officer).

Subdivision (d) adds authority for an agency to allow for peremptory challenge of the presiding officer. This is consistent with existing practice in some agencies. See, e.g., 8 Cal. Code Reg. 10453 (Workers' Compensation Appeals Board). In the case of a proceeding

conducted under Chapter 5 (formal hearing procedure) by an administrative law judge employed by the Office of Administrative Hearings, this provision authorizes the Office of Administrative Hearings, and not the agency for which the Office of Administrative Hearings is conducting the proceeding, to provide for peremptory challenge of the administrative law judge.

§ 11425.50. Decision to be in writing; Statement of factual and legal basis

(a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision.

(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 subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Decisions relied on as precedents; Index of precedent decisions

(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 and indexing as a precedent decision a decision issued before July 1, 1997.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997. Amended Stats 1996 ch 390 § 8 (SB 794), effective August 19, 1996, operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

(1996) Subdivision (d) of Section 11425.60 is amended to make clear that if an agency designates as precedential a decision issued before July 1, 1997, the decision must be indexed pursuant to subdivision (c).

ARTICLE 7: Ex Parte Communications

§ 11430.10. Ex parte communications

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 Org. 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

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 communication from agency that is party

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 preadjudicative 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:

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 Sch. Dists.* (1986), PERB Decision No. 560. Insider access is permitted here in furtherance of public policy favoring settlement, and because of the consonance of interest of the parties in this situation.

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

§ 11430.40. Disclosure of communication received while proceeding is pending

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Communication in violation of provisions

(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 10 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Prohibited communication as grounds to disqualify presiding officer

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Agency head delegated to hear or decide proceeding

(a) Subject to subdivision (b), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Under Section 11430.70, this article is applicable to the agency head or other person or body to which the power to act is delegated. For an additional limitation on communications between the presiding officer and agency head, see Section 11430.80.

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

§ 11430.80. Communication between presiding officer and agency head delegated to hear proceeding

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

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11430.80 is a special application of a provision of former Section 11513.5(a), which precluded a presiding officer from communicating with a person who presided in an earlier phase of the proceeding. Section 11430.80 extends the ex parte communications limitation of Section 11430.70 (application of provisions to agency head or other person) to include communications with an agency or non-agency presiding officer as well. This limitation does not apply where the presiding officer does not issue a decision to the parties, but merely prepares a recommended decision for the agency head or other person or body to which the power to decide is delegated.

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

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

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

ARTICLE 8: Language Assistance

§ 11435.05. "Language assistance"

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.05 supersedes former subdivision (g) of Section 11500. It extends this article to language translation for witnesses.

§ 11435.10. Interpretation for deaf or hard-of-hearing persons

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Provision of language assistance by state agencies

(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
- 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997. Amended Stats 1996 ch 390 § 5, effective August 19, 1996, operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

(1996) Section 11435.15 is amended to correct a printing error.

§ 11435.20. Hearing or medical examination to be conducted in English

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 providing interpreter

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.25 continues the fourth sentence and the second paragraph of former subdivision (d) of Section 11513 without substantive change.

§ 11435.30. Publication of list of certified interpreters

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.30 continues former subdivision (e) of Section 11513 without substantive change.

§ 11435.35. Publication of list of certified medical examination interpreters

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.35 continues former Section 11513(f) without substantive change.

§ 11435.40. Designation of languages for certification

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.40 continues former subdivision (g) of Section 11513 without substantive change.

§ 11435.45. Application fees to take interpreter examinations

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.45 continues former subdivisions (h) and (i) of Section 11513 without substantive change.

§ 11435.50. Removal of person from list of certified interpreters

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.50 continues former subdivision (j) of Section 11513 without substantive change.

§ 11435.55. Qualification and use of noncertified interpreters

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Party to be advised of right to interpreter

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.60 continues former subdivision (l) of Section 11513 without substantive change.

§ 11435.65. Rules of confidentiality applicable to interpreters

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11435.65 continues former subdivisions (m) and (n) of Section 11513 without substantive change.

ARTICLE 9: General Procedural Provisions

§ 11440.10. Review of decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Service of writing; Notice

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Conduct of hearing by telephone, television, or other electronic means

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Proceedings involving sexual offenses; Limitations on evidence

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

§ 11440.45. Benevolent gestures as admission of liability; Limitations on evidence

(a) In any proceedings pursuant to this chapter or Chapter 5 (commencing with Section 11500), the portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

(b) For purposes of this section:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party.

HISTORY:

Added Stats 2002 ch 92 § 1 (AB 2723).

§11440.50. Intervention; Grant of motion; Conditions

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11440.50 makes clear that this section does not apply to a proceeding unless an agency has acted to make it applicable. This section provides an optional means by which an agency can provide for intervention. This section does not provide an exclusive intervention procedure, and an agency may adopt other intervention rules or may preclude intervention entirely, subject to due process limitations.

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

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

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

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

§ 11440.60. Indication of person paying for written communication

(a) For purposes of this section, the following terms have the following meaning:

(1) "Quasi-judicial proceeding" means any of the following:

(A) A proceeding to determine the rights or duties of a person under existing laws, regulations, or policies.

(B) A proceeding involving the issuance, amendment, or revocation of a permit or license.

(C) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.

(D) A proceeding at which action is taken involving the purchase or sale of property, goods, or services by an agency.

(E) A proceeding at which an action is taken awarding a grant or a contract.

(2) "Written communication" means any report, study, survey, analysis, letter, or any other written document.

(b) Any person submitting a written communication, which is specifically generated for the purpose of being presented at the agency hearing to which it is being communicated, to a state agency in a quasi-judicial proceeding that is directly paid for by anyone other than the person who submitted the written communication shall clearly indicate any person who paid to produce the written communication.

(c) A state agency may refuse or ignore a written communication submitted by an attorney or any other authorized representative on behalf of a client in a quasi-judicial proceeding,

unless the written communication clearly indicates the client on whose behalf the communication is submitted to the state agency.

HISTORY:

Added Stats 1997 ch 192 § 1 (SB 504).

ARTICLE 10: Informal Hearing

§ 11445.10. Legislative findings and declarations

- (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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11445.10 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure is appropriate are provided in Section 11445.20 (when informal hearing may be used). The simplified procedures are outlined in Section 11445.40 (procedure for informal hearing).

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

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

It should be noted that a decision made pursuant to the informal hearing procedure is subject to judicial review to the same extent and in the same manner as a decision made pursuant to a formal hearing procedure. See, e.g., Code Civ. Proc. § 1094.5(a) (administrative mandamus for decisions "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency]"; see also Sections 11445.40 (procedure for informal hearing) and 11410.10 ("This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.")

§ 11445.20. Circumstances permitting use of informal hearing procedure

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 five 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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, where 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. Notice of informal procedure

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

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

(c) An objection to use of the informal hearing procedure shall be resolved by the presiding officer before the hearing on the basis of the pleadings and any written submissions in support of the pleadings. An objection to use of the informal hearing procedure in a disciplinary proceeding involving an occupational license shall be resolved in favor of the licensee.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Application of procedures otherwise required

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Denial of use of informal procedure; Conversion to formal hearing; Cross-examination

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Identity of witnesses or other sources

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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

§ 11450.05. Application of article

(a) This article applies in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500).

(b) An agency may use the subpoena procedure provided in this article in an adjudicative proceeding not required to be conducted under Chapter 5 (commencing with Section 11500), in which case all the provisions of this article apply including, but not limited to, issuance of a subpoena at the request of a party or by the attorney of record for a party under Section 11450.20.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11450.05 makes clear that the subpoena provisions of this article apply automatically in hearings required to be conducted under Chapter 5. Under subdivision (b), application of the subpoena provisions in other hearings is discretionary with the agency. But if the agency uses the subpoena procedure in other hearings, all provisions of this article apply, including the service and protective provisions, as well as the requirement for issuance of a subpoena on request of a party or by the attorney of record for a party. See Section 11450.20(a) (issuance of subpoena).

§ 11450.10. Issuance for attendance or production of documents

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Persons who may issue subpoenas; Service

(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 Section 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 at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 *Sehmeyer 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. Objection to subpoena; Motion for protective order; Motion to quash

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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's mileage and fees

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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).

§ 11450.50. Written notice to witness to attend; Service

(a) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person.

(b) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in Section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11450.50 is drawn from Code of Civil Procedure Section 1987 and adapted for administrative adjudication proceedings.

ARTICLE 12: Enforcement of Orders and Sanctions

§ 11455.10. Grounds for contempt sanction

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Certification of facts to justify contempt sanction; Other procedure

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Bad faith actions; Order to pay expenses including attorney's fees

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Conduct of proceeding under emergency procedure

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Emergency decision

(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 an interim or temporary suspension order, issued pursuant to other express statutory authority.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11460.20 requires specificity in agency regulations that adopt an emergency decision procedure. Notwithstanding this article, a statute on emergency decisions, including cease and desist orders and interim and temporary suspension orders, applicable to a particular agency or proceeding prevails over the provisions of this article. Section 11415.20 (conflicting or inconsistent statute controls).

§ 11460.30. Conditions for issuance of emergency decision

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

(b) An agency may only take 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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Notice and hearing prior to decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Statement of factual and legal basis and reasons for emergency decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Formal or informal proceeding after issuance of emergency decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11460.70 is drawn from 1981 Model State APA 4-501(f).

§ 11460.80. Judicial review of decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11460.80 is drawn from Section 11529(h) (interim suspension of medical care professional).

ARTICLE 14: Declaratory Decision

§ 11465.10. Conduct of proceeding under declaratory decision procedure

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

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Article 14 (commencing with Section 11465.10) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

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

The declaratory decision procedure provided in this article applies only to decisions subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required), 11501 (application of chapter). See also Section 11410.10 (application to constitutionally and statutorily required hearings).

It should be noted that an agency not governed by this chapter nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, *Advice to the Public from Federal Administrative Agencies* 121-22 (1973).

§ 11465.20. Application; Issuance of decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 for decision

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11465.30 is drawn from 1981 Model State APA 2-03(c). See also Section 11440.20 (notice).

§ 11465.40. Applicable hearing procedure

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Actions of agency after receipt of application

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Contents of decision; Status and binding effect of decision

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Model regulations

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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 into another type of proceeding

(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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Appointment of successor to preside over new proceeding

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Record of original proceeding

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Duties of presiding officer of new proceeding

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11470.40 is drawn from 1981 Model State APA 1-107(e).

§ 11470.50. Adoption of regulations to govern conversion

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.

HISTORY:

Added Stats 1995 ch 938 § 21 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11470.50 is drawn from 1981 Model State APA 1-107(f). Adoption of regulations is permissive, rather than mandatory.

ARTICLE 16: Administrative Adjudication Code of Ethics

§ 11475. Name of rules

The rules imposed by this article may be referred to as the Administrative Adjudication Code of Ethics.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

§ 11475.10. Application

(a) This article applies to the following persons:

(1) An administrative law judge. As used in this subdivision, "administrative law judge" means an incumbent of that position, as defined by the State Personnel Board, for each class specification for Administrative Law Judge.

(2) A presiding officer to which this article is made applicable by statute or regulation.

