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Witkin California Procedure, Fifth Edition

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CHAPTER XIV - Administrative Proceedings

Witkin Summary of California Law

I. INTRODUCTION

A. Nature of Proceedings.

9 *Witkin Cal. Proc. Admin Proc* § 1

[§ 1] Nature of Proceedings.

(1) *In General.* Administrative agencies play a fundamental role in implementing governmental programs in California. Agencies, both state and local, perform such important functions as regulation, ratemaking, licensing, permitting, and social welfare and entitlement. (See *infra*, §37 et seq.)

(2) *Governing Law and Practice.* Administrative procedures are generally less formal than those in court proceedings. They are largely governed by statutes, regulations, ordinances, and, often, unwritten practices that apply to the agency specifically rather than by the Code of Civil Procedure and the Evidence Code. Practice varies widely, although the California Administrative Procedure Act (see *infra*, §34 et seq.) governs many agencies in all or part of their proceedings. All agency proceedings are, of course, subject to constitutional limitations where applicable. (See *infra*, §§3, 4.)

(3) *Federal Administrative Procedure Act.* The federal Administrative Procedure Act (5 U.S.C., §551 et seq.) generally governs practice before federal agencies. Federal administrative regulations are set forth in the Code of Federal Regulations (C.F.R.). (See 66 *Harv. L. Rev.* 1065 [status of trial examiner in federal administrative agencies]; 80 *Harv. L. Rev.* 439 [Federal Register and Code of Federal Regulations]; 88 *Harv. L. Rev.* 980 [jurisdiction to review federal administrative action]; 88 *Harv. L. Rev.* 1815 [Federal Agency Assistance to Impecunious Intervenors]; 98 *Harv. L. Rev.* 247 [judicial review of agency rulemaking under federal act]; 56 *Hastings L. J.* 1067 [new test for formal adjudication]; 4 *San Diego L. Rev.* 141 [standing to intervene in F.C.C. hearings]; 61 *So. Cal. L. Rev.* 1017 [informal rulemaking under federal act]; 16 *Stanf. L. Rev.* 1035 [discovery in federal administrative proceedings]; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §14 et seq.)

(4) *Commentary.* The literature on administrative law and practice is understandably extensive:

(a) *Law Reviews.* See 52 *Cal. L. Rev.* 513 [The 20th Century Administrative Explosion]; 57 *Cal. L. Rev.* 866 [Administrative Control of Administrative Action]; 60 *Cal. L. Rev.* 1276 [rulemaking]; 63 *Cal. L. Rev.* 886 [Due Process Rights of Participation in Administrative Rulemaking]; 78 *Cal. L. Rev.* 1415 [review of Edley, Administrative Law: Rethinking Judicial Control of Bureaucracy]; 78 *Harv. L. Rev.* 921 [administrative rulemaking or adjudication]; 86 *Harv. L. Rev.* 1183 [Illusion of the Ideal Administration]; 87 *Harv. L. Rev.* 629 [Violations by Agencies of Their Own Regulations]; 88 *Harv. L. Rev.* 1669 [Reformation of American Administrative Law]; 95 *Harv. L. Rev.* 1195

[Public Programs and Private Rights]; 97 *Harv. L. Rev.* 1277 [analysis of administrative law doctrine and ideology of bureaucracy]; 104 *Harv. L. Rev.* 769 [review of Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy*]; 105 *Harv. L. Rev.* 1511 [A Civic Republican Justification for the Bureaucratic State]; 106 *Harv. L. Rev.* 1685 [review of Ayres & Braithwaite, *Responsive Regulation*]; 15 *Hastings L. J.* 235 [Occupational Licensing in California]; 26 *Hastings L. J.* 89 [Organizations and Administrative Practice]; 13 *Pacific L. J.* 315 [challenging, on procedural grounds, agency regulations]; 7 *Pepperdine L. Rev.* 553 [Current Trends in Administrative Law]; 16 *San Diego L. Rev.* 287 [Institutional Due Process in the Twenty-First Century: The Future of the Hearing Requirement]; 40 *San Diego L. Rev.* 177 [proposal for reforming agency procedures]; 65 *So. Cal. L. Rev.* 957 [Federal Advisory Committee Act]; 67 *So. Cal. L. Rev.* 621 [administrative rulemaking and adequacy of judicial review]; 16 *Stanf. L. Rev.* 603 [administrative sanctions]; 27 *Stanf. L. Rev.* 1041 [Crisis and Legitimacy in the Administrative Process]; 5 *U.C. Davis L. Rev.* 1 [legal problems of administrative practice]; 39 *U.C.L.A. L. Rev.* 1055 [Symposium: Contemporary Issues in Administrative Adjudication]; 45 *U.C.L.A. L. Rev.* 1 [collaborative administrative decision making]; 54 *U.C.L.A. L. Rev.* 117 [Fiduciary Foundations of Administrative Law].

(b) *Treatises and Practice Aids.* See Modjeska, *Administrative Law Practice and Procedure*; Pierce, *Administrative Law Treatise* 4th [cited hereinafter as *Pierce, Admin. Law* 4th]; C.E.B., *Administrative Hearing Practice* 2d, §1.2 et seq.; C.E.B., *Administrative Mandamus* 3d; California Regulatory Law Bulletin (published weekly) [current rulemaking activity]; California Regulatory Notice Register (published weekly) [regulatory issues of general concern]; Hanft, *Legal Research in California* (6th) §10.1 et seq. [researching administrative law issues]; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §1 et seq.; 1A *Am.Jur. P.P. Forms* (2003 ed.), *Administrative Law* §1 et seq.

West's Key Number Digest, *Administrative Law and Procedure* 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commentary.*

(a) *Law Reviews.* See 121 *Harv. L. Rev.* 613 [Oversight and Insight: Legislative Review of Agencies and Lessons from the States].



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CHAPTER XIV - Administrative Proceedings

Witkin Summary of California Law

I. INTRODUCTION

B. Creation of Agencies.

9 *Witkin Cal. Proc. Admin Proc* § 2

[§ 2] Creation of Agencies.

California administrative agencies differ in origin:

(1) *Legislature*. Most of the hundreds of state agencies have been established by the Legislature. (See, e.g., *Fin.C.* 200 [Department of Financial Institutions].)

(2) *Constitution*. The California Constitution creates a number of state agencies, either expressly (see, e.g., Cal. Const., Art. VII, §2 [State Personnel Board]) or impliedly by recognizing them (see, e.g., Cal. Const., Art. XII, §1 [Public Utilities Commission]). Of course, the organization, duties, and procedures of constitutionally created agencies are, as in the case of legislatively created agencies, augmented by statute. (See, e.g., *Pub.Util.C.* 1 et seq. [Public Utilities Commission].)

(3) *Initiative*. In a few instances, the voters have created agencies through initiative. (See, e.g., *Govt.C.* 83100 et seq. [Fair Political Practices Commission, by initiative measure adopting Political Reform Act of 1974 (*Govt.C.* 81000 et seq.)].)

(4) *Local Agencies*. Local agencies may result from general state legislation or be established by local charter or ordinance. (*Dierssen v. Civil Service Com. of San Francisco* (1941) 43 C.A.2d 53, 56, 110 P.2d 513.)

West's Key Number Digest, Administrative Law and Procedure 102

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Witkin Summary of California Law

I. INTRODUCTION

C. Constitutional Limits.

1. Due Process.

9 *Witkin Cal. Proc. Admin Proc* § 3

[§ 3] Due Process.

(1) *In General.* Agencies are, of course, obliged to act within constitutionally mandated limits in administering the law. The constitutional issue most frequently raised in administrative proceedings is that of procedural due process. Trial before a court is not constitutionally required. An adjudicative (quasi-judicial) proceeding before an administrative officer or board is sufficient if basic due process requirements are met, including notice and an opportunity for hearing. (*Anderson Nat. Bank v. Lueckett* (1944) 321 U.S. 233, 64 S.Ct. 599, 606, 88 L.Ed. 692, 705; *Blinder, Robinson & Co. v. Tom* (1986) 181 C.A.3d 283, 289, 226 C.R. 339; *Mohilef v. Janovici* (1996) 51 C.A.4th 267, 276, 58 C.R.2d 721 [due process is satisfied in administrative nuisance abatement proceeding as long as property owner receives adequate notice of nature of alleged nuisance and meaningful opportunity to respond to charges; owner need not receive full panoply of procedural protections accorded in judicial trial, such as ability to cross-examine witnesses, subpoena witnesses, or engage in discovery]; cf. *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1318, 64 C.R.2d 705, *infra*, §74 [ex parte communication to administrative decisionmaker does not violate due process where decisionmaker does not actually use illicit information in reaching its decision]; see 2 *Pierce*, Admin. Law 4th, Chap. 9; C.E.B., Administrative Hearing Practice 2d, §1.19 et seq.; on procedural due process rights in administrative proceedings generally, see 7 *Summary* (10th), *Constitutional Law*, §657 et seq.)

On the other hand, adjudicative proceedings involving a constitutionally protected interest that wholly deny notice or hearing, or provide inadequate modes of notice or hearing, are invalid. (*Morgan v. United States* (1936) 298 U.S. 468, 56 S.Ct. 906, 908, 80 L.Ed. 1288, 1291; *Morgan v. United States* (1938) 304 U.S. 1, 58 S.Ct. 773, 775, 776, 82 L.Ed. 1129, 1130, 1131, 1132; *Petrillo v. Bay Area Rapid Transit Dist.* (1988) 197 C.A.3d 798, 807, 808, 243 C.R. 74.) However, there is no constitutional hearing requirement in quasi-legislative or ministerial administrative proceedings. (See *Wood v. Public Util. Com.* (1971) 4 C.3d 288, 292, 93 C.R. 455, 481 P.2d 823 [regulatory commission adopting rules governing service and fixing rates]; *Mateo-Woodburn v. Fresno Community Hosp. & Med. Center* (1990) 221 C.A.3d 1169, 1184, 270 C.R. 894 [reorganization of hospital department].)

(2) *Scope of Requirement Is Flexible.* The particular form of hearing and notice that is constitutionally required in adjudicative proceedings varies with the circumstances. Due process "is flexible and calls for such procedural protections as the particular situation demands." (*Smith v. Organization of Foster Families for Equality & Reform* (1977) 431 U.S. 816, 97 S.Ct. 2094, 2112, 53 L.Ed.2d 14, 37; see *Shacket v. Osteopathic Med. Bd. of Calif.* (1996) 51

C.A.4th 223, 230, 58 *C.R.2d* 715 [where licensee was provided with ample opportunity to contest merits of underlying accusations before peer review body, due process did not require licensing agency to conduct additional hearing before accepting or disseminating that body's report]; *Department of Corrections v. Office of Administrative Hearings* (1997) 53 *C.A.4th* 780, 782, 786, 787, 61 *C.R.2d* 903 [administrative law judge appointed to conduct involuntary medication hearing (see 3 *Cal. Crim. Law* (3d), *Punishment*, §64) had authority, based on inmate's constitutional right to counsel and fair hearing, to appoint independent psychiatric expert to assist inmate and his attorney in preparing defense]; *Bollinger v. San Diego Civil Service Com.* (1999) 71 *C.A.4th* 568, 575, 84 *C.R.2d* 27, *infra*, §25 [civil service commission did not violate demoted police officer's procedural due process rights by reviewing hearing officer's determination in closed session, where hearing officer's determination followed noticed 3-day public evidentiary hearing and police officer also had opportunity to seek judicial review].) When a statutorily prescribed procedure exceeds minimum due process standards, the statute must be followed. (*People v. Johnson* (1941) 42 *C.A.2d* Supp. 827, 833, 109 *P.2d* 770.)

(3) *Impartiality*. The standard of impartiality required by due process in an administrative hearing is less exacting than that required in a judicial proceeding. A plaintiff must show actual bias, not merely the appearance of bias. (*Gai v. Selma* (1998) 68 *C.A.4th* 213, 219, 79 *C.R.2d* 910; see *Nasha L.L.C. v. Los Angeles* (2004) 125 *C.A.4th* 470, 482, 22 *C.R.3d* 772 [in ruling on development project, city planning commission violated developer's due process rights; one commissioner had earlier written newspaper article critical of project, thus establishing unacceptable probability of actual bias].)

West's Key Number Digest, Administrative Law and Procedure 4 et seq., 302

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C. Constitutional Limits.

2. Other Constitutional Issues.

9 *Witkin Cal. Proc. Admin Proc* § 4

[§ 4] Other Constitutional Issues.

(1) *Commerce Clause*. The Commerce Clause (U.S. Const., Art. I, §8; 8 *Summary* (10th), *Constitutional Law*, §1294 et seq.) precludes state tax regulations that burden or discriminate against interstate commerce. However, states are not prohibited from taxing interstate commerce as such, and may tax their fair share of an interstate transaction. A challenged regulation will be upheld if the tax (a) is applied to activity with a substantial nexus with the taxing state, (b) is fairly apportioned, (c) does not discriminate against interstate commerce, and (d) is fairly related to services provided by the state. (*Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 C.A.4th 338, 365, 86 C.R.2d 362 [regulation imposing use tax on merchandise purchased outside state and delivered to common carrier in California for delivery to donee in another state did not violate Commerce Clause by creating risk of multiple taxation; Multistate Tax Compact (Rev.C. 38001 et seq.) and California's separate and unilateral statutory credit (Rev.C. 6406) protected against double tax].)

(2) *Equal Protection Clause*. An agency's change in its earlier interpretation of an enactment does not constitute an equal protection violation. A different rule would effectively inhibit a legislative or other governmental body from amending its statutes or regulations. (*Hudson v. Board of Administration of Public Employees' Retirement System* (1997) 59 C.A.4th 1310, 1328, 69 C.R.2d 737 [refusal by Public Employees' Retirement System (PERS), in calculating pension benefits, to include conversion by city employees of benefits, such as health and life insurance, to salary increases in year before retirement did not violate equal protection, notwithstanding that PERS had formerly permitted employees of other cities to exercise similar salary conversions]; on Equal Protection Clause generally, see 8 *Summary* (10th), *Constitutional Law*, §694 et seq.)

(3) *Free Exercise Clause*. An administrative agency may not violate an individual's right of free exercise of religion. (See *Jaffe v. Unemp. Ins. App. Bd.* (1984) 156 C.A.3d 719, 721, 202 C.R. 812 [Unemployment Insurance Appeals Board improperly denied full week of unemployment benefits to applicant who had been unavailable for work on two days due to observance of religious holidays; applicant was entitled to five-sevenths of that week's benefits]; on Free Exercise Clause generally, see 7 *Summary* (10th), *Constitutional Law*, §514 et seq.)

(4) *Judicial Powers Clause*. Cal. Const., Art. VI, §1, vesting the "judicial power of this State" in the courts, does not preclude all judicial functions by administrative agencies: An administrative agency may constitutionally hold

hearings, determine facts, apply the law to those facts, and order relief. However, it is necessary that "(i) such activities are authorized by statute or legislation and are *reasonably necessary* to effectuate the administrative agency's *primary, legitimate regulatory purposes*, and (ii) the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) *remains ultimately in the courts, through review of agency determinations*." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 C.3d 348, 372, 261 C.R. 318, 777 P.2d 91, 7 Summary (10th), *Constitutional Law*, §146; see *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 C.A.4th 585, 589, 60 C.R.2d 583 [New Motor Vehicle Board lacked legislative authority under *Veh.C. 3050(c)* to entertain jurisdiction over dispute between dealer and manufacturer involving serious misconduct and in which damages were sought; quoting *McHugh*].)

(5) *Separation of Powers Clause*. Under Cal. Const., Art. III, §3, the powers of state government are executive, legislative, and judicial, and persons charged with the exercise of one power may not exercise either of the others except as constitutionally permitted. (On separation of powers generally, see 7 Summary (10th), *Constitutional Law*, §137 et seq.) However, an administrative officer or agency may exercise quasi-judicial or legislative powers without violating the separation of powers doctrine if the exercise of these powers is clearly defined by the Legislature and is subject to judicial review. Also, an administrative officer does not violate the doctrine by interpreting how pertinent statutes should be applied. Where the officer does not attempt to enforce his or her interpretation or promulgate a departmental regulation purporting to implement that interpretation, the officer's actions do not involve the improper exercise of quasi-judicial or legislative powers. (*20th Century Ins. Co. v. Quackenbush* (1998) 64 C.A.4th 135, 141, 75 C.R.2d 113 [Insurance Commissioner did not exceed authority by publicly disseminating opinion on applicable limitations period for submitting earthquake damage claims arising out of 1994 Northridge earthquake].)

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Witkin Summary of California Law

I. INTRODUCTION

D. Disclosure of Public Records.

9 *Witkin Cal. Proc. Admin Proc* § 5

[§ 5] Disclosure of Public Records.

Cal. Const., Art. I, §3(b), adopted by the voters at the November 2004 general election, guarantees the public's right of access to public records and governmental meetings. (See *infra*, §6.) The California Public Records Act (*Govt.C. 6250 et seq.*), permitting inspection and copying of public records, governs most local and state agencies. (*Govt.C. 6252(a)* and (f); see *Cook v. Craig* (1976) 55 C.A.3d 773, 781, 127 C.R. 712 [general policy of Act favors disclosure]; 1 Pierce, Admin. Law 4th, Chap. 5; on Public Records Act generally, see 2 *Cal. Evidence* (4th), *Witnesses*, §278 et seq.; on public access to electronic trial court records, see 2 *Cal. Proc.* (5th), *Courts*, §40.) "Public records" include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (*Govt.C. 6252(e)*; see *Govt.C. 11124.1(b)*, *infra*, §13 [tape or film record of open meeting made at state body's direction is subject to inspection under Public Records Act].) "Writing" is defined as including every "means of recording upon any tangible thing any form of communication or representation, ... and any record thereby created, regardless of the manner in which the record has been stored." (*Govt.C. 6252(g)*.) Certain exemptions from disclosure are provided by the Act (see *Govt.C. 6254*) and other statutes (see, e.g., *Welf.C. 10850* [welfare records]).

Public records "are open to inspection at all times during the office hours of the state or local agency" (*Govt.C. 6253(a)*), but every agency may adopt regulations stating the procedures to be followed (*Govt.C. 6253.4(a)*). Any person may receive a copy of an identifiable public record; and, on request, an "exact copy" must be provided unless it is "impracticable" to do so. (*Govt.C. 6253(b)*.) Agencies may impose reasonable restrictions on general requests for voluminous classes of documents, e.g., by requiring "specific requests for copies of specific documents." (*Rosenthal v. Hansen* (1973) 34 C.A.3d 754, 761, 110 C.R. 257.)

Any person may institute proceedings for injunctive or declaratory relief or mandamus to enforce the right to inspect or copy a public record or class of public records, and the matter must be heard "at the earliest possible time." (*Govt.C. 6258*.)

West's Key Number Digest, Records 30 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 11124.1(b) was amended in 2009 to refer to an audio or video record, rather than to a tape or film record.



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I. INTRODUCTION

E. Open Meeting Requirements.

1. In General.

a. Constitutional Provisions.

9 *Witkin Cal. Proc. Admin Proc* § 6

[§ 6] Constitutional Provisions.

Cal. Const., Art. I, §3(b), adopted by the voters at the November 2004 general election, guarantees the public's right of access to public records and governmental meetings as follows:

(1) *General Right of Access.* Because the public has the right of access concerning the conduct of public business, the meetings of public bodies and the writings of public officials and agencies must be open to public scrutiny. (Cal. Const., Art. I, §3(b)(1).)

(2) *Construction of Public Access Laws and Requirement of Findings.* A statute, court rule, or other authority, including those in effect on the effective date of Cal. Const., Art. I, §3(b), must be broadly construed if it furthers the public's right of access, and narrowly construed if it limits the right of access. An authority adopted after the effective date of Cal. Const., Art. I, §3(b), that limits the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. Const., Art. I, §3(b)(2).)

(3) *Limitations.* Cal. Const., Art. I, §3(b), does not supersede or modify any of the following:

(a) The right to privacy guaranteed by Cal. Const., Art. I, §1, or the construction of a statute, court rule, or other authority to the extent it protects that right. This limitation extends to statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer. (Cal. Const., Art. I, §3(b)(3).)

(b) A provision of the California Constitution, including the guarantees of due process and equal protection provided in Cal. Const., Art. I, §7. (Cal. Const., Art. I, §3(b)(4).)

(c) A constitutional or statutory exception to the right of access to public records or meetings of public bodies that was in effect on the effective date of Cal. Const., Art. I, §3(b), including, but not limited to, a statute protecting the confidentiality of law enforcement and prosecution records. (Cal. Const., Art. I, §3(b)(5).)

(d) Protections for the confidentiality of proceedings and records of the Legislature, members of the Legislature,

and its employees, committees, and caucuses provided by Cal. Const., Art. IV, §7, state law, or legislative rules adopted in furtherance of those provisions. Nor does Cal. Const., Art. I, §3(b), affect the scope of permitted discovery in judicial or administrative proceedings concerning the deliberation of the Legislature and its members, employees, committees, and caucuses. (Cal. Const., Art. I, §3(b)(6).)

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I. INTRODUCTION

E. Open Meeting Requirements.

1. In General.

b. Statutes and Ordinances.

9 *Witkin Cal. Proc. Admin Proc* § 7

[§ 7] Statutes and Ordinances.

(1) *General Legislation.* California's open meeting legislation consists primarily of two statutes:

(a) *State Bodies.* Meetings of state bodies are governed by the Bagley-Keene Open Meeting Act, *Govt.C. 11120* et seq. (see *infra*, §10 et seq.), which is supplemented by the open hearing provisions of the Administrative Procedure Act. (See Law Rev. Com. Comment to *Govt.C. 11425.20*, *infra*, §69; on open meeting legislation generally, see 1 Pierce, *Admin. Law* 4th, Chap. 5.)

(b) *Local Agencies.* Meetings of local agencies are governed by the Ralph M. Brown Act, *Govt.C. 54950* et seq. (see *infra*, §18 et seq.).

(2) *Special Statutes.* Other statutes impose open meeting requirements on particular public bodies. The following are illustrative:

(a) *Educ.C. 35145* et seq. (school boards).

(b) *Educ.C. 66602.5, 66602.7* (trustees of California State University).

(c) *Educ.C. 72121* et seq. (governing boards of community college districts).

(d) *Educ.C. 92030* et seq. (University of California Board of Regents). (See *Tafoya v. Hastings College* (1987) 191 C.A.3d 437, 444, 445, 236 C.R. 395 [University of California faculty, including Hastings College of Law faculty, are not subject to open meeting requirements applicable to university regents under *Educ.C. 92030* et seq.].)

(e) *Govt.C. 9027* et seq. (Legislature and legislative committees). (See *infra*, §9.)

(f) *Health & Saf.C. 1462* (county hospital boards).

(3) *Local Legislation.* Open meeting requirements may also appear in local ordinances. State statutes should be

construed, where possible, to avoid conflict with these requirements. (See *Gillespie v. San Francisco Public Library Com.* (1998) 67 C.A.4th 1165, 1177, 79 C.R.2d 649, *infra*, §25 [San Francisco's "Sunshine Ordinance"].)

West's Key Number Digest, Administrative Law and Procedure 124; Counties 52; Municipal Corporations 80 et seq.; States 72-

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I. INTRODUCTION

E. Open Meeting Requirements.

1. In General.

c. News Coverage.

9 *Witkin Cal. Proc. Admin Proc* § 8

[§ 8] News Coverage.

It is the declared public policy of the state that proceedings of public administrative agencies "should be conducted openly and in an orderly manner so that the public may remain informed," and that "the orderly use of broadcasting, telecasting and photographic equipment" at such proceedings "serves this public purpose." (*Govt.C. 6090.*)

With certain exceptions, radio and television stations "shall be permitted to broadcast and telecast, either directly or by means of transcriptions and film, the proceedings of all meetings and hearings ... of all state, county, and municipal administrative agencies that are required by law to be open to the public." However, unless the agency waives the requirement, the equipment must operate silently and not require auxiliary lighting; and the presiding officer may require pooling of equipment when it is deemed necessary. (*Govt.C. 6091.*)

The exceptions are (1) adjudicative proceedings under the Administrative Procedure Act (*infra*, §57 et seq.); and (2) meetings or hearings to consider the appointment, employment, or dismissal of a public officer or employee, or to hear appeals by or complaints or charges against a public officer or employee. (*Govt.C. 6091.*)

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I. INTRODUCTION

E. Open Meeting Requirements.

1. In General.

d. Legislature and Legislative Committees.

9 Witkin Cal. Proc. Admin Proc § 9

[§ 9] Legislature and Legislative Committees.

(1) *Development of Law.* California's first legislative open meeting statute, the Grunsky-Burton Open Meeting Act (former Govt.C. 9027 et seq.), was adopted in 1973. The current statute was enacted in 1989. (See Govt.C. 9027 et seq.)

(2) *Open Meetings Requirement.* Except as otherwise provided in the statute, all meetings of the Senate and the Assembly and their committees must be open and public, and all persons must be permitted to attend them. "Committee" includes a standing committee, joint committee, conference committee, subcommittee, select committee, special committee, research committee, "or any similar body." (Govt.C. 9027.)

(3) *Notice.* Any meeting required to be open under the statute, including any closed session permitted under Govt.C. 9029(a), requires full and timely notice to the public as provided by the Joint Rules of the Assembly and Senate. (Govt.C. 9028.)

(4) *Closed Sessions.* The Assembly and Senate, and their committees, may hold closed sessions for the following purposes:

(a) To consider the appointment, employment, evaluation of performance, or dismissal of a public officer or employee. (Govt.C. 9029(a)(1).)

(b) To consider or hear complaints or charges brought against a member of the Legislature or other public officer or employee. (Govt.C. 9029(a)(1).)

(c) To establish the classification or compensation of an employee of the Legislature. (Govt.C. 9029(a)(1).)

(d) To consider matters affecting the safety and security of members or employees of the Legislature or the safety and security of any buildings and grounds used by the Legislature. (Govt.C. 9029(a)(2).)

(e) To confer with, or receive advice from, legal counsel regarding pending or reasonably anticipated litigation, or whether to initiate litigation, when discussion in open session would not protect the interests of the house or committee

regarding the litigation. (*Govt.C. 9029(a)(3)*.) The circumstances permitting closed sessions concerning litigation, and procedures to be followed, are prescribed. (See *Govt.C. 9029.5*.)

Also, a caucus of the members of the Senate, the Assembly, or both that is composed of members of the same political party may meet in closed session. (*Govt.C. 9029(b)*.)

(5) *Civil Relief*. Any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of the statute by members of the Legislature or to determine the applicability of the statute to actions or threatened future action of a house of the Legislature or a committee. (*Govt.C. 9031*.)

(6) *Criminal Penalty*. Any member of the Legislature who attends a meeting of the Assembly, the Senate, or any committee in which action is taken in violation of *Govt.C. 9027*, with knowledge of the fact that the meeting is in violation of the requirement, is guilty of a misdemeanor. (*Govt.C. 9030*.)

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E. Open Meeting Requirements.

2. State Agencies (Bagley-Keene Open Meeting Act).

a. Nature of Act.

9 *Witkin Cal. Proc. Admin Proc* § 10

[§ 10] Nature of Act.

(1) *Enactment and Purpose.* The Bagley-Keene Open Meeting Act (*Govt.C. 11120 et seq.*), enacted in 1967, imposes on state bodies open meeting requirements similar to those applicable to local agencies under the Brown Act (*infra*, §18 *et seq.*). It is the intent of the law "that actions of state agencies be taken openly and that their deliberation be conducted openly." (*Govt.C. 11120.*)

(2) *General Open Meeting Requirement.* "All meetings of a state body shall be open and public and all persons shall be permitted to attend," except as otherwise provided by the Act. (*Govt.C. 11123(a).*)

(3) *"Meeting" Defined.* The term "includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains." (*Govt.C. 11122.5(a).*)

(4) *Constitutional Requirements.* Cal. Const., Art. I, §3(b), adopted by the voters at the November 2004 general election, guarantees the public's right of access to public records and governmental meetings. (See *supra*, §6.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Scope of Act.

9 *Witkin Cal. Proc. Admin Proc* § 11

[§ 11] Scope of Act.

(1) *General Application to State Bodies.* Each provision of the Bagley-Keene Open Meeting Act applies to "every state body unless the body is specifically excepted from that provision by law or is covered by any other conflicting provision of law." (*Govt.C. 11127.*)

(2) *"State Body" Defined.* The term includes:

(a) Every state board, commission, or similar multimember body that is created by statute or required by law to conduct official meetings. (*Govt.C. 11121(a).*)

(b) Every commission created by executive order. (*Govt.C. 11121(a).*)

(c) A board, commission, committee, or similar multimember body that exercises authority delegated by a state body. (*Govt.C. 11121(b).*)

(d) An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, created by formal action and consisting of three or more persons. (*Govt.C. 11121(c).*)

(e) A board, commission, committee, or similar multimember body, whether organized and operated by the state body or by a private corporation, on which members of the state body serve in their official capacity and that is supported in whole or in part by funds provided by the state body. (*Govt.C. 11121(d).*)

(3) *Excluded Entities.* The following entities are not considered state bodies for purposes of the Act:

(a) Judicial agencies under Cal. Const., Art. VI. (*Govt.C. 11121.1(a).*)

(b) Local agencies subject to the Brown Act (*infra*, §18 et seq.). (*Govt.C. 11121.1(b).*)

(c) Legislative agencies under Cal. Const., Art. IV. (*Govt.C. 11121.1(c).*) (On open meeting requirements for

legislative agencies, see *Govt.C. 9027 et seq.*, *supra*, §9.)

(d) State agencies conducting proceedings under *Govt.C. 3596* (higher education employee labor relations). (*Govt.C. 11121.1(d).*)

(e) The Cancer Advisory Council (*Health & Saf.C. 109260*), except as provided in *Health & Saf.C. 109390*. (*Govt.C. 11121.1(e).*) Under *Health & Saf.C. 109390*, specified hearings are conducted pursuant to the formal adjudicative hearing provisions of the Administrative Procedure Act (*Govt.C. 11500 et seq.*, *infra*, §96 *et seq.*).

(f) The Board of Directors of the State Compensation Insurance Fund. (*Govt.C. 11121.1(f)*; *Ins.C. 11770.5.*)

(g) The Credit Union Advisory Committee established under *Fin.C. 14380*. (*Govt.C. 11121.1(g).*)

(4) *Application to Members of State Bodies From Time of Appointment or Election.* A person appointed or elected to serve as a member of a state body who has not yet assumed the duties of office must conform his or her conduct to the Act. (*Govt.C. 11121.95.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Excluded Entities.*(f) *Board of Directors of State Compensation Insurance Fund:* *Govt.C. 11121.1(f)* and *Ins.C. 11770.5* were repealed in 2008.

(g) *Credit Union Advisory Committee:* *Govt.C. 11121.1(g)* was relettered *Govt.C. 11121.1(f)* in 2008.



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c. Exceptions.

9 *Witkin Cal. Proc. Admin Proc* § 12

[§ 12] Exceptions.

The general requirement of open meetings (*supra*, §10) is subject to exceptions. Closed sessions are permitted in the following circumstances:

(1) *Deliberations under Administrative Procedure Act.* A state body may hold closed sessions "to deliberate on a decision to be reached in a proceeding required to be conducted" under adjudicative formal hearing provisions of the Administrative Procedure Act (see *Govt.C. 11500 et seq.*, *infra*, §96 *et seq.*) or similar provisions of law. (*Govt.C. 11126(c)(3).*) (See *Cooper v. Board of Med. Examiners* (1975) 49 C.A.3d 931, 948, 123 C.R. 563 [determinations upheld in "executive sessions" in license revocation proceeding].)

(2) *Personnel Matters.* A state body may hold closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee, or to hear complaints or charges against the employee, unless the employee requests a public hearing. The employee is entitled to written notice of the right to a public hearing, and any action taken in the absence of proper notice is void. (*Govt.C. 11126(a).*) For purposes of this provision, "employee" does not include a person elected to public office or appointed to public office by a state body. (*Govt.C. 11126(b).*) Action taken in a closed session to appoint, employ, or dismiss a public employee must be reported at a subsequent public meeting. (*Govt.C. 11125.2.*) (See *California State Emp. Assn. v. State Personnel Bd.* (1973) 31 C.A.3d 1009, 1013, 108 C.R. 57 [upholding closed session at decisional stage of State Personnel Board deliberations].)

(3) *Professional Licensing.* State bodies that administer business or professional licensing may hold closed sessions "to prepare, approve, grade, or administer examinations." (*Govt.C. 11126(c)(1).*) An advisory body of a state body that administers business or professional licensing may hold closed sessions, provided it does not include a quorum of the members of the state body it advises, "to discuss matters that ... would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting," including review of an applicant's qualifications and inquiry preceding a civil, criminal, or administrative disciplinary action. (*Govt.C. 11126(c)(2).*) An examining committee of the State Board of Forestry and Fire Protection may hold a closed session to consider disciplinary action against a professional forester. (*Govt.C. 11126(f)(2).*) An examining or administrative committee of the State Board of

Accountancy may hold closed sessions to consider disciplinary action against an accountant or to interview an applicant or accountant regarding qualifications. (*Govt.C. 11126(f)(3).*)

(4) *Educational Matters.* A state body may hold closed sessions to consider the conferring of honorary degrees. (*Govt.C. 11126(c)(5).*) The Postsecondary Education Commission and the Council for Private Postsecondary and Vocation Education may hold closed sessions to consider the appointment or termination of their directors. (*Govt.C. 11126(c)(8), (c)(9).*) The Teachers' Retirement Board of the State Teachers' Retirement System and the Board of Administration of the Public Employees' Retirement System may hold closed sessions to consider the appointment or removal of the chief executive officer or chief investment officer of those systems. (*Govt.C. 11126(g)(1).*) The Commission on Teacher Credentialing may hold closed sessions to consider the recruitment, appointment, or removal of its executive director. (*Govt.C. 11126(g)(2).*) The State Board of Education, the Superintendent of Public Instruction, and advisory committees may hold closed sessions regarding those portions of a review of assessment instruments for school testing programs pursuant to *Educ.C. 60600* et seq. or *60850* et seq. during which actual test content is reviewed and discussed. (*Govt.C. 11126(c)(14).*)

(5) *Tax Matters.* The Franchise Tax Board may hold closed sessions to consider the appointment or removal of its executive officer or to discuss "confidential tax returns or information the public disclosure of which is prohibited." (*Govt.C. 11126(c)(10).*) The State Board of Equalization may hold closed sessions to consider the appointment or removal of its executive secretary or to hear "confidential taxpayer appeals or data, the public disclosure of which is prohibited." (*Govt.C. 11126(f)(7).*)

The Franchise Tax Board is not required to "notice or disclose" confidential tax information considered in closed session, or documents executed in connection with that consideration, public disclosure of which is prohibited by *Rev.C. 19542* et seq. (disclosure of information by board). (*Govt.C. 11126(c)(11).*) Similarly, the State Board of Equalization need not disclose any action taken in closed session, or documents executed in connection with that action, when public disclosure is prohibited by specified statutes. (*Govt.C. 11126(f)(8).*)

(6) *Labor Negotiations.* A state body, or its designated representatives, may hold closed sessions regarding salary and fringe benefits of local public employees under *Govt.C. 3500* et seq., and of public employees under the State Employer-Employee Relations Act (*Govt.C. 3512* et seq.; see 3 *Summary* (10th), *Agency and Employment*, §604 et seq.), the Bill of Rights for State Excluded Employees (*Govt.C. 3525* et seq.; see 3 *Summary* (10th), *Agency and Employment*, §612 et seq.), and the Education Employment Relations Act (*Govt.C. 3540* et seq.; see 3 *Summary* (10th), *Agency and Employment*, §587 et seq.). (*Govt.C. 11126(c)(17).*)

(7) *Real Property Negotiations.* A state body may hold closed sessions to instruct its negotiator on the price and terms of a purchase, sale, lease, or exchange of real property involving the state body, if the property and the negotiating parties have been identified in a public session. (*Govt.C. 11126(c)(7).*)

(8) *Investment Decisions.* A state body that invests retirement, pension, or endowment funds may hold closed sessions to consider investment decisions, subject to specified restrictions on closed sessions to consider shareholder voting. (*Govt.C. 11126(c)(16).*)

(9) *Agencies Exercising Delegated, Representative, or Advisory Authority.* State bodies as defined in *Govt.C. 11121(b), (c), (d)* (see *supra*, §11) may hold closed sessions to consider matters that could be considered in a closed session by the state body that it advises or represents or the authority of which it exercises. (*Govt.C. 11126(f)(4)-(f)(6).*)

(10) *Alcoholic Beverage Control Appeals Board.* The board may hold closed sessions for a deliberative conference. (*Govt.C. 11126(c)(6).*)

(11) *State Air Resources Board.* The board may hold closed sessions to consider "the proprietary specifications and performance data of manufacturers." (*Govt.C. 11126(c)(13).*)

(12) *California Integrated Waste Management Board*. The board and its auxiliary committees may hold closed meetings to discuss confidential tax returns, trade secrets or confidential or proprietary information in its possession, or other data, the public disclosure of which is prohibited by law. (Govt.C. 11126(c)(15).)

(13) *Public Utilities Commission*. The Commission may hold closed sessions to deliberate on the institution of proceedings or disciplinary actions against any person or entity under the jurisdiction of the Commission. (Govt.C. 11126(d)(2).) However, a meeting at which the rates of a regulated utility are changed must be open and public. (Govt.C. 11126(d)(1).)

(14) *Managed Risk Medical Insurance Board*. The board may hold closed sessions when considering the development of rates and contracting strategy for entities contracting or seeking to contract with the board. (Govt.C. 11126(i).)

(15) *Prisoners and Corrections*. A state body may hold closed sessions to consider the term, parole, release, or other disposition in an individual case, if public disclosure of the subjects considered is expressly prohibited by statute. (Govt.C. 11126(c)(4).) The Board of Corrections (now the Corrections Standards Authority) may hold closed sessions to consider reports to the Legislature and the Governor under P.C. 6027 (crime conditions). (Govt.C. 11126(c)(12).)

(16) *Criminal or Terrorist Activity*. Upon a two-thirds vote of its members, a state body may hold closed sessions to consider matters posing a threat or potential threat of criminal or terrorist activity against the state body's personnel, property, buildings, facilities, or equipment, including electronic data, where disclosure of those considerations could compromise or impede their safety or security. (Govt.C. 11126(c)(18).)

(17) *Gifts and Bequests*. A state body may hold closed sessions to consider gifts, donations, or bequests, if the proposed donor has requested confidentiality. (Govt.C. 11126(c)(5).)

(18) *Consideration of Long-Term Care Insurance Plans*. The Board of Administration of the Public Employees' Retirement System may hold closed sessions to consider matters relating to the development of rates and competitive strategy for long-term care insurance plans under Govt.C. 21660 et seq. (Govt.C. 11126(h).)

(19) *Consideration of State Audit Report*. A state body that has received a confidential final draft audit report from the Bureau of State Audits may hold a closed meeting to discuss its response to the report. (Govt.C. 11126.2(a).) However, the state body must meet in open session to discuss an audit report that has already been released to the public, unless some other exemption applies. (Govt.C. 11126.2(b).)

(20) *Earthquake Predictions*. Specified state bodies may hold closed sessions to consider volcanic or earthquake predictions. (Govt.C. 11126(f)(9).)

(21) *Disrupted Meetings*. If a meeting is "willfully interrupted" and "order cannot be restored" by removing disruptive individuals, a state body may clear the meeting and hold a closed session. However, only matters on the agenda may be considered and representatives of the news media who are not disruptive may not be excluded. (Govt.C. 11126.5.)

(22) *Pending Litigation*. On advice of counsel, a state body may hold closed sessions to confer with counsel regarding pending litigation, if an open session "would prejudice the position of the state body in the litigation." Counsel must state, in writing, the specific reasons and legal authority for the closed session. "Litigation" includes any adjudicatory proceedings before a court, administrative body, hearing officer, or arbitrator. For purposes of holding closed sessions under the Act, this provision "is the exclusive expression of the lawyer-client privilege." (Govt.C. 11126(e).) A state body operating under a joint powers agreement for insurance pooling may hold closed sessions to discuss claims for payment of tort liability or public liability losses incurred by the body or a member agency. (Govt.C. 11126(f)(1).)

In *Southern Calif. Edison Co. v. Peevey* (2003) 31 C.4th 781, 3 C.R.3d 703, 74 P.3d 795, plaintiff, a public utility, brought an action in federal district court for injunctive and declaratory relief against defendant Commissioners of the California Public Utilities Commission (PUC), alleging that the PUC's regulation of plaintiff's electricity rates violated federal law. The parties later reached an agreement settling the action, which became the basis for a stipulated judgment proposed to the federal district court. At a regular meeting, defendants had approved the settlement in a session closed to confer with counsel; defendants then reconvened in a public session to announce their decision. The particular litigation involved was not identified in either session. The district court judge approved the settlement as fair and entered the stipulated judgment over objections by an intervening party. On appeal, the Ninth Circuit Court of Appeals discerned a serious question whether the settlement violated California law, and therefore certified to the California Supreme Court questions of California law, including whether the procedures employed in entering the stipulated judgment violated the Open Meeting Act. *Held*, the Open Meeting Act was not violated.

(a) On its face, *Govt.C. 11126(e)(1)* permits a public body to conduct a closed session only to "confer with" and "receive advice from" its attorney regarding pending litigation. However, the provision was clearly intended to permit the public body not only to deliberate with counsel regarding a settlement, but also to actually settle the litigation in closed session where closure is necessary to avoid prejudice to a favorable settlement. (31 C.4th 798.)

(b) For the same reason, defendants were not thereafter required to announce their proposed decision in a public session--identifying the litigation--and to accept public comment on the proposed settlement before voting on it. (31 C.4th 800.)

In a strong dissent, one justice argued that *Govt.C. 11126(e)* did not authorize defendants to approve a secret settlement in closed session. (31 C.4th 806.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Personnel Matters*. See *Travis v. Board of Trustees of Calif. State University* (2008) 161 C.A.4th 335, 348, 73 C.R.3d 854 [upholding closed session to discuss former state university chancellor's controversial decision to return from lengthy leave of absence and assume teaching post].(14a) (*New*) *State Compensation Insurance Fund*. Under *Govt.C. 11126(j)*, added in 2008, the board of the State Compensation Insurance Fund may hold closed sessions for any of the following reasons:

(a) When considering workers' compensation claims under *Lab.C. 3200* et seq., to the extent that confidential medical information or other individually identifiable information would be disclosed.

(b) To the extent that matters related to audits and investigations that have not been completed would be disclosed.

(c) To the extent that an internal audit containing proprietary information would be disclosed.

(d) To the extent that the session would address the development of rates, contracting strategy, underwriting, or competitive strategy, under the powers granted to the board in *Ins.C. 11770* et seq., when discussion in open session concerning those matters would prejudice the position of the Fund.

When holding closed sessions for any of these reasons, the board must comply with the special meeting procedures specified in *Govt.C. 11125.4* (see text, §14), and must provide an opportunity for members of the public to be heard on the issue of the appropriateness of closing the meeting or session. (*Govt.C. 11126(k)*, added in 2008.)



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1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 13

[§ 13] In General.

(1) *Notice.* A state body must give notice of its meetings to persons who request notice in writing. Notice must also be made available on the Internet at least 10 days in advance of the meeting. The notice provided, written or on the Internet, must include the name, address, and telephone number of any person who can provide further information prior to the meeting. The written notice must additionally include the address of the Internet site where required notices are made available. (*Govt.C. 11125(a).*) Generally, the notice must include "a specific agenda" briefly describing the kinds of business to be transacted or discussed in *either* open or closed sessions. Items may be added to the agenda after the notice is given if otherwise permitted by the Act. (*Govt.C. 11125(b).*) (On agenda and other writings distributed to state body for discussion or consideration at public meeting as public records, see *Govt.C. 11125.1.*)

(2) *Website Requirements.* Every state agency must also post on the homepage of its website a link entitled "Decisions Pending and Opportunities for Public Participation." The link must contain all of the following information (*Govt.C. 11364(a)*):

(a) All applicable bulletins and notices required under the Administrative Procedure Act.

(b) Notices of all public meetings and agendas to be posted in compliance with the Administrative Procedure Act and the Bagley-Keene Open Meeting Act, or other applicable provisions of law, but no later than 10 days before the meeting where the regulatory action is on the agenda.

(c) Instructions on how the public may submit written comments or otherwise participate in administrative procedures, meetings, and hearings with a link entitled "How to Participate."

(d) A link to the text of all regulations and statutes related to current bulletins and notices entitled "Laws and Regulations Relevant to Current Public Proceedings." This requirement can be met by a link to another website containing the proposed regulation or statute.

(e) A link that provides an opportunity for the public to comment on draft regulations through electronic mail or by facsimile entitled "Submit Your Comments on Draft Regulations Here."

These website requirements remain in effect until January 1, 2012. (*Govt.C. 11365.*)

(3) *Attendance.* Attendance by members of the public may not be conditioned on registering, providing other information, completing a questionnaire, or otherwise fulfilling any condition. If an attendance list, register, questionnaire, or other similar document is posted or circulated, it must clearly state that signing, registering, or completing the document is voluntary. (*Govt.C. 11124.*)

(4) *Location.* State agencies may not conduct meetings, conferences, or functions in a facility that prohibits the admittance of any person, or persons, on the basis of ancestry or any characteristic listed or defined in *Govt.C. 11135* (prohibiting discrimination in state programs and activities; see 8 *Summary* (10th), *Constitutional Law*, §892), or that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. (*Govt.C. 11131.*) For this purpose, "state agency" includes "every state body, office, officer, department, division, bureau, board, council, commission, or other state agency." (*Govt.C. 11131.*)

(5) *Recording of Proceedings.* Any person attending an open meeting of a state body may record the proceedings with an audio or video tape recorder or a still or motion picture camera, unless the body makes a "reasonable finding" that recording cannot continue without noise, illumination, or obstruction of view that constitutes a persistent disruption of the proceedings. (*Govt.C. 11124.1(a).*) Also, no state body may prohibit or otherwise restrict the *broadcast* of an open meeting in the absence of a similar finding of disruption. (*Govt.C. 11124.1(c).*) Any tape or film record of an open meeting made at the state body's direction is subject to inspection pursuant to the California Public Records Act (*Govt.C. 6250 et seq., supra*, §5), but may be erased or destroyed 30 days after the taping or recording. (*Govt.C. 11124.1(b).*)

(6) *Teleconferencing.* Under *Govt.C. 11123(b)*, a state body may hold open or closed meetings by teleconference, "for the benefit of the public and state body." "Teleconference" means "a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or both audio and video." A state body also may provide the public with additional locations to observe or address the state body by electronic means. (*Govt.C. 11123(b)(2).*) The teleconferencing meeting is subject to all of the following:

(a) It must comply with all requirements applicable to other meetings. (*Govt.C. 11123(b)(1)(A).*)

(b) The portion of the meeting that is required to be open must be audible to the public at the location specified in the notice of the meeting. (*Govt.C. 11123(b)(1)(B).*)

(c) Each teleconference location must be identified in the notice of the meeting and must be accessible to the public. The state body also must post an agenda at each teleconference location that identifies the location and provides the public with an opportunity to address the state body directly at the location. The state body is further required to conduct teleconference meetings in a manner that protects the rights of parties or members of the public appearing before it. (*Govt.C. 11123(b)(1)(C).*)

(d) All votes during the meeting must be by roll call. (*Govt.C. 11123(b)(1)(D).*)

(e) The portion of the meeting that is closed to the public may not include consideration of any agenda item being heard under the emergency meetings provisions of *Govt.C. 11125.5* (*infra*, §15). (*Govt.C. 11123(b)(1)(E).*)

(f) At least one member of the state body must be physically present at the location specified in the notice of the meeting. (*Govt.C. 11123(b)(1)(F).*)

(7) *Prohibited Methods of Communication To Develop Collective Concurrence.* The use of direct communication,

personal intermediaries, or technological devices by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the state body is prohibited. (*Govt.C. 11122.5(b)*.) However, the prohibition does not apply to any of the following:

(a) Teleconferencing pursuant to *Govt.C. 11123*. (*Govt.C. 11122.5(b)*.)

(b) Individual contacts or conversations between a state body member and another person. (*Govt.C. 11122.5(c)(1)*.)

(c) Attendance by a majority of the members of the state body at any of the following: conferences or public gatherings involving discussions of general interest; open and publicized meetings organized by others to address topics of state concern; open and noticed meetings of other state bodies or the legislative bodies of local agencies; purely social or ceremonial occasions; or open and noticed meetings of standing committees of the state body. However, the exception applies only if the majority of the members do not discuss business that is within the subject matter jurisdiction of the state body. (*Govt.C. 11122.5(c)(2)-(c)(6)*)

(8) *Compliance With Americans With Disabilities Act*. All meetings of a state body that are open and public must meet the protections and prohibitions of the Americans With Disabilities Act (ADA) and the federal rules and regulations adopted to implement the ADA. (*Govt.C. 11123.1*.) On the request of a disabled person, the notice, the agenda, and other writings required to be distributed at the meetings must be made available in appropriate alternative formats to disabled persons, as required by the ADA. The notice must also include information on the availability of disability-related aids or services to enable the person to participate in the meeting consistent with the ADA. (*Govt.C. 11125(f)*; *Govt.C. 11125.1(b)*.)

(9) *Internet Transmission*. Until January 1, 2012 (see *Govt.C. 11365*), every state agency must, to the extent practicable and utilizing existing resources, have hearings on proposed regulations televised over the Internet via a webcast or other technology. (*Govt.C. 11364(b)*.)

(10) *Continuance*. Hearings held or noticed at meetings may be continued. A copy of the order or notice of continuance must be posted on or near the door of the place where the hearing was held. (*Govt.C. 11129*.)

(11) *Adjournment*. The state body may adjourn any meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn, and if all members are absent, the clerk or secretary of the state body may adjourn the meeting on prescribed notice. A copy of the order or notice of adjournment must be posted on or near the door of the place where the meeting was held. (*Govt.C. 11128.5*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice*. See *North Pacifica LLC v. California Coastal Com.* (2008) 166 C.A.4th 1416, 1430, 83 C.R.3d 636 [administrative agency substantially complied with notice requirements, even though notice was sent to plaintiff's post office box, rather than its street address, and was sent 2 days late; these were technical violations that did not prejudice plaintiff, especially where plaintiff had actual notice of meeting].(5) *Recording of Proceedings*. In 2009, *Govt.C. 11124.1(a)* was amended to refer to an audio or video recorder, rather than to an audio or video tape recorder and *Govt.C. 11124.1(b)* was amended to refer to an audio or video record, rather than to a tape or film record.(7) *Prohibited Methods of Communication To Develop Collective Concurrence*. *Govt.C. 11122.5(b)* was amended and further subdivided in 2009 to state the prohibition as follows: A majority of the members of a state body may not, outside of a meeting authorized by the Act, "use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body." (*Govt.C. 11122.5(b)(1)*.)

Exceptions to prohibition:

(a) *Teleconferencing*: As amended in 2009, *Govt.C. 11122.5(b)* no longer explicitly excepts teleconferencing from the prohibition. Instead, the provision now states that the prohibition does not prevent an employee or official of a state

agency from engaging in separate conversations or communications outside of a meeting authorized by the Act with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency, if that person does not communicate to members of the legislative body the comments or position of any other member of the legislative body.



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2. Special Meetings.

9 *Witkin Cal. Proc. Admin Proc* § 14

[§ 14] Special Meetings.

(1) *Basis.* The presiding officer or a majority of the members of a state body may call a special meeting for prescribed purposes where (a) compliance with the 10-day notice requirement of *Govt.C. 11125* (supra, §13) would impose a substantial hardship on the body or (b) immediate action is required to protect the public interest. (*Govt.C. 11125.4(a).*) The body must make a finding to this effect at the commencement of the special meeting, setting forth the specific facts that constitute the hardship to the body or the impending harm to the public interest. The finding must be adopted by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present. The finding must be made available on the Internet. (*Govt.C. 11125.4(c).*)

(2) *Authorized Purposes.* The special meeting must be called for one of the following purposes:

(a) To consider pending litigation. (*Govt.C. 11125.4(a)(1).*) (For definition of "pending litigation," see *Govt.C. 11126(e).*)

(b) To consider proposed legislation. (*Govt.C. 11125.4(a)(2).*)

(c) To consider issuance of a legal opinion. (*Govt.C. 11125.4(a)(3).*)

(d) To consider disciplinary action involving a state officer or employee. (*Govt.C. 11125.4(a)(4).*)

(e) To consider the purchase, sale, exchange, or lease of real property. (*Govt.C. 11125.4(a)(5).*)

(f) To consider license examinations and applications. (*Govt.C. 11125.4(a)(6).*)

(g) To consider an action on a loan or grant provided pursuant to *Health & Saf.C. 50000* et seq. (*Govt.C. 11125.4(a)(7).*)

(h) To consider the state body's response to a confidential final draft audit report from the Bureau of State Audits as

permitted by *Govt.C. 11126.2* (supra, §12). (*Govt.C. 11125.4(a)(8).*)

(i) To provide for an interim executive officer of a state body upon the death, incapacity, or vacancy in the office. (*Govt.C. 11125.4(a)(9).*)

(3) *Notice.* The state body must provide notice of the special meeting to each member of the body and to all parties that have requested notice of its meetings as soon as is practicable after the decision to call the meeting has been made. Notice must be delivered in a manner that allows it to be received by the members and by newspapers of general circulation and radio or television stations at least 48 hours before the time of the meeting. Notice must be made available to the media by providing notice to all national press wire services. Notice must also be made available on the Internet within the required time frame. (*Govt.C. 11125.4(b).*)

The notice must specify the time and place of the special meeting and the business to be transacted. No other business may be considered at the meeting. Written notice must additionally provide the address of the Internet website where required notices are made available. (*Govt.C. 11125.4(b).*)

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3. Emergency Proceedings.

