THE ADJUDICATION PROCESS*

by Michael Asimow

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I. INTRODUCTION

This is the fourth report prepared by the author for the California Law Revision Commission[1] on the subject of administrative adjudication. The governing assumptions are that California agencies that adjudicate cases will continue to do so, and that agencies that employ their own administrative law judges (ALJs) will also continue to do so. There will be a new Administrative Procedure Act (APA) that will govern the adjudication procedure of all agencies (unlike the existing APA that covers only a small percentage of the total number of agency adjudications). This act will provide the ground rules for all cases of adjudication where a hearing on the record is required by statute or by constitutional due process.

This report covers all the remaining topics relating to adjudication that were not covered in the prior reports.[2] It is organized

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1. The earlier reports are: "Administrative Adjudication: Structural Issues" (Oct. 1989); "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs" (Aug. 1990); and "Impartial Adjudicators: Bias, Ex Parte Contacts, and Separation of Functions" (Jan. 1991). These reports have been published in revised form as Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992), which is reprinted, *supra*, at 321.

2. I decided not to make recommendations on certain topics that might logically have been included in this study. These topics are laches, administrative res judicata and collateral estoppel, and administrative equitable estoppel. These are subjects that are now dealt with largely through case law; the rules tend to resist statutory generalization. In addition, I considered whether to draft recommendations concerning agency remedies; for example, whether agencies generally should have power to award compensatory damages or

chronologically into topics relating to the prehearing stage, the hearing stage, and the post-hearing stage. Because a new APA must be flexible enough to regulate the adjudications of vastly different agencies, the statute must contain relatively bare-bones provisions. These statutory provisions must be fleshed out by agency regulations. In many but not all situations, I will recommend statutory provisions that will function as defaults; agency regulations can depart from them but, in the absence of contrary regulations, the default rule controls.

Because such an act will require a significant rulemaking exercise by all adjudicating agencies, I want to make some observations about this process. The statute will certainly have an effective date far enough in the future to allow agencies ample time to study the problems, consult their constituencies, draft and redraft proposed rules, go through the public comment process, and pass the rules through the Office of Administrative Law, all before the new law will go into effect. I also suggest that the statute require the Office of Administrative Hearings (OAH) to draft a set of model rules which any agency can use.[3] These should significantly simplify the task of agency rulemakers and will also promote uniformity of procedure where that is feasible.

I believe the rulemaking process that is required by this approach will be a healthy one. The rulemaking process requires participation of all constituencies that deal with the agency (both in and outside of government). It requires agencies to take a fresh look at procedures that may have been unexamined for years. Agencies

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restitution or should be able to assess civil penalties. However, the existing statutes relating to remedies are highly agency-specific and there are substantial constitutional limitations on administrative remedies. Even these tend to resist generalization. *See* McHugh v. Santa Monica Rent Control Bd., 49 Cal. 3d 348, 261 Cal. Rptr. 318 (1989).

3. The recently adopted Washington statute provides that the Chief ALJ of the state is responsible for drafting a set of model rules appropriate for as many agencies as possible. Agencies adopting rules of procedure that differ from the model rules shall include in the order of adoption a finding stating the reasons for variance. Wash. Rev. Code Ann. § 34.05.250 (1990). In New Jersey the central panel has drafted model rules for all state agencies.

might decide to move to a model like that of the APA agencies, retain existing patterns, or adopt new approaches that can optimize the values of efficiency, fairness, and participant satisfaction. In many cases, the existing procedures are not stated in regulations (or stated only in a sketchy and incomplete form); they exist mostly in the institutional memories of the staff and experienced practitioners.

Here is a summary of the matters covered in this report and my recommendations:

THE PREHEARING STAGE

A. Notice and pleadings. The present APA provisions would serve as defaults. The pleadings called "accusations" and "statements of issues" would be renamed "complaints." Responsive pleadings, if required, would be called "answers." The APA provisions for amendment of pleadings would apply to all agencies. The right of private prosecution apparently permitted by the APA would be abolished. Directory provisions for time limits in responding to applications would be adopted.

B. Intervention. The APA should contain a provision allowing intervention in an ongoing hearing where the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. The order allowing intervention can place various conditions on intervention.

C. Discovery and subpoenas. The civil discovery rules should not be applicable in administrative law. The present limited discovery provisions in the APA should remain binding on agencies that use OAH ALJs. Those rules would also become applicable to all agencies unless a statute calls for greater discovery rights or agency rules call for different discovery rights. The provision for subpoenas duces tecum should make such subpoenas answerable at the time and place stated rather than at the hearing. The provisions for quashing and enforcing subpoenas should be improved.

D. Prehearing conference. The existing APA provision for prehearing conference should remain applicable to agencies that will

use OAH ALJs and should be the default for all other adjudication. In the ALJs discretion, the conference could be held by electronic means and there should be a sanction for parties who fail to show up. Finally, the conference could be converted immediately to a conference and the case could be resolved then and there.

E. Declaratory orders. The APA should provide that all agencies must issue declaratory orders on request, but can place certain areas off-limits to declaratory orders.

F. Consolidation and severance. Agencies should have power to consolidate related cases or sever cases.

G. Settlement and alternate dispute resolution. The statute should facilitate settlements by providing that all disputes can be settled on any terms the parties deem appropriate. Agency heads should have the power to delegate the approval of settlements. Agencies should assign settlement judges to cases and, with consent of all parties, should have power to refer cases for mediation or arbitration. The confidentiality of communications during ADR proceedings must be protected.

THE HEARING PROCESS

A. Evidence. The rules of the Evidence Code should not be adopted in administrative proceedings. However, the *Kelly-Frye* test (relating to scientific methodologies that are not generally accepted) should be adopted. Provisions relating to written evidence in the Model State Administrative Procedure Act (MSAPA) should be adopted. ALJs should have broader powers to exclude evidence whose probative value is outweighed by the amount of time it would consume or confusion it would produce. And the residuum rule (providing that a finding must be supported by some evidence other than hearsay) should be retained in agencies that use OAH ALJs but made optional for other agencies.

B. Burden of proof. The preponderance of the evidence standard should be used in preference to the "clear and convincing evidence to a reasonable certainty" standard now used in professional license revocation cases.

C. Official notice. The official notice provision should be broadened so that agencies can take notice of technical or scientific matters within their specialized knowledge, whether or not "generally accepted." However, the right of an opposing party to rebut such material must be protected.

D. Representation. A party should have a right to be represented by anyone, whether or not an attorney, unless agency regulations provide the contrary.

E. Informal trial models. Agencies should be authorized to adopt regulations under which they can discharge any adjudicatory responsibilities by using a conference adjudicative proceeding (where such does not conflict with a statute or due process). Similarly, agencies should be empowered to adopt regulations providing for emergency action in cases where the public health, safety, or welfare requires immediate action.

F. Other trial issues. Presiding officers in all agencies should have the power to administer oaths and shall take testimony under oath or affirmation unless regulations provide the contrary. Agencies should be empowered to tape record proceedings instead of being required to have a reporter present. Agencies should be authorized to take testimony by telephone or other electronic methods in appropriate cases. The provisions for interpreters should be streamlined and applied to hearing-impaired parties or witnesses. Hearings should be open to the public unless both parties agree they should be closed or a statute requires closed hearings.

POSTHEARING PROCESS

A. Findings. The APA should contain a more detailed findings provision along the lines of the MSAPA but should not adopt the "statement of decision" approach used in civil litigation.

B. Precedent decisions. All agencies should be required to designate their adjudicatory decisions that contain new law or policy as precedential and maintain an index of such decisions.

II. THE PREHEARING PROCESS

A. NOTICE AND PLEADINGS

An APA must contain general provisions for notice and pleadings. Because of the great variety of adjudicatory matters that must be covered by a new APA, it would be inadvisable to mandate a single set of notice and pleading requirements. Hence the details about the nomenclature of pleadings, as well as their timing and form, should be left to regulations.

1. Present California law. There are two broad categories of initial notice: hearing procedures that result from agency initiatives (such as sanctions against regulated persons or termination of employment or benefits) and hearing procedures that result from initiatives by outsiders (such as applications that have been rejected by the agency for licenses, employment, benefits, or waivers).

In the first category (agency initiatives), the existing APA provides for the filing of an "accusation" in cases where an agency proposes to revoke, suspend, limit or condition a right, authority, license or privilege. An accusation must set forth the relevant acts or omissions in ordinary and concise language. It shall specify the statutes and rules alleged to have been violated but shall not consist merely of charges phrased in the language of such statutes and rules. Case law requires that the pleading must give notice sufficient to allow a respondent to prepare a defense and it limits the agency to the items charged in its accusation.[4] However, at any

4. Subject to the rule of prejudicial error, a person cannot be disciplined for reasons not spelled out in the accusation. *See, e.g.*, Stearns v. Fair Employment Practice Comm'n, 6 Cal. 3d 205, 212-15, 98 Cal. Rptr. 467 (1971) (nonprejudicial variance); McFaddin San Diego 1130, Inc. v. Stroh, 208 Cal. App. 3d 1384, 257 Cal. Rptr. 8 (1989), *hearing denied* (prejudicial variance); Linda Jones General Builder v. Contractors' State Licensing Bd., 194 Cal. App. 3d 1320, 1327, 240 Cal. Rptr. 180 (1987); Wheeler v. State Bd. of Forestry, 144 Cal. App. 3d 522, 527, 192 Cal. Rptr. 693 (1982) (findings not based on accusation); Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 320-21, 1 Cal. Rptr. 494 (1959) (prejudicial variance); Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 941-42, 123 Cal. Rptr. 563 (1975) (pleading sufficiently specific to give notice); Dyment v. Board of Medical Examiners, 57 Cal. App. 260, 207 P. 409 (1922), *aff'd* on this ground by

time before a matter is submitted for decision, the agency may file an amended or supplemental accusation.[5]

The accusation must be served on the respondent personally or by registered mail (unless the respondent files a notice of defense or otherwise appears).[6] The accusation must include a postcard or other form whereby the respondent can acknowledge service and file a notice of defense.[7] The accusation also indicates that the respondent must request a hearing within 15 days after service or waive the hearing.[8] It must also advise the respondent of discovery rights.

The APA provides that within 15 days after service of an accusation, the respondent may file[9] a notice of defense asserting one or

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Supreme Court, 57 Cal. App. 266 (pleading in language of statute insufficient). *See generally* California Administrative Hearing Practice §§ 2.2, 2.6 (Cal. Cont. Ed. Bar 1984) [hereinafter CEB].

5. Gov't Code § 11507. If the amended or supplemental accusation presents new charges, the respondent is entitled to a reasonable opportunity to prepare his defense. He shall not be required to file a further pleading unless the agency in its discretion so orders. The rules about amendments of accusations also apply to statements of issues. Gov't Code § 11504.5; Button v. Board of Admin., 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218 (1981) (PERS can amend its statement of issues in response to application for a pension).

6. Registered mail service is effective if the respondent is required to file his address with the agency and notify it of any change. Gov't Code § 11505(c). The statute makes clear that in the latter situation, service by registered mail is effective if addressed to the respondent at the latest address on file with the agency.

7. Gov't Code § 11505(a).

8. Gov't Code §§ 11505(b), 11506(b). Apparently only the agency, not a presiding officer, can waive a failure to timely request a hearing. CEB, *supra* note 4, § 2.40. I would favor allowing either the presiding officer or the agency to waive a default.

9. File means delivered or mailed to the agency. Gov't Code § 11506(e). The notice of defense shall be in writing, signed by or on behalf of the respondent, and shall state his mailing address. It need not be verified or follow any particular form. If no notice of defense is filed, a streamlined default proceeding is conducted. If the burden of proof is on respondent (as occurs in the case of applications), no default proceeding needs to be conducted (but a notice of default should be mailed out). *See* Gov't Code § 11520; Bobby, *An Introduction*

more of the following: (1) request a hearing, (2) object to the accusation on the ground that it does not state acts or omissions upon which the agency may proceed, (3) object to the form of the accusation on the grounds that it is too indefinite or uncertain,[10] (4) admit the accusation in whole or in part, (5) present new matter by way of defense, or (6) object that compliance with the requirement of a regulation would result in violation of a regulation enacted by another department.[11]

Slightly different notice and pleading procedures apply in the case of agency proceedings triggered by rejected applications (outsider initiatives).[12] A hearing to determine whether a right, authority, license, or privilege shall be granted, issued or renewed, is initiated by filing a "statement of issues."[13] Statements of issues

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to Practice and Procedure Under the California Administrative Procedure Act, 15 Hastings L.J. 258, 264 (1964); CEB, *supra* note 4, §§ 2.39-2.40.

10. Failure to object on this ground waives all objections to the form of the accusation. Gov't Code § 11506(b). However, a failure to raise other objections in the notice of defense should not be treated as a waiver of such objections. *See* CEB, *supra* note 4, §§ 2.31-2.36. Of course, such objections should be raised at the hearing to avoid a possible failure to exhaust administrative remedies.

11. Gov't Code § 11506(a). Respondent may file a statement by way of mitigation even if he does not file a notice of defense, an option which the new law should retain. Gov't Code § 11506(d); *see* Bobby, *supra* note 9, at 263 (purpose of statement of mitigation is apparently to admit allegations but claim an excuse).

12. Generally, there is a right to a hearing upon the denial of an application where a statute limits administrative discretion to deny the application. Fascination, Inc. v. Hoover, 39 Cal. 2d 260, 269-71, 246 P.2d 656 (1952); Andrews v. State Bd. of Registration, 123 Cal. App. 2d 685, 692-96, 267 P.2d 352 (1954). These cases are based on construction of the statutes requiring a license. Due process will also guarantee a hearing in many cases of applications, even if the decision is left to administrative discretion. *See* Saleeby v. State Bar, 39 Cal. 3d 547, 216 Cal. Rptr. 367 (1985) (application for payments from client security fund — based on the California constitution).

13. Gov't Code § 11504; Bus. & Prof. Code § 485. The agency files the statement either together with its denial of an application or in response to a request for hearing after denial of the application. *See* Bobby, *supra* note 9, at 261.

The statement of issues specifies the statutes and rules with which the respondent must show compliance by producing proof at the hearing and in

are sometimes vague which places respondents (who have the burden of proof) at a disadvantage.[14]

Apart from discovery proceedings,[15] the next pleading stage consists of a notice of hearing which is delivered or mailed by the agency to all parties at least ten days prior to the hearing.[16] The notice spells out the time and place of the hearing and provides that parties may represent themselves or be represented by an attorney (but are not entitled to the appointment of an attorney at public expense). It also provides that the party can present any relevant evidence, will be given full opportunity to cross-examine adverse witnesses, and can subpoena witnesses and documents.[17]

The provisions for notice and pleadings at non-APA agencies are quite disparate. They involve different nomenclature,[18] specific disclosures, different time periods, and different requirements for responsive pleading.

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addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. It is served in the same manner as an accusation.

14. CEB, *supra* note 4, § 2.9. The requirements of specificity should be the same for both accusations or statements of issues regardless of the burden of proof. The existing APA provides that a respondent who has requested a hearing is not required to file a statement of issues. It is ambiguous with respect to whether a respondent must file a notice of defense where the agency simultaneously denies an application and files a statement of issues. *Id.* at § 2.25.

15. Discovery is discussed in Part I.C. [The Prehearing Stage], *supra* at 453.

16. Gov't Code § 11509. *See* Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 942, 123 Cal. Rptr. 563 (1975) (in counting ten day period, exclude first day, include the last day; service by mail is complete at time of deposit in mailbox). If the notice is mailed, an additional five days must be provided. Code Civ. Proc. § 1013(a). This should probably be made explicit in the APA. Governing Bd. v. Felt, 55 Cal. App. 3d 156, 163-64, 127 Cal. Rptr. 381 (1976), correctly holds that errors in postage or mailing address do not invalidate a notice of hearing if respondent is not prejudiced.

17. The APA also provides for the venue of the hearing and permits the parties to agree to a different venue. Gov't Code § 11508; CEB, *supra* note 4, § 2.53. This section might appropriately be amended to permit a party to move for a change of venue.

18. For example, "appeals," "notice of adverse action," "petition for hearing."

2. MSAPA provisions. Under the 1981 Model State APA (MSAPA), where an agency initiates a proceeding to detrimentally affect a license, it must first give notice and an opportunity for hearing.[19] The Act does not state how much notice is required or what form the notice should take. It makes no specific provision for responsive pleadings.[20] Where a proceeding is initiated on the application of a person other than the agency, and the agency is required to hold a hearing, it must respond to the application within 30 days[21] and either approve the application or commence the hearing process within 90 days.[22] The Act then provides in much greater detail for the contents of the notice of a prehearing conference and of the notice of hearing.[23]

3. Recommendations. I suggest that the revised APA build on the established principles of the existing APA which seem easily generalizable to all agencies. There seems to be no particular reason to substitute the MSAPA provisions for an existing regime which appears to be working well. The existing APA notice and pleading provisions would remain applicable to agencies that use OAH ALJs;[24] as to other agencies, they would serve as default provisions that could be varied by regulations.[25]

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19. MSAPA § 4-105. The 1981 Model State Administrative Procedure Act is printed in 15 U.L.A. 1 (1990).

20. MSAPA § 4-207(a) provides that a presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections, and offers of settlement.

21. Within this period, the agency must examine the application, notify the applicant of any apparent errors or omissions, request additional information, and notify the applicant of the name, title, address, and phone number of the person who should be contacted regarding the application.

22. MSAPA § 4-104. If the application is for subject matter that is not available when the application is filed but may be available in the future (such as housing or employment), the agency must make a determination of eligibility within the 90 days period and maintain the application on file. *Id.* § 4-104(a)(3).

23. *Id.* §§ 4-204(a)(3), 4-206(c).

24. However, those agencies may wish to present testimony to the Commission that indicates a need for greater flexibility; perhaps all agencies, including those covered by the existing APA, should be allowed to customize

I suggest a change in nomenclature to make the existing APA provisions more easily generalizable. The terms "accusation," and "statement of issues" might both be renamed "complaint" so that they can more readily apply to proceedings that do not involve licensing. The term "complaint" is familiar from the world of civil litigation and is more generic than the existing terms "accusation" or "statement of issues." It simply refers to the pleading that initiates litigation. Similarly, a responsive pleading should be called an "answer" instead of a notice of defense.

The provisions relating to the contents of a complaint filed by the agency, method of service, the postcard which constitutes a notice of defense (including a request for hearing and an opportunity to raise certain defenses), venue, timing, and similar provisions of the APA all should be stated as default provisions that would remain binding on existing-APA agencies and could be varied by regulation by other agencies.

The existing APA appears to be defective in not imposing any time restrictions on the agency in considering applications.[26] I suggest that California adopt the provision in the MSAPA which imposes a 30-day period to respond and a 90-day period to either grant or deny the application.[27]

The APA allows pleadings to be freely amended both before and after a matter is submitted for decision, but requires the provision

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their notice and pleading practice. The Commission should be alert to opportunities to make the practice of existing-APA agencies more efficient.

25. This report will frequently suggest that one standard apply to the existing-APA agencies; that standard would apply to all other agencies unless they adopt different rules. This approach is responsive to two sorts of arguments: (1) a new APA should not unnecessarily create diversity where there is presently uniformity among APA agencies, and (2) a new APA should not force non-APA agencies into a mold that is appropriate for licensing but inappropriate or inefficient for other sorts of functions. It forces agencies that wish to depart from the default to conduct a rulemaking provision at which all constituencies would have an opportunity for input. No doubt many agencies will accept the default provisions; thus there should be greater uniformity of practice than now exists. As suggested *supra* in text accompanying note 3, the director of OAH should promulgate a model set of rules that all agencies can draw upon to facilitate this process.

Of course, this approach may encourage agencies to adopt rules providing more efficient but less protective procedures than the existing-APA agencies will be required to provide. However, such procedures must survive a rulemaking process in which the private bar will call the problem of inadequate procedures to the agency's attention.

26. The existing statute does provide a 60-day period within which the applicant can request a hearing and requires that the hearing be held within 90 days (with limited provisions for extensions). Bus. & Prof. Code §§ 485, 487.

In addition, the requirement of specificity should be the same for pleadings resulting from agency and outsider initiatives; statements of issues under present practice are sometimes vague. See *supra* text accompanying notes 4, 14.

27. However, this provision should explicitly be directory, not mandatory, so that an agency would not be disabled from denying an application if it does not or cannot meet the deadlines. *See* Woods v. Department of Motor Vehicles, 211 Cal. App. 3d 1265, 259 Cal. Rptr. 885 (1989), which discusses numerous cases and concludes that a court must analyze legislative intent to decide whether a time period is directory or mandatory, even if it is stated in mandatory terms. Of course, this provision should be subject to other statutes that give agencies more or less time to respond.

of additional time if needed to prepare a defense.[28] Responsive pleadings should also be freely amendable.[29] There is some doubt about the propriety of amendment of pleadings before non-APA agencies,[30] and this doubt should be removed. There is no reason to deny either party the ability to amend a pleading based on newly discovered evidence or to conform to proof or because counsel has been hired or for any other reason.[31]

The existing APA might provide for a right of private prosecution whereby a third party could compel an agency to hold a hearing even though the agency does not wish to discipline a licensee or deny an application.[32] A new APA should abolish the right of private prosecution if it now exists. It is difficult to justify private prosecution in light of the heavy caseload of most agencies, particularly licensing agencies. And private prosecution for wrongdoing

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28. Gov't Code §§ 11507, 11516.

29. It should be possible to raise any defense, including objections to form of pleadings and affirmative defenses, by amendments to the notice of defense. Existing Gov't Code § 11506(b) might mean that objections to form cannot be raised by amendment. *See* Ogden, California Public Agency Practice § 31.03[6][g] (1991).

30. Cook v. Civil Service Commission, 178 Cal. App. 2d 118, 127, 2 Cal. Rptr. 836 (1960), *hearing denied*, appears to broadly validate amendments. *But see* Brooks v. State Personnel Bd., 222 Cal. App. 3d 1068, 1074-75, 272 Cal. Rptr. 292 (1990); Brown v. State Personnel Bd., 166 Cal. App. 3d 1151, 213 Cal. Rptr. 53 (1985), hearing denied. The latter two cases hold that California State University and College System cannot amend a Notice of Dismissal to add additional charges of misconduct, because the Education Code fails to provide for amendments. These cases are an excellent example of a pointless difference between the administrative procedure of different agencies.