(b) This article shall apply notwithstanding any general statutory provision that this chapter does not apply to some or all of a state agency's adjudicative proceedings.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.10 limits application of the Administrative Adjudication Code of Ethics to specified classes of hearing officers. See Section 11475.20 (application of Code of Judicial Ethics). Subdivision (a)(1) includes not only an administrative law judge who presides at a hearing but also a supervisory or management level administrative law judge or chief administrative law judge, whose function may relate directly or indirectly to the adjudicative process. This article does not apply to an agency head or hearing officer who presides in an administrative adjudication but who is not an administrative law judge, absent a special statute or regulation. See subdivision (a)(2). However, other ethical considerations apply to the hearing and nonhearing conduct of state agency presiding officers. See, e.g., Section 19572 (cause for discipline). An agency may make the Administrative Adjudication Code of Ethics applicable to its non-administrative law judge presiding officers by regulation where this article would not otherwise apply. See Section 11410.40 (election to apply administrative adjudication provisions); see also Section 11405.80 ("presiding officer" defined). Under subdivision (b), the Administrative Adjudication Code of Ethics applies to an administrative law judge even though the proceedings in which the administrative law judge presides might otherwise be statutorily exempt from this chapter. See, e.g., Section 15609.5 (State Board of Equalization); PUU § 1701 (Public Utilities Commission).

§ 11475.20. Law governing conduct

Except as otherwise provided in this article, the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the California Constitution for the conduct of judges governs the hearing and nonhearing conduct of an administrative law judge or other presiding officer to which this article applies.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.20 applies the Code of Judicial Ethics in administrative adjudication. For the persons to which this article applies, see Section 11475.10 (application of article). The Code of Judicial Ethics adopted by the Supreme Court is effective January 15, 1996. The incorporation by reference includes subsequent amendments and additions to the Code. Section 9. It is intended that interpretations of the Code of Judicial Ethics in its application to the judicial system, whether made by court rule or decision, should also be applied in administrative adjudication, to the extent relevant to the circumstances of administrative adjudication. Cf. Section 11475.40 (provisions of Code excepted from application). The Code of Judicial Ethics supplements other standards applicable to conduct of an administrative law judge, including disqualification for bias (Section 11425.40) and disciplinary action for failure of good behavior (Section 19572). See also Section 11475.50 & Comment (enforcement). These requirements are also in addition to the requirements pursuant to Chapter 9.5 (commencing with Section 89500) of Title 9, applicable to designated employees of state agencies, including administrative law judges and other presiding officers.

§ 11475.30. Definitions

For the purpose of this article, the following terms used in the Code of Judicial Ethics have the meanings provided in this section:

- (a) "Appeal" means administrative review.
- (b) "Court" means the agency conducting an adjudicative proceeding.
- (c) "Judge" means administrative law judge or other presiding officer to which this article applies. Related terms, including "judicial," "judiciary," and "justice," mean comparable concepts in administrative adjudication.
- (d) "Law" includes regulation and precedent decision.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.30 provides a general guide to conversion of terminology in the Code of Judicial Ethics for application to administrative adjudication. It is intended to be applied in a manner to effectuate that general purpose without requiring strict or grammatically precise rigidity in the conversion. Likewise, terms not specified in this section should be converted in an appropriate manner to effectuate the general intent of this statute to apply the Code of Judicial Ethics to the circumstances of administrative adjudication.

§ 11475.40. Inapplicable provisions of Code of Judicial Ethics

The following provisions of the Code of Judicial Ethics do not apply under this article:

- (a) Canon 3B(7), to the extent it relates to ex parte communications.
- (b) Canon 3B(10).
- (c) Canon 3D(3).
- (d) Canon 4C.
- (e) Canons 4E(1), 4F, and 4G.
- (f) Canons 5A-5D. However, the introductory paragraph of Canon 5 applies to persons subject to this article notwithstanding Chapter 9.5 (commencing with Section 3201) of Division 4 of Title 1, relating to political activities of public employees.
- (g) Canon 6.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.40 adapts the Code of Judicial Ethics for application to administrative law judges. Some provisions of the Code of Judicial Ethics, although not excepted by this section, may be minimally relevant to an administrative law judge. See, e.g., Canon 3C(4) (administrative responsibilities). Subdivision (a) of Section 11475.40 excepts the portion of Canon 3B(7) relating to ex parte communications. It reflects the fact that special provisions, and not the Code of Judicial Ethics, govern ex parte communications in administrative adjudication. See, e.g., Article 7 (commencing with Section 11430.10). Subdivision (b) excepts Canon 3B(10), relating to juries. It reflects the fact that juries are not used in administrative adjudication. Subdivision (c) excepts Canon 3D(3), which requires a judge who is criminally charged to report that fact to the Commission on Judicial Performance. This duty is not relevant to administrative law judges, who are not under the jurisdiction of the Commission on Judicial Performance. Subdivision (d) excepts Canon 4C, relating to governmental, civic, or charitable activities. An administrative law judge is not precluded from engaging in activities of this type, except to the extent the activities may conflict with general limitations on the administrative law judge's conduct. See, e.g., Canon 4A (extrajudicial activities in general). Subdivision (e) excepts Canons 4E(1), 4F, and 4G, relating to fiduciary activities, private employment in alternative dispute resolution, and the practice of law. These matters are the subject of the employing agency's incompatible activity statement pursuant to Section 19990. Subdivision (f) applies the introductory portion of Canon 5 to an administrative law judge or other presiding officer, but not Canons 5A-5D. Under this provision an administrative law judge or other presiding officer must avoid political activity that may create the appearance of political bias or impropriety. This would preclude participation in political activity related to an issue that may come before the administrative law judge or other presiding officer. Subdivision (f) limits the political activities of administrative law judges even though other public employees might be able to participate in those activities under the Hatch Act (Sections 3201-3209). This subdivision is not intended to preclude an administrative law judge or other presiding officer to which this article applies from appearing at a public hearing or officially consulting with an executive or legislative body or public official in matters concerning the judge's private economic or personal interests, or to otherwise engage in political activities relating to salary, benefits, and working conditions. Cf. Section 11475.70 (collective bargaining rights not affected). Subdivision (g) excepts Canon 6, which is superseded by Sections 11475.50 (enforcement) and 11475.60 (compliance).

§ 11475.50. Violations

A violation of an applicable provision of the Code of Judicial Ethics, or a violation of the restrictions and prohibitions on accepting honoraria, gifts, or travel that otherwise apply to elected state officers pursuant to Chapter 9.5 (commencing with Section 89500) of Title 9, by an administrative law judge or other presiding officer to which this article applies is cause for discipline by the employing agency pursuant to Section 19572.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.50 supersedes Canon 6A of the Code of Judicial Ethics. The compliance requirement is not precatory in administrative adjudication, but is mandatory. Appropriate discipline under this section is the responsibility of the agency that employs the administrative law judge. Thus if an administrative law judge employed by the Office of Administrative Hearings violates the code of ethics in a hearing conducted for another agency, the Office of Administrative Hearings is the disciplining entity, and not the other agency. An agency may apply appropriate disciplinary procedures. It should be noted that a person may also institute disciplinary proceedings directly before the State Personnel Board with the consent of the board. Gov't Code § 19583.5; 2 Cal. Code Regs. § 51.9 (1996). A violation of the code of ethics by the administrative law judge is not per se grounds for disqualification, or reversal of a decision, of the administrative law judge. But the violation may be indicative of the administrative law judge's violation of other procedural requirements. See, e.g., Section 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).

§ 11475.60. Compliance requirements

(a) Except as provided in subdivision (b), a person to whom this article applies shall comply immediately with all applicable provisions of the Code of Judicial Ethics.

(b) A person to whom this article applies shall comply with Canon 4D(2) of the Code of Judicial Ethics as soon as reasonably possible and shall do so in any event within a period of one year after the article becomes applicable.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.60 supersedes Canon 6F of the Code of Judicial Ethics.

§ 11475.70. Construction and intent

Nothing in this article shall be construed or is intended to limit or affect the rights of an administrative law judge or other presiding officer under Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1.

HISTORY:

Added Stats 1998 ch 95 § 1 (AB 2164).

LAW REVISION COMMISSION COMMENTS:

(1998) Section 11475.70 makes clear that the Administrative Adjudication Code of Ethics is not intended to interfere with collective bargaining rights guaranteed state employees under the Ralph C. Dills Act. These include the right to form, join, and participate in activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, to refuse to join or participate in the activities of employee organizations, or to represent themselves individually in their employment relations with the state. See Section 3515.

CHAPTER 5: ADMINISTRATIVE ADJUDICATION: FORMAL HEARING

§ 11500. Definitions

In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1947 ch 491 § 1, Stats 1977 ch 1057 § 1, operative July 1, 1978; Stats 1985 ch 324 § 15; Stats 1995 ch 938 § 23 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Application of chapter to agency

(a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) 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.

HISTORY:

Added Stats 1995 ch 938 § 24.5 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11501 is revised to make this chapter the default procedure, absent a contrary statute, for agencies created after the operative date of the revision. 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).

§ 11502. Administrative law judges

(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. 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1961 ch 2048 § 10; Stats 1971 ch 1303 § 7; Stats 1985 ch 324 § 16; Stats 1995 ch 938 § 26 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

§ 11503. Accusation

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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1947 ch 491 § 3.

§ 11504. Statement of issues

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 that have come to the attention of the initiating party and that 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 or her 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, except that, if the hearing is held at the request of the respondent, 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1947 ch 491 § 4; Stats 1968 ch 808 § 1; Stats 1996 ch 124 § 36 (AB 3470); Stats 1997 ch 17 § 50 (SB 947).

§ 11504.5. Applicability of references to accusations to statements of issues

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.

HISTORY:

Added Stats 1963 ch 856 § 1.

§ 11505. Service of accusation and accompanying papers; Notice of defense; Request for hearing

(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 the respondent of the accusation, and that failure to do so will constitute a waiver of 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 of the Government Code 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 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 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1968 ch 808 § 2; Stats 1970 ch 828 § 1; Stats 1979 ch 199 § 3; Stats 1995 ch 938 § 28 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Filing of notice of defense; Contents; Right to hearing on the merits

(a) Within 15 days after service of the accusation the respondent may file with the agency a notice of defense in which 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 the respondent cannot identify the transaction or prepare 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 of these notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense, and the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file 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.

(d) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1963 ch 931 § 1; Stats 1982 ch 606 § 1; Stats 1986 ch 951 § 20; Stats 1995 ch 938 § 29 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Amended or supplemental accusation; Objections

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.

HISTORY:

Added Stats 1945 ch 867 § 1.

§ 11507.3. Consolidated proceedings; Separate hearings

(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.

HISTORY:

Added Stats 1995 ch 938 § 30 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Exclusivity of discovery provisions

The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

HISTORY:

Added Stats 1968 ch 808 § 3.

§ 11507.6. Request for discovery

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 the 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 this 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 these 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 these 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.

HISTORY:

Added Stats 1968 ch 808 § 4. Amended Stats 1985 ch 1328 § 5; Stats 1995 ch 938 § 31 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Former subdivision (g) of Section 11507.6 is restated in Section 11440.40 (evidence of sexual conduct).

§ 11507.7. Motion to compel discovery; Order

(a) Any party claiming the party's request for discovery pursuant to Section 11507.6 has not been complied with may serve and file with the administrative law judge a motion to compel discovery, naming as respondent the party refusing or failing to comply with Section 11507.6. The 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 the matter is discoverable under 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 the moving party.

(b) The motion shall be served upon respondent party and filed within 15 days after the respondent party first evidenced 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.

(c) 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 motion before or at the time of the hearing.

(d) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that the matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under those provisions, the administrative law judge may order lodged with it matters provided in subdivision (b) of Section 915 of the Evidence Code and examine the matters in accordance with its provisions.

(e) The administrative law judge shall decide the case on the matters examined in

camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(f) Unless otherwise stipulated by the parties, the administrative law judge shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the administrative law judge upon the parties. Where the order grants the motion in whole or in part, the order shall not become effective until 10 days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

HISTORY:

Added Stats 1968 ch 808 § 5. Amended Stats 1971 ch 1303 § 8; Stats 1980 ch 548 § 2; Stats 1995 ch 938 § 32 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11507.7 is amended to provide for proceedings to compel discovery before the administrative law judge rather than the superior court. The administrative law judge may continue the proceeding if necessary to allow adequate briefing of the motion. Cf. Section 11524(a) (continuances granted for good cause).