9 *Witkin Cal. Proc. Admin Proc* § 15

[§ 15] Emergency Proceedings.

(1) *Emergency Meetings*. In specified emergency situations where prompt action is necessary due to the threatened disruption of public facilities, the 10-day notice requirement for general meetings (see *Govt.C. 11125*, supra, §13), and the 48-hour notice requirement for special meetings (see *Govt.C. 11125.4*, supra, §14) may be dispensed with. (*Govt.C. 11125.5(a)*.)

An emergency situation means either of the following, as determined by a majority of the members of the state body during a prior meeting or at the beginning of the emergency meeting:

(a) Work stoppage or other activity that severely impairs public health or safety, or both. (*Govt.C. 11125.5(b)(1)*.)

(b) Crippling disaster that severely impairs public health or safety, or both. (*Govt.C. 11125.5(b)(2)*.)

If telephone services are functioning, newspapers of general circulation and radio or television stations that have requested notice must be notified by telephone 1 hour prior to the emergency meeting. Notice of the meeting must be made available on the Internet as soon as practicable after the decision to call the emergency meeting has been made. (*Govt.C. 11125.5(c)*.) As soon after the meeting as possible, the state body must post in a public place for at least 10 days, and make available on the Internet for a minimum of 10 days, the minutes of the meeting, any actions taken, and additional specified information. (*Govt.C. 11125.5(d)*.)

(2) *Emergency Action on Items Not Listed on Posted Agenda*. A state body may take action on items of business not appearing on the posted agenda, on (a) a determination by majority vote that an emergency situation exists, as defined in *Govt.C. 11125.5*; or (b) a determination by a two-thirds vote, or, if less than two-thirds of the members are present, a unanimous vote of those present, that a need to take immediate action exists and came to the attention of the body after the agenda was posted. Notice of the additional item must be provided to each member of the state body and to all parties that have requested notice as soon as practicable and in a manner that allows it to be received by the members and the media at least 48 hours before the meeting. Notice must be made available to the media by providing notice to

all national press wire services. Notice must also be made available on the Internet as soon as practicable after the decision to consider additional items at a meeting has been made. (*Govt.C. 11125.3.*)

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9 *Witkin Cal. Proc. Admin Proc* § 16

[§ 16] Closed Sessions.

A state body may hold a closed session only during a regular or special meeting. (*Govt.C. 11128.*) If a session is closed, the state body must disclose, in an open meeting, the general nature of the items to be discussed in the closed session. (*Govt.C. 11126.3(a).*) The disclosure must be made as part of the notice of the meeting (see *supra*, §13) and as part of any notice or order of continuance (see *supra*, §13). Only matters covered in the disclosure may be considered at the closed session. (*Govt.C. 11126.3(b), (c), (d).*) (On record of closed sessions, see *Govt.C. 11126.1.*) After any closed session, the state body must reconvene in open session prior to adjournment to make specified disclosures of actions taken in the closed session. (*Govt.C. 11126.3(f).*)

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9 *Witkin Cal. Proc. Admin Proc* § 17

[§ 17] Enforcement.

(1) *Proceeding To Prevent Violation.* The Attorney General, the district attorney, or any interested person may commence an action for mandamus, injunction, or declaratory relief (a) to prevent violations or threatened violations of the Act, (b) to determine the applicability of the Act to past actions or threatened future actions of a state body, (c) to determine the validity of rules or actions by a state body to penalize or otherwise discourage the expression of its members, or (d) to compel a state body to tape record its closed sessions. (*Govt.C. 11130(a).*) (On award of costs and attorneys' fees to the prevailing party, see *Govt.C. 11130.5*; 7 *Pacific L. J.* 353.)

(2) *Proceeding To Determine Validity of Action.* Any interested person may commence an action for mandamus, injunction, or declaratory relief for a judicial determination that action taken by a state body in violation of *Govt.C. 11123* (general rule of open meetings, *supra*, §10) or *Govt.C. 11125* (notice requirements, *supra*, §13) is void. (*Govt.C. 11130.3(a).*) This provision does not apply, however, if the action taken (a) was in "substantial compliance" with the applicable statute, (b) gave rise to a contractual obligation on which a party has detrimentally relied in good faith, or (c) involved the collection of any tax or the sale or issuance of evidences of indebtedness and related agreements. (*Govt.C. 11130.3(b).*) Also, suit must be commenced within 90 days from the date the action was taken. (*Govt.C. 11130.3(a).*) (On award of costs and attorneys' fees to the prevailing party, see *Govt.C. 11130.5*.)

(3) *Criminal Penalty for Violation.* A member of a state body who attends a meeting in violation of the Act, and intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Act, is guilty of a misdemeanor. (*Govt.C. 11130.7*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Proceeding To Prevent Violation.* *Govt.C. 11130(a)* was amended in 2009 to refer to an audio recording rather than to a tape recording.

(2) *Proceeding To Determine Validity of Action.* See *North Pacifica LLC v. California Coastal Com.* (2008) 166 C.A.4th 1416, 1428, 83 C.R.3d 636 [proceeding under *Govt.C. 11130.3(a)* need not be by administrative mandamus, but may also be by ordinary mandamus or by action for declaratory relief].



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a. Nature of Act.

9 *Witkin Cal. Proc. Admin Proc* § 18

[§ 18] Nature of Act.

(1) *Enactment and Purpose.* The Ralph M. Brown Act (*Govt.C. 54950 et seq.*), often referred to as the "Brown Act," was adopted in 1953 and substantially amended in 1961. (See *Govt.C. 54950.5* [title of Act]; *54 Cal. L. Rev. 1650*; for similar acts of other states and the federal act, see *75 Harv. L. Rev. 1199*; *38 A.L.R.3d 1070* [validity, construction, and application of statutes making public proceedings open to public].)

The Act commences with a strong declaration of policy: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (*Govt.C. 54950.*) (See *Gillespie v. San Francisco Public Library Com. (1998) 67 C.A.4th 1165, 1169, 79 C.R.2d 649, infra, §25* [Brown Act's central purpose is to ensure sovereignty of people over agencies that serve them]; *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal (1999) 69 C.A.4th 287, 293, 81 C.R.2d 456, infra, §21* [Brown Act serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies]; *Fischer v. Los Angeles Unified School Dist. (1999) 70 C.A.4th 87, 95, 82 C.R.2d 452* [same]; *Boyle v. Redondo Beach (1999) 70 C.A.4th 1109, 1116, 83 C.R.2d 164* [same].)

(2) *General Open Meeting Requirement.* "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend," except as otherwise provided by the Act. (*Govt.C. 54953*; on scope of Act, see *infra, §19.*) Closed sessions are prohibited other than as specified in the Act or in other designated statutes. (*Govt.C. 54962*; on exceptions to open meeting requirement, see *infra, §§24, 25.*)

(3) *Construction.* As a remedial statute, the Brown Act must be construed liberally in favor of openness so as to accomplish its purpose. (*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, supra, 69 C.A.4th 294.*)

(4) *Constitutional Requirements.* Cal. Const., Art. I, §3(b), adopted by the voters at the November 2004 general election, guarantees the public's right of access to public records and governmental meetings. (See *supra*, §6.)

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b. Scope of Act.

9 *Witkin Cal. Proc. Admin Proc* § 19

[§ 19] Scope of Act.

(1) *In General.* The Brown Act applies to "[a]ll meetings of the legislative body of a local agency," except as otherwise provided. (*Govt.C.* 54953; for exceptions, see *infra*, §§24, 25; for definitions of "legislative body" and "local agency," see *infra*, §§20, 21.) The Act applies to the legislative body of every local agency, "notwithstanding the conflicting provisions of any other state law." (*Govt.C.* 54958; on open meeting requirements governing state Legislature, see *supra*, §9.) (On meetings of boards of directors of regional centers for persons with developmental disabilities, see *Welf.C.* 4660 *et seq.*)

(2) *Limited Scope Prior to 1961.* In *Adler v. City Council of Culver City* (1960) 184 C.A.2d 763, 7 C.R. 805, plaintiff taxpayer attacked a rezoning ordinance on the ground that several members of the city planning commission had discussed the subject at a private dinner with the property owner prior to making their recommendation. The court, on a showing that full public hearings were given at all regular meetings of the commission and the council, and that no fraud or other ground of invalidity was urged, upheld the ordinance. In the course of its opinion, the court declared that: (a) The Brown Act applies only to formal meetings of a city council or subordinate agency; (b) the Act did not apply to special committees of such agencies having advisory and not legislative functions, and the planning commission was such an agency; and (c) even if the meeting in question violated the Act, the Act itself provided no penalty or method of enforcement, and the only sanctions were those of *Govt.C.* 1222 and former P.C. 177 (now P.C. 19.4), making it a misdemeanor for a public officer to wilfully fail to perform a public duty, where no special penalty is prescribed. Hence, violation of the Act was not a ground for attack by a private person on the action taken.

(3) *Expanded Scope After 1961.* The 1961 Legislature adopted several amendments, partly designed to overcome the limitations of the *Adler* decision, including (a) expansion of the kinds of bodies and agencies covered by the Act (see *infra*, §§20, 21), (b) definition of "action taken" (see *infra*, §23), and (c) addition of enforcement mechanisms (see *infra*, §31 *et seq.*).

(4) *Additional Local Requirements.* The legislative body of a local agency may impose on itself open access requirements beyond the "minimal standards" provided by the Act, and an elected legislative body of a local agency may impose those requirements on a legislative body that the elected body appoints. (*Govt.C.* 54953.7.)

(5) *Application of Act to Elected Candidate.* Persons who have been elected as members of a legislative body but have not yet assumed office must conform their conduct to the requirements of the Act and are treated for enforcement purposes as if they had already assumed office. (*Govt.C. 54952.1*; see *216 Sutter Bay Associates v. Sutter (1997) 58 C.A.4th 860, 878, 68 C.R.2d 492 [Govt.C. 54952.1, operative in 1994, was not retroactive].*)

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c. Definitions.

1. Local Agency.

9 *Witkin Cal. Proc. Admin Proc* § 20

[§ 20] Local Agency.

"Local agency" means "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency." (*Govt.C. 54951.*) (See *Torres v. Board of Commrs. (1979) 89 C.A.3d 545, 549, 152 C.R. 506* [housing authority created under *Health & Saf.C. 34200* et seq. is subject to Act either as "municipal corporation" or as "other local public agency"]; *San Diego Union v. City Council (1983) 146 C.A.3d 947, 958, 196 C.R. 45* [Act does not impinge on constitutional authority of charter city to determine issues of local concern; public conduct of meetings is matter of statewide concern]; *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (2005) 134 C.A.4th 354, 358, 36 C.R.3d 47* [countywide crime task force created by cities under Joint Exercise of Powers Act (*Govt.C. 6500* et seq.) was local agency].)

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2. Legislative Body.

9 *Witkin Cal. Proc. Admin Proc* § 21

[§ 21] Legislative Body.

"Legislative body" means the following:

(1) "The governing body of a local agency or any other local body created by state or federal statute." (*Govt.C.* 54952(a); see *Wilson v. San Francisco Mun. Ry.* (1973) 29 C.A.3d 870, 879, 105 C.R. 855 [employee's presentation of grievance before hearing officer, under agreement between city and labor union, was not covered; single hearing officer is not "legislative body" and hearing before officer is not "meeting"]; *Longval v. Work. Comp. App. Bd.* (1996) 51 C.A.4th 792, 804, 59 C.R.2d 463 [Brown Act applies to legislative bodies of local agencies, not to Legislature]; 216 *Sutter Bay Associates v. Sutter* (1997) 58 C.A.4th 860, 878, 68 C.R.2d 492 [private meetings in 1992 by two newly elected members of county board of supervisors with incumbent supervisor did not violate open meeting requirement of Brown Act, which then applied only to those who had already assumed office; there was no "legislative body" convening among these three individuals]; *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 C.A.4th 354, 362, 36 C.R.3d 47 [board and executive council of countywide crime task force created by cities under Joint Exercise of Powers Act (*Govt.C.* 6500 et seq.) were legislative bodies].)

(2) "A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." Advisory committees that are composed solely of members of the legislative body constituting less than a quorum are not legislative bodies, but standing committees of a legislative body that have a continuing subject matter jurisdiction or fixed meeting schedule are legislative bodies. (*Govt.C.* 54952(b); see *Freedom Newspapers v. Orange County Employees Retirement System* (1993) 6 C.4th 821, 825, 832, 833, 25 C.R.2d 148, 863 P.2d 218 [advisory committee whose members constituted less than quorum of members of county retirement system board was not legislative body]; *Taxpayers for Livable Communities v. Malibu* (2005) 126 C.A.4th 1123, 1127, 24 C.R.3d 493 [open meeting requirements did not apply to private land use meetings between two members of city council; even though they were sole members of land use standing committee, they did not meet as committee members; further, they were not "other body" because they were not quorum of five-member council and council expressly directed that their action in present matter was advisory]; 22 *Pepperdine L. Rev.* 813 [*Freedom Newspapers*].)

(3) A board, commission, committee, or other multimember body that governs a private corporation, limited liability company, or other entity that either (a) is created by the elected legislative body to exercise lawfully delegated authority or (b) receives funds from a local agency and has, as an appointed *full voting* member of its governing body, a member of the local agency's legislative body. However, a board, commission, committee, or other multimember body is not relieved from the public meeting requirements by a subsequent change in voting status of a member of the local agency's legislative body who was a full voting member of the governing body of the private corporation, limited liability company, or other entity as of February 9, 1996. (*Govt.C. 54952(c)*.)

In *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 C.A.4th 287, 81 C.R.2d 456, the issue was whether the board of directors of a private corporation formed to design, construct, and operate a facility for the export of coal on land leased from the city harbor commission, which was a shareholder in the corporation, was a legislative body subject to the open meeting requirements of the Brown Act. *Held*, the Act applied. The board came within the definition of "legislative body" in *Govt.C. 54952(c)*. It was a multimember body that governed a private corporation; it was created by the elected legislative body--the city council--through the city harbor commission, a body appointed by the city council and subject to the city council's power to review and overturn any matter originally considered by the harbor commission; and it was created to exercise governmental authority, i.e., the harbor commission's authority to construct and operate a port facility, which the harbor commission delegated pursuant to the express or implied approval of the city council. (69 C.A.4th 295.) (See *Epstein v. Hollywood Entertainment Dist. II Business Imp. Dist.* (2001) 87 C.A.4th 862, 867, 104 C.R.2d 857 [property owners association administering city funds, raised through assessments on businesses in special assessment district, was "legislative body" subject to open meeting requirements; following *International Longshoremen's & Warehousemen's Union*].)

(4) The lessee of a hospital first leased in whole or in part under *Health & Saf.C. 32121(p)* after January 1, 1994, "where the lessee exercises any material authority of a legislative body of a local agency delegated to it by that legislative body whether the lessee is organized and operated by the local agency or by a delegated authority." (*Govt.C. 54952(d)*; see *Yoffie v. Marin Hosp. Dist.* (1987) 193 C.A.3d 743, 751, 238 C.R. 502 [governing board of private nonprofit public benefit corporation operating hospital owned by local hospital district under 30-year lease is not "legislative body"].)

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3. Meeting.

9 *Witkin Cal. Proc. Admin Proc* § 22

[§ 22] Meeting.

Prior to 1993, the term "meeting" was not statutorily defined, but it was held that the concept of "meeting" under the Act "comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business." (*Stockton Newspapers v. Redevelopment Agency of Stockton* (1985) 171 C.A.3d 95, 100, 214 C.R. 561 [separate, private telephone conversations between members of legislative body and body's attorney for purpose of collectively deciding to transfer ownership of property constituted "meeting" at which "action" was taken in violation of Act]; see *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 C.A.2d 41, 48, 69 C.R. 480, *infra*, §24 [Act applies to informal conferences]; *Rowan v. Santa Clara Unified School Dist.* (1981) 121 C.A.3d 231, 234, 175 C.R. 292 [as used in *Govt.C. 54950* (*supra*, §18), "deliberations" includes collective acquisition and exchange of facts preliminary to ultimate decision; Act prohibited closed session to consider qualifications of realty specialist prior to making decision on disposal of surplus property].)

The term "meeting" is now defined in *Govt.C. 54952.2*. The term includes "any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains." (*Govt.C. 54952.2(a)*.) Excluded from the definition are individual contacts or conversations; attendance at public conferences or similar gatherings to discuss issues of general interest; attendance at open meetings organized by other persons or organizations to address topics of local community concern; attendance at open meetings of another body of the local agency, or of a legislative body of another local agency; attendance at purely ceremonial or social occasions; and attendance at open meetings of a standing committee of the legislative body, provided that the attending members of the legislative body who are not members of the standing committee attend only as observers. (*Govt.C. 54952.2(c)*; see 216 *Sutter Bay Associates v. Sutter* (1997) 58 C.A.4th 860, 881, 68 C.R.2d 492 [Brown Act did not apply to private meetings involving only plan to call special open meeting on following day].)

Except for video teleconferencing authorized by *Govt.C. 54953* (*infra*, §26), "any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body" is

prohibited. (*Govt.C. 54952.2(b)*; see *Wolfe v. Fremont (2006) 144 C.A.4th 533, 545, 50 C.R.3d 524* [city resident who alleged that city manager violated Brown Act by privately meeting with individual members of city council to garner support for new police policy failed to state valid claim; complaint failed to allege that city manager acted as intermediary regarding policy and failed to demonstrate collective concurrence by majority of council].)

SUPPLEMENT: [This section is current through the latest supplement]

Definition of "meeting": The term "meeting" now means "any congregation of a majority of the members of a legislative body at the same time and location, including a teleconference location" as permitted by *Govt.C. 54953* (text, §26), "to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." (*Govt.C. 54952.2(a)*, as amended in 2008.) *Prohibition against serial communications*: The 2008 Legislature disapproved the holding of *Wolfe v. Fremont (2006) 144 C.A.4th 533, 50 C.R.3d 524*, text, p. 1126, to the extent the court construed the prohibition in *Govt.C. 54952.2(b)* against serial meetings by a legislative body "to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition." (2008 Stats., Chap. 63, §1.) (See 39 *McGeorge L. Rev. 1073* [*Wolfe*].) In conformity with this view, the Legislature amended and subdivided *Govt.C. 54952.2(b)* as follows:

A majority of the members of a legislative body may not, outside a meeting authorized by the Brown Act, "use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." (*Govt.C. 54952.2(b)(1)*.) However, this prohibition may "not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body." (*Govt.C. 54952.2(b)(2)*.)



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9 *Witkin Cal. Proc. Admin Proc* § 23

[§ 23] Action Taken.

"Action taken" refers to the following acts by a majority of the members of a legislative body (*Govt.C. 54952.6*):

- (1) A collective decision or a collective commitment or promise to make a positive or negative decision.
- (2) An actual vote, when sitting as a body or entity, on a motion, proposal, resolution, order or ordinance.

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d. Exceptions.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 24

[§ 24] In General.

The general requirement of open meetings (*supra*, §18) is subject to exceptions. Closed sessions are not prohibited where authorized (1) in the Act or (2) in other designated statutes. These include *Health & Saf.C. 1461, 1462, 32106, 32155; Govt.C. 37606, 37606.1, 37624.3* as they apply to hospitals; and Education Code provisions pertaining to school districts and community college districts. (*Govt.C. 54962*; on meetings of school district and community college district governing boards, see *Educ.C. 35140 et seq.* [elementary and secondary schools], *Educ.C. 72120 et seq.* [community colleges].) In addition to exceptions for personnel matters (*infra*, §25), the following exceptions are provided in the Act:

(1) *Real Property Negotiations*. A legislative body may hold closed sessions to grant authority to its negotiator regarding the price and terms of a purchase, sale, lease, or exchange of real property involving the local agency if the property and the negotiating parties for both sides have been identified in a public session. The agency negotiators may be members of the legislative body. (*Govt.C. 54956.8*; see *Shapiro v. San Diego City Council* (2002) 96 C.A.4th 904, 921, 117 C.R.2d 631 [city council did not qualify for exception as to closed session with real estate negotiators about major league baseball redevelopment project, where discussion also extended to land acquisition, parking, environmental considerations, traffic, naming rights, and expert consultant and staff decisions].)

(2) *Labor Negotiations*. A problem later solved by statute was presented in *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 C.A.2d 41, 69 C.R. 480. The entire county board of supervisors met at lunch with their county council, county executive, director of welfare, and members of the local Labor Council, to discuss a social workers union strike against the county and the county's effort to enforce an injunction secured against it. Newspaper reporters were barred, and plaintiff Newspaper Guild obtained an injunction against closed meetings. *Held*, injunction modified and affirmed. The general provisions of the Act, particularly *Govt.C. 54950* (*supra*, §18), showed an intention to cover deliberations as well as action, and the term "meeting" covers informal conferences. (263 C.A.2d 48, 51.) The injunction, however, was too broad in covering meetings with counsel; these are protected by the attorney-client privilege. (263 C.A.2d 59; see 2 *Cal. Evidence* (4th), *Witnesses*, §98 et seq.)

The main holding in the case was substantially nullified by the enactment of *Govt.C. 54957.6* in 1968: A legislative

body may hold closed sessions with the agency's representatives to review its position and give instructions regarding employee salaries and fringe benefits, and, for represented employees, any other matter within the statutorily provided scope of representation. These sessions may be held before or during discussions with union representatives and unrepresented employees. (*Govt.C. 54957.6*; on organization and collective bargaining by local public employees, see 3 *Summary* (10th), *Agency and Employment*, §571 et seq.) Prior to the closed session, the legislative body of the agency must hold an open and public session in which it identifies its designated representatives. (*Govt.C. 54957.6(a)*.)

(3) *Grand Jury Testimony*. The Act does not prohibit members of a local agency's legislative body from testifying privately before a grand jury, either as individuals or as a body. (*Govt.C. 54953.1*.)

(4) *License Applicants With Criminal Records*. A legislative body may hold closed sessions to consider whether a person with a criminal record who applies for an initial or renewed license has been sufficiently rehabilitated. All matters relating to the closed session are confidential, except where the license is denied and the applicant challenges the denial. (*Govt.C. 54956.7*.)

(5) *Consideration of State Audit Report*. A legislative body that has received a confidential final draft audit report from the Bureau of State Audits may hold a closed meeting to discuss its response to the report. (*Govt.C. 54956.75(a)*.) However, the legislative body must meet in open session to discuss an audit report that has already been released to the public, unless some other exemption applies. (*Govt.C. 54956.75(b)*.)

(6) *Pension Fund Investments*. A legislative body of a local agency that invests pension funds may hold closed sessions to consider the purchase or sale of specific pension fund investments. (*Govt.C. 54956.81*.)

(7) *Employee Request for Early Withdrawal of Funds in Deferred Compensation Plan*. A legislative body of a local agency may hold closed sessions to discuss an employee's application for early withdrawal of funds in a deferred compensation plan, where the application is based on financial hardship arising from an unforeseeable emergency due to illness, accident, casualty, or other extraordinary event specified in the plan. (*Govt.C. 54957.10*.)

(8) *Health Care Plan Member Complaint*. A legislative body of a local agency that provides services under Welf.C.14087.3 (Medi-Cal Services) may hold a closed session to hear a charge or complaint from a member enrolled in its health plan if the member so requests. (*Govt.C. 54956.86*.)

(9) *Health Care Plan Trade Secrets and Insurance Rates*. The governing board of a health care plan subject to the Knox-Keene Health Care Service Plan Act of 1975 (*Health & Saf.C. 1340* et seq.) may hold a closed meeting to discuss (a) health plan trade secrets or (b) contracts and contract negotiations by the health plan with providers of health care services concerning rates of payment. (*Govt.C. 54956.87*.)

(10) *Security and Access to Public Facilities*. A legislative body may hold closed sessions with various law enforcement officials and security personnel "on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities." (*Govt.C. 54957(a)*.)

(11) *Multijurisdictional Law Enforcement Agency*. The legislative body and an advisory body of a multijurisdictional law enforcement agency may hold closed sessions to discuss case records of an ongoing criminal investigation, to hear testimony, and to discuss action in particular cases. (*Govt.C. 54957.8(b)*; see *Govt.C. 54957.8(a)* [defining multijurisdictional law enforcement agency as joint powers entity providing law enforcement services for parties to joint powers agreement for purpose of investigating specified criminal activities].)

(12) *Disrupted Meetings*. If a meeting is "willfully interrupted" and "order cannot be restored" by removing disruptive individuals, a legislative body may clear the meeting and hold a closed session. However, only matters on the agenda may be considered, and representatives of the news media who are not disruptive may not be excluded. (*Govt.C. 54957.9*.)

(13) *Pending Litigation*. On advice of counsel, a legislative body may hold closed sessions to confer with counsel regarding pending litigation, if an open session "would prejudice the position of the local agency in the litigation." "Litigation" includes any adjudicatory proceedings before a court, administrative body, hearing officer, or arbitrator. For purposes of holding closed sessions under the Act, this provision "is the exclusive expression of the lawyer-client privilege." (Govt.C. 54956.9; see Govt.C. 54956.95 [joint powers agency may meet in closed session to discuss tort liability, public liability, or workers' compensation claims].) (See *Roberts v. Palmdale* (1993) 5 C.4th 363, 377, 20 C.R.2d 330, 853 P.2d 496 [language in Govt.C. 54956.9 abrogating lawyer-client privilege applies only to open meeting requirements; statute does not abrogate attorney-client privilege under Public Records Act (Govt.C. 6250 et seq., supra, §5), and city attorney's letter to city council expressing legal opinion on pending matter was not subject to open meeting requirements]; *Register Div. of Freedom Newspapers v. Orange* (1984) 158 C.A.3d 893, 907, 205 C.R. 92 [closed session to discuss settlement of prisoner's assault claim against county violated Act; case was decided before enactment of Govt.C. 54956.9]; *Los Angeles v. Superior Court (Union of Amer. Physicians & Dentists)* (2005) 130 C.A.4th 1099, 1105, 30 C.R.3d 708 ["pending litigation" includes threatened litigation]; *Shapiro v. Board of Directors of Centre City Dev. Corp.* (2005) 134 C.A.4th 170, 185, 35 C.R.3d 826 [Govt.C. 54956.9 did not authorize agency to delegate to second agency authority to meet in closed session with first agency's counsel to discuss pending litigation in which second agency was not party]; *Trancas Property Owners Assn. v. Malibu* (2006) 138 C.A.4th 172, 186, 41 C.R.3d 200 [Govt.C. 54956.9 did not authorize city council to approve in closed session settlement agreement that granted zoning variance to developer]; 34 A.L.R.5th 591 [attorney-client exception to state law requiring meetings of public bodies to be open].)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Exceptions.

2. Personnel Matters.

9 *Witkin Cal. Proc. Admin Proc* § 25

[§ 25] Personnel Matters.

(1) *In General.* A legislative body may hold closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of an officer or public employee. (*Govt.C. 54957(b)*; see *Lucas v. Board of Trustees* (1971) 18 C.A.3d 988, 991, 96 C.R. 431 [exception applies to action as well as consideration; hence, decision not to reemploy superintendent of high school district was properly made in executive session]; *San Diego Union v. City Council* (1983) 146 C.A.3d 947, 955, 196 C.R. 45 [exception applies to evaluation of specific employee's performance, but determination of salary increase must be in open session]; *Duval v. Board of Trustees of Coalinga-Huran Joint Unified School Dist.* (2001) 93 C.A.4th 902, 909, 113 C.R.2d 517 ["evaluation of performance" is not limited to comprehensive review of employee's performance, but may include examination of specific instances of performance, evaluation criteria and process, and other preliminary matters involving agency's discretion]; cf. *Morrow v. Los Angeles Unified School Dist.* (2007) 149 C.A.4th 1424, 1438, 57 C.R.3d 885 [statements by school superintendents to newspaper concerning high school principal's handling of student violence on campus, leadership abilities, and retirement plans were not equivalent of personnel evaluation under collective bargaining agreement, and thus did not fall within personnel exception to Brown Act; personnel exception does not to create enforceable right to privacy in favor of employee that would cover information provided to press here].) Action taken in a closed session to appoint, employ, or dismiss a public employee must be reported at a public meeting. (*Govt.C. 54957.1(a)(5)*.)

(2) *Specific Complaints or Charges Against Employee.* As a condition to holding a closed session on specific complaints or charges against an employee, the employee must be given prescribed written notice of the right to have the complaints or charges heard in open session. (*Govt.C. 54957(b)*; see *Fischer v. Los Angeles Unified School Dist.* (1999) 70 C.A.4th 87, 100, 82 C.R.2d 452 [allegations of misconduct by probationary teachers that were considered by school board in determining not to reemploy them were "evaluation of performance" under personnel matters exception, rather than "specific complaints or charges" brought against teachers, which would have required notice of right to request open session]; *Bell v. Vista Unified School Dist.* (2000) 82 C.A.4th 672, 681, 98 C.R.2d 263 [school board violated "specific complaints or charges" provision by voting to permanently remove football coach in closed session

with no advance notice to coach]; *Morrison v. Housing Authority of Los Angeles Bd. of Commrs.* (2003) 107 C.A.4th 860, 870, 132 C.R.2d 453 [following *Bell* rationale; in employee discipline proceeding, agency that rejected hearing officer's findings of fact and engaged in its own fact-finding conducted "hearing" within meaning of *Govt.C. 54957(b)*; thus, agency violated Brown Act by upholding employee's termination in closed session with no advance notice to employee].)

(3) *Employee's Right To Request Public Session Is Limited to Hearing of Complaints or Charges Against Employee.* In *Furtado v. Sierra Community College* (1998) 68 C.A.4th 876, 80 C.R.2d 589, the court construed the somewhat ambiguous language of *Govt.C. 54957* regarding when the employee may require the agency to consider a matter at an open session. Plaintiff received negative performance evaluations as a librarian for defendant community college district. The district board of trustees met in a closed session, despite plaintiff's request for an open meeting, and voted not to rehire her. Plaintiff's petition for mandamus, alleging that the board's procedures violated the Brown Act, was denied by the trial court. *Held*, affirmed.

(a) An exception to the open meeting requirements exists when certain personnel issues are slated for discussion. Under *Govt.C. 54957*, "[n]othing contained in this chapter shall be construed to prevent the legislative body of a local agency ... from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session." The use of the disjunctive "or" to separate the reference to "complaints or charges" from the rest of the personnel exception indicates that the request for a public session applies only to the hearing of complaints or charges brought against the employee. Qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. (68 C.A.4th 880.)

(b) This interpretation is further supported by the portion of the statute that states: "As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session." This paragraph clarifies the statute's intention to permit an employee to request an open session when complaints or charges have been brought against the employee. Conspicuously absent is any mention of other personnel matters. Where the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded. (68 C.A.4th 881.)

(c) In addition to comports with rules of statutory construction, the board's interpretation makes practical sense. The purposes underlying the personnel exception to the open meeting requirement are to permit candid discussions of personnel matters and to protect the employee from public embarrassment. The Legislature has drawn a reasonable compromise, leaving most personnel matters to be discussed freely and candidly in closed session, but permitting an employee to request an open session to defend against complaints or charges brought by another individual. (68 C.A.4th 882.)

(d) Negative comments in plaintiff's evaluations did not constitute "complaints or charges brought against [her] by another person or employee," within the meaning of *Govt.C. 54957*. The statutory language includes a reference to "evaluation of performance" that is separate and distinct from the hearing of "complaints or charges brought against the employee." Thus, to merge employee evaluations into the category of "complaints or charges" in order to permit an open session would effectively rewrite the statute. Both "complaint" and "charge" connote an accusation, something that is brought against an individual. Performance evaluations conducted in the due course of business are not in the nature of an accusation and are not normally thought of as being "brought against the employee." (68 C.A.4th 882.) (See *Fischer v. Los Angeles Unified School Dist.*, *supra*, 70 C.A.4th 98 [probationary teachers had no right to request that school board meet in open session in determining whether to reemploy them; following *Furtado*].)

In contrast to *Furtado* and *Fischer*, *Bollinger v. San Diego Civil Service Com.* (1999) 71 C.A.4th 568, 84 C.R.2d 27, which concerned a police officer's demotion, did not involve a routine employee performance evaluation, but "specific complaints or charges" other police officers brought against plaintiff. However, the closed session in issue was

conducted solely for the purpose of *deliberating* whether the complaints or charges justified disciplinary action rather than conducting an evidentiary *hearing* regarding them. *Held*, plaintiff was not entitled to notice. The plain language of *Govt.C. 54957* lends itself to the interpretation that notice need not be provided in these circumstances. The statute uses "to consider" in reference to the "appointment, employment, evaluation of performance, discipline, or dismissal" of an employee, but "to hear" and "heard" in reference to "complaints or charges brought against the employee by another person or employee." (71 C.A.4th 574.) The statute's legislative history further supports this position. The Legislature specifically rejected the notion that an employee is entitled to notice when the closed session is for the purpose of considering whether complaints or charges justify discipline or dismissal. (71 C.A.4th 575.)

(4) *Nomination of Candidate for Employment Is Within Exception*. In *Gillespie v. San Francisco Public Library Com.* (1998) 67 C.A.4th 1165, 79 C.R.2d 649, a public access organization petitioned for mandamus to set aside a city public library commission's nomination of candidates for city librarian. The organization asserted that the commission violated the Brown Act by meeting in closed session to select nominees for the position. Under the city charter, the mayor appointed the librarian from the list of candidates so nominated. *Held*, the commission properly met in closed session. The exception in *Govt.C. 54957* permitting closed sessions "to consider the appointment" of a public employee applies. The mayor has the power to ultimately select the successful candidate from the commission's nominees, but the mayor's discretion is not absolute. Both the commission and the mayor participate in the appointment process before a candidate is selected. Thus, they share the power of appointment. A body need not be vested with sole power of appointment before it may properly consider the appointment of a public officer in closed session. (67 C.A.4th 1169.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Kolter v. Commission on Professional Competence of Los Angeles Unified School Dist.* (2009) 170 C.A.4th 1346, 1352, 88 C.R.3d 620 [exception applied to consideration of whether initiation of dismissal proceedings against teacher was warranted, where no evidentiary hearing on charges had been conducted]; *Hofman Ranch v. Yuba County Local Agency Formation Com.* (2009) 172 C.A.4th 805, 810, 91 C.R.3d 458 [contractor assigned to perform "executive officer services" for county local agency formation commission was employee of commission; thus, exception applied to consideration of his performance evaluation].



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1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 26

[§ 26] In General.

(1) *Regular Meetings.* The legislative body of a local agency must provide a time and place for regular meetings and must post an agenda in a public place at least 72 hours before the meeting. (*Govt.C. 54954.2(a)(1)*; see *Cohan v. Thousand Oaks* (1994) 30 C.A.4th 547, 554, 35 C.R.2d 782 [error in changing agenda without complying with 72-hour notice requirement of *Govt.C. 54954.2* was not prejudicial].) With specified exceptions, no action may be taken on an item of business that does not appear on the posted agenda. (*Govt.C. 54954.2(a)(2)*.) (On request for mailed copy of meeting agenda or of documents constituting agenda packet, see *Govt.C. 54954.1*; on agenda and other writings distributed to legislative body for discussion or consideration at public meeting as disclosable public records, see *Govt.C. 54957.5(a)*; on availability for public inspection of writings distributed for consideration, see *Govt.C. 54957.5(b)*.)

Advisory committees and standing committees are exempt from the requirement that legislative bodies provide the time and place for holding regular meetings. However, meetings of advisory or standing committees for which an agenda is in fact posted at least 72 hours in advance of the meeting (pursuant to *Govt.C. 54954.2*) are considered regular meetings of the legislative body for purposes of the Act. (*Govt.C. 54954(a)*.)

(2) *Special Meetings.* Notice of a special meeting must be publicly posted at least 24 hours before the meeting and must be "delivered personally or by any other means" to members of the legislative body and to news media representatives requesting notice. Only business specified in the notice may be transacted. (*Govt.C. 54956*; see *Moreno v. King* (2005) 127 C.A.4th 17, 26, 25 C.R.3d 29 [agenda for special meeting of city council describing business as "public employee (employment contract)" was inadequate, where 25% of meeting was devoted to discussing whether public finance director should be dismissed].)

(3) *General Tax or Assessment Meetings.* At least one public meeting must be held before adoption of any new or increased general tax or any new or increased assessment. This meeting must be in addition to the noticed public hearing at which the legislative body proposes to enact or increase the tax or assessment, and public testimony must be allowed at the meeting. (*Govt.C. 54954.6(a)(1)*.) At least 45 days' notice of the hearing must be given, and notice of the

public meeting must be given at the same time and in the same document, but the meeting must occur before the hearing. (*Govt.C. 54954.6(a)(2)*.) (On contents and method of notice, see *Govt.C. 54954.6(b)* and (c).)

(4) *Location*. Subject to specified exceptions, regular and special meetings of a legislative body must be held within the boundaries of the territory over which the local agency exercises jurisdiction (*Govt.C. 54954(b)*), meetings of the governing board of a school district must be held within the district (*Govt.C. 54954(c)*), and meetings of a joint powers authority must be held within the territory of one of its member agencies (*Govt.C. 54954(d)*). Local agencies may not conduct meetings in a facility that prohibits the admittance of any person on the basis of ancestry or any characteristic listed or defined in *Govt.C. 11135* (prohibiting discrimination in state programs and activities; see 8 *Summary* (10th), *Constitutional Law*, §892), or that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. (*Govt.C. 54961(a)*.)

(5) *Attendance*. Attendance by members of the public may not be conditioned on registering, providing other information, completing a questionnaire, or otherwise fulfilling any condition. If an attendance list, register, questionnaire, or other similar document is posted or circulated, it must state clearly that signing, registering, or completing the document is voluntary. (*Govt.C. 54953.3*.)

(6) *Public Testimony*. At regular meetings, the public must have an opportunity "to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body." However, the agenda need not provide an opportunity for public participation "on any item that has already been considered by a committee, composed exclusively of members of the legislative body" at a public meeting where public comment on that item was afforded. (*Govt.C. 54954.3(a)*); see *Chaffee v. San Francisco Library Com. (2004) 115 C.A.4th 461, 467, 9 C.R.3d 336* [*Govt.C. 54954.3(a)* does not require that public comment period be provided at each session of continued public meeting held to consider single published agenda]; *Coalition of Labor, Agriculture & Business v. Santa Barbara Bd. of Supervisors (2005) 129 C.A.4th 205, 209, 28 C.R.3d 198* [*Govt.C. 54954.3(a)* does not require that public comment period be provided to address whether item should be placed on agenda].) In addition, the local agency may make reasonable regulations governing public participation, including "regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." (*Govt.C. 54954.3(b)*); see *Chaffee v. San Francisco Public Library Com. (2005) 134 C.A.4th 109, 116, 36 C.R.3d 1* [*Govt.C. 54954.3(b)* did not preclude library commission from limiting public comment on each agenda item to 2 minutes per speaker, rather than 3 minutes normally allotted].) The legislative body may not prohibit public criticism of its acts or omissions or of the local agency's policies, procedures, programs, or services. (*Govt.C. 54954.3(c)*.)

(7) *Recording of Proceedings*. Any person attending an open meeting of a local agency's legislative body may record the proceedings with an audio or video tape recorder or a still or motion picture camera, unless the body makes a "reasonable finding" that recording constitutes a disruption. (*Govt.C. 54953.5(a)*.)

(8) *Broadcast of Proceedings*. A legislative body may not prohibit or otherwise restrict the broadcast of its open and public meetings unless it makes "a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings." (*Govt.C. 54953.6*.)

(9) *Teleconferencing*. A legislative body may use teleconferencing for the benefit of the public or a legislative body in connection with any authorized meeting or proceeding. The teleconferenced meeting or proceeding must comply with all requirements of the Act and all otherwise applicable provisions of law relating to the specific type of meeting or proceeding. (*Govt.C. 54953(b)(1)*.) A "teleconference" is a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both. (*Govt.C. 54953(b)(4)*.) Teleconferencing may be used for "all purposes in connection with any meeting within the subject matter jurisdiction" of the legislative body. (*Govt.C. 54953(b)(2)*.) The legislative body must post agendas at all teleconference locations and must "conduct teleconference meetings in a manner that protects" the rights of the parties or the public appearing before it. During the teleconference, at least a quorum of the members of the legislative body must participate from

locations within the boundaries of the territory over which the agency exercises jurisdiction. (*Govt.C. 54953(b)(3).*)

(10) *Secret Ballot Prohibited.* The legislative body may not take either preliminary or final action by secret ballot. (*Govt.C. 54953(c).*)

(11) *Compliance With Americans With Disabilities Act.* All meetings of a legislative body that are open and public must meet the protections and prohibitions of the Americans With Disabilities Act (ADA) and the federal rules and regulations adopted to implement the ADA. (*Govt.C. 54953.2.*) On the request of a disabled person, the agenda and other writings required to be distributed at the meetings must be made available in appropriate alternative formats to disabled persons, as required by the ADA. The agenda must also include information on the availability of disability-related aids or services to enable the person to participate in the meeting consistent with the ADA. (*Govt.C. 54954.1, 54954.2(a)(1), 54957.5(c).*)

(12) *Continuance and Adjournment.* Meetings may be adjourned (*Govt.C. 54955*) and hearings held or noticed at meetings may be continued. (*Govt.C. 54955.1.*)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Public Testimony.* See *Galbiso v. Orosi Public Util. Dist.* (2008) 167 C.A.4th 1063, 1079, 84 C.R.3d 788

[administrative agency may not prohibit public comments authorized by *Govt.C. 54954.3(a)* merely because they would likely relate to pending litigation that may be held in closed session under *Govt.C. 54956.9* (see text, §24)].

(7) *Recording of Proceedings.* *Govt.C. 54953.5(a)* was amended in 2009 to refer to an audio or a video recorder, rather than to an audio or a video tape recorder.



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9 *Witkin Cal. Proc. Admin Proc* § 27

[§ 27] Emergency Proceedings.

In situations where public health or safety is severely impaired and prompt action is necessary due to the threatened disruption of public facilities, the 24-hour notice requirement of *Govt.C. 54956* (supra, §26) may be dispensed with. Representatives of the news media must be notified 1 hour before the emergency meeting by telephone if possible. (*Govt.C. 54956.5*; see *33 A.L.R.5th 731* [emergency exception to state law requiring meetings of public bodies to be open].)

In the case of a "dire emergency," the 24-hour notice requirement also may be dispensed with prior to holding an emergency meeting. However, unlike the 1-hour notice requirement for other emergencies, the news media may be notified about a meeting concerning a dire emergency at or near the time that the presiding officer notifies the members of the legislative body of the meeting. A "dire emergency" means a crippling disaster, mass destruction, terrorist act, or threatened terrorist act that poses an immediate and significant peril to the public health or safety. (*Govt.C. 54956.5*.)

When *relocation* of a meeting is required by reason of emergency, notice of the new meeting place must be given "by the most rapid means of communication available at the time" to local media who have requested notice under *Govt.C. 54956* (supra, §26). (*Govt.C. 54954(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Closed Sessions.

aa. In General.

9 *Witkin Cal. Proc. Admin Proc* § 28

[§ 28] In General.

(1) *Disclosures Before Session.* Prior to holding a closed session, the legislative body of the local agency must disclose, in an open meeting, the item or items to be discussed in the closed session. Only matters covered in the statement may be considered. (*Govt.C. 54957.7(a).*)

(2) *Disclosures After Session.* After a closed session, the legislative body must reconvene in open session before adjournment and publicly report any of the following actions taken at the closed session and the vote or abstention of each member on that action (*Govt.C. 54957.1(a), 54957.7(b)*):

(a) Approval of an agreement concluding real estate negotiations under *Govt.C. 54956.8* (*supra*, §24), after the agreement is final. (*Govt.C. 54957.1(a)(1).*)

(b) Approval given to its legal counsel under *Govt.C. 54956.9* (*supra*, §24) to defend, to seek or refrain from seeking appellate review, to enter as amicus curiae, or to settle litigation. (*Govt.C. 54957.1(a)(2)* and *(a)(3).*)

(c) Disposition of liability claims discussed in closed session under *Govt.C. 54956.95* (*supra*, §24). (*Govt.C. 54957.1(a)(4).*)

(d) Action taken under *Govt.C. 54957* (*supra*, §25) with respect to the employment status of a public employee. (*Govt.C. 54957.1(a)(5)*; see *Gillespie v. San Francisco Public Library Com.* (1998) 67 C.A.4th 1165, 1173, 79 C.R.2d 649, *supra*, §25 [only actual appointment of candidate for public employment, not candidate's nomination for position, need be reported on day of action].) (See *Govt.C. 54957.1(e)* [employee or former employee with respect to whom disclosure is made may not bring action for injury to reputation, liberty, or other personal interest].)

(e) Approval of an agreement concluding labor negotiations with represented employees under *Govt.C. 54957.6* (*supra*, §24) after the agreement is final and has been accepted or ratified by the other party. (*Govt.C. 54957.1(a)(6).*)

(f) Pension fund investment transaction decisions made under *Govt.C. 54956.81* (supra, §24) at the first open meeting held after either the close of the transaction or the transfer of the pension fund assets for the transaction, whichever occurs earlier. (*Govt.C. 54957.1(a)(7)*.)

The required reports may be oral or written. Persons who have made written requests within 24 hours of the posting of the agenda, as well as persons who have made standing requests under *Govt.C. 54954.1* or *54956* (see supra, §26), must, if present when the closed session ends, be given copies of any documents that were finally approved or adopted. A document that requires retyping because of a substantive amendment need not be released until retyping is completed during normal business hours, but the presiding officer or a designee must give an oral summary of the substance of the amendment. (*Govt.C. 54957.1(b)*.) The required documentation must be available to any person on the next business day or when necessary retyping is complete. (*Govt.C. 54957.1(c)*.) (On prohibition of discovery of recollections of participants in closed meetings, see *infra*, §29; on prohibition against disclosing confidential information acquired during closed session, see *Govt.C. 54963*, *infra*, §30.)

(3) *Record of Session*. Minute books for closed sessions, recording topics discussed and decisions made, may be authorized by the legislative body. The minute book is not subject to disclosure under the Public Records Act (*Govt.C. 6250*, supra, §5) and is ordinarily available only to members of the body. The minute book may consist of a recording of the session. (*Govt.C. 54957.2*; see *Los Angeles v. Superior Court (Union of Amer. Physicians & Dentists)* (2005) 130 C.A.4th 1099, 1105, 30 C.R.3d 708 [under *Govt.C. 54957.2*, minutes from closed session were not discoverable in civil action].)

In *Hamilton v. Los Gatos* (1989) 213 C.A.3d 1050, 261 C.R. 888, plaintiff city council member, who had a disqualifying financial conflict of interest, voluntarily left a closed session where litigation was discussed. *Held*, despite *Govt.C. 54957.2*, plaintiff's request for access to a tape recording of the session was properly denied under *Govt.C. 87100* (7 Summary (10th), *Constitutional Law*, §281), prohibiting participation in governmental decisions by an official with a financial interest. (213 C.A.3d 1059.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Disclosures Before Session*. See *Galbiso v. Orosi Public Util. Dist.* (2008) 167 C.A.4th 1063, 1082, 84 C.R.3d 788 [public utility district board violated *Govt.C. 54957.7(a)* by going into closed session to discuss pending foreclosure of landowner's property to collect sewer assessments without making required disclosures; agenda's description of closed-session items was not in substantial compliance with Brown Act, and board did not publicly identify litigation to be discussed as required by Act].



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bb. No Discovery of Participants' Recollections.

9 *Witkin Cal. Proc. Admin Proc* § 29

[§ 29] No Discovery of Participants' Recollections.

In *Kleitman v. Superior Court* (1999) 74 C.A.4th 324, 87 C.R.2d 813, plaintiff, a city resident, brought an action against defendant city council members, alleging that an unrecorded, closed session of the council concerning negotiation of a lease of city property violated the Brown Act. The trial judge granted plaintiff's discovery motion and ordered defendants to answer interrogatories regarding their personal recollections of the closed council session. *Held*, reversed.

(a) The Brown Act does not provide for disclosure of the personal recollections of members of a legislative body with regard to the proceedings held in an unrecorded closed session. Instead, the Act provides only for in camera review by the trial court of minute books of closed sessions (*Govt.C. 54957.2*), and in camera review and disclosure of the tape recordings of those sessions (*Govt.C. 54960(c)*), in specified circumstances. Thus, the trial court cannot compel disclosure of members' personal recollections without improperly reading into the Act a discovery procedure that would violate the confidentiality of closed sessions inherent in the Act. (74 C.A.4th 326, 331.)

(b) Discovery into the subjective motives or mental processes of city council members is prohibited. (74 C.A.4th 335, citing *Santa Cruz v. Superior Court* (1995) 40 C.A.4th 1146, 48 C.R.2d 216.) The contention that interested persons must be able to compel the members of legislative bodies to disclose their recollections of unrecorded closed sessions whenever a Brown Act violation is alleged is one that should be addressed to the Legislature, not to the courts. (74 C.A.4th 336.)

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 54960(c) was amended in 2009 to refer to audio recordings rather than to tape recordings.



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cc. Prohibition Against Disclosing Confidential Information.

9 *Witkin Cal. Proc. Admin Proc* § 30

[§ 30] Prohibition Against Disclosing Confidential Information.

(1) *Prohibition.* It is unlawful to disclose confidential information acquired while attending a closed session to someone not authorized to receive it, unless the legislative body authorizes the disclosure. (*Govt.C. 54963(a).*) "Confidential information" means a communication made in a closed session that is specifically related to the basis for which the legislative body met lawfully in closed session. (*Govt.C. 54963(b).*)

(2) *Remedies for Violations.* Remedies for violations include, but are not limited to, the following:

(a) Injunctive relief to prevent the disclosure. (*Govt.C. 54963(c)(1).*)

(b) Disciplinary action against an employee who has wilfully disclosed the information. (*Govt.C. 54963(c)(2).*) However, discipline may be imposed only if the employee has received training or notice about the prohibition. (*Govt.C. 54963(d).*)

(c) Referral to the grand jury of a member of a legislative body who has wilfully disclosed the information. (*Govt.C. 54963(c)(3).*)

(3) *Exclusions.* The prohibition does not extend to any of the following:

(a) Making a confidential inquiry or complaint to a district attorney or grand jury about a perceived violation of law, including disclosing illegal or potential illegal action taken by the legislative body during the closed session. (*Govt.C. 54963(e)(1).*)

(b) Expressing an opinion concerning the propriety or legality of actions taken by the legislative body in closed session, including disclosing the nature and extent of illegal or potentially illegal action. (*Govt.C. 54963(e)(2).*)

(c) Disclosing information that is not confidential. (*Govt.C. 54963(e)(3).*)

(d) Making a disclosure that is protected under the whistle-blower statutes (*Govt.C. 53296 et seq.*; *Lab.C. 1102.5*; see 3 *Summary* (10th), *Agency and Employment*, §284 et seq.). (*Govt.C. 54963(f).*)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Proceeding To Prevent Violation of Act or for Other Prospective Relief.

9 *Witkin Cal. Proc. Admin Proc* § 31

[§ 31] Proceeding To Prevent Violation of Act or for Other Prospective Relief.

(1) *In General.* The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief (a) to prevent violations or threatened violations of the Act by members of a legislative body, (b) to determine the applicability of the Act to actions or threatened actions of the body, (c) to determine whether any rule or action by the body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under state or federal law, or (d) to compel the legislative body to tape record its closed sessions. (*Govt.C. 54960(a).*) (See *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 C.A.2d 41, 46, 69 C.R. 480, supra, §24 [any county elector has standing under *Govt.C. 54960*; whether labor organization of newsmen had standing was questioned]; *Shapiro v. San Diego City Council* (2002) 96 C.A.4th 904, 913, 117 C.R.2d 631 [injunctive relief was properly granted under *Govt.C. 54960(a)* where past violations might recur]; *McKee v. Orange Unified School Dist.* (2003) 110 C.A.4th 1310, 1316, 2 C.R.3d 774 [any California citizen is "interested person" entitled to initiate proceeding for purposes of *Govt.C. 54960(a)*; standing is not limited to resident or taxpayer within jurisdiction of affected legislative body]; *Holbrook v. Santa Monica* (2006) 144 C.A.4th 1242, 1255, 51 C.R.3d 181 [by accepting seats on city council, council members, seeking relief under *Govt.C. 54960(a)*, forfeited standing to sue council otherwise conferred by Brown Act based on citizenship; following *Carsten v. Psychology Examining Committee of Bd. of Med. Quality Assur.* (1980) 27 C.3d 793, 166 C.R. 844, 614 P.2d 276, infra, §122]; on award of costs and attorneys' fees to the prevailing party, see *Govt.C. 54960.5.*)

In a proceeding for declaratory relief, the general tests for determining the availability of that relief apply. (See 5 *Cal. Proc.* (5th), *Pleading*, §849 et seq.) In *California Alliance for Util. Safety & Education v. San Diego* (1997) 56 C.A.4th 1024, 65 C.R.2d 833, a citizens group filed a declaratory relief action against defendant city, alleging that defendant was engaged in continuing violations of the Brown Act by conducting closed meetings in which it reduced an electric company's obligation under its franchise to place power lines underground. The trial court sustained defendant's demurrer. *Held*, reversed. The complaint alleged an actual controversy between the parties for which declaratory relief was available. An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or when they dispute whether a public entity has engaged in conduct or established

policies in violation of applicable law. Here, a controversy existed between the parties because plaintiffs alleged that defendant did not meet the open meeting requirements of the Brown Act and, in effect, that defendant believed its actions were proper. That belief could be found not only in plaintiffs' allegations that defendant would engage in similar practices in the future but also in defendant's failure to concede that the facts alleged by plaintiffs constituted a violation of the open meeting requirements. (56 C.A.4th 1029.)