31. Judicial Council of California, Tenth Biennial Report 72 (1944); Button v. Board of Admin., 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218 (1981).

32. The language of Section 11503 suggests that a third party complainant can file an accusation or a statement of issues and thus trigger a hearing, even though the agency does not wish to discipline the licensee or to deny an application. *See* Humane Society v. Merrill, 199 Cal. App. 2d 115, 120 n.1, 18 Cal. Rptr. 701 (1962); *but see* Hogen v. Valley Hospital, 147 Cal. App. 3d 119, 195 Cal. Rptr. 5 (1983); Spear v. Board of Medical Examiners, 146 Cal. App. 2d 207, 212-13, 303 P.2d 886 (1956).

seems as inappropriate in administrative law as in criminal law where it has long since been abandoned.[33]

B. INTERVENTION

If a person intervenes, that person becomes an additional party to the adjudication (in addition to the agency and the private party or parties who are disputing with the agency or with each other). Intervention is useful both to protect the interests of the intervening party and to assure that the agency receives input from and considers all of the interests affected by its decision. But intervention may also complicate a proceeding by adding one or more parties whose interests conflict with the other parties and who are entitled to engage in discovery, present witnesses, cross-examine witnesses, and so on.

1. Present California law. The present APA leaves issues of intervention unclear: it does not explain when or whether a person has a right to be admitted as a party (mandatory intervention) or when or whether the presiding officer has discretion to admit a person as a party (permissive intervention).[34] An Attorney General's

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33. MSAPA does not require an agency to hold a hearing, even if an outsider-complainant insists on one. MSAPA §§ 4-101(a)(1)-(2), 4-102(b)(2), 4-103. This seems like the correct call. The preclusion of private prosecution should be subject to specific statutory provisions designed to provide initiation rights to third parties. For example, environmental statutes sometimes explicitly enable third parties to force agencies to hold a hearing. *See also* Bus. & Prof. Code § 24203, which provides that accusations against liquor licensees can be filed by various public officials. Similarly, such a provision could not override constitutional protections of notice and hearing to third persons who suffer deprivation of liberty or property by reason of the agency action. Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979) (adjoining landowner has right to notice and hearing before approval of subdivision of adjacent property); Endler v. Schutzbank, 68 Cal. 2d 162, 65 Cal. Rptr. 297 (1968) (employee harmed by action against licensee-employer has right to a hearing).

Although private prosecution should be precluded, it is important to distinguish the issue of public participation in ongoing proceedings. Once a proceeding has been properly initiated, outsider intervention (and other forms of participation) should be legitimated. See discussion of intervention in Part I.B. [The Prehearing Stage], *supra* at 453.

34. Gov't Code § 11500(b) defines "party" to include any person who has been allowed to appear or participate in the proceeding. However, it gives no

opinion states that there is no right of intervention in non-APA proceedings unless specifically conferred by the legislature,[35] but intervention does exist in numerous non-APA agencies.[36]

It should be emphasized that there are numerous ways, all clearly acceptable under existing law, whereby a person can have an impact on an ongoing adjudication without intervening as a party. The person can file an amicus brief, write a letter to the agency, testify as a witness, or contribute to the fees of a party. These techniques may be sufficient to transmit the person's views without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties.[37]

2. MSAPA. The MSAPA[38] contains detailed provisions on intervention. A presiding officer must grant a petition for intervention (mandatory intervention) if it states facts demonstrating that the petitioner's legal interests may be substantially affected by the proceeding *and* the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.[39] MSAPA also provides

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clue to the standards whereby someone should be allowed to appear or participate. The federal APA is similarly unclear. 5 U.S.C. § 555(b) (1988).

35. 32 Ops. Cal. Att'y Gen. 297 (1959) (protestants to application to Cemetery Board to establish new cemetery are not entitled to intervene; Board may but need not consider their written submissions). *But see* Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979), indicating that adjoining landowners may have a constitutional right to intervene in land use proceedings; Note, 47 Cal. L. Rev. 747 (1959) (criticizing Attorney General opinion).

36. The Public Utilities Commission routinely grants applications to intervene (absent unreasonable broadening of issues) and administers a system of intervenor funding. Pub. Util. Code §§ 1801-1808; 20 Cal. Code Regs. §§ 53, 54, 76.51-76.62. The PUC's Public Adviser's Office does an outstanding job of assisting public interveners. *See* California Public Utilities Commission, Guide for PUC Intervenors (1989). Similarly, intervention is allowed in Insurance Commissioner rate cases (including a system of intervenor funding) and in banking cases. 10 Cal. Code Regs. Arts. 14, 15; 10 Cal. Code Regs. § 5.5005.

37. Agency regulations should spell out these alternatives to intervention.

38. MSAPA § 4-209.

39. MSAPA § 4-209(a).

for permissive intervention: the presiding officer *may* grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.[40]

The presiding officer can place *conditions* on intervention, in order to facilitate reasonable input by intervenors without subjecting the proceedings to unreasonably burdensome or repetitious presentations.[41] The conditions may include limiting the intervenor's participation to designated issues; limiting the intervenor's use of discovery, cross-examination, and other procedures; and requiring two or more intervenors to combine their presentations.[42]

3. Recommendations. The Model Act's approach seems appropriate.[43] It broadly validates the concept of intervention in administrative law by persons (including other government agencies) who want to participate and have something to add because their point of view is being inadequately presented. Yet, regardless of the strength of the applicant's interest in the case, the MSAPA allows

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40. MSAPA § 4-209(b). The new Washington statute is similar, but it combines the provisions for mandatory and permissive intervention into a single standard based on the interests of justice and impairment of the orderly and prompt conduct of the proceeding. Wash. Rev. Code Ann. § 34.05.443 (1990). The new Connecticut statute requires an intervenor to demonstrate that his legal rights, duties or privileges shall be affected by the agency's decision and also requires a demonstration that participation is in the interests of justice and will not impair the orderly conduct of the proceeding. Conn. Gen. Stat. Ann. § 4-177a (Supp. 1991).

41. MSAPA § 4-209 comment.

42. MSAPA § 4-209(c). The Advisory Committee's notes to Federal Rules of Civil Procedure 24 also authorizes a court to condition intervention rights. It seems better to place the authority in the statute itself rather than in the comment. On conditional intervention, see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 752-56 (1968). The Public Utilities Commission, which allows virtually unlimited intervention and apparently unconditional rights for interveners to participate might consider the imposition of conditions on intervention to limit the complexity of its proceedings.

43. In providing for both mandatory and permissive intervention, it loosely parallels the intervention rules in the Federal Rules and in the California Code of Civil Procedure. Fed. R. Civ. P. 24, Code Civ. Proc. § 387.

the presiding officer to balance that interest against the possible negative impact that intervention may have on the proceeding.[44] However, I would suggest a merger of the mandatory and permissive intervention standards; unless a person is entitled to intervene by reason of some other statute, intervention should always depend on the balance of the strength of the intervenor's interest against the impact on the proceedings.[45]

The Model Act makes clear that intervention can be limited to certain issues or that intervenors can be restricted in their participation or may be required to join with similarly situated intervenors. This provision significantly lessens the risk that intervention (especially by multiple parties) can seriously bog down a proceeding. Although not mentioned by the Model Act, it might sometimes be appropriate to limit the participation of or even exclude intervenors from settlement negotiations.

The Model Act correctly rejects any necessary link between intervention and standing to initiate an administrative proceeding or to bring a lawsuit or to seek judicial review; any person can intervene without regard to that person's legal interest.[46] It is important that standing and intervention not become synonymous

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44. Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979), holds that a landowner suffers deprivation of property by reason of approval of a subdivision on adjacent property and is thus entitled to notice and hearing. If *Horn* means that the adjacent landowner has a right to intervene, it could conflict with Section 4-209(a) which allows a presiding officer to refuse intervention based on the balancing of interest standard set out in the statute.

However, due process requires a balancing of the interests of all parties and an assessment of the costs and benefits of the particular form of process sought. Mathews v. Eldridge, 424 U.S. 319 (1976). The Section 4-209 balancing appears consistent with Mathews. Therefore, there should be no absolute right to intervene, even in a *Horn* situation, if intervention would unduly complicate the hearing or delay a decision.

45. See the recently adopted Washington statute discussed *supra* note 40.

46. Some federal cases hold that a person has a right to intervene because that person would have standing to seek judicial review (or that a person cannot intervene unless he meets criteria for standing). *See, e.g.*, National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Note, 1990 U. Ill. L. Rev. 605, 636 (arguing that the two doctrines should be wholly disentangled).

because they present sharply differing policy concerns. Intervention may be refused because it would unduly complicate a proceeding, but at least that proceeding is already ongoing. Granting a person standing to initiate an administrative proceeding or a lawsuit or seek review, on the other hand, allows a proceeding or an appeal to take place that (by hypothesis) otherwise would not take place. Standing to seek review has separation of powers dimensions and is designed to exclude certain cases from the courts. In contrast, intervention should be largely prudential and is intended to include (rather than to exclude) persons who have something to add to litigation.[47]

C. DISCOVERY AND SUBPOENAS[48]

1. Present California law. The present APA contains a limited and exclusive provision for pre-hearing discovery.[49] These statutes codify the landmark case of *Shively v. Stewart*[50] in which Justice Traynor created a common law right of discovery in license revocation proceedings that parallels criminal discovery.[51]

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47. However, in some situations, there is a necessary link: if judicial review is limited to those who were "parties" to the administrative proceeding, a denial of intervention would be tantamount to barring the person from seeking review. In such situations, it is important for an agency to permit intervention. By the same token, a person that has been allowed to intervene as a party at the administrative level normally should have standing to seek review of the agency decision.

48. This report does not address agency investigatory techniques, including investigatory hearings, inspections, warrant requirements, or defenses against judicial enforcement of investigatory subpoenas. *See* Gov't Code §§ 11180 *et seq.*; Craib v. Bulmash, 49 Cal. 3d 475, 261 Cal. Rptr. 686 (1989) (required records doctrine).

49. Gov't Code §§ 11507.5 (exclusive method of discovery), 11507.6 (what is discoverable), 11507.7 (petition to compel discovery), 11511 (deposition of witness who will be unable or cannot be compelled to attend hearing). *See* State v. Superior Court, 16 Cal. App. 3d 87, 93 Cal. Rptr. 663 (1971) (post-hearing discovery not permitted).

50. 65 Cal. 2d 475, 55 Cal. Rptr. 217 (1966).

51. *Shively* involved revocation of the licenses of physicians alleged to have performed illegal abortions. The Court held that respondents had a common law right to discovery of the statements of the women and their husbands describing

Discovery under the APA occurs upon a written request by any party to another party made prior to the hearing and within 30 days after service of the initial pleading.[52] Any party is entitled to obtain from any other party the names and addresses of witnesses known to the other party[53] and to inspect and make a copy of any of the following:[54]

(a) Statements[55] of persons named in pleadings when it is claimed that the respondent's act or omission as to such person is the basis for the administrative proceeding;
(b) Statements pertaining to the subject matter made by any party to another party or person;

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their care. They also had a right to copies of their own bills, letters and documents with respect to that treatment. Although they could not simply subpoena all other reports and documents gathered by the Board's investigators, they could take the depositions of the Board's attorney and executive secretary to determine whether there was good cause for the production of other documents that would not be privileged or work product. *See also* Nightingale v. State Personnel Bd., 7 Cal. 3d 507, 518, 102 Cal. Rptr. 758 (1972) (interrogatories did not meet good cause standard). Earlier the Supreme Court had applied the civil discovery rules to attorney discipline matters, stating these were *sui generis.* Brotsky v. State Bar, 57 Cal. 2d 287, 300-02, 19 Cal. Rptr. 153 (1962).

The *Shively* case seems to follow logically from Jencks v. United States, 353 U.S. 657 (1957) (although not its subsequent codification). *Jencks* required the prosecution in a federal criminal case to provide to the defense all prior statements by prosecution witnesses in the possession of the prosecution. The *Horn* rule does not extend to the taking of depositions or interrogatories since these devices are not part of criminal discovery. Everett v. Gordon, 266 Cal. App. 2d 667, 72 Cal. Rptr. 379 (1968).

52. Gov't Code § 11507.6, first sentence. The request can also occur 15 days after service of an additional pleading.

53. Including but not limited those intended to be called to testify at the hearing.

54. The statute protects legal privileges including work product. Gov't Code § 11507.6 (last sentence).

55. For this and other purposes under Section 11507.6, a "statement" includes a written statement signed by the person making it, a recording or transcript thereof of oral statements, or written reports or summaries of such oral statements.

(c) Statements of witnesses proposed to be called by the party or of other persons having personal knowledge of the matter;
(d) All writings (including mental, physical, and blood examinations) and things that the party proposes to offer in evidence;
(e) Any other writing or thing that is relevant and would be admissible in evidence;
(f) Investigative reports.[56]

The APA then provides a detailed scheme for the enforcement of discovery requests through a petition to the superior court.[57] Another provision provides for depositions from any material witness who will be unable or cannot be compelled to attend, including a witness residing outside the state.[58]

Some non-APA agencies provide a discovery practice.[59] It is unclear whether the *Shively* case would require non-APA agencies

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56. Gov't Code § 11507.6.

57. Gov't Code § 11507.7. *See* CEB, *supra* note 4, §§ 2.61-2.71; Ogden, *supra* note 29, § 32.06, 32.08. Failure to utilize this procedure waives rights of discovery. Lax v. Board of Medical Quality Assurance, 116 Cal. App. 3d 669, 172 Cal. Rptr. 258 (1981).

58. Gov't Code § 11511. Unlike the other discovery and subpoena provisions, the right to take the deposition of an unavailable witness is discretionary with the agency which must decide whether the witness' testimony would be "material." The constitutionality of this provision was questioned in Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986), *hearing denied.* The court was troubled that a prosecutor could decide what evidence a party would later be able to present before an ALJ. The court reluctantly upheld the provision, based on separation of powers precedents, and, more importantly, because the decision would ultimately be reviewable under an independent judgment standard.

59. State Bar disciplinary proceedings employ the full panoply of civil discovery. State Bar Rule 315. Civil discovery rules apply to termination of permanent teachers. Educ. Code § 44944. Workers compensation practice includes depositions and required medical examinations. Lab. Code §§ 4050-4055, 5710. The State Personnel Board must allow employees against whom adverse action is taken to inspect any relevant documents possessed by the appointing authority and to interview other employees having knowledge of the acts or omissions on which the adverse action was based. Gov't Code §§ 19574.1, 19574.2. Depositions and interrogatories can be ordered in the discretion of an Unemployment Insurance Appeals Board ALJ; also the Department of Employment is required to make its files available to a claimant. Unemp. Ins. Code § 1953; 22 Cal. Code Regs. § 5038(d); 5040, 5041(e). I am

to provide for discovery of witness lists and documents. To the extent that an agency proceeding that is not covered by the existing APA entails a fact-based determination and a remedy with serious repercussions for a private party (such as denial of a license, disapproval of a merger, loss of livelihood, or a civil penalty), it might be expected that the courts would follow *Shively*.

The APA also provides for the automatic issuance of pre-hearing subpoenas and subpoenas duces tecum at the request of any party.[60] During the hearing, however, the issuance of subpoenas is discretionary with the ALJ. The process extends to all parts of the state.[61]

2. Model Act. The MSAPA provisions on discovery and subpoenas appear to merge agency procedures with those of courts in civil litigation. The Act provides alternative versions, leaving states to

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informed that depositions and data requests are extensively used in Public Utilities Commission practice but the PUC rules say nothing about discovery. *See* Pub. Util. Code § 1794 (providing that a commissioner or any party may take a deposition). In insurance rate cases arising under Proposition 13, "discovery shall be liberally construed and disputes determined by the ALJ." Ins. Code § 1861.08.3. The discovery regulations of the Superintendent of Banks are patterned on the APA model. 10 Cal. Code Regs. § 5.5104.

60. Gov't Code § 11510. The standards of Code Civ. Proc. Sections 1985, 1985.1, and 1985.2 relating to subpoenas duces tecum and protections of privacy must be complied with. As to non-APA agencies, the Public Utilities Commission provides for subpoenas issued in blank. 20 Cal. Code Regs. Art. 15. The Department of Social Services in benefit cases provides for subpoenas requiring the presence of any witness whose expected testimony has been shown to be relevant and not cumulative or unduly repetitious. DSS Rule § 22-051.4. However, I was informed that DSS ALJs in welfare or MediCal cases are extremely reluctant to compel doctors to attend a hearing. The issuance of subpoenas is discretionary with the ALJ in appeals heard by the Unemployment Insurance Appeals Board. Unemp. Ins. Code § 1953; 22 Cal. Code Regs. § 5030(c). The Coastal Commission is not empowered to issue subpoenas.

61. Gov't Code § 11511.5. *See* Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, 95-103 (conference becomes discovery device where parties exchange witness lists and evidentiary exhibits). The prehearing conference is discussed in Part I.D. [The Prehearing Stage], *supra* at 453.

decide whether the issuance of discovery orders and subpoenas are automatic or discretionary with the presiding officer.[62]

3. Recommendations

a. Civil discovery rules. The main issue that the Commission should consider is whether to require some or all agencies to adopt the civil discovery rules, particularly those providing for depositions and written interrogatories.[63] I believe this would be a mistake. Civil discovery has become a long, tedious and costly process; perhaps prodded by possible malpractice exposure, attorneys feel that they must do exhaustive discovery in every case in which the client can pay for it. While the extensive use of depositions and interrogatories no doubt is effective in preventing surprises, encouraging settlement, and clarifying the issues to be tried, the costs may well outweigh the benefits. And unfortunately discovery is sometimes misused to exhaust an opponent, run up bills, or delay an ultimate resolution.[64]

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62. MSAPA § 4-210. The Comment observes that discovery and subpoena rights of interveners can be limited. See *supra* text accompanying note 42. The federal APA allows ALJs to permit depositions to be taken when the ends of justice would be served, § 556(c)(4), and permits agency rules to condition the issuance of subpoenas on a showing of general relevance and reasonable scope of the evidence sought, § 555(d).

63. An early recommendation of the Administrative Conference favors adoption by federal agencies of most of the discovery provisions in the Federal Rules, although with numerous modifications and provisions for agencies to tailor the rules to their own situation. *See* Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, which discusses the ACUS recommendation in detail. The Florida APA adopted civil discovery rules. Fla. Stat. Ann. § 120.58(1)(b) (West Supp. 1991). *See also* Comment, *Discovery in State Administrative Adjudication*, 56 Cal. L. Rev. 756 (1968) (urging adoption of discovery in range of adjudications); Comment, *Discovery Prior to Administrative Adjudications — A Statutory Proposal*, 52 Cal. L. Rev. 823 (1964) (suggesting flexible provision whereby ALJ in any agency could order appropriate discovery).

64. The empirical support for these assertions comes from accounts of those in the trenches. See *A Report on the Conduct of Depositions*, 131 F.R.D. 613 (1990); *Putting the Rocket in the Docket*, 76 A.B.A.J. 32 (Oct. 1990); *Discovery*, 15 Litigation 7 (Fall, 1988); Solovy & Byman, *Hardball Discovery*, *id.* at 8; Stein, *The Discoverers*, *id.* at 46; *Judges Identify Causes of Delay in Civil Litigation*, 14 Litigation News 3 (Dec. 1988) (survey of state and federal judges

Administrative adjudication was always intended to be quicker, simpler, more informal, and cheaper than litigation in court. The public interest demands that agency adjudication move as rapidly as possible, consistent with due process, and without undue technicality. Moreover, every California agency now experiences budget stringency and the Commission should be wary of recommending anything that would increase agency costs, increase the duties of agency enforcement staff or ALJs, require additional rulings before the hearing by ALJs or by courts, delay proceedings, or provide technical bases for reversal on judicial review. In my view, discovery would increase the costs of all sides — both respondents and agencies — and markedly delay the resolution of cases.[65] For example, lawyers for agencies or the Attorney General would have

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indicates that discovery abuse is most important cause of delay in civil litigation); Sherman & Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 246 (1983); Brazil, *The Adversary Character of Civil Discovery*, 31 Vand. L. Rev. 1295 (1978). *See also* Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2031-43 (1989) (attempts to limit discovery abuse in federal cases).

Contrary evidence comes from two empirical studies that concluded that discovery was not abused over a broad range of routine cases. However, the conclusions may be dated. Trubek *et al., The Costs of Ordinary Litigation*, 31 UCLA. L. Rev. 72, 89-90 (1983) (using 1978 data); Rosenberg, *The Impact of Procedure-Impact Studies on the Administration of Justice*, 51 Law & Contemp. Probs. 13, 25-27 (Summer 1988) (discussing study that used 1962 data).

65. An example is the apparently simple discovery statute applicable to the State Personnel Board. Gov't Code §§ 19574.1-19574.2. This provision allows employees to inspect relevant documents and interview other employees with knowledge of the events leading to an adverse action. Yet my interviews indicate that this section has caused protracted discovery disputes and delayed hearings. The problem, especially in disparate impact cases, is that the employee wants to inspect more documents than the appointing agency is willing to disclose. Also there are numerous disputes about evidentiary privileges. Similarly, I was told by Public Utilities Commission ALJs that discovery practice there has consumed large amounts of their time and effort.

Depositions seem well accepted in workers compensation practice. Note, however, that the dispute is between the employee and an insurance company; agency personnel need not be present. While deposition practice may be costly to the compensation system as a whole, at least the adjudicating agency does not have to pay those costs.

to sit through lengthy depositions of witnesses and would have to answer interrogatories. In addition, discovery would unduly favor respondents represented by counsel over unrepresented ones.