An order of the administrative law judge compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 11455.10-11455.20. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The administrative law judge may also impose monetary sanctions for bad faith tactics, which are reviewable in the same manner as the decision in the proceeding. Section 11455.30.

§ 11508. Time and place of hearing

(a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of the hearing. The hearing shall be held at a hearing facility maintained by the office in Sacramento, Oakland, Los Angeles, or San Diego and shall be held at the facility that is closest to the location where the transaction occurred or the respondent resides.

(b) Notwithstanding subdivision (a), the hearing may be held at either of the following places:

(1) A place selected by the agency that is closer to the location where the transaction occurred or the respondent resides.

(2) A place within the state selected by agreement of the parties.

(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.

Unless good cause is identified in writing by the administrative law judge, hearings shall be held in a facility maintained by the office.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1963 ch 710 § 1; Stats 1967 ch 17 § 39; Stats 1987 ch 50 § 1; Stats 1995 ch 938 § 33 (SB 523), operative July 1, 1997; Stats 2005 ch 674 § 22 (SB 231), effective January 1, 2006.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11508 is amended to reflect relocation of the San Francisco branch of the Office of Administrative Hearings to Oakland and to recognize creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) codifies practice authorizing a motion for change of venue. See 1 G. Ogdan, 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. Notice of hearing

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).

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1988 ch 362 § 2; Stats 1995 ch 938 § 34 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11509 is amended to include notification of the right to seek change of venue. See Section 11508 (time and place of hearing).

§ 11511. Depositions

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 be taken by deposition in the manner prescribed by law for depositions in civil actions under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. 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 the testimony; a showing that the witness will be unable or cannot 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 and where the administrative law judge or agency has ordered the taking of 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1995 ch 938 § 36 (SB 523), operative July 1, 1997; Stats 1998 ch 931 § 182 (SB 2139), effective September 28, 1998; Stats 2004 ch 182 § 42 (AB 3081), operative July 1, 2005.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

(1998) Section 11511 is amended to accommodate unification of the municipal and superior courts in a county.

(2004) Section 11511 is amended to reflect nonsubstantive reorganization of the rules governing civil discovery.

§ 11511.5. Prehearing conference; Conduct by telephone or other electronic means; Conversion to ADR or informal hearing; Prehearing order

(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 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. Use of alternative dispute resolution or of the informal hearing procedure is subject to subdivision (d).

(12) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) The administrative law judge 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.

HISTORY:

Added Stats 1986 ch 899 § 1. Amended Stats 1995 ch 938 § 37 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11511.5 is amended to reflect the practice of the administrative law judge, rather than the agency, giving the required notice. Subdivision (b)(9) is not intended to provide a new discovery procedure. If a party has not availed itself of discovery within the time periods provided by Section 11507.6, it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

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

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

(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.

HISTORY:

Added Stats 1995 ch 938 § 38 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Administrative law judge to preside over hearing; Disqualification; Reporting of Proceedings

(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 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 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 stenographic reporter. However,

upon the consent of all the parties, the proceedings may be reported electronically.

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall render a proposed decision in accordance with subdivision (b) of Section 11517 .

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1973 ch 231 § 1; Stats 1983 ch 635 § 1; Stats 1985 ch 324 § 19; Stats 1995 ch 938 § 39 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (b) of Section 11512 is amended to overrule any contrary implication that might otherwise be drawn from the language of subdivision (b).

Grounds for disqualification under subdivision (c) include bias, prejudice, or interest of presiding officer (Section 11425.40) and receipt of ex parte communications (Section 11430.60). A waiver of disqualification is a voluntary relinquishment of rights by the parties. The administrative law judge need not accept a waiver; the waiver is effective only if accepted by the administrative law judge. The provision for appointment of a substitute for an agency member is drawn from 1981 Model State APA § 4-202(e). In cases where there is no appointing authority, e.g., the agency member is an elected official, the "rule of necessity" still applies and the agency member shall not withdraw or be disqualified. See 1 G. Ogden, California Public Agency Practice § 36.14 (1994).

§ 11513. Evidence

(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.

(e) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(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.

HISTORY:

Added Stats 1992 ch 1302 § 9 (AB 3107), effective September 30, 1992, operative July 1, 1995. Amended Stats 1995 ch 938 § 40 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (d) of Section 11513 is intended to avoid or eliminate routine objections to administrative hearsay. If a proposed finding is supported only by hearsay evidence, a single objection at the conclusion of testimony, or on petition for reconsideration by the agency, is sufficient and timely. The "irrelevant and unduly repetitious" standard formerly found in Section 11513 is replaced in subdivision (f) by the general standard of Evidence Code Section 352. The basic standard of admissibility of relevant evidence is stated in subdivision (c); nothing in subdivision (f) authorizes admission of irrelevant evidence.

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

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

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

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

Former subdivision (q) is deleted as obsolete.

§ 11514. Affidavits

(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).

HISTORY:

Added Stats 1947 ch 491 § 6.

§ 11515. Official notice

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.

HISTORY:

Added Stats 1945 ch 867 § 1.

§ 11516. Amendment of accusation after submission

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.

HISTORY:

Added Stats 1945 ch 867 § 1.

§ 11517. Contested cases

(a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(b) If a contested case is originally heard before an agency itself, all of the following provisions apply:

(1) An administrative law judge shall be present during the consideration of the case and, if requested, shall assist and advise the agency in the conduct of the hearing.

(2) No member of the agency 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.

(c)(1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency 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.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) 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.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(i) 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.

(ii) The agency itself shall not decide any 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.

(iii) 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.

(iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, 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.

(d) 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.

HISTORY:

Added Stats 1999 ch 339 § 2 (AB 1692).

LAW REVISION COMMISSION COMMENTS:

(1995) Subdivision (a) of Section 11517 is amended to add a provision formerly located in subdivision (b).

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 the amount, so long as the sanction adopted is not of increased severity.

Subdivision (b) is also amended to make clear that the agency is not accountable for the administrative law judge's failure to meet required deadlines. This implements case law determinations that the time periods provided in this section are directory and not mandatory or jurisdictional. See, e.g., *Chrysler v. New Motor Vehicle Bd.*, 12 Cal. App. 4th 621, 15 Cal. Rptr. 2d 771 (1993); *Outdoor Resorts v. Alcoholic Beverage Control Appeals Bd.*, 224 Cal. App. 3d 696, 273 Cal. Rptr. 748 (1990). Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a decision.

Subdivision (c) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation. The addition of the provision for an agreed statement of the parties in subdivision (c) is drawn from Rule 6 of the California Rules of Court (agreed statement).

Remand under subdivision (c) is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

The authority in subdivision (c) for the agency itself to elect to decide some but not all issues in the case is drawn from 1981 Model State Act 4-216(a)(2)(i). The authority of the agency itself to select issues for decision under this provision is unlimited, and includes authority to select for agency decision questions of law, questions of fact, and mixed questions of law and fact.

Subdivision (d) is amended to require affirmative notice of nonadoption of a proposed decision within 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. Copies of decision to parties

Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1947 ch 491 § 7; Stats 1995 ch 938 § 43 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Govt Code 6250-6268.

§ 11518.5. Application to correct mistake or error in decision; Modification; Service after correction

(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.

HISTORY:

Added Stats 1995 ch 938 § 44 (SB 523), operative July 1, 1997

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Effective date of decision; Stay of execution; Notice of suspension or revocation; Restitution; Actual knowledge as condition of enforcement

(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 the officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution. Where restitution is ordered and paid pursuant to the provisions of this subdivision, the amount paid shall be credited to any subsequent judgment in a civil action.

(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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1949 ch 314 § 2; Stats 1976 ch 476 § 1; Stats 1977 ch 680 § 1; Stats 1995 ch 938 § 45 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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.

§ 11519.1. Order of restitution for financial loss or damages

(a) A decision rendered against a licensee under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code may include an order of restitution for any financial loss or damage found to have been suffered by a person in the case.

(b) The failure to make the restitution in accordance with the terms of the decision is separate grounds for the Department of Motor Vehicles to refuse to issue a license under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code, and constitutes a violation of the terms of any applicable probationary order in the decision.

(c) Nothing in this section is intended to limit or restrict actions, remedies, or procedures otherwise available to an aggrieved party pursuant to any other provision of law.

HISTORY:

Added Stats 2007 ch 93 § 1 (SB 525), effective January 1, 2008.

§ 11520. Defaults and uncontested cases

(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 the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1947 ch 491 § 8; Stats 1963 ch 931 § 2; Stats 1995 ch 938 § 46 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Reconsideration

(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 agency shall notify a petitioner of the time limits for petitioning for reconsideration. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1953 ch 964 § 1; Stats 1985 ch 324 § 22; Stats 1987 ch 305 § 1. Amended Stats 2004 ch 865 § 34 (SB 1914).

§ 11522. Reinstatement of license or reduction of penalty

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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1985 ch 587 § 4.

§ 11523. Judicial review

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. 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 the petitioner, within 30 days after the request, which time shall be extended for good cause shown, upon the payment of the cost for the preparation of the transcript, the cost for preparation of other portions of the record and for certification thereof. 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. If the 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. If 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1947 ch 491 § 9; Stats 1953 ch 962 § 1; Stats 1955 ch 246 § 1; Stats 1965 ch 1458 § 10; Stats 1971 ch 984 § 1; Stats 1985 ch 324 § 23, Stats 1985 ch 973 § 1; Stats 1986 ch 597 § 3; Stats 1994 ch 1206 § 29 (SB 1775); Stats 1995 ch 938 § 47 (SB 523), operative July 1, 1997; Stats 2005 ch 674 § 23 (SB 231), effective January 1, 2006.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Continuances; Requirement of good cause; Judicial review of denial

(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 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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1953 ch 962 § 2; Stats 1963 ch 842 § 1; Stats 1971 ch 1303 § 9; Stats 1979 ch 199 § 5; Stats 1985 ch 324 § 24; Stats 1995 ch 938 § 48 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11524 is amended to reflect current practice.

§ 11526. Voting by mail

The members of an agency qualified to vote on any question may vote by mail or another appropriate method.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1995 ch 938 § 50 (SB 523), operative July 1, 1997.

LAW REVISION COMMISSION COMMENTS:

(1995) 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. Charge against funds of agency

Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

HISTORY:

Added Stats 1945 ch 867 § 1.

§ 11528. Oaths

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.

HISTORY:

Added Stats 1945 ch 867 § 1. Amended Stats 1969 ch 191 § 1; Stats 1985 ch 324 § 25.

§ 11529. Interim orders

(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, or is unable to practice safely due to a mental or physical condition, 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 administrative law judge shall grant the interim order where, in the exercise of discretion, 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 the decision is received from the administrative law judge, or the board shall nullify the interim order previously issued, unless good cause can be shown by the 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:

- (1) In addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.

(2) A limitation on the emergency decision procedure provided in Article 13 (commencing with Section 11460.10) of Chapter 4.5.

HISTORY:

Added Stats 1990 ch 1597 § 35 (SB 2375). Amended Stats 1993 ch 1267 § 54 (SB 916); Stats 1995 ch 938 § 51 (SB 523), operative July 1, 1997.

Amended Stats 1998 ch 878 § 57 (SB 2239).

LAW REVISION COMMISSION COMMENTS:

(1995) Section 11529 is amended to substitute the administrative law judge for the court in subdivision (e).