(2) *Court Order for Tape Recording.* On a judgment of violation of any of several provisions of the Act relating to closed sessions, the court may order the legislative body to tape record the sessions and preserve the tapes for the period and under the terms of security and confidentiality that the court deems appropriate. (Govt.C. 54960(b).) These provisions include Govt.C. 54956.7 (applicant with criminal record), Govt.C. 54956.8 (real property negotiations), Govt.C. 54956.9 (pending litigation), Govt.C. 54956.95 (liability claims), Govt.C. 54957 (personnel matters), and Govt.C. 54957.6 (labor negotiations). (Govt.C. 54960(b); on provisions permitting closed sessions, see supra, §§24, 25.) The tapes are subject to discovery in actions under Govt.C. 54959 (infra, §33), Govt.C. 54960, or Govt.C. 54960.1 (infra, §32), but only after in camera review by the court. (Govt.C. 54960(c)(2), (c)(3), (c)(4); on discovery generally, see 2 Cal. Evidence (4th), Discovery, §1 et seq.)

(3) *Complaint Must Allege Violation of Act by Defendant.* In *Ingram v. Flipppo* (1999) 74 C.A.4th 1280, 89 C.R.2d 60, a county district attorney stated in a press release that there had been Brown Act violations by several local school board members. Plaintiff, one of the members, brought suit against the district attorney and the county under Govt.C. 54960, seeking a declaration that she had not violated the Act and an injunction to prevent defendant district attorney from threatening further action. *Held*, dismissal of complaint affirmed; no cause of action was stated.

(a) Plaintiff is a proper party to bring an action under Govt.C. 54960, even though she is also a member of the board whose conduct allegedly violated the Act. The statutory language that "any interested person" may bring an action appears to be all-inclusive. The closer question is whether plaintiff can state a cause of action under Govt.C. 54960 against defendants, when they are not the parties who have allegedly committed the Brown Act violations. (74 C.A.4th 1288.)

(b) The general purposes of the Brown Act and basic principles of law dictate that the defendant in an action for relief under the Act must be the entity that has allegedly violated the Act. While Govt.C. 54960(a) refers to actions to stop or prevent the local legislative body from violating the Act, Govt.C. 54960(b) further provides that if the court finds specified violations of the Act, the court may "order the legislative body to tape record its closed sessions and preserve the tape recordings for the period and under the terms of security and confidentiality the court deems appropriate." This provision clearly contemplates that the legislative body will be a party defendant, subject to the court's order. The same holds true for Govt.C. 54960.1 (infra, §32), which sets forth the procedure to obtain injunctive relief to declare null and void an action taken by the legislative body. Govt.C. 54960.1(b) specifically provides that demand must be made "of the legislative body" to cure or correct its action prior to filing suit. Finally, under Govt.C. 54960.5, a court may award costs and attorneys' fees to a plaintiff who has prevailed in an action under Govt.C. 54960 or 54960.1. These costs and fees "shall be paid by the local agency." Thus, in order for the court to issue a binding decision in actions under Govt.C. 54960 and 54960.1 and impose costs under Govt.C. 54960.5, the legislative body of the local agency or its representative or members or the agency itself must necessarily be defendants in the action. "Indeed we have found no case concerning the Brown Act that deviates from this pattern and appellant has cited none." (74 C.A.4th 1289.)

(c) The gravamen of plaintiff's complaint was not that the district attorney violated the Brown Act but that he published inaccurate, unfounded statements about plaintiff's conduct as a member of the board. Plaintiff alleged that the district attorney "had no authority to publish and republish the conclusions made in regard to the 'less serious' violations" of the Act and that these publications damaged her reputation and interfered with her rights "as an elected official and as a citizen." (74 C.A.4th 1290.) Plaintiff's allegations sound in tort and are in the nature of an action for defamation. The Brown Act contains no provision for a "name-clearing" hearing such as plaintiff seeks here, and there appears to be no authority or precedent supporting the application of the Act in this way. (74 C.A.4th 1290.)

(d) Plaintiff's cause of action for injunctive relief fails for a further reason. The district attorney is specifically authorized to file an action under *Govt.C. 54960* if a legislative body is not complying with the Brown Act. Thus, plaintiff cannot enjoin the district attorney here from taking an action he is statutorily authorized to take. (*74 C.A.4th 1291.*)

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 54960, discussed throughout this section, was amended in 2009 to refer to audio recording rather than to tape recording.



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2. Proceeding To Determine Validity of Action.

9 *Witkin Cal. Proc. Admin Proc* § 32

[§ 32] Proceeding To Determine Validity of Action.

(1) *In General.* The district attorney or any interested person may commence an action by mandamus or injunction for a judicial determination that action taken in violation of any of several prescribed provisions of the Act is void. (*Govt.C. 54960.1(a)*; see *Holbrook v. Santa Monica* (2006) 144 C.A.4th 1242, 1255, 51 C.R.3d 181 [by accepting seats on city council, council members, seeking relief under *Govt.C. 54960.1(a)*, forfeited standing to sue council otherwise conferred by Brown Act based on citizenship; following *Carsten v. Psychology Examining Committee of Bd. of Med. Quality Assur.* (1980) 27 C.3d 793, 166 C.R. 844, 614 P.2d 276, *infra*, §122]; 20 U.S.F. L. Rev. 163 [invalidation as remedy for violation of open meeting statute]; on award of costs and attorneys' fees to the prevailing party, see *Govt.C. 54960.5*.) These provisions include *Govt.C. 54953* (general rule requiring open meetings, *supra*, old §18), *Govt.C. 54954.2* (posting agenda, *supra*, §26), *Govt.C. 54954.5* (description in agenda of closed session items, *supra*, §28), *Govt.C. 54954.6* (general tax or assessment meetings, *supra*, §26), *Govt.C. 54956* (special meetings, *supra*, §26), and *Govt.C. 54956.5* (emergency proceedings, *supra*, §27). (*Govt.C. 54960.1(a)*; see *Boyle v. Redondo Beach* (1999) 70 C.A.4th 1109, 1117, 83 C.R.2d 164 [action under *Govt.C. 54960.1* did not lie against city council that did no more at meeting than confer with and give direction to staff; there was no "action taken" that could be found invalid]; *Ingram v. Flippo* (1999) 74 C.A.4th 1280, 1289, 89 C.R.2d 60, *supra*, §31 [defendant in *Govt.C. 54960.1* or other Brown Act action must be entity that has allegedly violated Act]; *Shapiro v. San Diego City Council* (2002) 96 C.A.4th 904, 918, 117 C.R.2d 631 [city council violated requirements of *Govt.C. 54954.5*].)

(2) *Exceptions.* This proceeding does not lie if (a) the action taken was in "substantial compliance" with the applicable statute, (b) the action taken gave rise to a contractual obligation on which a party has detrimentally relied in good faith, (c) the action taken involved the collection of a tax or the sale or issuance of evidences of indebtedness and related agreements, or (d) the complainant alleges noncompliance with the notice requirements of the statute, but he or she had actual notice within the required time period. (*Govt.C. 54960.1(d)*.)

(3) *Demand To Correct Violation.* Before commencing the proceeding, the district attorney or interested person must demand in writing that the legislative body cure or correct the violation. (*Govt.C. 54960.1(b)*.) The demand must be made within 90 days (or in the case of a violation of *Govt.C. 54954.2*, within 30 days) of the date the action was

taken. (*Govt.C. 54960.1(c)(1).*) The legislative body must respond within 30 days of receipt of the demand. (*Govt.C. 54960.1(c)(2).*)

(4) *Time for Bringing Action.* The proceeding must be commenced within 15 days of receipt of written notice of the legislative body's decision, or expiration of the 30-day period for response, whichever is earlier. (*Govt.C. 54960.1(c)(3)* and (c)(4); see *Boyle v. Redondo Beach, supra*, 70 C.A.4th 1119 [*Govt.C. 54960.1(c)* barred action where amended complaint was filed more than 15 days after expiration of 30-day period for legislative body's response to plaintiff's demand; amended complaint did not relate back to initial complaint concerning different meeting].)

(5) *Standard of Review.* Where the facts are undisputed, and the issue on appeal is whether actions have violated the Brown Act, the appellate court's review is de novo. (See *Furtado v. Sierra Community College (1998) 68 C.A.4th 876, 880, 80 C.R.2d 589, supra*, §25.)

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3. Criminal Penalty for Violation.

9 *Witkin Cal. Proc. Admin Proc* § 33

[§ 33] Criminal Penalty for Violation.

A member of a legislative body who attends a meeting where action is taken in violation of the Act, and who intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Act, is guilty of a misdemeanor. (*Govt.C. 54959.*) Originally, the criminal penalty was exclusive: A court had no power to order an agency decision set aside as void for failure to comply with the Act. (See *Griswold v. Mt. Diablo Unified School Dist. (1976) 63 C.A.3d 648, 657, 134 C.R. 3.*) Now, in specified circumstances, action taken at a meeting in violation of the Act may be set aside. (See *Govt.C. 54960.1*, *supra*, §32.) (On criminal prosecution for disclosing confidential information acquired while attending closed session, see *Govt.C. 54963(c)(3)*, *supra*, §30.)

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F. Administrative Procedure Act (A.P.A.).

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 34

[§ 34] In General.

The Administrative Procedure Act (*Govt.C. 11340 et seq.*), popularly known as the "A.P.A.," is the general administrative procedure statute in California. The Act is subdivided into three general areas:

- (1) The adoption and repeal of regulations (*Govt.C. 11340 et seq.*). (See *infra*, §37 et seq.)
- (2) The Office of Administrative Hearings (*Govt.C. 11370 et seq.*). (See *infra*, §58.)
- (3) Administrative adjudications (*Govt.C. 11400 et seq., 11500 et seq.*). (See *infra*, §58 et seq.)

These provisions may be cited collectively as the Administrative Procedure Act. (*Govt.C. 11370.*) (On practice under the A.P.A., see C.E.B., *Administrative Hearing Practice* 2d, §1.35 et seq.; 5 *U.C. Davis L. Rev.* 1 et seq. [Legal Problems of Administrative Practice (entire volume covering various aspects of administrative practice and procedure)]; for 1961 Model State Administrative Procedure Act, see 15 *U.L.A. (Master Ed.)*, p. 184, 15A *U.L.A. (Master Ed.)*, p. 1; for 1981 Model State Administrative Procedure Act, see 15 *U.L.A. (Master Ed.)*, p. 1.)

While the Act's coverage of state administrative agencies is extensive, numerous agencies remain wholly or largely outside its scope. (See, e.g., *Pub.Util.C. 1701* [Public Utilities Commission].)

West's Key Number Digest, Administrative Law and Procedure 101 et seq.

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F. Administrative Procedure Act (A.P.A.).

2. Original Act and Early Amendments.

9 *Witkin Cal. Proc. Admin Proc* § 35

[§ 35] Original Act and Early Amendments.

The Administrative Procedure Act (A.P.A.) was adopted in 1945 in response to an extensive study by the Judicial Council. (See Judicial Council, Tenth Biennial Report (1944); *Cooper v. State Bd. of Med. Examiners of Dept. of Professional & Vocational Standards of Calif.* (1950) 35 C.2d 242, 245, 217 P.2d 630 [reference to report in interpreting statute]; *Brock v. Superior Court* (1952) 109 C.A.2d 594, 598, 241 P.2d 283 [same]; *Hohreiter v. Garrison* (1947) 81 C.A.2d 384, 397, 184 P.2d 323 ["In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report"].)

The A.P.A. originally covered only adjudications conducted by licensing agencies and prescribed a single mode of formal, trial-type adjudicative procedure. These limitations were at the time understandable. The Act was a pioneering effort; there were no comparable administrative procedure statutes, and the idea of an administrative procedure code applicable to agencies in general was untried and controversial. (See 25 Cal. Law Rev. Com. Reports, pp. 77, 78.)

Provisions on rulemaking were added in 1947 and substantially revised in 1979 to cover almost all state agencies. The adjudication provisions had only minor revisions until 1995 and remained limited both as to the agencies affected and the procedures prescribed. (See 25 Cal. Law Rev. Com. Reports, p. 77 et seq.; 15 *Hastings L. J.* 237 [history of A.P.A].)

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F. Administrative Procedure Act (A.P.A.).

3. Revised Act.

9 *Witkin Cal. Proc. Admin Proc* § 36

[§ 36] Revised Act.

(1) *Recommendation and Enactment of Revision.* While the provisions of the Administrative Procedure Act relating to adjudication changed little in the first 50 years after enactment (see *supra*, §35), the regulatory and social welfare responsibilities of state government, and therefore the scope of administrative adjudication, broadened vastly and in ways unforeseeable in 1945. In 1987, the Legislature directed the California Law Revision Commission to study whether there should be changes in California administrative law. The Commission divided the study into four phases, and in 1995 issued a recommendation on the first phase--*administrative adjudication*. (See 25 Cal. Law Rev. Com. Reports, p. 75.) The 1995 Legislature subsequently enacted most of the recommended changes. (See 1995 Stats., Chap. 938; 25 Cal. Law Rev. Com. Reports, pp. 59, 69 et seq.; 27 *Pacific L. J.* 941.)

(2) *Major Changes.* Among the major changes made in the revised Act are the following:

(a) An expansion of the agencies subject to some or all of the adjudicative provisions. (See *infra*, §§64, 96). Although the Commission considered unifying the various administrative adjudication statutes, it did not recommend a uniform statute "at this time because of the short-term costs involved." (25 Cal. Law Rev. Com. Reports, p. 80.)

(b) An administrative adjudication "bill of rights" applicable to *all* state agency adjudicative proceedings. (See *infra*, §68 et seq.)

(c) Increased flexibility and economy by permitting such options as alternative dispute resolution (see *infra*, §84 et seq.) and informal (see *infra*, §§78, 79), emergency (see *infra*, §§80, 81), and declaratory (see *infra*, §§82, 83) hearing procedures.

(d) Modernization of the existing Act by such devices as consolidation of proceedings (see *infra*, §101), administrative resolution of discovery disputes (see *infra*, §102), and electronic hearings (see *infra*, §109).

(3) *Operative Date.* The 1995 legislation deferred the operative date of the bulk of the new provisions to July 1, 1997. (1995 Stats., Chap. 938.) This delay was designed to enable agencies to promulgate regulations necessary for smooth operation under the new law. (25 Cal. Law Rev. Com. Reports, p. 83.)

(4) *Remaining Phases.* The Commission issued a tentative recommendation on the second phase of revision--*judicial review of agency action*. The recommendation proposed that "the archaic judicial review system that has evolved over the years be replaced by a simple and straightforward statute. The proposed law provides that final state or local agency action is reviewable by a petition for review filed with the appropriate court. Common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced for judicial review of agency action by the unified scheme of the proposed law." (Law Rev. Com. Revised Tentative Recommendation on Judicial Review of Agency Action (1996), p. 5.) The proposed statute additionally would have clarified "the standard of review and the rules for standing, exhaustion of administrative remedies, limitations periods, and other procedural matters." (Law Rev. Com. Revised Tentative Recommendation on Judicial Review of Agency Action (1996), preface.) The Commission recommendations were introduced in the 1997-1998 Legislative Session (SB 209 and 261) but were not enacted. (See 28 Cal. Law Rev. Com. Reports, p. 708.) (On revision of rulemaking provisions, see *infra*, §38.)

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II. RULEMAKING

A. In General.

1. Legislative Authority.

9 *Witkin Cal. Proc. Admin Proc* § 37

[§ 37] Legislative Authority.

The procedure employed by most state agencies in adopting, amending, or repealing regulations is subject to the rulemaking provisions of the Administrative Procedure Act. (See *Govt.C. 11340* et seq.; on administrative rulemaking generally, see 1 Pierce, Admin. Law 4th, Chaps. 6, 7; California Regulatory Law Bulletin [published weekly]; California Regulatory Notice Register [published weekly]; 15 *Hastings L. J.* 272; 5 *U.C. Davis L. Rev.* 309; on local agency adoption of regulations, see 15 *Hastings L. J.* 310.) Rulemaking action not subject to the A.P.A. is governed by the statutes that establish the agency or that the agency is authorized to administer. (See *State Comp. Ins. Fund v. McConnell* (1956) 46 *C.2d* 330, 343, 294 *P.2d* 440 [Insurance Commissioner's regulations changing method of rating premiums of workers' compensation insurance, exempt from Act, were properly adopted under Insurance Code].)

A regulation is ordinarily invalid unless it falls within the scope of authority conferred on the agency by statute. (*Govt.C. 11342.1*.) (On judicial review of administrative rulemaking generally, see *infra*, §138 et seq.; on constitutional limitations on delegation of legislative authority to agencies, see 7 *Summary* (10th), *Constitutional Law*, §166 et seq.) However, absent an express statutory directive to the contrary, an agency may exercise its discretion in selecting the methodology by which it will implement the authority granted to it by the Legislature. (*Lavin v. California Horse Racing Bd.* (1997) 57 *C.A.4th* 263, 268, 66 *C.R.2d* 843 [language of authorizing statute (racehorse "may" be "summarily" disqualified for running with drug in system) plainly invested state Horse Racing Board with option to adopt "no tolerance" regulation, disqualifying horse summarily without hearing and irrespective of exculpatory facts].)

A regulation adopted pursuant to statutory authority, express or implied, is not valid or effective "unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (*Govt.C. 11342.2*.) These two requirements were examined, in the course of reviewing the validity of a State Board of Forestry rule, in *Santa Cruz v. State Bd. of Forestry* (1998) 64 *C.A.4th* 826, 75 *C.R.2d* 393. Plaintiff county sought a judicial declaration that defendant board exceeded the scope of its statutory mandate in promulgating a "financial emergency" exception, which excused timber owners and operators experiencing a financial emergency from compliance with the normal timber harvesting plan requirements. Plaintiff alleged (1) that the exception conflicted with the enabling statute, *Pub.Res.C. 4592*, which authorizes immediate commencement of timber operations if a forester files a notice declaring that an emergency exists requiring immediate harvest activities, and (2) that it also contravened the environmental objectives of the Z'berg-Nejedly Forest Practice Act of 1973 (*Pub.Res.C. 4511* et seq.) and the California

Environmental Quality Act (CEQA) (*Pub.Res.C. 21000 et seq.*). *Held*, summary judgment for defendant affirmed.

(a) "*Consistent and not in conflict.*" The first of the two criteria for regulatory validity in *Govt.C. 11342.2* requires judicial construction of the claimed source of the agency's rulemaking authority, in this case *Pub.Res.C. 4592*, to determine whether the regulation is "consistent and not in conflict." The task of the reviewing court is to decide whether the agency reasonably interpreted the legislative mandate. What deference should be accorded an administrative construction of a statute itself requires a judicial construction of the limits of the claimed source of rulemaking authority, whether that be the substantive provisions of an applicable statute or the statutory boundaries of a delegated power. Where the language of the governing statute is intelligible to judges, their task is simply to apply it, whether that be language of substantive limitation or the boundaries of a delegation of rulemaking authority. Where the intelligibility of the statutory language depends on the employment of administrative expertise, which it is the purpose of a statutory scheme to invoke, the judicial role is limited to determining whether the agency has reasonably interpreted the power that the Legislature granted it. (*64 C.A.4th 834.*)

(b) "*Reasonably necessary.*" The second standard set out by *Govt.C. 11342.2* involves assessing whether the regulation is "reasonably necessary" to effectuate the purpose of the statute. This receives even more deferential review, essentially requiring only reasonability by the promulgating agency. In the review of quasi-legislative actions of administrative agencies, judicial review is limited to determining whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law. The court must defer to the agency's expertise and not superimpose its own policy judgment on the agency in the absence of an arbitrary and capricious decision. (*64 C.A.4th 835.*)

(c) *Regulation is valid.* Applying these principles here, the board reasonably interpreted *Pub.Res.C. 4592*. The language used in *Pub.Res.C. 4592*, indicating that "emergencies shall be defined by the board and may include, but are not limited to," is the broadest possible grant of legitimate powers to an administrative agency. The board determined that more than one type of emergency was possible, which was a reasonable interpretation of the statute and within the scope of the board's statutory duty under *Govt.C. 11342.2*. (*64 C.A.4th 835.*) Moreover, the regulation was "reasonably necessary" to effectuate the purpose of *Pub.Res.C. 4592*. The plain language of the Z'berg-Nejedly Forest Practice Act of 1973 envisions that the board will achieve a balance between the public interest in conservation and those who use timber resources to earn their livelihood. Also, there remained sufficient conservation measures, so as not to render the regulation arbitrary or capricious. (*64 C.A.4th 837.*) (See *Pulaski v. California Occupational Safety & Health Standards Bd.* (1999) 75 *C.A.4th* 1315, 1329, 90 *C.R.2d* 54 [regulatory standards for ergonomics in workplace designed to minimize repetitive motion injuries were reasonably necessary to effectuate purpose of *Lab.C. 6357* mandating those standards].)

Certain agencies have constitutional authority to exercise specified legislative power. (See, e.g., Cal. Const. Art. VII, §3 [State Personnel Board]; Cal. Const. Art. XII, §2 et seq. [Public Utilities Commission].) Administrative regulations that alter or amend the enabling statute or enlarge or impair its scope are void, and it is the court's obligation to strike down those regulations. An administrative agency granted quasi-legislative powers may, however, adopt regulations to fill in the details of the statutes enacted by the Legislature. (*Helene Curtis v. Assessment App. Bd.* (1999) 76 *C.A.4th* 124, 129, 90 *C.R.2d* 31 [board properly exercised its gap-filling authority by adopting rule prohibiting substantive amendment of applications to reduce escape property tax assessments after expiration of statutory filing deadlines].)

West's Key Number Digest, Administrative Law and Procedure 381 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XIV - Administrative Proceedings

Witkin Summary of California Law

II. RULEMAKING

A. In General.

2. A.P.A. Rulemaking Provisions.

a. History, Legislative Intent, and Revision.

9 *Witkin Cal. Proc. Admin Proc* § 38

[§ 38] History, Legislative Intent, and Revision.

(1) *History of A.P.A. Rulemaking Provisions.* Provisions governing administrative rules and regulations were adopted as part of the original Administrative Procedure Act (A.P.A.) in 1945. (See *Duskin v. State Bd. of Dry Cleaners, Dept. of Professional & Vocational Standards* (1962) 58 C.2d 155, 165, 23 C.R. 404, 373 P.2d 468 [holding regulation invalid as attempt to enlarge terms of enabling statute]; *Los Angeles v. State Dept. of Public Health* (1958) 158 C.A.2d 425, 427, 322 P.2d 968 [holding particular regulation invalid]; *American Friends Service Committee v. Procnier* (1973) 33 C.A.3d 252, 262, 109 C.R. 22.) California's current rulemaking provisions, which are much broader in scope, were adopted in 1979. (See *Govt.C. 11340* et seq.) The 1979 revision also established the Office of Administrative Law (O.A.L.) to supervise and review the enactment of administrative regulations. (*Govt.C. 11340.2*.)

(2) *Legislative Intent Behind A.P.A. Rulemaking Provisions.* The legislative intent in adopting the rulemaking provisions of the Act is set forth in *Govt.C. 11340.1(a)*:

(a) "[T]hat it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations." (On review of regulations by the Office, see *infra*, §51 et seq.)

(b) "[T]hat agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards whenever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process." (See *Govt.C. 11342.570* ["performance standard" is regulation that "describes an objective with the criteria stated for achieving" it]; *Govt.C. 11342.590* ["prescriptive standard" is regulation that "specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means"].)

(c) "[T]hat neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations."

(d) "[T]hat while the Office of Administrative Law will be part of the executive branch of state government, that

the office work closely with, and upon request report directly to, the Legislature in order to accomplish regulatory reform in California."

(3) *Revision of Rulemaking Provisions.* The 1987 Legislature directed the California Law Revision Commission to study whether the A.P.A. rulemaking provisions should be further revised. (25 Cal. Law Rev. Com. Reports, p. 75.) Pursuant to the 1987 legislative directive, the California Law Revision Commission reviewed the A.P.A. rulemaking provisions and recommended changes "to improve the efficiency of the regulatory process without compromising the important benefits it provides." (See 29 Cal. Law Rev. Com. Reports, p. 465.) Most of the recommendations involve minor improvements to the rulemaking process and refinements to the exceptions to the rulemaking requirements. (See 29 Cal. Law Rev. Com. Reports, p. 463.) The 2000 Legislature adopted most of those recommendations. (See Stats. 2000, Chap. 1060.) Among the principal changes are the following:

- (a) A new article entitled "Definitions" was enacted. (See *Govt.C. 11342.510* et seq.)
- (b) Various exceptions to the rulemaking requirements were consolidated in a new section. (See *Govt.C. 11340.9*, *infra*, §39.)
- (c) Agencies were authorized to use electronic communications in the rulemaking process. (See *Govt.C. 11340.85*, *infra*, §39.)
- (d) The "plain English" requirement for drafting regulations was expanded. (See *Govt.C. 11346.5(a)(3)*, and *Govt.C. 11342.580*, *infra*, §43.)
- (e) The procedures governing comment at public hearings by members of the public were clarified and expanded. (See *Govt.C. 11346.8*, *infra*, §46.)
- (f) The *California Regulatory Code Supplement* was renamed the *California Code of Regulations Supplement*. (See *Govt.C. 11343.5*, *11344(b)*, and *11344.6*, *infra*, §55.)
- (g) Evidence that a court may consider in a declaratory action to determine the invalidity of a regulation or an order of repeal was expressly specified. (See *Govt.C. 11350(d)*, *infra*, §143.)

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b. Nature and Scope.

9 *Witkin Cal. Proc. Admin Proc* § 39

[§ 39] Nature and Scope.

(1) *Agencies Subject to Rulemaking Provisions.* The Administrative Procedure Act (A.P.A.) rulemaking provisions apply to most state agencies and their regulations. (See *Govt.C. 11340.9, 11343, 11346(a)*; *Engelmann v. State Bd. of Education* (1991) 2 C.A.4th 47, 49, 3 C.R.2d 264 [Cal. Const., Art. IX, §7.5, granting State Board of Education power to adopt textbooks, does not exempt rules and procedures for adopting textbooks from compliance with Act]; C.E.B., Administrative Hearing Practice 2d, §1.6.) There are significant exceptions, however, both as to the agencies and types of regulations covered. (See *Govt.C. 11340.9, 11351* et seq.; *Paleski v. State Dept. of Health Services* (2006) 144 C.A.4th 713, 728, 729, 51 C.R.3d 28 [published "prior authorization criteria" of Department of Health Services for drugs provided by Medi-Cal were exempt from requirements of A.P.A., as Medi-Cal statute expressly required that criteria be published in provider manuals; broader notice requirements of A.P.A. need not be met].) For example, agencies in the judicial and legislative branches of state government are outside the scope of the Act (*Govt.C. 11340.9(a)*), and only certain of the Act's provisions govern the Public Utilities Commission, the Division of Workers' Compensation, and the Workers' Compensation Appeals Board. (*Govt.C. 11351*.) Further, regulations adopted by the State Personnel Board are exempt from the Act's rulemaking provisions, subject to prescribed exceptions. (*Govt.C. 18211*; see *Govt.C. 18210* [purpose of *Govt.C. 18210* et seq. is to establish "basic minimum procedural requirements" for the adoption, amendment, or repeal of State Personnel Board regulations].) However, implied exceptions to A.P.A. requirements, "if recognized at all," are disfavored. (*State Water Resources Control Bd. v. Office of Administrative Law* (1993) 12 C.A.4th 697, 703, 16 C.R.2d 25.)

(2) *Relation of A.P.A. Rulemaking Provisions to Other Statutes.* The Act establishes *minimum* procedural requirements applicable to the adoption, amendment, or repeal of administrative regulations. *Additional* requirements imposed by other statutes are not superseded by the A.P.A. requirements. (*Govt.C. 11346(a)*.)

Under *Govt.C. 11346(a)*, the rulemaking provisions of the A.P.A. "shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." Thus, another statute will supplant or limit the A.P.A. provisions only when two conditions are met: first, the other statute directing that these provisions be supplanted or limited must have been enacted after 1947, the year that *Govt.C. 11346* was originally adopted; and second, the other statute must disclose an express intention to supplant or limit the A.P.A. provisions. (

Voss v. Superior Court (1996) 46 C.A.4th 900, 909, 54 C.R.2d 225 [issuance of marketing orders pursuant to the California Marketing Act (*Food & Ag.C. 58601 et seq.*) was exempted from A.P.A. rulemaking requirements by provisions of Act that were adopted in 1957 and indicated that marketing orders would not be subject to A.P.A.].)

(3) *Use of Electronic Communications.* *Govt.C. 11340.85* permits agencies to use electronic communications in the rulemaking process where the recipient has consented to electronic communication. (*Govt.C. 11340.85(b).*) The statute is intended to make the regulatory process more user-friendly and to improve communication between interested parties and regulatory agencies. (*Govt.C. 11340.85(f).*) An electronic communication includes electronic transmission of written or graphical material by e-mail, fax, or other means, but does not include voice communication. (*Govt.C. 11340.85(a).*) Agencies with Internet websites must publish rulemaking notices on the websites. (*Govt.C. 11340.85(c).*) A document that is required to be published on a website must be posted within a reasonable time after it is issued and must remain posted for a prescribed period of time. Website publication supplements other required forms of publication. (*Govt.C. 11340.85(d).*)

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c. What Constitutes Regulation.

9 *Witkin Cal. Proc. Admin Proc* § 40

[§ 40] What Constitutes Regulation.

A "regulation" within the scope of the Act is broadly defined as "every rule, regulation, order, or standard of general application" (or its amendment, supplement, or revision) adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure. (*Govt.C. 11342.600*; see *Govt.C. 11340.9(d)* [Act does not apply to regulation relating only to internal management of state agency].) The Administrative Procedure Act (A.P.A.) authorizes accelerated adoption and repeal of *emergency regulations*. (See *infra*, §§48, 49.)

In *Morning Star Co. v. State Bd. of Equalization* (2006) 38 C.4th 324, 42 C.R.3d 47, 132 P.3d 249, plaintiff corporate taxpayer sought a refund of hazardous materials assessments it had paid under *Health & Saf.C. 25205.6*. Plaintiff presented evidence that the Department of Toxic Substance Control routinely classified all corporations with 50 or more employees within California as subject to the assessments, based on the use of common office supplies such as fluorescent light bulbs and batteries. Plaintiff claimed that the Legislature did not intend those materials to be interpreted as hazardous under *Health & Saf.C. 25205.6*. *Held*, summary judgment denying plaintiff's request for a refund was reversed and remanded for further proceedings.

(a) *Department's interpretation was regulation*. The department's interpretation of *Health & Saf.C. 25205.6* was a regulation as defined by *Govt.C. 11342.600*, because it was a rule of general application that interpreted the law. That interpretation was therefore invalid under *Govt.C. 11340.5(a)*, because it failed to comply with the rulemaking requirements of the A.P.A. (38 C.4th 334.)

(b) *Rulemaking exception did not apply*. Under *Govt.C. 11340.9(f)*, the rulemaking requirements do not apply to an agency's interpretation of a statute that represents the only legally tenable interpretation. However, that exception did not apply here, because the complexity of the regulatory scheme indicated that the Legislature did not intend such a rote or ministerial agency interpretation of *Health & Saf.C. 25205.6*. (38 C.4th 337.) (On agency interpretive policies as regulations generally, see *infra*, §41.)

United Systems of Arkansas v. Stamison (1998) 63 C.A.4th 1001, 74 C.R.2d 407, held that a State Administrative Manual provision that changed the statutory protest procedure for specified bids was a regulation subject to the A.P.A.

rulemaking provisions. The protest procedure implemented and interpreted the enabling statute and, because it affected the rights of third-party bidders, it did not fall within the internal management exception. The 1998 Legislature responded by enacting *Govt.C. 14615.1*, which, in part, exempts from the A.P.A. actions taken by the Department of General Services with respect to the *State Administrative Manual and the State Contracting Manual*. (63 C.A.4th 1009.) (See *San Joaquin Helicopters v. Department of Forestry & Fire Protection* (2003) 110 C.A.4th 1549, 1563, 3 C.R.3d 246.)

A number of other cases have applied or interpreted the term "regulation." The following are illustrative:

Tidewater Marine Western v. Bradshaw (1996) 14 C.4th 557, 568, 59 C.R.2d 186, 927 P.2d 296, *infra*, §41 [written policies of Division of Labor Standards Enforcement interpreting Industrial Welfare Commission work orders constituted regulations subject to A.P.A. rulemaking requirements].

Grier v. Kizer (1990) 219 C.A.3d 422, 438, 440, 268 C.R. 244 [auditing method used by Department of Health Services to determine overpayments to Medi-Cal providers was regulation subject to A.P.A. procedural requirements].

Aguilar v. Association for Retarded Citizens (1991) 234 C.A.3d 21, 25, 28, 285 C.R. 515 [agency's interpretation and application of preexisting regulation to particular situation is not regulation subject to A.P.A. requirements].

Taye v. Coxe (1994) 29 C.A.4th 1339, 1345, 35 C.R.2d 27 [where auditing method was not standard of general application used in all Medi-Cal cases, it was not regulation subject to adoption and filing requirements].

Caldo Oil Co. v. State Water Resources Control Bd. (1996) 44 C.A.4th 1821, 1827, 52 C.R.2d 609 [a regulation only "interprets or makes specific" agency's administration of statutory duty; it cannot be used to impair the implementing statute, nor does it confer on agency power to limit its statutory duty].

Coastal Community Hosp. v. Belshe' (1996) 45 C.A.4th 391, 396, 52 C.R.2d 659 [Department of Health Services requirement that Medi-Cal provider's cost report be complete and free from obvious errors prior to departmental processing, and department's review of cost reports to determine if full field audit was necessary, were internal management procedures necessary to efficient management of Medi-Cal program and not subject to rulemaking provisions of A.P.A.].

In re Garcia (1998) 67 C.A.4th 841, 844, 79 C.R.2d 357 [correctional facility policy limiting correspondence between its inmates and those of other institutions was not regulation of general application under former Govt.C. 11342(g), but rather local rule applying solely to that facility, and thus was not subject to A.P.A. rulemaking requirements].

Sherwin-Williams Co. v. South Coast Air Quality Management Dist. (2001) 86 C.A.4th 1258, 1263, 1282, 104 C.R.2d 288 [inclusion by State Air Resources Board of rule of local agency in state implementation plan did not constitute adoption of regulation subject to A.P.A.; distinguishing *Tidewater*].

Wilson v. San Diego (2001) 91 C.A.4th 974, 982, 111 C.R.2d 173, quoting the text [county children's center employee manual did not constitute regulation subject to A.P.A.].

California Advocates for Nursing Home Reform v. Bonta' (2003) 106 C.A.4th 498, 511, 130 C.R.2d 823 [A.P.A. applied to written and unwritten policies of Department of Health Services regarding recovery of Medicaid benefits from estates of recipients; policies were intended to apply generally, and not simply in specific cases, and policies implemented, interpreted, and made specific estate recovery provisions of federal and state law].

Pacific Gas & Elec. Co. v. Department of Water Resources (2003) 112 C.A.4th 477, 502, 5 C.R.3d 283 [revenue requirement of Department of Water Resources was not regulation for purposes of A.P.A.].

Donaldson v. Department of Real Estate (2005) 134 C.A.4th 948, 967, 36 C.R.3d 577 [if Department of Real Estate had practice of viewing all alleged minor sex offense victims of real estate licensees as nonconsenting for purposes of deciding whether to discipline licensees, practice amounted to regulation subject to A.P.A.].

Syngenta Crop Protection v. Helliker (2006) 138 C.A.4th 1135, 1175, 42 C.R.3d 191 [agency's amendments to pest control regulations were substantive changes subject to A.P.A.'s rulemaking requirements].

Savient Pharmaceuticals v. Department of Health Services (2007) 146 C.A.4th 1457, 1468, 53 C.R.3d 689 [listing and delisting by Department of Health Services of drugs in formulary for AIDS drug assistance program were regulations subject to A.P.A.].

SUPPLEMENT: [This section is current through the latest supplement]
The following cases have also applied or interpreted the term "regulation":

Morales v. California Dept. of Corrections & Rehabilitation (2008) 168 C.A.4th 729, 737, 85 C.R.3d 724, 3 Cal. Crim. Law (3d), Punishment, Supp., §6 [protocol issued by Department of Corrections and Rehabilitation, which declared that certain condemned inmates would be executed by lethal injection unless they affirmatively elected to be executed by lethal gas, was regulation; although protocol did not apply to all inmates, or even to all inmates sentenced to death, it did apply to certain class of inmates, i.e., those whose execution dates had already been set].

Marin v. Costco Wholesale Corp. (2008) 169 C.A.4th 804, 815, 87 C.R.3d 161 [Division of Labor Standards Enforcement manual provision governing flat-sum bonuses was regulation because it was standard of general application interpreting law enforced by division, and not merely restatement of prior division decisions or advice letters].

Naturist Action Committee v. Department of Parks & Recreation (2009) 175 C.A.4th 1244, 1249, 96 C.R.3d 620 [Department of Parks and Recreation internal policy of enforcing administrative regulation prohibiting nude sunbathing at state beach only when specific complaint was made was underground regulation; thus, policy could be rescinded without complying with A.P.A., because it was not validly adopted under A.P.A.].



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2. A.P.A. Rulemaking Provisions.

d. Interpretive Policies.

9 *Witkin Cal. Proc. Admin Proc* § 41

[§ 41] Interpretive Policies.

In *Tidewater Marine Western v. Bradshaw* (1996) 14 C.4th 557, 59 C.R.2d 186, 927 P.2d 296, the Supreme Court discussed, among other issues, whether written interpretive policies of a state agency charged with enforcing administrative orders constitute "underground" regulations subject to the rulemaking procedures of the Administrative Procedure Act (A.P.A.) (*Govt.C. 11340 et seq.*). In *Tidewater*, operators of seagoing vessels that transported workers and supplies between the California mainland and oil drilling platforms lying within the Santa Barbara Channel sought to enjoin application to these workers of Industrial Welfare Commission (IWC) wage orders governing overtime pay. The wage orders were applied to these workers pursuant to a Division of Labor Standards Enforcement (DLSE) written enforcement policy interpreting the orders. The DLSE is empowered to enforce the state labor laws, including IWC wage orders. The DLSE policy was prepared internally, without input from affected employers and employees or from the public generally. While the IWC is statutorily exempted from the A.P.A. under *Lab.C. 1185*, the DLSE is not. The trial court granted the injunction, but the Court of Appeal reversed. *Held*, while affirming on other grounds, the DLSE policy is void for failure to follow the A.P.A.

(a) *DLSE regulations are subject to A.P.A.*

(1) There is no basis for exempting the DLSE from A.P.A. rulemaking requirements. *Govt.C. 11340.5(a)* provides that "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation ... unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State," and *Govt.C. 11346* provides that the A.P.A. applies "to the exercise of any quasi-legislative power conferred by any statute." These broad statements of scope suggest that the A.P.A. applies to the DLSE. (14 C.4th 570.)

(2) Defendants' contention that applying the A.P.A. to the DLSE interpretations of IWC wage orders would undermine the IWC exemption from the A.P.A. must be rejected. It is not the validity of the IWC wage orders that is being examined, but the DLSE policy interpreting the orders. Moreover, the Legislature created comprehensive rulemaking procedures (*Lab.C. 1178 et seq.*) that apply to the IWC in lieu of the A.P.A., while no such procedures

apply to the DLSE. (14 C.4th 570.)

(b) *DLSE interpretive policy constitutes regulation.*

(1) Defendants argued that the DLSE policy is not a "regulation" subject to the A.P.A. The A.P.A., however, defines the term very broadly to include "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" (former Govt.C. 11342(g), now Govt.C. 11342.600), except one that relates only to the internal management of the state agency (former Govt.C. 11342(g), now Govt.C. 11340.9(d)). A regulation subject to the A.P.A. thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must "implement, interpret, or make specific" the law enforced or administered by the agency or govern the agency's procedure. (14 C.4th 571.)

(2) The policy was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy interprets the law that the DLSE enforces by determining the scope of the IWC wage orders. It is true that a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters is not a regulation. However, the record does not establish that the policy was, either in form or substance, merely a restatement or summary of how the DLSE had applied the IWC wage orders in the past. Accordingly, the DLSE enforcement policy appears to be a regulation within the meaning of former Govt.C. 11342(g) (now Govt.C. 11342.600), and therefore void because the DLSE failed to follow A.P.A. procedures. (14 C.4th 572.)

(c) *Interpretive regulations are subject to A.P.A.*

(1) The contention that interpretive regulations, such as the DLSE policy at issue here, are not "quasi-legislative" within the scope of the A.P.A., because an agency does not adopt them pursuant to delegated legislative power and they do not have the force of law, must be rejected. To the contrary, a written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law. Because courts must defer to agency interpretations found in these regulations, they are rules of law, and the public disregards them at its peril. (14 C.4th 574.)

(2) Moreover, even if interpretive regulations were considered not "quasi-legislative," an agency would arguably still have to adopt these regulations in accordance with the A.P.A. While Govt.C. 11346(a) states that A.P.A. rulemaking procedures apply "to the exercise of any quasi-legislative power," the statute does not state that the rulemaking procedures do not apply when an agency adopts rules that are not quasi-legislative. Also, Govt.C. 11340.5 makes clear that the rulemaking procedures of the A.P.A. apply to any "regulation," and the definition of regulation includes rules adopted to *interpret* the law (i.e., interpretive regulations). If the Legislature did not intend the A.P.A. to apply to interpretive regulations, it would not have expressly included interpretive regulations in this definition. Furthermore, when the Legislature wanted to create exceptions to the formal rulemaking requirements of the A.P.A., it did so expressly and in separate sections. (14 C.4th 575.)

(d) *Rejection of DLSE decision to apply wage orders is not required.* While the DLSE policy here is void for failure to comply with the A.P.A., and thus no deference can be given to the DLSE interpretation of the wage orders, it does not follow that the court must reject its decision to apply the wage orders to these workers. (14 C.4th 576.) If, when a court agreed with an agency's application of a controlling law, it nevertheless rejected that application simply because the agency failed to comply with the A.P.A., the legal force of the controlling law would be undermined. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations. (14 C.4th 577.)

Later cases have applied the *Tidewater* rule. (See *Modesto City Schools v. Education Audits App. Panel* (2004) 123 C.A.4th 1365, 1382, 20 C.R.3d 831 [state audit guide did not constitute underground regulation because guide served as suggested--but not sole--resource for performance audits, and because guide adopted interpretation consistent with governing statute]; *Rea v. Work. Comp. App. Bd.* (2005) 127 C.A.4th 625, 647, 25 C.R.3d 828, 2 Summary (10th), *Workers' Compensation*, Supp., §418 [administrative procedures requiring Uninsured Employers Fund to appear at priority conferences and to assist with discovery of employer's identity interpreted and implemented workers' compensation statutes, and thus were subject to A.P.A.]; *Capen v. Shewry* (2007) 155 C.A.4th 378, 388, 65 C.R.3d 890 [generally applicable interpretation by Department of Health Services of statutory exception to licensure requirement for specified surgical clinics was regulation subject to A.P.A.; statute could be read two ways, and no one reading of consequence was patently compelled].)

SUPPLEMENT: [This section is current through the latest supplement]

See *San Diego v. Bowen* (2008) 166 C.A.4th 501, 516, 82 C.R.3d 818 [Secretary of State's imposition of postelection manual ballot tallying requirements on local election officials was regulation within meaning of A.P.A.; requirements established uniform statewide voting machine tally procedures that specifically enforced Elections Code]; 35 Ecology L. J. 657 [interpretive rules and guidance documents for environmental regulations].



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II. RULEMAKING

A. In General.

2. A.P.A. Rulemaking Provisions.

e. Incorporation by Reference.

9 *Witkin Cal. Proc. Admin Proc* § 42

[§ 42] Incorporation by Reference.

Kings Rehabilitation Center v. Premo (1999) 69 C.A.4th 215, 81 C.R.2d 406, approved the practice of incorporation by reference of materials into published regulations. (69 C.A.4th 217.) A rehabilitation center disputed cuts in reimbursement rates by the State Department of Rehabilitation. The cuts were made pursuant to the Habilitation Ratesetting Manual that was incorporated by reference in a departmental regulation but was not itself promulgated as a published regulation. The rehabilitation center petitioned for mandamus and declaratory relief, contending that the manual was an illegal "underground" regulation in violation of the Administrative Procedure Act (A.P.A.). *Held*, denial of petition affirmed.

(a) The A.P.A. is partly designed to eliminate the use of underground regulations, i.e., rules that only the Government knows about. If a policy or procedure falls within the definition of a "regulation" within the meaning of the A.P.A., the promulgating agency must comply with the procedures for formalizing regulations, which include public notice and approval by the Office of Administrative Law (O.A.L.). Failure to comply with the A.P.A. nullifies the rule. (69 C.A.4th 217.)

(b) Under *Govt.C. 11342.4*, the O.A.L. has the broad authority to adopt, amend, or repeal regulations furthering the purposes of the A.P.A. It has promulgated a regulation (1 *Cal. Code Reg.* §20(e)) specifically approving the practice of incorporation by reference. The O.A.L. regulation is not a statute, but it is a regulation approving the practice of incorporation by reference and it was promulgated by the very agency that "regulates regulations." It is entitled to deference. (69 C.A.4th 218.)

(c) At least one statute assumes that the practice is lawful. *Govt.C. 11344.6* provides in relevant part: "The courts shall take judicial notice of the contents of each regulation which is printed or which is incorporated by appropriate reference into the California Code of Regulations as compiled by the office." As there is no reason to judicially notice illegal regulations, it must be assumed that the Legislature agrees with the O.A.L.'s determination that incorporation by reference can, in some cases, further the purposes of the A.P.A. (69 C.A.4th 218.)

(d) There is nothing "underground or covert" about the process employed here. "Anybody who wants to learn about

ratesetting under this program can consult the Code of Regulations index, find the regulation at issue, and then write to the address listed and obtain a copy of the Manual at the cost of printing." (69 C.A.4th 218.)

(e) Many agencies of necessity establish comprehensive manuals, technical standards, and the like, often of interest to only a select few. The thousands, if not hundreds of thousands, of pages represented by these manuals would only further deluge the subscribers to the Code of Regulations, with no benefit to them or the public at large. Under 1 Cal. Code Reg. §20(c)(1), material may be incorporated by reference only if "it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations." That reflects good sense. (69 C.A.4th 219.)

(f) There is no evidence that the practice of incorporation by reference has been or can be used to "hide" a regulation. The O.A.L. exercises appropriate control over the practice, scrutinizing proposed regulations, and sometimes rejects them when the rules regarding incorporation of material by reference are not followed. (69 C.A.4th 219.)

(g) The federal analogue to the A.P.A. explicitly endorses the practice. Under 5 U.S.C., §552(a)(1), matter "is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register." (69 C.A.4th 220.)

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A. In General.

3. Drafting Requirements.

9 *Witkin Cal. Proc. Admin Proc* § 43

[§ 43] Drafting Requirements.

Regulations are often confusing to those who must comply and are "frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account." (*Govt.C. 11340(b)*.) The Office of Administrative Law is required to conduct an orderly review of adopted regulations. The purpose of this review is to reduce the number of administrative regulations and to improve the quality of regulations that are adopted. (*Govt.C. 11340.1(a)*.) (See *Govt.C. 6219* [all state agency documents must be written "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style".]) Regulations must be drafted in the style prescribed by the Office. (*Govt.C. 11343.1(a)*.)

A "plain English" requirement applies to notices of proposed action (see *infra*, §44). (See *Govt.C. 11346.5(a)(3)*; *Govt.C. 11342.580* [definition of "plain English"].)

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B. Agency Procedure.

1. Notice Requirements.

9 *Witkin Cal. Proc. Admin Proc* § 44

[§ 44] Notice Requirements.

(1) *Rulemaking Calendar.* Every state agency responsible for implementing a statute that requires interpretation under the Administrative Procedure Act (A.P.A.) must prepare, by January 30 of each year, a rulemaking calendar for that year. The calendar must specify projected dates on which the agency plans to (a) publish the notice of proposed action for each rulemaking, (b) schedule a public hearing if required or requested, (c) adopt the regulations, and (d) submit the regulations to the Office of Administrative Law (O.A.L.) for review. (*Govt.C. 11017.6.*)

(2) *Notice of Proposed Action.* Notice of proposed action on the regulation must generally be given at least 45 days prior to the hearing and close of the public comment period on the proposed action. (*Govt.C. 11346.4(a).*) The persons or entities notified, the manner of notice, and the content are prescribed. (See *Govt.C. 11346.4, 11346.5; Tidewater Marine Western v. Bradshaw* (1996) 14 C.4th 557, 568, 59 C.R.2d 186, 927 P.2d 296, supra, §41 [interpretive regulation adopted without input from affected persons or from public generally was void for noncompliance with A.P.A. (including *Govt.C. 11346.4, 11346.5*)]). The effective period of the notice may not exceed 1 year. (*Govt.C. 11346.4(b).*)

An agency must give notice where it decides to completely abandon a proposed regulatory action; however, notice is not required where the agency does not proceed with part of a proposed action but proceeds with the remainder. (*Govt.C. 11347; see Law Rev. Com. Comment.*)

(3) *Proposed Regulation and Statements of Reasons.* The agency must also prepare, submit to the O.A.L. with the notice of the proposed action, and make available to the public on request (a) a copy of the express terms of the proposed regulation and (b) an initial statement of reasons for proposing the action. The initial statement must include, but is not limited to, specified criteria. (*Govt.C. 11346.2; see Govt.C. 11346.3* [agency must assess potential economic impact of proposed action on California businesses and individuals]; *Pulaski v. California Occupational Safety & Health Standards Bd.* (1999) 75 C.A.4th 1315, 1328, 90 C.R.2d 54 [board properly assessed economic impact, as required by *Govt.C. 11346.3*, of regulatory standards for ergonomics in workplace designed to minimize repetitive motion injuries].) In addition, after the action is taken, the agency must submit to the O.A.L., with the adopted regulation, a final statement of reasons. (*Govt.C. 11346.9.*)

The agency is required to explain, preliminarily in the notice of proposed action and comprehensively in the final statement of reasons, (a) the necessity for the regulation, (b) why that regulation was chosen instead of some alternate form of regulation that might be of lesser impact, and (c) why changes from the originally proposed text were made or not made in response to objections or comments received. (*Voss v. Superior Court* (1996) 46 C.A.4th 900, 916, 54 C.R.2d 225.)

(4) *Electronic Communications.* Agencies are authorized, and in some circumstances required, to use electronic communications to transmit notices, proposed regulations, statements of reasons, and related materials. (See *Govt.C. 11340.85*, *supra*, §39.)

Every state agency must post required notices, including notices of public meetings, on the homepage of its website (see *Govt.C. 11364(a)*, *supra*, §13), and must, to the extent practicable and utilizing existing resources, have hearings on proposed regulations televised over the Internet via a webcast or other technology (*Govt.C. 11364(b)*). Unless extended, these provisions are repealed effective January 1, 2012. (*Govt.C. 11365*.)

West's Key Number Digest, Administrative Law and Procedure 394, 395

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2. Petition by Interested Person.

9 *Witkin Cal. Proc. Admin Proc* § 45

[§ 45] Petition by Interested Person.

An administrative action under the Administrative Procedure Act (A.P.A.) need not be initiated by the agency. Generally, "any interested person" may petition an agency requesting adoption, amendment, or repeal of a regulation. The petition must state (1) the substance or nature of the regulation, amendment, or repeal requested, (2) the reason for the request, and (3) a reference to the agency's authority to take the requested action. (*Govt.C. 11340.6.*)

Within 30 days, the agency must either deny the petition or schedule the matter for a public hearing in accordance with the generally applicable notice and hearing requirements. (*Govt.C. 11340.7(a).*) Any interested person may request reconsideration of the agency's decision. (*Govt.C. 11340.7(c).*)

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3. Hearing.

9 *Witkin Cal. Proc. Admin Proc* § 46

[§ 46] Hearing.

In proceedings under the Administrative Procedure Act (A.P.A.), the agency must, if no public hearing is scheduled, afford interested persons the opportunity to present written statements, arguments, or contentions. (*Govt.C. 11346.8(a)*.)