Yet the benefits of moving from the existing system of discovery to the civil system are dubious. Respondents already get to see witnesses statements in APA cases. And respondents are themselves in possession of a good deal of information about the events in question.[66] Perhaps discovery would help parties prepare better for trial, avoid surprising testimony from witnesses, and marginally improve the accuracy and fairness of the process. Nevertheless, the benefits are only incremental, since the existing system reveals most relevant information. Yet this change would carry heavy efficiency costs and has the potential, in the hands of a well-heeled litigant, to tie an agency in knots. Administrative discovery may be an example of the familiar motto that the best is the enemy of the good.

b. Non-APA agencies. As mentioned above, some non-APA agencies do provide for rudimentary discovery and some provide for a system that approximates the civil litigation model. However, even APA-style discovery of documents in the agency's file or other rudimentary techniques might be inappropriate or unnecessary in some of the adjudicative matters that would be covered by a revised APA. Consequently, I propose that the existing APA provisions continue to be applicable to agencies required to use OAH ALJs. These agencies could provide, by rule, for greater discovery rights than are provided by the present APA but not less. Moreover, the APA procedures would also apply to all other agency adjudication covered by the new Act unless the agency provides for a different scheme (or for no discovery at all) in regulations.[67]

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66. Moreover, as discussed below, respondents have subpoena duces tecum power. I suggest below that this discovery device be expanded so that the subpoenaed documents are available before the hearing. This will make them more useful for trial preparation.

67. This provision would not pre-empt statutes calling for a different discovery scheme, as in the case of workers' compensation or insurance commission ratemaking.

Similarly, the automatic subpoena provision in the APA[68] should continue to be applicable to all agencies required to use OAH ALJs. It should also be treated as a default provision; it will apply to other agencies that have a statutory subpoena power unless their rules provide a different approach.[69] However, all adjudicating agencies should have a subpoena power.[70]

c. Revisions in the APA. I suggest only a few minor revisions in the existing APA provisions. The existing provision for subpoenas duces tecum provides that the subpoenaed materials or documents will be available only at the hearing itself.[71] Private lawyers have complained that this gives them inadequate time to prepare; it may also require a continuance to be granted.[72] The agency, of course, has broad power to compel depositions and subpoena documents at

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The new Washington statute, which is modeled in large part on MSAPA, takes a slightly different approach. It allows agency rules to determine discovery rights but, unless otherwise provided in such rules, the presiding officer may decide whether to permit the use of all civil litigation discovery techniques. The statute provides guidance to the presiding officer for the exercise of such discretion. Wash. Rev. Code Ann. § 34.05.446(2)-(4) (1990). I did not follow this model because of concern that it would impose a substantial extra burden on ALJs, particularly since an ALJ may not have been designated at the time that the parties engage in discovery.

68. Gov't Code § 11510.

69. Thus agencies could provide that subpoenas will not issue unless the party seeking them first establishes the relevance of the evidence sought. Or it could have different standards for subpoenas compelling the attendance of witnesses and subpoenas duces tecum.

70. The Coastal Commission lacks subpoena power at present.

71. Gov't Code § 11510(a); Gilbert v. Superior Court, 193 Cal. App. 3d 161, 238 Cal. Rptr. 220 (1987).

72. Letter from Kenneth L. Freeman to California Law Revision Commission (Jan. 16, 1991). Freeman explained that in some cases the documents provided by the agency under Section 11507.6 are incomplete; the complete records can only be obtained from witnesses by the use of a subpoena duces tecum. Yet these materials would be available only at the hearing itself which provides inadequate time to analyze them before using them in the examination or cross examination of witnesses. Similarly, a party's expert witnesses do not have adequate time to prepare if they cannot review documents in advance of the hearing.

any time as part of its investigatory powers,[73] so there is a considerable discrepancy between the powers of the two sides.

I suggest that the successor to Section 11510 permit subpoenas duces tecum that require documents to be produced at any reasonable time and place, rather than only at the hearing.[74] This should not pose any additional burden to persons who must supply documents; they must simply supply them earlier than is presently the case. Nor would it burden the agency or its staff; it would not expand a party's discovery rights against the agency. If the subpoena is not honored, the party who issued it should be able to petition for judicial relief under the same provision presently used to compel discovery.[75]

Another minor change concerns the existing APA provision that concerns depositions of witnesses who will be unavailable to testify at the hearing.[76] The agency can refuse to authorize such depositions upon a finding that the testimony would not be material. A recent case questioned the fairness and constitutionality

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73. Gov't Code § 11180 *et seq.*; Brovelli v. Superior Court, 56 Cal. 2d 524, 15 Cal. Rptr. 630 (1961).

74. This proposal is similar to an Administrative Conference Recommendation. *See* Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, 124-39. It would thus convert the subpoena duces tecum provision into a discovery tool. Therefore, Section 11507.5 should be correspondingly amended (it states that Section 11507.6 is the exclusive discovery provision).

75. Gov't Code § 11507.7. Alternatively, the contempt provision in Gov't Code § 11525 could be amended to permit respondents to seek enforcement of the subpoena in the superior court. *See* Gilbert v. Superior Court, 193 Cal. App. 3d 161, 238 Cal. Rptr. 220 (1987) (requester of subpoena can petition for enforcement).

Such judicial enforcement provisions might be abused to achieve delay of a hearing. I can imagine a situation in which the recipient of a subpoena duces tecum might refuse to supply documents so that the issuer of the subpoena would have to seek judicial enforcement, and the pendency of the enforcement proceeding could be used as an excuse for continuing the hearing before the ALJ. Therefore, it should be provided that the pendency of a judicial enforcement action against a party other than the agency itself would not be good cause to continue the hearing. *See* Gov't Code § 11524(a). If the subpoenaed material has not yet been produced, it would have to be produced at the hearing as under present law.

76. Gov't Code § 11511.

of this provision where the decision denying the application was made by an adversary.[77]

One approach to the issue would be to give any party an automatic right to take the deposition of a party who will be unavailable to testify. However, such a provision might be abused since the recipients of the subpoena might be unsophisticated and submit to the deposition even though they would be available at the hearing. Probably the ability to take a pre-hearing deposition should continue to be discretionary, but the decision whether to allow the deposition should be made by an ALJ, if one has been assigned, or by an agency staff member or agency head who has not been involved in the case as an adversary.

There should be a clear provision whereby the recipient of a subpoena can move before an ALJ to quash it, whether issuance of the subpoena was mandatory or discretionary with the agency.[78] There is some doubt about whether an agency has the power to quash its own subpoena that was issued as a matter of right;[79] this doubt should be removed. It should also be made clear that any party who has issued a subpoena can petition the court for enforcement (the statute suggests that only the agency can do so).[80] Prior to any recourse to a court arising out of a discovery dispute, the parties must make a good faith attempt to resolve the matter.[81] Finally, the

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77. Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 290, 226 Cal. Rptr. 339 (1986), *hearing denied* (decision made by senior corporation counsel who also was chief prosecutor).

78. For example, the Public Utilities Commission regulations provide for such a proceeding. 20 Cal. Code Regs. § 61. *See also* Florida APA, Fla. Stat. Ann. § 120.58(2) (West Supp. 1991) (any person on timely petition may request hearing officer to invalidate subpoena on ground it was not lawfully issued, is unreasonably broad in scope, or requires production of irrelevant material).

79. CEB, *supra* note 4, § 2.96.

80. Gov't Code § 11525; Gilbert v. Superior Court, 193 Cal. App. 3d 161, 167, 238 Cal. Rptr. 220 (1987) allows the requester to go directly to court despite the literal language of the statute. The result of the Gilbert case should be confirmed.

81. *See* Code Civ. Proc. § 2025(i): Motion for a protective order shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

statute providing that a person who fails to respond to a subpoena can be held in contempt should be clarified so that the person has the opportunity to respond after the court has upheld the subpoena.[82]

D. PREHEARING CONFERENCE

1. Present California law. As amended in 1986, the APA provides for a prehearing conference to be held on motion of either party or by order of the ALJ.[83] The conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities
(2) Preparation of stipulations
(3) Clarification of issues
(4) Rulings on identity and limitation of the number of witnesses
(5) Objections to proffer of evidence
(6) Order of presentation of evidence and cross-examination
(7) Rulings regarding issuance of subpoenas and protective orders
(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.
(9) Any other matters as shall promote the orderly and prompt conduct of the hearing.

The ALJ shall issue a prehearing order incorporating the matters determined at the prehearing conference (or direct one or more of the parties to do so).

Some non-APA agencies also employ prehearing conferences.[84]

2. Model Act. MSAPA contains detailed provisions on prehearing conferences.[85] It permits the prehearing conference to be converted directly into a conference or a summary hearing, thus

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82. The language of Gov't Code Section 11525 implies that a person might be automatically in contempt for refusing to comply with the subpoena if the court upholds the subpoena. A better model is Gov't Code Section 11188.

83. Gov't Code § 11511.5.

84. These include the Public Utilities Commission, Water Resources Control Board, and State Personnel Board.

85. MSAPA §§ 4-204, 4-205.

obviating any further hearing.[86] It makes clear that a party who fails to attend or participate in the prehearing conference may be held in default. It also states that the presiding officer can conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant has an opportunity to participate in the proceeding.

3. Proposals. The prehearing conference now provided for by the APA is an excellent innovation.[87] It is generally presided over by the same ALJ who will conduct the hearing, so that it is an efficient case management device. It should speed up the actual hearing by clearing away procedural issues in advance. Thus the prehearing conference should continue to be required in hearings presided over by OAH ALJs. It should also constitute the default provision applicable to all agency adjudication unless an agency adopts regulations dispensing with it or changing it.

I have a few suggestions for improvement of the APA provision. First, the provision in the MSAPA allowing the prehearing conference to occur by electronic means, such as a conference telephone call, seems like a good idea. It must be a hardship for respondents and their counsel who live in remote parts of the state to come to a prehearing conference. Second, the MSAPA makes clear that a party must attend a prehearing conference or be found in default; this also seems like a good idea and should be part of the California act. Third, the prehearing conference could serve as an informal discovery technique. Therefore, the ALJ should be permitted to require an exchange of witness lists and of evidentiary exhibits.[88] Finally, if the Law Revision Commission decides to

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86. Conference and summary hearings are discussed in Part III.E., *infra* at 519, 523.

87. *See* 3 K. Davis, Administrative Law Treatise § 14.8 (1980).

88. *See* Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89, 95-103. Tomlinson suggests that the ALJ have power to issue orders to protect a witness from intimidation.

There is a possible conflict between the discovery provision of the APA, discussed previously, and the suggestion that provision for exchange of witness lists and of exhibits that can be required at the prehearing conference. The discovery provisions contain strict time limits. If a party has not availed itself of

adopt various informal hearing models (such as conference hearings), the MSAPA provision that allows a prehearing conference to be converted directly into a conference hearing seems appropriate, so long as the parties are given notice that such can occur.

E. DECLARATORY ORDERS

Persons subject to the regulatory authority of administrative agencies frequently need reliable advice about the application to them of the agency's enabling statute, its rules, or its case law.[89] They need this information for planning purposes, even though there is no pending administrative proceeding (such as an accusation or an application) involving them. Generally, they can get sufficiently reliable advice simply by asking agency staff for it and receiving a written advice letter. However, if the issue is uncertain the staff may be unwilling to provide such guidance, and, in any event, the reliability of the letter is not absolutely assured. Therefore, such persons sometimes need a more binding expression of the agency's views about the issue.

In the judicial system, this requirement is satisfied by the declaratory judgment procedure. A declaratory order is the administrative law equivalent of a declaratory judgment.[90] Essentially, a declaratory order petition asks an agency to declare how the law would apply to assumed facts. Therefore, no hearing is necessary since the facts are stated in the petition.[91] The declaratory order has the same legal effect as any other adjudicatory order. Thus it is res judicata and the order (or an agency refusal to issue an order) is

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discovery within those time periods, it should not be permitted to use the prehearing conference as a substitute. The pre-hearing conference should not be a substitute for statutory discovery and should be limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

89. *See* M. Asimow, Advice to the Public from Federal Administrative Agencies (1973).

90. *See generally* Bonfield, *The Iowa Administrative Procedure Act,* 60 Iowa L. Rev. 731, 805-24 (1975).

91. The conference hearing format discussed in Part III.E would be appropriate to resolve declaratory order cases. See *infra* at 519.

subject to judicial review. Modern APAs generally contain a provision authorizing declaratory orders[92] and I suggest that the California APA follow suit.

1. Model Act. Because the concept was virtually unknown in 1945,[93] there is no declaratory order provision in the California APA.[94] The federal APA contains a skeletal provision on declaratory orders that makes their issuance wholly discretionary with the agency.[95] The 1981 MSAPA contains a provision that reflects modern thinking on the subject.[96] Essentially that provision requires the agency to issue a declaratory order[97] unless the agency's rules provide that no such order will be issued in that particular class of circumstances.[98]

2. Proposals. I suggest that California adopt a provision for declaratory orders that parallels the MSAPA approach. As under MSAPA, an agency's rules concerning declaratory orders must permit third party intervention, but otherwise can make the various adjudicatory provisions of the Act inapplicable. For example,

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92. *See, e.g.*, Conn. Gen. Stat. Ann. § 4-176 (1991 Supp.); Fla. Stat. Ann. § 120.565 (West Supp. 1991); Bonfield, note 90 (Iowa statute); Wash. Rev. Code Ann. § 34.05.240 (1990) (leaving issuance of orders discretionary with agency).

93. By then, however, the judicial declaratory judgment was well recognized. See Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933).

94. The absence of a provision in the existing statute raises the question of whether agencies can issue binding declaratory orders absent statutory authority. Scholarly opinion is that they can; the power is implied from the power to adjudicate. *See* Asimow, *supra* note 89, at 121-22.

95. The federal APA, 5 U.S.C. § 554(e) (1988), provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." *See* Comment, *Declaratory Orders — Uncertain Tools to Remove Uncertainty,* 21 Admin. L. Rev. 257 (1969).

96. MSAPA § 2-103.

97. Unless the declaratory order would substantially prejudice the rights of another person who has not consented to the proceeding. MSAPA § 2-103(a).

98. MSAPA § 2-103(b). The recently adopted Washington and Connecticut statutes largely track MSAPA but do not make the issuance of a declaratory order mandatory. Conn. Gen. Stat. Ann. § 4-176(e) (Supp. 1991); Wash Rev. Code § 34.05.240 (1990).

cross-examination is unnecessary since the petition establishes the facts on which the agency should rule. Oral argument could also be dispensed with. The rules should also provide all necessary procedural details, including a suggested form for a declaratory ruling petition. The rules should require a clear and precise presentation of facts, so that the agency will not be required to rule on the application of law to unclear or excessively general facts. If the facts are not sufficiently precise, the agency's rule should make clear that the agency can require additional facts or a narrowing of the petition.

One argument against providing for declaratory orders (especially a mandatory provision like the one in 1981 MSAPA) is that it could pose an additional burden for agencies. Moreover, the burden would be difficult to anticipate; an agency can largely control its own caseload by deciding how many accusations to issue but it could not control petitions for declaratory orders (except by adopting rules that preclude such orders in designated classes of cases). However, the burden on the agency of issuing the order is not severe because no trial is involved; there need be no proceeding before an ALJ. The matter can simply be resolved by briefs and oral argument, so the burden should not be substantial. And if a particular situation is generating an unmanageably large demand for declaratory orders, that situation could be placed off limits by the rules. Or the Commission may decide to handle the problem by leaving the issuance of declaratory orders discretionary, as was done in several recently adopted statutes.[99]

Another argument against declaratory orders is that they may allow requesters to find out exactly where the line is located between legal and illegal conduct, so they can skate to the edge of what is legally permissible. Agencies may believe that it is desirable to maintain a certain ambiguity about what is legal. In general, I disagree; if it is possible to state clearly where the line is located, people are entitled to know this. If this knowledge permits people to engage in undesirable behavior, the rule should be changed to move the line. In any event, however, if the agency does not wish

99. See *supra* note 98.

to provide guidance on a particular point, for this or any other sound reason, it can so declare in its rules and then decline declaratory order requests.

The arguments against a declaratory order provision are not persuasive. In light of the utility of the procedure to private parties who need absolutely reliable guidance on legal questions, I recommend adoption of a provision similar to the MSAPA provision on declaratory orders.[100]

F. CONSOLIDATION AND SEVERANCE

The existing APA contains no provisions allowing agencies to consolidate related cases or to sever a single case that could be more economically handled in several parts, although I understand that ALJs have assumed they had such power. Some agencies have regulations allowing consolidation.[101] The consolidation and severance provisions in the Code of Civil Procedure[102] are virtually identical to those in the Federal Rules.[103] It has been suggested that such provisions should appear in a new APA, so that a presiding officer can require either consolidation or severance of cases to promote efficient decisionmaking or avoid prejudice.[104]

One well established administrative law principle that requires consolidation concerns "comparative hearings": application cases should be heard together when they are competitive and fewer than all can be granted.[105] With appropriate modifications of terminol-

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100. The comment should point out that agencies have power to issue declaratory orders even without statutory authority to do so. See *supra* note 94. Otherwise, the enactment of this provision might be interpreted to deny that power to agencies or to adjudications that are not covered by the new APA.

101. The Public Utilities Commission and Unemployment Insurance Appeals Board have consolidation rules. 20 Cal. Code Regs. § 55 (cases with common questions of law or fact can be consolidated); 22 Cal. Code Regs. § 5032 (any number of cases can be joined to dispose of all of the issues).

102. Code Civ. Proc. § 1048.

103. Fed. R. Civ. P. 42.

104. Letter from Gregory L. Ogden to Michael Asimow (Feb. 26, 1990).

105. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). In Bostick v. Martin, 247 Cal. App. 2d 179, 55 Cal. Rptr. 322 (1966), *hearing denied*,

ogy to adapt it to administrative law, the consolidation-severance provision in the Code of Civil Procedure should work well. These provisions should be broad enough so that related cases brought before several agencies could be consolidated into a single proceeding[106] and so that class action procedures can be employed in the agency's discretion.[107]

G. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

1. The ADR movement. In both civil litigation and in all facets of administrative law, the alternative dispute resolution (ADR) movement has won powerful support.[108] The legislature has broadly declared support for ADR at all levels of dispute resolution, including local government and administrative agencies.[109]

Virtually everyone agrees that mechanisms should be in place to facilitate and encourage settlement of many kinds of disputes. A negotiated settlement is far preferable in most situations to the costly, slow, zero-sum and emotionally exhausting process of

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applications of two competing savings and loans were heard comparatively. This approach was approved by the appellate court.

106. *See* Ogden, *supra* note 29, § 33.02[1][a] (filing of fraudulent MediCal claims by physician could trigger proceedings before both Department of Health Services and Board of Medical Quality Assurance).

107. *See* Ramos v. County of Madera, 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421 (1971) (no provision for class actions in welfare statutes); Rose v. City of Hayward, 126 Cal. App. 3d 926, 935-37, 179 Cal. Rptr. 287 (1981) (APA does not authorize class actions).

108. The ADR movement is the subject of a vast literature. *See, e.g.,* Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution (1987), which is over 1000 pages long. Shannon, *The Administrative Procedure and Texas Register Act and ADR,* 42 Baylor L. Rev. 705 (1990) summarizes state law developments. The details of the different techniques of ADR, or of the procedures of any given federal or state agency, are beyond the scope of this report. My purpose is to validate ADR in administrative adjudication and to require agencies to establish mechanisms so that it can evolve.

109. Bus. & Prof. Code Section 465(d) declares "Courts, prosecuting authorities, law enforcement agencies, and administrative agencies should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved."

adjudication and judicial review. In this era of backlogged dockets, staggering litigation costs on both the private and public side, and diminishing resources available to agencies, ADR takes on enhanced importance. Agencies and private attorneys cannot be compelled to develop a culture that favors settlement over adversary struggle, but an APA can help by legitimating various ADR techniques (so that their legality cannot be questioned) and encouraging agencies to put in place feasible mechanisms to facilitate settlements.[110]

In 1990, Congress amended the federal APA in order to require agencies to explore and utilize ADR techniques in all agency functions, including adjudication and rulemaking.[111] The federal APA now empowers a presiding officer to use ADR techniques and to require the attendance of parties at settlement conferences. It also requires the presiding officer to inform the parties as to the availability of ADR techniques and to encourage their use.[112] In addition, the statute authorizes and encourages agencies to use the whole range of ADR techniques: settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration.[113] The statute makes clear that these techniques are voluntary

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110. In the civil litigation system, court-ordered arbitration and settlement conferences are now routine. *See, e.g.*, Fed. R. Civ. P. 16 (providing for sanctions for refusal to participate in good faith in settlement conferences). Federal judges have pioneered numerous other ADR strategies including various forms of mediation and minitrials.

111. Administrative Dispute Resolution Act, Pub. L. No. 101-552. The Act is concisely summarized in S. Rep. 101-543, 6 U.S.C.C.A.N. 3931 (1990). The Act requires agencies to appoint a dispute resolution specialist and provide training for all employees engaged in implementing an ADR program. Pub. L. No. 101-552, § 3(b). It provides for confidentiality of communications made in the course of ADR proceedings. 5 U.S.C. § 574 (Supp. V 1993). In 1990, Congress also passed a related piece of legislation, the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, to foster ADR techniques in rulemaking.

112. 5 U.S.C. § 556(c)(6)-(8) (Supp. V 1993).

113. The most detailed provisions concern arbitration. 5 U.S.C. §§ 575-581 (Supp. V 1993). To allay constitutional concerns, the head of an agency is authorized to terminate an arbitration proceeding after the arbitrator makes an award but before it becomes final.

and not always appropriate (for example, where an authoritative resolution of a matter is required to establish a precedent).[114]

At the federal level, even before the 1990 adoption of the Alternate Dispute Resolution Act, much had been done to encourage and facilitate negotiation, mediation, and arbitration.[115] The 1990 statutory amendments should greatly accelerate this trend. Elaborate mediation structures are already in place and a variety of creative mediation techniques have been developed, including factfinding and minitrials.[116]

The California APA contains a provision for prehearing conferences, one purpose of which is "exploration of settlement possibilities."[117] The prehearing conference should be strengthened and made universally applicable,[118] but it has limitations as a case settlement device. If the ALJ who conducts the prehearing conference is the same person who will conduct the hearing, the judge can do relatively little to mediate the dispute or push the parties toward settlement without compromising judicial impartiality or receiving ex parte contacts.