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

CALIFORNIA CODE OF REGULATIONS

Title 1. General Provisions

Division 2. Office of Administrative Hearings

Chapter 1. General APA Hearing Procedures

§ 1000. Purpose

These regulations specify the procedures for the conduct of matters before the Office of Administrative Hearings. Parties should also refer to the Administrative Procedure Act (Government Code sections 11370 through 11529) and/or other laws which apply to their Case. When a statute is in conflict or inconsistent with these regulations, the statute shall take precedence.

Authority cited: Section 11370.5(b), Government Code.
Reference: Sections 11370-11529, Government Code.

§ 1002. Definitions

- (a) As used in these regulations, the following definitions apply:
- (1) "ALJ" means an administrative law judge of the Office of Administrative Hearings.
 - (2) "Case" means the administrative action referred by an agency to OAH.
 - (3) "Day" means a calendar day, unless otherwise specified.
 - (4) "Declaration" means a statement under penalty of perjury that complies with Code of Civil Procedure section 2015.5.
 - (5) "Hearing" means the adjudicative hearing on the merits of the Case.
 - (6) "Motions" shall include all motions or applications for orders.
 - (7) "OAH" means the Office of Administrative Hearings. Unless otherwise specified, "OAH" means the appropriate regional office to which the Case is assigned.
 - (8) "Presiding Judge" means the Presiding Judge of the regional office of the Office of Administrative Hearings or his or her designee.
 - (9) "Serve" or "Service" of papers means delivery of the document by the means specified in Regulation 1008 and as required by law.
- (b) These definitions are supplementary to those found in Government Code section 11500 and other applicable laws and regulations.

Authority cited: Section 11370.5(b), Government Code.
Reference: Section 11500, Government Code; and Section 2015.5, Code of Civil Procedure.

§ 1004. Construction of Regulations

- (a) As used in these regulations, words in the singular shall include the plural and words in the plural shall include the singular, unless the context otherwise requires.
- (b) Statutory references are to the Government Code unless otherwise specified.
- (c) In these regulations, whenever a time is stated within which an act is to be done, the time is computed by excluding the first Day and including the last Day. If the last Day is any day OAH is closed for business, that Day is also excluded.
- (d) Time limits set forth in these regulations are not jurisdictional.

Authority cited: Section 11370.5(b), Government Code.
Reference: Section 11370.5(b), Government Code.

§ 1006. Format and Filing of Papers

(a) After a Case has been assigned to a regional office of OAH for Hearing, all papers filed pursuant to any provision of law, regulation, or ALJ order shall be filed at that regional office within applicable time limits.

(b) The first page of each paper filed should include the following:

(1) The name, address, and telephone number of the person filing the paper, including the State Bar number if the person filing the paper is an attorney;

(2) A caption setting forth the title of the Case, including the names of the agency and the respondent;

(3) The agency case number;

(4) The OAH Case number, if assigned;

(5) A brief title describing the paper filed;

(6) The dates of the Hearing and any future prehearing or settlement conferences, if known.

(c) Papers should be filed on 8 1/2" x 11" stock paper of customary weight and quality, with two normal-sized holes punched at the top (centered 2 1/2 inches apart, and 5/8 inch from the top of the paper).

(d) Papers should be typed or computer-printed. Type should be at least pica (10 characters per inch) or 12 point print. The color of the type should be blue-black or black.

(e) In addition to a paper copy, the ALJ may direct a party to submit pleadings or other papers on computer compatible diskette or by other electronic means if the party is able to do so.

(f) A party may obtain proof of the filing of a paper by submitting either an extra copy of the paper or the first page only, with a self-addressed, return envelope, postage prepaid. The clerk will return the copy marked with the date of filing.

(g) Papers may be filed with OAH by facsimile transmission. Unless required by the ALJ, the original paper need not be filed with OAH if the party obtains telephonic or other confirmation from OAH that a complete and legible copy of the papers was received.

(h) Papers delivered by the U.S. Postal Service are filed on the date received by OAH. Papers hand delivered to OAH and complete papers received by OAH by facsimile transmission during regular business hours (8 a.m. to 5 p.m.) will be filed on the date received. Papers received after regular business hours are deemed filed on the next regular business day.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11507.3, 11507.7, 11508(c), 11511, 11511.5, 11512(c) and 11524, Government Code.

§ 1008. Service; Proof of Service

(a) Proof of Service of papers shall be a Declaration stating the title of the paper Served or filed, the name and address of the person making the Service, and that he or she is over the age of 18 years and not a party to the matter.

(b) Service may be made by leaving the paper at the residence or business of the person named to be Served, with a person not less than 18 years of age. Where Service is made in this manner, the proof of Service shall also state the date and place of delivery and the name of the person to whom the papers were handed. Where the person making the Service is unable to obtain the name of the person to whom the papers were handed, the person making the Service may substitute a physical description for the name.

(c) Where Service is made by mail, the proof of Service shall show the date and place of deposit in the mail, the name and address of the person Served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(d) Where Service is by facsimile the proof of Service shall state the method of Service upon each party, the date and time sent and the facsimile number to which the document was sent.

(e) The proof of Service shall be signed by the person making it and contain the following statement above the signature:

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this Declaration was executed at (city, state) on (date)." The name of the declarant shall be typed and signed below this statement.

(f) A proof of Service made in accordance with Code of Civil Procedure section 1013a complies with this Regulation.

Authority cited: Section 11370.5(b), Government Code.

Reference: Section 11440.20, Government Code; and Section 1013a, Code of Civil Procedure.

§ 1012. Ex Parte Petitions and Applications for Temporary or Interim Orders

(a) This regulation applies to any *ex parte* petition or application an agency files with OAH for temporary relief or interim orders specifically authorized by statute or regulation.

(b) Absent a showing of good cause, parties shall be given at least 24 hours notice of the specific relief sought and the date, time, and place of the *ex parte* proceeding. Notice may be given by telephone or facsimile transmission.

(c) At the time of the *ex parte* appearance the petitioner or applicant shall submit a written Declaration stating the manner in which the notice was given.

(d) If prior notice was not given, the petitioner or applicant shall submit a written Declaration stating the facts showing cause why the notice under subdivision (b) could not be given or should not be required.

(e) *Ex parte* petitions and applications shall be in writing and comply with Regulation 1006. The petition or application shall state the statutory authority for the temporary relief and include a proposed order.

(f) Except as provided in Regulation 1022(b), Regulation 1022 does not apply to *Ex parte* petitions and applications filed under this regulation.

Authority cited: Section 11370.5(b), Government Code.

Reference: Section 494, Business and Professions Code; Sections 1550.5 and 1558, Health and Safety Code; and Section 11529, Government Code.

§ 1014. Pleadings; Notice of Defense; Withdrawal of Notice of Defense

(a) When a party amends a pleading, the party shall Serve on all other parties and promptly file with OAH a complete, new pleading incorporating the amendments. The new pleading shall be titled a "First Amended" pleading, and subsequent amended pleadings shall be titled consecutively. If the amendments are made during the Hearing, the party shall use highlighting or any other effective method to identify the changes made to the pleading. The ALJ may allow exceptions for minor amendments during Hearing.

(b) OAH prefers amended to supplemental pleadings. However, if a party issues a supplemental pleading, the party shall Serve on all other parties and promptly file with OAH the supplemental pleading which shall be titled a "First Supplemental" pleading. Subsequent supplemental pleadings shall be titled consecutively.

(c) A party who withdraws a notice of defense, a request for Hearing, or an asserted special defense shall immediately notify OAH and all other parties.

(d) When a party withdraws a notice of defense or a request for Hearing, the agency shall promptly notify OAH of the agency's decision either to proceed with the Hearing as a default or request that the scheduled Hearing be taken off calendar as a result of the party's withdrawal of the notice of defense or request for Hearing. If the agency's request to take the Hearing off calendar is made before the scheduled Hearing, the agency shall file the request in writing and include the name of the party who has withdrawn the notice of defense or request for Hearing.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11505, 11506 and 11507, Government Code.

§ 1015. Notice of Representation and Withdrawal of Counsel or Other Representative

(a) Any counsel or other representative who has assumed representation of a party after the agency has referred a Case to OAH shall give written notice to OAH and all other parties of his or her name, address, telephone and fax number (if any) and the name of the represented party, within a reasonable time after assuming representation.

(b) Any counsel or other representative may withdraw as counsel or representative of record by giving written notice to OAH and all parties of the withdrawal. The written notice shall include the last known address of the formerly represented party.

(c) Upon withdrawal by counsel or other representative:

(1) OAH retains jurisdiction over the Case.

(2) The formerly represented party bears the burden of keeping OAH and all other parties informed of a current address for purposes of Service. If notice of address is not given, any party may Serve the formerly represented party at the last known address and the current address of record with the agency, if a statute or regulation requires the party to maintain an address with the agency and to notify the agency of any change of address.

(3) The formerly represented party is responsible for preparation and representation throughout the remainder of the Case, unless and until such party retains new counsel or other representative.

(d) Withdrawal or change of counsel or other representative does not alone constitute grounds for continuance of any previously scheduled proceeding in the Case.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11505, 11506 and 11524, Government Code.

§ 1016. Consolidated Proceedings; Separate Hearings

(a) A party who brings a Motion for consolidated proceedings or separate Hearings pursuant to section 11507.3 shall comply with Regulation 1022.

(b) Before an ALJ orders consolidated proceedings or separate Hearings pursuant to section 11507.3, the ALJ shall provide notice to all parties and allow a reasonable time for the parties to file with OAH and Serve on all other parties any written opposition. Failure to file a timely opposition shall constitute a waiver of objection to an order of consolidation or severance.

(c) The parties may stipulate to consolidated proceedings or separate Hearings. In the event a stipulation is reached, the moving party shall file a written stipulation with OAH, signed by all parties, and with a signature line for the ALJ to order the consolidation. The ALJ has sole discretion to decide whether proceedings shall be consolidated or separated.

(d) If OAH consolidates Cases for Hearing, the ALJ shall prepare a separate proposed decision for each agency pleading that was consolidated, unless the agency requests or agrees otherwise.

Authority cited: Section 11370.5(b), Government Code.
Reference: Section 11507.3, Government Code.

§ 1018. Agency Request for Hearing; Required Documents

(a) An agency's request to OAH to set a Hearing date shall be in writing and contain the following information:

- (1) The title of the Case including the identities of the agency and respondent(s);
- (2) The agency case number and, if known, the OAH number assigned to the Case;
- (3) The names, addresses and phone numbers of all parties who must receive notice of the hearing and their representatives, if any;
- (4) The time estimate for Hearing, taking into account the time for respondent's presentation of evidence;
- (5) The dates the agency and its counsel are unavailable for Hearing over the next six months; and the unavailable dates of all other parties for Hearing, if known;
- (6) Preferred Hearing dates, but only if the agency includes at least three alternative preferred Hearing dates and the agency confirms in the request either that all parties have agreed to the specific dates or that it has made reasonable efforts to confer with all other parties for mutually acceptable Hearing dates, and includes the reasonable efforts the agency has made;
- (7) A reference to any statute or regulation (if other than section 11517(c)) which specifies the time within which the Hearing shall be held or the proposed decision issued; and
- (8) The city or county in which the Hearing will be held, pursuant to section 11508.

(b) OAH may defer setting a matter for Hearing until the agency supplies all of the information set forth in subparagraph (a).

(c) The document used by the agency to request the Hearing date shall contain a space for OAH to insert the OAH number assigned to the Case, and the date(s), time and location set for the Hearing. OAH shall transmit this information simultaneously to the agency, respondent(s), and each respondent's representative as identified in the written request to set. The transmission of this information by OAH does not replace the notice of Hearing required by section 11509.