A public hearing must be held if, no later than 15 days before close of the written comment period, an interested person or a duly authorized representative submits a written request to the agency. The agency must, to the extent practicable, provide notice of the time, date, and place of hearing by mailing notice to persons who have requested notice. At the hearing, both oral or written statements, arguments, or contentions must be permitted, subject to reasonable agency limitations on oral presentations. (*Govt.C. 11346.8(a)*.) The agency or its authorized representative may administer oaths or affirmations. The agency may continue or postpone a hearing from time to time to such time and place as it determines. (*Govt.C. 11346.8(b)*.) If a comment made at a public hearing raises a new issue concerning a proposed regulation and a member of the public requests additional time to respond before the agency takes final action, the agency should consider granting that request if it is practical to do so and does not unduly delay action on the regulation. (*Govt.C. 11346.8(e)*.) (See *Tidewater Marine Western v. Bradshaw* (1996) 14 C.4th 557, 568, 59 C.R.2d 186, 927 P.2d 296, supra, §41 [interpretive regulation adopted without input from affected persons or from public generally was void for noncompliance with A.P.A. (including *Govt.C. 11346.8*)].)

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4. Determination by Agency.

9 *Witkin Cal. Proc. Admin Proc* § 47

[§ 47] Determination by Agency.

An agency subject to the Administrative Procedure Act (A.P.A.) must "consider all relevant matter presented to it" before adopting, amending, or repealing a regulation. (*Govt.C. 11346.8(a)*.) (See *Voss v. Superior Court* (1996) 46 C.A.4th 900, 917, 54 C.R.2d 225 [decision to issue regulation rests with sponsoring agency, after comments are received or public hearing is held and subject to administrative review by Office of Administrative Law].)

A regulation or an order of repeal required to be filed with the Secretary of State (see *infra*, §54) becomes effective on the 30th day after the date of filing unless:

(1) Otherwise specifically provided by the statute under which it was adopted, in which event it becomes effective on the day prescribed by that statute. (*Govt.C. 11343.4(a)*.)

(2) A later date is prescribed by the agency in a written instrument filed with, or as part of, the regulation or order of repeal. (*Govt.C. 11343.4(b)*.)

(3) The agency makes a written request to the Office of Administrative Law demonstrating good cause for an earlier effective date, in which case the Office may prescribe an earlier date. (*Govt.C. 11343.4(c)*.)

Findings are not required where a determination is quasi-legislative, i.e., involves rulemaking. (*Ensign Bickford Realty Corp. v. City Council* (1977) 68 C.A.3d 467, 473, 137 C.R. 304 [city council's denial of property owner's application for rezoning]; *Santa Cruz v. Local Agency Formation Com.* (1978) 76 C.A.3d 381, 387, 142 C.R. 873 [determination of county agency formation commission approving annexation of land]; on findings in *quasi-judicial* proceedings, see *infra*, §§71, 72.)

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B. Agency Procedure.

5. Emergency Action.

a. In General.

9 *Witkin Cal. Proc. Admin Proc* § 48

[§ 48] In General.

(1) *Scope of Exception from General A.P.A. Procedures.* The adoption, amendment, and repeal of emergency regulations under the Administrative Procedure Act (A.P.A.) are governed by *Govt.C. 11346.1* and *11349.6*. The general notice and hearing provisions (*Govt.C. 11346* et seq.) and the provisions governing administrative review of proposed regulations (*Govt.C. 11349* et seq.) do not apply, except that *Govt.C. 11349.5* (Governor's review of decisions of Office of Administrative Law) is applicable. (*Govt.C. 11346.1(a)(1)*.) However, other provisions of the A.P.A. remain applicable to emergency regulations. (See Law. Rev. Com. Comment to *Govt.C. 11346.1* [identifying applicable provisions].)

(2) *Required Finding and Supporting Written Statement.* An agency may adopt an emergency regulation or order of repeal on a finding that the action is necessary to address an emergency. (*Govt.C. 11346.1(b)(1)*.) In lieu of complying with the general notice and hearing requirements of the A.P.A., the agency must immediately file the regulation or order, together with a prescribed written statement, with the Office of Administrative Law. (*Govt.C. 11346.1(b)(3)*.) A finding based only on expediency, convenience, best interest, general public need, or speculation is not sufficient to demonstrate the existence of an emergency. (*Govt.C. 11346.1(b)(2)*.) The Office must review the regulation or order within 10 calendar days of submission. (*Govt.C. 11349.6(b)*.)

(3) *Public Notice.* At least 5 working days before submitting an emergency regulation to the Office of Administrative Law, the adopting agency must send a prescribed notice of the proposed action to every person who has filed a request for notice of regulatory action with the agency. (*Govt.C. 11346.1(a)(2)*.)

(4) *Public Comment Period.* As part of its review of an emergency regulation, the Office of Administrative Law must post a notice of filing of the proposed emergency regulation on its Internet website and allow interested persons 5 calendar days to submit comments, unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest. (*Govt.C. 11349.6(b)*.)

(5) *Duration of Emergency Regulation.* The emergency regulation or order of repeal remains in effect for only 180 days unless the agency either (a) complied with the general notice and hearing requirements before adoption or (b)

formally adopts the regulation or order during the 180-day period. (*Govt.C. 11346.1(e).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Exception from General A.P.A. Procedures.* See 122 *Harv. L. Rev.* 1096 [arguing that ambiguities in A.P.A. result in executive branch having too much authority in emergencies].



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5. Emergency Action.

b. Interim Regulations To Comply With Federal Legislation.

9 *Witkin Cal. Proc. Admin Proc* § 49

[§ 49] Interim Regulations To Comply With Federal Legislation.

In *Doe v. Wilson* (1997) 57 C.A.4th 296, 67 C.R.2d 187, the California Department of Health Services (DHS) issued regulations intended to conform existing regulations to newly enacted federal legislation. This legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) (8 U.S.C., §1601 et seq.), barred states and local governments from providing or funding routine medical care for illegal aliens, and thereby rendered unlawful California's existing program providing routine prenatal health care to illegal aliens. The regulations were issued as interim emergency regulations pursuant to *Govt.C. 11346.1*, so as to avoid deferring compliance with the federal requirements for the full period normally required for giving statutory notice, soliciting public comments, holding public hearings, and promulgating final, nonemergency regulations. Plaintiffs unsuccessfully sought to enjoin enforcement of the emergency regulations in federal court, and then brought the present action in superior court against the DHS, its director, and the Governor. The trial court granted plaintiffs' request for a preliminary injunction, holding that the DHS findings of emergency circumstances were not supported by substantial evidence. *Held*, reversed. Where a state program is rendered immediately illegal by a new federal law on a subject over which the federal government has plenary jurisdiction, it is an abuse of discretion to frustrate prompt compliance with that federal law simply by forbidding the state from issuing the emergency regulations necessary to achieve timely state compliance. (57 C.A.4th 300.)

(a) *Discretion of agency in issuing emergency regulations.* *Govt.C. 11346.1* vests state agencies with discretion to issue emergency regulations, which become effective on an interim basis and for a period of up to 120 days (now 180 days), in order to deal with an "emergency" that calls for prompt action during the period necessary for the promulgation of final regulations. What constitutes an emergency is primarily a matter for the agency's discretion. A court must accord substantial deference to the agency, and may overturn an emergency finding only if it constitutes an abuse of discretion. (57 C.A.4th 305.)

(b) *Discretion was properly exercised.* Defendants properly exercised their discretion when they determined that the passage of the federal PRA, which invalidated California's ongoing program of paying for routine prenatal care for illegal aliens, was an emergency justifying the issuance of emergency regulations. The PRA became effective immediately, because of Congress' judgment that the provision of public benefits to illegal aliens was a violation of

federal immigration policy that should be ended immediately. Defendants would have been subject to justified criticism had they simply ignored the provisions of the federal law, as plaintiffs might have wished. When the DHS decided to issue emergency regulations here, to take effect temporarily and on an interim basis during the lengthy proceedings necessary for the preparation of final regulations, it did not abuse its discretion. (57 C.A.4th 306; on supremacy of federal law, see 7 *Summary* (10th), *Constitutional Law*, §8 et seq.)

(c) *Agency's findings were properly based.* The trial court improperly took evidence relating to the medical benefits of prenatal care, on which the DHS emergency findings were not based, and concluded from this evidence that the emergency findings were "unsupported by substantial evidence." The findings of emergency were required to be reviewed on an abuse of discretion standard. That standard of review could not be converted to one of review for substantial evidence by the trial court's *post hoc* consideration of evidence that defendants did not consider in enacting the regulations. Defendants' findings of emergency were not premised on conflicting evidence, such as the medical advisability of continued publicly funded routine prenatal services for illegal aliens. (57 C.A.4th 309.) They were based on three undisputed matters of law and fact: first, that the PRA became effective immediately on passage; second, that it required termination of state-funded public benefits for routine prenatal care for illegal aliens; and third, that Congress, exercising its plenary jurisdiction over national immigration policy in enacting this legislation, determined it furthered a compelling public interest by removing the incentive for pregnant illegal aliens to enter this country to receive these benefits. (57 C.A.4th 310, 311.)

(d) *Public notice and comment were unnecessary.* Plaintiffs also suggested that the defendants' action here was invalid because it violated the public interest embodied by the A.P.A.'s provisions in generally allowing a notice and comment period to persons who would be affected by the new regulations. However, this is an interest that an agency may override, in its discretion, when it properly concludes that an emergency exists. More critically, here the normal interest in having an extensive notice and comment period simply did not apply. (57 C.A.4th 312.) The rule of law that the DHS sought to enforce was the one previously stated by Congress in the PRA, and it could not vary that rule of law and was bound to follow it. The passage of the PRA provided ample notice to affected parties that the federal law was being changed, effective immediately; and no amount of comment from the public during the DHS proceedings could change the PRA's provisions. (57 C.A.4th 313.) (On injunctive relief against enforcement of administrative regulations, see *infra*, §146.)

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B. Agency Procedure.

6. No Amendment of Regulation by Interpretation.

9 *Witkin Cal. Proc. Admin Proc* § 50

[§ 50] No Amendment of Regulation by Interpretation.

In *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 C.A.4th 1190, 59 C.R.2d 608, a labor union representing teachers in the entertainment industry petitioned for mandamus to enforce a Department of Industrial Relations regulation that then required studio teachers to hold both single and multiple subject teaching credentials, after the Labor Commissioner construed the regulation to require only the multiple subject credential. The trial court upheld the commissioner's interpretation and denied the writ. *Held*, reversed.

(a) An agency's interpretation of its own regulation is entitled to considerable judicial deference. The agency's construction generally controls unless it is clearly erroneous or inconsistent with the plain language of the regulation. But the principle of deference is not without limit; it does not permit the agency to disregard the regulation's plain language. (51 C.A.4th 1195.)

(b) If a state agency believes that the regulation it adopted ought to be changed, it may only accomplish that result through the procedure set forth by the Administrative Procedure Act, a process that ordinarily requires advance publication and an opportunity for public comment (see *Govt.C. 11346.4, 11346.5, 11346.8*). It may not do so by interpreting the regulation in a manner inconsistent with its plain language. (51 C.A.4th 1195.)

(c) If the department believed that only one credential is needed to enable a person to teach minors in the entertainment industry, it should have and could have so required by regulation. However, the regulation here unequivocally requires two credentials for certification as a studio teacher. The respondents contended that the purpose of the regulation is to allow any studio teacher to teach any student, and that because teachers with multiple subject certificates are commonly allowed to teach all grade levels, a multiple subject certified teacher satisfies the regulation's goal. That is not what the regulation provides, however. If the regulation is too vague, too cumbersome, or not in concert with proper policy, the department has the power to amend it or adopt a new regulation. Until it does so, the department is required, through the commissioner, to enforce the regulation as written. (51 C.A.4th 1196.)

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C. Administrative Review.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 51

[§ 51] In General.

(1) *Scope and Basis of Review.* The Office of Administrative Law is required to review all regulations adopted, amended, or repealed under the Administrative Procedure Act (A.P.A.) and submitted to it for publication and transmittal to the Secretary of State. (*Govt.C. 11343, 11349.1(a)*; see *Govt.C. 11349.7* [priority review on request of legislative committee]; on review of emergency agency actions, see *supra*, §§48, 49; on filing and publication of regulations, see *infra*, §54 et seq.)

Determinations by the Office are made on the basis of specified standards, i.e., necessity, authority, clarity, consistency, reference, and nonduplication. (*Govt.C. 11349.1(a)* and (b); see *Govt.C. 11349* [defining these standards of review].) The Office does not, however, substitute its judgment regarding the substantive content of regulations for that of the agency. (*Govt.C. 11340.1(a)*.) The Office restricts its review to the regulation itself and the record of the rulemaking proceedings. (*Govt.C. 11349.1(a)*; see *Govt.C. 11347.3* [maintenance of rulemaking record].)

A regulation or order of repeal must be approved if it complies with the standards of review set forth in *Govt.C. 11349.1* and with the A.P.A. rulemaking provisions (*Govt.C. 11340* et seq.). (*Govt.C. 11349.3(b)*.)

(2) *Time Requirements for Approval or Disapproval.* Within 30 working days after a regulation is submitted to the Office for review, the Office must either approve it and transmit it to the Secretary of State for filing (see *infra*, §54) or disapprove it and return it to the agency. If the Office fails to act within that period, the regulation is deemed approved. (*Govt.C. 11349.3(a)*.)

(3) *Return of Regulation to Agency.* A regulation must be returned to the adopting agency if the agency, contrary to the requirements of the A.P.A., fails to estimate costs or savings to local agencies or school districts resulting from adoption or amendment of the regulation, makes that estimate but fails to provide for reimbursement of costs to local agencies or school districts, or fails to assess the potential for adverse economic impact on business enterprises or individuals resulting from the adoption or amendment. (*Govt.C. 11349.1(d)*.)

If the Office disapproves a regulation, it must return it to the agency within the 30-day period, accompanied by a notice specifying the reasons for disapproval. Within 7 calendar days of the issuance of the notice, the Office must

provide the agency with a written decision detailing the reasons for disapproval. (*Govt.C. 11349.3(b).*)

(4) *Review by Governor.* On application by the agency, disapproval may be reviewed by the Governor. (*Govt.C. 11349.5.*)

(5) *Initiation of Repeal by Office of Administrative Law.* The Office must initiate repeal of regulations for which statutory authority has been repealed or become inoperative or ineffective. (See *Govt.C. 11349.8, 11349.9.*)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope and Basis of Review.* See *California Forestry Assn. v. California Fish & Game Com.* (2007) 156 C.A.4th 1535, 1553, 68 C.R.3d 391 [discussing "necessity" and "nonduplication" standards in *Govt.C. 11349.1(a)* and (b), and holding that administrative regulation listing two types of Coho salmon under Endangered Species Act satisfied both standards].



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C. Administrative Review.

2. Review of Rewritten Regulations.

9 *Witkin Cal. Proc. Admin Proc* § 52

[§ 52] Review of Rewritten Regulations.

A regulation returned to an agency may be rewritten and resubmitted for review within 120 days of receipt of the Office of Administrative Law's written decision (see *supra*, §51), without compliance with the general Administrative Procedure Act notice and hearing requirements, unless the substantive provisions of the regulation have been significantly changed. (*Govt.C. 11349.4(a)*; see *Californians for Safe Prescriptions v. California State Bd. of Pharmacy* (1993) 19 C.A.4th 1136, 1144, 23 C.R.2d 755 [compliance with A.P.A. requirements was not required].)

If there is significant change, or if the regulation is not submitted within 120 days of receipt of the written decision, the agency must formally readopt the regulation. (*Govt.C. 11349.4(a)*.)

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C. Administrative Review.

3. Determination Whether Uncodified Agency Action Constitutes Regulation.

9 *Witkin Cal. Proc. Admin Proc* § 53

[§ 53] Determination Whether Uncodified Agency Action Constitutes Regulation.

The Office of Administrative Law is authorized to determine whether an uncodified guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation under the Administrative Procedure Act, and therefore subject to the requirements regarding formal adoption. (*Govt.C. 11340.5(a), (b), (c)*; see Law Rev. Com. Comment to *Govt.C. 11425.60*, *infra*, §73 [referring to these rules as "underground regulations"].) The determination may be issued whether the Office "is notified of, or on its own, learns" of the agency action. (*Govt.C. 11340.5(b).*)

An "interested person" may obtain judicial review of the determination, subject to prescribed exceptions and conditions. (*Govt.C. 11340.5(d)* and (e); on judicial review of validity of regulations, see *infra*, §138 et seq.)

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D. Filing.

9 *Witkin Cal. Proc. Admin Proc* § 54

[§ 54] Filing.

(1) *In General.* Each agency subject to the Administrative Procedure Act (A.P.A.) must ordinarily transmit its regulations, orders of repeal, and notices of proposed action to the Office of Administrative Law for filing with the Secretary of State. (*Govt.C. 11343.*) The Office affixes its endorsement on all approved regulations. (*Govt.C. 11343.1(b)*); on review by Office, see *supra*, §51 et seq.) A regulation or order of repeal generally becomes effective on the 30th day after the date of filing. (*Govt.C. 11343.4.*)

(2) *Presumptions.* Filing with the Secretary of State raises the following rebuttable presumptions regarding the certified copy of the regulation or order filed:

(a) The regulation or order was duly adopted. (*Govt.C. 11343.6(a).*)

(b) It was duly filed and made available for public inspection at the day and hour endorsed on it. (*Govt.C. 11343.6(b).*)

(c) All related requirements of the A.P.A. and regulations of the Office have been complied with. (*Govt.C. 11343.6(c).*)

(d) The text of the certified copy filed is the text of the regulation or order as adopted. (*Govt.C. 11343.6(d).*)

(3) *Judicial Notice.* Courts must take judicial notice of the contents of the filed certified copy. (*Govt.C. 11343.6*; cf. *Fickeisen v. Civil Service Com. (1950) 98 C.A.2d 419, 423, 220 P.2d 605* [court may not take judicial notice of rule or resolution adopted by *local board*].)

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E. Publication.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 55

[§ 55] In General.

(1) *California Code of Regulations and Supplement*. The Office of Administrative Law is required to provide for the official compilation, printing, and publication of adoption, amendment, or repeal of regulations in the *California Code of Regulations*. (*Govt.C. 11344(a)*; see *Voss v. Superior Court* (1996) 46 C.A.4th 900, 917, 54 C.R.2d 225 [A.P.A. requires publication, in appropriate regulatory journal, both of notice of proposed regulation and of regulation as approved]; on researching California and federal regulations, see Hanft, Legal Research in California (6th) §10.2 et seq.) The Office likewise provides for publication of a weekly update, the *California Code of Regulations Supplement*, containing amendments to the Code. (*Govt.C. 11344(b)*.) Both are published by Thomson-West under contract with the Office.

Copies of the Code and Supplement must be filed with the county clerks of each county. (*Govt.C. 11343.5*.)

(2) *Presumption and Judicial Notice*. Publication in the Code or Supplement raises a rebuttable presumption that the published text of a regulation is the regulation adopted. Courts take judicial notice of the contents of each regulation printed or incorporated by reference into the Code, and also of the repeal of a regulation as published in the Supplement. (*Govt.C. 11344.6*; see *People v. Haugh* (1963) 216 C.A.2d 603, 607, 31 C.R. 74 [publication is not condition precedent to judicial notice of regulation].)

(3) *California Regulatory Notice Register*. The *California Regulatory Notice Register* is published weekly, and contains the following:

(a) Notices of proposed action. (*Govt.C. 11344.1(a)(1)*.)

(b) A summary of all regulations filed and all regulation decisions issued in the previous week. (*Govt.C. 11344.1(a)(2)*, (a)(3).)

(c) Material that is required to be published under *Govt.C. 11349.5*, *11349.7*, and *11349.9* (Governor's actions in reviewing various matters). (*Govt.C. 11344.1(a)(4)*.)

(d) Office determinations whether uncodified agency actions must be adopted as regulations. (*Govt.C.*

11344.1(a)(5).)

(e) Agencies' annual rulemaking calendars. (*Govt.C. 11017.6.*)

(f) Agency decisions on petitions requesting adoption, amendment, or repeal of regulations. (*Govt.C. 11340.7(d).*)
(See California Regulatory Law Bulletin [weekly service respecting new and proposed regulations].)

Each agency must keep its rulemaking records on all pending actions in which a notice has been published in the *Register* current and in one central location. (*Govt.C. 11348.*)

(4) *Internet Publication.* The Office of Administrative Law must make available on the Internet, free of charge, the full text of the California Code of Regulations. The office may contract with another state agency or a private entity to provide this service. (*Govt.C. 11344(a).*) It is the intent of the Legislature that the Code provided on the Internet include complete authority and reference citations and history notes. (*Govt.C. 11340.1(b).*) The office must post on its website (a) each issue of the *California Regulatory Notice Register* and (b) Internet links to the text of proposed regulations. (*Govt.C. 11344.1(c).*) The website is <http://www.oal.ca.gov>.

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II. RULEMAKING

E. Publication.

2. Titles of Code of Regulations.

9 *Witkin Cal. Proc. Admin Proc* § 56

[§ 56] Titles of Code of Regulations.

The California Code of Regulations consists of 28 titles, most of which include the regulations of a number of agencies:

Title 1: General Provisions (including regulations by the Office of Administrative Law and Office of Administrative Hearings).

Title 2: Administration (including regulations by, e.g., the State Personnel Board, the Department of General Services, the State Lands Commission, the Fair Employment and Housing Commission, the Fair Political Practices Commission, and the Secretary of State).

Title 3: Food and Agriculture (including regulations by, e.g., the Department of Food and Agriculture).

Title 4: Business Regulations (including regulations by, e.g., the Department of Alcoholic Beverage Control, the State Athletic Commission, and the Bureau of Home Furnishings).

Title 5: Education (including regulations by, e.g., the State Department of Education and the State Teachers' Retirement System).

Title 6: Governor (no regulations filed).

Title 7: Harbors and Navigation (including regulations by, e.g., the San Francisco Port Authority).

Title 8: Industrial Relations (including regulations by, e.g., the Division of Occupational Health and Safety, the Fair Employment and Housing Commission, the Division of Industrial Safety, the Division of Workers' Compensation, and the Agricultural Labor Relations Board).

Title 9: Rehabilitative and Developmental Services (including regulations by, e.g., the Department of Mental Health and the Department of Rehabilitation).

Title 10: Investment (including regulations by, e.g., the State Banking Department, the Department of Corporations, the Department of Insurance, and the Department of Real Estate).

Title 11: Law (including regulations by, e.g., the Department of Justice).

Title 12: Military and Veterans Affairs (including regulations by, e.g., the Department of Veterans Affairs).

Title 13: Motor Vehicles (including regulations by, e.g., the Department of Motor Vehicles and the Department of the California Highway Patrol).

Title 14: Natural Resources (including regulations by, e.g., the California Environmental Protection Agency, the California Coastal Commission, the Fish and Game Commission, the Department of Forestry, the Department of Parks and Recreation, and the Department of Boating and Waterways).

Title 15: Crime Prevention and Corrections (including regulations by, e.g., the California Department of Corrections and Rehabilitation and the Division of Juvenile Justice).

Title 16: Professional and Vocational Regulations (including regulations by, e.g., the Medical Board of California and the Contractors' State License Board).

Title 17: Public Health (including regulations by, e.g., the State Department of Health Care Services and the Department of Developmental Services).

Title 18: Public Revenues (including regulations by, e.g., the State Board of Equalization, the State Controller, and the Franchise Tax Board).

Title 19: Public Safety (including regulations by, e.g., the Office of Emergency Services and the Office of the State Fire Marshal).

Title 20: Public Utilities and Energy (including regulations by, e.g., the Public Utilities Commission, the State Energy Resources Conservation and Development Commission, and the California Energy Commission).

Title 21: Public Works (including regulations by, e.g., the Department of General Services, the Department of Transportation, and the Business, Transportation and Housing Agency).

Title 22: Social Security (including regulations by, e.g., the Employment Development Department, the California Department of Aging, the Department of Economic Opportunity, and the Health and Welfare Agency).

Title 23: Waters (including regulations by, e.g., the Department of Water Resources and the Reclamation Board).

Title 24: formerly Building Standards (reserved--building standards are no longer part of the Code).

Title 25: Housing and Community Development (including regulations by, e.g., the Department of Housing and Community Development).

Title 26: Toxics (including regulations by, e.g., the Department of Food and Agriculture, the Division of Industrial Safety, and the Department of Health Care Services).

Title 27: Environmental Protection (including regulations by, e.g., the California Environmental Protection Agency).

Title 28: Managed Health Care (including regulations by the Department of Managed Health Care).

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III. ADJUDICATION

A. In General.

1. Nature and Scope of A.P.A. Adjudication Provisions.

9 *Witkin Cal. Proc. Admin Proc* § 57

[§ 57] Nature and Scope of A.P.A. Adjudication Provisions.

(1) *Statutory Development.* The provisions of the 1945 Administrative Procedure Act (A.P.A.) governing administrative adjudication covered only adjudications conducted by licensing agencies and prescribed a single mode of formal, trial-type hearing procedure. These provisions had only minor revisions until 1995 and remained limited both as to the agencies affected and the procedures prescribed. A comprehensive revision in that year, operative for the most part on July 1, 1997, significantly expanded the scope and effect of the Act. (See 25 Cal. Law Rev. Com. Reports, p. 77 et seq.; supra, §36; on administrative adjudication generally, see C.E.B., Administrative Hearing Practice 2d, §1.35 et seq.; 1 Pierce, Admin. Law 4th, Chap. 8.)

(2) *Current Provisions.* The adjudicative provisions are now in two chapters of Title 2, Division 3, Part 1 of the Government Code:

(a) Chapter 4.5 contains general provisions for administrative adjudication. (See *Govt.C. 11400* et seq., infra, §63 et seq.)

(b) Chapter 5 contains procedures for formal hearings. (See *Govt.C. 11500* et seq., infra, §96 et seq.)

(3) *Agencies.* Although the number of agencies subject to the Act's adjudicative provisions was greatly increased in the 1995 revision (see infra, §§64, 96), local agencies and many important state agencies remain wholly or largely outside the scope of the Act. Relevant procedures are prescribed by their enabling statutes or ordinances and implementing regulations. (See, e.g., *Pub.Util.C. 1701* [Public Utilities Commission]; *Lab.C. 5300* et seq. [Workers' Compensation Appeals Board]; *Wells Fargo Bank v. Goldzband* (1997) 53 C.A.4th 596, 627, 61 C.R.2d 826 [administrative adjudicative action may be barred, independently of A.P.A. or other statute, by equitable estoppel or by laches]; *Department of Corrections v. Office of Administrative Hearings* (1997) 53 C.A.4th 780, 786, 61 C.R.2d 903 [hearing procedures used by Department of Corrections and Department of Mental Health were not subject to A.P.A. where those agencies were not included in Act and Act was not incorporated by legislation governing those agencies]; for list of state agencies and procedures that apply to their adjudicative hearings, see C.E.B., Administrative Hearing Practice 2d, Appendix A.)

(4) *Regulations Governing Adjudicative Proceedings.* Agencies are generally authorized to adopt permanent regulations to govern A.P.A. adjudicative proceedings. (*Govt.C. 11400.20* [exception for proceedings required to be conducted by administrative law judges employed by Office of Administrative Hearings (*infra*, §58)]; on administrative review of regulations, see *supra*, §51 et seq.)

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III. ADJUDICATION

A. In General.

2. Office of Administrative Hearings.

9 *Witkin Cal. Proc. Admin Proc* § 58

[§ 58] Office of Administrative Hearings.

(1) *In General.* Formerly, an agency requiring a full-time hearing officer could appoint a lawyer to serve in that function for that agency. (See *Bartosh v. Board of Osteopathic Examiners of Calif.* (1947) 82 C.A.2d 486, 492, 186 P.2d 984 [stressing importance of lawyer as hearing officer].) In 1961, the practice was changed by the enactment of *Govt.C. 11370.1* et seq., creating the Office of Administrative Procedure. The name was changed to the Office of Administrative Hearings in 1971. (*Govt.C. 11370.2*.) Hearing officers in adjudicative proceedings arising under the Administrative Procedure Act are now generally referred to as administrative law judges.

California was the first, and for many years the only, jurisdiction to have a central panel of independent hearing officers to hear administrative adjudications for a number of different agencies. (25 Cal. Law Rev. Com. Reports, p. 94.) However, many California agencies continue to employ their own administrative law judges and hearing officers. (See, e.g., *Govt.C. 18671* [civil service hearings]; *Veh.C. 14100* et seq. [hearings to suspend or revoke motor vehicle operator licenses]; *Welf.C.10953* [social services entitlement proceedings are generally conducted by judges employed by Department of Social Services].)

(2) *Appointment of Administrative Law Judges.* The Director of the Office of Administrative Hearings appoints and maintains a staff of full-time judges and may appoint pro tem, part-time judges. (*Govt.C. 11370.3, 11502(b)*; see 27 *Pacific L. J.* 943.) The director *must* assign judges for formal hearings under the Act. (See *Govt.C. 11500* et seq., *infra*, §96 et seq.) The director may, on agency request, assign judges to conduct other administrative proceedings. (*Govt.C. 11370.3*.)

(3) *Qualifications and Ethics of Administrative Law Judges.* Administrative law judges must have been admitted to practice law in California for at least 5 years and have any additional qualifications prescribed by the State Personnel Board. (*Govt.C. 11502(b)*.) Following recommendations by the California Law Revision Commission, the 1998 Legislature enacted a code of ethics for administrative law judges based on the California Code of Judicial Ethics. (See *infra*, §60.)

(4) *Rules, Regulations, and Recommendations.* The Office is authorized to adopt rules and regulations to carry out its functions and duties. Also, it is directed to study the subject of administrative adjudication, to submit suggestions to

the various agencies, and to report recommendations to the Governor and Legislature. (*Govt.C. 11370.5*; see *1 Cal. Code Reg. §1000* et seq. [Office of Administrative Hearings regulations governing adjudicatory hearings]; C.E.B., *Administrative Hearing Practice* 2d, §1.11.)

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III. ADJUDICATION

A. In General.

3. County Hearing Officer.

9 *Witkin Cal. Proc. Admin Proc* § 59

[§ 59] County Hearing Officer.

The 1965 Legislature added a new chapter to the Government Code, creating the office of County Hearing Officer. (*Govt.C. 27720 et seq.*)

(1) *Qualifications and Appointment.* The board of supervisors "may" establish the office. (*Govt.C. 27720.*) The officer, or any deputy or assistant, must be an attorney admitted to practice law in California for at least 5 years prior to appointment. (*Govt.C. 27724.*)

(2) *Duties.* The officer's duties are to conduct hearings for "the county or any board, agency, commission, or committee of the county." (*Govt.C. 27720.*) The local body may, but need not, be present during the proceeding. (*Govt.C. 27723.*)

(3) *Powers.* When a state law or local ordinance requires a hearing or findings and conclusions by a county board, agency, commission, or committee, the officer "may be authorized" by ordinance or resolution to conduct the hearing, issue subpoenas, receive evidence, administer oaths, rule on questions of law and admissibility of evidence, and prepare a record. (*Govt.C. 27721*; see *Haas v. San Bernardino* (2002) 27 C.4th 1017, 1024, 119 C.R.2d 341, 45 P.3d 280, 7 Summary (10th), *Constitutional Law*, §669 [temporary administrative hearing officer had pecuniary interest requiring disqualification on due process grounds where county, under *Govt.C. 27721*, unilaterally selected and paid officer on ad hoc basis and officer's income from future adjudicative work depended entirely on county's goodwill].)

(4) *Decision.* If the hearing officer is authorized to determine a matter on which a hearing is held, the officer submits a written decision (and any required findings or conclusions) and the record to the local body. If the officer is not authorized to decide, the officer submits a recommended decision. The local body may adopt the recommendation or enter its own findings, conclusions, and decision, after a review of the record. (*Govt.C. 27722.*)

(5) *Use of Officer by Other Public Entities.* Any other local public entity may contract with a county to employ the services of its officer. (*Govt.C. 27725.*)

(6) *Use of State Administrative Law Judge or Hearing Officer.* A county or other local public entity may contract

with the Office of Administrative Hearings for a hearing officer or administrative law judge. (*Govt.C.* 27727; on Office of Administrative Hearings, see *supra*, §58.)

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A. In General.

4. Administrative Adjudication Code of Ethics.

9 *Witkin Cal. Proc. Admin Proc* § 60

[§ 60] Administrative Adjudication Code of Ethics.

(1) *In General.* The Administrative Adjudication Code of Ethics, enacted by the 1998 Legislature pursuant to a recommendation by the California Law Revision Commission, generally applies the canons of the Code of Judicial Ethics to the conduct of administrative law judges and, to the extent provided by statute or regulation, other presiding officers. (*Govt.C. 11475* et seq.; see 26 Law. Rev. Com. Reports, p. 335 (Recommendation on Ethical Standards for Administrative Law Judges) (1996); on Code of Judicial Ethics, see 2 *Cal. Proc. (5th), Courts*, §52 et seq.)

(2) *Persons Covered.* The rules prescribed in the Administrative Adjudication Code of Ethics apply to the following persons:

(a) An administrative law judge, as defined by the State Personnel Board. (*Govt.C. 11475.10(a)(1).*)

(b) A presiding officer to whom the rules are made applicable by statute or regulation. (*Govt.C. 11475.10(a)(2).*) (See *Lab.C. 123.6* [workers' compensation administrative law judges are subject to Code of Judicial Ethics].)

The rules apply notwithstanding any general statutory provision that the general adjudicative provisions of the Administrative Procedure Act (*Govt.C. 11400* et seq.) do not apply to some or all of a state agency's adjudicative proceedings. (*Govt.C. 11475.10(b).*)

(3) *General Applicability of Code of Judicial Ethics.* Except as otherwise provided, the Code of Judicial Ethics, adopted by the Supreme Court pursuant to Cal. Const., Art. VI, §18(m) for the conduct of judges, governs the hearing and nonhearing conduct of an administrative law judge or other presiding officer subject to these rules. (*Govt.C. 11475.20.*) It is intended that interpretations of the Code of Judicial Ethics in its application to the judicial system, whether made by court rule or decision, also apply to administrative adjudication to the extent relevant. (Law Rev. Com. Comment to *Govt.C. 11475.20.*)

(4) *Special Definitions.* For the purpose of these rules, the following terms used in the Code of Judicial Ethics have the following meanings (*Govt.C. 11475.30*):

(a) "Appeal" means administrative review.

(b) "Court" means the agency conducting an adjudicative proceeding.

(c) "Judge" means an administrative law judge or other presiding officer to whom these rules apply. Related terms, including "judicial," "judiciary," and "justice," mean comparable concepts in administrative adjudication.

(d) "Law" includes regulation and precedent decision.

(5) *Provisions of Code of Judicial Ethics That Are Not Applicable.* The following provisions of the Code of Judicial Ethics do not apply:

(a) Canon 3B(7), to the extent it relates to ex parte communications. (*Govt.C. 11475.40(a)*.) This exception reflects the fact that *Govt.C. 11430.10* et seq., and not the Code of Judicial Ethics, govern ex parte communications in administrative adjudication. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(b) Canon 3B(10). (*Govt.C. 11475.40(b)*.) The exception of this canon, which relates to juries, reflects the fact that juries are not used in administrative adjudication. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(c) Canon 3D(3). (*Govt.C. 11475.40(c)*.) This canon, which requires a judge who is criminally charged to report that fact to the Commission on Judicial Performance, is not relevant to administrative law judges and other administrative presiding officers, who are not under the jurisdiction of the Commission. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(d) Canon 4C. (*Govt.C. 11475.40(d)*.) This canon relates to governmental, civic, and charitable activities. An administrative law judge or presiding officer is not precluded from engaging in activities of this type, except to the extent that the activities may conflict with general limitations on the administrative law judge's conduct. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(e) Canons 4E(1), 4F, and 4G. (*Govt.C. 11475.40(e)*.) These canons relate to fiduciary activities, private employment in alternative dispute resolution, and the practice of law. These matters are the subject of the employing agency's incompatible activity statement pursuant to *Govt.C. 19990*. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(f) Canons 5A-5D. These canons, involving political activity, are generally not applicable. However, the introductory paragraph of Canon 5 applies to persons subject to these rules notwithstanding *Govt.C. 3201* et seq., relating to political activities of public employees. (*Govt.C. 11475.40(f)*); for restrictions on political activities of public employees, see 7 *Summary* (10th), *Constitutional Law*, §§254, 255.) An administrative law judge or other presiding officer must avoid political activity that may create the appearance of political bias or impropriety. The officer must not participate in political activity related to an issue that may come before him or her. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(g) Canon 6. (*Govt.C. 11475.40(g)*.) This canon, which relates to enforcement and compliance, is superseded by *Govt.C. 11475.50* and *11475.60*. (Law Rev. Com. Comment to *Govt.C. 11475.40*.)

(6) *Effect of Violation.* A violation of an applicable provision of the Code of Judicial Ethics, or a violation of the restrictions and prohibitions on accepting honoraria, gifts, or travel that otherwise apply to elected state officers pursuant to *Govt.C. 89500* et seq., is cause for discipline by the employing agency pursuant to the State Civil Service Act (see *Govt.C. 19572*). (*Govt.C. 11475.50*; on discipline of civil service employees, see 3 *Summary* (10th), and *Agency and Employment*, §278 et seq. 7 *Summary* (10th), *Constitutional Law*, §§692, 693; on prohibitions against receipt of honoraria, gifts, or travel, see 7 *Summary* (10th), *Constitutional Law*, §286.)

(7) *Compliance.* A person who becomes subject to these rules must comply immediately with all applicable provisions of the Code of Judicial Ethics with the exception of Canon 4D(2) (use of name in connection with business venture or commercial advertising program). Compliance with that canon must be as soon as reasonably possible and in

any event within 1 year. (*Govt.C. 11475.60.*)

(8) *Collective Bargaining Rights Are Not Affected.* *Govt.C. 11475* et seq. may not be construed to limit or affect the collective bargaining rights guaranteed to state employees (see *Govt.C. 3512* et seq.). (*Govt.C. 11475.70*; on collective bargaining rights of state employees, see 3 *Summary* (10th), *Agency and Employment*, §604 et seq.)

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III. ADJUDICATION

A. In General.

5. Award of Interest by Agency.

a. Interest Not Recoverable.

9 *Witkin Cal. Proc. Admin Proc* § 61

[§ 61] Interest Not Recoverable.

In *AFL-CIO v. Unemp. Ins. App. Bd.* (1996) 13 C.4th 1017, 56 C.R.2d 109, 920 P.2d 1314, an unemployment insurance claimant sought to "backdate" her claim to obtain benefits for an earlier period. After the Employment Development Department denied her request, the claimant filed an administrative claim with the Unemployment Insurance Appeals Board. The administrative law judge hearing the appeal reversed the department's decision and ordered retroactive benefits for the 10-week period between the initial denial of eligibility and the subsequent benefit award. The claimant then sought to recover interest on the 10 weeks of retroactive benefits. The board, after removing the matter to itself, issued a precedent benefit decision that neither it nor administrative law judges acting on its behalf have the authority to award prejudgment interest on retroactive benefits awarded to a claimant. Plaintiff labor organization, acting as an "interested organization" pursuant to *Unemp.Ins.C. 409.2*, filed a complaint for declaratory relief challenging the board's decision. The trial judge entered judgment for plaintiff and ordered the board to modify its decision to permit the recovery of interest, and the Court of Appeal affirmed. *Held*, reversed.

(a) *Administrative interpretation of Unemployment Compensation Code is given great weight.* In light of the board's expertise, its interpretation of the Unemployment Compensation Code is entitled to great weight and will be accepted unless its application of legislative intent is clearly unauthorized or erroneous. (13 C.4th 1027.)

(b) *Cases permitting prejudgment interest award by trial court are distinguishable.* C.C. 3287(a) allows an award of prejudgment interest as an element of damages that are "certain, or capable of being made certain" where the right to recover is vested "upon a particular day." Under the statute, courts have awarded prejudgment interest following successful administrative mandamus actions to recover *wrongfully withheld* benefits. (13 C.4th 1029, citing *Tripp v. Swoap* (1976) 17 C.3d 671, 681, 131 C.R. 789, 552 P.2d 749, 8 Cal. Proc. (5th), *Extraordinary Writs*, §214, and *Aguilar v. Unemp. Ins. App. Bd.* (1990) 223 C.A.3d 239, 246, 272 C.R. 696, 8 Cal. Proc. (5th), *Extraordinary Writs*, §214.) The rationale for the interest award is that a claimant who is wrongfully denied benefits must receive compensation for egregious delay in receiving benefits that is caused by the need to file the mandamus action challenging the administrative denial. Thus, these cases do *not* support an award of interest on claims *resolved in the claimant's favor* in the administrative proceedings themselves. (13 C.4th 1030.)

(c) *No express or implied statutory authority to award interest.* Administrative agencies have only the powers conferred on them, either expressly or by implication. Neither the Unemployment Insurance Code nor C.C. 3287(a) expressly authorizes the board, or administrative law judges acting on the board's behalf, to award interest. Nor is there any *implied* power to award interest during the administrative review process. Under the administrative scheme of the Unemployment Insurance Code, the department has no underlying monetary obligation to the claimant until it determines that the claimant is eligible for benefits. Hence, there can be no wrongful withholding of benefits, and corresponding delay in receiving benefits, until the board makes a final decision that the claimant is not entitled to the benefits. Where the board, as here, determines that the claimant is eligible for benefits, there is, of course, no wrongful withholding of benefits at all. Also, there are no damages "capable of being made certain" that would give rise to an implied obligation to award interest on the benefits recovered during the administrative process. Accordingly, administrative law judges lack statutory authority to award C.C. 3287(a) interest on a routine award of retroactive unemployment insurance benefit payments. (13 C.4th 1033, 1042.)

(d) *Contrary authority is disapproved.* In *Knight v. McMahon* (1994) 26 C.A.4th 747, 754, 31 C.R.2d 832, 9 Cal. Proc. (5th), Appeal, §34, the Court of Appeal held that administrative law judges may award C.C. 3287(a) interest in the same proceeding in which they issue an award of retroactive in-home supportive services. *Knight* is disapproved to the extent that it conflicts with the analysis here. (13 C.4th 1037.) Under C.C. 3287(a) and the Unemployment Insurance Code, only a court may award prejudgment interest. (13 C.4th 1042.) (See *Weber v. Board of Retirement of Los Angeles County Retirement Assn.* (1998) 62 C.A.4th 1440, 1445, 73 C.R.2d 769 [county employees entitled to retroactive disability retirement benefits were not entitled to interest covering period from eligibility date; following *AFL-CIO v. Unemp. Ins. App. Bd.*].)

SUPPLEMENT: [This section is current through the latest supplement]



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III. ADJUDICATION

A. In General.

5. Award of Interest by Agency.

b. Interest Recoverable.

9 *Witkin Cal. Proc. Admin Proc* § 62

[§ 62] Interest Recoverable.

AFL-CIO v. Unemp. Ins. App. Bd. (1996) 13 C.4th 1017, 56 C.R.2d 109, 920 P.2d 1314, *supra*, §61, was distinguished, and an "expansive" interpretation of its holding rejected, in *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 C.A.4th 1084, 80 C.R.2d 712. Defendant county civil service commission reversed orders terminating the employment of plaintiff deputy sheriffs, reinstated their employment, and restored their back pay, but refused to include interest on the award sought pursuant to C.C. 3287(a). Plaintiffs petitioned for mandamus, arguing that, under *Goldfarb v. Civil Service Com.* (1990) 225 C.A.3d 633, 275 C.R. 284, an administrative agency must award interest on wrongfully withheld back pay. The trial court disagreed, denying the petition on the ground that *AFL-CIO* overruled *Goldfarb*, and construing *AFL-CIO* as broadly holding that, without an express statutory authorization, an administrative agency has no authority to award prejudgment interest. *Held*, reversed. This construction is overbroad; *AFL-CIO* did not overrule *Goldfarb*.

(a) The holding of *AFL-CIO* is that interest is not available, lacking an agency decision or action that has resulted in wrongful withholding of, and corresponding delay in receiving, benefits to which the claimant is entitled. The *AFL-CIO* court extensively explained that the unemployment insurance scheme contemplates several steps and inherently involves some minimal delay before there is a determination of eligibility for the benefit. Until these steps are exhausted, there has been no wrongful delay or action because the claimant is not entitled to benefits until the administrative process has been completed. Accordingly, when a claimant is found entitled to benefits at one of the administrative levels, there has been no wrongful delay or action in receiving benefits on which to predicate an award of prejudgment interest by the agency. (68 C.A.4th 1094.)

(b) In contrast to *AFL-CIO*, *Goldfarb* addresses the recoverability of interest in situations in which there has been a determination of wrongful action by an agency and wrongful withholding of funds to which the claimant was entitled, prior to the completion of the administrative process. In *Goldfarb* and here, the initial disciplinary action deprived the employee of a fully vested right to his job and paycheck. When defendant subsequently reversed the initial disciplinary action, it effectively determined that the employee's vested property interests were wrongfully withheld by the initial disciplinary action. This administrative decision, unlike the decision of the administrative law judge in *AFL-CIO*, is not a decision giving rise to entitlement to benefits in the first instance but is instead a decision that salary was wrongfully

withheld. Under the rationale of *AFL-CIO*, which reasoned that the allowance of interest requires a wrongful withholding of benefits due, interest should be paid on the back pay. (68 C.A.4th 1095.)

(c) *AFL-CIO* evaluated an administrative scheme in which claimants could not argue that their benefits were wrongfully withheld until the administrative process was completed; until then, no wrongful withholding of benefits or delay attributable to the administrative process occurred. Only the entity charged with subsequently reviewing that decision--the superior court in a mandamus action--may then award interest for the delayed disbursement if the court determines the benefits were wrongfully withheld. *Goldfarb*, however, evaluated an administrative scheme in which the wrongful action and withholding of payment was the triggering event for commencing the administrative review process, and the administrative law judge (like the superior court in the mandamus action reviewing denial of unemployment benefits) reviewed whether to uphold the wrongful action. (68 C.A.4th 1095.)

(d) Defendant's argument that *AFL-CIO* overruled *Goldfarb* is based solely on its conclusion that *AFL-CIO* held that an agency never has power to award interest without express statutory authorization. However, *AFL-CIO* cannot be read so expansively. *AFL-CIO* acknowledged that an agency can have powers not expressly granted if the statutory scheme can be construed to encompass unenumerated powers. *AFL-CIO* held that the statutory scheme of the Unemployment Insurance Code could not be construed to encompass the unexpressed power to award interest, because its provisions strictly limit the powers of administrative law judges to determine benefit eligibility and amount, a process that includes some delay in the normal course of administrative review. The delays inherent in the system, however, do not result in any wrongful withholding of benefits on which to predicate an interest award, and therefore the *AFL-CIO* court refused to imply a power to award interest based on that delay. In contrast, under statutory schemes where a claimant's benefits are wrongfully delayed, *AFL-CIO*'s analysis is inapplicable. (68 C.A.4th 1096.)

(e) Because *Goldfarb* operates in an arena distinct from any of the types of statutory schemes evaluated by *AFL-CIO*, *AFL-CIO* does not overrule *Goldfarb*. Accordingly, if defendant finds that the disciplinary action was wrongful, there appears to be no reason to deny appellants interest on their back pay simply because they were vindicated in an administrative proceeding and did not have to contest their employment termination in court. (68 C.A.4th 1096.)

AFL-CIO was again distinguished, and its holding narrowly construed, in *Currie v. Work. Comp. App. Bd.* (2001) 24 C.4th 1109, 104 C.R.2d 392, 17 P.3d 749. The Workers' Compensation Appeals Board (WCAB) found that a school bus driver's termination did not violate *Lab.C. 132a* (discriminatory termination for filing or threatening to file workers' compensation claim; see 2 Summary (10th), *Workers' Compensation*, §17 et seq.), but that the employer's refusal to reinstate him thereafter did violate that statute. Among other benefits, the driver was awarded lost wages and back pay with interest. In a later decision, the workers' compensation judge also awarded prejudgment interest, payable from the dates of accrual of the lost wages. On reconsideration, however, the WCAB found, relying on *Lab.C. 5800* (see 2 Summary (10th), *Workers' Compensation*, §§403, 411), that only postjudgment interest was allowable on *Lab.C. 132a* awards. *Held*, the WCAB erred in failing to award prejudgment interest on the lost wages award.

(a) *Lab.C. 5800*, which specifies the payment of postjudgment interest on an award of "compensation" or "death benefits," was not an implied exclusion of the authority to pay prejudgment interest. *Lab.C. 132a* awards are not "compensation" as that term is defined in *Lab.C. 3207* or used in the *Workers' Compensation Law*. (24 C.4th 1113, 1114, citing *Moorpark v. Superior Court* (1998) 18 C.4th 1143, 77 C.R.2d 445, 959 P.2d 752, 2 Summary (10th), *Workers' Compensation*, §20.)

(b) Although *Lab.C. 132a* does not itself expressly authorize the addition of prejudgment interest to an award of back pay to a victim of discrimination, C.C. 3287 requires prejudgment interest on damages due on a particular date, including awards of back pay, when they are certain or capable of being made certain by calculation. Awards of back pay generally are damages for purposes of C.C. 3287; the statute applies to an award made by an administrative agency, such as the WCAB, and nothing in *Lab.C. 132a* was intended to preclude that interest. (24 C.4th 1116, 1119.) Because the WCAB is expressly authorized to award reimbursement for lost wages under *Lab.C. 132a*, and because the inclusion

of prejudgment interest in a back pay award is mandated by C.C. 3287, that inclusion does not violate the principle that an administrative agency cannot create a remedy the Legislature has withheld. (24 C.4th 1117.)

(c) Unlike here, *AFL-CIO* did not address the statutory authority of the WCAB, but only decided the "narrow question" whether an administrative law judge acting on behalf of the Unemployment Insurance Appeals Board could award interest on unemployment benefits previously denied by the Employment Development Department. *AFL-CIO* "concerned as it was with the very different statutory scheme governing unemployment insurance benefits, is not apposite." (24 C.4th 1118.) Further, in denying interest on unemployment insurance benefits, *AFL-CIO* emphasized that certain delays are inherent in the administrative process, while conversely, the case here is concerned with wages wrongfully withheld from an employee as violative of *Lab.C. 132a*. (24 C.4th 1118, 1119, citing *San Diego County Deputy Sheriffs Assn.*, *supra*.) (See *Utility Audit Co. v. Los Angeles* (2003) 112 C.A.4th 950, 956, 5 C.R.3d 520 [following *Currie* and distinguishing *AFL-CIO* and *Weber v. Board of Retirement of Los Angeles County Retirement Assn.* (1998) 62 C.A.4th 1440, 73 C.R.2d 769, *supra*, §61].)

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B. General A.P.A. Procedures.

1. Nature and Scope of A.P.A. General Adjudication Provisions.

a. In General.

9 *Witkin Cal. Proc. Admin Proc* § 63

[§ 63] In General.

(1) *Governing Law.* General provisions of the Administrative Procedure Act governing administrative adjudication are set forth in Chapter 4.5. (*Govt.C. 11400 et seq.*) (See 27 *Pacific L. J.* 958; C.E.B., *Administrative Hearing Practice* 2d, §§1.26.)

(2) *Definitions.* A number of terms govern the construction of *Govt.C. 11400 et seq.* unless the provision or context requires otherwise. (*Govt.C. 11405.10.*) These include the following:

(a) "Adjudicative proceeding" means "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." (*Govt.C. 11405.20.*)

(b) "Agency." (See *Govt.C. 11405.30*, *infra*, §64.)

(c) "Agency head" means "a person or body in which the ultimate legal authority of an agency is vested" and includes "a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide." (*Govt.C. 11405.40.*)

(d) "Decision." (See *Govt.C. 11405.50*, *infra*, §64.)

(e) "Party" includes "the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate agencies, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party." (*Govt.C. 11405.60.*)

(f) "Person" means an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity "of any character." (*Govt.C. 11405.70.*)

(g) "Presiding officer" includes the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding. (*Govt.C. 11405.80.*)

(3) *Waiver*. Except as prohibited by another statute or regulation, a person may waive a right conferred by the administrative adjudication provisions of the Act. (*Govt.C. 11415.40.*)

(4) *Settlement*. The parties to a proceeding may reach a decision by settlement made before, during, or after the hearing. (*Govt.C. 11415.60(b).*) No evidence of an offer of compromise or settlement made in agency settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose. Also, no evidence of conduct or statements made in the settlement negotiations is admissible to prove liability for any loss or damage except as provided in *Ev.C. 1152* (see *1 Cal. Evidence (4th), Circumstantial Evidence, §140* et seq.). However, these rules do not render inadmissible any public document created by a public agency. (*Govt.C. 11415.60(a).*)

West's Key Number Digest, Administrative Law and Procedure 441 et seq.

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1. Nature and Scope of A.P.A. General Adjudication Provisions.

b. When Provisions Apply.

9 *Witkin Cal. Proc. Admin Proc* § 64

[§ 64] When Provisions Apply.

(1) *Decisions by State Agencies.* *Govt.C. 11400* et seq. (the general adjudicative provisions) apply to any decision by a state agency if, under the federal or state Constitution or a federal or state statute, an *evidentiary hearing* for determining facts is required for the decision. (*Govt.C. 11410.10, 11410.20(a)*.) "Agency" means "a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head." (*Govt.C. 11405.30*.) A "decision" is "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." (*Govt.C. 11405.50(a)*.) An example is a rate making or licensing determination of specific application, addressed to a named or particular party, such as a certain power company or a certain licensee. (Law Rev. Com. Comment to *Govt.C. 11405.50*.) A decision may be contrasted with a "regulation" (subject to the rulemaking provisions of the A.P.A.), which is an agency action of general application, applicable to all members of a described class. (See *Govt.C. 11342.600*, supra, §40.)