I am informed that OAH will, on request and in relatively lengthy cases, make a settlement judge available.[119] My information is that this judge can be quite effective in causing the parties to reevaluate their positions and move toward settlement. Several

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114. 5 U.S.C. § 572(b) (Supp. V 1993).

115. Various Administrative Conference resolutions were instrumental in encouraging ADR. *See* 1 C.F.R. § 305.86-3, 87-11, 88-5. *See generally* Pou, *Federal Agency Use of "ADR": The Experience to Date*, in Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 101-13 (1987); Smith, 1984 Mo. J. Disp. Resol. 9.

116. It is important to establish a system of mediator confidentiality, insofar as this is legally possible. *See* Harter, *Neither Cop nor Collection Agent: Encouraging Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315 (1989) (this article has a good discussion of EPA's successful mediation in Superfund cases).

117. Gov't Code § 11511.5(b)(1); *see also* 20 Cal. Code Regs. § 51.1(b) (PUC settlement conferences).

118. See Part I.D. [The Prehearing Stage], *supra* at 453.

119. The State Personnel Board also makes settlement judges available.

federal agencies also make settlement judges available routinely, with excellent results.[120]

Apparently a deterrent to settlement of cases under the APA is that only the agency heads have the authority to approve a settlement; a deal negotiated by the parties, perhaps with the help of a settlement judge, cannot be finalized until it is passed on by the agency heads. No other agency staff has authority to agree to a settlement.

2. Proposals. The APA should contain a variety of provisions that will clearly validate ADR techniques and will encourage agencies to create routine mechanisms to encourage settlement. I suggest the following:

a. The statute should make clear that administrative adjudicatory disputes can be settled upon any terms the agency and the parties deem appropriate,[121] before or after an accusation is issued.[122] The

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120. See ACUS Rec. 88-5, 1 C.F.R. § 305.88-5; Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 Admin. L.J. 571 (1989-90). Joseph & Gilbert discuss the well established practice at FERC and OSHRC employing settlement judges. One disadvantage of settlement judges, aside from the fact that assignment of judges to settlement takes them away from trying cases, is the fact that the judge's efforts to settle one case might be viewed as compromising the judge's impartiality when later trying a similar case or one involving some of the same parties.

121. *See* Rich Vision Centers, Inc. v. Board of Medical Examiners, 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983), *hearing denied*. This case holds broadly that a licensing agency has implied power to settle cases, including an agreement that imposes the agency's litigation and investigation costs on the licensee. The *Rich Vision* decision was a case of first impression and it would be desirable to codify the result.

Of course, such a provision would be precluded by more specific legislation. Workers' compensation settlements must be approved by the Board or a workers' compensation judge. *See* Lab. Code § 5001; California Workers' Compensation Practice, ch. 13 (Cal. Cont. Ed. Bar 1985).

122. Present law may be unclear as to whether an agency can settle a licensing case without filing an accusation. *See* Cooper, *Resolving Real Estate Disciplinary Matters Prior to Hearing*, 47 Cal. St. B.J. 331, 363 (1972). I am told that agencies are reluctant to settle a case before an accusation is filed, lest they be accused of concealing serious wrongdoing. My feeling is that settlements should be facilitated; if a dispute can be settled by an agreement satisfactory to all sides before a complaint is issued, so much the better.

statute should also empower agencies to delegate the power to approve settlements.[123]

b. Unless agency rules otherwise provide, an agency should put in place a system of settlement judges, whereby a judge of comparable status to the judge who will hear the case will be made available to help mediate a settlement. A settlement judge should be routinely assigned on request of either party or by decision of the chief ALJ of the agency. The chief ALJ should decide, in each case, whether the proceeding is suspended pending termination of settlement negotiations. The agencies should have power to impose sanctions on parties that fail to participate in good faith in settlement negotiations with the settlement judge or fail to send someone with authority to settle to the conference

c. The statute should make clear that all agencies have power to refer cases for mediation by outside mediators with the consent of all parties.[124] Such mediators should have the ability to utilize any mediation technique. The agencies should be required to adopt rules to implement this statute. Such rules would include provisions explaining how mediators are selected and compensated, their qualifications, and for confidentiality of the mediation proceeding.

d. The statute should make clear that all agencies have power to refer cases for binding or non-binding arbitration with the consent

123. Thus the agency heads should be able to empower a staff member, such as the executive officer, to definitively approve a settlement. At present, the general understanding is that settlements must be approved by the agency heads, but the heads are typically part-time appointees who may not be able to meet and consider the settlement for a considerable period of time. Power to settle licensing cases before the Department of Social Services has been delegated so that settlements can be approved on the spot.

124. Perhaps OAH could maintain a roster of mediators who would be available for dispute settlement in all administrative agencies, whether or not they use OAH ALJs. The federal Administrative Dispute Resolution Act requires the Administrative Conference to maintain a roster of neutrals who can serve as mediators or arbitrators.

of the parties.[125] Again, agency rules would provide for the qualifications of the arbitrators and for the ways in which they would be chosen and paid. In the case of binding arbitration, the arbitrator's decision would bind both parties and would be subject to only the limited judicial review customarily accorded to arbitrations.[126] In the case of non-binding arbitration, the party who chose to continue litigating must pay the other party's costs if the ultimate result is not better for him than the arbitrator's decision.

e. The statute should provide a clear provision protecting the confidentiality of communications made during the course of ADR proceedings.[127]

III. THE HEARING PROCESS

A. EVIDENCE

1. Present California law. The APA provides that "technical rules" of evidence and witnesses are not applicable to administrative hearings. Instead, "any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."[128] The APA also provides that "irrelevant and unduly

125. Prior to enactment of the Administrative Dispute Resolution Act in 1990, *supra* note 111, there were serious doubts about whether federal agencies could engage in binding arbitration.

126. It could be argued that such arbitration should be open to judicial review by persons who were not parties to the arbitration but were adversely affected by it. *See* newly adopted federal APA provision, 5 U.S.C. § 581 (Supp. V 1993).

127. Confidentiality of the negotiating process is critical. Thus any statements made or documents produced in the course of settlement negotiations should not be admissible during subsequent proceedings. *See* Harter, *supra* note 116. The federal statute now contains a detailed provision protecting communications to a mediator. 5 U.S.C. § 574 (Supp. V 1993).

128. Gov't Code § 11513(c). The Judicial Council's report stated:

> There are several reasons which led the Council to favor a continuance of the present informal evidence rules in administrative hearings. Many of the court rules of evidence were devised to prevent certain types of evidence

repetitious evidence shall be excluded."[129] In addition, the rules of privilege are recognized.[130] There is an additional provision on affidavits as evidence.[131]

Notwithstanding the APA's broad command to dispense with the rules of evidence, my understanding is that OAH ALJs typically apply the rules of the Evidence Code. Some of them exclude hearsay evidence that would be inadmissible in civil cases, while others admit it.

> from reaching an untrained lay jury selected for one case. The Council concluded that these exclusionary safeguards are not necessary when the decision is to be made by experts in a particular field …. More important, perhaps, is the fact that many litigants in agency hearings are not represented by counsel, and they would be penalized if the court rules were applied …. A final consideration leading to a relaxation of the court rules of evidence in agency proceedings stems from the criticism of these rules as applied in the courts. Courts frequently recognize that the rules are too restrictive, and particularly when the case is tried without a jury the tendency is to admit all relevant evidence which will contribute to an informed result ….

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

129. Gov't Code § 11513(c). It is not clear whether this provision requires the application of relevance standards in the law of evidence. *See* Coburn v. State Personnel Bd., 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134 (1978), *hearing denied*, which suggests that the Evidence Code rules on admission of prior convictions apply to administrative proceedings.

130. The APA provides: "The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing …." This might suggest that the rules of privilege are inapplicable unless a statute requires them to be observed in administrative proceedings. Notwithstanding this ambiguity, the rules of privilege are recognized in administrative hearings. Ogden, *supra* note 29, § 38.05.

131. Gov't Code § 11514. This provision requires a party that wishes to introduce an affidavit to deliver a copy to the opposing party at least ten days before the hearing. At least seven days before the hearing, the opponent must deliver to the proponent a request to cross-examine the affiant or the opponent waives cross-examination and the affidavit will be given the same effect as if the affiant had testified orally. However, if an opportunity to cross-examine the affiant is not afforded after request, the affidavit may be introduced but will be treated as hearsay. This means it cannot be the sole support for findings under the residuum rule, discussed below. Affidavits can be freely used in default cases. Gov't Code § 11520.

The APA's provision on the introduction of evidence parallels the rules applicable to non-APA agencies[132] and indeed is the general rule in state and federal administrative law: civil evidence rules do not control the admission of evidence in administrative proceedings but the presiding officer has the discretion to exclude evidence of little probative value.

The APA imposes the "residuum rule," meaning that findings cannot be supported exclusively by hearsay.[133] It provides: "Hearsay evidence may be used for the purpose or supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."[134] The residuum rule is also a part of California administrative common law. Under *Walker v. City of San*

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132. *See, e.g.*, Lab. Code § 5708 (workers compensation judges "shall not be bound by the common law or statutory rules of evidence and procedure").

In contrast, the State Personnel Board may be required to follow the more demanding rules of the Evidence Code in discharge cases. Gov't Code Section 19578 states the Board should follow Gov't Code Section 11513 "except that … the parties may submit all proper and competent evidence …." Coburn v. State Personnel Bd., 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134 (1978), indicates the word "competent" may incorporate all admissibility rules of the law of evidence. I believe this interpretation is erroneous.

State Bar Rule 556 (applicable to disciplinary proceedings) requires adherence to evidence rules. The Agricultural Labor Relations Board must apply provisions of the Evidence Code "so far as practicable." Lab. Code § 1160.2. This peculiar provision tracks a statute governing the NLRB, which has caused much uncertainty at the federal level and was criticized by the Administrative Conference. Rec. 82-6, 1 C.F.R. § 305.82-6. *See* Davis, *supra* note 87, § 16.13; Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 7-9, 16 (1987). In its only application in California, it generated a 2-1 split in the Court of Appeals. Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd., 153 Cal. App. 3d 262, 201 Cal. Rptr. 371 (1984), *hearing denied*.

133. "[I]n the end there must be a residuum of legal evidence to support the claim before an award can be made" and "[s]uch hearsay evidence is no evidence." Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507, 509 (1916). In *Carroll*, the workers compensation board had made an award based solely on a declaration of the employee just prior to his death that the injury was job-related.

134. Gov't Code § 11513(c).

Gabriel,[135] a reviewing court will set aside a decision based solely on hearsay because such a decision is an abuse of discretion or is lacking in substantial evidence.[136] This rule does not seek to evaluate the actual reliability of the hearsay; if a finding is supported solely by evidence that would be excludable in court under the hearsay rule, it cannot support a decision.

California law contains several other variations on this theme. In unemployment cases, contradicted hearsay cannot support a finding.[137] PERB follows the residuum rule in unfair labor practice cases but not representation cases.[138] In workers' compensation cases, the residuum rule is not followed,[139] but a finding based solely on *unreliable* hearsay flunks the substantial evidence test on judicial review.[140] Thus the worker's compensation rule is quite different from the APA and the California common law residuum rule, which require rejection of findings supported only by hearsay regardless of the reliability of the particular hearsay evidence.

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135. 20 Cal. 2d 879, 129 P.2d 349 (1942).

136. *See also* Layton v. Merit System Comm., 60 Cal. App. 3d 58, 131 Cal. Rptr. 318 (1976); Kinney v. Sacramento City Employees' Retirement Sys., 77 Cal. App. 2d 779, 176 P.2d 775 (1947). See Collins, *Hearsay and the Administrative Process,* 8 Sw. U. L. Rev. 577, 591-95 (1976). The *Walker* decision clearly states that the residuum rule can be altered by statute. 20 Cal. 2d at 881 (majority), 882 (concurring opinion). Thus it is not a constitutional rule.

137. *See* Stout v. Dept. of Employment, 172 Cal. App. 2d 666, 673, 342 P.2d 918 (1959) (dictum); *see also* Silver v. California Unemployment Ins. Appeals Bd., 129 Cal. Rptr. 411 (1976), *reh'g granted,* but no later decision reported.

138. 8 Cal. Code Regs. §§ 32175, 32176.

139. Lab. Code § 5709: "No order … shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure."

140. Skip Fordyce, Inc. v. Worker's Compensation Appeals Bd., 149 Cal. App. 3d 915, 926-27, 197 Cal. Rptr. 626 (1983), *hearing denied* (double hearsay was not the sort of evidence on which reasonable persons customarily rely in conduct of serious affairs, so finding of exposure to asbestos lacked substantial evidence); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 47 Cal. App. 2d 494, 499-500, 118 P.2d 334 (1941) (hearsay must be evidence of a substantial character from which commission may deduce a reasonable inference).

Finally, in State Bar interim suspension cases, findings can be supported wholly by affidavits.[141]

There is also a constitutional dimension to this problem. Due process requires an opportunity to confront and cross-examine adverse witnesses.[142] By definition, hearsay evidence is an out of court statement by a declarant offered to prove the truth of the statement. Thus reliance on hearsay could deny due process, because an unavailable declarant's testimony cannot be tested by cross-examination. What is required by due process cannot be stated in absolute terms; it depends on a case-specific balancing of the private interest at stake, the likelihood that the questioned procedure would produce an incorrect result, and the state's interest in using the challenged procedure.[143] Where the private interest is strong, the veracity of the declarant is critical, and the state could have rendered the declarant available for cross examination, a court might find that a finding supported only by uncorroborated hearsay violated due process.[144]

2. Model and Federal Acts. MSAPA provides that the presiding officer can exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of recognized evidentiary privilege.[145] It explicitly rejects the residuum rule.[146] It also provides that any part of the

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141. The constitutionality of this provision was upheld in Conway v. State Bar, 47 Cal. 3d 1107, 255 Cal. Rptr. 390 (1989).

142. Goldberg v. Kelly, 397 U.S. 154 (1970).

143. Mathews v. Eldridge, 424 U.S. 319 (1976).

144. *See, e.g.*, Carlton v. Department of Motor Vehicles, 203 Cal. App. 3d 1428, 250 Cal. Rptr. 809 (1988) (serious due process problem if DMV could revoke driver's license solely on basis of computer key stroke — triple hearsay involved); Snelgrove v. Department of Motor Vehicles, 194 Cal. App. 3d 1364, 240 Cal. Rptr. 281 (1987) (reliance on hearsay does not violate due process since respondent had opportunity to subpoena declarant but failed to do so). *See* Collins, *supra* note 136, at 615-43.

145. MSAPA § 4-212(a).

146. "Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil

evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.[147] Similarly it allows documentary evidence to be received in the form of a copy or excerpt.[148]

The evidence provision in the federal APA is similar to California's.[149] The residuum rule is not recognized in federal administrative law,[150] but a finding based exclusively on unreliable hearsay might be set aside because it does not meet the substantial evidence test. However, if the hearsay is reliable, it can satisfy the substantial evidence test.

3. Recommendations

a. Adoption of Evidence Code. Although some observers favor adoption of the rules of evidence in formal administrative hear-

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trial." MSAPA § 4-215(d). The Comment to Section 4-215 makes clear that this language is intended to reject the residuum rule.

147. MSAPA § 4-212(d). MSAPA contains no parallel to Gov't Code Section 11514 which requires ten days notice of a proposed affidavit and seven days notice of demand to cross examine the affiant.

148. MSAPA § 4-212(e). On request, parties must be given an opportunity to compare the copy with the original if available.

149. APA § 556(d):

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

150. Richardson v. Perales, 402 U.S. 389 (1971). The *Perales* case reinterpreted an earlier decision, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938), which had been understood to mandate the residuum rule. Davis observes that post-*Perales* federal administrative cases treat the residuum rule as dead. However, this is not absolutely clear, since *Perales* can be distinguished on the basis of waiver — the applicant could have subpoenaed the declarant but failed to do so. Davis, *supra* note 87, § 16.8. Thus it is conceivable that the residuum rule could still be applied in federal administrative law if a declarant were unavailable.

ings,[151] I believe this would be an error. In 1944, the Judicial Council decided that these rules would be inappropriate in the new APA and its reasoning on this point remains persuasive.[152]

Rejection of civil evidence standards (particularly the rule against opinion evidence and the hearsay rule and its numerous exceptions) is in line with decades of criticism from administrative law scholars who argue that these rules have no place in administrative law.[153] I agree with that analysis for a number of reasons. First, if the Evidence Code rules were transplanted into administrative adjudication, very considerable modification would be required. Creation of a new Administrative Evidence Code would be a substantial project.[154]

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151. The Federal Bar Association Administrative Law Section encourages agencies to examine whether they should adopt rules patterned on the Federal Rules of Evidence, but would not require them to do so. Resolution 91-5 (Apr. 13, 1991). The Administrative Law Section of the ABA concurs with this suggestion. However, the National Conference of ALJs of the ABA has recommended legislation requiring that the Federal Rules of Evidence apply to administrative adjudications, with some ability for agency rules to vary the Federal Rules. (Report of April 1991). At this writing, the ABA House of Delegates has not resolved the conflict. *See* Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach,* 1991 U. Ill. L.F. 353 (urging adoption of Federal Rules of Evidence in administrative proceedings).

152. See *supra* note 128.

153. The Administrative Conference recommends that civil evidence rules not be applied in administrative proceedings. Rec. 86-2, 1 C.F.R. § 305.86-2. *See* Pierce, *supra* note 132, at 1, 16-22 (1987); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings,* 1971 Duke L.J. 1, 12-17. The withering criticism in Davis, *supra* note 87, § 16.6, is particularly noteworthy.

154. The Department of Labor has adopted the Federal Rules of Evidence but found it necessary to make numerous modifications and to add five new hearsay exceptions to reflect the reality of administrative practice. *See* Graham, *supra* note 151, at 373-82; 29 C.F.R. § 18.803. The NLRB and ALRB follow the rules of evidence "so far as practicable." The quoted phrase has caused great difficulties of application. *See supra* note 87. Although individual agencies may wish to go through this sort of exercise, by adopting rules that incorporate some civil evidence rules, I do not believe that agencies in general should be required to do so.

Maintenance of the hearsay rule insures countless close calls as to whether an item is hearsay at all or whether such hearsay exceptions as business records or public records might apply.[155] In order to introduce evidence under a hearsay exception, it is often necessary to lay a careful foundation; this may take more time than just admitting the evidence. Administrative hearings (especially those not covered by the existing APA) are often conducted by non-lawyer ALJs and one or both parties are often not represented by counsel. Thus the niceties of the hearsay rule cannot be sorted out at the hearing. Adoption of the rules of evidence would constantly bring ALJ evidentiary rulings before the courts on judicial review with the likelihood of frequent reversals.

The reality is that the hearsay rule was largely intended to keep evidence from juries, not from professional factfinders who are well able to gauge its inherent reliability.[156] Some hearsay evidence is quite trustworthy (as is evidenced by the fact that it is admissible in civil proceedings if not objected to), and all of us rely upon it to make serious decisions in our daily lives. Some items of hearsay evidence are inherently untrustworthy, but then so is a lot of evidence that is legally admissible under hearsay exceptions or otherwise. In short, the existing APA's standard — calling for admission of relevant evidence of the sort that responsible persons rely on in the conduct of their serious affairs — seems far more appropriate than the Evidence Code standards.

b. Unreliable scientific evidence. One recent decision, *Seering v. Department of Social Services*,[157] declares that an ALJ should have

155. *See, e.g.* Stearns v. Fair Employment & Housing Comm'n, 6 Cal. 3d 205, 210 n.2, 98 Cal. Rptr. 467 (1971) (evidence of out of court statement not hearsay); Snelgrove v. Department of Motor Vehicles, 194 Cal. App. 3d 1364, 240 Cal. Rptr. 281 (1987) (public records exception applies to police officer's statement about failure to submit to test); Carlton v. Department of Motor Vehicles, 203 Cal. App. 3d 1428, 250 Cal. Rptr. 809 (1988) (no exception applies to police officer's accident report).

156. Davis points out that the testimony of an expert witnesses is admissible, even though based on hearsay; yet the residuum rule prevents an expert factfinder from relying on hearsay. Davis, *supra* note 87, § 16.6.

157. 194 Cal. App. 3d 298, 306-13, 239 Cal. Rptr. 422 (1987). *Seering* involved the revocation of the license of a day care center because of alleged

excluded evidence of child molestation offered by a psychiatrist based upon the "child sexual abuse accommodation syndrome" because such evidence must be excluded in civil litigation. The rationale was the *Kelly-Frye* rule, which requires a trial court to exclude evidence based on methods of proof that are not generally accepted as reliable in the scientific community. The concern is that such evidence would be uncritically accepted, despite the opponent's right to rebut it, because of the "aura of infallibility" borne by scientific evidence. In Seering, the court declared that the *Kelly-Frye* rule applies to administrative adjudication despite the provision in the APA which states that an administrative hearing "need not be conducted according to technical rules relating to evidence and witnesses."[158]

Whether *Kelly-Frye* should apply in administrative law is a tough question. It can easily be argued that an ALJ and the agency heads should be precluded from considering evidence that a trial judge cannot consider because of its scientific unreliability.[159] The issue here is quite different from whether the rules of evidence should apply before administrative agencies. *Kelly-Frye* is not a rule that was designed to protect juries; it is a determination that factfinders (even expert ones) should not be compelled to weigh in each case the probative value of testimony that is based on methodologies not yet recognized as scientifically reliable. Moreover, exclusion of this sort of the evidence can be justified, even under

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child molestation. The court upheld the revocation because the DSS' decision was supported by sufficient admissible evidence apart from the disputed scientific evidence. Therefore, the court's statements about the application of *Kelly-Frye* in administrative law are dictum.

158. Similarly, *see* Kaske v. City of Rockford, 96 Ill. 2d 298, 450 N.E.2d 314 (1983); Department of Pub. Safety v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989) — both holding that the rule precluding courts from considering the results of polygraph tests is binding on agencies as well.