(d) The agency shall file the following documents with OAH at the time it files the written request to set a Hearing date or as soon thereafter as the documents become available:

- (1) accusation, statement of issues, statement of charges, suspension order, or other initial pleading, with proof of Service on all parties;
- (2) notice of defense executed by respondent(s);
- (3) notice of Hearing, with proof of Service on all parties.

Authority cited: Section 11370.5(b), Government Code.
Reference: Sections 11508 and 11509, Government Code.

§ 1019. Request for Security

- (a) Any party or participant in a proceeding before OAH may request security for the proceeding. The request for security shall be made to the Presiding Judge as soon as the need for security is known.
- (b) The Presiding Judge or the ALJ presiding over the proceeding may determine on his or her own initiative that security is required.
- (c) To assure that appropriate safety measures are arranged, the person requesting security shall inform the Presiding Judge of the nature of the safety risk.
- (d) If the request for security is made without sufficient time for OAH to obtain appropriate security, the Presiding Judge has discretion to continue the proceeding.

Authority cited: Section 11370.5(b), Government Code.
Reference: *Zaheri v New Motor Vehicle Board* (1997) 55 Cal.App.4th 1305, 64 Cal.Rptr.2d 705.

§ 1020. Motion for Continuance of Hearing

- (a) A Case filed with OAH is assigned to the Presiding Judge until reassigned to another ALJ.
- (b) A Motion to continue a Hearing shall be in writing, directed to the Presiding Judge, and Served on all other parties.
- (c) Before filing the Motion, the moving party shall make reasonable efforts to confer with all other parties to determine whether any party opposes the Motion and to obtain future dates when all parties are unavailable for Hearing over the next six months and at least three alternative preferred future Hearing dates.
- (d) The Motion shall include all facts which support a showing of good cause to continue the Hearing, as well as:
 - (1) the Case name, and OAH Case number;
 - (2) the date, time and place of the Hearing;
 - (3) the address and daytime telephone number of the moving party;
 - (4) the name, address and telephone number of all other parties;
 - (5) a list of all previous Motions to continue the Hearing and the dispositions thereof;
 - (6) whether or not any party opposes the Motion;
 - (7) any future dates when the parties are unavailable for Hearing over the next six months and any preferred future Hearing dates obtained pursuant to paragraph (c);
 - (8) if the moving party has not included all of the information required pursuant to this paragraph (d), the reasons why it is not included;
 - (9) a reference to any legal or other requirement to set the Hearing within a certain period of time, and whether or not the parties have waived the requirement.
- (e) If the Motion is not timely pursuant to section 11524(b) or other applicable law, the Motion shall include all facts justifying the lack of timeliness.
- (f) The Motion may include a proposed order granting the continuance.
- (g) Any party may request a written order from OAH reflecting the disposition of the Motion.

(h) Any party opposing the Motion shall file with OAH and Serve on all other parties a written opposition.

(i) The Presiding Judge may waive any requirement of this regulation, including but not limited to the requirement for a written Motion, written opposition, written order, and/or any notice to other parties.

(j) Regulation 1022 does not apply to Motions for continuance filed under this regulation.

Authority cited: Section 11370.5(b), Government Code.

Reference: Section 11524, Government Code. *Arnett v Office of Administrative Hearings*, 49 Cal. App. 4th 332 (1996).

§ 1022. Motions

(a) All Motions made prior to the Hearing shall be directed to the Presiding Judge. Thereafter, Motions shall be directed to the ALJ assigned to the Hearing.

(b) A Motion shall be made with written notice to all parties, unless the Motion is made during a Hearing while on the record. If a specific statute or regulation permits an *ex parte* petition or application, the moving party shall give all other parties 24-hour notice in accordance with Regulation 1012. Every written Motion shall be filed with an attached proof of Service showing that all parties have been Served with the Motion.

(c) If a prehearing conference has been scheduled, all Motions to be heard at the prehearing conference shall be filed in accordance with Regulation 1026(b), unless the Presiding Judge determines otherwise.

(d) Motions and any response thereto shall conform to the requirements of Regulation 1006. The Motion shall state in plain language the relief sought and the facts, circumstances, and legal authority that support the Motion.

(e) Except as otherwise provided by statute or regulation, or as ordered by the Presiding Judge, a Motion shall be filed and Served at least 15 Days before the date set for the commencement of the Hearing, and any response to the Motion shall be filed and Served no later than 3 Days before the date the Motion is scheduled to be heard.

(f) Except as otherwise provided by statute or regulation, or as ordered by the Presiding Judge, a Motion shall be decided without oral argument. A party may request oral argument at the time of filing the Motion or response.

(g) If the Presiding Judge orders oral argument, OAH shall set the date, time and place. The Presiding Judge may direct a party to Serve written notice on all other parties of the date, time, and place of the oral argument. Oral argument may be made in person or by telephone conference call, video conference, or any other electronic means, in compliance with section 11440.30 and Regulation 1030.

(h) The Presiding Judge has discretion to decide whether oral argument shall be stenographically reported on his or her own motion or upon the written request of any party which includes the reasons for the request.

(i) The ruling on any Motion shall be made by written order, unless the Motion and ruling are made during the course of a Hearing while on the record. The ALJ may direct the prevailing party to prepare the order, or dispense with the requirement of a written order.

(j) This regulation does not apply to a Motion to continue a Hearing pursuant to section 11524 and Regulation 1020. Requests for *Ex Parte* Petitions and Applications for Temporary or Interim Orders shall be made pursuant to the provisions of Regulation 1012, and do not constitute a Motion within the meaning of this regulation. A request for a settlement conference pursuant to Regulation 1028, a prehearing conference pursuant to

Regulation 1026, or security pursuant to Regulation 1019 does not constitute a Motion within the meaning of this regulation.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11440.30, 11507.3, 11507.7, 11508(c), 11511 and 11524, Government Code.

§ 1024. Subpoenas; Motion for a Protective Order

(a) Subpoena forms are available from OAH. Subpoenas may also be issued pursuant to section 11450.20(a).

(b) A Motion pursuant to section 11450.30 for a protective order, including a Motion to quash, shall be made in compliance with Regulation 1022. The Motion shall be made within a reasonable period after receipt of the subpoena. The person bringing the Motion shall Serve copies of the Motion on all parties and persons who are required by law to receive notice of the subpoena.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 1985-1985.4, Code of Civil Procedure; and Sections 11450.05, 11450.20, 11450.50 and 11450.30, Government Code.

§ 1026. Prehearing Conferences

(a) After a Case is assigned to OAH, any party may file with OAH and Serve on all parties a request for a prehearing conference. A request for a prehearing conference shall be directed to the Presiding Judge and state the reasons for the conference. If the request is granted, OAH shall set the date and time for the conference. Regulation 1022 does not apply to a request for a prehearing conference.

(b) Motions to be heard at the prehearing conference shall be filed with OAH no later than 15 Days before the prehearing conference and shall otherwise comply with Regulation 1022. Responses shall be filed with OAH no later than 3 business days prior to the prehearing conference. The ALJ may, in his or her discretion, allow oral Motions during the prehearing conference.

(c) A request to continue the date of the prehearing conference shall be directed to the Presiding Judge. After commencement of the prehearing conference, the assigned ALJ may continue it to any other convenient time prior to the Hearing date.

(d) At least 3 business days before a prehearing conference, each party shall file with OAH and Serve on all other parties a prehearing conference statement containing the following information:

- (1) Identification of all operative pleadings by title and date signed;
- (2) The party's current estimate of time necessary to try the Case;
- (3) The name of each witness the party may call at the Hearing along with a brief statement of the subject matter of the witness's expected testimony;
- (4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 11514;
- (5) The name and address of each expert witness the party intends to call at the Hearing along with a brief statement of the opinion the expert is expected to give and a copy of the expert's current resume;
- (6) The need for an interpreter or special accommodation;
- (7) A list of the documentary exhibits the party intends to present and a description of any physical or demonstrative evidence; and
- (8) A concise statement of any legal issues or affirmative defenses that may affect the presentation of evidence or the disposition of the Case.

(e) Exhibits need not be premarked or filed with the prehearing conference statements unless requested by the ALJ. Exhibits shall be exchanged between the parties at least 3 business days before the prehearing conference. On agreement of the parties, exhibits already produced in discovery need not be exchanged.

(f) The prehearing conference may be held by telephone or other electronic means pursuant to section 11511.5(c).

(g) After the prehearing conference, the ALJ shall issue a prehearing conference order which incorporates the matters determined at the conference. This order may be issued orally if an accurate record is made. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the ALJ. If no matters were determined or dates set at the prehearing conference, a prehearing conference order is not required.

(h) Upon request of a party, the ALJ shall prepare a written prehearing conference order. The ALJ may direct a party to prepare a proposed prehearing conference order.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11420.10, 11445.10, 11511.5 and 11514, Government Code.

§ 1027. Informal Hearings

An agency may file a written request directed to the Presiding Judge to set a Case for an informal hearing. The request shall explain how the circumstances are appropriate for an informal hearing procedure, pursuant to section 11445.10 et seq. The Presiding Judge may order the Case to proceed as an informal hearing. If the Case proceeds by informal hearing, the Presiding Judge or assigned ALJ shall advise the parties of the procedures to be applied pursuant to section 11445.40.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11445.10-11445.60 and 11470.10, Government Code.

§ 1028. Settlement Conferences; Settlements

(a) After a Case is assigned to OAH, any party may file with OAH and Serve on all parties a request for a settlement conference. A request for a settlement conference shall be directed to the Presiding Judge. If the request is granted, OAH shall set the date and time for the conference. Regulation 1022 does not apply to a request for a settlement conference.

(b) Each respondent and his or her representative and an agency counsel or other representative, if the agency is not represented by counsel, shall appear in person at all settlement conferences. Each party or representative who attends the settlement conference shall be fully familiar with the facts and issues in the Case and shall have authority, or be able to obtain authority immediately by telephone, to negotiate settlement terms subject to the approval by the agency head. An agency representative who is familiar with the case, and has authority to approve settlement terms subject to the approval by the agency head, must be available to participate in the settlement conference in person or by telephone, subject to section 11511.7.

(c) The Presiding Judge may excuse the attendance or participation of a party or representative upon a showing of good cause. A request to be excused shall be made not less than 3 business days before the date of the conference.

(d) A Request to continue the settlement conference shall be addressed to the Presiding Judge.

(e) The settlement conference ALJ may structure the conference to meet the needs of the particular dispute. A telephonic settlement conference may be arranged pursuant to section 11511.7(b).

(f) A party may file a written settlement conference statement with OAH that describes the factual and legal issues and the status of any previous settlement discussions in the Case. The statement may be Served on all other parties or it may be marked "confidential" and submitted only to the Presiding Judge or the settlement conference ALJ. The statement should be submitted at least 3 business days before the conference. The Presiding Judge or settlement conference ALJ may require a party to file a settlement conference statement.

(g) A party should bring any pertinent documents and a draft of any settlement proposal on disk or in writing to the settlement conference.

(h) The settlement conference statement, other settlement materials, and settlement discussions shall not be disclosed to the Hearing ALJ and are deemed confidential unless the parties agree otherwise.

(i) Any settlement shall be included in a written stipulation, settlement agreement or consent order, or an oral agreement placed on the record.

(j) The parties shall promptly notify the OAH calendar clerk of any resolution that terminates a Case before OAH. OAH will vacate all Hearing dates upon receipt of a written request and notice of final resolution of the Case from the agency. A copy shall be Served on all other parties. Notice of final resolution of a Case consists of written confirmation from the agency that all parties have signed a final written agreement resolving the Case (subject to approval by the agency head) or that the agency has taken any unilateral actions legally required to withdraw, dismiss, or otherwise resolve the Case. A copy of the signed settlement, stipulation, agency order or any other paperwork terminating a matter before OAH, or, at the discretion of the agency, the first page and signature pages thereof, shall be filed with OAH.