The hearing must be constitutionally or statutorily required. Agency actions under statutes not requiring hearings (see, e.g., *Pub.Res.C. 21000* et seq. [California Environmental Quality Act]) are not covered unless the hearing is mandated by due process. (Law Rev. Com. Comment to *Govt.C. 11410.10*.)

Unless otherwise provided, coverage extends to formal adjudicative proceedings conducted under *Govt.C. 11500* et seq. (infra, §96 et seq.). (*Govt.C. 11410.50, 11501(c)*; see *Govt.C. 11405.20*, supra, §63 [defining "adjudicative proceeding"].)

Govt.C. 11400 et seq. do not apply to the Legislature, the courts, or the Governor (*Govt.C. 11410.20(b)*), or to local agencies (*Govt.C. 11410.30(b)*). However, an exempt agency *may* adopt any of these provisions. (*Govt.C. 11410.40*.)

(2) *Adjudicative Decisions by Quasi-Public Entities.* *Govt.C. 11400* et seq. also apply to adjudicative proceedings of quasi-public entities if all of the following conditions are satisfied:

(a) *A statute vests the power of decision in the quasi-public entity. (Govt.C. 11410.60(b)(1).)*

(b) *A statute, the United States Constitution, or the California Constitution requires an evidentiary hearing for determining facts for formulation and issuance of the decision. (Govt.C. 11410.60(b)(2).)* A typical decision of this type might involve resolution of a membership assessment protest or a hearing on a claim that has been denied, provided the statute or Constitution requires a hearing for a decision of that type. *Govt.C. 11400 et seq.* do not apply to legislative actions, such as an election or negotiation and adoption of a health and welfare benefits plan, pension trust, or collective bargaining agreement by an industry or labor organization. (Law Rev. Com. Comment to *Govt.C. 11410.60.*)

(c) The decision is *not otherwise subject to administrative review* in an adjudicative proceeding to which *Govt.C. 11400 et seq.* apply. (*Govt.C. 11410.60(b)(3).*) However, a quasi-public entity may voluntarily adopt the procedural protections provided in *Govt.C. 11400 et seq.* (see *Govt.C. 11410.40*). (Law Rev. Com. Comment to *Govt.C. 11410.60.*)

"Quasi-public entity" means an entity, other than a governmental agency, whether characterized by statute as a public corporation, public instrumentality, or otherwise, that is *expressly created by statute for the purpose of administration of a state function.* (*Govt.C. 11410.60(a)*; see *Govt.C. 11410.60(d)* [requiring strict construction of section to effectuate legislative intent to apply *Govt.C. 11400 et seq.* only to decision by quasi-public entity that is expressly created by statute to administer state function].) Thus, *Govt.C. 11400 et seq.* govern hearings required to be held by a statutory entity such as the Winegrowers of California Commission (see *Food & Ag.C. 74061*) or the Escrow Agents' Fidelity Corporation (see *Fin.C. 17311*). But the provisions do not govern hearings of a private entity such as a licensed health care provider (see *Health & Saf.C. 1200 et seq.*), a labor organization, or a board of trustees established pursuant to statute under an interindemnity, reciprocal, or interinsurance contract between members of a cooperative corporation (see *Ins.C. 1280.7*). *Govt.C. 11410.60* does not apply to the State Bar (see *B. & P.C. 6001*), including proceedings of the State Bar Court. (Law Rev. Com. Comment to *Govt.C. 11410.60.*)

Govt.C. 11410.60 does not apply to decisions made on authority of an approved plan of operations of a quasi-public entity that is subject to the regulation or supervision of the Insurance Commissioner. (*Govt.C. 11410.60(e).*)

For purposes of application of *Govt.C. 11400 et seq.*, "agency" includes a quasi-public entity (*Govt.C. 11410.60(c)(1)*) and "regulation" includes a rule promulgated by a quasi-public agency (*Govt.C. 11410.60(c)(2)*).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Decisions by State Agencies.* Under *Govt.C. 11410.30(c)*, Chapter 4.5 of the A.P.A. applies to an agency created or appointed by the joint or concerted action of the state and one or more local agencies. *Patterson Flying Service v. Department of Pesticide Regulation (2008) 161 C.A.4th 411, 74 C.R.3d 290*, held that a county agricultural commissioner constituted such an agency under that statute, and therefore that hearings conducted under the commissioner's authority were subject to Chapter 4.5. (*161 C.A.4th 422.*)



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c. Specific Statute Prevails.

9 *Witkin Cal. Proc. Admin Proc* § 65

[§ 65] Specific Statute Prevails.

The governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations that *specifically apply* to that proceeding. (*Govt.C. 11415.10(a)*.) A state statute or federal statute or regulation applicable to the particular agency or decision prevails over any inconsistent provision in *Govt.C. 11400* et seq. (the general adjudicative provisions). (*Govt.C. 11415.20*; see *Usher v. Monterey* (1998) 65 C.A.4th 210, 217, 76 C.R.2d 274 [special hearing provisions prescribed for particular agency prevail over more general provisions of A.P.A.]; *Economic Empowerment Foundation v. Quackenbush* (1998) 65 C.A.4th 1397, 1403, 77 C.R.2d 390 [Legislature may prescribe different time limits and other procedural rules for different types of orders emanating from single agency subject to A.P.A.].) However, if no relevant procedure is provided, an agency may then conduct the proceeding under the A.P.A. (*Govt.C. 11415.10(a)*; see *Govt.C. 11415.10(b)* [provisions of chapter supplement applicable governing procedure].)

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1. Nature and Scope of A.P.A. General Adjudication Provisions.

d. Optional and Mandatory Provisions.

9 *Witkin Cal. Proc. Admin Proc* § 66

[§ 66] Optional and Mandatory Provisions.

(1) *In General.* The Law Revision Commission Comment to *Govt.C. 11415.10* identifies which of the general adjudicative provisions in *Govt.C. 11400* et seq. are optional and which are mandatory. The agency determines whether to use any of the optional provisions, and these provisions do not replace any other agency procedures that serve the same purpose. (Law Rev. Com. Comment to *Govt.C. 11415.10*.) The mandatory provisions govern any adjudicative proceeding to which *Govt.C. 11400* et seq. are applicable, and supplement the governing procedure by which an agency conducts an adjudicative proceeding, subject to a contrary statute applicable to the particular agency or proceeding. (Law Rev. Com. Comment to *Govt.C. 11415.10*.)

(2) *Optional Provisions.* The following provisions are optional:

(a) *Govt.C. 11420.10* et seq., *infra*, §84 et seq. (alternative dispute resolution).

(b) *Govt.C. 11440.30*, *infra*, §92 (hearing by electronic means).

(c) *Govt.C. 11440.50*, *infra*, §91 (intervention).

(d) *Govt.C. 11445.10* et seq., *infra*, §§78, 79 (informal hearing procedure).

(e) *Govt.C. 11450.05* et seq., *infra*, §89 (subpenas other than in formal hearings).

(f) *Govt.C. 11460.10* et seq., *infra*, §§80, 81 (emergency decision procedure).

(g) *Govt.C. 11465.10* et seq., *infra*, §§82, 83 (declaratory decision procedure).

(h) *Govt.C. 11470.10* et seq., *infra*, §87 (conversion of proceeding).

(3) *Mandatory Provisions.* The following provisions are mandatory:

- (a) *Govt.C. 11425.10 et seq., infra, §68 et seq.* (administrative adjudication bill of rights).
- (b) *Govt.C. 11440.10, infra, §95* (administrative review).
- (c) *Govt.C. 11440.20, infra, §88* (service and notice).
- (d) *Govt.C. 11440.40, infra, §93* (evidence in proceedings involving sexual misconduct).
- (e) *Govt.C. 11450.05 et seq., infra, §89* (subpenas in formal hearings).
- (f) *Govt.C. 11455.10 et seq., infra, §94* (sanctions).

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e. Procedure Where Adjudicative Proceeding Is Not Required.

9 *Witkin Cal. Proc. Admin Proc* § 67

[§ 67] Procedure Where Adjudicative Proceeding Is Not Required.

An adjudicative proceeding is not required for any of the following (*Govt.C. 11415.50(b)*):

- (1) Informal fact-finding.
- (2) An informal investigatory hearing.
- (3) A decision whether to initiate an investigation, prosecution, or other proceeding.

If a decision does not require an adjudicative proceeding, the agency may provide *any appropriate procedure*. (*Govt.C. 11415.50(a)*.) The applicable procedure may, of course, be specified by statute. (See *Govt.C. 11415.20*, *supra*, §65; Law Rev. Com. Comment to *Govt.C. 11415.50*.)

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B. General A.P.A. Procedures.

2. Administrative Adjudication Bill of Rights.

a. In General.

9 *Witkin Cal. Proc. Admin Proc* § 68

[§ 68] In General.

(1) *Fundamental Protections Guaranteed.* A major innovation of the 1995 revision of the Administrative Procedure Act is the inclusion of an "Administrative Adjudication Bill of Rights" guaranteeing fundamental due process and public policy protections to persons involved in state agency adjudicative proceedings. (*Govt.C. 11425.10* et seq.; see 25 Cal. Law Rev. Com. Reports, pp. 70, 81, 98 et seq.; 27 *Pacific L. J.* 958.) These requirements are mandatory in any hearing subject to *Govt.C. 11400* et seq. (the general adjudicative provisions). (Law Rev. Com. Comment to *Govt.C. 11425.10*.) (See C.E.B., Administrative Hearing Practice 2d, §1.26.)

(2) *Required Procedures.* The governing procedure of the agency must meet all of the following requirements:

(a) *Notice and hearing.* The agency must give a person to whom agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence. (*Govt.C. 11425.10(a)(1)*.) However, the right to present and rebut evidence is subject to reasonable control and limitation by the agency conducting the hearing, including determination of the manner of presentation of evidence (whether oral, written, or electronic), limitation on lengthy or repetitious testimony or other evidence, and "other controls or limitations appropriate to the character of the hearing." (Law Rev. Com. Comment to *Govt.C. 11425.10*.) (See *Arnett v. Office of Administrative Hearings* (1996) 49 C.A.4th 332, 338, 56 C.R.2d 774 [physician incarcerated in another state did not have absolute right to be present at Medical Board of California disciplinary proceedings].)

(b) *Copy of governing procedure.* The agency must make available to the person a copy of the governing procedure, including a statement whether the statutes governing formal hearings (*Govt.C. 11500* et seq., *infra*, §96 et seq.) apply. (*Govt.C. 11425.10(a)(2)*.) This provision is intended to make the procedures of an agency more readily accessible to those having business before it. (25 Cal. Law Rev. Com. Reports, p. 99.) This requirement is subject to a rule of reasonableness, however, and does not necessarily require the agency routinely to provide a copy to a person each time agency action is directed to that person. It may be satisfied, for example, by the agency's offer to provide a copy on request. (Law Rev. Com. Comment to *Govt.C. 11425.10*.)

(c) *Public proceeding.* The hearing must be open to public observation. (*Govt.C. 11425.10(a)(3)*, 11425.20; see

infra, §69.)

(d) *Separate functions.* The adjudicative function must be separated from the investigative, prosecutorial, and advocacy functions within the agency. (*Govt.C. 11425.10(a)(4), 11425.30*; see infra, §70.)

(e) *Disqualification of presiding officer.* The presiding officer may be disqualified for bias, prejudice, or interest. (*Govt.C. 11425.10(a)(5), 11425.40*; see infra, §70.)

(f) *Written decision.* A written decision, based on the record and with a statement of its factual and legal basis, must be issued. (*Govt.C. 11425.10(a)(6), 11425.50*; see infra, §§71, 72.)

(g) *Decision as precedent.* A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent. (*Govt.C. 11425.10(a)(7), 11425.60*; see infra, §73.)

(h) *Ex parte communications.* Ex parte communications to the presiding officer are generally prohibited. (*Govt.C. 11425.10(a)(8), 11430.10 et seq.*; see infra, §74 et seq.)

(i) *Language assistance.* Language assistance must be made available under specified circumstances. (*Govt.C. 11425.10(a)(9), 11435.05 et seq.*; see infra, §77.)

(3) *Requirements Are Self-Executing.* The requirements of *Govt.C. 11425.10* apply without further action and prevail over conflicting or inconsistent provisions of an agency's governing procedure. However, an agency's governing procedure may include provisions equivalent to or more protective than these requirements. (*Govt.C. 11425.10(b)*; see Law Rev. Com. Comment to *Govt.C. 11425.10* [section is self-executing].)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Open Hearing.

9 *Witkin Cal. Proc. Admin Proc* § 69

[§ 69] Open Hearing.

(1) *Hearing Must Be Open.* Under the Administrative Adjudication Bill of Rights, a hearing must be open to public observation. (*Govt.C. 11425.20(a)*; on conduct of formal hearing, see *infra*, §109.) *Govt.C. 11425.20* supplements the Bagley-Keene Open Meeting Act (*Govt.C. 11120 et seq.*, *supra*, §10 *et seq.*). (See Law Rev. Com. Comment to *Govt.C. 11425.20*; 27 *Pacific L. J.* 959; C.E.B., *Administrative Hearing Practice* 2d, §7.22.)

(2) *Exceptions and Limitations.* The open hearing requirement does not apply to a prehearing or settlement conference or proceedings for alternative dispute resolution other than binding arbitration. (*Govt.C. 11425.20(c)*; on alternative dispute resolution, see *infra*, §52 *et seq.*) (See C.E.B., *Administrative Hearing Practice* 2d, §7.23 *et seq.*)

The presiding officer may order closure of a hearing or make other protective orders to the extent necessary or proper for any of the following purposes:

(a) To satisfy the federal or state Constitution, a federal or state statute, or other law, including laws protecting privileged, confidential, or other protected information. (*Govt.C. 11425.20(a)(1)*; on protected information generally, see 2 *Cal. Evidence (4th)*, *Witnesses*, §59 *et seq.*)

(b) To ensure a fair hearing in the circumstances of the particular case. (*Govt.C. 11425.20(a)(2)*.)

(c) To conduct the hearing, including the examination of witnesses, in a way that is appropriate to protect a minor witness or a witness with a developmental disability (as defined in *Welf.C. 4512*) from intimidation or other harm, taking into account the rights of all persons. (*Govt.C. 11425.20(a)(3)*.)

(3) *Electronically Conducted Hearings.* If a hearing is conducted by telephone, television, or other electronic means, the open hearing requirement is satisfied if members of the public have an opportunity to do the following:

(a) At reasonable times, to hear or inspect the agency's record and inspect any transcript obtained by the agency. (*Govt.C. 11425.20(b)(1)*.)

(b) To be physically present at the place where the hearing is conducted. (*Govt.C. 11425.20(b)(2).*)

The right of the public to be present where a hearing is being conducted telephonically does not include the right to participate, and the right of the public to inspect the record does not impose a duty on the agency to provide a copy independent of the Public Records Act (*supra*, §5). (Law Rev. Com. Comment to *Govt.C. 11425.20.*)

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c. Separation of Adjudicative Function From Other Functions.

9 *Witkin Cal. Proc. Admin Proc* § 70

[§ 70] Separation of Adjudicative Function From Other Functions.

(1) *In General.* The Administrative Adjudication Bill of Rights places restrictions on those who may serve as a "presiding officer," i.e., preside over the adjudicative hearing (*Govt.C. 11405.80*, *supra*, §63). (See *Govt.C. 11425.10(a)(4)*, *11425.30*, *11425.40*.) These requirements also govern an agency head or other person or body who is delegated power to hear or decide. (*Govt.C. 11425.30(c)*; *11425.40(c)*.)

(2) *Neutrality Is Required.* Prior California law on the separation of the adjudicative from the investigative, prosecutorial, and advocacy functions within an agency was unclear. The Administrative Adjudication Bill of Rights requires that the adjudicative function be separated from the other functions. (*Govt.C. 11425.10(a)(4)*, *11425.30*; see *C.E.B., Administrative Hearing Practice* 2d, §6.21.)

Thus, a person may not serve as the presiding officer in either of the following circumstances:

(a) The person has served as investigator, prosecutor, or advocate in an adjudicative proceeding or its preadjudicative stage. (*Govt.C. 11425.30(a)(1)*.)

(b) The person is subject to the authority, direction, or discretion of a person who has so served. (*Govt.C. 11425.30(a)(2)*.)

However, a person may serve as the presiding officer at successive stages of the adjudicative proceeding. Also, a person who has participated only as a decisionmaker or advisor to a decisionmaker in making a probable cause or equivalent preliminary determination may serve as the presiding officer. (*Govt.C. 11425.30(b)*.)

A person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has done so. The separation of functions requirements are intended to apply to *substantial involvement* in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is "meaningful participation that is likely to affect an individual with a commitment to a particular result in the case." (*Law Rev. Com. Comment to Govt.C. 11425.30*.)

(3) *Disqualification for Bias, etc.* The presiding officer may be disqualified for bias, prejudice, or interest in the proceeding. (*Govt.C. 11425.40(a).*)

The following circumstances are not, by themselves, grounds for disqualification of the presiding officer:

(a) The presiding officer is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group. (*Govt.C. 11425.40(b)(1).*)

(b) The presiding officer has experience, technical competence, or specialized knowledge of, or has expressed a view on, a legal, factual, or policy issue involved in the proceeding. (*Govt.C. 11425.40(b)(2).*) However, expression of a view concerning the particular proceeding before the presiding officer could be grounds for disqualification, and disqualification in that situation might also occur under *Govt.C. 11425.30* (neutrality of presiding officer). (Law Rev. Com. Comment to *Govt.C. 11425.40.*) (See *State Water Resources Control Bd. Cases (2006) 136 C.A.4th 674, 840, 39 C.R.3d 189* [parties' claims that board was biased by its prejudgment of issues in water rights proceeding were without merit].)

(c) The presiding officer, as a lawyer or public official, has participated in drafting or attempting to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. (*Govt.C. 11425.40(b)(3).*)

An agency may provide by regulation for peremptory challenge of the presiding officer. (*Govt.C. 11425.40(d).*)

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1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 71

[§ 71] In General.

Prior to the 1995 revision, *Govt.C. 11518* required a written administrative decision containing "findings of fact," which could be "stated in the language of the pleadings or by reference thereto," as well as "a determination of the issues presented and the penalty, if any."

The 1995 revision imposed more detailed requirements under the Administrative Adjudication Bill of Rights. (See *Govt.C. 11425.50*.) The broad rule is that the decision "shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues." (*Govt.C. 11425.10(a)(6)*, *11425.50(a)*; see *Govt.C. 11425.50(d)* [nothing in *Govt.C. 11425.50* limits information that may be contained in decision, including summary of evidence relied on]; Law Rev. Com. Comment to *Govt.C. 11425.50* [articulation of basis for decision facilitates administrative and judicial review]; C.E.B., *Administrative Hearing Practice* 2d, §8.52 et seq.; 73 *Harv. L. Rev.* 406; 27 *Pacific L. J.* 961; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §368 et seq.; on decision after formal hearing, see *infra*, §113 et seq.)

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2. Statement of Factual Basis.

9 *Witkin Cal. Proc. Admin Proc* § 72

[§ 72] Statement of Factual Basis.

(1) *Necessity*. The former requirement of *findings of fact* (supra, §71) was elaborately discussed in *Topanga Assn. for Scenic Community v. Los Angeles* (1974) 11 C.3d 506, 113 C.R. 836, 522 P.2d 12: (a) Findings of fact are required in support of administrative adjudications. This requirement is primarily judge-made law, and is uniform in the federal and state courts. (11 C.3d 515.) (b) Findings facilitate orderly analysis and minimize the likelihood that the agency "will randomly leap from evidence to conclusions." (11 C.3d 516.) (c) Findings enable the reviewing court to trace and examine the agency's mode of analysis; without them, the court would have to grope through the record to determine whether some combination of credible evidentiary items supported some line of factual and legal conclusions supporting the ultimate order. (11 C.3d 516.) (d) Proper findings enable the parties to determine whether and on what basis they should seek review. (11 C.3d 517.) (e) "They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (11 C.3d 517.)

A number of decisions apply the *Topanga* findings requirement. (See *Lucas v. Board of Education* (1975) 13 C.3d 674, 680, 119 C.R. 462, 532 P.2d 110; *Hadley v. Ontario* (1974) 43 C.A.3d 121, 127, 117 C.R. 513; *Rancho Palos Verdes v. City Council* (1976) 59 C.A.3d 869, 877, 882, 129 C.R. 173 [applying requirement to statutory proceeding for vacating city street, involving mixed legislative and adjudicatory agency action]; *McMillan v. American General Finance Corp.* (1976) 60 C.A.3d 175, 182, 131 C.R. 462 [applying requirement to city council's approval of tentative subdivision map, and holding that findings were sufficient]; *Kateen v. Department of Real Estate* (1985) 169 C.A.3d 481, 485, 486, 215 C.R. 295 [findings were sufficient]; *Bam v. Board of Police Commrs.* (1992) 7 C.A.4th 1343, 1346, 1350, 9 C.R.2d 738 [board rejected examiner's findings and, without making findings of its own, suspended arcade operator's license; *held*, following *Topanga*, operator was entitled to have findings prepared *before* board made decision]; *Glendale Memorial Hosp. & Health Center v. State Dept. of Mental Health* (2001) 91 C.A.4th 129, 139, 110 C.R.2d 101 [applying requirement of factual basis to hospitals' challenge to administrative regulations governing Medi-Cal reimbursement, and holding that findings were insufficient].)

In *Fairfield v. Superior Court* (1975) 14 C.3d 768, 122 C.R. 543, 537 P.2d 375, the trial court made an order permitting discovery (by deposition) of the *reasoning processes* of city council members who had denied a permit for a

shopping center. *Held*, prohibition granted. If findings are made by the administrative agency, there can be no inquiry as to the reasoning employed. If findings are not made, "the remedy, depending on the case, is to annul the administrative action or to remand the matter to the board for findings, not to take the depositions of the administrators as a substitute for findings." (14 C.3d 779.) (See *Mountain Defense League v. Board of Supervisors* (1977) 65 C.A.3d 723, 135 C.R. 588 [following *Fairfield*; matter remanded to board to make findings]; *Governing Bd. of Alum Rock Union Elementary School Dist. v. Superior Court* (Garza) (1985) 167 C.A.3d 1158, 1161, 213 C.R. 771 [findings made; improper to inquire into administrative record to determine what evidence was considered]; *Respers v. University of Calif. Retirement System* (1985) 171 C.A.3d 864, 871, 872, 217 C.R. 594 [failure to make findings].)

Under the 1995 revision, the decision must contain a *statement of the factual basis* for the decision. (Govt.C. 11425.50(a).) This language "more accurately reflects case law, and is not a substantive change." (Law Rev. Com. Comment to Govt.C. 11425.50, citing *Topanga*.)

(2) *Reference to Pleading, Statute, or Regulation.* The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If it is a mere repetition or paraphrase of the relevant statute or regulation, however, the statement must be accompanied by a concise and explicit statement of the underlying facts that support the decision. (Govt.C. 11425.50(b).) (See *Jones v. Maloney* (1951) 106 C.A.2d 80, 89, 234 P.2d 666 [findings construed liberally]; *Rudolph v. Athletic Com. of Calif.* (1960) 177 C.A.2d 1, 16, 1 C.R. 898 [same]; 27 *Stanf. L. Rev.* 125 [findings of federal agencies in proceedings involving environmental law].)

(3) *Credibility.* If the factual basis includes a determination based substantially on the credibility of a witness, the statement must identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination. A reviewing court "shall give great weight to the determination" to the extent such evidence has been identified. (Govt.C. 11425.50(b).) Thus, the reviewing court is required to weigh more heavily findings by the trier of fact (i.e., the presiding officer) based on the observation of witnesses than findings based on other evidence. (Law Rev. Com. Comment to Govt.C. 11425.50.) (See *California Youth Authority v. State Personnel Bd.* (2002) 104 C.A.4th 575, 595, 128 C.R.2d 514 [Govt.C. 11425.50(b) did not require court to defer to administrative law judge's determination of credibility of witness, where determination was based on inferences unrelated to witness demeanor, manner, or attitude].)

(4) *Evidence in the Record.* The statement must be based exclusively on the evidence of record and on matters officially noticed in the proceeding. (Govt.C. 11425.50(c); see Govt.C. 11515 (infra, §111) [official notice]; *Vollstedt v. Stockton* (1990) 220 C.A.3d 265, 272, 269 C.R. 404 [decision not based on evidence at hearing was denial of due process].)

(5) *Officer's Experience, Competence, and Knowledge.* The presiding officer's experience, technical competence, and specialized knowledge may be used in *evaluating* evidence. (Govt.C. 11425.50(c).)

In *Vinson v. Snyder* (1999) 75 C.A.4th 182, 89 C.R.2d 44, the hearing officer at a driver's license suspension proceeding relied on her own experience and specialized knowledge in determining the date of a prior offense from departmental records. The trial court reduced the suspension on the ground that no foundation had been laid establishing the hearing officer's expertise in the area. *Held*, reversed.

(a) Govt.C. 11425.50(c) provides, in relevant part, that when rendering a decision after an adjudicative proceeding conducted by an agency, "[t]he presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence." This provision does not require the presiding officer to affirmatively set forth his or her experience and expertise on the record, and it does not compel the officer to find that he or she is an expert before considering the evidence in light of his or her technical competence. (75 C.A.4th 186.)

(b) Nor do other subdivisions of Govt.C. 11425.50 require the presiding officer to set forth his or her experience and specialized knowledge in the statement of the factual basis of the decision. The officer's technical knowledge is not

a factual or legal basis of the decision. It is simply a tool that the officer may use in determining what the evidence does and does not prove. The statute does not require the hearing officer to document his or her expertise in reading departmental documents either orally or in writing. (75 C.A.4th 187.)

(c) Under *Govt.C. 11425.50(c)*, the hearing officer was entitled to rely on her own knowledge, technical competence, and expertise in assessing the evidence presented by the parties. Under *Ev.C. 600(b)*, she was further entitled to draw reasonable inferences and deductions of fact from the evidence presented. Thus, she was not required to "document" her expertise in reading the records nor to lay a foundation establishing her qualifications as an expert in this area before she could evaluate the evidence before her. (75 C.A.4th 188.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Necessity*. See *Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 C.A.4th 215, 243, 77 C.R.3d 432 [staff report recommended method for calculating environmental mitigation fee and recommended \$ 1 million fee, but board adopted different method and imposed \$ 5.6 million fee; *Held*, distinguishing *Bam v. Board of Police Commrs.* (1992) 7 C.A.4th 1343, 9 C.R.2d 738, text, p. 1196, board did not arbitrarily impose fee and adopt rationale without findings, because staff report also detailed method ultimately chosen and admitted that its recommendation may have underestimated amount of mitigation needed]. (3) *Credibility*. See *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 C.A.4th 411, 430, 74 C.R.3d 290 [following *California Youth Authority v. State Personnel Bd.* (2002) 104 C.A.4th 575, 128 C.R.2d 514, text, p. 1197].



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3. Reliance on Appropriate Authority.

9 *Witkin Cal. Proc. Admin Proc* § 73

[§ 73] Reliance on Appropriate Authority.

(1) *Designation of Precedent Decisions.* A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency. (*Govt.C. 11425.60(a)*; see *Govt.C. 11425.60(d)* [section applies to decisions issued on or after July 1, 1997, but does not preclude agency from designating decision issued before that date as precedent decision]; 27 *Pacific L. J.* 962; cf. *Corrales v. Bradstreet* (2007) 153 *C.A.4th* 33, 50, 62 *C.R.3d* 440 [because Labor Commissioner's hearings on employees' compensation complaints were not required by statute or due process, and thus were not subject to administrative adjudication provisions of A.P.A., *Govt.C. 11425.60* did not apply, and commissioner's designation of decision on payments for missed meal and rest periods as binding precedent was invalid].)

An agency may designate a decision or part of a decision as a precedent decision if it contains a significant legal or policy determination of general application that is likely to recur. (*Govt.C. 11425.60(b)*.) The designation is not rulemaking and is not subject to the requirements of *Govt.C. 11340* et seq. (adoption of regulations; *supra*, §37 et seq.), nor is it subject to judicial review. (*Govt.C. 11425.60(b)*; see Law Rev. Comment to *Govt.C. 11425.60* [section applies notwithstanding *Govt.C. 11340.5* (proscribing "underground regulations"), *supra*, §53]; C.E.B., *Administrative Hearing Practice* 2d, §8.106.) The agency is required to maintain an index of significant legal and policy determinations made in precedent decisions, which must be made available to the public by subscription. (*Govt.C. 11425.60(c)*.)

This statutory authorization to designate precedent decisions recognizes the need of agencies to make law and policy through adjudication as well as through rulemaking, and it codifies the earlier practice of a number of agencies to designate important decisions as precedential. Its intent is to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. However, an agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis. (Law Rev. Com. Comment to *Govt.C. 11425.60*.)

Precedent decisions are "akin to agency rulemaking," because they state how governing law will be applied in future cases, and are subject to judicial deference. (*AFL-CIO v. Unemp. Ins. App. Bd.* (1996) 13 *C.4th* 1017, 1027, 56

C.R.2d 109, 920 P.2d 1314, supra, §61.)

(2) *Penalty Based on Precedent Decision.* A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is subject to the rulemaking provisions of the Administrative Procedure Act (*Govt.C. 11340 et seq., supra, §37 et seq.*) but that has not been adopted as a regulation. (*Govt.C. 11425.50(e).*) A penalty may properly be based on a precedent decision, however, because it is not an "underground rule." (*Law Rev. Com. Comment to Govt.C. 11425.50.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Designation of Precedent Decisions.* See *Messenger Courier Assn. of the Americas v. California Unemp. Ins. App. Bd.* (2009) 175 C.A.4th 1074, 1087, 96 C.R.3d 797, citing the text [in considering action for declaratory judgment regarding Unemployment Insurance Appeals Board's designation of decision as precedential, appellate court could make limited judicial inquiry into underlying legal or policy determinations made by board, regardless of any statutory restrictions on review of designation of precedent].



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e. Ex Parte Communications.

1. General Prohibition.

9 *Witkin Cal. Proc. Admin Proc* § 74

[§ 74] General Prohibition.

(1) *Communications With Presiding Officer.* As a general rule under the Administrative Adjudication Bill of Rights, neither an employee or representative of an agency that is a party, nor an interested person outside the agency, may communicate, directly or indirectly, with the presiding officer regarding any issue in a pending proceeding, without notice and opportunity for all parties to participate. (*Govt.C. 11430.10(a)*; see C.E.B., *Administrative Hearing Practice* 2d, §6.10 et seq.) A proceeding is pending, for this purpose, from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier. (*Govt.C. 11430.10(c)*.) But nothing in this section precludes a communication made on the record at a hearing. (*Govt.C. 11430.10(b)*; see 27 *Pacific L. J.* 962.)

In *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 64 C.R.2d 705, an administrative proceeding before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, counsel for the franchisor made an undisclosed communication to the participating administrative law judges that the dealer had been crying during the testimony of a witness and that counsel was concerned for his own safety. Arrangements were then made for a state police officer to attend the hearing. After the board ruled in favor of the franchisor, the dealer petitioned for mandamus to overturn the decision on the ground that he was deprived of a fair hearing because of the ex parte communication. The dealer contended that the franchisor secretly provided the board with evidence that the dealer made threats and that the board improperly acted on that evidence. The trial court denied the petition. *Held*, affirmed.

(a) The ex parte communication did not assert that the dealer made *threats* to counsel. In context, counsel said no more than that the dealer presented a *potential* threat because he was unable to maintain his composure under the stress of trial adversity, which had a lesser propensity to impugn the dealer's veracity than the assertion that the dealer "made a threat." (55 C.A.4th 1312.)

(b) The ex parte communication did not violate *Govt.C. 11513* (infra, §111), which limits evidence to the admissible evidence introduced in the hearing. The ex parte communication could be characterized as "evidence" only if the information was considered by the presiding administrative law judge for its bearing on the issues resolved by the findings. However, because the information was not so considered, it did not constitute evidence taken or admitted, nor

could counsel be characterized as an opposing witness. The fact that the administrative law judges were made aware of counsel's concern for his safety and decided not to proceed without security did not mean the information inevitably colored the presiding judge's view of the dealer and his integrity. An administrative law judge, having observed that a litigant is acting irrationally, may decide that the presence of a police officer is a prudent safeguard without drawing adverse conclusions as to the veracity of the litigant. The same is true if the impetus is increased by an expression of concern by opposing counsel. (55 C.A.4th 1313.)

(c) The trial court's finding that the ex parte communication was a violation of legal ethics on the part of counsel or the administrative law judges did not necessitate reversal of the board's decision. The misconduct was not shown to be prejudicial as a miscarriage of justice, or as intentional and sufficiently heinous to warrant reversal as a punishment or because it shows bias on the part of the tribunal. (55 C.A.4th 1314.)

(d) When an administrative adjudicator uses evidence outside the record, there is a denial of the due process requirement of a fair hearing; as to that evidence, there has been no hearing. However, the ex parte communication here did not violate the dealer's right to due process because the board did not actually use the illicit information in reaching its decision. (55 C.A.4th 1318.)

(2) *Communications With Entity Delegated Power To Hear or Decide*. Generally, the provisions of the Act governing ex parte communications to the presiding officer likewise govern ex parte communications to an agency head or other person or body who is delegated the power to hear or decide. (Govt.C. 11430.70(a).)

Ordinarily, there may be no communication on issues in a pending proceeding *between* the presiding officer and the person or body delegated the power to hear or decide. (Govt.C. 11430.80(a).)

In *Department of Alcoholic Beverage Control v. Alcoholic Bev. Control App. Board* (2006) 40 C.4th 1, 50 C.R.3d 585, 145 P.3d 462, plaintiff Department of Alcoholic Beverage Control filed charges of selling alcoholic beverages to a minor against defendant licensees. At the administrative hearing, the parties presented evidence, and the administrative law judge (ALJ) rendered a proposed decision dismissing plaintiff's accusation, which was then referred to plaintiff for final action. After the close of the administrative hearing but before plaintiff rendered its decision, plaintiff's prosecutor prepared a report of hearing in which he summarized the issues and evidence and recommended a particular disposition of the case, and apparently sent the report to plaintiff's chief counsel. After plaintiff rejected the ALJ's proposed decision to dismiss the accusation and, instead, suspended defendants' licenses, defendants appealed to the Alcoholic Beverage Control Appeals Board, which reversed plaintiff's decision. Plaintiff then sought writ relief, but the Court of Appeal affirmed. *Held*, affirmed; plaintiff's procedure of allowing its prosecutor to communicate with the ultimate decision maker before a final decision was rendered violated the Administrative Procedure Act's (A.P.A.) bar against ex parte communications.

(a) Govt.C. 11430.70(a) limits ex parte contacts with agency heads and their delegees during "adjudicative proceedings," and an "adjudicative proceeding" is defined in Govt.C. 11405.20 as an "evidentiary hearing" for the determination of facts pursuant to which an agency formulates and issues a decision. Plaintiff argued that the A.P.A. limits on ex parte communications extend only to communications during the trial stage, not to those during the decision stage. This contention is without merit. Govt.C. 11430.70(a) is in article 7 of the general adjudicative provisions, and the context of the rest of article 7 and its legislative history make clear that Govt.C. 11430.70(a) was not intended to incorporate the narrow definition of "adjudicative proceeding" contained in Govt.C. 11405.20, but was intended to apply more broadly to limit ex parte contacts in all nonratemaking proceedings that employ an evidentiary hearing in the course of adjudicating the rights of a single party. (40 C.4th 12.)

(b) If, as plaintiff maintains, an agency head is constrained *only* when he or she serves as a presiding officer, Govt.C. 11430.70(a) has no function, because presiding officers, including agency heads who serve as presiding officers, are already prevented, by Govt.C. 11430.10(a) and 11405.80, from engaging in ex parte communications. (40 C.4th 14.)

(c) *Govt.C. 11517* (infra §113 et seq.), while giving plaintiff wide latitude to structure its adjudicative proceedings, is beside the point. Plaintiff may indeed structure its decisionmaking however it sees fit, but only so long as it complies with the A.P.A. and related statutory and constitutional minimums. *Govt.C. 11517* does not purport to authorize procedures that run afoul of proscriptions stated elsewhere in the *Government Code*. (40 C.4th 14.)

(d) The party faced with an ex parte communication need not prove that the communication was actually considered. Conversely, the agency engaging in ex parte discussions cannot raise as a shield that the advice was not considered. (40 C.4th 16.)

(e) As a unitary agency, plaintiff is involved both in determining whether licensees are in violation of the law and taking action to correct violations. Plaintiff and the Attorney General expressed concern that a rule precluding prosecutor-decision maker contact will both require it to split these functions and deprive its decisionmakers of the advice of their subordinates. However, plaintiff (and other agencies) may still function as a unitary agency. In doing so, however, it must afford licensees fundamentally fair hearings by observing a limited internal separation of functions. The decisionmaker is free to speak with anyone in the agency and to solicit and receive advice from whomever he or she pleases--anyone, that is, except the personnel who serve as adversaries in a specific case. Indeed, the decisionmaker can even contact the prosecutor to discuss settlement or direct dismissal (see *Govt.C. 11430.10(a)*). The only contact that is forbidden is that which occurred here, i.e., an off-the-record communication between the prosecutor and the agency decisionmaker or the decisionmaker's advisors about the substance of the case. (40 C.4th 16.)

(f) On determining that plaintiff had violated the A.P.A. and due process, the board reversed plaintiff's order. Plaintiff implied that this was an unnecessary remedy, because submission of the report of hearing was harmless in that the decisionmaker could have inferred the report's contents from the record. However, because plaintiff refused to make copies of the report part of the record, whether its contents are as innocuous as plaintiff claims is impossible to determine. Thus, reversal of plaintiff's order was required. However, the further remedy ordered by the Court of Appeal, i.e., mandatory screening procedures barring prosecutor-decisionmaker contacts and precluding use of reports of hearing in future cases, is overbroad. Thus, plaintiff may continue to use the report of hearing procedure, so long as it provides licensees a copy of the report and the opportunity to respond. (40 C.4th 17.) (See *Chevron Stations v. Alcoholic Beverage Control App. Bd.* (2007) 149 C.A.4th 116, 132, 57 C.R.3d 6 [Department of Alcoholic Beverage Control's practice of allowing its ultimate decisionmaker access to prosecuting attorneys' hearing reports violates A.P.A. regardless of whether decisionmaker adopts or rejects ALJ's proposed decision]; *Rondon v. Alcoholic Bev. Control App. Bd.* (2007) 151 C.A.4th 1274, 1289, 60 C.R.3d 295 [same].)

(3) *Disqualification of Presiding Officer*. Receipt of a prohibited communication may be grounds for disqualification of the presiding officer. A presiding officer who is disqualified may order the portion of the record pertaining to the ex parte communication sealed. (*Govt.C. 11430.60*; see C.E.B., *Administrative Hearing Practice* 2d, §6.15.)

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e. Ex Parte Communications.

2. Permissible Communications.

9 *Witkin Cal. Proc. Admin Proc* § 75

[§ 75] Permissible Communications.

An otherwise prohibited communication is permissible if required for disposition of an ex parte matter specifically authorized by statute or if it concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy. (*Govt.C. 11430.20.*) (See C.E.B., *Administrative Hearing Practice* 2d, §6.11.)

Otherwise prohibited ex parte communications to an agency head or other person or body delegated power to hear or decide are permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in *Govt.C. 11430.50* (infra, §76). (*Govt.C. 11430.70(b).*) Also, the prohibition against ex parte communications between the presiding officer and the delegatee does not apply where the delegatee serves as both presiding officer and agency head, or where the presiding officer does not issue a decision. (*Govt.C. 11430.80(b).*)

The following otherwise prohibited communications from *agency personnel* are permissible:

(1) *Advisor.* A communication from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, if the purpose is to assist and advise the presiding officer. An assistant or advisor may evaluate but may not furnish, augment, diminish, or modify the evidence in the record. (*Govt.C. 11430.30(a).*)

(2) *Settlement proposal.* A communication made for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor. (*Govt.C. 11430.30(b).*)

(3) *Technical issue or issue before specified agency in nonprosecutorial proceeding.* A communication in a nonprosecutorial adjudicative proceeding made for the purpose of advising the presiding officer if (a) the advice concerns a technical issue and is necessary for and not otherwise reasonably available to the presiding officer, and the content of the advice is disclosed on the record and all parties are given an opportunity to address it as provided in *Govt.C. 11430.50* (infra, §76), or (b) the advice involves an issue in a proceeding of one of several specified agencies

(primarily involving water resources). (*Govt.C. 11430.30(c).*)

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9 *Witkin Cal. Proc. Admin Proc* § 76

[§ 76] Disclosure of Communications.

A prohibited communication, as well as the presiding officer's response to it, must be made a part of the record. If written, the communication itself must be included; if oral, a memorandum stating the substance of the communication and the identity of the person making it must be placed in the record. (*Govt.C. 11430.50(a).*) In addition, the presiding officer must notify all parties of the communication. (*Govt.C. 11430.50(b).*)

A party who, within 10 days after receipt of the notice, requests an opportunity to address the communication must be allowed to do so, and the presiding officer has discretion to reopen a hearing and to allow the party to present evidence concerning the subject of the communication. (*Govt.C. 11430.50(c).*)

A person who has previously received a communication that would be prohibited if received while serving as the presiding officer must, promptly after starting to serve as the presiding officer, disclose the communication on the record and give all parties an opportunity to address it. (*Govt.C. 11430.40.*)

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f. Language Assistance.

9 *Witkin Cal. Proc. Admin Proc* § 77

[§ 77] Language Assistance.

(1) *Definition.* "Language assistance," as guaranteed by the Administrative Adjudication Bill of Rights, means "oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty." (*Govt.C. 11435.05*; see 27 *Pacific L. J.* 964.)

(2) *Agencies Subject to Requirement.* Language assistance must be made available by agencies described in *Govt.C. 11018* (state agencies not governed by formal hearing provisions of Act; see *infra*, §96 et seq.) or *Govt.C. 11435.15* (list of designated agencies). (*Govt.C. 11425.10(a)(9)*.) Language assistance must be made available by a *quasi-public entity* (see *supra*, §64) to the same extent as a state agency. (*Govt.C. 11410.60(c)(3)*.)

(3) *When Assistance Is Required.* Hearings, as well as medical examinations conducted for the purpose of determining compensation or monetary awards, must be conducted in English. (*Govt.C. 11435.20(a)*.) However, an agency subject to the language assistance requirement must provide an interpreter for any party or witness who does not speak or understand English proficiently and who requests language assistance. (*Govt.C. 11435.20(b)*; see *Govt.C. 11435.25* [cost of interpreter to be paid by agency or party, as directed by presiding officer].) An agency subject to the language assistance requirement must advise each party of the right to an interpreter at the same time that the party is advised of the hearing date or medical examination. (*Govt.C. 11435.60*; see *Leal v. Gourley* (2002) 100 *C.A.4th* 963, 968, 969, 123 *C.R.2d* 220, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §310 [notice under *Govt.C. 11435.60* need only be given in English; also holding that agency's failure to give notice was harmless error].)

(4) *Interpreters.* An interpreter used in a hearing must be a certified administrative hearing interpreter. (*Govt.C. 11435.55(a)*; on certification, see *Govt.C. 11435.30*.) Similarly, an interpreter used in a medical examination must be a certified medical examination interpreter. (*Govt.C. 11435.55(b)*; on certification, see *Govt.C. 11435.35*.) However, if a certified interpreter cannot be present at the hearing or medical examination, the hearing agency or physician has discretion to provisionally use another interpreter. (*Govt.C. 11435.55(a), (b)*.) (See *Govt.C. 11435.40* [designation of languages for certification]; *Govt.C. 11435.45* [application fees for interpreter examinations]; *Govt.C. 11435.50* [removal of persons from list of certified interpreters].)

An interpreter may not have had any involvement in the issues of the case prior to the hearing. (*Govt.C. 11435.65(b).*) The agency's rules of confidentiality apply to the interpreter. (*Govt.C. 11435.65(a).*)

(5) *Assistance for Hearing Impaired.* Nothing in *Govt.C. 11435.05* et seq. limits application of *Ev.C. 754* (interpreters for hearing impaired persons; see *3 Cal. Evidence (4th), Presentation at Trial, §30*) in an adjudicative proceeding. (*Govt.C. 11435.10.*)

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a. Informal Hearings.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 78

[§ 78] In General.

(1) *Purpose of Informal Hearing.* The informal hearing provisions (*Govt.C. 11445.10* et seq.) of the Administrative Procedure Act (A.P.A.) are intended to provide a procedure that is simpler and more expeditious than a formal hearing, while still satisfying due process and public policy requirements. The informal hearing procedure provides a forum in the nature of a conference, in which parties may be heard by the presiding officer and members of the public may participate without appearing or intervening as parties. (*Govt.C. 11445.10(b)*; see *27 Pacific L. J. 953*.)

(2) *When Informal Hearing May Be Used.* An agency may use an informal hearing to conduct an adjudicative proceeding in prescribed circumstances, provided that its use does not violate statutory or constitutional requirements. (*Govt.C. 11445.10(a)*, *11445.20*; see C.E.B., *Administrative Hearing Practice* 2d, §6.49.) These circumstances include the following:

(a) There is no disputed issue of material fact. (*Govt.C. 11445.20(a)*.)

(b) The agency by regulation has authorized use of an informal hearing. (*Govt.C. 11445.20(c)*.)

(c) An evidentiary hearing for the determination of facts is not statutorily required but may be constitutionally required. (*Govt.C. 11445.20(d)*.)

An informal hearing procedure may also be used if there is a disputed issue of material fact, if the matter is limited to either of the following (*Govt.C. 11445.20(b)*):

(a) A monetary amount of not more than \$ 1,000.

(b) A disciplinary sanction (1) against a student not involving expulsion or suspension for more than 10 days, (2) against an employee not involving discharge, demotion, or suspension for more than 5 days, or (3) against a licensee not involving actual (as opposed to stayed) revocation of a license or suspension of a license for more than 5 days.

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2. Procedure.

9 *Witkin Cal. Proc. Admin Proc* § 79

[§ 79] Procedure.

(1) *Notice and Objection.* The notice of hearing must state the agency's selection of the informal hearing procedure. (*Govt.C. 11445.30(a).*) Any objection by a party must be made in the party's pleading (*Govt.C. 11445.30(b)*) and must be resolved by the presiding officer before the hearing, on the basis of the pleadings and any supporting written submissions (*Govt.C. 11445.30(c)*). (See *Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 C.A.4th 1377, 1385, 38 C.R.3d 450 [objection must be made before or at time of hearing].) In a disciplinary proceeding involving an occupational license, any objection must be resolved in the licensee's favor. (*Govt.C. 11445.30(c).*)

(2) *Denial or Conversion of Informal Hearing Where Cross-Examination Is Necessary.* The presiding officer may deny use of the informal hearing procedure, or after commencement may convert an informal hearing to a formal hearing, if it appears that cross-examination is necessary for proper determination of the matter, and that the delay, burden, or complication due to cross-examination will be more than minimal. (*Govt.C. 11445.50(a)*; see *Govt.C. 11445.50(b)* [agency by regulation may specify categories of cases in which cross-examination is deemed not necessary, but presiding officer may allow cross-examination notwithstanding regulation]; on conversion of proceedings from one type to another, see *infra*, §87.) The presiding officer's actions in denying or converting the hearing are not subject to judicial review. (*Govt.C. 11445.50(c)*; on judicial review of administrative adjudications, see *infra*, §148 et seq.)

(3) *Conduct of Proceeding.* The presiding officer regulates the course of the proceeding. The officer must permit the parties, and may permit others, to offer written or oral comments on the issues, but may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal. (*Govt.C. 11445.40(b).*) Except as provided, "the hearing procedures otherwise required by statute for an adjudicative proceeding apply to an informal hearing." (*Govt.C. 11445.40(a).*) The informal hearing is a simplified version of a formal hearing. (Law Rev. Com. Comment to *Govt.C. 11445.40*; see *Govt.C. 11502(a)* [informal hearing must be conducted by administrative law judge if matter is one that otherwise must be conducted under formal hearing procedures]; Law Rev. Com. Comment to *Govt.C. 11445.10* [informal hearing decision is subject to judicial review to same extent as formal hearing decision].)

(4) *Disclosure of Witnesses or Sources.* If there is reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would present proof in a formal hearing. If confidential facts, allegations, or sources are involved, disclosure of which is privileged or expressly prohibited, the presiding officer may require the party to so indicate, but may not require their disclosure. (*Govt.C. 11445.60(a).*)

If a party reasonably believes that essential facts must be obtained to permit an adequate presentation of the case, the party may inform the presiding officer of the general nature of the facts and the sources from which the party would obtain them in a formal hearing. (*Govt.C. 11445.60(b).*)

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b. Emergency Decisions.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 80

[§ 80] In General.

(1) *Enabling Regulation Is Authorized.* In some circumstances (e.g., serious abuse of a ward in a child or elder care facility or harmful conduct by a professional licensee), an agency may need to take immediate action to protect the public. (25 Cal. Law Rev. Com. Reports, pp. 112, 113.) The 1945 Act failed to provide such a procedure, although a few specialized statutes did so. (See, e.g., *Health & Saf.C. 1596.886* [emergency suspension of child daycare facility license].)

The 1995 legislation (see *Govt.C. 11460.10* et seq.) permits an agency to issue an emergency decision for temporary relief if the agency has adopted a regulation permitting it to do so. (*Govt.C. 11460.20(a)*; see C.E.B., *Administrative Hearing Practice* 2d, §2.95 et seq.; 27 *Pacific L. J.* 956.) The empowering regulation must (a) define the specific circumstances in which an emergency decision may be issued, (b) state the nature of the relief that the agency may order, and (c) prescribe the procedures that will be available before and after issuance of an emergency decision. (*Govt.C. 11460.20(b)*.)

(2) *Scope of Provisions.* *Govt.C. 11460.10* et seq. do not apply to emergency decisions, including cease and desist orders or interim or temporary suspension orders, that are issued pursuant to other express statutory authority. (*Govt.C. 11460.20(c)*; see Law Rev. Com. Comment to *Govt.C. 11460.10* [emergency decision procedure supplements and does not replace other statutes providing for interim suspension or other emergency orders].)

The statutory procedure and implementing administrative regulations for suspension and revocation of nonpublic, nonsectarian schools do not provide for the issuance of emergency decisions, and therefore are not subject to *Govt.C. 11460.10* et seq. (*California Assn. of Private Special Education Schools v. California Dept. of Education* (2006) 141 C.A.4th 360, 378, 45 C.R.3d 888.)

(3) *Conditions and Limitations.* An agency may only issue an emergency decision in a situation involving, and may only take action necessary to prevent or avoid, an immediate danger to the public health, safety, or welfare requiring immediate action. (*Govt.C. 11460.30(a)*, (b); see Law Rev. Com. Comment to *Govt.C. 11460.30(a)* [immediate danger

to public health, safety, or welfare includes adverse effects on environment, such as to fish and wildlife].)

The emergency decision is limited to temporary, interim relief. (*Govt.C. 11460.30(c)*.) Also, the decision is subject to prompt subsequent adjudication and to accelerated judicial review. (See *infra*, §81.)

(4) *Discretion of Agency*. The decision whether to use the emergency procedure, if available, is in the agency's discretion. (*Govt.C. 11460.10*.)

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2. Procedure.

9 *Witkin Cal. Proc. Admin Proc* § 81

[§ 81] Procedure.

(1) *Notice and Hearing.* Before issuing an emergency decision, the agency must, if practicable, give the person to whom the action is directed notice and an opportunity to be heard. (*Govt.C. 11460.40(a)*; see *Govt.C. 11405.70*, *supra*, 63 ["person" includes entity of any character].) The notice and hearing may be oral or written and may be given by telephone, fax transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as an informal hearing. (*Govt.C. 11460.40(b)*; see *Govt.C. 11502(a)* [emergency hearing must be conducted by administrative law judge if matter is one that otherwise must be conducted under formal hearing procedures]; on informal hearings, see *supra*, §§78, 79.)

(2) *Decision.* The decision is effective when issued or as provided in the decision. (*Govt.C. 11460.50(b)*.) To justify the determination of an immediate danger and the decision to take the specific action, the agency must include a brief explanation of the factual and legal basis and reasons for the emergency decision. (*Govt.C. 11460.50(a)*.) The agency must give notice to the extent practicable to the person to which the action is directed. (*Govt.C. 11460.50(b)*; see *Govt.C. 11460.70* [agency must keep official record consisting of any documents considered or prepared by it].)

(3) *Follow-Up Proceeding.* The underlying issue giving rise to the temporary, interim relief is subject to a subsequent adjudicative proceeding. (*Govt.C. 11460.30(c)*.) Within 10 days after issuing an emergency decision, the agency, even if proceedings for judicial review of the emergency decision are pending, must commence an adjudicative proceeding under a formal, informal, or other applicable hearing procedure to resolve the underlying issues. (*Govt.C. 11460.60*.) If the emergency proceedings have rendered the matter completely moot, however, the agency is not required to conduct follow-up proceedings. (Law Rev. Com. Comment to *Govt.C. 11460.60*.)