159. This argument is particular strong in the context of the child sexual abuse methodology involved in *Seering*, because earlier cases have held that family court judges cannot consider the same methodology in dependency cases. If these specialized trial courts who are charged with protection of children cannot consider the evidence, it would appear that less specialized OAH ALJs should also be precluded from considering it.

the existing APA, since by hypothesis it may not be the "sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."

Yet there are strong public interest arguments in favor of allowing the scientific evidence to be admitted in administrative adjudication (of course, subject to scientific rebuttal).[160] *Seering* involved alleged child molestation by a licensee. Thus the protection of children was at stake along with the proprietor's license. And the agency heads, if not the ALJ, should become relatively sophisticated about the methodology since the problem tends to be recurring. Another argument in favor of admission is that the scientific consensus on particular methodologies is constantly changing; consequently, proponents of the evidence can force the agency to reexamine the question of reliability every time a new piece of scientific evidence emerges. Therefore, why not just admit the evidence in all cases, subject to rebuttal?

My recommendation (a rather uncertain one) is to follow *Seering* and hold that the *Kelly-Frye* rule applies in administrative law.[161]

c. Other evidence exclusion issues. The existing APA provision is largely satisfactory[162] and I propose that it be the default rule for all agencies.[163] Agencies could, if they wish, adopt regulations that

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160. This argument would not justify the admission of evidence which the ALJ believes is plainly bogus or pseudo-scientific such as astrology. Such evidence is not the "sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."

161. If *Kelly-Frye* were not followed, for example, the results of lie detector tests would be admissible in administrative cases even though they are excluded in civil litigation because of the unreliability of the methodology.

I approve of another holding in *Seering.* The small children who were the alleged victims of molestation were allowed to testify outside the presence of the respondent. The court upheld this practice. A new APA should contain explicit recognition that the ALJ has discretion to manage the hearing so as to protect children from intimidation.

162. The rules protecting sexual privacy in the APA seem satisfactory. *See* Gov't Code § 11513(c) (last paragraph), (j), (k).

163. I suggest that the comment reject the rule in the *Coburn* case that the Evidence Code rules relating to excludability of evidence about prior

embody some or all of the provisions of the Evidence Code. The MSAPA provisions mentioned above on admission of evidence in written form (if its admission will expedite the hearing and can be received without substantial prejudice to any party), and for permitting copies of documents,[164] seem sound, and I would include them in a new APA, again subject to variation by regulations.[165]

A provision in the existing APA[166] allows the use of affidavits as evidence. It requires that the proponent of the affidavit notify the opponent at least ten days prior to the hearing; the opponent must demand the right to cross-examine the affiant within seven days after the notice is mailed or delivered. The affidavit provision seems useful and should be a default provision applicable to all agencies. However, the provision should be modified so that the notice that a proponent will introduce an affidavit must be mailed or delivered not more than thirty days prior to the hearing. Under the existing provision, the notice that the agency prosecutors intend to introduce an affidavit is often sent out with the accusation, before the respondent has retained counsel. As a result, the seven day period within which the respondent can request cross-examination runs out before counsel has an opportunity to make the demand.

d. Case management. The existing APA provision provides for exclusion of "irrelevant and unduly repetitious" evidence. This is not an adequate case management tool. It should be broadened to explicitly confer discretion to exclude evidence that contributes little to the result but promotes delay and confusion. Evidence Code Section 352 provides that a court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption

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convictions apply automatically in administrative cases. See *supra* notes 129, 132. Administrative fact finders should have access to this information and, unlike juries, should be able to place it in context.

164. MSAPA § 4-212(d), (e), cited *supra* in text accompanying notes 147-48.

165. *See* Gellhorn, *supra* note 153, at 37-42.

166. Gov't Code § 11514.

of time or create substantial danger of confusing the issues.[167] Both the Administrative Conference and Federal Bar Associations have recommended that agencies adopt Federal Evidence Rule 403 which contains almost identical language.[168] Thus I propose that the APA include language similar to Section 352.[169]

e. Exclusionary rule. Another recurring evidence issue is whether the exclusionary rule should apply in administrative proceedings. The general rule is that it does not apply; illegally seized evidence (or confessions obtained in violation of *Miranda*) can be admitted because exclusion of such evidence would not deter officials from making unlawful searches or violating *Miranda*.[170] However, where the exclusionary rule would deter unlawful conduct by employees of the agency engaging in illegal conduct, it has been applied.[171] This principle seems adequately covered in case law; since it involves a case-by-case analysis of deterrent effect, it probably should not be codified in the APA.

f. Power of agencies to reverse ALJ evidence rulings. The general understanding, at least with respect to existing-APA agencies,

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167. Section 352 also permits exclusion if probative value is outweighed by substantial danger of undue prejudice or of misleading the jury. These criteria seem inappropriate in administrative proceedings.

168. See *supra* note 151; Pierce note 87 at 23-26. Pierce reports that the use of this standard by Department of Labor ALJs has worked out well. The ALJs report high satisfaction with the standard as a case management tool.

169. Pierce, *supra* note 132, at 24, gives this example: a party wishes to introduce a voluminous exhibit tangentially related to an issue in the case and based entirely on low quality hearsay. The ALJ is confident that neither the ALJ nor the agency will rely on the exhibit for any purpose. Yet if it is introduced it will prolong the hearing because opposing counsel will insist on extensive cross-examination and the introduction of opposing exhibits. Yet the exhibit cannot be excluded under the existing APA since it is neither irrelevant nor repetitious. The Rule 403 approach allows the ALJ to exclude the evidence as its probative value is substantially outweighed by its tendency to prolong the hearing.

170. Emslie v. State Bar, 11 Cal. 3d 210, 226-30, 113 Cal. Rptr. 175 (1974); Finkelstein v. State Personnel Bd., 218 Cal. App. 3d 271, 267 Cal. Rptr. 133 (1990). *See* CEB, *supra* note 4, §§ 3.28-3.34 (1984 & Supp. 1990); Ogden, *supra* note 29, §§ 38.06-38.07.

171. Dyson v. State Personnel Bd., 213 Cal. App. 3d 711, 262 Cal. Rptr. 112 (1989).

is that the agency heads cannot reject an ALJ's decision on a question of admission or exclusion of evidence.[172] This seems like the right result and should be confirmed by the new statute. ALJs are professional factfinders and experts on the conduct of trials, whereas agency heads are usually not lawyers. Moreover, the general thrust of my recommendations has been to increase the authority of ALJs vis a vis agency heads on matters that fall within the ALJs' special competence.[173] Thus an ALJ's rulings on the admission or exclusion of evidence should not be subject to reversal by the agency heads, whether the ALJ hears the case alone or sits with the agency heads to decide it.

g. Residuum rule. The major policy issue is whether to abolish the existing common law and statutory residuum rule. If the residuum rule is abolished, the alternative would be the MSAPA and California workers compensation model. Under this approach, a finding can be based exclusively on hearsay, but if the hearsay is unreliable the finding would be vulnerable on judicial review.[174] In an extreme case, such a finding could violate the due process right to confront an adverse witness.[175]

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172. The argument is based on Gov't Code Section 11512(b). Under this provision, when agency heads hear the case, an ALJ presides at the hearing and rules on the admission and exclusion of evidence. Therefore, it is argued, the ALJ's power over evidence should be no less when the ALJ hears the case alone (which, of course, the ALJ does in virtually all cases).

173. In my second report, I recommended that the statute limit the ability of agency heads to overturn ALJ factual determinations based on demeanor of witnesses.

174. Alternatively, a finding based on unreliable evidence (whether hearsay or otherwise) might violate the APA's responsible persons-serious affairs test.

175. Many of the California residuum rule cases would have been decided the same way on the basis of one of these rationales because the hearsay offered in support of the findings was unreliable. In the leading case of Walker v. City of San Gabriel, 20 Cal. 2d 879, 129 P.2d 548 (1942), a local government revoked the license of an auto wrecker based solely on a letter from the chief of police stating charges against the wrecker. In Carlton v. Department of Motor Vehicles, 203 Cal. App. 3d 1428, 250 Cal. Rptr. 809 (1988), the decision turned on a computer printout of a single number representing a policeman's assessment of who was at fault in an accident. The court remarked that this was triple hearsay and extremely unreliable for various reasons, including the possibility of

My initial preference was to suggest abolition of the residuum rule across the board.[176] My reasons for this proposal are the same as the reasons for not adopting the Evidence Code — the inappropriateness of those rules in administrative law. The residuum rule absolutely precludes findings based on evidence that may be quite reliable, and it leads to time-consuming disputes about the fine points of evidence law before the ALJ and on judicial review.[177] Moreover, it is unnecessary to protect private rights because a finding exclusively based on *unreliable* hearsay would be overturned on judicial review (either under the substantial evidence or independent judgment standards),[178] would violate the responsible

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computer keypunching error. In Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972), *hearing denied*, a discharge was based on double hearsay, both declarants being felons.

176. *See* Davis, *supra* note 87, 16.6; Gellhorn, *supra* note 153, at 22-26. The recently adopted Washington statute abolished the residuum rule but it provides:

> [T]he presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

Wash. Rev. Code Ann. § 34.05.461(4) (1990). If the Commission wished to abolish the residuum rule, this language would be an excellent substitute.

177. Similarly, there are frequent disputes about whether the hearsay is used "for the purpose of supplementing or explaining other evidence" as opposed to supporting a finding on its own. Gov't Code § 11513(c). One agency staff member gave this example: the agency wishes to revoke a license based on misconduct toward person *A* and it presents non-hearsay concerning this misconduct. It also wishes to put on evidence that similar misconduct occurred toward *B* and *C*, to show that a pattern of misconduct exists. The only evidence relating to *B* and *C* is hearsay. His theory is that the residuum rule is not violated, because the evidence concerning *B* and *C* merely supports the finding that *A* committed misconduct. Yet ALJs frequently refuse to hear the evidence because they say that the misconduct towards *B* and *C* is a separate finding, it would be supported only by hearsay, and would thus violate the residuum rule.

178. The residuum rule seems extraneous where a reviewing court exercises independent judgment on the evidence. Code Civ. Proc. § 1094.5(c). Independent judgment applies when the agency has deprived a person of a vested, fundamental right, such as a professional license. A subsequent report will discuss whether the independent judgment standard should be retained. I

person-serious affairs test, and might violate due process in an extreme case. Administrative findings based on reliable evidence should stand; those based on unreliable evidence should fall.[179]

Nevertheless, I propose a compromise: the residuum rule should be retained for the agencies that use OAH ALJs. As far as I could determine, there is widespread support for the residuum rule on the part of the existing APA agencies, private attorneys, Attorney General's staff, and ALJs, and virtually no support for abolishing the rule. The best argument for the residuum rule is that it forces agency advocates to put on a better case; they cannot simply rely on a written report from *B* or accounts by *A* of what *B* said if there is no other evidence to support the finding. It is necessary to produce *B.* In light of the severe sanctions administered by agencies that use OAH ALJs, the sophistication of those ALJs, and the

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only point out here that the residuum rule issue is intertwined with the scope of review issue. It would seem that sufficient protection of private rights is provided by the judge's ability to reweigh the evidence. The judge would certainly take into account the fact that the evidence supporting the agency's decision was exclusively hearsay and would evaluate its inherent reliability. Thus if the Commission ultimately decides to retain the independent judgment test, it might wish to revisit the question of whether to abandon the residuum rule in cases in which the independent judgment test is applicable.

179. In deciding whether evidence is too unreliable to meet the substantial evidence standard, the court could take numerous factors into account. These would include the nature and quality of the evidence, indicia of reliability or unreliability of the evidence, which party has the burden of proof, whether better evidence was available, and the cost of acquiring the better evidence.

A federal hearsay exception that was not adopted in California could also be applied to assess the substantiality of evidence: under Federal Rules of Evidence 803(24) and 804(b)(5), hearsay that does not fall under any exception is admissible where it has equivalent circumstantial guarantees of trustworthiness and is more probative than any other evidence that can be produced through reasonable efforts and the interests of justice are served by admission of the evidence.

Another factor would be the importance of the interest of the party against whom the evidence was introduced. Thus it might be wholly appropriate to find that tenuous hearsay evidence is insubstantial when used to impose a serious sanction yet substantial in granting an application for benefits. For a discussion of factors measuring the reliability of hearsay, see Gellhorn, *supra* note 153, at 19-22; Davis, *supra* note 87, § 16.6; Collins, *supra* note 136, at 643-48.

strong political resistance that proposals to abolish the residuum rule would surely encounter, it is probably best to retain the rule.[180]

However, I suggest that the residuum rule not be binding on the other agencies that will come under a new APA, unless they choose to adopt it by regulations.[181] Outside the agencies that use OAH ALJs, there is opposition to the residuum rule.[182] Thus I would leave it to the agencies to consider whether the rule or some variation thereof makes sense in their own situations; the rulemaking process that would ensue would permit everyone who deals with the agency to submit input on this important issue.

The revised statute should clarify whether the residuum objection can be made for the first time on judicial review, an issue which is unresolved under present law.[183] I believe that an objec-

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180. Still another compromise is to apply the residuum rule in cases in which the state is terminating a status or benefit but not where the state denies an application for a status or benefit as in the case of a license application or an application for welfare or a job. Still another compromise would be to retain the residuum rule but expand the list of hearsay exceptions that would apply. *See, e.g.*, Lab. Code § 5803; Fed.R. Evid. 803(24), 804(b)(5), discussed *supra* note 179; or the Federal Department of Labor regulations mentioned *supra* note 154. The proposal for acceptance of evidence in written form, discussed *supra* in text accompanying notes 147-48, could also be viewed as creating an additional hearsay exception that would allow a decision to survive the residuum rule.

181. The California common law residuum rule arose in cases reviewing the decisions of local government. Since a new APA would not impose any fair hearing rules on local government and the fairness of local government hearings is often in doubt, it could be argued that the residuum rule might be appropriate with respect to local government or to state government hearings not covered by the APA. Thus my proposal to abolish the residuum rule would apply only to agency hearings subject to the new APA (other than those in which an OAH ALJ is used).

182. The Public Utilities Commission staff indicated that they have never applied the residuum rule and would like to avoid hassles about hearsay in complex economic cases where proof is based on written reports and intercompany communications. The Workers Compensation Appeals Board does not currently apply the residuum rule and appears to be precluded by statute from applying it. See *supra* note 139.

183. Apparently, in non-APA cases, an objection is needed to preserve the issue, regardless of whether there is contrary evidence. Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd., 153 Cal. App. 3d 262, 270 n.5, 201 Cal.

tion should be required. The general rule of administrative law is that issues must first be raised at the hearing in order to preserve them for judicial review purposes.[184] The rules of evidence and the residuum rule should be no different.

There could be several criticisms of this suggestion. The first concerns unrepresented persons who cannot be expected to understand the vagaries of the hearsay and residuum rules. Such persons would probably fail to object to the hearsay, thus waiving their right to assert the residuum rule. However, the objection to the hearsay need not be in technical terms. It might, for example, simply be a protest that the particular hearsay evidence is unreliable, unfair, or whatever. But it seems unwarranted to make an exception to the general rule of exhaustion of remedies in the case of hearsay objections.

The second criticism is that the need to make objections to hearsay would slow down the hearing since hearsay is generally admissible. Yet only a single objection, at the end of the hearing, is needed, to the effect that the proponent has failed to introduce any evidence admissible over objection in civil actions. It is hard to see how this would obstruct the hearing.

Rptr. 371 (1984), *hearing denied*; Fox v. San Francisco Unified Sch. Dist., 111 Cal. App. 2d 885, 891, 245 P.2d 603 (1952).

In APA cases, there is a split in authority. *See* Ogden, *supra* note 29, § 38.04[2]. One line of cases says that an objection is needed to preserve the issue, at least in cases where there is evidence contrary to the hearsay. Borror v. Department of Inv., 15 Cal. App. 3d 531, 545-46, 92 Cal. Rptr. 525 (1971), *hearing denied* (dictum); Kirby v. Alcohol Beverage Control Appeals Bd., 8 Cal. App. 3d 1009, 1018-20, 87 Cal Rptr. 908 (1970), *hearing denied*. In *Kirby*, the court held that if a respondent failed to object to hearsay, the hearsay shifted the burden of producing evidence to the respondent; thus the hearsay would be sufficient to support findings in the absence of contrary evidence. This approach was designed to protect the rights of an unrepresented party who would be unlikely to make a hearsay objection.

A second line of cases says that no objection is needed because of the absolute terms in which the residuum rule is stated in the statute. Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972), *hearing denied*.

184. *E.g.*, Milligan v. Hearing Aid Dispensers Exam. Comm., 142 Cal. App. 3d 1002, 1008, 191 Cal. Rptr. 490 (1983).

B. BURDEN OF PROOF

1. Existing California law. The APA contains no provisions on burden of proof but there are numerous cases as well as statutory and regulatory provisions.[185] The case law rules generally place the burden of producing evidence and the burden of persuasion on the proponent of an order.[186] Thus the applicant for a benefit has the burden,[187] whereas the agency has the burden when it seeks a sanction[188] or to discharge an employee.[189]

Ordinarily, a proponent must prove a case by a preponderance of the evidence. However, some decisions have held that in cases of revocation of professional licenses, an agency must prove its case "by clear and convincing proof to a reasonable certainty."[190]

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185. *See* Ogden, *supra* note 29, § 39.03; CEB, *supra* note 4, §§ 3.58-3.66. For example, although applicants generally have the burden of proof, an employer has the burden to establish that an applicant did not have good cause to leave the job. Perales v. Department of Human Resources Dev., 32 Cal. App. 3d 332, 108 Cal. Rptr. 167 (1973).

186. *See* federal APA, 5 U.S.C. § 556(d) (1988): "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

187. CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 330, 118 Cal. Rptr. 315 (1974) (applicant for coastal zone permit has burden).

188. Daniels v. Department of Motor Vehicles, 33 Cal. 3d 532, 536, 189 Cal. Rptr. 512 (1983) (until agency meets burden of going forward with the evidence, licensee has no duty to rebut allegations or otherwise respond).

189. Skelly v. State Personnel Bd., 15 Cal. 3d 194, 204 n.19, 124 Cal. Rptr. 14 (1975); Pereyda v. State Personnel Bd., 15 Cal. App. 3d 47, 92 Cal. Rptr. 746 (1971), *hearing denied.*

190. Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982), *hearing denied*; Realty Projects, Inc. v. Smith, 32 Cal. App. 3d 204, 212, 108 Cal. Rptr. 71 (1973). These decisions relied heavily on Furman v. State Bar, 12 Cal. 2d 212, 229, 83 P.2d 12 (1938), which imposed a clear and convincing standard in disbarment cases on the theory that disbarment is quasi-criminal. *See also* McComb v. Commission on Judicial Performance, 19 Cal. 3d Spec. Trib. Supp. 1, 11, 138 Cal. Rptr. 459 (1977). But *Furman's* reasoning is not persuasive; administrative licensee discipline cases are not quasi-criminal. *See, e.g.,* Borror v. Department of Inv., 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525 (1971), *hearing denied*.

Only proof by a preponderance is required to discharge a teacher or a state employee, because such cases involves only the loss of a job rather than the loss

2. Proposals

I suggest a simple provision stating that the proponent of the order has the burden of production and persuasion. However, it should be clear that this allocation can be varied by other statutes or agency regulations.[191] It should also be made clear that the ALJ can dismiss a matter if the party who has the burden fails to show up.[192]

The rule that an agency must prove its case by "clear and convincing evidence" in order to revoke a license seems unwarranted and idiosyncratic.[193] In contrast, under the federal act, the burden

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of all professional opportunity. *See* Gardner v. Comm'n on Professional Competence, 164 Cal. App. 3d 1035, 210 Cal. Rptr. 795 (1985) (discharge of teacher on morals charges). This is unconvincing; a teacher or other professional who is fired because of serious misconduct will find it difficult or impossible to practice his or her profession.

191. In a letter to the Law Revision Commission dated Dec. 11, 1989, Gregory Thomas argued that the Commission should look closely at burdens of proof in environmental and resource disputes. He pointed out that the scientific and technical issues in such cases are so intractable that the party with the burden of proof usually loses. Problems that relate to adjudication in a specific area of regulatory practice (such as the burden of proof in environmental cases) cannot be treated in a study that is designed to produce a new APA for all agencies. However, it should be made clear that the ordinary rules of burden of proof can be varied either by statute or by agency regulation. Thus an environmental regulatory agency that chose to place the burden in some cases on resource consumers or dischargers could do so.

192. Gov't Code Section 11520(a) should, in other words, apply in all administrative cases. This was a suggestion made by a number of Unemployment Insurance Appeals Board referees when I addressed their annual meeting. Less clear is the question of whether an ALJ should have power to grant a nonsuit on the grounds that the party with the burden of proof has failed to make a prima facie case. Frost v. State Personnel Bd., 190 Cal. App. 2d 1, 11 Cal. Rptr. 718 (1961), holds that an ALJ has no such power, pointing to various practical difficulties. The practical difficulties do not seem significant to me, and a nonsuit motion would appear to have as much utility in administrative law as in court. I suggest that agencies be given the power to adopt regulations under which an ALJ could grant a nonsuit, but I would not require them to do so.

193. See the lengthy and careful opinion by the New Jersey Supreme Court in *In re* Polk, 449 A.2d 7 (N.J. 1982), holding that the legislature did not intend and due process does not require the use of a clear and convincing standard in a proceeding to revoke a physician's license. Like California, New Jersey uses a

of proof is the preponderance test even in a case involving the imposition of sanctions against a broker for securities fraud.[194]

It is unclear whether the elevated standard of proof makes any difference in practice; some people I interviewed feel that it does. In some marginal cases, an ALJ will decide that the agency's proof cannot meet a clear and convincing standard although it could have met a preponderance standard. Granted, a professional license is enormously valuable and should be surrounded with due process protections. However, the clear and convincing burden of proof applicable in license revocation cases seems unjustified.[195] The public interest in weeding out unqualified or incompetent licensees seems just as compelling as the licensee's interest. A proper balance is achieved by returning to the preponderance rule.

C. OFFICIAL NOTICE

1. Existing California law. The APA provides that an agency can take official notice either before or after submission of the case for decision and must inform parties present that it has done so and place the matters noticed in the record.[196] The decisionmaker can

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clear and convincing standard for attorney disbarments, but the *Polk* decision holds that this standard need not be extended to other professional licenses.