Authority cited: Section 11370.5(b), Government Code.
Reference: Sections 11415.60 and 11511.7, Government Code.

§ 1030. Conduct of Hearing; Protective Orders

(a) A party seeking an order for closure or other protective order for all or part of a Hearing, including a request to seal the record, pursuant to section 11425.20 shall file a Motion stating in plain language the relief sought and the facts, circumstances, and legal authority that support the Motion.

(b) A party seeking to have all or part of a Hearing conducted by electronic means pursuant to section 11440.30 shall file a Motion stating in plain language the relief sought and the facts, circumstances, and legal authority that support the Motion.

(c) An ALJ, in his or her discretion, and with due consideration for the effect on witnesses, the Hearing process, and existing protective orders, may grant a request by a party or interested person to film, photograph, or record the Hearing. A record made pursuant to this section shall not be part of the official record.

(d) If a party's Motion or request under subsections (a), (b), or (c) of this Regulation is granted, the ALJ may direct the moving party to make the necessary arrangements and pay the related costs.

(e) The ALJ may:

- (1) Exclude persons whose actions impede the orderly conduct of the Hearing;
- (2) Restrict attendance because of the physical limitations of the Hearing facility; or

(3) Take other action to promote due process or the orderly conduct of the Hearing.

Authority cited: Section 11370.5(b), Government Code.
Reference: Sections 11425.20, 11440.30, and 11455.10, Government Code.

§ 1032. Interpreters and Accommodation

(a) A party shall give timely notice to OAH and the agency when that party or the party's representative or witness needs any of the following accommodations during a proceeding before OAH:

- (1) Language assistance, including sign language.
- (2) Accommodation for a disability.
- (3) Electronic amplification for hearing impairment.
- (4) Any other special accommodation.

(b) Unless otherwise provided by contract, the agency shall provide the appropriate language assistance.

(c) An interpreter at a Hearing or other proceeding shall be sworn by oath or affirmation to perform his or her duties truthfully. The oath or affirmation shall be in substantially the following form:

"Do you swear or affirm that, to the best of your skill and judgment, you will make a true interpretation of the questions asked and the answers given and that you will make a true translation of any documents which require translation?"

(d) A party may ask the ALJ assigned to the Hearing to direct payment for the cost of interpreter services pursuant to section 11435.25.

Authority cited: Section 11370.5(b), Government Code.
Reference: Section 751, Evidence Code; and Sections 11435.05, 11435.10, 11435.55, and 11435.65, Government Code.

§ 1034. Peremptory Challenge

(a) Pursuant to section 11425.40(d), a party is entitled to one peremptory challenge (disqualification without cause) of an ALJ assigned to an OAH Hearing. A peremptory challenge is not allowed in proceedings involving petitions or applications for temporary relief or interim order or in a proceeding on reconsideration or remand; and shall not apply to panel members of a Commission on Professional Competence, other than the ALJ, in proceedings under Education Code section 44944. In no event will a peremptory challenge be allowed if it is made after the Hearing has commenced.

(b) A peremptory challenge shall be:

- (1) Directed to the Presiding Judge;
- (2) Filed by a party, attorney or authorized representative;
- (3) Made in writing or orally on the record in substantially the following form:

"I am a party to [CASENAME] and am exercising my right to a peremptory challenge regarding ALJ [NAME], pursuant to Regulation 1034 and Government Code section 11425.40(d)";

(4) Served on all parties if made in writing; and

(5) Filed in compliance with the time requirements of subsections (c), (d), and (e) herein.

(c) If, at the time of a scheduled prehearing conference, an ALJ has been assigned to the Hearing, any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference.

(d) Except as provided in (c), if the Hearing is to be held at an OAH regional office, the peremptory challenge of the assigned ALJ shall be made no later than 2 business days before the Hearing.

(e) Except as provided in (c), if the Hearing is to be held at a site other than an OAH regional office, the peremptory challenge of the assigned ALJ shall be made by noon on Friday prior to the week in which the Hearing is to commence.

(f) A party may contact OAH to determine the name of the ALJ assigned to the Hearing.

(g) A Hearing shall not be continued by reason of a peremptory challenge unless a continuance is required for the convenience of OAH. If continued, the Hearing shall be rescheduled to the first convenient date for OAH.

(h) Nothing in this regulation shall affect or limit the provisions of a challenge for cause under sections 11425.40, 11430.60 and 11512(c) or any other applicable provisions of law.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11425.40, 11430.60 and 11512(c), Government Code.

§ 1038. Ordering the Record

(a) Any person may request a copy of all or a portion of the record, subject to any protective orders or provisions of law prohibiting disclosure. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an ALJ, the final decision, a transcript of all proceedings, all exhibits whether admitted or rejected, the written evidence and any other papers in the Case, except as provided by law.

(b) Except as provided in (f), no portion of the record will be prepared until the requesting person has paid a deposit equal to the estimated cost of preparation. The deposit will be applied to the actual cost and any excess will be returned to the person who submitted it. The record will not be released until the person ordering the record has paid any balance due for the actual cost of preparing the record.

(c) If OAH has contracted for the stenographic reporting or tape recording of the proceeding, a person may contact the OAH transcript clerk to order and pay for preparation of all or a portion of the transcript in the Case. If the agency for whom OAH has conducted the proceeding has contracted for the stenographic reporting or tape recording, a person seeking to order all or a portion of the transcript or a copy of the tape must contact the agency directly.

(d) Any person may contact the OAH transcript clerks or the agency to order and pay for copying of any other portions of the record in a Case, except as provided in (c).

(e) If the official record of the Hearing or other proceeding was made by audio tape, copies of the audio tape(s) are available upon written request to the OAH transcript clerk and payment of the costs of duplication, except as provided in (c). Copies of audio tapes and transcripts made from the copies are not part of the official record.

(f) A party seeking a waiver of fees and costs to prepare the record for the purpose of judicial review under Code of Civil Procedure section 1094.5 who has been declared in forma pauperis (Government Code section 68511.3) shall submit a valid order issued by the Superior Court.

Authority cited: Section 11370.5(b), Government Code.

Reference: Section 1094.5, Code of Civil Procedure; Section 11512, 11523, and 69950, Government Code; and Section 985, California Rules of Court.

§ 1040. Monetary Sanctions

(a) The ALJ may order a party, a party's 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.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ.

(2) "Frivolous" means

(A) totally and completely without merit or

(B) for the sole purpose of harassing an opposing party.

(b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.

(c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

Authority cited: Section 11370.5(b), Government Code.

Reference: Section 128.5, Code of Civil Procedure; and Section 11455.30, Government Code.

§ 1042. Cost Recovery

(a) An agency shall allege in its pleading any request for costs, citing the applicable cost recovery statute or regulation.

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

(3) When the agency presents an estimate of actual costs incurred, its Declaration shall explain the reason actual cost information is not available.

(4) The ALJ may permit a party to present testimony relevant to the amount and reasonableness of costs.

(c) The proposed decision shall include a factual finding and legal conclusion on the request for costs and shall state the reasons for denying a request or awarding less than the amount requested. Any award of costs shall be specified in the order.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 125.3(c), 3753.5(a), 4990.17 and 5107(b), Business and Professions Code; and Sections 11507.6 and 11520(b), Government Code.

§ 1044. Request for Expenses After Default

When a request is made for expenses pursuant to section 11520(b), the requesting party shall submit a Declaration setting forth, with specificity, the expenses incurred as a result of respondent's failure to appear.

Authority cited: Section 11370.5(b), Government Code.
Reference: Section 11520(b), Government Code.

§ 1046. Amicus Briefs

A non-party with an interest in the outcome of the Hearing may, by Motion, request permission to file an Amicus brief. The Motion shall show good cause for allowing the brief, giving consideration to the following factors:

- (a) Due process of law;
- (b) Whether matters in the Amicus brief will be helpful to the ALJ;
- (c) The interests of the public and public policy; and
- (d) The costs to the parties to reply to the Amicus brief.

Authority cited: Section 11370.5(b), Government Code.
Reference: Sections 11500(b) and 11512(b), Government Code.

§ 1048. Technical and Minor Changes to Proposed and Final Decisions

(a) The agency may make an application to OAH to correct a mistake or clerical error, or make minor or technical changes, in a proposed decision by filing a written request addressed to the Presiding Judge.

(1) The application must be signed on behalf of the agency that is seeking the correction(s) and identify the correction(s) being sought and the reasons therefor. The application shall be served on all other parties, together with a copy of the proposed decision. A copy of the proof of service shall be filed with the application.

(2) A party shall have a period of 10 days from the date the application is served to file written opposition. The opposition shall be served on all parties and filed with OAH, with a copy of the proof of service.

(3) If opposition is filed, the Presiding Judge may permit oral argument or decide the matter on the papers alone. If the Presiding Judge permits oral argument, at least 5 days notice of the time and place for oral argument shall be given. The Presiding Judge shall decide the matter no later than 5 days after it is submitted.

(4) If the application is granted, the Presiding Judge shall prepare, and cause to be served on all parties, a notice and order of correction and/or a corrected proposed decision, which shall identify the correction(s) made.

(5) If the application is denied, the Presiding Judge shall cause notice of the denial to be served on all parties.

(6) The Presiding Judge will designate the same ALJ who prepared the proposed decision in the case to review and decide the application for correction. If the same ALJ is not reasonably available, the Presiding Judge may designate another ALJ.

(b) Any party other than the agency shall file an application with the agency to correct a mistake or clerical error, or make minor or technical changes, in a proposed decision. Subject to section 11517(c)(2)(C), the agency may decide the application itself or refer it to the Presiding Judge to decide. If the application is referred to the Presiding Judge, the provisions of paragraph (a)(1)-(6) shall apply.

(c) An ALJ who prepares a proposed decision may, on his or her own motion, correct any mistakes or clerical errors or make minor or technical changes in the proposed decision.

The ALJ must cause to be served on all parties, a notice and order of correction and/or a corrected proposed decision, each of which shall identify the correction(s) made. Before making any correction under this paragraph, an ALJ may, in his or her discretion, provide notice to all parties and an opportunity to be heard.

(d) Section 11517(c)(2)(C) authorizes the agency to make technical or other minor changes to a proposed decision and adopt it as the decision in the Case. The agency may obtain an electronic copy of the proposed decision for this purpose upon written request addressed to the Presiding Judge of the OAH office that issued the proposed decision. When OAH provides an electronic copy of the proposed decision to the agency, it does not constitute OAH's approval of any changes the agency proposes. The agency shall send a copy of the proposed decision, as corrected, to OAH.

(e) OAH may correct a clerical error or mistake, or make technical or minor changes, in a proposed decision if all of the parties agree to the correction. The stipulation pursuant to the agreement must be in writing, signed by all parties, and clearly identify the change(s) or correction(s) to be made in the proposed decision. The stipulation must be filed with the Presiding Judge. If the stipulation is accepted, the Presiding Judge shall prepare, and cause to be served on all parties, a notice and order of correction and/or a corrected proposed decision, each of which shall identify the correction(s) made. If the stipulation is rejected, the Presiding Judge shall cause notice thereof to be served on all parties.

(f) No change or correction to a proposed decision shall be effective if the agency rejects or adopts the existing proposed decision without the change or correction.

(g) Government Code section 11518.5 governs corrections of mistakes or clerical errors in agency decisions issued after adjudicative proceedings that are subject to the formal hearing provisions of the Administrative Procedure Act in Title 2, Division 3, Part 1, Chapter 5, commencing with Government Code section 11500.