(4) *Judicial Review.* The person to whom the agency action is directed may obtain judicial review of the decision by administrative mandamus under *C.C.P. 1094.5* (see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §258 et seq.); exhaustion of administrative remedies is not required. (*Govt.C. 11460.30(c)*; 11460.80(a), (b); on judicial review of administrative adjudications generally, see *infra*, §148 et seq.) The hearing must be on the earliest day that the court's business will permit, but not later than 15 days after service of the petition on the agency. (*Govt.C. 11460.80(b)(1)*.)

Before proceedings for review and within 10 days after issuance of the emergency decision, a party, on written request to another party, is entitled to appropriate discovery. (*Govt.C. 11460.80(b)(3).*) The relief that may be ordered is limited to a stay of the emergency decision. (*Govt.C. 11460.80(b)(4).*)

Where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. (*Govt.C. 11460.80(b)(2).*)

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3. Alternatives to Formal Hearing.

c. Declaratory Decisions.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 82

[§ 82] In General.

(1) *Nature and Purpose.* Although the federal Administrative Procedure Act (A.P.A.) (see 5 U.S.C., §554(e)) and other statutes (see Model Administrative Procedure Act (1981 Act) §2-103, 15 U.L.A. (Master Ed.), p. 26) provide for declaratory orders, California law formerly included no such provision because the concept was virtually unknown in 1945 when the A.P.A. was first enacted. (25 Cal. Law Rev. Com. Reports, p. 114.) The 1995 amendments created a special adjudicative proceeding known as a "declaratory decision" proceeding. (See *Govt.C. 11465.10* et seq.) The purpose of the proceeding is to provide an inexpensive means to obtain fully reliable information regarding the applicability of agency-administered law to particular circumstances. The declaratory decision procedure is "quasi-adjudicative" in nature, enabling an agency to issue in effect an advisory opinion concerning assumed facts submitted. (See Law Rev. Com. Comment to *Govt.C. 11465.10*; C.E.B., *Administrative Hearing Practice* 2d, §2.49 et seq.; 27 *Pacific L. J.* 957.)

(2) *Model Regulations.* The Office of Administrative Hearings (supra, §58) is directed to adopt model regulations under the declaratory decision provisions that facilitate agency issuance of reliable advice and provide for (a) a description of the classes of circumstances in which an agency will not issue a declaratory decision; (b) the form, contents, and filing of an application; (c) the procedural rights of a person in relation to an application; and (d) the disposition of an application. (*Govt.C. 11465.70(a)*.) The model regulations apply unless the agency adopts its own regulations to govern declaratory decisions. (*Govt.C. 11465.70(b)*.) The declaratory decision provisions do not apply to the extent the agency by regulation provides inconsistent rules or provides that the declaratory decision provisions are not applicable. (*Govt.C. 11465.70(c)*.) (See 1 *Cal. Code Reg. §1260* et seq. [setting forth model regulations that govern declaratory decisions under A.P.A. unless agency otherwise provides].)

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2. Procedure.

9 *Witkin Cal. Proc. Admin Proc* § 83

[§ 83] Procedure.

(1) *General Requirements Are Not Applicable.* The provisions governing formal, informal, or other hearing procedures do not apply to a proceeding for a declaratory decision, except to the extent that the declaratory decision provisions (*Govt.C. 11465.10 et seq.*) or the agency by regulation or order so provides. (*Govt.C. 11465.40.*) The reason for exempting declaratory decisions from the usual procedural requirements for adjudications is to encourage declaratory decisions. Moreover, many adjudicative provisions (e.g., cross-examination and oral argument) have no applicability. There are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to facts furnished by the applicant. (*Law Rev. Com. Comment to Govt.C. 11465.40.*)

(2) *Application.* A person may apply to an agency for a declaratory decision "as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency." (*Govt.C. 11465.20(a)*; see *Govt.C. 11465.20(c)* [application for declaratory decision is not required for exhaustion of administrative remedies for purposes of judicial review]; *Law Rev. Com. Comment to Govt.C. 11465.20* [declaratory decision may determine whether subject of proceeding is within agency's primary jurisdiction].)

(3) *Notice.* Within 30 days after receipt of the application, the agency must give notice of the application to all persons to whom notice of an adjudicative proceeding is otherwise required, and may give notice to any other person. (*Govt.C. 11465.30.*)

(4) *Action on Application.* The agency must, within 60 days after receipt of an application, do one of the following in writing:

(a) Issue a decision on the applicability of the statute, regulation, or decision in question to the specified circumstances. (*Govt.C. 11465.50(a)(1).*)

(b) Set the matter for specified proceedings. (*Govt.C. 11465.50(a)(2).*)

(c) Agree to issue a decision by a specified time. (*Govt.C. 11465.50(a)(3).*)

(d) Decline to issue a decision, stating the reasons in writing. (*Govt.C. 11465.50(a)(4).*) The agency's action is not subject to judicial review. (*Govt.C. 11465.50(a)(4).*)

A copy of the agency's action must be served promptly on the applicant and any other party. (*Govt.C. 11465.50(b).*) If the agency does not take action within the required 60 days, it is considered to have declined to issue a declaratory decision. (*Govt.C. 11465.50(c).*)

(5) *When Declaratory Decision May Not Be Issued.* An agency may not issue a declaratory decision in any of the following circumstances:

(a) Issuance would be contrary to a regulation adopted under the declaratory decision provisions (see *Govt.C. 11465.10 et seq.*). (*Govt.C. 11465.20(b)(1).*)

(b) The decision would substantially prejudice the rights of a person who would be a necessary party and who does not give written consent to determination of the matter by a declaratory decision proceeding. (*Govt.C. 11465.20(b)(2).*)

(c) The decision involves a matter that is the subject of pending administrative or judicial proceedings. (*Govt.C. 11465.20(b)(3).*)

(6) *Form and Effect of Decision.* A declaratory decision must contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion. (*Govt.C. 11465.60(a).*) The decision has the same status and binding effect as any other agency decision in an adjudicative proceeding. (*Govt.C. 11465.60(b).*)

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d. Alternative Dispute Resolution.

1. In General.

9 *Witkin Cal. Proc. Admin Proc* § 84

[§ 84] In General.

(1) *Authorization of ADR.* Agencies covered by *Govt.C. 11400* et seq. (the general adjudicative provisions of the Administrative Procedure Act) have authority, with the consent of all parties, to refer any dispute subject to an adjudicative proceeding for alternative dispute resolution (ADR). (*Govt.C. 11420.10(a)*; see *Govt.C. 11420.10(b)* [where another statute requires mediation or arbitration, that statute prevails]; *Govt.C. 11420.10(c)* [section does not apply to extent agency by regulation so provides]; C.E.B., *Administrative Hearing Practice* 2d, §§1.46, 2.110, 6.52; 27 *Pacific L. J.* 955; on ADR generally, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §468 et seq.) Under *Govt.C. 11420.20*, the Office of Administrative Hearings must adopt model regulations on ADR. (See 1 *Cal. Code Reg.* §1200 et seq. [setting forth model regulations that govern ADR under Administrative Procedure Act unless agency otherwise provides].) The Law Revision Commission finds "broad support" for ADR in administrative adjudications: "A negotiated outcome is preferable in most situations to the costly, time-consuming, and difficult process of adjudication and judicial review." (25 *Cal. Law Rev. Com. Reports*, p. 110.)

(2) *Available ADR Procedures.* The dispute may be referred for resolution by any of the following means:

(a) *Mediation* by a neutral mediator. (*Govt.C. 11420.10(a)(1)*; on mediation, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §486 et seq.)

(b) *Binding arbitration* by a neutral arbitrator. (*Govt.C. 11420.10(a)(2)*; on binding arbitration, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §499 et seq.)

(c) *Nonbinding arbitration* by a neutral arbitrator. (*Govt.C. 11420.10(a)(3)*.)

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2. Judicial Review of Award.

9 *Witkin Cal. Proc. Admin Proc* § 85

[§ 85] Judicial Review of Award.

(1) *Binding Arbitration*. An award in a binding arbitration is subject to judicial review in the manner provided in the Arbitration Act (see *C.C.P. 1285* et seq.). (*Govt.C. 11420.10(a)(2)*; on review of arbitration award, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §566 et seq.; on review of administrative adjudications generally, see *infra*, §148 et seq.)

(2) *Nonbinding Arbitration*. The arbitrator's decision in a nonbinding arbitration is final unless, within 30 days after the arbitrator delivers the award to the agency head, a party requests that the agency conduct a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party must pay the costs and fees prescribed by *C.C.P. 1141.21* (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§564, 565). (*Govt.C. 11420.10(a)(3)*.)

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3. Protection of Communications.

9 *Witkin Cal. Proc. Admin Proc* § 86

[§ 86] Protection of Communications.

A communication made in alternative dispute resolution is protected as follows:

(1) *Mediation Communications Are Confidential.* Anything said, any admission made, and any document prepared in connection with mediation is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent disclosure of the communication in any proceeding or action. (*Govt.C. 11420.30(a).*) (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §487; 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §152 et seq.)

(2) *Reference to Nonbinding Arbitration Is Prohibited.* No reference to nonbinding arbitration proceedings, a decision in the arbitration that is rejected, the evidence produced in the arbitration, or any other aspect of the arbitration may be made in any proceeding or other action. (*Govt.C. 11420.30(b).*) This provision protects confidentiality of a proposed decision in nonbinding arbitration that is rejected by a party; it does not protect a decision accepted by the parties in a nonbinding arbitration or an award in a binding arbitration. (Law Rev. Com. Comment to *Govt.C. 11420.30.*)

(3) *Mediator or Arbitrator May Not Testify.* A mediator or arbitrator may not testify in a subsequent proceeding as to any statement, conduct, decision, or order occurring at or in conjunction with the alternative dispute resolution. (*Govt.C. 11420.30(c).*) This provision is drawn from *Ev.C. 703.5* (see 2 *Cal. Evidence* (4th), *Witnesses*, §51). (Law Rev. Com. Comment to *Govt.C. 11420.30.*)

Evidence that is otherwise admissible is not inadmissible or protected from disclosure solely by reason of its use in alternative dispute resolution. (*Govt.C. 11420.30(d).*)

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3. Alternatives to Formal Hearing.

e. Conversion of Proceeding From One Type to Another.

9 *Witkin Cal. Proc. Admin Proc* § 87

[§ 87] Conversion of Proceeding From One Type to Another.

(1) *Grounds for Conversion.* At any point in an agency proceeding, the presiding officer or other agency official responsible for the proceeding may convert it to another type of agency proceeding provided for by statute, if the conversion "is appropriate, is in the public interest, and does not substantially prejudice a party's rights." (*Govt.C. 11470.10(a)(1)*; see Law Rev. Com. Comment to *Govt.C. 11410* ["agency proceeding" includes rulemaking as well as adjudicative proceeding]; C.E.B., *Administrative Hearing Practice* 2d, §§1.45, 6.50, 6.51; 27 *Pacific L. J.* 965.) For example, an agency that has elected to conduct a formal hearing in a case where it could have proceeded by informal hearing initially may subsequently convert to an informal hearing. (See 25 Cal. Law Rev. Com. Reports, p. 115.)

If required by regulation or statute, a proceeding *must* be converted to another type of agency proceeding. (*Govt.C. 11470.10(a)(2)*.) This is true even if a nonconsenting party is prejudiced by the conversion. (See Law Rev. Com. Comment to *Govt.C. 11470.10*.)

(2) *Notice.* Notice of the conversion must be given to all parties to the original proceeding. (*Govt.C. 11470.10(b)*.)

(3) *Converted Proceeding.* After a proceeding is converted, the presiding officer or other agency official responsible for the new proceeding must do the following: (a) give additional notice to parties or others necessary to satisfy the statutory requirements of the new proceeding; (b) dispose of the matter without further proceedings if sufficient proceedings have already been held to satisfy those statutory requirements; and (c) conduct or cause to be conducted any additional proceedings necessary to satisfy those statutory requirements, and allow the parties a reasonable time to prepare for the new proceeding. (*Govt.C. 11470.40*.) The agency head must appoint a successor if the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding. (*Govt.C. 11470.20*.) The record of the original proceeding must be used in the new proceeding to the extent practicable and consistent with the parties' rights and with statutory requirements. (*Govt.C. 11470.30*.)

(4) *Implementing Regulations.* An agency may adopt regulations, which may include an enumeration of the factors and circumstances to be considered, to govern the conversion of one type of proceeding to another. (*Govt.C. 11470.50*.)

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4. Service and Notice.

9 *Witkin Cal. Proc. Admin Proc* § 88

[§ 88] Service and Notice.

When service of a writing or giving of a notice is required in a proceeding subject to *Govt.C. 11400* et seq. (the general adjudicative provisions of the Administrative Procedure Act), the writing or notice must be delivered personally, sent by mail or other means to the person's last known address, or delivered or sent to a party's attorney or other authorized representative. (*Govt.C. 11440.20(a)*; see 27 *Pacific L. J.* 945.)

Unless otherwise provided, service or notice by mail may, in the discretion of the sender, be by first-class, registered or certified mail, mail delivery service, fax transmission, or other electronic means as provided by regulation. (*Govt.C. 11440.20(b)*.)

Proof of service may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. (See Law Rev. Com. Comment to *Govt.C. 11440.20*; on proof of service in civil proceedings, see 3 *Cal. Proc.* (5th), *Actions*, §1064 et seq.; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§20, 23, 26.)

These provisions do not apply to formal hearings, which are subject to their own service and notice provisions (see *Govt.C. 11505*, *infra*, §98). (See Law Rev. Com. Comment to *Govt.C. 11440.20*.)

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5. Subpenas.

9 *Witkin Cal. Proc. Admin Proc* § 89

[§ 89] Subpenas.

(1) *Application of Provisions.* The Administrative Procedure Act subpoena procedure (see *Govt.C. 11450.05* et seq.) applies to formal hearings. (*Govt.C. 11450.05(a)*; see 27 *Pacific L. J.* 948.) It may be used in other adjudicative proceedings in the agency's discretion. (*Govt.C. 11450.05(b)*.)

(2) *Issuance.* The agency, the presiding officer, and the attorneys of record for the parties, in accordance with *C.C.P. 1985* et seq. (see 2 *Cal. Evidence (4th)*, *Witnesses*, §24 et seq.; 2 *Cal. Evidence (4th)*, *Discovery*, §218 et seq.), may issue subpoenas and subpoenas duces tecum for attendance at a hearing and for production of documents. (*Govt.C. 11450.20(a)*; see *Mohilef v. Janovici* (1996) 51 *C.A.4th* 267, 303, 58 *C.R.2d* 721 [due process was satisfied despite refusal or inability of agency to subpoena witnesses where ultimate decision in case was not based solely on their written reports]; C.E.B., *Administrative Hearing Practice* 2d, §5.7.) A witness is obliged to attend only if the witness is a California resident at the time of service. (*Govt.C. 11450.20(c)*.) A witness is entitled to mileage and fees as allowed by law to witnesses in civil cases. (*Govt.C. 11450.40*.) Subpoenas may be issued for attendance or production "at any reasonable time," as well as at the hearing. (*Govt.C. 11450.10(a)*.)

(3) *Service.* Process extends to all parts of state and may be served in accordance with *C.C.P. 1987* and *1988* (see 2 *Cal. Evidence (4th)*, *Witnesses*, §§26, 27; 2 *Cal. Evidence (4th)*, *Discovery*, §221), by certified mail return receipt requested, or by messenger if receipt is acknowledged. (*Govt.C. 11450.20(b)*.) In the case of the production of a party or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person. (*Govt.C. 11450.50(a)*; see *Govt.C. 11450.50(b)* [service must be made pursuant to *C.C.P. 1987*].)

(4) *Response.* To protect against hardship (see 25 *Cal. Law Rev. Com. Reports*, p. 107), a custodian of documents may satisfy a subpoena duces tecum not only by delivering documents, but also by providing copies of them or by making them available for inspection or copying. (*Govt.C. 11450.10(b)*.)

(5) *Objection and Motion To Quash.* A person served with a subpoena or a subpoena duces tecum may object by a motion for a protective order, including a motion to quash. (*Govt.C. 11450.30(a)*.) The objection must be resolved by

the presiding officer, who may make an order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy. (*Govt.C. 11450.30(b).*)

An agency on its own motion may quash a subpoena or a subpoena duces tecum that it has issued. (*Govt.C. 11450.30(c).*)

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6. Client Identification.

9 *Witkin Cal. Proc. Admin Proc* § 90

[§ 90] Client Identification.

Govt.C. 11440.60 requires the identification of persons for whom written communications are submitted in quasi-judicial proceedings.

A person submitting a written communication to a state agency in a quasi-judicial proceeding that is directly paid for by another person must clearly indicate that person's name. (*Govt.C. 11440.60(b).*)

A state agency may refuse or ignore a written communication submitted by an attorney or any other representative on behalf of a client in a quasi-judicial proceeding, unless the communication clearly indicates the name of the client. (*Govt.C. 11440.60(c).*)

"Quasi-judicial proceeding" means any of the following:

(1) A proceeding to determine the rights or duties of a person under existing laws, regulations, or policies. (*Govt.C. 11440.60(a)(1)(A).*)

(2) A proceeding involving the issuance, amendment, or revocation of a permit or license. (*Govt.C. 11440.60(a)(1)(B).*)

(3) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law. (*Govt.C. 11440.60(a)(1)(C).*)

(4) A proceeding at which action is taken involving the purchase or sale of property, goods, or services by an agency. (*Govt.C. 11440.60(a)(1)(D).*)

(5) A proceeding at which an action is taken awarding a grant or a contract. (*Govt.C. 11440.60(a)(1)(E).*)

"Written communication" means any report, study, survey, analysis, letter, or any other written document. (*Govt.C. 11440.60(a)(2).*)

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7. Intervention.

9 *Witkin Cal. Proc. Admin Proc* § 91

[§ 91] Intervention.

An agency subject to the Administrative Procedure Act may by regulation authorize intervention. (*Govt.C. 11440.50(a)*; see Law Rev. Com. Comment to *Govt.C. 11440.50* [agency may adopt procedure provided in *Govt.C. 11440.50* or may adopt alternate procedure or no procedure]; C.E.B., *Administrative Hearing Practice* 2d, §6.82; 27 *Pacific L. J.* 966; on intervention in civil actions, see 4 *Cal. Proc. (5th), Pleading*, §212 et seq.)

Intervention may be granted on written motion if the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired. The motion must state facts demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor by statute or regulation. Copies of the motion must be served on all parties. The motion must be made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion must be made in advance of, and be resolved at, that conference. (*Govt.C. 11440.50(b)*.)

If intervention is granted, the presiding officer may impose conditions on the intervenor's participation. The intervenor may be limited to participation concerning designated issues, may be limited or excluded in the use of discovery, cross-examination, and other procedures, may be required to combine its presentations with other intervenors, and may be limited or excluded in participation in settlement negotiations. (*Govt.C. 11440.50(c)*.)

The presiding officer must issue an order granting or denying the motion "[a]s early as practicable in advance of the hearing." (*Govt.C. 11440.50(d)*.) This determination is not subject to administrative or judicial review. (*Govt.C. 11440.50(e)*.)

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8. Hearing by Electronic Means.

9 *Witkin Cal. Proc. Admin Proc* § 92

[§ 92] Hearing by Electronic Means.

Unless a party objects, a hearing under the Administrative Procedure Act may be conducted in whole or in part by telephone, television, or other electronic means, provided each participant has an opportunity to participate and to hear the entire proceeding while it is taking place and to observe exhibits. (*Govt.C. 11440.30*; on requirement of open hearing, see *supra*, §69; on conduct of formal hearings, see *infra*, §109.)

The opportunity to observe exhibits includes a reasonable opportunity to examine and object to exhibits before or at the hearing. (Law Rev. Com. Comment to *Govt.C. 11440.30*.)

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9. Specific Evidentiary Rules.

9 *Witkin Cal. Proc. Admin Proc* § 93

[§ 93] Specific Evidentiary Rules.

(1) *Proceedings Involving Sexual Misconduct.* In prescribed proceedings involving employment discrimination in which sexual harassment, sexual assault, or sexual battery is alleged, discovery and admission of evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is limited to evidence sought and offered to attack the complainant's credibility. (*Govt.C. 11440.40*; see 27 *Pacific L. J.* 967; on evidence in formal hearings, see *infra*, §111; for detailed treatment of evidence in administrative proceedings, see 1 *Cal. Evidence* (4th), *Introduction*, §52 et seq.)

(2) *Evidence of Sympathy Expressed to Accident Victim.* In proceedings under the Administrative Procedure Act, portions of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of an accident victim made to the victim or to his or her family are not admissible as evidence of an admission of liability. (*Govt.C. 11440.45(a)*; for definitions, see *Govt.C. 11440.45(b)*.)

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B. General A.P.A. Procedures.

10. Sanctions.

9 *Witkin Cal. Proc. Admin Proc* § 94

[§ 94] Sanctions.

(1) *Contempt*. A contempt sanction in an adjudicative proceeding before an agency subject to the Administrative Procedure Act may be based on the following grounds:

(a) Disobedience of or resistance to a lawful order. (*Govt.C. 11455.10(a).*)

(b) Refusal of a witness to take the oath or affirmation or to be examined. (*Govt.C. 11455.10(b).*)

(c) Obstruction or interruption of the proceeding during or near the place of the hearing by (1) disorderly, contemptuous, or insolent behavior toward the presiding officer; (2) breach of the peace, boisterous conduct, or violent disturbance; or (3) other unlawful interference with the agency's process or proceedings. (*Govt.C. 11455.10(c).*)

(d) Violation of the prohibition of ex parte communications under *Govt.C. 11430.10* et seq. (*supra*, §74 et seq.). (*Govt.C. 11455.10(d).*)

(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order, or moving, without substantial justification, to compel discovery. (*Govt.C. 11455.10(e).*)

The presiding officer or agency head may certify the facts justifying a contempt sanction to the superior court for the county where the proceeding is conducted. (*Govt.C. 11455.20(a)*; see *Parris v. Zolin* (1996) 12 C.4th 839, 845, 50 C.R.2d 109, 911 P.2d 9 [former *Govt.C. 11525*, providing that agency "shall" certify facts to superior court after contempt, imposed duty on agency to transmit certification in those circumstances].) The court must then issue an order directing the person to appear at a specified time and place to show cause why he or she should not be punished for contempt. On service on the person of the order and a copy of the certified statement, the court has jurisdiction of the matter. (*Govt.C. 11455.20(a)*; see *Parris v. Zolin*, *supra*, 12 C.4th 845 [neither party is obligated to initiate superior court proceeding; receipt of certification triggers duty by court itself to issue show cause order to person appearing to be in contempt].)

The proceedings, possible penalties, and methods of purging the contempt are the same as contempt committed in the trial of a civil action in superior court. (*Govt.C. 11455.20(b)*; on contempt in civil actions, see 7 *Cal. Proc.* (5th),

Trial, §168 et seq.)

(2) *Monetary Sanctions for Frivolous or Delaying Acts.* The presiding officer may order a party, his or her attorney or other representative, or both, to pay reasonable expenses, including attorneys' fees, caused by the party's bad faith actions or tactics that are "frivolous or solely intended to cause unnecessary delay" as defined in *C.C.P. 128.5*. (*Govt.C. 11455.30(a)*); see Law Rev. Com. Comment to *Govt.C. 11455.30* [bad faith actions or tactics may include failure or refusal to comply with order under *Govt.C. 11455.10(e)*]; on monetary sanctions for improper tactics in civil actions, see 7 *Cal. Proc.* (5th), *Trial*, §226 et seq.) Monetary sanctions may be imposed on the agency, as well as other parties. (Law Rev. Com. Comment to *Govt.C. 11455.30*.)

The order, or its denial, is subject to judicial review in the same manner as a decision in the proceeding, and is enforceable in the same manner as a money judgment or by a contempt sanction. (*Govt.C. 11455.30(b)*.)

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11. Administrative Review.

9 *Witkin Cal. Proc. Admin Proc* § 95

[§ 95] Administrative Review.

An agency head has broad discretion concerning review of a decision of the presiding officer or the agency. The agency head may review some but not all issues, not exercise any review, delegate review authority to others, or authorize review by others subject to the agency head's further review. (*Govt.C. 11440.10(a)*.) The agency by regulation may require, preclude, or limit review of the decision. (*Govt.C. 11440.10(b)*.)

In *Coastal Community Hosp. v. Belshe'* (1996) 45 C.A.4th 391, 52 C.R.2d 659, the Department of Health Services accepted two hospitals' Medi-Cal cost reports "as filed," instead of performing a field audit, which might have resulted in an adjustment to the claimed reimbursement amounts. *Welf.C. 14171(a)* required the Department of Health Services to provide for an administrative appeal process "to review grievances or complaints arising from the findings of an audit or examination," and an implementing regulation permitted a Medi-Cal provider to request a hearing to examine any disputed audit or examination finding that results in adjustment to Medi-Cal program reimbursement or reimbursement rates. *Held*, neither the statute nor the regulation entitled the hospitals to an administrative appeal from the department's decision. The department made no findings resulting in adjustment to Medi-Cal reimbursements due, and the hospitals logically could not be aggrieved by the decision to accept as true their own representations regarding the amount of reimbursement due them. (45 C.A.4th 394.)

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C. A.P.A. Formal Hearing Procedures.

1. Nature and Scope of A.P.A. Formal Hearing Provisions.

9 *Witkin Cal. Proc. Admin Proc* § 96

[§ 96] Nature and Scope of A.P.A. Formal Hearing Provisions.

The 1995 Legislature made a number of significant changes to modernize and add flexibility to existing Administrative Procedure Act formal hearing procedures. These include, for example, consolidation and severance, resolution of discovery disputes by the presiding officer, settlement conferences, simplified correction of mistakes in decisions, and electronic voting by agency members. (See 25 Cal. Law Rev. Com. Reports, pp. 72, 83, 115 et seq.; C.E.B., Administrative Hearing Practice 2d, §1.37; 27 *Pacific L. J.* 945; *infra*, §97 et seq.)

The general adjudicative provisions set forth in *Govt.C. 11400* et seq. (*supra*, §63 et seq.) apply to formal hearing proceedings under *Govt.C. 11500* et seq., unless provided otherwise by statute. (*Govt.C. 11410.50, 11501(c)*.) Thus, if an agency is required by statute to conduct a hearing under *Govt.C. 11500* et seq., the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution, the informal hearing procedure, or other appropriate provisions of *Govt.C. 11400* et seq. Similarly, the general provisions restricting ex parte communications, regulating precedent decisions, and the like apply to formal hearings. (Law Rev. Com. Comment to *Govt.C. 11501*.)

The formal hearing provisions (*Govt.C. 11500* et seq.) apply to the following:

(a) Any state agency as determined by the statutes relating to that agency. (*Govt.C. 11500(a), 11501(a)*.)

(b) Adjudicative proceedings of all state agencies created on or after July 1, 1997, unless provided otherwise by statute. (*Govt.C. 11500(a), 11501(b)*); see Law Rev. Com. Comment to *Govt.C. 11501* [*Govt.C. 11500* et seq. provide default procedure, absent contrary statute, for agencies created after operative date of 1995 revision].) (See *Frankel v. Board of Dental Examiners* (1996) 46 C.A.4th 534, 544, 54 C.R.2d 128 [*Govt.C. 11500* et seq. give agencies implied authority to settle licensing disputes and incorporate settlement into formal agency decision]; *Boctor v. Los Angeles County Metropolitan Transit Authority* (1996) 48 C.A.4th 560, 571, 55 C.R.2d 861 [*Govt.C. 11500* et seq. do not govern local agencies unless adopted by them].)

West's Key Number Digest, Administrative Law and Procedure 446 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 C.A.4th 411, 422, 74 C.R.3d 290 [formal hearing procedures in Chapter 5 of A.P.A. did not apply to county agricultural commissioner's penalty proceeding about improper spraying under *Food & Ag.C. 12999.5*, where latter statute did not so provide].



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2. Accusation or Statement of Issues.

a. Filing.

9 *Witkin Cal. Proc. Admin Proc* § 97

[§ 97] Filing.

(1) *In General.* Formal proceedings against a licensee or applicant are commenced by a written accusation or statement of issues. (*Marlo v. State Bd. of Med. Examiners of Dept. of Professional Standards* (1952) 112 C.A.2d 276, 278, 246 P.2d 69; see 15 *Hastings L. J.* 258.) The person against whom an accusation or statement of issues is filed is termed the "respondent." (*Govt.C. 11500(c)*.) A proceeding commenced by an accusation is civil in nature, intended to protect the public rather than punish the licensee. (*Frankel v. Board of Dental Examiners* (1996) 46 C.A.4th 534, 543, 54 C.R.2d 128.)

(2) *Accusation.* A hearing to determine "whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned" must be initiated by filing an accusation setting forth "in ordinary and concise language the acts or omissions with which the respondent is charged" and specifying "the statutes and rules which the respondent is alleged to have violated." An accusation may not consist merely of "charges phrased in the language of such statutes and rules." (*Govt.C. 11503*; see *Smith v. State Bd. of Pharmacy* (1995) 37 C.A.4th 229, 241, 43 C.R.2d 532 [accusation that made it seem as if plaintiff had actually dispensed controlled substances did not charge him with negligence]; C.E.B., *Administrative Hearing Practice* 2d, §3.8 et seq.)

(3) *Statement of Issues.* A hearing to determine "whether a right, authority, license, or privilege should be granted, issued, or renewed" must be initiated by filing a statement of issues specifying "the statutes and rules with which the respondent must show compliance by producing proof at the hearing" and "particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought." (*Govt.C. 11504*; see *Coffin v. Alcoholic Bev. Control App. Bd.* (2006) 139 C.A.4th 471, 475, 43 C.R.3d 420 [under *Govt.C. 11504*, liquor license applicant had burden of proving eligibility for license until final determination by licensing agency; burden did not shift to those opposing license after interim license was issued to applicant].) The statement of issues is, in practice, initiated in either of two ways: The agency may send a denial in the form of a letter and provide the statement of issues following a request for hearing on the denial, or it may issue the denial in the form of a statement of issues. (See C.E.B., *Administrative Hearing Practice* 2d, §3.16.)

(4) *Verification.* Accusations and statements of issues must be verified, unless made by a public officer acting in his

or her official capacity or by an employee of the agency that will hold the hearing. (*Govt.C. 11503, 11504*; see C.E.B., *Administrative Hearing Practice* 2d, §3.18.)

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2. Accusation or Statement of Issues.

b. Service.

9 *Witkin Cal. Proc. Admin Proc* § 98

[§ 98] Service.

(1) *Accusation*. A copy of an accusation must be served on the respondent. (*Govt.C. 11505(a)*.) The accusation must be accompanied by a form for a notice of defense (*infra*, §100) and a statement indicating the respondent's hearing and discovery rights. (*Govt.C. 11505(a)*.) A form for the accompanying statement is set forth in *Govt.C. 11505(b)*. No order may be made adversely affecting the respondent's rights unless the respondent is served personally, has filed a notice of defense or otherwise appeared, or is served by registered mail. Service by registered mail is effective if a statute or agency rule requires the respondent to file the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to the respondent at the latest address on file with the agency. (*Govt.C. 11505(c)*; see *Govt.C. 8311* [certified mail is deemed equivalent to registered mail]; C.E.B., *Administrative Hearing Practice* 2d, §3.29 et seq.; 27 *Pacific L. J.* 946.)

In *Evans v. Department of Motor Vehicles* (1994) 21 *C.A.4th* 958, 26 *C.R.2d* 460, defendant Department of Motor Vehicles revoked plaintiff automobile dismantler's business license under *Veh.C. 11509* after serving the accusation and notice of hearing by certified mail at the address of record for plaintiff's business and holding an evidentiary hearing, which plaintiff did not attend. After plaintiff learned of the revocation, he requested reconsideration because he had not received actual notice of the accusation and hearing (the return receipt indicated that the notice had been delivered to a residential cottage on plaintiff's business premises, but not to the structure where plaintiff actually operated his business). At the subsequent rehearing, plaintiff requested *de novo* consideration on all matters, but defendant limited the rehearing to evidence in mitigation or extenuation of the appropriate discipline, and found that plaintiff's showing was insufficient to modify the original revocation order. Plaintiff then petitioned for mandamus relief. The trial judge found that even though defendant had complied with *Govt.C. 8311* and *Govt.C. 11505(c)*, which permit service by registered or certified mail where a statute (here, *Veh.C. 11513*) required plaintiff to keep defendant apprised of its established place of business, the statutory scheme was unconstitutional as applied to plaintiff because he had not received actual notice. *Held*, reversed.

(a) The statutory scheme for serving notice of a disciplinary proceeding by certified mail at a dismantler's established place of business satisfies due process because it is reasonably calculated to provide a dismantler with notice of the proceeding. That plaintiff allegedly did not receive the notice does not render the statutory scheme

unconstitutional, because actual notice is not a necessary element of proper service in a disciplinary proceeding. A dismantler is presumed to be aware of the statutes and regulations requiring that he furnish his business address, and he is in the best position to ensure receipt of notices by providing the most complete address available. (21 C.A.4th 963, 970.)

(b) Even though the service complied with due process, defendant nevertheless had discretion to grant relief from default on an adequate showing that plaintiff did not in fact receive notice of the accusation and hearing. However, the bare, unsworn allegation in plaintiff's reconsideration request alleging that he had not received the notice, unaccompanied by any showing that the lack of notice was not due to his avoidance of service or inexcusable neglect (as required by C.C.P. 473.5(b)), was insufficient to compel defendant to set aside plaintiff's default. (21 C.A.4th 964, 972.)

In a strong dissent, one justice argued that it was unfair to require plaintiff to satisfy the requirements of a *judicial* procedure, i.e., relief from default under C.C.P. 473.5(b), in an *administrative* request for rehearing in order to perfect his claim of failure to receive actual notice. (21 C.A.4th 978.)

Evans was followed in *Miller Family Home v. Department of Social Services* (1997) 57 C.A.4th 488, 67 C.R.2d 171, a mandamus proceeding to set aside revocation of the licenses of two group homes by the state Department of Social Services. The court held that service of the accusations by certified mail at the addresses on file with the department complied with Govt.C. 11505(c), and that this service was constitutionally sufficient even though the accusations were returned to the department by the postal service as "Returned to Sender, Unclaimed." (57 C.A.4th 491.) Moreover, because the service of process was proper, the department did not abuse its discretion when it denied relief from the default. (57 C.A.4th 494.)

(2) *Statement of Issues*. When an agency denies an application by direct issuance of a statement of issues, service is effected in the same manner as for an accusation. (Govt.C. 11504.) If, however, the agency issues a simple denial of the application, and the applicant, in response, requests a hearing, the statement of issues is served along with the notice of hearing. (Govt.C. 11504, 11509.) (See C.E.B., Administrative Hearing Practice 2d, §3.29 et seq.)

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2. Accusation or Statement of Issues.

c. Amendment and Supplementation.

9 *Witkin Cal. Proc. Admin Proc* § 99

[§ 99] Amendment and Supplementation.

(1) *Before Submission for Decision.* At any time before the matter is submitted for decision, the agency may file or permit the filing of an amended or supplemental accusation or statement of issues. All parties must be notified. If the amended or supplemental pleading presents new charges, the agency must afford the respondent a reasonable opportunity to prepare a defense to them, but the respondent may not file a further pleading unless the agency in its discretion so orders. Any new charges are deemed controverted, and any objections to the amended or supplemental pleading may be made orally and noted in the record. (*Govt.C. 11507*; see *Anserv Ins. Services v. Kelso* (2000) 83 C.A.4th 197, 208, 99 C.R.2d 357 [defendant waived objection to service of amended accusation less than 2 working days before hearing, where it appeared at hearing, acknowledged service, and presented defense]; C.E.B., *Administrative Hearing Practice* 2d, §7.119.)

(2) *After Submission for Decision.* The agency may likewise order amendment of the pleading *after* submission of the case for decision. Each party must be given notice of the intended amendment and an opportunity to show prejudice unless the case is reopened to permit the introduction of additional evidence. (*Govt.C. 11516*; see C.E.B., *Administrative Hearing Practice* 2d, §7.120.)

In *Taylor v. Los Angeles* (1997) 60 C.A.4th 611, 70 C.R.2d 521, plaintiff, a police officer of a charter city, petitioned for administrative mandamus to overturn defendant city's disciplinary suspension of him under charges that were amended after submission for decision. The manual promulgated by defendant city's police department permitted amendment of the charges to conform to proof, notwithstanding that the charter itself did not so provide. The charter stated only that punishment of police officers could not occur "except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair, and impartial hearing before a Board of Rights." (60 C.A.4th 615.) The trial court denied plaintiff's petition. *Held*, affirmed.

(a) While the board of rights was not specifically named in the charter, it was an administrative board governed by general administrative rules. As a general rule, amendments to conform to proof are within the broad discretion of the presiding officer of an administrative body. *Govt.C. 11516*, which authorizes an agency to order amendment of the accusation after submission of the case for decision, is also persuasive. Moreover, other charter provisions gave the city

broad latitude in enacting regulations to enforce the charter. *(60 C.A.4th 617.)*

(b) The rulemaking power of a civil service administrative board is not to be narrowly prescribed. Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. These boards are vested with a high discretion and abuse must appear very clearly before the courts will interfere. *(60 C.A.4th 618.)*

(c) The ability to amend charges is in conformance with, and not contrary to, the duties of the board of rights set forth in the charter. In order to implement its responsibility of conducting a full, fair, and impartial hearing, the board of rights must have the concomitant power to establish the proper procedures. The charter has not, and cannot, specify every procedural aspect for the board of rights to follow. *(60 C.A.4th 618.)*

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3. Notice of Defense.

9 *Witkin Cal. Proc. Admin Proc* § 100

[§ 100] Notice of Defense.

(1) *In General.* Generally, within 15 days after service of the initial pleading (supra, §98), the respondent may file one or more notices of defense with the agency. (*Govt.C. 11506(a)*, (b).) The notice must be in writing and signed, but need not be verified or follow any particular form. (*Govt.C. 11506(d)*.) (See C.E.B., *Administrative Hearing Practice* 2d, §4.30 et seq.) However, where the respondent has initiated a statement of issues proceeding by a request for hearing (see supra, §97), *Govt.C. 11506* does not apply. (*Govt.C. 11504*, *11504.5*.)

Formerly, the respondent could file a "statement by way of mitigation" even if a notice of defense was not filed. (Former *Govt.C. 11506(d)*.) Although statutory authorization for a statement in mitigation has been repealed, default may be cured under *Govt.C. 11520* (infra, §112), and evidence in mitigation may be presented as a defense in the hearing. (Law Rev. Com. Comment to *Govt.C. 11506*.)

(2) *Content.* In a notice of defense, the respondent may do the following:

(a) Request a hearing. (*Govt.C. 11506(a)(1)*.)

(b) Admit all or part of the initial pleading. (*Govt.C. 11506(a)(4)*.)

(c) Present new matter as a defense. (*Govt.C. 11506(a)(5)*.)

(d) Object to the form of the initial pleading on the ground of indefiniteness or uncertainty. (*Govt.C. 11506(a)(3)*.)

(e) Object to the initial pleading on the ground that "it does not state acts or omissions upon which the agency may proceed." (*Govt.C. 11506(a)(2)*.)

(f) Object to the initial pleading on the ground that "compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantial rights." (*Govt.C. 11506(a)(6)*.)

(3) *Effect of Filing.* If a notice is filed, the respondent is entitled to a hearing on the merits. If a notice is not filed,

the right to a hearing is waived, but the agency may nevertheless grant a hearing. (*Govt.C. 11506(c)*); on default by failure to file notice of hearing, see *infra*, §112.) The notice is deemed a specific denial of all parts of the accusation not expressly admitted, but objections to the form of the accusation are waived unless specifically objected to. (*Govt.C. 11506(c)*.)

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4. Consolidation and Severance.

9 *Witkin Cal. Proc. Admin Proc* § 101

[§ 101] Consolidation and Severance.

(1) *Statutory Development.* The original Administrative Procedure Act did not specifically authorize consolidation of related cases or severance of issues in a case that could be more economically handled in several parts. (25 Cal. Law Rev. Com. Reports, p. 115.) *Govt.C. 11507.3*, added in 1995, is patterned on the consolidation and severance procedures of the Code of Civil Procedure (see *C.C.P. 1048, 4 Cal. Proc.*, (5th), *Pleading*, §§342, 377). (Law Rev. Com. Comment to *Govt.C. 11507.3*; see C.E.B., *Administrative Hearing Practice* 2d, §§6.79, 6.80; 27 *Pacific L. J.* 952.)

(2) *Consolidation.* If pending proceedings involve a common question of law or fact, the administrative law judge on the judge's own motion or on that of a party may order a joint hearing of any or all the matters at issue. The judge may order all the proceedings consolidated and may make orders concerning procedure to avoid unnecessary costs or delay. (*Govt.C. 11507.3(a)*; see Law Rev. Com. Comment to *Govt.C. 11507.3* [statute is sufficiently broad to allow consolidation in single proceeding of related cases brought before several agencies].)

(3) *Severance.* The judge on the judge's own motion or on that of a party, "in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy," may order a separate hearing of any issue or issues, including one raised in the notice of defense. (*Govt.C. 11507.3(b)*.)

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5. Discovery and Investigation.

a. Limited Discovery.

9 *Witkin Cal. Proc. Admin Proc* § 102

[§ 102] Limited Discovery.

The respondent's right to discovery was judicially recognized in *Shively v. Stewart* (1966) 65 C.2d 475, 55 C.R. 217, 421 P.2d 65, 1 Cal. Evidence (4th), Introduction, §76, and was thereafter implemented by statute. However, the discovery provided is somewhat limited. The extensive discovery available in civil proceedings is deemed inappropriate for administrative adjudications, "which should be simple, quick, and inexpensive." (25 Cal. Law Rev. Com. Reports, p. 116; see C.E.B., Administrative Hearing Practice 2d, §5.5 et seq.; 27 Pacific L. J. 949; on broader discovery in disciplinary proceedings involving teachers and school personnel, see *Educ.C.* 44944, 87675, 87679; 4 Pacific L. J. 459; 6 Pacific L. J. 309; for full discussion of discovery in administrative proceedings, see 1 Cal. Evidence (4th), Introduction, §75 et seq.)

Discovery is allowed to all parties to the proceeding, including the agency, but does not extend to discoverable matters in the possession of nonparties. Generally, parties may discover (1) the names and addresses of witnesses known to the other party; (2) statements of parties and witnesses; (3) writings, including mental, physical, and blood examination reports that a party proposes to offer in evidence; (4) certain portions of investigative reports; and (5) "[a]ny other writing or thing which is relevant and which would be admissible in evidence." (*Govt.C.* 11507.6; see *Govt.C.* 11507.5 [*Govt.C.* 11507.6 provides exclusive right and method of discovery in A.P.A. formal hearing proceedings]; *Govt.C.* 11507.7 [proceeding to compel discovery].) Discovery depositions, interrogatories, and requests for admissions are not used (see *Govt.C.* 11507.6), but depositions may be taken in lieu of testimony when the witness is not available at the hearing (*Govt.C.* 11511). (See *Blinder, Robinson & Co. v. Tom* (1986) 181 C.A.3d 283, 289, 226 C.R. 339, 1 Cal. Evidence (4th), Introduction, §81 [rejecting due process challenge to *Govt.C.* 11511]; *Kenneally v. Medical Bd.* (1994) 27 C.A.4th 489, 493, 496, 498, 32 C.R.2d 504, 1 Cal. Evidence (4th), Introduction, §81 [same]; *Mohilef v. Janovici* (1996) 51 C.A.4th 267, 302, 58 C.R.2d 721 [extent of discovery permitted in absence of statute is determined by agency, unless refusal in particular situation would be so prejudicial as to deny due process]; *RLI Ins. Co. Group v. Superior Court* (1996) 51 C.A.4th 415, 433, 59 C.R.2d 111 [motion to compel discovery should have been granted in proceeding to determine insurance rate rollbacks under Prop. 103 (*Ins.C.* 1861.01 et seq.) where material sought was relevant and potentially highly persuasive, even though it related to other insurers]; *Cimarusti v. Superior Court* (2000) 79 C.A.4th 799, 803, 94 C.R.2d 336, 1 Cal. Evidence (4th), Introduction, Supp., §76 [*Welf.C.* 827

(juvenile court has exclusive authority to disclose juvenile court records) prevails over *Govt.C. 19574.1* (disciplined employee has right to inspect records in possession of appointing agency)].)

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5. Discovery and Investigation.

b. Subpenas in Aid of Investigation.

9 *Witkin Cal. Proc. Admin Proc* § 103

[§ 103] Subpenas in Aid of Investigation.

Statutes that are not a part of the Administrative Procedure Act govern investigations. *Govt.C. 11180* authorizes the head of each state department to investigate matters within his or her jurisdiction. (See *People v. El Dorado* (2005) 36 C.4th 971, 988, 32 C.R.3d 109, 116 P.3d 567 [*Govt.C. 11180(a)*] only authorizes state agency to sue, but does not itself confer standing to sue; authorization to sue does not necessarily create in agency beneficial interest in mandamus relief.)

Govt.C. 11181(e) authorizes issuance of subpoenas and subpoenas duces tecum in any investigation or hearing. This procedure for issuance of subpoenas was challenged in *Brovelli v. Superior Court* (1961) 56 C.2d 524, 15 C.R. 630, 364 P.2d 462, where the Attorney General conducted an investigation of suspected violations of the Cartwright Act and the Unfair Practices Act (see 1 *Summary* (10th), *Contracts*, §§591 et seq., 609 et seq.). The subpoena duces tecum called for specified documents from R Corp., a manufacturer and distributor of concrete block. The officers ignored the subpoena and court orders to show cause, and sought review of the resulting contempt order, contending that such process may be issued only in a formal administrative hearing. The Supreme Court annulled the contempt order on the ground that, in the absence of any Government Code provision on service, the general provisions of the Code of Civil Procedure applied and the attempted service was defective. But the constitutionality of issuance of a subpoena in an investigation was upheld: "There is no constitutional objection to a system under which the heads of departments of government may compel the production of evidence for purposes of investigation, without instituting formal proceedings against the one from whom the evidence is sought or filing any charges against him." (56 C.2d 529.) The holding in *Brovelli* has been codified, and the issues of process and subpoenas in administrative agency investigations are now governed by the general provisions in the Code of Civil Procedure for service of summons. (*Govt.C. 11184(a)*.) (See *Arnett v. Dal Cielo* (1996) 14 C.4th 4, 56 C.R.2d 706, 923 P.2d 1, 2 *Cal. Evidence* (4th), *Witnesses*, §514 [subpoena issued by administrative agency for investigative purposes is not "discovery" within *Ev.C. 1157* (2 *Cal. Evidence* (4th), *Witnesses*, §505 et seq.) privilege protecting proceedings and records of medical review committee]; *People v. Superior Court (Safeco)* (1985) 164 C.A.3d 526, 538, 210 C.R. 695 [upholding subpoena duces tecum requiring insurance company to disclose to Franchise Tax Board identity of policyholders and income credited to their accounts]; *Wood v. Superior Court* (1985) 166 C.A.3d 1138, 1146, 212 C.R. 811 [distinguishing *Brovelli*; insufficient showing of good cause in investigation of

physicians' prescription practices to overcome patients' privacy rights in medical records]; *Bearman v. Superior Court* (2004) 117 C.A.4th 463, 471, 11 C.R.3d 644 [following *Wood*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *California v. Pet Food Express Ltd.* (2008) 165 C.A.4th 841, 853, 81 C.R.3d 486 [upholding subpoena duces tecum requiring chain of pet food stores to disclose to Department of Pesticide Regulation information about chain's sale of flea prevention products that were not properly registered under California law]; *People v. U.S. Financial Management* (2009) 169 C.A.4th 1502, 1513, 87 C.R.3d 615 [upholding subpoena duces tecum requiring corporation to disclose to Department of Corporations records relevant to department's investigation of corporation's suspected violation of *Fin.C. 12000* et seq. (licensing and regulation of check sellers, bill payers, and proraters)].



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6. Prehearing Conference.

9 *Witkin Cal. Proc. Admin Proc* § 104

[§ 104] Prehearing Conference.

In formal proceedings, a prehearing conference may be held on motion of a party or the administrative law judge. The judge sets the time and place for the conference, gives all parties reasonable written notice, and, after the conference, prepares an order incorporating the matters determined. (*Govt.C. 11511.5(a)*, (e); see C.E.B., *Administrative Hearing Practice* 2d, §6.38 et seq.; 27 *Pacific L. J.* 947.)

The conference may deal with the following matters:

- (1) Settlement possibilities. (*Govt.C. 11511.5(b)(1)*; on settlement conferences, see *infra*, §105.)
- (2) Stipulations. (*Govt.C. 11511.5(b)(2)*.)
- (3) Clarification of the issues. (*Govt.C. 11511.5(b)(3)*.)
- (4) The identity and number of witnesses. (*Govt.C. 11511.5(b)(4)*.)
- (5) Objections to offers of evidence. (*Govt.C. 11511.5(b)(5)*; on introduction of evidence at hearing, see *infra*, §111.)
- (6) The order of presenting evidence and cross-examination. (*Govt.C. 11511.5(b)(6)*.)
- (7) Subpenas and protective orders. (*Govt.C. 11511.5(b)(7)*.)
- (8) Schedules for submitting briefs and commencing and conducting the hearing. (*Govt.C. 11511.5(b)(8)*; on conduct of hearing, see *infra*, §109.)
- (9) Exchange of witness lists, exhibits, and documents. (*Govt.C. 11511.5(b)(9)*.) This provision is not intended to provide a new discovery procedure. If a party has not availed itself of discovery within the time provided by *Govt.C. 11507.6* (*supra*, §102), it cannot use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of witness lists, exhibits, and documents to be offered in evidence at the hearing.

(Law Rev. Com. Comment to *Govt.C. 11511.5*.)

(10) Motions for intervention. (*Govt.C. 11511.5(b)(10)*.)

(11) Exploring the possible use of alternative dispute resolution provided in *Govt.C. 11420.10* et seq. (supra, §84 et seq.) or the informal hearing procedure provided in *Govt.C. 11445.10* et seq. (supra, §§78, 79) and objections to use of the informal hearing procedure. (*Govt.C. 11511.5(b)(11)*.) With the parties' consent, the conference may be converted into alternative dispute resolution, either immediately or to be conducted at another time, or into an informal hearing, which, with the agency's consent, may be conducted at another time. (*Govt.C. 11511.5(d)*); on conversion of proceedings generally, see supra, §87.)

(12) "Any other matters as shall promote the orderly and prompt conduct of the hearing." (*Govt.C. 11511.5(b)(12)*.)

All or part of the prehearing conference may be conducted by telephone, television, or other electronic means if each participant has an opportunity to participate and to hear the entire proceeding while it is taking place. (*Govt.C. 11511.5(c)*.)

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7. Settlement Conference.

9 *Witkin Cal. Proc. Admin Proc* § 105

[§ 105] Settlement Conference.

The administrative law judge may order the parties to a formal proceeding to attend a settlement conference. The judge sets the time and place and gives the parties reasonable written notice. (*Govt.C. 11511.7(a).*) All or part of the conference may be conducted by telephone, television, or other electronic means if each participant has an opportunity to participate and to hear the entire proceeding while it is taking place. (*Govt.C. 11511.7(b).*) The settlement conference may, but need not, be separate from the prehearing conference (*supra*, §104), at which exploration of settlement issues may occur. (Law Rev. Com. Comment to *Govt.C. 11511.7*; see C.E.B., *Administrative Hearing Practice* 2d, §6.88 et seq.; 27 *Pacific L. J.* 948.)

The judge at the settlement conference may not preside at the hearing unless the parties so stipulate. (*Govt.C. 11511.7(b).*)

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8. Hearing.

a. Time and Place.

9 *Witkin Cal. Proc. Admin Proc* § 106

[§ 106] Time and Place.

(1) *Time of Hearing.* A formal hearing may not be held prior to the expiration of the time within which the respondent is entitled to file a notice of defense (*supra*, §100). (*Govt.C. 11509*; see C.E.B., *Administrative Hearing Practice* 2d, §§6.32, 6.33; 27 *Pacific L. J.* 946.)

(2) *Place of Hearing.* The hearing is held at a hearing facility maintained by the agency in Sacramento, Oakland, Los Angeles, or San Diego that is closest to the location where the transaction occurred or the respondent resides. (*Govt.C. 11508(a)*.) However, notwithstanding *Govt.C. 11508(a)*, the hearing also may be held (a) at a place selected by the agency that is closer to the location where the transaction occurred or the respondent resides, or (b) at a place within the state selected by agreement of the parties. (*Govt.C. 11508(b)*.) (See *Campbell v. Board of Dental Examiners* (1971) 17 *C.A.3d* 872, 876, 95 *C.R.* 351 [hearing was properly held in San Diego County where respondent was in custody there]; C.E.B., *Administrative Hearing Practice* 2d, §6.34 et seq.; 27 *Pacific L. J.* 946.)

(3) *Change of Venue.* The respondent, within 10 days after service of the notice of hearing (*infra*, §107), may move for a change in the place of the hearing. The administrative law judge has discretion to grant or deny the motion. Unless good cause is identified in writing by the administrative law judge, the hearing must be held in a facility maintained by the agency. (*Govt.C. 11508(c)*.) Grounds for change of venue include selection of an improper county and promotion of the convenience of witnesses and the ends of justice. The judge, in making the determination, may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. (Law Rev. Com. Comment to *Govt.C. 11508*; see C.E.B., *Administrative Hearing Practice* 2d, §6.36; on grounds for change of venue in civil actions, see *C.C.P.* 397, 3 *Cal. Proc.* (5th), *Actions*, §905.)