194. Steadman v. SEC, 450 U.S. 91 (1981). This is a strong holding because allegations of fraud in a contract case must be proved by clear and convincing evidence. Not so in an administrative case. Some federal decisions do manipulate the burden of proof in order to make it difficult for agencies to take particular action. *See* Woodby v. INS, 385 U.S. 276 (1966) (government must prove deportation case by "clear, unequivocal and convincing evidence.") However, such decisions are narrowly focused on situations of perceived injustice where the courts distrust the agency and its procedures. California administrative law provides more than adequate due process to licensees who face revocation; an elevated burden of proof is not necessary to protect their interests.

195. Another reason to question the elevated standard of proof is that the revocation of a professional license is reviewed under the independent judgment test by Superior Court. Thus the extra layer of protection conferred by the clear and convincing standard seems unnecessary. However, my view on this point would be the same regardless of whether the independent judgment test is retained.

196. Gov't Code § 11515.

notice matters that could be noticed by a court[197] or "generally accepted technical or scientific matter within the agency's special field." There must be a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.[198] Apparently, non-APA agencies can also take official notice of matters of which a court could take notice.[199]

In an important decision, the Supreme Court recognized that an agency makes use of official notice in finding disputable legislative facts; consequently, an opportunity to respond is essential. *Frantz v. Board of Medical Quality Assurance*[200] arose from an attempt by the Board to sanction a physician for gross negligence. The Board failed to introduce expert testimony about community standards with respect to two of the charges. The Court held that this gap could be filled by taking official notice of the applicable community standards, even though such information might be both disputable and not obvious to a lay judge.[201] The effect of *Frantz* is

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197. *See* Evid. Code §§ 451-452 for matters that must and may be noticed by courts. These include "facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute," "facts and propositions that are of such common knowledge … that they cannot reasonably be the subject of dispute," and "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evid. Code §§ 451(f), 452(g)-(h).

198. Gov't Code § 11515.

199. Cantrell v. Board of Supervisors, 87 Cal. App. 2d 471, 477-78, 197 P.2d 218 (1948) (county board can take notice of fact that presence of rats is detrimental to public health — tribunals partake of the nature of courts). The rules of the Public Utilities Commission and Board of Equalization limit official notice to matters that could be noticed by a court. 20 Cal. Code Regs. § 73 (PUC); 18 Cal. Code Regs. § 5006 (Board of Equalization). In welfare cases, the Department of Social Services takes notice of "any generally accepted technical fact relating to the administration of public social services." DSS Rule § 22-050.43.

200. 31 Cal. 3d 124, 138-43, 181 Cal. Rptr. 732 (1982).

201. Note that the Medical Board contained some lay members; consequently, the Board as a whole — including some non-experts — were

that the agency can satisfy its burden of producing evidence on a critical point (community standards in a negligence case) without putting on testimony to that effect. Clearly, this holding goes beyond the existing APA's provision for taking official notice of any "generally accepted technical or scientific matter within the agency's special field …."

The *Frantz* opinion has a second and equally important dimension. By recognizing that the Board had used official notice to ascertain community standards of medical practice, the court triggered a rebuttal right. The opponent of a disputable noticed fact should have two bites at this apple: (i) arguing that it is improper to officially notice the item, because it should be the subject of testimony, and (ii) disputing the correctness of the item after it has been noticed.[202]

2. MSAPA provision. MSAPA provides for a considerably wider scope of official notice than the California provision. It allows an agency to take notice of technical or scientific matters within the agency's specialized knowledge.[203] Thus such matters need not be "generally accepted" as under the California APA. MSAPA also provides a detailed scheme for rebuttal of noticed matters.[204]

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allowed to take judicial notice of a scientific or technical matter that was not generally accepted and could be disputable.

202. In *Frantz, supra* note 200, Justice Kaus' concurring opinion argues that a party should not be permitted to rebut an item once it has been officially noticed, because this is the rule of judicial notice. Evid. Code § 457. He argues that Gov't Code Section 11515 should be construed to reach the same result. I disagree. Where notice is taken of items that could be disputed, it is essential to allow the opponent an opportunity to dispute them. Gov't Code Section 11515 and MSAPA Section 4-212(f) seem explicit on this point and should not be construed as Kaus suggested. *See* Davis, *supra* note 87, §§ 15.13, 15.17.

203. MSAPA § 4-212(f). MSAPA also allows notice of the record of other proceedings before the agency and of codes or standards that have been adopted by an agency of the United States or of any state or by a nationally recognized organization or association.

204. MSAPA § 4-212(f):

> Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source

3. Recommendations. I believe that official notice is a significant technique for improving the efficiency of the adjudication process without diminishing its fairness. It allows either party to prove items that are unlikely to be disputed without having to introduce testimony. Thus it can significantly shorten and simplify hearings.[205] Agencies should not be limited to matters that could be judicially noticed by courts. Moreover, when we recognize that an agency has taken official notice of facts, we impose a corresponding obligation to allow rebuttal. This enhances the fairness of the process and the likelihood that the facts will be found accurately.[206]

The *Frantz* decision[207] confirms my belief that the official notice standard should be broadened. An adjudicator should be allowed to take notice of technical or scientific material that is disputable, so long as it is within the agency's area of expertise.[208] The MSAPA provision would accomplish this since it allows notice of "technical or scientific matters within the agency's specialized knowledge."[209] I believe this provision should be adopted in California. Similarly, the MSAPA provision on rebuttal of noticed

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thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.

205. Rodriguez, *Official Notice and the Administrative Process*, 10 J. Nat'l Ass'n ALJs 47 (1991); Gellhorn, *supra* note 153, at 44. Gellhorn gives an example from FTC practice: after hearing evidence on the point in numerous prior cases, the FTC took judicial notice that consumers prefer American to foreign made goods. However, respondents would have the opportunity to show that this was not true in the particular case.

206. See the extensive discussion of official notice in Davis, *supra* note 87, ch. 15. Davis points out that agencies and courts constantly take notice of legislative facts, both in deciding individual cases and in making law and policy, but seldom provide a fair opportunity for the parties to dispute those facts.

207. Holding that the Medical Board can take judicial notice of community standards for practicing medicine but must allow rebuttal if the matter noticed is disputable. *See supra n*otes 200-02.

208. *See* Davis, *supra* note 87, § 15.11; Rodriguez, *supra* note 205.

209. It also allows notice of records of other proceedings before the agency and of codes or standards. This also seems appropriate.

items[210] seems somewhat more protective than the California standard and I suggest that it be adopted also.[211] In addition, the statute or comment should make clear that the opponent should have the opportunity to contest the propriety of taking official notice as well as to rebut the factual material that has been noticed.

The proposal to allow official notice of technical or scientific material within the agency's specialized knowledge could be criticized on the grounds that it would allow an agency to put on a sloppy and incomplete case — as arguably it did in *Frantz* — and leave it to the respondent to protest and to put on expert testimony in rebuttal. Under present law, it is the agency's obligation to prove all the elements of its case, including technical material, by introducing appropriate expert testimony and exposing its experts to cross-examination. Perhaps it would be unfair to relax that obligation in any way.

However, I am not persuaded by this criticism. In many, if not most, cases, the noticed matter will not be disputed. Therefore, it is a great time saver to dispense with expert testimony to establish the matter. In the minority of cases in which the matter is disputed, the statute will provide the opportunity to challenge both the propriety of taking official notice and the noticed fact itself.[212] If the opponent does challenge the noticed fact by putting on evidence to the contrary, or even challenging the agency's reasoning through a written submission, the burden should shift back to the agency to prove the disputed fact by expert testimony. The only practical effect of the official notice procedure, therefore, is to shift the burden of producing evidence to the opponent; simply by mounting a challenge to the noticed fact, the opponent could compel the

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210. See *supra* note 204.

211. For example, MSAPA clearly defines the procedure for providing rebuttal opportunities when a matter is noticed for the first time in the ALJ's or the agency head's decision. *See* Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981) (requirement to provide rebuttal opportunity for matter noticed in ALJs decision). With respect to the great majority of factual assumptions (particularly indisputable ones), it is not possible to provide advance notification that the decisionmaker intends to take notice of them. *See* Davis, *supra* note 87, § 15.16.

212. See *supra* note 204.

agency to prove the fact. Thus the agency must be prepared to prove the noticed fact and, it seems to me, could not assume that it will get by with a sloppily prepared case.

While the opportunity to rebut an officially noticed fact is critical, there cannot be a response obligation with respect to every proposition of legislative fact or every judgmental or predictive fact that an agency decisionmaker finds.[213] Indeed, the *Frantz* decision held that a rebuttal opportunity was unnecessary with respect to one item which was based on common sense and thus unlikely to be disputable,[214] but it remanded to give the physician an opportunity to rebut another noticed item that was beyond lay comprehension and thus quite possibly disputable.[215] Certainly, it is good practice to allow an opportunity to rebut in all cases where it is likely that the opportunity could be productive.[216]

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213. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978) (refusing to require factual evidence in the record to provide support for Commission's predictions). As an extreme example, if an ALJ's decision states that Sacramento is in California, the ALJ does not need to offer a rebuttal opportunity to anybody.

214. The item noticed was that it is negligent to schedule high risk surgery in a hospital that lacks emergency facilities. The court's decision, in essence, is that the failure to give a rebuttal opportunity on this item was not prejudicial error. *See* Market St. Ry. v. R.R. Comm'n, 324 U.S. 548 (1945) (Commission consulted applicant's own reports in its files and failed to give notice and opportunity to respond — no prejudice).

215. The Board had found that it was gross negligence for a doctor to schedule surgery before selecting a surgeon. Official notice was proper but, because this item is not a matter of simple common sense, the physician is entitled to the right to respond.

Frantz indicated that due process would be violated by taking official notice of a disputable matter that required expertise without giving a rebuttal opportunity. 31 Cal. 3d at 140. Similarly, see Ohio Bell Telephone v. Public Util. Comm'n, 301 U.S. 292 (1937) (due process violated when agency took judicial notice of land values without giving notice and rebuttal opportunity).

216. The extended discussion in Davis, *supra* note 87, ch. 15, particularly §§ 15.13, 15.15, is largely devoted to this difficult problem. It is difficult to generalize, but the more disputable, critical, and specific a particular noticed fact is, the more likely that a court will insist that the opponent have an opportunity to respond, either under the applicable statute or under due process. Similarly, it is difficult to generalize on whether the opportunity to respond can be limited to written comments or whether trial-type process must be afforded. *Id.* § 15.18.

I also favor adoption of a related provision in the MSAPA: "The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence."[217] This provision confirms a well established distinction in administrative law between (i) receiving evidence, either through testimony or official notice, and (ii) evaluating the evidence that is already in the record.[218] Theoretically, an agency need not provide any prior notice or opportunity for rebuttal when it evaluates the evidence in the record, for example by deciding to reject the testimony of an expert, even though the evaluation rests on a variety of facts and intuitions in the mind of the decider.[219] Nevertheless, the distinction between taking official notice and evaluating evidence is not always clear-cut, and in doubtful situations the agency should provide prior notice and an opportunity to rebut.[220]

D. REPRESENTATION

The APA provides that parties have a right to be represented by an attorney but not to the appointment of counsel at the agency's

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In Harris v. Alcoholic Beverage Appeals Bd., 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965), the Supreme Court said that a reviewing court could take judicial notice of a bulletin issued by the director of the department even though it was not part of the record below and even though the agency had no opportunity to refute it. The court stated that the provision allowing opportunity for rebuttal was for the benefit of licensees, not the agency. This is troubling. The opportunity to rebut a matter that has been officially noticed should be available to either side.

217. MSAPA § 4-215(d).

218. *See* Gellhorn, *supra* note 153, at 42-43.

219. *See* Frantz v. Board of Medical Quality Assurance, 31 Cal. 3d 124, 139-40, 181 Cal. Rptr. 732 (1982) (adjudicator can use professional competence to reject opinion testimony that is found unpersuasive).

220. *Frantz* illustrates the difficulty of making the distinction. When the agency decided that the physician was grossly negligent, was it merely evaluating the evidence in the record or was it taking official notice of community standards of medical practice? In this marginal area, the Supreme Court appropriately required the agency to provide a response opportunity.

expense.[221] This provision should apply to all agencies covered by a new APA, whether or not due process applies.[222] However, it should allow all agencies to adopt regulations that impose qualification standards and disciplinary standards for lay representatives.[223]

Some non-APA agencies now allow parties to be represented by non-attorneys.[224] The Model Act takes no position on lay represen-

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221. Gov't Code § 11509. Due process does not require the appointment of counsel, even in a case of license revocation for conduct that could also be criminal. *See* Borror v. Department of Inv., 15 Cal. App. 3d 531, 537-44 (1971), *hearing denied*. *See also* White v. Board of Medical Quality Assurance, 128 Cal. App. 3d 699, 707-08, 180 Cal. Rptr. 516 (1982), *hearing denied* (no defense of ineffective assistance of counsel in administrative cases). In a few administrative situations, due process does require the appointment of counsel. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (parole revocation — right to appointed counsel upon showing of need).

222. Generally if due process applies parties have a right to be represented by counsel. Goldberg v. Kelly, 397 U.S. 254 (1970). However, an attorney's fee can be limited to $10, thus making it impossible to retain counsel as a practical matter. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985). And in some situations in which due process applies, there is no right to counsel. *See* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal of cadet from Merchant Marine Academy).

The statute that allows representation should permit agencies to adopt regulations that make exceptions to the right to counsel for situations involving minor sanctions or in which counsel is otherwise inappropriate, such as a brief suspension from school. *See* Perlman v. Shasta Joint Junior College Dist., 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970).

223. Such regulations could contain provisions allowing agencies to establish qualification standards for lay representatives that require the representatives to meet standards of competency and character. The rules might also contain provisions for standards of conduct, including confidentiality, and disciplinary control, and for procedures to bar representatives guilty of violating the standards from future representation before the agency. *See* Rose, *Nonlawyer Practice Before Federal Administrative Agencies Should Be Encouraged*, 37 Admin. L. Rev. 363, 370-72 (1985) (ethical rules for non-lawyer advocates before Patent Office, ICC, and Treasury Department).

224. Unemployment Insurance Appeals Board (Unemp. Ins. Code § 1957); Workers Compensation Appeals Board (Lab. Code § 5700); Department of Social Services welfare cases (Welf. & Inst. Code § 10950); Board of Equalization (18 Cal. Code Regs. § 5056). In Welfare Rights Org. v. Crisan, 33 Cal. 3d 766, 190 Cal. Rptr. 919 (1983), the Court created a privilege for communications between welfare clients and lay representatives, by analogy to the

tation.[225] I believe that the APA should provide that a party can be represented by anyone of his choice, before any agency, whether or not a licensed attorney.[226] The prohibitive cost of legal services, and the very limited availability of legal services for the poor or pro bono representation, means that most parties to administrative proceedings cannot afford lawyers. Indeed, non-lawyer advocates may do a better job than lawyers in specialized tribunals such as tax or welfare cases or in cases raising scientific or technical issues.[227] As dispute settlement shifts from formal adjudication to alternate methods of dispute resolution[228] or to less formal modes,[229] non-attorney representation seems quite appropriate.[230]

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attorney client privilege. In Eagle Indem. Co. v. Industrial Accident Comm'n, 217 Cal. 244, 18 P.2d 341 (1933), the Court allowed a lay representative in a workers' compensation proceeding to collect a fee even though the fee statute referred only to attorneys.

225. MSAPA defers to other state law on the question. § 4-203(b) states that a person can be advised and represented, at his own expense, by counsel or, if permitted by law, other representative. The federal APA allows representation by "other qualified representative" if "permitted by the agency." 5 U.S.C. § 555(b) (1988).

226. It is unclear whether such a provision can be adopted by the legislature, as opposed to the Supreme Court. However, the legislature's power to authorize lay representation before the Workers' Compensation Appeals Board was squarely upheld in Eagle Indem. Co. v. Industrial Accident Comm'n, 217 Cal. 244, 18 P.2d 341 (1933). Other states have conflicting positions on this issue. *See* Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 B.Y.U. J. Pub. L. 219, 252-54 (1988); Comment, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings*, 43 Vand. L. Rev. 245 (1990); Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law*, 15 Val. U. L. Rev. 567 (1981). This issue is beyond the scope of this report.

227. In Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985), the Court expressed strong approval for representation of claimants before the VA by non-attorney claims representatives employed by veterans' organizations.

228. See Part II.G., *supra* at 484.

229. See Part III.E., *infra* at 516.

230. The arguments in favor of non-lawyer representation in administrative proceedings are set forth in Rose, *supra* note 223, at 391. *But see* Heiserman, *Nonlawyer Practice before Federal Administrative Agencies Should be*

However, there are some complex and technical administrative cases that require attorneys; it would irresponsible to allow non-attorney representation. Consequently, I would allow all agencies, by regulation, to limit representation to licensed attorneys.

E. INFORMAL TRIAL MODELS

1. A menu of adjudicatory models. The California APA now provides for only one model of adjudication: a fairly formal trial with examination and cross-examination of witnesses. Although the proceeding may be informal in some respects (such as relaxed rules of evidence), the ingredients of APA adjudication are pretty much the same as a trial in Superior Court.

The Commission has tentatively agreed that a new APA should cover all state agencies[231] required by state statute or by state or federal due process to hold an adjudicatory hearing on the record.[232] In many cases to which such an APA will apply, the formal trial type hearing model of the existing APA is inappropriate. In addition, there are probably numerous cases presently heard by agencies covered by the existing APA which could be fairly disposed of with less formality.[233]

Discouraged, 37 Admin. L. Rev. 375, 385 (1985). This volume of the Administrative Law Review contains a stimulating discussion by numerous participants of the issue of non-attorney representation together with articles about the experience of various federal agencies that permit lay representation.

231. With a few exceptions, such as the University of California.

232. The Commission tentatively rejected my recommendation that the APA should cover *all* state agency adjudication, whether or not a statute or the constitution requires a trial type hearing. However, the Commission agreed to reconsider this issue before it finishes its recommendations on adjudication. This section of the report will assume that the Commission sticks to its decision. Therefore, it does not propose models suitable only for adjudications that are not required by statute or constitution to be conducted on the record.

233. In addition, there are probably a good many cases that an agency would like to bring to hearing but does not because of the relatively high cost of conducting a formal hearing before an OAH ALJ. These costs are charged back to the agency and must be absorbed in its budget. If the APA provided a mechanism for a shorter and simpler hearing, perhaps agency budgets could be stretched to cover more cases and thus improve law enforcement.

In my first report,[234] I suggested that California adopt a scheme similar to that in the 1981 MSAPA which provides for a menu of hearing procedures of varying degrees of formality. Under this approach, formal adjudication is the default, but agencies would be entitled to employ less formal models. The Commission deferred action on this proposal. It is now time to decide whether to adopt the idea of variable due process and to decide how many models the menu should contain and when they can be used.

The MSAPA's proposal for a choice of models is an ingenious answer to the criticism that a broadened act would call for more formality than is appropriate to resolve a broad range of disputes. It does so by providing for less formal models. Moreover, it responds to critics of the administrative process who complain that it has become too judicialized or too imbued with adversary behavior, by providing models whereby unnecessarily judicialized procedures and adversary styles can be dispensed with.

An important element of this suggestion is that formal procedure is the default; an agency that wishes to use less formal models must first adopt rules authorizing it to do so.[235] This rulemaking process will engage each of the constituents (inside and outside of government) that the agency deals with. The agency will be forced to confront the difficult issue of just how much formality is appropriate in its decisionmaking. I believe this rulemaking process would be a healthy one, for it would compel agencies to deal with an issue which is seldom considered in the daily routine.[236] And it would result in a set of regulations which, for the first time, will

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234. Asimow, "Administrative Adjudication: Structural Issues," pp. 66-82 (October 1989); set forth in revised form in Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1094-105 (1992), and reprinted, *supra* p. 321, at 348-59.

235. Under the MSAPA, emergency adjudicative procedure need not be authorized by a rule, whereas summary and conference adjudication procedure must first be authorized by rules. As discussed below, I disagree with the MSAPA on this point.

236. *See* Verkuil, *A Study of Informal Agency Procedures*, 43 U. Chi. L. Rev. 739, 745, 792-93 (1976).

accurately describe the actual adjudicatory procedures of each agency.

Ideally, the end result of the exercise will be a set of agency procedures properly matched to the needs for formality. Yet because the MSAPA provides for relatively few models, all agency procedures will fall into one slot or the other, thus enabling California for the first time to have a true administrative law with some consistency of procedure across all of its agencies. The essential ingredients of a conference hearing at one agency, for example, will be about the same in all agencies. This will permit attorneys who practice before every California agency to consider themselves administrative lawyers (as well as energy lawyers, or workers' compensation lawyers, or licensee defense lawyers) and allow the presentation of CEB courses applicable to all agencies. It will also permit the courts to build up a body of precedents applicable to all of the agencies.

The MSAPA leaves a critical choice to the states in adopting a system of variable process. Under one approach, the MSAPA defines precisely which types of matters are suitable for which hearing model. Under the second approach, agencies can pick whichever model they believe is appropriate for various situations or for different categories of their caseload. The first approach strikes me as too rigid when applied across the entire universe of administrative adjudication; it creates many interpretive problems and probably leaves out situations in which less formal procedures would be appropriate. Thus I prefer the second approach: the Act will provide for several models and agencies can select by rule which model will apply to each type of decision in their adjudicatory caseload and when it will apply. But, to repeat, without adoption of a rule that calls for less formal procedure, the agency must use full-fledged formal adjudication. Thus there is a great incentive for agencies to address this problem and adopt appropriate rules.