(h) Decisions issued by an ALJ in proceedings that are not subject to the formal hearing provisions of the Administrative Procedure Act (Title 2, Division 3, Part 1, Chapter 5, commencing with Government Code section 11500) may be corrected in accordance with the procedures provided in paragraphs (a), (b), and (e).

(i) In no event may any correction made pursuant to this policy statement result in reconsideration, or change the factual or legal basis, of a proposed or final decision.

(j) All documents filed or issued with a request to correct a proposed or final decision shall become a part of the record in the Case.

Authority cited: Section 11370.5(b), Government Code.
Reference: Sections 11517(c) and 11518.5, Government Code.

§ 1050. Remand or Reconsideration

(a) An agency referral of a Case to OAH for rehearing or reconsideration pursuant to sections 11517(c)(2)(D) or 11521(b) shall be filed in the OAH regional office that issued the proposed decision. The referral shall be in writing, directed to the Presiding Judge, and shall contain the following:

- (1) Information as required in Regulation 1018, except for Hearing dates if no Hearing is requested;
- (2) The name of the ALJ who prepared the proposed decision;
- (3) A copy of any agency order or decision for rehearing or reconsideration and the proof of Service of the order or decision on all parties; and
- (4) The evidence or issues to be considered on rehearing or reconsideration.

(b) The agency shall lodge the record in the Case, including the transcript, exhibits, and other papers that are part of the record, with OAH promptly after the agency has received it. If the agency has not lodged the complete record at least 15 days before the scheduled Hearing in the Case, it shall provide written notice thereof to OAH and all other parties.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 11517(c)(2)(D) and 11521(b), Government Code.

APPENDIX

Business and Professions Code

§ 125.3. Direction to licentiate violating licensing act to pay costs of investigation and enforcement

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

(b) In the case of a disciplined licentiate that is a corporation or a partnership, the order may be made against the licensed corporate entity or licensed partnership.

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the board to increase the cost award. The board may reduce or eliminate the cost award, or remand to the administrative law judge if the proposed decision fails to make a finding on costs requested pursuant to subdivision (a).

(e) If an order for recovery of costs is made and timely payment is not made as directed in the board's decision, the board may enforce the order for repayment in any appropriate court. This right of enforcement shall be in addition to any other rights the board may have as to any licentiate to pay costs.

(f) In any action for recovery of costs, proof of the board's decision shall be conclusive proof of the validity of the order of payment and the terms for payment.

(g)

(1) Except as provided in paragraph (2), the board shall not renew or reinstate the license of any licentiate who has failed to pay all of the costs ordered under this section.

(2) Notwithstanding paragraph (1), the board may, in its discretion, conditionally renew or reinstate for a maximum of one year the license of any licentiate who demonstrates financial hardship and who enters into a formal agreement with the board to reimburse the board within that one-year period for the unpaid costs.

(h) All costs recovered under this section shall be considered a reimbursement for costs incurred and shall be deposited in the fund of the board recovering the costs to be available upon appropriation by the Legislature.

(i) Nothing in this section shall preclude a board from including the recovery of the costs of investigation and enforcement of a case in any stipulated settlement.

(j) This section does not apply to any board if a specific statutory provision in that board's licensing act provides for recovery of costs in an administrative disciplinary proceeding.

(k) Notwithstanding the provisions of this section, the Medical Board of California shall not request nor obtain from a physician and surgeon, investigation and prosecution costs for a disciplinary proceeding against the licentiate. The board shall ensure that this subdivision is revenue neutral with regard to it and that any loss of revenue or increase in costs resulting

from this subdivision is offset by an increase in the amount of the initial license fee and the biennial renewal fee, as provided in subdivision (e) of Section 2435.

HISTORY:

Added Stats 1992 ch 1059 § 1 (AB 3745), ch 1289 § 1 (AB 2743). Amended Stats 2001 ch 728 § 1 (SB 724); Stats 2005 ch 674 § 2 (SB 231), effective January 1, 2006; Stats 2006 ch 223 § 2 (SB 1438), effective January 1, 2007.

§ 162. Evidentiary effect of certificate of records officer as to license, etc.

The certificate of the officer in charge of the records of any board in the department that any person was or was not on a specified date, or during a specified period of time, licensed, certified or registered under the provisions of law administered by the board, or that the license, certificate or registration of any person was revoked or under suspension, shall be admitted in any court as prima facie evidence of the facts therein recited.

HISTORY:

Added Stats 1949 ch 355 § 1.

§ 494. Interim suspension or restriction order

(a) A board or an administrative law judge sitting alone, as provided in subdivision (h), may, upon petition, issue an interim order suspending any licentiate or imposing license restrictions, including, but not limited to, mandatory biological fluid testing, supervision, or remedial training. The petition shall include affidavits that demonstrate, to the satisfaction of the board, both of the following:

(1) The licentiate has engaged in acts or omissions constituting a violation of this code or has been convicted of a crime substantially related to the licensed activity.

(2) Permitting the licentiate to continue to engage in the licensed activity, or permitting the licentiate to continue in the licensed activity without restrictions, would endanger the public health, safety, or welfare.

(b) No interim order provided for in this section shall be issued without notice to the licentiate unless it appears from the petition and supporting documents that serious injury would result to the public before the matter could be heard on notice.

(c) Except as provided in subdivision (b), the licentiate shall be given at least 15 days' notice of the hearing on the petition for an interim order. The notice shall include documents submitted to the board in support of the petition. If the order was initially issued without notice as provided in subdivision (b), the licentiate shall be entitled to a hearing on the petition within 20 days of the issuance of the interim order without notice. The licentiate shall be given notice of the hearing within two days after issuance of the initial interim order, and shall receive all documents in support of the petition. The failure of the board to provide a hearing within 20 days following the issuance of the interim order without notice, unless the licentiate waives his or her right to the hearing, shall result in the dissolution of the interim order by operation of law.

(d) At the hearing on the petition for an interim order, the licentiate may:

(1) Be represented by counsel.

(2) Have a record made of the proceedings, copies of which shall be available to the licentiate upon payment of costs computed in accordance with the provisions for transcript costs for judicial review contained in Section 11523 of the Government Code.

(3) Present affidavits and other documentary evidence.

(4) Present oral argument.

(e) The board, or an administrative law judge sitting alone as provided in subdivision (h), shall issue a decision on the petition for interim order within five business days following

submission of the matter. The standard of proof required to obtain an interim order pursuant to this section shall be a preponderance of the evidence standard. If the interim order was previously issued without notice, the board shall determine whether the order shall remain in effect, be dissolved, or modified.

(f) The board shall file an accusation within 15 days of the issuance of an interim order. In the case of an interim order issued without notice, the time shall run from the date of the order issued after the noticed hearing. If the licentiate files a Notice of Defense, the hearing shall be held within 30 days of the agency's receipt of the Notice of Defense. A decision shall be rendered on the accusation no later than 30 days after submission of the matter. Failure to comply with any of the requirements in this subdivision shall dissolve the interim order by operation of law.

(g) Interim orders shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure and shall be heard only in the superior court in and for the Counties of Sacramento, San Francisco, Los Angeles, or San Diego. The review of an interim order shall be limited to a determination of whether the board abused its discretion in the issuance of the interim order. Abuse of discretion is established if the respondent board has not proceeded in the manner required by law, or if the court determines that the interim order is not supported by substantial evidence in light of the whole record.

(h) The board may, in its sole discretion, delegate the hearing on any petition for an interim order to an administrative law judge in the Office of Administrative Hearings. If the board hears the noticed petition itself, an administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the board on matters of law. The board 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 petition has been delegated to an administrative law judge, he or she shall sit alone and exercise all of the powers of the board relating to the conduct of the hearing. A decision issued by an administrative law judge sitting alone shall be final when it is filed with the board. If the administrative law judge issues an interim order without notice, he or she shall preside at the noticed hearing, unless unavailable, in which case another administrative law judge may hear the matter. The decision of the administrative law judge sitting alone on the petition for an interim order is final, subject only to judicial review in accordance with subdivision (g).

(i) Failure to comply with an interim order issued pursuant to subdivision (a) or (b) shall constitute a separate cause for disciplinary action against any licentiate, and may be heard at, and as a part of, the noticed hearing provided for in subdivision (f). Allegations of noncompliance with the interim order may be filed at any time prior to the rendering of a decision on the accusation. Violation of the interim order is established upon proof that the licentiate was on notice of the interim order and its terms, and that the order was in effect at the time of the violation. The finding of a violation of an interim order made at the hearing on the accusation shall be reviewed as a part of any review of a final decision of the agency. If the interim order issued by the agency provides for anything less than a complete suspension of the licentiate from his or her business or profession, and the licentiate violates the interim order prior to the hearing on the accusation provided for in subdivision (f), the agency may, upon notice to the licentiate and proof of violation, modify or expand the interim order.

(j) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section. A certified record of the conviction shall be conclusive evidence of the fact that the conviction occurred. A board may take action under this section notwithstanding the fact that an appeal of the conviction may be taken.

(k) The interim orders provided for by this section shall be in addition to, and not a

limitation on, the authority to seek injunctive relief provided in any other provision of law.

(l) In the case of a board, a petition for an interim order may be filed by the executive officer. In the case of a bureau or program, a petition may be filed by the chief or program administrator, as the case may be.

(m) "Board," as used in this section, shall include any agency described in Section 22, and any allied health agency within the jurisdiction of the Medical Board of California. Board shall also include the Osteopathic Medical Board of California and the State Board of Chiropractic Examiners. The provisions of this section shall not be applicable to the Medical Board of California, the Board of Podiatric Medicine, or the State Athletic Commission.

HISTORY:

Added Stats 1993 ch 840 § 1 (SB 842). Amended Stats 1994 ch 1275 § 4 (SB 2101).

Code of Civil Procedure

§ 1985. Subpoena; Issuance; Affidavit

(a) The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, or other things under the witness's control which the witness is bound by law to produce in evidence. When a county recorder is using the microfilm system for recording, and a witness is subpoenaed to present a record, the witness shall be deemed to have complied with the subpoena if the witness produces a certified copy thereof.

(b) A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

(c) The clerk, or a judge, shall issue a subpoena or subpoena duces tecum signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service. An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein; the subpoena in such a case need not be sealed. An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena.

HISTORY:

Enacted 1872. Amended Stats 1933 ch 567 § 1; Stats 1961 ch 496 § 1; Stats 1967 ch 431 § 1; Stats 1968 ch 95 § 1. Amended Stats 1979 ch 458 § 1; Stats 1982 ch 452 § 1; Stats 1986 ch 603 § 3; Stats 1990 ch 511 § 1 (SB 163).

§ 1985.1. Agreement to appear at time not specified in subpoena

Any person who is subpoenaed to appear at a session of court, or at the trial of an issue therein, may, in lieu of appearance at the time specified in the subpoena, agree with the party at whose request the subpoena was issued to appear at another time or upon such notice as may be agreed upon. Any failure to appear pursuant to such agreement may be punished as a contempt by the court issuing the subpoena. The facts establishing or disproving such agreement and the failure to appear may be proved by an affidavit of any person having personal knowledge of the facts.

HISTORY:

Added Stats 1969 ch 140 § 1.

§ 1985.2. Subpoena requiring attendance of witness; Notice

Any person who is subpoenaed to appear at a session of court, or at the trial of an issue therein, may, in lieu of appearance at the time specified in the subpoena, agree with the party at whose request the subpoena was issued to appear at another time or upon such notice as may be agreed upon. Any failure to appear pursuant to such agreement may be punished as a contempt by the court issuing the subpoena. The facts establishing or disproving such agreement and the failure to appear may be proved by an affidavit of any person having personal knowledge of the facts.

HISTORY:

Added Stats 1969 ch 140 § 1.