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8. Hearing.

b. Notice of Hearing.

9 *Witkin Cal. Proc. Admin Proc* § 107

[§ 107] Notice of Hearing.

The agency must send all parties notice of the time and place of hearing at least 10 days before the hearing. (*Govt.C. 11509*; see *Rudolph v. Athletic Com. of Calif. (1960) 177 C.A.2d 1, 12, 1 C.R. 898* [statute applied by analogy to agency not subject to A.P.A.].) A form for the notice is set forth in *Govt.C. 11509*. (See C.E.B., *Administrative Hearing Practice* 2d, §6.37; *27 Pacific L. J. 945*; on third party participation, not provided for in the A.P.A., see *47 Cal. L. Rev. 747*; and see generally *2 Am.Jur.2d (2004 ed.), Administrative Law* §288 et seq.)

Govt.C. 11509 does not expressly require proper addressing and prepayment of postage; hence, there is substantial compliance with the statute if the notice is mailed and received in the normal time, despite an incorrect address and insufficient postage. (*Governing Bd. of Palos Verdes Peninsula Unified School Dist. v. Felt (1976) 55 C.A.3d 156, 163, 127 C.R. 381.*)

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8. Hearing.

c. Continuance.

9 *Witkin Cal. Proc. Admin Proc* § 108

[§ 108] Continuance.

(1) *Authority To Order*. The agency may grant continuances. Once an administrative law judge has been assigned to the hearing, only the judge or the presiding judge of the appropriate regional office of the Office of Administrative Law may grant a continuance, and only on a showing of good cause. (*Govt.C. 11524(a)*; see C.E.B., *Administrative Hearing Practice* 2d, §6.65 et seq.)

In *Powers v. Commission on Professional Competence* (1984) 157 C.A.3d 560, 204 C.R. 185, the administrative law judge, facing a congested calendar, ordered a continuance on his own motion, after one witness was sworn and was asked six fundamental questions. *Held*, the order was within the judge's power under *Govt.C. 11524*. (a) The procedure of commencing a trial in this manner, sanctioned by *Hartman v. Santamarina* (1982) 30 C.3d 762, 765, 180 C.R. 337, 639 P.2d 979 (6 Cal. Proc. (5th), *Proceedings Without Trial*, §377), may be used in an administrative proceeding. (157 C.A.3d 569.) (b) An administrative law judge has authority to continue a hearing on his or her own motion. (157 C.A.3d 570.) (See *Wilmot v. Commission on Professional Competence* (1998) 64 C.A.4th 1130, 1140, 75 C.R.2d 656 [for jurisdictional purposes, parties could stipulate to commencing dismissal hearing before expiration of statutory time limit, and to reconvening hearing later; citing *Powers*].)

In *Arnett v. Office of Administrative Hearings* (1996) 49 C.A.4th 332, 56 C.R.2d 774, a continuance granted to a party to an administrative disciplinary proceeding until his release from out-of-state incarceration was held an abuse of discretion. In exercising the power to grant continuances, an administrative law judge "must be guided by the same principles applicable to continuances generally in adjudicative settings." Continuances must be granted sparingly and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and obviously there must be a substantial showing of necessity to support a continuance into the indefinite future. Here, the continuance was based solely on incarceration; this is not good cause for a continuance and it was an abuse of discretion to grant an indefinite continuance on that basis. (49 C.A.4th 342, citing the text.)

(2) *Application*. A party seeking a continuance must apply within 10 working days following the time he or she discovers or should have discovered the event or occurrence that establishes good cause; but a continuance may be

granted after that time if the party is not responsible for, and has made a good faith effort to prevent, the condition or event. (*Govt.C. 11524(b)*; see *C.E.B., Administrative Hearing Practice* 2d, §6.71 et seq.)

(3) *Judicial Review of Denial.* If a continuance is denied, a party seeking judicial review must apply for "appropriate judicial relief in the superior court" within 10 working days of the denial or "be barred from judicial review thereof as a matter of jurisdiction." The agency and other parties must be notified, either orally at the time the continuance is denied or in writing at the time application is made in court for judicial relief. (*Govt.C. 11524(c)*; see *C.E.B., Administrative Hearing Practice* 2d, §6.76.; on judicial review of adjudicative proceedings generally, see *infra*, §148 et seq.)

(4) *Extension Where Attorney Is Legislator.* A party before a state administrative agency whose attorney of record is a member of the Legislature is entitled to a mandatory extension of time when the Legislature or a legislative committee of which the attorney is a member is in session. (*C.C.P. 1054.1*; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §18.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authority To Order.* *Bussard v. Department of Motor Vehicles* (2008) 164 C.A.4th 858, 79 C.R.3d 414, involved a proceeding by the Department of Motor Vehicles (DMV) to determine whether a motorist's driver's license should be suspended for driving with a blood-alcohol content in excess of 0.08%. A deputy sheriff stopped the motorist after observing him making a left turn against a red light and driving on the wrong side of the street. During the traffic stop, the deputy observed that the motorist appeared intoxicated, and contacted the California Highway Patrol (CHP) to send an officer to take over the case. A CHP officer arrived on the scene, arrested the motorist, and prepared an officer's statement and arrest report containing statements by the deputy. At the administrative hearing, the motorist objected to the documents on the ground of hearsay, and argued that the deputy's statements were not admissible under the public employee records hearsay exception without proof that the deputy was on duty when he observed the motorist. The hearing officer continued the hearing in order to subpoena the deputy. *Held*, the continuance was properly granted.

(a) Based on the arrest report and statement, it was reasonable to believe that the deputy was on duty at the time he observed the motorist's driving. When that question was raised for the first time at the hearing, it was an unexpected development and "not ... a situation in which the DMV was lacking in diligence or negligently unprepared." Thus, it was well within the hearing officer's discretion to allow the deputy to testify, in an abundance of caution, to confirm that he was on duty. (164 C.A.4th 865.)

(b) The motorist was not prejudiced by the continuance, because he "ultimately received a fair hearing and the suspension of his license was *stayed* until after the DMV issued its findings and decision." (164 C.A.4th 865.)

(c) *Veh.C. 14104.5* authorizes a DMV hearing officer at a license suspension hearing to issue a subpoena after the hearing is commenced. (164 C.A.4th 865.) "This section clearly evidences the Legislature's intent to give the DMV hearing officer reasonable flexibility to issue subpoenas *after* the hearing has commenced, in order to obtain witness testimony or documents." (164 C.A.4th 866.)



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8. Hearing.

d. Conduct of Hearing.

9 *Witkin Cal. Proc. Admin Proc* § 109

[§ 109] Conduct of Hearing.

(1) *Who Conducts Hearing.* Formal hearings in contested cases must be conducted by administrative law judges on the staff of the Office of Administrative Hearings (*supra*, §58). (*Govt.C. 11502(a), 11512(a)*; on qualifications of judge, see *Govt.C. 11502(b)*, *supra*, §58; see also C.E.B., Administrative Hearing Practice 2d, §7.6.) The agency itself may originally hear a contested case, or alternatively, at the discretion of the agency, an administrative law judge may originally hear the case. (*Govt.C. 11517(a)*.) If the case is originally heard before the agency itself, an administrative law judge must be present during the consideration of the case and assist and advise the agency on request. (*Govt.C. 11517(b)(1)*.) The judge hears the case alone unless the agency decides to hear the case with the judge. (*Govt.C. 11512(a)*.) Where the agency itself commences to hear the case but fails to maintain a quorum of agency members, the administrative judge who is presiding completes the hearing as if sitting alone. (*Govt.C. 11512(e)*.)

Failure to provide an administrative law judge where one is required is a ground for nullifying an agency's action for lack of jurisdiction. In such a case, the reviewing court must remand the matter to the agency for further consideration. (*Usher v. Monterey* (1998) 65 C.A.4th 210, 216, 76 C.R.2d 274 [hearing officer lacked jurisdiction to conduct appeal hearing of county decision denying retirement disability benefits where conduct of hearing by administrative law judge was statutorily required]; *Langan v. El Monte* (2000) 79 C.A.4th 608, 615, 94 C.R.2d 254 [following *Usher*].)

(2) *Powers of Judge Hearing Case Alone.* An administrative law judge hearing a case alone exercises all powers related to the conduct of the hearing. (*Govt.C. 11512(b)*; on power to administer oaths, see *Govt.C. 11528*.) However, a motion in the nature of nonsuit may not be entertained by a judge hearing the case alone. (*Frost v. State Personnel Bd.* (1961) 190 C.A.2d 1, 6, 11 C.R. 718; *O'Mara v. California State Bd. of Pharmacy* (1966) 246 C.A.2d 8, 11, 54 C.R. 862; on nonsuit in civil actions, see 7 *Cal. Proc.* (5th), *Trial*, §406 et seq.) A ruling by the judge on admission or exclusion of evidence is subject to agency review in the same manner and to the same extent as the judge's proposed decision in the proceeding. (*Govt.C. 11512(b)*; on agency review of proposed decision, see *infra*, §113; see also *Fireman's Fund Ins. Cos. v. Quackenbush* (1997) 52 C.A.4th 599, 606, 60 C.R.2d 732, 9 *Cal. Proc.* (5th), *Appeal*, §736 [*Govt.C. 11512(b)*, subjecting administrative law judge's evidentiary rulings to agency review, does not authorize that review while hearing is still pending].)

In *Duarte & Witting v. New Motor Vehicle Bd.* (2002) 104 C.A.4th 626, 128 C.R.2d 501, plaintiff car dealer sought administrative mandamus to compel defendant New Motor Vehicle Board to hold an evidentiary hearing on a car manufacturer's termination of plaintiff's franchise for a particular type of vehicle. The manufacturer had notified plaintiff that it was ceasing production of this type of vehicle. Plaintiff filed a protest with defendant, but the administrative law judge granted the manufacturer's motion to dismiss the protest. The trial judge issued a judgment denying plaintiff's petition. *Held*, affirmed.

(a) While defendant did not have express statutory authority to dismiss plaintiff's protest, defendant had implied authority to do so where the undisputed facts demonstrated good cause for the franchise termination as a matter of law and afforded no basis for preventing termination of the franchise. (104 C.A.4th 638.)

(b) *Frost, supra*, which held that a motion in the nature of a nonsuit may not be entertained by a judge hearing the case alone, is distinguishable. Unlike in *Frost*, there was no need to weigh any evidence here because it was undisputed that the manufacturer was ceasing production of the type of vehicle at issue. Moreover, any evidence of the factors set out in *Veh.C. 3061* (determination whether good cause supports termination of automobile franchise) would have been irrelevant because the manufacturer had ceased production. (104 C.A.4th 641.)

(3) *Powers of Agency Hearing Case*. Where the agency itself hears the case, the judge (a) presides, (b) rules on the admission and exclusion of evidence, and (c) advises the agency on matters of law. The agency exercises all other powers relating to the conduct of the hearing, but may delegate any or all of them to the judge. (*Govt.C. 11512(b)*.)

(4) *Method of Reporting Hearing*. The proceedings at the hearing must ordinarily be reported by a stenographic reporter. However, on the consent of all parties, the proceedings may be reported electronically. (*Govt.C. 11512(d)*); see C.E.B., Administrative Hearing Practice 2d, §§6.85, 7.33.)

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8. Hearing.

e. Disqualification of Judge or Agency Member.

9 Witkin Cal. Proc. Admin Proc § 110

[§ 110] Disqualification of Judge or Agency Member.

An administrative law judge or agency member must voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification. These include bias, prejudice, or interest (*Govt.C. 11425.40*, supra, §70), or receipt of ex parte communications (*Govt.C. 11430.60*, supra, §74), by a presiding officer. (*Govt.C. 11512(c)*; Law Rev. Com. Comment to *Govt.C. 11512*; see C.E.B., Administrative Hearing Practice 2d, §§6.19 et seq., 7.9 et seq.)

The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record. (*Govt.C. 11512(c)*.)

Any party may request disqualification by filing an affidavit, prior to the taking of evidence at a hearing, stating the grounds with particularity. Where the request concerns an agency member, the issue must be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue is determined by the agency if the agency itself hears the case with the judge, and by the judge if the judge hears the case alone. (*Govt.C. 11512(c)*.)

No agency member may withdraw voluntarily or be disqualified if disqualification would prevent the existence of a quorum qualified to act in the particular case, except that a substitute qualified to act may be appointed by the appointing authority. (*Govt.C. 11512(c)*.) In cases where there is no appointing authority, e.g., the agency member is an elected official, this "rule of necessity" still applies and the agency member may not withdraw or be disqualified. (Law Rev. Com. Comment to *Govt.C. 11512*.)

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8. Hearing.

f. Evidence.

9 *Witkin Cal. Proc. Admin Proc* § 111

[§ 111] Evidence.

(1) *In General.* The technical rules of evidence do not apply at the hearing, although the rights to examine and cross-examine witnesses, to introduce exhibits, and to rebut evidence are safeguarded. (*Govt.C. 11513(a)*, (b), (c); see C.E.B., *Administrative Hearing Practice* 2d, §7.63 et seq.; 27 *Pacific L. J.* 951; on use of affidavits in lieu of oral testimony, see *Govt.C. 11514*; on official notice of generally accepted technical or scientific matter within agency's special field or fact that may be judicially noticed, see *Govt.C. 11515*.)

"Any relevant evidence" of the sort "on which responsible people are accustomed to rely in the conduct of serious affairs" may be admitted, regardless of common law or statutory rules governing the admission of evidence in civil actions. (*Govt.C. 11513(c)*; see *Mohilef v. Janovici* (1996) 51 C.A.4th 267, 295, 58 C.R.2d 721 [administrative agency may properly see evidence that would be inadmissible in court of law, e.g., letters of complaint in public nuisance abatement proceeding]; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1313, 64 C.R.2d 705, supra, §74 [ex parte communication did not violate *Govt.C. 11513*, which in effect limits evidence to admissible evidence introduced at hearing, where information was not considered by administrative law judge for its bearing on issues]; for restrictions on evidence of prior sexual history and on evidence of sympathy expressed to accident victims, see supra, §93.) However, hearsay evidence "over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (*Govt.C. 11513(d)* [objection is timely if made before submission or on reconsideration or other administrative review]; see 8 *Loyola L.A. L. Rev.* 632 [sufficiency of uncorroborated hearsay].) (For full discussion of evidence in administrative proceedings, see 1 *Cal. Evidence* (4th), *Introduction*, §52 et seq.)

(2) *Burden of Proof.* Under *Ev.C. 115* (1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §35), the standard of proof at an administrative hearing is proof by preponderance of the evidence, "[e]xcept as otherwise provided by law." (*San Benito Foods v. Veneman* (1996) 50 C.A.4th 1889, 1892, 58 C.R.2d 571.)

(3) *No Waiver by Failing To Object.* An objection to improper evidence introduced in an administrative proceeding need not be raised to preserve the issue for judicial review. (*McNary v. Department of Motor Vehicles* (1996) 45 C.A.4th 688, 695, 53 C.R.2d 55 [Department of Motor Vehicles did not waive valid objection to introduction of

toxicologist's declaration at license suspension hearing by failure to raise question there].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Burden of Proof*. See *Lopez v. Imperial County Sheriff's Office* (2008) 165 C.A.4th 1, 4, 80 C.R.3d 557 [where vote in disciplinary proceeding was tied, burden of proof requirement mandated re-vote]. (3) *No Waiver by Failing To Object*. The 1997 Legislature abrogated the holding in *McNary v. Department of Motor Vehicles* (1996) 45 C.A.4th 688, 53 C.R.2d 55, text, p. 1238. As amended, *Govt.C. 11513(d)* now provides that a hearsay objection must be made at the administrative hearing to preserve the issue for judicial review. (See *Dibble v. Gourley* (2002) 103 C.A.4th 496, 501, 503, 126 C.R.2d 709 [although arresting officer's unsworn report would have been inadmissible, over objection, in administrative hearing concerning suspension of driver's license, driver waived objection by failing to attend].)



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9. Default.

9 *Witkin Cal. Proc. Admin Proc* § 112

[§ 112] Default.

(1) *In General.* If the respondent in a formal proceeding (a) fails to file a notice of defense (*supra*, §100) or (b) fails to appear at the hearing, "the agency may take action based upon the respondent's express admissions or upon other evidence." Affidavits may be used as evidence without notice to the respondent. Where the burden is on the respondent to show entitlement to the agency action sought, the agency may act without taking evidence. (*Govt.C. 11520(a)*; see C.E.B., *Administrative Hearing Practice* 2d, §4.48 et seq.; 27 *Pacific L. J.* 951.)

(2) *Waiver of Default and Imposition of Costs.* Notwithstanding the respondent's default, the agency or the administrative law judge has discretion to grant a hearing on reasonable notice to the parties. If the agency and judge make conflicting orders, the agency's order takes precedence. The respondent, his or her attorney or other representative, or both, may be ordered to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of the default. (*Govt.C. 11520(b)*.)

(3) *Vacation of Default.* Within 7 days after service on the respondent of a default decision, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency has discretion to vacate the decision and grant a hearing on a showing of good cause, which includes, but is not limited to: (a) the person's failure to receive notice; or (b) mistake, inadvertence, surprise, or excusable neglect. (*Govt.C. 11520(c)*.)

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10. Decision.

a. Rendition.

9 Witkin Cal. Proc. Admin Proc § 113

[§ 113] Rendition.

(1) *Case Heard by Administrative Law Judge Alone.* If a contested case is heard by an administrative law judge alone (supra, §109), he or she must prepare a proposed decision within 30 days after the case is submitted. (*Govt.C. 11517(c)(1)*; see C.E.B., *Administrative Hearing Practice* 2d, §8.24 et seq.; on uncontested cases, see supra, §112.) The judge's failure to deliver the proposed decision within the time required does not prejudice the agency's rights in the case. (*Govt.C. 11517(c)(1)*.) Further, the statute does not specify a penalty for a judge's failure to act within the specified time, and therefore the statutory time limit is directory, not mandatory and jurisdictional. (*Anserv Ins. Services v. Kelso* (2000) 83 C.A.4th 197, 207, 99 C.R.2d 357 [also holding that late rendition did not unduly prejudice defendants or deny them due process].)

An administrative law judge who resigns after submission but before decision may not participate in the decision. (*Graves v. Commission on Professional Competence* (1976) 63 C.A.3d 970, 976, 134 C.R. 71.)

(2) *Agency Response to Proposed Decision.* On receiving the proposed decision, the agency may do any of the following:

(a) *Adoption.* The agency may adopt the proposed decision by (1) adopting it in its entirety (*Govt.C. 11517(c)(2)(A)*), (2) reducing or otherwise mitigating the proposed penalty and adopting the balance (*Govt.C. 11517(c)(2)(B)*), or (3) making technical or other minor changes in the proposed decision and adopting it as the decision (*Govt.C. 11517(c)(2)(C)*).

(b) *Reference.* The agency may refer the case to the administrative law judge to take additional evidence and prepare a proposed decision on that evidence and the existing record. The agency may refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge. (*Govt.C. 11517(c)(2)(D)*.)

(c) *Decision.* The agency may decide the case itself on the basis of the record, including the transcript or an agreed statement of the parties, with or without taking additional evidence. The parties may stipulate to a decision without a

transcript. The agency's authority to decide the case itself includes authority to decide some but not all issues. (*Govt.C. 11517(c)(2)(E)*; see *Alford v. Department of Motor Vehicles* (2000) 79 C.A.4th 560, 563, 94 C.R.2d 222 [decided under predecessor statute; agency that elects to decide case itself may adopt administrative law judge's proposed decision but increase penalty].)

In *Hohreiter v. Garrison* (1947) 81 C.A.2d 384, 184 P.2d 323, a hearing officer conducted a hearing on charges against an insurance agent, and prepared a decision recommending revocation of his license. The Insurance Commissioner adopted the decision without reviewing the record. *Held*, the rule of *Morgan v. United States* (1936) 298 U.S. 468, 56 S.Ct. 906, 912, 80 L.Ed. 1288, 1295, and *Morgan v. United States* (1938) 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, 1131, 7 Summary (10th), *Constitutional Law*, §673, that the person who makes the determination must consider the evidence, does not apply where, by statutory authority (*Govt.C. 11517*), the paramount board adopts the decision of the hearing officer. (81 C.A.2d 393.) (See *Cooper v. State Bd. of Med. Examiners of Dept. of Professional & Vocational Standards of Calif.* (1950) 35 C.2d 242, 245, 217 P.2d 630 [approving *Hohreiter*]; *Leeds v. Gray* (1952) 109 C.A.2d 874, 880, 242 P.2d 48 [following *Hohreiter*]; *Dami v. Department of Alcoholic Beverage Control* (1959) 176 C.A.2d 144, 151, 1 C.R. 213 [same]; 38 Cal. L. Rev. 896; 21 So. Cal. L. Rev. 182; 18 A.L.R.2d 606 [administrative decision by officer not present when evidence was taken].)

(3) *Case Heard Before Agency*. If a contested case is heard before the agency itself, an administrative law judge must be present during consideration of the case by the agency and may assist and advise the agency if requested. (*Govt.C. 11517(b)(1)*; see C.E.B., *Administrative Hearing Practice* 2d, §8.12 et seq.) And the agency may delegate fact-finding to an administrative law judge after it has begun a hearing before itself. (*Feist v. Rowe* (1970) 3 C.A.3d 404, 421, 83 C.R.465.)

(4) *Voting by Agency Members*. Agency members qualified to vote on any question may vote "by mail or another appropriate method." (*Govt.C. 11526*; see Law Rev. Com. Comment to *Govt.C. 11526* [telephonic voting is permitted].) An agency member is not qualified to vote when a contested case is heard before the agency itself and the member did not hear the evidence. (*Govt.C. 11517(b)(2)*.)

(5) *Reasons for Decision*. It is preferable that a statement of reasons be formally entered in the agency's resolution and committed to writing. Although this is not essential, the record of the administrative hearing must somehow reflect the basis for the agency's decision in order for the court to scrutinize the substantiality of the evidence supporting that decision. (*McBail & Co. v. Solano County Local Agency Formation Com.* (1998) 62 C.A.4th 1223, 1230, 72 C.R.2d 923 [local agency formation commission's denial of annexation petition was reversed for reconsideration where proper statutory basis for decision was not apparent from record].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Agency Response to Proposed Decision*.

(a) *Adoption*. See *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 C.A.4th 296, 306, 85 C.R.3d 423 [board did not make mere "technical or other minor changes" under *Govt.C. 11517(c)(2)(C)* to ALJ's proposed decision for disciplining therapist; board added 15-page decision with detailed new factual findings and conclusions of law supporting license revocation to ALJ's 4-page proposed decision recommending lesser discipline].

(c) *Decision*. *Govt.C. 11517(c)(2)(E)(ii)* provides that an agency itself may not decide a case originally heard by an administrative law judge without affording the parties the opportunity to present either oral or written argument before the agency itself. In *Ventimiglia v. Board of Behavioral Sciences*, *supra*, the court held that the statute applies to a case before an agency on remand after the issuance of a writ of administrative mandamus. (168 C.A.4th 308.)



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10. Decision.

b. Time for Decision.

9 *Witkin Cal. Proc. Admin Proc* § 114

[§ 114] Time for Decision.

(1) *Issuance of Decision by Agency Hearing Case.* Where the agency itself hears a contested case, the agency must issue its decision within 100 days of submission of the case. (*Govt.C. 11517(b)(3).*)

(2) *Adoption of Proposed Decision of Administrative Law Judge.* A proposed decision of an administrative law judge hearing a contested case alone is deemed adopted by the agency 100 days after receipt unless the agency acts on that decision in one of the statutorily prescribed ways (see *supra*, §113). (*Govt.C. 11517(c)(2)*; see *Boctor v. Los Angeles County Metropolitan Transit Authority* (1996) 48 C.A.4th 560, 571, 55 C.R.2d 861 [statutory time limits did not apply to proceedings of municipal transit agency; *Govt.C. 11500* et seq. do not govern local agencies unless adopted by them]; *Fireman's Fund Ins. Cos. v. Quackenbush* (1997) 52 C.A.4th 599, 604, 60 C.R.2d 732, 9 Cal. Proc. (5th), Appeal, §736 [Insurance Commissioner lacked authority to review administrative law judge's interim evidentiary rulings at rate reduction hearing during the course of that hearing; review could occur only after hearing was concluded].)

Where, however, the agency commences proceedings to decide the case itself, the agency must issue its final decision not later than 100 days after rejection of the proposed decision or, if a transcript is ordered, receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it must issue an order delaying the decision for no more than 30 days; the order must specify the reasons and is reviewable under *Govt.C. 11523* (*infra*, §148 et seq.). (*Govt.C. 11517(c)(2)(E)(iv)*; see *Poliak v. Board of Psychology* (1997) 55 C.A.4th 342, 346, 63 C.R.2d 866 [revocation of psychologist's license was timely where board commenced proceedings within 100 days of receipt of administrative law judge's proposed decision; board's request for transcripts after expiration of statutory period was immaterial]; *St. Francis Med. Center v. Shewry* (2005) 134 C.A.4th 1556, 1559, 1564, 36 C.R.3d 895 [administrative law judge's decision was deemed adopted where agency failed to file final decision within 100 days of its rejection of judge's proposed decision].)

(3) *Dismissal for Delay.* By analogy to the statutes governing civil actions (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §315 et seq.), a court may order an administrative proceeding dismissed for unreasonable delay in prosecution. (See *Pearson v. Los Angeles* (1957) 49 C.2d 523, 539, 319 P.2d 624 [delay caused by requesting party himself was not ground for dismissal]; *Horner v. Board of Trustees of Excelsior Union High School Dist. of Los*

Angeles (1964) 61 C.2d 79, 86, 37 C.R. 185, 389 P.2d 713 [delay caused by uncertainty as to legal right to hearing was not unreasonable].)

In *Gates v. Department of Motor Vehicles* (1979) 94 C.A.3d 921, 156 C.R. 791, the license of petitioner, an automobile dismantler, was revoked for various violations of the Vehicle Code. The trial court found that over 15 months had elapsed between the investigation and the accusation, and that the department witnesses had no recollection of many of the events; hence, the delay prevented petitioner from getting a fair trial. *Held*, judgment granting mandamus affirmed. "[T]he trial court has the inherent power to dismiss administrative proceedings brought to revoke a state-issued license where there has been an unreasonable delay between the discovery of the facts constituting the reason for the revocation and the commencement of revocation proceedings, and where the licensee has been prejudiced by the delay." (94 C.A.3d 925.)

Where there has been an unreasonable delay between discovery of the relevant facts and the commencement of administrative license revocation proceedings, a trial court may dismiss the proceedings for *laches* (see 13 *Summary* (10th), *Equity*, §16 et seq.), but only where there is substantial prejudice. (See *Fahmy v. Medical Bd. of Calif.* (1995) 38 C.A.4th 810, 814, 45 C.R.2d 486 [delay of over 3 years in bringing disciplinary proceeding against physician did not warrant dismissal for laches, where physician did not satisfy burden of showing that he was harmed by delay].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Adoption of Proposed Decision of Administrative Law Judge.*

One-hundred-day deadline where agency decides case itself: See *Matus v. California Public Employees' Retirement System* (2009) 177 C.A.4th 597, 608, 99 C.R.3d 341 [failure of agency to issue final decision within 100 days of rejecting ALJ's decision, or to initiate new 100-day period by ordering transcript of proceedings before ALJ within initial 100-day period, divested agency of authority to hear matter, and required adoption of ALJ's decision].



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10. Decision.

c. Filing and Service.

9 *Witkin Cal. Proc. Admin Proc* § 115

[§ 115] Filing and Service.

A proposed decision (*supra*, §113) must be filed by the agency as a public record and served on the parties within 30 days after receipt from the administrative law judge. Filing and service by the agency of the proposed decision is not an adoption of the proposed decision. (*Govt.C. 11517(c)(1)*; on content of decision, see *Govt.C. 11425.50*, *supra*, §§71, 72.)

The final decision of the agency must be filed and served, in the same manner, "immediately." (*Govt.C. 11517(d)*.) (See C.E.B., *Administrative Hearing Practice* 2d, §8.19; 27 *Pacific L. J.* 952.)

The decision must be delivered to the parties personally or by registered mail. (*Govt.C. 11518*; see *Govt.C. 8311* [certified mail is deemed equivalent to registered mail].) The decision does not become effective, so as to start the 30-day period for a petition for administrative mandamus (*infra*, §149), until the date of mailing or delivery. (*Koons v. Placer Hills Union School Dist.* (1976) 61 *C.A.3d* 484, 490, 132 *C.R.* 243; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §307.)

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10. Decision.

d. Correction.

9 Witkin Cal. Proc. Admin Proc § 116

[§ 116] Correction.

(1) *On Application by Party.* A party may apply to the agency for correction of a mistake or clerical error in the decision. (*Govt.C. 11518.5(a)*; see *Govt.C. 11500(b)* ["party" includes agency that is party to proceedings].) The application must be made not later than the effective date of the decision and within 15 days after service of the decision on the party, and it must state the specific ground on which it is made. Notice must be given to the other parties. (*Govt.C. 11518.5(a)*.)

The agency may refer the application to the administrative law judge who formulated the proposed decision or may delegate its authority to one or more persons. (*Govt.C. 11518.5(b)*.) It may deny the application or grant the application and either modify the decision or set the matter for further proceedings. (*Govt.C. 11518.5(c)*.) The application is considered denied if the agency does not dispose of it within 15 days after it is made or a longer time provided by agency regulation. (*Govt.C. 11518.5(c)*; see 27 *Pacific L. J.* 953.)

The application is not a prerequisite for seeking judicial review. (*Govt.C. 11518.5(a)*; on judicial review of administrative adjudications generally, see *infra*, §148 et seq.)

(2) *On Court's Own Motion.* Before the 1995 revision, an administrative tribunal exercising quasi-judicial functions was deemed to have the same power to correct clerical errors as a court. (See *Russ v. Smith* (1968) 264 *C.A.2d* 385, 391, 70 *C.R.* 813 [disciplinary proceeding against realtor; hearing officer made nunc pro tunc correction of original recommendation]; on court's power, see 7 *Cal. Proc.* (5th), *Judgment*, §67.) The present rule is stated in *Govt.C. 11518.5*: "Nothing in this section precludes" the agency, on its own motion or that of the administrative law judge, from modifying a decision to correct a mistake or clerical error. However, modification must be made "within 15 days after issuance of the decision." (*Govt.C. 11518.5(d)*.)

(3) *Service of Correction.* The agency must, within 15 days after correction of a mistake or clerical error, serve a copy of the correction on all parties who were served with copies of the decision. (*Govt.C. 11518.5(e)*; on service of decision, see *supra*, §115.)

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10. Decision.

e. Effect, Enforcement, and Stay.

9 *Witkin Cal. Proc. Admin Proc* § 117

[§ 117] Effect, Enforcement, and Stay.

(1) *When Decision Is Effective.* A decision becomes effective 30 days after it is delivered or mailed to the respondent unless the agency (a) orders a reconsideration (*infra*, §118) within that time, (b) grants a stay of execution, or (c) orders that the decision become effective sooner. (*Govt.C. 11519(a)*; see C.E.B., *Administrative Hearing Practice* 2d, §8.61 et seq.)

(2) *When Decision Is Enforceable.* The person to whom the agency action is directed may not be required to comply unless he has been served with the decision as provided in *Govt.C. 11505* (*supra*, §98) or has actual knowledge of the decision. (*Govt.C. 11519(e)*.) A nonparty may not be required to comply unless the agency has made the decision available for public inspection and copying or the nonparty has actual knowledge of the decision. (*Govt.C. 11519(f)*.) "Actual knowledge" requires not only knowledge that the decision has been issued, but also knowledge of the decision's general contents. (Law Rev. Com. Comment to *Govt.C. 11519*.) However, these provisions do not preclude the agency from taking immediate action under the emergency decision procedure of *Govt.C. 11460.10* (*supra*, §§80, 81). (*Govt.C. 11519(g)*.)

(3) *Stay of Execution.* A stay of execution may be included in the decision or ordered by the agency before the decision becomes effective. It may be conditioned on specified terms of probation, which must be "just and reasonable in the light of the findings and decision." (*Govt.C. 11519(b)*; see *Governing Bd. of Chaffey Union High School Dist. v. Commission on Professional Competence* (1977) 72 C.A.3d 447, 458, 461, 140 C.R. 206 [permanent stay of dismissal of certified teacher conditioned on 2 years' actual suspension]; C.E.B., *Administrative Hearing Practice* 2d, §8.68 et seq.) Specified terms of probation may include an order of restitution. (*Govt.C. 15119(d)*.)

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11. Reconsideration.

9 *Witkin Cal. Proc. Admin Proc* § 118

[§ 118] Reconsideration.

The agency may order reconsideration of all or part of a case, either on its own motion or on the motion of a party, and may reconsider the case itself or assign it to an administrative law judge. (*Govt.C. 11521*; see *In re Fain* (1976) 65 C.A.3d 376, 389, 135 C.R. 543 [parole rescission by Adult Authority]; C.E.B., Administrative Hearing Practice 2d, §8.87 et seq.; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §378 et seq.; 73 *A.L.R.2d* 939 [power in absence of statute].)

The power to order reconsideration expires (1) 30 days after delivery or mailing of the decision to the respondent, (2) on an earlier date on which the decision becomes effective, or (3) on the termination of a stay of no more than 30 days granted for the purpose of filing an application for reconsideration. The agency may grant an additional stay of no more than 10 days to evaluate a petition for reconsideration. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is deemed denied. (*Govt.C. 11521(a)*; see *Koehn v. State Bd. of Equalization, Dept. of Alcoholic Beverage Control* (1958) 166 C.A.2d 109, 114, 333 P.2d 125 [board may grant stay at any time before effective date of decision even though petition for reconsideration has already been filed]; *Gamm v. Board of Med. Quality Assur.* (1982) 129 C.A.3d 34, 37, 181 C.R. 23 [granting reconsideration requires timely board order; mere agreement by members is insufficient].)

The plain language of *Govt.C. 11521(a)* dictates that the maximum 30-day stay is for purposes of filing an application for reconsideration. Once a petition for reconsideration has been filed, any stay that is granted is solely for the purpose of considering the petition and must be limited to 10 days. (*Bonnell v. Medical Bd. of Calif.* (2003) 31 C.4th 1255, 1262, 8 C.R.3d 532, 82 P.3d 740.)

A case reconsidered by the agency itself is determined on the basis of "all the pertinent parts of the record and such additional evidence and argument as may be permitted." A reconsideration assigned to an administrative law judge is subject to the procedure provided in *Govt.C. 11517* (supra, §113) for such assignments at the original hearing. If oral evidence is introduced before the agency itself, members may not vote unless they have heard the evidence. (*Govt.C. 11521(b)*.)

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12. Reinstatement of License or Reduction of Penalty.

9 Witkin Cal. Proc. Admin Proc § 119

[§ 119] Reinstatement of License or Reduction of Penalty.

Unless the statutes governing the agency provide otherwise, a person whose license has been suspended or revoked in a formal proceeding may petition the agency for reinstatement after at least 1 year has elapsed from the effective date of the revocation or suspension or of denial of a similar petition. The Attorney General is entitled to notice, and both the petitioner and the Attorney General must be afforded an opportunity to present oral or written argument before the agency. The agency itself must determine the petition and any terms and conditions, and the decision must include a statement of reasons. (*Govt.C. 11522.*) (See C.E.B., Administrative Hearing Practice 2d, §9.2 et seq.)

The same rules apply to a petition for the reduction of a penalty. (*Govt.C. 11522.*)

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IV. JUDICIAL REVIEW

A. In General.

1. Nature of Review.

9 *Witkin Cal. Proc. Admin Proc* § 120

[§ 120] Nature of Review.

The decisions of administrative agencies exercising quasi-judicial or quasi-legislative powers are usually, though not invariably, subject to judicial review. (See, e.g., *Federal Communications Com. v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 60 S.Ct. 437, 441, 84 L.Ed. 656, 662; *Dunlop v. Bachowski* (1975) 421 U.S. 560, 95 S.Ct. 1851, 1853, 44 L.Ed.2d 377, 380 [decision not to undertake enforcement action was not reviewable]; *Bixby v. Pierno* (1971) 4 C.3d 130, 131, 93 C.R. 234, 481 P.2d 242; *Jameson v. Board of Dental Examiners* (1931) 118 C.A. 105, 107, 5 P.2d 47; *Board of Administration v. Superior Court* (1975) 50 C.A.3d 314, 316, 123 C.R. 530 [no review of "physical and mental processes" by which agency reaches its decision]; *Apte v. Regents of Univ. of Calif.* (1988) 198 C.A.3d 1084, 1091, 244 C.R. 312; *Traverso v. People* (1996) 46 C.A.4th 1197, 1210, 54 C.R.2d 434; 2 *Pierce*, Admin. Law 4th, Chap. 11; C.E.B., *Administrative Hearing Practice* 2d, §8.102 et seq.; 87 *Cal. L. Rev.* 613 [review by federal courts of state or local administrative action]; 71 *Harv. L. Rev.* 401, 769 [exhaustive study]; 81 *Harv. L. Rev.* 1325 [suggesting intermediate appellate review boards]; 93 *Harv. L. Rev.* 1735 [venue for judicial review of actions of federal agencies]; 98 *Harv. L. Rev.* 507; 38 *Hastings L. J.* 1233 [administrative deregulation]; 10 *Santa Clara Lawyer* 276 [state practice]; 69 *So. Cal. L. Rev.* 431 [judicial deference to agency action]; 39 *U.C.L.A. L. Rev.* 1193 [coordinating judicial review of administrative proceedings]; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §402 et seq.; on tort actions against governmental entities and their employees, see 5 *Summary* (10th), *Torts*, §203 et seq.)

Considerable litigation and comment has been directed to review of decisions by particular kinds of agencies and in particular substantive areas. (See *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 91 S.Ct. 814, 823, 28 L.Ed.2d 136, 153 [district court must conduct "a substantial inquiry" in reviewing informal agency action regarding highway location]; *Heckler v. Chaney* (1985) 470 U.S. 821, 105 S.Ct. 1649, 1651, 84 L.Ed.2d 714, 717 [review of decisions of Alcoholic Beverage Control Appeals Board]; *Franklin v. Massachusetts* (1992) 505 U.S. 788, 112 S.Ct. 2767, 2775, 2776, 120 L.Ed.2d 636, 650 [federal A.P.A. (5 U.S.C., §701 et seq.) does not apply to actions of President]; *Dalton v. Specter* (1994) 511 U.S. 462, 114 S.Ct. 1719, 1728, 128 L.Ed.2d 497, 511 [same]; *Walsh v. Kirby* (1974) 13 C.3d 95, 102, 118 C.R. 1, 529 P.2d 33 [same as *Heckler*]; *Traverso v. People* (1996) 46 C.A.4th 1197, 1210, 54 C.R.2d 434, 8 *Summary* (10th), *Constitutional Law*, §1064 [application for billboard permit]; 81 *Harv. L. Rev.* 1861 [forfeiture of veterans' benefits]; 85 *Harv. L. Rev.* 315 [*Citizens*]; 99 *Harv. L. Rev.* 264 [*Heckler*]; 108 *Harv. L. Rev.* 300 [*Dalton*]; 25 *San Diego L. Rev.* 1 [*Citizens*, *Dunlop*, and *Heckler*]; 46 *So. Cal. L. Rev.* 69 [highway relocation]; 24 *Stanf. L. Rev.*

903 [disputes between athletes and N.C.A.A.]; 39 *U.C.L.A. L. Rev.* 1251 [*Citizens*]; on review of public aid denial, see 7 *Summary* (10th), *Constitutional Law*, §686; on review of disciplinary action against students, see 7 *Summary* (10th), *Constitutional Law*, §688 et seq.; on review of dismissal of professors and schoolteachers, see 7 *Summary* (10th), *Constitutional Law*, §691.)

West's Key Number Digest, Administrative Law and Procedure 651 et seq.

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A. In General.

2. Forms of Relief.

9 *Witkin Cal. Proc. Admin Proc* § 121

[§ 121] Forms of Relief.

Various methods are available for judicial review of administrative action:

(1) *General Methods*. General forms of relief include the following:

(a) *Declaratory relief*. Regulations adopted by state agencies and repealing orders are generally subject to review in actions for declaratory relief. (See *Govt.C. 11350*, *infra*, §§141, 142.)

(b) *Administrative mandamus*. Adjudications of state and local agencies are usually subject to review by administrative mandamus. (See *C.C.P. 1094.5*; *Govt.C. 11523*, *infra*, §148 *et seq.*)

(c) *Ordinary mandamus*. In proper circumstances, review may be available by ordinary mandamus. (See *C.C.P. 1085*, *infra*, §140; *Vernon Fire Fighters v. Vernon* (1980) 107 C.A.3d 802, 803, 165 C.R. 908.)

(d) *Injunction*. In certain circumstances, review may be available by injunction. (See *Agricultural Lab. Rel. Bd. v. Superior Court* (1976) 16 C.3d 392, 401, 128 C.R. 183, 546 P.2d 687, *infra*, §146.)

(e) *Collateral attack*. An administrative decision may be collaterally attacked in the same manner as a judgment. (See *Aylward v. State Bd. of Chiropractic Examiners* (1948) 31 C.2d 833, 835, 192 P.2d 929; on collateral attack on judgments, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §6 *et seq.*)

(2) *Special Procedures for Particular Agencies*. Statutes may prescribe special review procedures for particular agencies. The following are illustrative:

(a) *B. & P.C. 6082* (review of State Bar disciplinary actions by California Supreme Court or Court of Appeal under procedure prescribed by Supreme Court).

(b) *B. & P.C. 23090 et seq.* (review of Alcoholic Beverage Control Appeals Board orders by writ of review in California Supreme Court or Court of Appeal).

(c) *Govt.C. 3520, 3542, 3564* (review of Public Employment Relations Board unit determinations and unfair practice case orders by petition for extraordinary writ in Court of Appeal).

(d) *Lab.C. 1160.8* (review of Agricultural Labor Relations Board decisions by Court of Appeal).

(e) *Lab.C. 5950 et seq.* (review of Workers' Compensation Appeals Board orders, rules, and decisions by writ of review in California Supreme Court or Court of Appeal).

(f) *Pub.Util.C. 1756 et seq.* (review of Public Utilities Commission decisions by writ of review in California Supreme Court or Court of Appeal).

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A. In General.

3. Standing To Obtain Review.

9 *Witkin Cal. Proc. Admin Proc* § 122

[§ 122] Standing To Obtain Review.

A party seeking judicial review of an administrative determination must have standing. (See *Sierra Club v. Morton* (1972) 405 U.S. 727, 92 S.Ct. 1361, 1363, 31 L.Ed.2d 636, 639; *Simon v. Eastern Kentucky Welfare Rights Organization* (1976) 426 U.S. 26, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450, 464; *Duke Power Co. v. Carolina Environmental Study Group* (1978) 438 U.S. 59, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595, 612; *AFL-CIO v. Unemp. Ins. App. Bd.* (1996) 13 C.4th 1017, 1027, 56 C.R.2d 109, 920 P.2d 1314, supra, §61 [labor organization could challenge benefits decision under *Unemp.Ins.C.* 409.2, allowing any "interested person or organization" to seek declaratory relief concerning validity of precedent decision of Unemployment Compensation Appeals Board]; *Associated Calif. Loggers v. Kinder* (1978) 79 C.A.3d 34, 41, 144 C.R. 786; 2 Pierce, Admin. Law 4th, Chap. 16; 76 Cal. L. Rev. 1061 [Standing of Third Parties to Challenge Administrative Agency Actions]; 75 Harv. L. Rev. 255; 90 Harv. L. Rev. 205; 92 Harv. L. Rev. 253; 112 Harv. L. Rev. 1313 ["expressive" or "stigmatic" injuries and standing]; 25 U.C.L.A. L. Rev. 1358 [A Balancing Approach]; 2 Am.Jur.2d (2004 ed.), *Administrative Law* §419 et seq.)

Generally, one seeking review of an administrative decision must be interested in, or aggrieved by, the decision. (See *C.C.P.* 1086 [mandamus issues on petition of party "beneficially interested"]; *Govt.C.* 11350(a) [petitioner for declaration on validity of regulation or order of repeal must be "interested person"]; *Grant v. Board of Med. Examiners* (1965) 232 C.A.2d 820, 827, 43 C.R. 270 [administrative mandamus must benefit petitioner "aggrieved by" decision]; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 C.A.4th 1011, 1017, 50 C.R.2d 892, infra, §142 [organization may be "interested person" under *Govt.C.* 11350(a) if either it or its members may be impacted by regulation]; *Farm Sanctuary v. Department of Food & Agriculture* (1998) 63 C.A.4th 495, 502, 74 C.R.2d 75 [organization opposed to inhumane treatment of farm animals had standing to challenge Department of Food and Agriculture regulation allowing department to approve religious ritualistic slaughter of poultry; organization was appropriate party to defend animals' interests].)

The federal Administrative Procedure Act (5 U.S.C., §702) states the test of standing as follows: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

A person has a sufficient private interest to confer standing if the agency action is directed to that person, or if the

person's interest is over and above that of members of the general public. (*Carsten v. Psychology Examining Committee of Bd. of Med. Quality Assur.* (1980) 27 C.3d 793, 796, 166 C.R. 844, 614 P.2d 276.) Standing is readily recognized where the economic interests of a party are affected. (See *Association of Data Processing Service Organization v. Camp* (1970) 397 U.S. 150, 90 S.Ct. 827, 829, 25 L.Ed.2d 184, 188 [sellers of data processing services had standing to challenge rule of Comptroller of Currency allowing national banks to offer those services]; *Barlow v. Collins* (1970) 397 U.S. 159, 90 S.Ct. 832, 836, 25 L.Ed.2d 192, 198 [tenant farmers had standing to challenge ruling removing financing restrictions, on allegation that under new regulation they would be subject to higher financing rates]; 84 Harv. L. Rev. 177 [*Data Processing* and *Barlow* cases]; 12 Santa Clara Lawyer 124 [same].) However, nonpecuniary interests such as environmental or aesthetic claims are also sufficient. (See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* (1973) 412 U.S. 669, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254, 269 [student environmental group was sufficiently aggrieved to seek injunction against I.C.C. order allowing surcharge to railroads, on allegations of adverse environmental impact on natural resources of area]; *Bozung v. Local Agency Formation Com.* (1975) 13 C.3d 263, 272, 118 C.R. 249, 529 P.2d 1017; *Kane v. Redevelopment Agency of Hidden Hills* (1986) 179 C.A.3d 899, 903, 224 C.R. 922.) Where a public right is involved, a person who lacks a private interest may sometimes nonetheless sue as a citizen to vindicate that public interest. (See, e.g., *Board of Social Welfare v. Los Angeles* (1945) 27 C.2d 98, 101, 162 P.2d 627; *California Homeless & Housing Coalition v. Anderson* (1995) 31 C.A.4th 450, 457, 37 C.R.2d 639.)

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IV. JUDICIAL REVIEW

A. In General.

4. Mootness.

9 *Witkin Cal. Proc. Admin Proc* § 123

[§ 123] Mootness.

Repeal or expiration of an administrative regulation under consideration may render an appeal moot. This is not the case, however, where a material portion of the regulation is reenacted so that the agency or trial court determination concerning that regulation remains in effect after the change. (*Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 C.A.4th 472, 480, 71 C.R.2d 606, *infra*, §132 [appeal from decision invalidating emergency regulation of Fair Political Practices Commission was not moot, despite expiration of that regulation, where commission adopted identical permanent regulation]; on mootness doctrine, see 9 *Cal. Proc. (5th), Appeal*, §749 et seq.)

In re Garcia (1998) 67 C.A.4th 841, 844, 79 C.R.2d 357, was a habeas corpus proceeding brought by an inmate at one correctional facility who was denied permission by a second correctional facility to correspond with an inmate incarcerated at the second facility, pursuant to a regulation of the second facility. *Held*, the petition was not subject to dismissal on the ground of mootness, notwithstanding that the second inmate was no longer housed at the facility that denied permission to correspond. While institutional transfers may have rendered the petition technically moot, the appellate court exercised its inherent discretion to decide the matter, which was of substantial public importance and had already resulted in another petition pending in the appellate court. (67 C.A.4th 843.)

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B. Time of Review.

1. Finality and Ripeness.

9 *Witkin Cal. Proc. Admin Proc* § 124

[§ 124] Finality and Ripeness.

(1) *Final Action Is Required.* Generally an agency action is not reviewable until it is final. (*Board of Med. Quality Assur. v. Superior Court* (1977) 73 C.A.3d 860, 862, 141 C.R. 83; see C.E.B., Administrative Hearing Practice 2d, §§8.103, 8.104.) Thus, an administrative adjudication ordinarily cannot be reviewed by the courts until it is a "final administrative order or decision." (See C.C.P. 1094.5(a); 8 Cal. Proc. (5th), *Extraordinary Writs*, §267 [administrative mandamus].) If the agency has power to rehear or reconsider after it announces its decision, a party must seek a rehearing and await the ruling, unless otherwise provided by statute. (*Alexander v. State Personnel Bd.* (1943) 22 C.2d 198, 200, 137 P.2d 433.) The A.P.A. does provide otherwise: "The right to petition shall not be affected by the failure to seek reconsideration before the agency." (*Govt.C.* 11523, *infra*, §149.)

(2) *Ripeness Doctrine.* Under the ripeness doctrine, a court may deny review where the issues raised by a general challenge to an administrative rule or policy are not sufficiently concrete to allow judicial resolution even in the absence of a precise factual context. The court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 171, 188 C.R. 104, 655 P.2d 306 [general challenge to public access guidelines adopted by California Coastal Commission]; see *California Alliance for Util. Safety & Education v. San Diego* (1997) 56 C.A.4th 1024, 1029, 65 C.R.2d 833, *supra*, §31 [ripeness doctrine did not require citizens filing declaratory action against city for violation of Brown Act open meeting requirements (*supra*, §18 et seq.) to allege and prove pattern or practice of past violations; it was sufficient to allege controversy over whether past violation had occurred]; *Farm Sanctuary v. Department of Food & Agriculture* (1998) 63 C.A.4th 495, 502, 74 C.R.2d 75 [challenge by organization opposed to inhumane treatment of farm animals to Department of Food and Agriculture regulation allowing department to approve religious ritualistic slaughter of poultry was ripe for review; regulation was definitive and final, and imminent injury to poultry would result from delay]; *Santa Teresa Citizen Action Group v. San Jose* (2003) 114 C.A.4th 689, 708, 7 C.R.3d 868 [nuisance action against city for approving extension of water recycling program was not ripe for review; action lacked definiteness and urgency, because there was no evidence that use of water would inevitably contaminate aquifer].)

West's Key Number Digest, Administrative Law and Procedure 722 et seq.

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B. Time of Review.

2. Exhaustion of Administrative Remedies.

9 *Witkin Cal. Proc. Admin Proc* § 125

[§ 125] Exhaustion of Administrative Remedies.

(1) *Requirement.* A party aggrieved by an administrative action must first seek relief before the agency, and is entitled to review of only its final or ultimate decision. Thus, where the statute provides for an initial determination by an administrative officer and an appeal or other review by the board itself, the party must exhaust these administrative remedies before the court will accept his or her application for review. (See *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U.S. 41, 58 S.Ct. 459, 463, 82 L.Ed. 638, 644 [federal district courts lacked jurisdiction to enjoin N.L.R.B. hearing]; *Abelleira v. District Court of App., Third Dist.* (1941) 17 C.2d 280, 292, 109 P.2d 942; *Bockover v. Perko* (1994) 28 C.A.4th 479, 485, 34 C.R.2d 423 [state university employee, put on leave without pay for failure to obtain security clearance, was not excused on due process grounds from utilizing university's grievance procedure before filing suit for back pay, even though she alleged that she was not entitled to subpoena witness or documentary evidence and that administrative decision was advisory only]; *McAllister v. Monterey* (2007) 147 C.A.4th 253, 283, 54 C.R.3d 116, citing the text [property owner's judicial claim that county's approval of neighbor's coastal development project was null and void did not excuse him from complying with requirement that he exhaust administrative remedies by pursuing pending appeal to Coastal Commission to completion]; 2 *Pierce, Admin. Law* 4th, Chap. 15; C.E.B., *Administrative Hearing Practice* 2d, §8.108 et seq.; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §474 et seq.; on exhaustion requirement generally, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §92 et seq.; 3 *Cal. Proc.* (5th), *Actions*, §325 et seq.) To be considered by the reviewing court, the *exact issue* must first have been presented to the agency. (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 C.A.3d 886, 894, 236 C.R. 794.) The exhaustion requirement is jurisdictional, rather than discretionary with the court. (*Abelleira v. District Court of App., supra*, 17 C.2d 291.)