2. Conference hearings. The MSAPA modeled its provision for conference hearings[237] on the provision for informal hearings in

237. Kansas adopted the conference hearing and, under recent amendments permits use of that format even without the prior adoption of rules. Kan. Stat.

the Florida statute. Florida employs an all-inclusive definition of adjudication[238] but allows some hearings to be informal rather than formal if there is no disputed issue of material fact.[239]

A conference hearing dispenses with certain elements of a formal hearing. In particular, there is no pre-hearing conference, no subpoenas and discovery, no formal presentation of evidence or cross examination, no right of non-parties to participate. Instead, the parties can testify and present written exhibits and offer comments on the issues. However, the requirements of notice, unbiased decisionmaker, separation of functions, ex parte contacts, statement of findings and reasons, and agency review remain the same as in a formal hearing. In addition, I believe that an OAH ALJ should preside at a conference hearing if one would do so in the case of a formal hearing.

Ann. § 77-533 (Supp. 1988); Leben, *Survey of Kansas Law: Administrative Law*, 37 Kan. L. Rev. 679, 682, n.13 (1989). None of the other states that have adopted part or all of the MSAPA have adopted conference hearings, but the provision was drawn from the pre-existing statutes of numerous states. See *infra* notes 238-39. The conference approach is inspired by the seminal work of Paul Verkuil who identified it as the core administrative law procedure, applicable to both adjudication and rulemaking. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258 (1978).

238. Fla. Stat. Ann. §§ 120.52(10), 120.57 (West Supp. 1991) (hearings required in all proceedings in which the substantial interests of a party are determined by an agency).

239. Fla. Stat. Ann. § 120.57 (West Supp. 1991). In an informal hearing, an agency is required to give reasonable notice, give affected persons an opportunity to present written or oral evidence or a written statement, and provide a written explanation within 7 days. *See* England & Levinson, Florida Administrative Practice Manual ch. 12. (1979).

Similarly, Virginia provides for informal fact-finding in any case where no statute requires a formal hearing. The "conference-consultation procedure" involves informal presentation of factual data or argument, a prompt decision, and written statement of reasons. This procedure can also be used as a method of settlement or pre-trial before a formal hearing. Va. Code Ann. § 9.6.14:11 (1989). Delaware, which has an all-inclusive definition of adjudication, provides for fact-finding by informal conference or consultation, but only where the parties so agree. Del. Code Ann. tit. 29, § 10123 (1983). Another model is the Montana statute which allows an agency to adopt rules embodying a conference format. Mont. Code Ann. § 2-4-604.

Thus a conference hearing is essentially just that — a conference that lacks courtroom drama but nevertheless provides assurance that the issues will be aired, an unbiased decisionmaker will make a decision based exclusively on the record of the proceedings, the decision will be explained, and it will be reviewed by a higher-level decisionmaker (such as the agency heads).[240] The conference hearing will be particularly useful in the case of hearings required by federal or California due process, where a full-fledged trial type procedure is not required but some form of structured on-the-record hearing is necessary.[241]

When can the conference procedure approach be used? As mentioned above, there are two alternatives (agency choice or constraint by statute). I recommend that conference procedure be used in any circumstance defined by agency rules (unless, of course,

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240. The Water Resources Control Board uses a workshop procedure which is quite like a conference hearing. The workshop procedure was highly praised by private attorneys who practice before the board. It allows the issues in a pending case (either an appeal to the Board from a decision of one of its regional Boards or a matter within the Board's original jurisdiction) to be discussed informally by the litigants, the staff, and the Board members. The matter then returns to the Board in a brief formal hearing where a final vote of the Board members is taken.

241. For example, due process often requires a hearing to vindicate a person's liberty interest in restoring his good name which has been stigmatized by agency action. Thus a probationary employee who is fired for stigmatic reasons is entitled to a hearing purely to clear his name. *See, e.g.*, Heger v. City of Costa Mesa, 231 Cal. App. 3d 42, 282 Cal. Rptr. 341 (1991); Lubey v. San Francisco, 98 Cal. App. 3d 340, 159 Cal. Rptr. 440 (1979), *hearing denied*; Board of Regents v. Roth, 408 U.S. 564 (1977). A conference hearing might be well adapted for this purpose.

It is essential to realize that California due process is more inclusive than federal due process. *See* Asimow, "Administrative Adjudication: Structural Issues," pp. 60-66 (Oct. 1989); set forth in revised form in Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1084-90 (1992), and reprinted, *supra* p. 321, at 338-44. For example, in Saleeby v. State Bar, 39 Cal. 3d 547, 562-68, 216 Cal. Rptr. 367 (1985), the Supreme Court held that the Bar must provide an appropriate but informal hearing when considering claims for purely discretionary payments from the client security fund. Again, it is imperative that the statute provide less formal hearing models to deal with such cases.

conference hearings would violate some other statute or constitutional due process).[242]

Some cases decided under the existing APA could lend themselves to conference procedure. For example, where there is no disputed issue of fact but only a question of law, policy, or discretion (such as severity of penalty), conference procedure would be quite appropriate.[243]

In addition, conference procedure would be appropriate for a range of adjudications presently conducted by California agencies outside the APA. Adversary, trial-type process is not necessary or even desirable to settle a wide range of disputes between government and the public. One large group of cases that could be resolved by conference hearings are decisions to deny discretionary permissions, grants, or licenses, where a hearing is required by statute or by federal or California due process.

The various land use planning and environmental decisions made by state agencies provide another opportunity to consider the use of the conference format.[244] One example is the grant or revocation

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242. If the constraint alternative under MSAPA is followed, conference hearings would apply to cases of minor sanctions and cases in which there is no disputed issue of material fact.

Conference hearings could not be used when some other statute mandates trial-type hearings, as in the case of workers' compensation claims. Similarly, due process generally requires confrontation and cross-examination when an agency imposes a serious sanction, factual issues are central to the decision, and those issues turn on credibility. Goldberg v. Kelly, 397 U.S. 254 (1970). Conference proceedings could not be used in such cases either. However, courtroom drama is not necessary when no such issues must be resolved. Thus cross-examination is not needed in a variety of preliminary determinations (such as interim suspension) or when the agency needs to resolve broad questions of legislative fact or determine questions of law and policy.

243. Federal cases now recognize the importance of providing for a streamlined procedure when there is no factual issue, for example in the case of summary judgment or where the disputed issue has already been settled by a validly adopted rule. *See* American Hospital Ass'n v. NLRB, 111 S. Ct. 1539 (1991); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

244. Conference hearings would resemble the workshops used to excellent effect by the Water Resources Control Board. Various proceedings conducted by

of permits by the Coastal Commission to engage in construction near the beach. The agency operates rather like to a local planning and zoning agency. After the staff studies the application for permit and issues a report, there is a relatively brief, argument-type hearing before the entire twelve-member Commission.[245] Non-parties, such as objecting neighbors, can also take part. Here again, the conference hearing format appears appropriate.[246]

Conference hearings might also be useful in individualized ratemaking cases. For example, Public Utilities Commission ratemaking cases are now heard by ALJs in a trial-type mode with extensive cross-examination of experts. These cumbersome proceedings could be simplified through the adoption of generic rules.[247] To the extent that issues remain to be tried, the agency should have discretion to dispense with trial-type formality and use less formal and far more efficient approaches, such as conference

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the Energy Commission also closely resemble the conference model. The Workers Compensation Appeals Board rules also provide for conference hearings. 8 Cal. Code Regs. § 10541.

245. The Commission should consider the delegation of the hearing function to ALJs. *See* Asimow, "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs," pp. 7-9 (Aug. 1990); set forth in revised form in Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1106-08 (1992), and reprinted, *supra* p. 321, at 360-62.

246. The conference format would be inappropriate to the extent that it would exclude participation by non-parties. However, I believe that agencies should have the power to determine in their rules whether non-party participation would be permitted in conference hearings. On this point, I part company with the MSAPA if that statute would preclude agencies from adopting rules that would allow non-party participation.

247. When I study rulemaking procedure, I intend to suggest a provision to make clear that generic issues that arise in the course of adjudication can be split off from the pending adjudication and resolved through rulemaking.

hearing procedures[248] which would allow informal participation by all concerned parties.[249]

Finally, the conference procedure could lend itself to tax adjudications now conducted by the State Board of Equalization, either in cases of appeals from Franchise Tax Board determinations or in cases of appeals from the Board's own business tax decisions. While a few tax cases may involve credibility determinations (as to which traditional cross-examination may be appropriate), most of them turn on issues of statutory interpretation and application of the law and regulations to stipulated facts. A conference might be quite appropriate for resolving this kind of case.

3. Summary adjudicative proceedings. 1981 MSAPA provides for an abbreviated, bare-bones procedure called a summary proceeding.[250] As sketched in MSAPA, this model[251] simply requires notice and an opportunity for a party to explain his position to a

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248. *See* Brown, *The Overjudicialization of Regulatory Decisionmaking*, 5 Nat. Resources & Env't 20, 48 (1990), urging that ratemaking proceedings be much less formal and judicialized and that a workshop approach focused on the conflicting views of experts be substituted for trial-type combat.

249. As in the case of the Coastal Commission, a conference hearing at the Public Utilities Commission should permit participation by non-parties.

250. MSAPA § 4-502 to 4-506. Washington's new APA provides for a "brief adjudicative procedure." Brief adjudicative procedure can be used in any situation where the agency, by rule, has provided for it if the public interest does not require the involvement of non-parties and if "the issue and interests involved in the controversy do not warrant" use of more formal procedure. Also brief procedure cannot be used in public assistance and food stamp programs. Wash. Rev. Code Ann. § 34.05.482 (1990). Kansas also adopted summary hearings. Kan. Stat. Ann. § 77-537 (Supp. 1988), with amendments described in Leben, *supra* note 237, at 682 n.13, 685 n.27.

251. *See generally* Comment, *Experiments in Agency Justice: Informal Adjudicatory Procedures in Administrative Procedure Acts*, 58 Wash. L. Rev. 39, 55 (1982) (concluding MSAPA model was better than informal procedures in various state laws). The summary model might have been inspired by Goss v. Lopez, 419 U.S. 566 (1975). Goss holds that a student threatened by a ten-day suspension from school is entitled to notice of the charges against him, an explanation of the evidence the authorities have if he denies the charges, and an opportunity to present his side of the story. In essence, the Court held that due process required a conversation between the student and the disciplinarian.

presiding officer named by the agency.[252] The officer must furnish a brief statement of findings and reasons.[253] On request, the aggrieved party can obtain an administrative review of a decision taken through summary adjudication.[254] In short, summary procedure allows a person subject to an adverse agency decision appropriate notice, a chance to state his point of view, an explanation of an adverse decision, and an administrative review of the decision.[255]

My belief is that California need not adopt the summary adjudicative procedure in its new APA, assuming that the definition of adjudication is limited to hearings on the record required by statute or due process.[256] By definition, a summary hearing is not an on-the-record proceeding, so it should not be needed under a statute that provides ground rules only for on-the-record proceedings.[257]

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252. There is no requirement that the presiding officer be a person uninvolved in the dispute, much less an ALJ from OAH. Any person exercising authority over the matter is the presiding officer. MSAPA § 4-503(a).

253. Except in monetary cases, the order can be oral or written. MSAPA § 4-503(c).

254. However, reconsideration can be prohibited by any provision of law. MSAPA §§ 4-504, 4-505.

255. None of the other Model Act provisions relating to adjudication are applicable unless agency rules cause them to apply. MSAPA § 4-201(2).

256. As mentioned above, if the Commission wishes to reconsider its decision to limit the definition of adjudication, it will also have to consider adoption of the summary hearing model to deal with the large numbers of small-stakes cases that would be swept under the act.

257. In many situations, a statute or due process requires an agency to furnish a bare-bones type of procedure. For example, due process requires a procedure that falls short of an on-the-record hearing in the case of short suspensions of students or employees. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (10-day suspension from high school — student entitled to oral or written notice, explanation of evidence, and opportunity to present his side of the story); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 124 Cal. Rptr. 14 (1975) (pre-termination procedures for permanent civil service employee — notice, statement of reasons, copy of charges, and right to respond orally or in writing).

Similarly, licensing statutes are often interpreted to provide for informal procedures before denial of the license. *See* Fascination, Inc. v. Hoover, 39 Cal. 2d 260, 269-71, 246 P.2d 656 (1952). The *Fascination* case involved an application for a license for an amusement business. The city denied it on the

Elimination of the summary hearing model simplifies the drafting of a new APA and also simplifies the task agencies face in deciding which model to employ for their various functions. Moreover, elimination of summary hearings eases concerns that agencies would opt for the summary model in their rules in cases that require more formalized proceedings.

Elimination of the summary hearing model does create a problem. Department of Motor Vehicle driver's license hearings, as presently constituted, cannot meet the standards for separation of functions that the Commission has decided to adopt. At the time of the Commission's discussion of this subject, I suggested that the problem could be solved by placing driver's license hearings into the summary hearing slot because separation of functions are not required for summary hearings. Consequently, it will apparently be necessary to write an exemption for the DMV from separation of functions.

4. Emergency procedure. The California statute contains no general provision for emergency adjudication (although it does provide for emergency rulemaking).[258] Yet emergencies do occur and must be dealt with. For example, emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public. In most cases, agencies must go to court to seek immediate relief in emergency situations. This remedy has proved to be

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basis that the business involved a game of chance rather than skill. The Supreme Court held that notice and hearing was required, reaching this conclusion by "interpreting" the ordinance. The court suggests that the hearing requirement might have been satisfied by an inspection of the game by the chief of police and an opportunity for the applicant to state his case.

258. Procedural due process cases recognize that in a significant class of cases, government can shoot first and ask questions afterward. *See, e.g.*, FDIC v. Mallen, 108 S. Ct. 1780 (1988) (suspension of banking executive under indictment for felony involving dishonesty); Hodel v. Virginia Surface Mining Ass'n, 452 U.S. 264 (1981) (immediate closure of dangerous mine).

unsatisfactory in professional licensing cases where interim suspension is urgently required to protect public safety.[259]

If the new APA applies in all situations in which due process requires a hearing, there is a clear need for an emergency provision in the statute. In numerous situation, due process requires a hearing before an agency acts; absent some specific provision for emergency procedure, the APA would then mandate full-fledged formal procedure which could thwart the agency in dealing with an emergency situation. Thus there should be a specific provision that allows the agency to take emergency action with abbreviated procedure.

Moreover, a generic provision for emergency action would be a useful addition to the California APA. The law already contains provisions for interim suspension of both medical licensees and attorneys and some other licensing situations,[260] as well as for

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259. *See* Fellmeth, *Physician Discipline in California: A Code Blue Emergency,* 9 Cal. Reg. L. Rep. 1, 5-6, 15 (Spring 1989). Under prior law, the Medical Board was empowered to seek temporary restraining orders in court, but it sought and obtained only three in 1986-87 and none at all in 1987-88. *See* Bus. & Prof. Code §§ 125.7, 2311. I was informed that the low number of TROs resulted from reluctance by the attorney general's staff to seek them because of a well-founded belief that trial judges would refuse to grant them.

260. Gov't Code § 11529 (medical licensee's violations endanger public health, safety, or welfare); Bus. & Prof. Code § 6007(c) (suspension of attorney from practice if conduct poses a substantial threat of harm to clients or the public and on other grounds). The provision for interim suspension of attorneys was upheld by the Supreme Court. Conway v. State Bar, 47 Cal. 3d 1107, 255 Cal. Rptr. 390 (1989). Under Section 6007(c) and the State Bar rules, there is an expedited hearing; either party has subpoena power but the usual provisions for discovery and evidence do not apply. Instead, evidence can be taken by affidavit. The State Bar Court does not review interim suspensions; they are judicially reviewable but the suspension goes into effect pending review. The Real Estate Commissioner has power to order a licensee to desist and refrain from illegal activity immediately with a hearing granted within 30 days. Bus. & Prof. Code § 10086(a). The Public Utilities Commission has power to suspend trucking licenses before granting a hearing. Pub. Util. Code § 1070.5. The DMV has power to suspend certain licenses pending a hearing if the public interest so requires. Veh. Code § 11706.

health facilities and day care centers.[261] This indicates that such legislation is acceptable to the legislature and that all agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

The 1981 MSAPA provides that "emergency adjudicative procedure" can be used in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." The agency can take only such action as is necessary to avoid the immediate danger.[262] The agency must provide practicable notice and a brief statement of findings, conclusions, and policy reasons for the decision if it is an exercise of discretion. After issuing the order, the agency must then proceed as quickly as possible to complete proceedings that would be required if there was no emergency.[263]

Thus a new California statute could be modeled on the MSAPA provision. However, I have some additional suggestions. Unless it is infeasible, there should be provision for an expedited and streamlined hearing before an agency employee, as is provided in the legal interim suspension statutes,[264] at which the party at least

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261. *See* Health & Safety Code §§ 1550 (last paragraph), 1569.50, 1596.886. These provisions are used 150-200 times per year. They allow the agency to suspend a facility's license ex parte, without any prior procedure, but require a hearing within 30 days after receipt of the suspension notice and a decision within 30 days after completion of the hearing. This provision was upheld in Habrun v. Department of Social Serv., 145 Cal. App. 3d 318, 193 Cal. Rptr. 340 (1983). I was informed that licensees frequently manage to stay open by securing a temporary restraining order against the department's suspension order; the trial court grants a hearing to the facility at the preliminary injunction stage.

262. MSAPA § 4-501(a)-(b). Kansas adopted this provision. Kan. Stat. Ann. § 77-536 (Supp. 1988). Unlike conference or summary adjudication, emergency procedure can be used even though the agency has not previously provided for it by a rule. I differ with the MSAPA on this point, as discussed *infra*.

263. MSAPA § 4-501(c)-(e). The Supreme Court indicated that post-termination proceedings must follow reasonably promptly after conclusion of the interim suspension. Conway v. State Bar, 47 Cal. 3d 1107, 1120-23, 255 Cal. Rptr. 390 (1989).

264. Unfortunately, the provision for interim suspension of medical licensees provides for more than an expedited and streamlined hearing. It allows the

has an opportunity (orally or in writing) to rebut the charges against him or persuade the agency not to suspend him.[265] Immediate judicial review should be provided.[266] Finally, emergency action should be authorized by agency rules, just like conference and summary proceedings, something which MSAPA does not require. Such regulations would define the circumstances in which emergency action can be taken, the nature of the interim relief which the agency can obtain, and the procedures that will be accorded before and after the emergency action (which could be more protective than those that the statute provides as a default).

F. OTHER TRIAL ISSUES

1. The oath. The APA provides that testimony shall be taken only on oath or affirmation[267] and that is the general practice in

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licensee to call, examine, and cross-examine witnesses and to present and rebut evidence determined to be relevant. Thus the suspension hearing could consume weeks rather than hours or a day or two. Gov't Code § 11529(d). I am informed that this has not occurred in the few interim suspension hearings that have occurred so far, but obviously it could occur. I recommend that the provision for suspension of medical licensees be conformed to this recommendation.

265. Ordinarily, some sort of brief conference is feasible. But one can imagine a leaking toxic chemical tank where the owner is away on vacation and cannot be contacted, yet immediate action is needed to protect the public. The statutes calling for suspension of the licenses of day care centers, elderly care centers, and health facilities allow the facilities to be shut down without any prior procedure. I recommend that these statutes be conformed to the new APA. It is my belief that DSS and DHS can provide at least a brief conference with licensees before shutting them down.

266. Bus. & Prof. Code Section 6083(b) provides for immediate judicial review of a Bar decision to place a member on interim suspension. Gov't Code Section 11519(h) provides for immediate judicial review of a Medical Board interim suspension. In cases involving suspension by the Departments of Health and Social Services, which under present law can be done without any prior procedure, licensees have succeeded in obtaining delays from the courts. The courts should not delay the agency from putting an interim suspension into effect if the agency has followed the procedures spelled out in its regulations; nor should the court grant a hearing to the licensee which supplants the procedures that the agency must provide.

267. Gov't Code § 11513(a).

non-APA agencies as well.[268] Some doubt has been expressed about whether Board of Equalization hearing officers have the power to take testimony under oath. Consequently, it would be desirable if a new APA made clear that presiding officers have the power to administer oaths and shall take testimony only under oath or affirmation unless agency regulations provide the contrary.[269]

2. Transcripts. The APA provides that proceedings are reported by a phonographic reporter, except that on consent of all the parties, the proceedings may be reported electronically.[270] In my view, all agencies should have power to tape record their hearings, rather than use the much costlier method of having a reporter present, with or without the consent of the parties. Several agencies now tape their hearings and report no problems with transcribing the tapes when a transcript is needed.[271] With modern electronic reporting equipment (such as multi-track recorders), agencies may be able to achieve significant efficiencies and cost savings.[272] The

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268. *See* Marlow v. County of Orange Human Serv. Agency, 110 Cal. App. 3d 290, 167 Cal. Rptr. 776 (1980) (a "witness" under state law is a person who testifies under oath — failure to take testimony under oath a case involving dismissal from methadone maintenance program requires reversal).

269. In a case involving hotly contested facts, it may be that agency acceptance of unsworn testimony violates due process. *See* Broussard v. Regents of Univ. of Cal., 131 Cal. App. 3d 636, 184 Cal. Rptr. 460 (1982), *hearing denied* (no due process violation where facts not disputed).

270. Gov't Code § 11512(d). The section was amended in 1983 to provide for recording by consent to overrule an Attorney General's opinion to the contrary. Op. 82-802, 65 Ops. Cal. Att'y Gen. 682 (1982).

271. The Unemployment Insurance Appeals Board tapes most hearings and reports very few problems of audibility. Similarly, the State Personnel Board tapes hearings involving relatively minor sanctions and reports few problems where good equipment is used.

272. In an early case involving primitive equipment, a reviewing court was confronted by a transcript of recorded testimony that had significant omissions. The court was compelled to remand for a new hearing because it could not apply the substantial evidence test to an incomplete transcript. Aluisi v. County of Fresno, 159 Cal. App. 2d 823, 324 P.2d 920 (1958); Chavez v. Civil Serv. Comm'n, 86 Cal. App. 3d 324, 332, 150 Cal. Rptr. 197 (1978), *hearing denied* (day's tape defective). In County of Madera v. Holcomb, 259 Cal. App. 2d 226, 230-31, 66 Cal. Rptr. 428 (1968), *hearing denied*, the court found that a transcript from a taped hearing left much to be desired because some speakers

OAH reports that it is necessary to employ a monitor to confirm that the equipment is working properly and to maintain a log of speakers, but such a monitor is much less costly than having a court reporter present. Other agencies have managed to tape hearings successfully without a monitor.