§ 1985.3. Subpoena duces tecum for production of personal records; Definitions; Application of section

(a) For purposes of this section, the following definitions apply:

(1) "Personal records" means the original, any copy of books, documents, other writings, or electronic data pertaining to a consumer and which are maintained by any "witness" which is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, or telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code.

(2) "Consumer" means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary.

(3) "Subpoenaing party" means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding pursuant to this code, but shall not include the state or local agencies described in Section 7465 of the Government Code, or any entity provided for under Article VI of the California Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

(4) "Deposition officer" means a person who meets the qualifications specified in Section 2020.420.

(b) Prior to the date called for in the subpoena duces tecum for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a copy of the subpoena duces tecum, of the affidavit supporting the issuance of the subpoena, if any, and of the notice described in subdivision (e), and proof of service as indicated in paragraph (1) of subdivision (c). This service shall be made as follows:

(1) To the consumer personally, or at his or her last known address, or in accordance with

Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his or her attorney of record. If the consumer is a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is at least 12 years of age.

(2) Not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail.

(3) At least five days prior to service upon the custodian of the records, plus the additional time provided by Section 1013 if service is by mail.

(c) Prior to the production of the records, the subpoenaing party shall do either of the following:

(1) Serve or cause to be served upon the witness a proof of personal service or of service by mail attesting to compliance with subdivision (b).

(2) Furnish the witness a written authorization to release the records signed by the consumer or by his or her attorney of record. The witness may presume that any attorney purporting to sign the authorization on behalf of the consumer acted with the consent of the consumer, and that any objection to release of records is waived.

(d) A subpoena duces tecum for the production of personal records shall be served in sufficient time to allow the witness a reasonable time, as provided in Section 2020.410, to locate and produce the records or copies thereof.

(e) Every copy of the subpoena duces tecum and affidavit, if any, served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court or serve a written objection as provided in subdivision (g) prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by this subdivision.

(f) A subpoena duces tecum for personal records maintained by a telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, shall not be valid or effective unless it includes a consent to release, signed by the consumer whose records are requested, as required by Section 2891 of the Public Utilities Code.

(g) Any consumer whose personal records are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum. Notice of the bringing of that motion shall be given to the witness and deposition officer at least five days prior to production. The failure to provide notice to the deposition officer shall not invalidate the motion to quash or modify the subpoena duces tecum but may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records.

Any other consumer or nonparty whose personal records are sought by a subpoena duces tecum may, prior to the date of production, serve on the subpoenaing party the witness, and the deposition officer, a written objection that cites the specific grounds on which production of the personal records should be prohibited.

No witness or deposition officer shall be required to produce personal records after receipt of notice that the motion has been brought by consumer, or after receipt of a written objection from a nonparty consumer, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected.

The party requesting a consumer's personal records may bring a motion under Section 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney.

(h) Upon good cause shown and provided that the rights of witnesses and consumers are preserved, a subpoenaing party shall be entitled to obtain an order shortening the time for service of a subpoena duces tecum or waiving the requirements of subdivision (b) where due diligence by the subpoenaing party has been shown.

(i) Nothing contained in this section shall be construed to apply to any subpoena duces tecum which does not request the records of any particular consumer or consumers and which requires a custodian of records to delete all information which would in any way identify any consumer whose records are to be produced.

(j) This section shall not apply to proceedings conducted under Division 1 (commencing with Section 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200) of the Labor Code.

(k) Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the personal records sought by a subpoena duces tecum.

(l) If the subpoenaing party is the consumer, and the consumer is the only subject of the subpoenaed records, notice to the consumer, and delivery of the other documents specified in subdivision (b) to the consumer, is not required under this section.

HISTORY:

Added Stats 1980 ch 976 § 1, operative July 1, 1981. Amended Stats 1981 ch 227 § 1, effective July 20, 1981, operative July 1, 1981, ch 1014 § 1; Stats 1982 ch 666 § 1; Stats 1984 ch 603 § 1; Stats 1985 ch 983 § 1, effective September 26, 1985; Stats 1986 ch 248 § 21, ch 605 § 1, ch 1209 § 2; Stats 1987 ch 20 § 1, ch 149 § 1, effective July 10, 1987, ch 1080 § 10, ch 1492 § 2; Stats 1988 ch 184 § 1; Stats 1990 ch 1220 § 1 (AB 2980); Stats 1996 ch 679 § 1 (SB 1821); Stats 1997 ch 442 § 10 (AB 758); Stats 1998 ch 932 § 19 (AB 1094); Stats 1999 ch 444 § 1 (AB 794); Stats 2004 ch 182 § 18 (AB 3081), operative July 1, 2005; Stats 2005 ch 300 § 6 (AB 496), effective January 1, 2006.

LAW REVISION COMMISSION COMMENTS:

(2004) Subdivisions (a) and (d) of Section 1985.3 are amended to reflect nonsubstantive reorganization of the rules governing civil discovery.

§ 1985.4. Production of consumer records maintained by state or local agency

The procedures set forth in Section 1985.3 are applicable to a subpoena duces tecum for records containing "personal information," as defined in Section 1798.3 of the Civil Code which are otherwise exempt from public disclosure under Section 6254 of the Government Code which are maintained by a state or local agency as defined in Section 6252 of the Government Code. For the purposes of this section, "witness" means a state or local agency as defined in Section 6252 of the Government Code and "consumer" means any employee of any state or local agency as defined in Section 6252 of the Government Code, or any other natural person. Nothing in this section shall pertain to personnel records as defined in Section 832.8 of the Penal Code.

HISTORY:

Added Stats 1984 ch 437 § 1. Amended Stats 1988 ch 441 § 1.

§ 1985.6. Definitions; Subpoena duces tecum for production of employment records; Application of section

(a) For purposes of this section, the following definitions apply:

(1) "Deposition officer" means a person who meets the qualifications specified in paragraph (3) of subdivision (d) of Section 2020.

(2) "Employee" means any individual who is or has been employed by a witness subject to a subpoena duces tecum. "Employee" also means any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum.

(3) "Employment records" means the original or any copy of books, documents, other writings, or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee, or by any labor organization that has represented or currently represents the employee.

(4) "Labor organization" has the meaning set forth in Section 1117 of the Labor Code.

(5) "Subpoenaing party" means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding, but does not include the state or local agencies described in Section 7465 of the Government Code, or any entity provided for under Article VI of the California Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

(b) Prior to the date called for in the subpoena duces tecum of the production of employment records, the subpoenaing party shall serve or cause to be served on the employee whose records are being sought a copy of: the subpoena duces tecum; the affidavit supporting the issuance of the subpoena, if any; and the notice described in subdivision (e), and proof of service as provided in paragraph (1) of subdivision (c). This service shall be made as follows:

(1) To the employee personally, or at his or her last known address, or in accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his or her attorney of record. If the employee is a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor, or with whom the minor resides, and on the minor if the minor is at least 12 years of age.

(2) Not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail.

(3) At least five days prior to service upon the custodian of the employment records, plus the additional time provided by Section 1013 if service is by mail.

(c) Prior to the production of the records, the subpoenaing party shall either:

(1) Serve or cause to be served upon the witness a proof of personal service or of service by mail attesting to compliance with subdivision (b).

(2) Furnish the witness a written authorization to release the records signed by the employee or by his or her attorney of record. The witness may presume that the attorney purporting to sign the authorization on behalf of the employee acted with the consent of the employee, and that any objection to release of records is waived.

(d) A subpoena duces tecum for the production of employment records shall be served in sufficient time to allow the witness a reasonable time, as provided in paragraph (1) of subdivision (d) of Section 2020, to locate and produce the records or copies thereof.

(e) Every copy of the subpoena duces tecum and affidavit served on an employee or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) employment records

about the employee are being sought from the witness named on the subpoena; (2) the employment records may be protected by a right of privacy; (3) if the employee objects to the witness furnishing the records to the party seeking the records the employee shall file papers with the court prior to the date specified for production on the subpoena; and (4) if the subpoenaing party does not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the employee's interest in protecting his or her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by this subdivision.

(f) Any employee whose employment records are sought by a subpoena duces tecum may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum. Notice of the bringing of that motion shall be given to the witness and the deposition officer at least five days prior to production. The failure to provide notice to the deposition officer does not invalidate the motion to quash or modify the subpoena duces tecum but may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records.

Any nonparty employee whose employment records are sought by a subpoena duces tecum may, prior to the date of production, serve on the subpoenaing party, and the deposition officer, the witness a written objection that cites the specific grounds on which production of the employment records should be prohibited.

No witness or deposition officer shall be required to produce employment records after receipt of notice that the motion has been brought by an employee, or after receipt of a written objection from a nonparty employee, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and employees affected.

The party requesting an employee's employment records may bring a motion under subdivision (c) of Section 1987 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the employment records and the employee or the employee's attorney.

(g) Upon good cause shown and provided that the rights of witnesses and employees are preserved, a subpoenaing party shall be entitled to obtain an order shortening the time for service of a subpoena duces tecum or waiving the requirements of subdivision (b) where due diligence by the subpoenaing party has been shown.

(h) This section may not be construed to apply to any subpoena duces tecum which does not request the records of any particular employee or employees and which requires a custodian of records to delete all information which would in any way identify any employee whose records are to be produced.

(i) This section does not apply to proceedings conducted under Division 1 (commencing with Section 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200) of the Labor Code.

(j) Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the employment records sought by subpoena duces tecum.

HISTORY:

Added Stats 1995 ch 299 § 1 (AB 617). Amended Stats 1996 ch 679 § 1 (SB 1821); Stats 1997 ch 442 § 11 (AB 758); Stats 1998 ch 932 § 20 (AB 1094). Amended Stats 1999 ch 444 § 2 (AB 794); Stats 2004 ch 101 § 1 (SB 1465) (ch 101 prevails), ch 182 § 19 (AB 3081), operative July 1, 2005; Stats 2005 ch 22 § 20 (SB 1108), ch 294 § 5 (AB 333), ch 300 § 7.5 (AB 496), effective January 1, 2006; Stats 2006 ch 538 § 76 (SB 1852), effective January 1, 2007.

§ 1987. Service of subpoena, or of written notice

(a) Except as provided in Sections 68097.1 to 68097.8, inclusive, of the Government Code, the service of a subpoena is made by delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to the witness at the same time, if demanded by him or her, the fees to which he or she is entitled for travel to and from the place designated, and one day's attendance there. The service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. The service may be made by any person. If service is to be made on a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of those persons cannot be located with reasonable diligence, service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older. If the minor is alleged to come within the description of Section 300, 601, or 602 of the Welfare and Institutions Code and the minor is not in the custody of a parent or guardian, regardless of the age of the minor, service also shall be made upon the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the minor has been placed.

(b) In the case of the production of a party to the record of any civil action or proceeding or of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person. The notice shall be served at least 10 days before the time required for attendance unless the court prescribes a shorter time. If entitled thereto, the witness, upon demand, shall be paid witness fees and mileage before being required to testify. The giving of the notice shall have the same effect as service of a subpoena on the witness, and the parties shall have those rights and the court may make those orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.

(c) If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, it may include a request that the party or person bring with him or her books, documents or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or any other time period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required.

Subject to this subdivision, the notice provided in this subdivision shall have the same effect as is provided in subdivision (b) as to a notice for attendance of that party or person.

HISTORY:

Enacted 1872. Amended Stats 1963 ch 1485 § 3; Stats 1968 ch 933 § 1; Stats 1969 ch 311 § 1, ch 1034 § 1.5. Amended Stats 1981 ch 184 § 2; Stats 1986 ch 605 § 2; Stats 1989 ch 1416 § 28; Stats 2002 ch 1008 § 6 (AB 3028).