The question of whether and when to tape record agency hearings should be left to agency regulations. The statute might provide for stenographic reporting as a default, but allow agencies to adopt regulations calling for electronic reporting in all cases or in designated classes of cases, with or without the consent of the parties.

3. Telephone hearings. Naturally, a hearing in which all the parties, witnesses, and the judge are in the same place at the same time is optimal, particularly where credibility determinations must be made. Nevertheless, there are many situations in which the time and money of the litigants and the agency could be conserved if the telephone (or other appropriate telecommunications equipment) were used instead to conduct the examination of a witness or even an entire hearing. The Unemployment Insurance Appeals Board makes use of hearings in which part or all of the testimony is taken by telephone where the location of the hearing is inconvenient for parties or witnesses.[273] A carefully done study indicated that more than two-thirds of UIAB referees were satisfied by this procedure and felt that it met due process guarantees.[274]

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did not identify themselves and others spoke at the same time, but found the transcript sufficient to conduct review. These sorts of problems should be almost completely removed as presiding officers become accustomed to taped hearings (they must admonish speakers to identify themselves and not to talk at the same time) and by the use of modern taping equipment.

273. 22 Cal. Code Regs. § 5041(c). I am informed that telephone testimony is taken in about 20% of UIAB hearings. *See* Slattery v. Unemployment Ins. Appeals Bd., 60 Cal. App. 3d 245, 131 Cal. Rptr. 422 (1976), criticizing the Board for conducting simultaneous hearings before different referees when the problems could have been solved by a telephone hearing.

274. Corsi & Hurley, *Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience*, 31 Admin. L. Rev. 247 (1979); *see also* Corsi & Hurley, *Pilot Study of the Use of the Telephone in*

Probably explicit statutory sanction is needed to allow hearings by telephone if a party objects.[275] Where considerations of distance, illness, or other factors make the location of a hearing inconvenient for parties or witnesses, or where in-person hearings require parties or witnesses to sit and wait for long periods of time, I think that it makes sense to take testimony by phone. Thus the APA should allow agencies to adopt regulations that include provision for conducting part or all of adjudicatory procedures by conference telephone call or other appropriate telecommunications technology.

4. Interpreters. The present statute contains elaborate provisions for interpreters in both APA[276] and non-APA proceedings.[277] I have not heard of any problems with these provisions and they

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Administrative Fair Hearings, 31 Admin. L. Rev. 485 (1979), reporting a pilot project in New Mexico in the use of the telephone in unemployment and welfare cases, and reporting general satisfaction by both hearing officers and users.

275. *See* Purba v. INS, 884 F.2d 516 (9th Cir. 1989) (phone hearings are contrary to statute which requires testimony to be taken "before" immigration judge); Detroit Based Coalition for Human Rights v. Department of Social Serv., 431 Mich. 172, 428 N.W.2d 335 (1988) (phone hearings violate regulations requiring in-person hearing). There is some authority that telephone hearings deny due process where a large percentage of the hearings turn on issues of credibility. Gray Panthers v. Schweiker, 716 F.2d 23, 34-38 (D.C. Cir. 1983). *But see* Casey v. O'Bannon, 536 F. Supp. 350 (E.D. Pa. 1982). *See generally* Note, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due*, 1984 U. Ill. L.F. 445. Current conceptions of due process require a careful evaluation of both private and governmental interests, and of the actual risks of error posed by the challenged procedure. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). It is my belief that a well designed scheme of telephonic hearings would be upheld under contemporary due process analysis where significant savings to parties, witnesses, or the agency could be shown.

276. Gov't Code Section 11501.5(a) furnishes a list of agencies that must provide language assistance; Section 11501.5(b) allows other agencies to elect to do so. Section 11513(d) provides for appointment of interpreters, leaving it to the ALJ to decide whether the party or the agency should pay for them. Section 11513(e) provides that the State Personnel Board shall establish criteria for interpreters and compile lists of names. Section 11513(f)-(i) provides additional ground rules for interpreters. Section 11500(g) defines language assistance.

277. Gov't Code Section 11018 requires non-APA agencies to comply with Gov't Code Section 11513(d).

should be brought together (and simplified) in a single provision.[278] That provision should also make clear that a presiding officer has the power to provide an interpreter to translate the testimony of a witness who does not speak English even if the parties do speak English.[279] It should also make clear that language assistance provisions require provision of sign language assistance for hearing impaired parties or witnesses.

5. Open hearings. The APA contains no provision relating to open hearings,[280] but the general assumption is that hearings are open to the public.[281] The APA should make clear that hearings are open unless both parties agree that they should be closed or unless some other statute mandates closed hearings.[282] The MSAPA

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278. I am informed that the Judicial Council is currently trying to develop a new set of rules for interpreters. When this work is completed, it may be possible to incorporate it into the APA. I am also informed that the provision permitting agencies to establish special materials and examinations for interpreters is meaningless because none of the agencies have done so. Gov't Code § 11513(d)(2).

279. Ogden, *supra* note 29, § 37.04[1][b].

280. The Bagley-Keene Open Meeting Act, Gov't Code § 11120 *et seq.*, appears inapplicable to hearings before ALJs. It may be applicable when the agency heads conduct the hearing, although they are allowed to close it when they deliberate on the decision. *See* Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 948-49, 123 Cal. Rptr. 563 (1975). The Open Meeting Act also contains an exception for employee disciplinary matters. Gov't Code § 11126.

281. Ogden, *supra* note 29, § 37.03[1][a].

282. *See* Mosk v. Superior Court, 25 Cal. 3d 474, 488-501, 159 Cal. Rptr. 494 (1979) (constitutional provision for closed hearings); McCartney v. Comm'n on Judicial Qualifications, 12 Cal. 3d 512, 520-21, 116 Cal. Rptr. 260 (1974) (same); Swars v. City Council of Vallejo, 33 Cal. 2d 867, 873-74, 206 P.2d 355 (1949) (dissent argues that the rule of open trials should apply to local civil service commission).

OAH informs me that they now close hearings when minors must testify about matters which are, in the nature of the allegations, extremely embarrassing. This practice was upheld in Seering v. Department of Social Serv., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). It should be confirmed by statute.

provides for open hearings,[283] and there is authority that an individual is entitled to an open hearing under due process.[284]

IV. POSTHEARING PROCEDURES

A. FINDINGS AND REASONS

1. Present California law. The APA provides that agency decisions shall contain findings of fact, a determination of the issues presented and the penalty if any. The findings may be stated in the language of the pleadings or by reference thereto.[285]

As in numerous other areas of state administrative law, the courts have created a common law of findings that expands on the APA and generalizes it to all administrative adjudication whether or not covered by the APA. According to the *Topanga* case,[286] administrative adjudicatory decisions must be supported by findings that

283. MSAPA § 4-211(6): "The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure." The section makes an exception for hearings conducted by electronic means.

284. Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

285. Gov't Code § 11518. Recall that the pleadings are in the form either of an accusation or a statement of issues. Part II.A., *supra* at 456. An accusation must be a reasonably detailed statement of the acts or omissions with which a person is charged. A statement of issues includes any particular matters that have come to the attention of the initiating party. Gov't Code §§ 11503, 11504. Thus findings stated in the language of the pleadings probably would be somewhat more informative than a mere statement of ultimate facts.

286. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514-18, 113 Cal. Rptr. 836 (1974) (zoning board must make findings when granting variance). The Court noted that a zoning board need not make findings with the formality required in judicial proceedings, but it disapproved of findings set forth solely in the language of the applicable legislation. Again, in Saleeby v. State Bar, 39 Cal. 3d 547, 566-68, 216 Cal. Rptr. 367 (1985), the Court imposed a findings requirement upon State Bar decisions concerning whether to make a discretionary grant from the client security fund. Absent such findings, it would be impossible to decide whether the Bar's decision was an abuse of discretion. Thus the Bar must make findings both on the question of whether a reimbursable loss occurred and also on how that finding was translated into the actual award. *Id.* at 568 n.8.

bridge the analytic gap between the raw evidence and the ultimate decision. Thus *Topanga* requires more than a statement of who did what to whom plus a finding of ultimate fact. It requires the agency to articulate sub-conclusions that explain the reasoning whereby it moved from the evidence to ultimate facts.[287] In many cases, a mere restatement or incorporation by reference of the pleadings, as permitted by the APA, probably would not meet the *Topanga* requirements.[288]

The court's analysis in the *Topanga* decision is based on the language of California's judicial review statute which requires a reviewing court to determine whether substantial evidence supports the agency's findings and whether the findings support the decision.[289] Conceivably, *Topanga* might not be applicable where the

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287. *See* Wheeler v. State Bd. of Forestry, 144 Cal. App. 3d 522, 528-29, 192 Cal. Rptr. 693 (1982):

> *Topanga* mandates there be a 'bridge' between evidence and findings and findings and decision. This requires a legally valid warrant of some kind [footnote omitted], which links the evidence to the findings and the findings to the order and which tells courts whether and to what extent the licensee's conduct has anything to do with the claimed ground of discipline.

Similarly, see Medlock Dusters, Inc. v. Dooley, 129 Cal. App. 3d 496, 502, 181 Cal. Rptr. 80 (1982), *hearing denied* (statement of incidents followed by conclusion that cause for discipline was established is inadequate).

288. Thus it is doubtful that Swars v. City Council of Vallejo, 33 Cal. 2d 867, 206 P.2d 355 (1949), would or should be followed. That case allowed the civil service commission to dispense with findings in discharging an employee because the commission "upheld the action taken by the city council" and the council had made specific charges against the employee. The Commission's action discharging the employee raised a presumption that the existence of the necessary facts was ascertained. The court held this procedure met the requirements of an ordinance that the commission make written findings and conclusions. *But see* Respers v. University of Cal. Retirement Sys., 171 Cal. App. 3d 864, 870-73, 217 Cal. Rptr. 594 (1985), distinguishing and apparently rejecting *Swars* — there must be some clearly adoptive act before incorporation of prior documents can substitute for findings. Moreover, such incorporation is suspect since the person who drafted the prior documents did not hear the witnesses. *See also* Farmer v. City of Inglewood, 134 Cal. App. 3d 130, 139, 185 Cal. Rptr. 9 (1982), distinguishing *Swars*.

289. The findings requirement in *Saleeby*, *supra* note 286, was apparently based on California due process rather than on statutory construction.

court reviews the decision under the independent judgment test rather than the substantial evidence test.[290]

The *Topanga* decision is also based on strong considerations of policy. Without proper findings, the court cannot responsibly review the decision. In addition, a findings requirement minimizes the risk that an agency will act arbitrarily.[291] Finally, proper findings enable the parties to decide whether to seek review and help persuade the parties that the decision was careful, reasoned, and equitable.

The courts do not and should not impose these requirements woodenly. There must be a rule of prejudicial error.[292] When, for example, the ultimate facts are obvious from the basic facts, there is no separate requirement that the ultimate facts (or "determination of issues" in the language of the APA) be stated.[293] However, it is less likely that a court would infer basic facts where the agency states only an ultimate fact; unless matters are totally obvious, this would violate the reasoning of the *Topanga* decision.[294]

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290. *See* Cooper v. Kizer, 230 Cal. App. 3d 1291, 282 Cal. Rptr. 492 (1991) (ALJ not required to make findings regarding MediCal applicant's back pain where court reviews decision under independent judgment test).

291. *Topanga* was a challenge to the approval of a zoning variance. The Court seemed suspicious of the variance granting process and argued that a proper findings requirement would help achieve the intended scheme of land use control.

292. *See* DeMartini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787, 812-15, 30 Cal. Rptr. 668 (1963) (missing finding was necessary implication of other findings).

293. Parkmerced Residents Org. v. San Francisco Rent Stabilization Bd., 210 Cal. App. 3d 1235, 258 Cal. Rptr. 774 (1989) (agency not required to state that there was "good cause" for a waiver or that it was "in the interests of justice" since such ultimate findings were obvious from the basic fact findings).

294. *See* J. L. Thomas, Inc. v. County of Los Angeles, 232 Cal. App. 3d 916, 283 Cal. Rptr. 815, 820-22 (1991); Respers v. University of Cal. Retirement Sys., 171 Cal. App. 3d 864, 870-73, 217 Cal. Rptr. 594 (1985). Pre-*Topanga* cases do allow agencies to dispense with findings of basic fact where only one finding could have been made. Savoy Club. v. Board of Supervisors, 12 Cal. App. 3d 1034, 1040-41, 91 Cal. Rptr. 198 (1970). But if this is not the case, the courts do require basic fact findings; findings of ultimate facts are not sufficient.

2. MSAPA provision. The MSAPA provides a detailed findings requirement applicable to formal adjudication.[295] An order must contain separately stated findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed. If the findings are set forth in language that merely repeats or paraphrases the relevant provisions of law, there must be a concise and explicit statement of the underlying facts of record. Much less onerous requirements apply to summary and emergency adjudication.[296]

3. Recommendations. I suggest that a new APA contain the MSAPA provision on findings.[297] The existing APA's findings requirement for formal adjudication seems too sketchy. For example, under the existing APA, there is no requirement that the

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California Motor Transp. Co. v. Public Util. Comm'n, 59 Cal. 2d 270, 28 Cal. Rptr. 868 (1963); Bostick v. Martin, 247 Cal. App. 2d 179, 55 Cal. Rptr. 322 (1966), *hearing denied*.

295. MSAPA § 4-215(c). The federal APA similarly requires a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. 5 U.S.C. § 557(c)(A) (1988). In informal adjudication not otherwise governed by the federal APA, there is a requirement that a notice of denial of a written application, petition, or other request shall be accompanied by a brief statement of the grounds for denial (except when affirming a prior denial or when the denial is self-explanatory). 5 U.S.C. § 555(e) (Supp. V 1993).

296. In summary adjudication involving a monetary matter or a sanction, the presiding officer must give each party a brief statement of findings of fact, conclusions of law, and policy reasons for the agency's discretion. Except in a monetary matter, the findings can be oral or written. In other cases, the agency need only furnish notification which includes a statement of the action and notice of any available review. MSAPA § 4-503(b)(2), (c), (d). In emergency action, the order shall contain a brief statement of findings of fact, conclusions of law, and policy reasons for the exercise of discretion. MSAPA § 4-501(c).

297. MSAPA appropriately sets out more relaxed findings requirements in emergency proceedings. MSAPA § 4-501(c). I recommend adoption of this provision also. If California adopts the summary hearing procedure, it should also adopt the MSAPA provisions that relax the findings requirement in such proceedings. *See* MSAPA § 4-503(b)(2).

agency state the reasons why it has selected a particular penalty;[298] MSAPA clearly requires reasons for all exercises of discretion, including the remedy prescribed. In addition, I would preserve the *Topanga* requirement that the order contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts. Perhaps this requirement should be articulated in a comment. And the findings requirement should be the same whether the decision is judicially reviewable under the substantial evidence or independent judgment tests.[299]

In civil litigation, the traditional requirements of findings and conclusions has been supplanted by the "statement of decision."[300] I considered but rejected the idea of transplanting the statement of decision into administrative adjudication. Judicial decisions express confusion about whether the change had any real significance;[301] I see no need to cause administrative judges to struggle with a new concept. Moreover, if a change from findings and conclusions to statement of decision means that less specificity would be required, I would oppose making the change. The *Topanga* case establishes the norm for administrative findings and

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298. Williamson v. Board of Medical Quality Assurance, 217 Cal. App. 3d 1343, 266 Cal. Rptr. 520 (1990); Golde v. Fox, 98 Cal. App. 3d 167, 187-88, 159 Cal. Rptr. 864 (1979), *hearing denied* (no requirement that Board make findings on rehabilitation despite a statute requiring evidence of rehabilitation be taken into account).

299. As explained *supra* in text accompanying note 290, present law might not require administrative findings on issues reviewed by courts under the independent judgment test.

300. Code Civ. Proc. § 632; Cal. R. Ct. 232.

301. As one court said: "… the Legislature adopted what it thought would be a less formal method of stating the factual basis for a court decision. Whether the Legislature succeeded in implementing its intent is debatable. As many trial judges now realize, the labels may have changed, but the game is the same. There is little substantive difference between findings of fact and the statement of decision. Findings consisted of all issues of fact 'material' to the judgment; the statement of decision must include the factual and legal basis of each of the 'principal contested issues.'" R.E. Folcka Constr. Co. v. Medallion Home Loan Co., 191 Cal. App. 3d 50, 54, 236 Cal. Rptr. 202 (1987).

it can be argued that a statement of decision might tolerate a greater level of generality than does *Topanga*.[302]

B. PRECEDENT DECISIONS

Several California agencies designate important adjudicatory decisions as "precedent decisions."[303] These agencies designate as precedents their adjudicatory decisions that contain significant legal or policy material. The precedent decisions are published, cited, and referred to in subsequent decisions. Other agencies are considering whether to adopt this practice. Still other agencies routinely publish all of their decisions.[304]

I recommend that a system of precedent decisions apply to all agencies covered by the adjudicatory provisions of a new APA. An earlier phase of my report strongly recommended that agencies retain their power to adjudicate; the Commission accepted this recommendation. One important reason for that recommendation was that agencies need the ability to make law and policy through adjudication as well as through rulemaking.[305] But if this is so, agencies have a responsibility to let the law and policy they make through their case law be generally known.[306]

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302. A statement of decision requires only findings of "ultimate" not "evidentiary" facts. People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164 (1984). Clearly, *Topanga* requires far more than findings of ultimate facts.

303. The Fair Employment and Housing Commission and the Unemployment Insurance Appeals Board designate and publish precedent decisions. *See* Gov't Code § 12935(h) (FEHC); Unemp. Ins. Code § 409 (UIAB).

304. Agricultural Labor Relations Board, Public Utilities Commission, Public Employees Relations Board, Workers Compensation Appeals Board.

305. Traditionally in administrative law, lawmaking through adjudication is acceptable and of equal dignity with lawmaking through rules. *See, e.g.,* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

306. Some people have argued to me that agencies are not making any significant law or policy through their adjudicatory decisions, simply finding facts. I doubt this. Every agency is confronted by vague statutory terms, such as "unprofessional conduct" or "moral turpitude" or "gross negligence." Their decisions make law. They should be available and accessible to the public. In addition, agency decisions generally establish a pattern of appropriate sanctions. This information should also be generally known.

The reality is that although adjudicatory decisions of most California agencies are public records,[307] nobody knows about them. There is no convenient way to access them. Of course, the staff has an institutional memory of these precedents and counsel who practice constantly before an agency know about them. But this knowledge is unavailable to everyone else.

If precedent decisions were generally available, it would benefit everyone — counsel for both the agency and the parties and the ALJs and agency heads who make the final decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in adjudicatory decisions. And it is more efficient to cite an existing decision than to reinvent the wheel or, worse, decide inconsistently with a prior decision without knowing or without acknowledging that this has occurred.

My suggestion would be that each agency be required to designate significant adjudicatory decisions as precedential.[308] The statute would make clear that a decision to adopt a decision as precedential would not be rulemaking and would not require compliance with the rulemaking provisions of the APA.[309] Precedent decisions could include decisions written by agency heads as well as ALJ decisions that have been adopted by agencies. Agencies could, but would not be required to, designate decisions reached prior to the effective date of the Act as precedential. They would also be required to maintain a current index of the issues resolved in precedent decisions.[310] In all likelihood, publishers would col-

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307. Gov't Code § 6250 *et seq.* There is an exception for records pertaining to pending litigation to which the agency is a party but the exemption ends when the litigation is adjudicated or otherwise settled. Gov't Code § 6254(c).

308. Agencies that publish all of their decisions should be exempt from this provision.

309. *See* Ogden, *supra* note 29, § 20.06[4], which argues that precedential decisions might be treated as rulemaking. Similarly, the decision whether or not to designate a decision as precedential should not be judicially reviewable.

310. *See* Administrative Conference of the United States, Recommendation 89-8, 1 C.F.R. § 305.89-8 (agencies should index all significant adjudicatory decisions whether or not designated as precedential).

lect and sell precedent decisions[311] and could also issue an annotated California Code of Regulations.[312]

One observer criticized the suggestion that agencies be required to adopt a system of precedential decisions because it might encourage agencies to reject a greater number of ALJ decisions in order to rewrite and polish them as precedents. However, that has been no problem at the Unemployment Insurance Appeals Board and I do not believe it would be a problem generally. Only cases involving genuine precedential value would be designated as precedential decisions and it is likely that such cases would receive plenary agency consideration in any event.

One question is whether the agency itself or someone else should have the responsibility for selecting precedent decisions. It might be possible, for example, for the director of OAH to select the decisions of agencies covered by the existing APA.[313] While I would allow agencies and OAH to agree that OAH would take over the chore, I hesitate to mandate this and would be satisfied to leave the selection process to the agency heads. Under that approach, there would be no effective sanction if an agency failed to designate any of its decisions as precedential. However, I would anticipate that the public and perhaps the legislature would criticize an agency's failure to designate any of its decisions as precedential. This sort of criticism should be a sufficiently effective incentive to designate decisions.

V. CONCLUSION

This report, like its three predecessors, has surveyed a large number of issues relating to administrative procedure. Many of them are of fundamental importance to realizing a scheme of

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311. *See* Thorup, *Recent Developments in State Administrative Law: The Utah Experience*, 41 Admin. L. Rev. 465, 476-79 (1989).

312. Barclays Law Publishers recently contracted with the state of New Jersey to publish its precedent decisions. Since Barclays also publishes the California Code of Regulations, it would be natural to integrate the two.

313. This is the practice in New Jersey.

administrative procedure that is fair, efficient, and satisfying to participants. It is not simple to design a system of procedure that will work for all of the adjudicating agencies of California, but I firmly believe that it is both possible and highly desirable. An overarching administrative procedure act is reality now in virtually all states and the federal government. California, once a pioneer of administrative procedure, has fallen far behind. With the collaboration of all who are interested in administrative law — private and government practitioners, agency heads and staff, administrative law judges, and scholars, the Law Revision Commission can design a new statute that could once more be pioneering. It is to that end that my work has been devoted.