(2) *Exceptions.* The requirement is excused in certain circumstances. (See *Horn v. Ventura* (1979) 24 C.3d 605, 611, 156 C.R. 718, 596 P.2d 1134 [challenge to provision or procedure as unconstitutional on face]; *Common Cause of Calif. v. Board of Supervisors* (1989) 49 C.3d 432, 443, 261 C.R. 574, 777 P.2d 610 [inadequate administrative remedies]; *Ogo Associates v. Torrance* (1974) 37 C.A.3d 830, 834, 112 C.R. 761 [futility, i.e., certainty of administrative denial of requested relief]; *Environmental Law Fund v. Corte Madera* (1975) 49 C.A.3d 105, 113, 122 C.R. 282 [lack of notice]; *Contra Costa v. California* (1986) 177 C.A.3d 62, 73, 222 C.R. 750 [agency lacks subject matter jurisdiction]; on exceptions to exhaustion requirement generally, see 3 *Cal. Proc.* (5th), *Actions*, §336 et seq.) However, neither lack of legal representation in the administrative proceedings, nor misadvice by agency officials as to

the proper method of taking an administrative appeal, excuses failure to exhaust administrative remedies. (*Park Area Neighbors v. Fairfax* (1994) 29 C.A.4th 1442, 1444, 1450, 35 C.R.2d 334.)

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3. Primary Jurisdiction.

a. Nature of Doctrine.

9 Witkin Cal. Proc. Admin Proc § 126

[§ 126] Nature of Doctrine.

Under the doctrine of "primary jurisdiction," a case properly filed in a court may be referred to an administrative agency that also has statutory power to resolve some or all of the issues, where those issues are within the agency's special competence. (*E.B. Ackerman Importing Co. v. Los Angeles* (1964) 61 C.2d 595, 601, 39 C.R. 726, 394 P.2d 566; *Farmers Ins. Exchange v. Superior Court* (1992) 2 C.4th 377, 386, 6 C.R.2d 487, 826 P.2d 730, 3 Cal. Proc. (5th), Actions, §330; on federal doctrine of primary jurisdiction, see 77 Harv. L. Rev. 1037; 11 U.C.L.A. L. Rev. 617.) The doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. (*Farmers Ins. Exchange v. Superior Court*, *supra*, 2 C.4th 391.)

No rigid formula exists for applying the doctrine. Resolution generally hinges on the court's determination, in the exercise of its discretion, of the extent to which the policies advanced by the doctrine are implicated in the particular case. (*Farmers Ins. Exchange v. Superior Court*, *supra*, 2 C.4th 391.)

Courts have often confused the doctrine with the closely related concept of exhaustion of remedies (*supra*, §125). (See Law Rev. Com. Revised Tentative Recommendation on Judicial Review of Agency Action (1996), p. 10, footnote 10 ["Most California primary jurisdiction cases incorrectly describe the issue as one of exhaustion of remedies"].) " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (*United States v. Western Pac. R. Co.* (1956) 352 U.S. 59, 77 S.Ct. 161, 165, 1 L.Ed. 2d 126, 132; *Farmers Ins. Exchange v. Superior Court*, *supra*, 2 C.4th 390 [quoting *Western*].)

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3. Primary Jurisdiction.

b. Procedure on Referral to Agency.

9 Witkin Cal. Proc. Admin Proc § 127

[§ 127] Procedure on Referral to Agency.

In *South Bay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 C.A.4th 1068, 82 C.R.2d 1, plaintiff car dealership sued defendant manufacturer and others, alleging that they engaged in wrongful conduct designed to cause plaintiff's business to fail and to force plaintiff to sell the dealership. The trial judge sustained defendants' demurrers without leave to amend, dismissed the action, and referred the matter to the New Motor Vehicle Board under the doctrine of primary jurisdiction. *Held*, reversed. The referral was inconsistent with dismissal of the action, which rendered the referral ineffective. The proper procedure on referral under the primary jurisdiction doctrine is not to dismiss the action, but to stay it pending resolution of the issues within the administrative body's expertise. (69 C.A.4th 1080.) (See *Wise v. Pacific Gas & Elec. Co.* (1999) 77 C.A.4th 287, 295, 91 C.R.2d 479 (*Wise I*) [fraud and unfair competition action against electric utility was subject to doctrine, and proper procedure was to stay action to permit Public Utility Commission to act]; *Wise v. Pacific Gas & Elec. Co.* (2005) 132 C.A.4th 725, 745, 34 C.R.3d 222 (*Wise II*) [after *Wise I* was reinstated in trial court following administrative agency review, trial judge committed reversible error in dismissing action on ground that doctrine deprived him of jurisdiction]; *AICCO v. Insurance Co. of North America* (2001) 90 C.A.4th 579, 594, 109 C.R.2d 359 [trial judge erred in failing to follow procedure].)

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3. Primary Jurisdiction.

c. Illustrations.

9 Witkin Cal. Proc. Admin Proc § 128

[§ 128] Illustrations.

(1) *Doctrine Applicable*. In the following cases, the doctrine of primary jurisdiction was held applicable:

Jonathan Neil & Associates v. Jones (2004) 33 C.4th 917, 933, 16 C.R.3d 849, 94 P.3d 1055 [primary jurisdiction doctrine, rather than exhaustion of administrative remedies doctrine, applied to action between insurer and trucking company, in which central issue was proper premium to be charged under California Automobile Assigned Risk Plan].

Piscioneri v. Ontario (2002) 95 C.A.4th 1037, 1051, 116 C.R.2d 38, 13 Summary (10th), *Equity*, §17 [in mandamus proceeding by firefighter seeking to require city to conduct hearing on his disability retirement applications, trial judge properly ruled that city's claim that firefighter was guilty of laches should be determined at hearing].

(2) *Doctrine Not Applicable*. In the following cases, the doctrine of primary jurisdiction was held not applicable:

State Farm Fire & Cas. Co. v. Superior Court (1996) 45 C.A.4th 1093, 1111, 53 C.R.2d 229 [trial judge's failure to stay action alleging fraudulent practices by insurer pending investigation and review by Insurance Commissioner was not abuse of discretion].

Miller v. Superior Court (1996) 50 C.A.4th 1665, 1676, 58 C.R.2d 584 [trial judge erred in staying action by car dealership against manufacturer for fraud and unfair business practices, pending review by New Motor Vehicle Board, without considering whether specialized agency review was desirable].

Hardin Oldsmobile v. New Motor Vehicle Bd. (1997) 52 C.A.4th 585, 593, 60 C.R.2d 583 [doctrine did not permit New Motor Vehicle Board to decide automobile franchise dispute, because board had no jurisdiction over claims]; *Tovas v. American Honda Motor Co.* (1997) 57 C.A.4th 506, 511, 67 C.R.2d 145 [following *Hardin*]; *Kemp v. Nissan Motor Corp.* (1997) 57 C.A.4th 1527, 1531, 67 C.R.2d 794 [following *Hardin* and *Tovas*].

Hewlett v. Squaw Valley Ski Corp. (1997) 54 C.A.4th 499, 528, 63 C.R.2d 118 [in unfair competition action against ski resort for cutting down 1,800 trees to develop additional ski run, trial judge properly denied ski resort's motion to defer to Department of Forestry on whether it had violated state forestry laws].

South Bay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 C.A.4th 1068, 1081, 82 C.R.2d 1 [action by car dealership against manufacturer and others, alleging that they engaged in wrongful conduct designed to cause plaintiff's business to fail and to force plaintiff to sell dealership; referral to New Motor Vehicle Board under doctrine was inappropriate because factual issues and common law claims involved were not beyond usual competence of courts].

Tenderloin Housing Clinic v. Astoria Hotel (2000) 83 C.A.4th 139, 142, 98 C.R.2d 924 [trial judge properly declined to stay housing clinic's action against hotel for violating city laws by renting residential units to tourists; neither party had initiated administrative proceeding, and case did not require agency's fact-finding expertise, but rather statutory interpretation appropriate for judicial resolution].

AICCO v. Insurance Co. of North America (2001) 90 C.A.4th 579, 594, 109 C.R.2d 359 [trial judge improperly declined to decide Unfair Competition Law action against insurers, where administrative agencies had already adjudicated relevant issues].

Cundiff v. GTE Calif. (2002) 101 C.A.4th 1395, 1413, 125 C.R.2d 445 [trial judge erred in declining to decide whether telephone companies had deceived customers about equipment rental charges; agency did not have more expertise than judge, and case did not require uniform application of regulatory law].

Palmer v. Regents of Univ. of Calif. (2003) 107 C.A.4th 899, 906, 132 C.R.2d 567 [doctrine has no application to, and thus does not eliminate, requirement that *internal* grievance procedures must be exhausted before pursuing civil action for wrongful termination in violation of public policy].

People v. Beaumont Inv., Ltd. (2003) 111 C.A.4th 102, 126, 3 C.R.3d 429 [doctrine did not preclude judicial determination whether mobilehome park landlords had committed unfair business practice by unlawfully forcing tenants to accept long-term leases to avoid rent control in violation of city ordinance; construing ordinance is "inherently judicial function"].

Donabedian v. Mercury Ins. Co. (2004) 116 C.A.4th 968, 987, 11 C.R.3d 45 [doctrine did not preclude judicial determination whether insurer had committed unfair business practice by using automobile insurance applicant's lack of prior insurance in determining eligibility for good driver discount, in violation of Proposition 103].

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B. Time of Review.

4. Statutes of Limitations.

9 *Witkin Cal. Proc. Admin Proc* § 129

[§ 129] Statutes of Limitations.

The periods of limitation for judicial review of administrative determinations are sometimes prescribed by statute:

- (1) *Adjudications under the A.P.A.*: 30 days. (*Govt.C. 11523*, *infra*, §148 et seq.)
- (2) *Certain adjudications by local agencies other than school districts*: 90 days. (*C.C.P. 1094.6*.)
- (3) *Agricultural Labor Relations Board proceedings*: 30 days. (*Lab.C 1160.8*.)
- (4) *Department of Motor Vehicles proceedings*: 90 days after notice of driver's license order. (*Veh.C. 14401(a)*.)
- (5) *Department of Social Services proceedings*: 1 year. (*Welf.C. 10962*.)
- (6) *Public Employment Relations Board proceedings*: 30 days. (*Govt.C. 3520(c)*, *3542(c)*, *3564(c)*.)
- (7) *Unemployment Insurance Appeals Board proceedings*: 6 months. (*Unemp.Ins.C. 410*.)
- (8) *Workers' Compensation Appeals Board proceedings*: 45 days. (*Lab.C 5950*.)
- (9) *Zoning Board proceedings*: 90 days. (*Govt.C. 65009(c)(1)(E)*.)

In the absence of these or other special statutes, the general statutes of limitation apply to the review of administrative decisions. The applicable period depends on the nature of the right or obligation to be enforced by judicial action. (See *Green v. Obledo* (1981) 29 C.3d 126, 140, 172 C.R. 206, 624 P.2d 256 [applying 3-year period of C.C.P. 338(a) for "action upon a liability created by statute"]; *Allen v. Humboldt County Bd. of Supervisors* (1963) 220 C.A.2d 877, 885, 34 C.R. 232 [applying 4-year period of C.C.P. 343 for "action for relief not hereinbefore provided for"]; 3 *Cal. Proc.* (5th), *Actions*, §684.)

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C. Standards of Review.

1. Interpretation and Application of Law.

a. Independent Judicial Review.

9 Witkin Cal. Proc. Admin Proc § 130

[§ 130] Independent Judicial Review.

A person aggrieved by an agency determination has a right to independent judicial review of questions of law, such as those dealing with the interpretation and application of statutes or judicial precedents. (*Morris v. Williams* (1967) 67 C.2d 733, 748, 63 C.R. 689, 433 P.2d 697; *Poliak v. Board of Psychology* (1997) 55 C.A.4th 342, 348, 63 C.R.2d 866; see *Quackenbush v. Mission Ins. Co.* (1996) 46 C.A.4th 458, 466, 54 C.R.2d 112 [whether administrative agency properly applies legislative standards, and whether it acts within authority conferred, are questions for judicial determination]; *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 C.A.4th 1179, 1216, 103 C.R.2d 75 [it is not enough for court to determine that statute is ambiguous and that agency's interpretation is reasonable; court must still independently assess whether agency's construction is lawful and whether it deserves deference under circumstances]; 2 Pierce, Admin. Law 4th, Chap. 17; 69 Harv. L. Rev. 239; 51 Hastings L. J. 255 [Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules]; 29 So. Cal. L. Rev. 434; 2 Am.Jur.2d (2004 ed.), Administrative Law §490 et seq.; cf. *Gai v. Selma* (1998) 68 C.A.4th 213, 219, 79 C.R.2d 910 [trial court's legal conclusions are open to reviewing court's examination to determine if errors of law were committed].)

The following cases illustrate applications of this rule:

20th Century Ins. Co. v. Garamendi (1994) 8 C.4th 216, 271, 32 C.R.2d 807, 878 P.2d 566 [validity of rate regulations].

Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 C.4th 1, 6, 78 C.R.2d 1, 960 P.2d 1031, infra, §139 [interpretive annotations of State Board of Equalization were subject to independent judicial review].

Mohilef v. Janovici (1996) 51 C.A.4th 267, 285, 58 C.R.2d 721 [administrative procedural issues raising pure question of law involving application of due process clause would be reviewed de novo].

Grimes v. State Dept. of Social Services (1999) 70 C.A.4th 1065, 1072, 83 C.R.2d 203 [licensing requirements of California Community Care Facilities Act].

Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 C.A.4th 338, 349, 86 C.R.2d 362 [sales and use tax statutes and regulations].

SUPPLEMENT: [This section is current through the latest supplement]

Illustrative cases: The following case also illustrates application of the rule that a person aggrieved by an agency determination has a right to independent judicial review of questions of law:

Smith v. Selma Community Hosp. (2008) 164 C.A.4th 1478, 1516, 80 C.R.3d 745, citing the text [question whether substantial evidence supported hospital committee's decision to terminate physician's staff privileges based solely on termination of his privileges at two other hospitals].



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C. Standards of Review.

1. Interpretation and Application of Law.
 - b. Deference to Agency's Interpretation.
 1. In General.

9 Witkin Cal. Proc. Admin Proc § 131

[§ 131] In General.

(1) *Nature of Rule.* The courts, in exercising independent judgment (*supra*, §130), must give appropriate deference to the agency's interpretation. (*Bodinson Mfg. Co. v. California Emp. Com.* (1941) 17 C.2d 321, 325, 109 P.2d 935; *Garfield Med. Center v. Belshe'* (1998) 68 C.A.4th 798, 806, 80 C.R.2d 527; *RCJ Med. Services v. Bonta'* (2001) 91 C.A.4th 986, 1004, 111 C.R.2d 223; see *Nipper v. California Auto. Assigned Risk Plan* (1977) 19 C.3d 35, 45, 136 C.R. 854, 560 P.2d 743 [agency interpretation is "significant factor" in ascertaining meaning unless "clearly erroneous"]; 110 Harv. L. Rev. 469 [judicial deference to agency interpretation of federal criminal statute]; on judicial deference to agency's interpretation of its own regulations, see *infra*, §132.)

However, deference should be paid only to the extent appropriate. (*Southern Calif. Edison Co. v. Public Util. Com.* (2000) 85 C.A.4th 1086, 1106, 102 C.R.2d 684.) It is the court that must conclusively interpret and apply the law, and if the Legislature attempted to vest in a commission final authority to pass on legal questions, "the act would clearly be unconstitutional." (*Bodinson Mfg. Co. v. California Emp. Com.*, *supra*, 17 C.2d 325; on exceptions and distinctions to deference rule, see *infra*, §133.)

(2) *Illustrations: Deference Given.* The following decisions illustrate circumstances in which deference has been given:

AFL-CIO v. Unemp. Ins. App. Bd. (1996) 13 C.4th 1017, 1027, 56 C.R.2d 109, 920 P.2d 1314, *supra*, §61 [Unemployment Insurance Appeals Board's interpretation of Unemployment Compensation Code was entitled to great weight and would be accepted unless its application of legislative intent was clearly unauthorized or erroneous].

MHC Operating Ltd. Partnership v. San Jose (2003) 106 C.A.4th 204, 219, 130 C.R.2d 564, citing the text [court was required to defer to city hearing officer's interpretation of city rent control ordinance].

Mason v. Retirement Bd. of San Francisco (2003) 111 C.A.4th 1221, 1228, 4 C.R.3d 619 [city's interpretation that charter did not require city to include cash payments for unused vacation and sick leave when calculating employee

retirement benefits was entitled to substantial deference].

Weinberg v. Cedars-Sinai Med. Center (2004) 119 C.A.4th 1098, 1109, 15 C.R.3d 6, citing the text [under B. & P.C. 809.05 (authority of peer review body or hospital to suspend or restrict staff privileges), court was required to defer to hospital's decision to terminate physician's staff privileges].

California Career Schools v. Department of Motor Vehicles (2004) 120 C.A.4th 10, 15, 15 C.R.3d 813 [court deferred to Department of Motor Vehicle interpretation of Veh.C. 362, defining "house car," where department had special knowledge and expertise and where circumstances indicated that department was probably correct].

Diablo Valley College Faculty Senate v. Contra Costa Community College Dist. (2007) 148 C.A.4th 1023, 1034, 56 C.R.3d 294 [court would accord some weight to Chancellor's interpretation of state regulation requiring collegial consultation for policies relating to academic and professional matters, where Chancellor's careful consideration of issue was shown by his having issued four legal opinions, and where he had consistently interpreted regulation so as not to require collegial consultation for management reorganizations].

(3) *Illustrations: Deference Not Given.* The following cases illustrate circumstances in which deference has not been given:

Bonnell v. Medical Bd. of Calif. (2003) 31 C.4th 1255, 1265, 8 C.R.3d 532, 82 P.3d 740 [court was not required to defer to agency interpretation of statute that was clearly erroneous].

Land v. Anderson (1997) 55 C.A.4th 69, 76, 63 C.R.2d 717 [although contemporaneous construction of new statute by agency charged with its enforcement is entitled to great weight, California Department of Social Services regulations governing federal foster care payments, promulgated decades after federal act authorizing payments, had to yield where contrary legislative purpose was apparent].

Estrada v. Work. Comp. App. Bd. (1997) 58 C.A.4th 1458, 1468, 69 C.R.2d 176 [Workers' Compensation Appeals Board construction of Labor Code to permit settlement of accrued vocational rehabilitation benefits without showing of good faith issue on right to compensation, although entitled to great weight, was invalid where contrary to plain statutory language].

Family Planning Associates Med. Group v. Belshe' (1998) 62 C.A.4th 999, 1004, 73 C.R.2d 221 [Department of Health Services interpretation of Medi-Cal reimbursement regulations, although it carried presumption of correctness and regularity, would not be permitted to eradicate clear language and purpose of regulations].

West's Key Number Digest, Administrative Law and Procedure 754 et seq., 784 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Rule.* See 39 *McGeorge L. Rev.* 977 [summarizing various state approaches, with California's approach described in appendix].



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2. Agency's Interpretation of Its Own Regulations.

9 Witkin Cal. Proc. Admin Proc § 132

[§ 132] Agency's Interpretation of Its Own Regulations.

(1) *In General.* An agency's interpretation of its own regulations is of controlling weight unless plainly erroneous or inconsistent with the regulation. A court may not substitute its independent judgment for that of the agency on the facts or policy considerations involved. (*Calderon v. Anderson* (1996) 45 C.A.4th 607, 613, 52 C.R.2d 846.) The following decisions are illustrative:

Calderon v. Anderson, supra [Department of Social Welfare interpretation of regulations governing In-Home Supportive Services Program].

Department of Alcoholic Beverage Control v. Alcoholic Bev. Control App. Bd. (Anheuser-Busch) (1999) 71 C.A.4th 1518, 1520, 84 C.R.2d 621 [annulling department's order, which was inconsistent with department regulations].

State Farm Mut. Auto. Ins. Co. v. Quackenbush (1999) 77 C.A.4th 65, 71, 91 C.R.2d 381 [Insurance Commissioner's order to implement rate rollback provisions of Proposition 103 (see 2 *Summary* (10th), *Insurance*, §9) was invalid as inconsistent with regulations or with related regulatory scheme].

Simi Corp. v. Garamendi (2003) 109 C.A.4th 1496, 1504, 1 C.R.3d 207 [court was required to defer to Insurance Commissioner's interpretation of regulations about reporting status and experience rating systems of workers' compensation claims].

PG&E Corp. v. Public Util. Com. (2004) 118 C.A.4th 1174, 1195, 13 C.R.3d 630 [although scope of PUC's jurisdiction is legal question subject to independent judicial review, in deciding this issue, courts take into account PUC's interpretation of statutes it is charged to administer, mindful that PUC's interpretation is not controlling but is accorded weight commensurate with thoroughness, validity, and consistency of its reasoning].

(2) *Agency's Change of Interpretation.* While contemporaneous administrative construction of an enactment by the agency charged with its enforcement is entitled to great weight, the agency may change its interpretation, rejecting an

old construction and adopting a new one. Even when an agency adopts a new interpretation of a statute and rejects an old one, a court must continue to apply a deferential standard of review. (*Hudson v. Board of Administration of Public Employees' Retirement System* (1997) 59 C.A.4th 1310, 1325, 69 C.R.2d 737 [Public Employees' Retirement System (PERS) properly refused to include as compensation in calculating pension benefits conversion by city employees of benefits, such as health and life insurance, to salary increases in year before retirement, notwithstanding evidence that PERS had formerly permitted employees of other cities to exercise salary conversions similar to those at issue]; but see *WaterKeepers Northern Calif. v. State Water Resources Control Bd.* (2002) 102 C.A.4th 1448, 1458, 126 C.R.2d 389 [no deference was required where Water Resources Control Board interpretation of toxic standards indicated shift in position without providing clear and controlling guidance].)

(3) *Agency's Amendment of Regulations.* The principle of judicial deference (see *supra*, §131) applies to an agency's amendment of its regulations. In *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 C.A.4th 472, 71 C.R.2d 606, an interested party sought to overturn an amended regulation enacted by the Fair Political Practices Commission. The regulation excepted from the statutory definition of "contribution" in the Political Reform Act of 1974 (*Govt.C. 81000 et seq.*) payments by a sponsoring organization to establish and administer its political action committee. The trial court ruled the amended regulation invalid. *Held*, reversed.

(a) *Govt.C. 83112* empowers the Commission to adopt, amend, and rescind regulations to carry out the purposes and provisions of the Act. The amended regulation was a reasonable construction of a statute the enforcement of which lies with the Commission. The Commission's definition was reasonable, consistent with the purposes of the Act, and entitled to deference from the courts. (61 C.A.4th 482.)

(b) Because of an administrative agency's expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized. Where the regulation at issue is one deemed necessary to effectuate the purposes of the statute, courts apply a more deferential standard of review, requiring only that the regulation be reasonable. This is particularly true as to quasi-legislative decisions of the Commission, which involve controversial issues that would entangle the courts in a "political thicket." (61 C.A.4th 484.)

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 - b. Deference to Agency's Interpretation.
3. Exceptions and Distinctions to Deference Rule.

9 Witkin Cal. Proc. Admin Proc § 133

[§ 133] Exceptions and Distinctions to Deference Rule.

(1) *No Deference to Interpretation Not Requiring Agency Expertise.* Where the language of the regulation does not require administrative expertise, the court will not defer to the agency's construction but simply apply the regulation as the court understands it. (*Department of Alcoholic Beverage Control v. Alcoholic Bev. Control App. Bd. (Anheuser-Busch)* (1999) 71 C.A.4th 1518, 1520, 84 C.R.2d 621 [annulling department's order, which was prohibited by its regulations under common understanding of terms used]; *California Veterinary Med. Assn. v. West Hollywood* (2007) 152 C.A.4th 536, 555, 61 C.R.3d 318 [opinion of Department of Consumer Affairs that ordinance prohibiting certain veterinary practice was preempted by statute was not entitled to heightened deference, where statute was neither technical nor complex, and agency interpretation of statute was inconsistent].)

(2) *No Deference to Interpretation Altering Statute or Regulation.* Although deference is given to an agency's interpretation of a statute, its interpretation is not conclusive. An interpretation altering or enlarging the terms of the statute does not govern. This is so even where the statute is subsequently reenacted without change. (*Traverso v. People* (1996) 46 C.A.4th 1197, 1206, 54 C.R.2d 434 [construing statutes relating to issuance of billboard permits]; see *Department of Alcoholic Beverage Control v. Alcoholic Bev. Control App. Bd. (Anheuser-Busch)*, *supra* [agency may not adopt rule conflicting with governing statute]; *Van Wagner Communications v. Los Angeles* (2000) 84 C.A.4th 499, 508, 100 C.R.2d 922, citing the text [no deference to city agency's interpretation of ordinance imposing spacing limit between billboards; interpretation conflicted with city's prior practice, agency's earlier ruling, and unambiguous meaning of ordinance, and agency was not involved in drafting ordinance]; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 C.A.4th 47, 68, 11 C.R.3d 546 [construing statute determining public school enrollment based on parents' residence].)

The same is true of an interpretation altering a regulation. The principle of deference does not permit an agency to disregard a regulation's plain language. (*Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 C.A.4th 1190, 59 C.R.2d 608, *supra*, §50.)

(3) *"Respectful Nondeference" in Review of Agency's Authority To Issue Regulation.* In *Environmental Protection*

Information Center v. Department of Forestry & Fire Protection (1996) 43 C.A.4th 1011, 1017, 50 C.R.2d 892, *infra*, §142, an action seeking to invalidate a Board of Forestry regulation, the court discussed the applicable standard of review: While the contemporaneous administrative construction of a statute by an administrative agency charged with the statute's enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized, "the applicable principle changes a great deal when what is involved is a challenge to the *very authority of the agency to even issue the challenged regulation.*" (43 C.A.4th 1022.) A different standard applies when the challenged regulation is not one merely interpreting and applying a broad statutory provision, but one that is challenged regarding its fundamental legitimacy. Because the rulemaking authority of an agency is circumscribed by the substantive provisions of the law governing the agency, a court's task is to decide that the agency reasonably interpreted its legislative mandate, as regulations that alter or amend the statute or enlarge or impair its scope are void. This standard of review is one of "respectful nondeference." (43 C.A.4th 1022.) (See *Farm Sanctuary v. Department of Food & Agriculture* (1998) 63 C.A.4th 495, 505, 74 C.R.2d 75 [following *Environmental Protection Information Center*].)

(4) *Effect of Invalid Interpretive Regulation.* Deference may not be given to an interpretive regulation that is void for failure to comply with the Administrative Procedure Act. The court may, nevertheless, agree with that interpretation in deciding the case. (*Tidewater Marine Western v. Bradshaw* (1996) 14 C.4th 557, 568, 576, 59 C.R.2d 186, 927 P.2d 296, *supra*, §41.)

(5) *Less Deference to Interpretation Resulting From Nonadversarial Proceeding at Behest of Private Organization.* In *People v. Superior Court (American Standard)* (1996) 14 C.4th 294, 58 C.R.2d 855, 926 P.2d 1042, the Attorney General filed an action against manufacturers and distributors of drinking water faucets, alleging violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Saf.C. 25249.5 et seq.*, 12 *Summary* (10th), *Real Property*, §§894, 911). *Health & Saf.C. 25249.5* prohibits the knowing discharge of chemicals known to cause cancer or reproductive toxicity into water where the chemical passes or probably will pass into any "source of drinking water." The Attorney General alleged that defendants' products leached lead, a qualifying toxic chemical, into drinking water and that they were "sources of drinking water" within the meaning of the Act. Earlier, an industry group to which most of the defendants belonged requested administrative guidelines exempting plumbing products from *Health & Saf.C. 25249.5*. In a private, unpublished letter, a science adviser to the Health and Welfare Agency responded that the agency "cannot adopt such a position," but went on to state that the agency "has never taken the position that the leaching of chemicals from a private plumbing facility into water within the facility constitutes a discharge into a 'source of drinking water.' " Defendants cited this letter in support of their position that their products were not "sources of water." *Held*, the science adviser's comment was not entitled to judicial deference. The views of an administrative agency that are the product of a nonadversarial, ex parte process, conducted at the request of an organization that exclusively represents the interests of a private industry group are entitled to less deference than administrative decisions made after formal proceedings in which adversarial views are aired. Deference to the pronouncement of an administrative agency is even less warranted in this case, because the science adviser's private letter explicitly declined to take a definitive position on the question posed by the industry group. (14 C.4th 311.)

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2. Determination of Fact.

9 Witkin Cal. Proc. Admin Proc § 134

[§ 134] Determination of Fact.

An administrative agency may be given final power to determine questions of fact within its authority, free from judicial review; and in those situations, provided that the facts are in dispute, the court may not independently weigh the evidence and reach a contrary determination. (*Tex-Cal Land Management v. Agricultural Lab. Rel. Bd.* (1979) 24 C.3d 335, 342, 156 C.R. 1, 595 P.2d 579; see 56 Harv. L. Rev. 899; 69 Harv. L. Rev. 1020; 70 Harv. L. Rev. 698.) On the other hand, the Legislature may provide for independent review of the facts by the court in prescribed circumstances, as it has in C.C.P. 1094.5 with respect to administrative mandamus. Under that statute, the extent to which evidence may be reevaluated by the court, i.e., whether the substantial evidence test or the independent judgment test is applied, depends on the nature of the proceeding and of the parties involved. (See *infra*, §148.)

If the facts are not in dispute, i.e., the determination of fact is based on no evidence at all, or on evidence so unsubstantial that it is deemed equivalent to no evidence, the question is independently determined by the court. In other words, due process requires that the determination be based on substantial and legally competent evidence, and whether there is such evidence is a question of law. (*Bridges v. Wixon* (1945) 326 U.S. 135, 65 S.Ct. 1443, 1450, 89 L.Ed. 2103, 2112; *Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 71 S.Ct. 456, 463, 95 L.Ed. 456, 466; see *Walker v. San Gabriel* (1942) 20 C.2d 879, 881, 129 P.2d 349 [hearsay evidence was not enough to support order]; 60 Cal. L. Rev. 39 [factual background of *Bridges*]; 64 Harv. L. Rev. 1233; 25 San Diego L. Rev. 631 [The Constitutional Requirement of "Some Evidence"]; 8 Stanf. L. Rev. 563; 2 Am.Jur.2d (2004 ed.), *Administrative Law* §497 et seq.; 1 Cal. Evidence (4th), *Introduction*, §56 et seq.)

In *Crowell v. Benson* (1932) 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598, a proceeding on a claim for compensation under the federal Longshoremen's Act, it was held that a determination of the *jurisdictional facts* of employment and injury on navigable waters was subject to review, and also that a judicial trial de novo and independent hearing on the evidence were necessary. This theory has been criticized (see 21 Cal. L. Rev. 266; 70 Harv. L. Rev. 953; 23 So. Cal. L. Rev. 78), and has been repudiated in California. In *Temescal Water Co. v. Department of Public Works* (1955) 44 C.2d 90, 280 P.2d 1, the court held that, on review under C.C.P. 1094.5 (*infra*, §148), it is unnecessary to distinguish between so-called jurisdictional and other facts, there being no right to a trial de novo in either case. "*Crowell v. Benson* has never been overruled, but both the vitality of the rule stated by it and the authority of the cases upon which that rule rests have been greatly diminished by subsequent decisions. ... The rule generally has been limited to cases arising

under the specific act construed in that decision." (44 C.2d 104.)

SUPPLEMENT: [This section is current through the latest supplement]
See 95 Cal. L. Rev. 1367 [*Crowell v. Benson*].



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3. Application of Law to Fact.

9 *Witkin Cal. Proc. Admin Proc* § 135

[§ 135] Application of Law to Fact.

In adjudicatory decisions, the agency generally applies a legal standard to facts shown. This "mixed question of law and fact" is ordinarily reviewed as a question of fact, provided that the facts of the case are disputed. (See, e.g., *Holmes v. Kizer* (1992) 11 C.A.4th 395, 400, 13 C.R.2d 746; on review of administrative adjudications generally, see *infra*, §148 et seq.) This is the case where "the pertinent inquiry requires application of experience with human affairs." But "[i]f, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Crocker Nat. Bank v. San Francisco* (1989) 49 C.3d 881, 888, 264 C.R. 139, 782 P.2d 278; see *20th Century Ins. Co. v. Garamendi* (1994) 8 C.4th 216, 271, 32 C.R.2d 807, 878 P.2d 566.)

Where a constitutional right is involved in the factual determination, the courts will make an independent examination of the evidence and determine whether it is sufficient to sustain the determination of the "constitutional facts." The most important illustration of this doctrine is found in the cases dealing with rate regulation by the Interstate Commerce Commission, state public utilities commissions, and similar agencies. If the administrative agency makes an improperly low determination of the value of the utility's property, the resulting rate may be deemed confiscatory and therefore a violation of substantive due process (see 8 *Summary* (10th), *Constitutional Law*, §1100), and procedural due process guarantees a judicial consideration of this issue. (*Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U.S. 287, 40 S.Ct. 527, 529, 64 L.Ed. 908, 914; *St. Joseph Stock Yards Co. v. United States* (1936) 298 U.S. 38, 56 S.Ct. 720, 724, 80 L.Ed. 1033, 1040; see 70 *Harv. L. Rev.* 700, 953.)

If the underlying facts, of whatever nature, are *not disputed*, the agency's determination is independently reviewed as a question of law. (See *Dimmig v. Work. Comp. App. Bd.* (1972) 6 C.3d 860, 864, 101 C.R. 105, 495 P.2d 433; *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 C.3d 341, 349, 256 C.R. 543, 769 P.2d 399.)

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4. Exercise of Discretion.

9 *Witkin Cal. Proc. Admin Proc* § 136

[§ 136] Exercise of Discretion.

An agency has discretion when it may legally choose between several alternative policies or courses of action (e.g., in determining whether there is good cause to deny a license or in deciding the permitted level of a toxin in drinking water). In reviewing an agency's exercise of discretion, a court first uses its independent judgment in deciding whether the agency's choice was legally permissible and whether the agency followed legally required procedures. (*California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 11, 270 C.R. 796, 793 P.2d 2.) The court must then determine whether the agency's choice was an *abuse of discretion*. Where the agency acts within the scope of its authority and pursuant to proper procedures, the agency has power to choose between alternatives, and the court may not substitute its judgment for that of the agency. However, the court must reverse if the agency abuses the discretion thus accorded it. (See *Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mut. Auto Ins. Co.* (1983) 463 U.S. 29, 103 S.Ct. 2856, 2860, 77 L.Ed.2d 443, 447 ["arbitrary and capricious" standard of review of agency's rescission of a prior regulatory rule]; *Paulsen v. Golden Gate University* (1979) 25 C.3d 803, 808, 159 C.R. 858, 602 P.2d 778; *Saleeby v. State Bar* (1985) 39 C.3d 547, 563, 216 C.R. 367, 702 P.2d 525; *Quackenbush v. Mission Ins. Co.* (1996) 46 C.A.4th 458, 465, 54 C.R.2d 112 [Insurance Commissioner, when acting as conservator for insurance company, is vested with broad discretion, and trial court reviews these actions not de novo but under abuse of discretion standard, i.e., whether action was arbitrary]; *Doe v. Wilson* (1997) 57 C.A.4th 296, 309, 67 C.R.2d 187, *supra*, §49 [findings of emergency required for enacting emergency regulations are reviewed under abuse of discretion standard, not substantial evidence standard]; *Hudson v. Board of Administration of Public Employees' Retirement System* (1997) 59 C.A.4th 1310, 1328, 69 C.R.2d 737 [court may not substitute its judgment for discretionary agency decision merely because it disagrees with policy behind it]; *Grimes v. State Dept. of Social Services* (1999) 70 C.A.4th 1065, 1073, 83 C.R.2d 203 [abuse of discretion will be found where agency (a) effectually alters or amends statute or enlarges or impairs its scope, (b) fails to exercise discretion, or (c) engages in unjustified, unreasonable delay in implementing statutory commands]; 7 U.S.F. L. Rev. 111 [review of abuse of discretion].)

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9 *Witkin Cal. Proc. Admin Proc* § 137

[§ 137] Agency Procedure.

Courts use independent judgment on the question whether the procedure followed by the agency complied with statutory or constitutional requirements. (*Fairfield v. Superior Court* (1975) 14 C.3d 768, 776, 122 C.R. 543, 537 P.2d 375; *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 C.3d 200, 209, 157 C.R. 840, 599 P.2d 31.)

In *Rosenblit v. Superior Court* (1991) 231 C.A.3d 1434, 282 C.R. 819, 7 Summary (10th), *Constitutional Law*, §659, the trial court found that plaintiff doctor had received a fair hearing from the hospital panel, and in this mandamus proceeding the hospital contended that the trial court's finding should be sustained if supported by substantial evidence. *Held*, the fair hearing finding was a conclusion of law, not a finding of fact, and an independent review of the administrative record was required. "In several cases, the Supreme Court has conducted an independent scrutiny of the fair hearing claims without articulating the appropriate scope of review. ... In each case, the Supreme Court determined whether the administrative proceedings were conducted in a manner consistent with the minimal requisites of fair procedure demanded by established common law principles. Its determination was based, however, on its independent evaluation of fairness. Hospital has not cited a single Supreme Court case, and we have found none, restricting review of a fair procedure challenge to a deferential search for substantial evidence." (231 C.A.3d 1442.)

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D. Review of Rulemaking.

1. In General.

9 Witkin Cal. Proc. Admin Proc § 138

[§ 138] In General.

(1) *Limited Review*. Administrative rulemaking is *quasi-legislative* in character, and regulations have the force and effect of law. Accordingly, the validity of a regulation is subject to judicial review in the same manner as other legislation. (*Dabis v. San Francisco Redevelopment Agency* (1975) 50 C.A.3d 704, 706, 122 C.A. 800; see 86 Harv. L. Rev. 1183 [dangers in broad delegations of discretion]; 5 U.C. Davis L. Rev. 309 [effect of procedures for rulemaking under California Environmental Quality Act]; on scope of review of administrative decisions generally, see *supra*, §131 et seq.; on private organization's rulemaking as equivalent to quasi-legislative action, see *infra*, §147; on judicial review of administrative *adjudications*, see *infra*, §148 et seq.)

The court exercises *limited review* out of deference to the separation of powers and to the agency's presumed expertise within the scope of its authority. Review is ordinarily limited to determining whether the agency acted within the scope of its delegated authority, whether it employed fair procedures, and whether its action is reasonable or is "arbitrary, capricious, or lacking in evidentiary support." (See *Pitts v. Perluss* (1962) 58 C.2d 824, 833, 27 C.R. 19, 377 P.2d 83; *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 C.3d 200, 212, 157 C.R. 840, 599 P.2d 31; *Industrial Welfare Com. v. Superior Court* (1980) 27 C.3d 690, 702, 166 C.R. 331, 613 P.2d 579; *Western Oil & Gas Assn. v. Air Resources Bd.* (1984) 37 C.3d 502, 509, 208 C.R. 850, 691 P.2d 606; *Ramirez v. Yosemite Water Co.* (1999) 20 C.4th 785, 800, 85 C.R.2d 844, 978 P.2d 2, *infra*, §139; *Brock v. Superior Court* (1952) 109 C.A.2d 594, 605, 241 P.2d 283; *California Assn. of Nursing Homes etc. v. Williams* (1970) 4 C.A.3d 800, 810, 84 C.R. 590, 85 C.R. 735, 7 Summary (10th), *Constitutional Law*, §674 [regulations of Medi-Cal administrator were invalid, lacking evidentiary support]; *RLI Ins. Co. Group v. Superior Court* (1996) 51 C.A.4th 415, 430, 59 C.R.2d 111; *Doe v. Wilson* (1997) 57 C.A.4th 296, 305, 67 C.R.2d 187, *supra*, §49; *Taylor v. Los Angeles* (1997) 60 C.A.4th 611, 618, 70 C.R.2d 521, *supra*, §99 [exercise of rulemaking power is not to be narrowly prescribed; abuse of discretion must appear very clearly before courts will interfere]; *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 C.A.4th 472, 484, 71 C.R.2d 606, *supra*, §132; *California Labor Federation, AFL-CIO v. Industrial Welfare Com.* (1998) 63 C.A.4th 982, 989, 74 C.R.2d 397; *Santa Cruz v. State Bd. of Forestry* (1998) 64 C.A.4th 826, 830, 75 C.R.2d 393, *supra*, §37; *Western States Petroleum Assn. v. Department of Health Services* (2002) 99 C.A.4th 999, 1006, 122 C.R.2d 117 [agency's determination of appropriate level of methyl tertiary-butyl ether in drinking water involved distinctively legislative process, and court lacked authority to exercise independent judgment]; *North Gualala Water Co. v. State*

Water Resources Control Bd. (2006) 139 C.A.4th 1577, 1588, 43 C.R.3d 821.)

Where the agency *simultaneously* acts in a quasi-legislative and quasi-judicial capacity in rendering a single decision, the substantial evidence test for review of quasi-judicial decisions applies. (*Mountain Defense League v. Board of Supervisors (1977) 65 C.A.3d 723, 729, 135 C.R. 588*; on standard of review of administrative adjudications, see *infra*, §148.)

Where an administrative regulation is challenged, the standard of constitutional vagueness is less strict than when a criminal law is attacked. (*Ford Dealers Assn. v. Department of Motor Vehicles (1982) 32 C.3d 347, 366, 185 C.R. 453, 650 P.2d 328.*)

(2) *Burden of Proof.* The burden of proving that an adopted regulation is invalid rests on the plaintiff. (*Benton v. Board of Supervisors (1991) 226 C.A.3d 1467, 1478, 277 C.R. 481.*)

(3) *Remedies.* Primary remedies for reviewing rulemaking include the following:

(a) *Ordinary mandamus.* (See *C.C.P. 1085*; *infra*, §140; on review of administrative adjudications by administrative mandamus, see *infra*, §148 et seq.)

(b) *Declaratory relief.* (See *C.C.P. 1060* et seq. [general remedy]; *Govt.C. 11350, 11350.3* [remedy under Administrative Procedure Act]; *infra*, §141 et seq.)

(c) *Injunction.* (See *C.C. 3420* et seq.; *C.C.P. 525* et seq.; *infra*, §146.)

(4) *Regulation Outside Agency's Statutory Authority.* Quasi-legislative administrative action that transgresses the agency's statutory authority is void. (*Association for Retarded Citizens v. Department of Developmental Services (1985) 38 C.3d 384, 391, 211 C.R. 758, 696 P.2d 150*; see *Rosas v. Montgomery (1970) 10 C.A.3d 77, 92, 88 C.R. 907* [regulation, as applied, was in conflict with governing statute]; *Garcia v. Swoap (1976) 63 C.A.3d 903, 909, 134 C.R. 137* [same]; *Mineral Assn. Coalition v. State Mining & Geology Bd. (2006) 138 C.A.4th 574, 583, 588, 41 C.R.3d 544* [regulation did not conflict with governing statute or exceed board's statutory power].) In such a case, the court does not review the action for abuse of discretion, because there is no discretion to abuse. (*Association for Retarded Citizens v. Department of Developmental Services, supra.*)

In *Caldo Oil Co. v. State Water Resources Control Bd. (1996) 44 C.A.4th 1821, 52 C.R.2d 609*, a State Water Resources Control Board regulation limited the definition of "occurrence" in the Underground Storage Tank Cleanup Trust Fund Act (*Health & Saf.C. 25299.11* et seq.), thereby permitting the board to consolidate two fuel leak cleanup claims and thus reduce the amount of reimbursement available. *Held*, the regulation was invalid. Because the claimant had earned the entitlement under the existing statutory scheme, it was not within the board's power to take it away by rewriting the statute. (*44 C.A.4th 1827.*) (See *Blue v. Bonta' (2002) 99 C.A.4th 980, 990, 121 C.R.2d 483* [emergency regulation determining that stairway chair lifts were not covered by Medi-Cal was judicially reviewable; question was purely legal and did not call for factual inquiry or specialized administrative expertise, and relevant case law indicated that agency lacked authority to restrict coverage for similar equipment].)

(5) *Joinder of Parties.* In *Elk County Water Dist. v. Department of Forestry & Fire Protection (1997) 53 C.A.4th 1, 61 C.R.2d 536*, an action brought by a county water district and other interested parties against the California Department of Forestry and Fire Protection and a logging company to halt proposed salvage operations in a watershed area, plaintiffs sought to invalidate the state Board of Forestry's exemption and emergency regulations, promulgated pursuant to the Z'berg-Nejedly Forest Protection Act (*Pub.Res.C. 4511* et seq.). *Held*, the board was an indispensable party, the absence of which precluded reaching the validity of the regulations. The Act gave the board rulemaking authority (*Pub.Res.C. 4551*), including authority to define the exempt activities (*Pub.Res.C. 4584*) and emergency categories (*Pub.Res.C. 4592*) at issue. The department had only enforcement authority (*Pub.Res.C. 4119*). Any judgment declaring the exemption or emergency regulations invalid would therefore have left the promulgating agency

unaffected and the department still responsible for enforcement. The board was thus an indispensable party. (53 C.A.4th 8; see C.C.P. 389(b), 4 Cal. Proc. (5th), Pleading, §180.)

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2. Quasi-Legislative and Interpretive Rules Distinguished.

9 *Witkin Cal. Proc. Admin Proc* § 139

[§ 139] Quasi-Legislative and Interpretive Rules Distinguished.

In *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 C.4th 1, 78 C.R.2d 1, 960 P.2d 1031, plaintiff taxpayer, a seller of musical instruments, sued defendant State Board of Equalization for a refund of use taxes paid for promotional gifts of instruments and informational material given to customers in other states. The trial court held that the out-of-state gifts were excluded from the use tax and ordered a refund, but the Court of Appeal reversed, concluding that defendant's published annotation interpreting the pertinent statute disposed of the issue. *Held*, reversed and remanded; the Court of Appeal used the incorrect standard of review in concluding that the annotation was dispositive.

(a) *Binding power of rules differs*. In effect, the Court of Appeal found that defendant's annotations were entitled to the same weight or deference as an administrative agency's quasi-legislative rules. An agency's interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts. However, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to make law, and that, if authorized by the enabling legislation, bind courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual. Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. (19 C.4th 6.)

(b) *Degree of judicial scrutiny is not susceptible to precise formulation*. The appropriate degree of judicial scrutiny of an administrative agency's rules and regulations in any particular case is not susceptible to precise formulation, but lies somewhere along a continuum, with nonreviewability at one end and the exercise of independent judgment at the other. Quasi-legislative administrative decisions are properly placed at that point on the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum. An administrative interpretation will be accorded great respect by the courts and will be followed if not clearly erroneous. But a tentative interpretation makes no pretense at finality, and it is the court's duty to finally and conclusively state the statute's true meaning, even though this requires the overthrow of an earlier erroneous administrative construction. The ultimate interpretation of a statute is an exercise of the judicial power conferred on the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. (19 C.4th 7.)

(c) *Categories of rules*. It is a "black letter proposition" that there are two categories of administrative rules, and

that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind--*quasi-legislative* rules--represents an authentic form of substantive lawmaking. Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. Because agencies granted this power are truly "making law," their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of these rules, the scope of its review is narrow. If the court is satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end. The other category of administrative rules, those *interpreting a statute*, is at issue in this case. Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of a statute's legal meaning and effect, which are questions lying within the constitutional domain of the courts. Because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with legal and regulatory issues. However, because the interpretation is an agency's legal opinion, rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference. (19 C.4th 9.)

(d) *Factors considered.* Whether judicial deference to an agency's interpretation of a statute is appropriate is fundamentally *situational*. A court assessing the value of an interpretation must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought to command. There are two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: those indicating that the agency has a comparative interpretive advantage over the courts, and those indicating that the interpretation in question is probably correct. The first category includes agency expertise and technical knowledge, especially where the legal text to be interpreted is obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. The second group of factors includes indications of careful consideration by senior agency officials, evidence that the agency has consistently maintained the interpretation in question, especially if it is long standing, and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute. (19 C.4th 12.)

(e) *Reviewing court must exercise independent judgment.* Thus, the reviewing court exercises its independent judgment in reviewing an agency's interpretation of law, giving deference to the determination of the agency appropriate to the circumstances of the agency's action. In this case, the Legislature had not conferred adjudicatory powers on the board to determine sales and use tax liability, nor had the board promulgated regulations. Although the annotations had substantial precedential value within the agency, they were not entitled to the judicial deference due quasi-legislative rules. (19 C.4th 14.) (See *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 C.A.4th 338, 349, 86 C.R.2d 362 [applying suggested standard of review to *Yamaha* on remand, and again upholding board's interpretive annotation].)

The principles announced in *Yamaha* were applied in *Ramirez v. Yosemite Water Co.* (1999) 20 C.4th 785, 85 C.R.2d 844, 978 P.2d 2, in determining the validity of a regulation with both quasi-legislative and interpretive characteristics. Plaintiff, a bottled water route sales representative, brought an action against his former employer for unpaid overtime pay. *Lab.C. 1171* excludes from the overtime laws employees who are outside salespersons, and *Lab.C. 1185* delegates to the California Industrial Welfare Commission the authority to promulgate wage orders setting minimum wages, maximum hours, and standard conditions of labor for all employees. The trial court and the Court of Appeal concluded that plaintiff was exempt from overtime pay under a wage order defining an outside salesperson as one who regularly works more than half the working time engaged in sales activities outside the workplace. *Held*, the wage order was valid.

(a) In *Yamaha*, the court posited a dichotomy between quasi-legislative and interpretive rules. As there acknowledged, administrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature. The regulation at issue in the present case has both quasi-legislative and interpretive characteristics. (20 C.4th 799.) The Legislature has expressly delegated to the Commission the authority to promulgate wage orders like the one here, and judicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the Commission engages in

a quasi-legislative endeavor, a task that necessarily and properly requires its exercise of a considerable degree of policymaking judgment and discretion. On the other hand, because the Commission is engaged in construing the meaning of a portion of *Lab.C. 1171*, its regulation is in some sense interpretive. (20 C.4th 800.)

(b) If the wage order is considered a quasi-legislative regulation, it is certainly valid. In reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation is (1) within the scope of the authority conferred and (2) reasonably necessary to effectuate the purpose of the statute. First, the wage order here is within the scope of the Commission's authority. The Legislature adopted the outside salesperson exemption already found in the federal Fair Labor Standards Act, and federal regulations define this term differently. However, there is no reason to presume that the Legislature, in delegating broad regulatory authority to the Commission, obliged it to follow in each particular a federal regulatory agency's interpretation of a common term. (20 C.4th 800.) Second, the wage order was reasonably necessary to effectuate the purpose of *Lab.C. 1171*. It was necessary for the Commission to establish some working definition of "outside salesperson" that takes into account the fact that some employees work in both sales and nonsales capacities. It was reasonable for the Commission, in formulating its definition, to take a quantitative approach, looking to the actual hours spent on sales activity to determine if an employee is primarily a salesperson. (20 C.4th 801.)

(c) On the other hand, even if the wage order is considered a purely interpretive regulation, it has two attributes that weigh in favor of considerable judicial deference to the agency's interpretation. First, the interpretation is contained in a regulation formally adopted pursuant to the Administrative Procedure Act, after public notice and comment. Second, it embodies a statutory interpretation that the administrative agency has consistently maintained and is of long standing, i.e., for almost 20 years. For these reasons, it must be concluded that the Commission's interpretation of the term "outside salesperson" is reasonable and should not be invalidated. (20 C.4th 801.)

Other decisions are illustrative. (See *San Francisco Fire Fighters Local 798 v. San Francisco* (2006) 38 C.4th 653, 670, 42 C.R.3d 868, 133 P.3d 1028 [city's interpretation that civil service promotion rule was exempt from binding arbitration requirement of city charter was quasi-legislative act and thus entitled to limited review; Court of Appeal erred in ruling that agency finding that expands agency's powers is subject to independent judicial review, while agency finding that is ordinary exercise of agency's powers is subject to limited review]; *Megrabian v. Saenz* (2005) 130 C.A.4th 468, 479, 30 C.R.3d 262 [relying on *Ramirez*; interpretation of Department of Social Services concerning immigrant eligibility requirements for disability benefits was quasi-legislative act and thus entitled to great deference, even though interpretation conflicted with that of federal Social Security Administration].)

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See *Kawamura v. Organic Pastures Dairy Co., LLC* (2008) 160 C.A.4th 1374, 1388, 73 C.R.3d 500 [determination by Department of Food and Agriculture that dairy company was milk handler required to participate in price pooling plan between milk handlers and producers was interpretive regulation entitled to judicial deference]; *Aguilar v. Superior Court* (2009) 170 C.A.4th 313, 328, 87 C.R.3d 813 [city's adoption of regulation implementing living wage ordinance, which limited compensation of employees who worked less than 20 hours per month, was quasi-legislative act entitled to limited review; regulation directly conflicted with ordinance's purpose and, thus, was invalid].



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3. Mandamus.

9 Witkin Cal. Proc. Admin Proc § 140

[§ 140] Mandamus.

Administrative rulemaking is subject to judicial review by mandamus. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 168, 188 C.R. 104, 655 P.2d 306.) The appropriate mandamus proceeding is one for ordinary (traditional) mandamus under C.C.P. 1085, rather than administrative mandamus under C.C.P. 1094.5. (*Lowe v. California Resources Agency* (1991) 1 C.A.4th 1140, 1149, 2 C.R.2d 558; see *Voss v. Superior Court* (1996) 46 C.A.4th 900, 922, 54 C.R.2d 225 [traditional mandamus was available to challenge quasi-legislative action of Secretary of Department of Agriculture in issuing marketing order pursuant to *Food & Ag.C. 58601 et seq.*]; on mandamus generally, see 8 Cal. Proc. (5th), *Extraordinary Writs*, §§74 et seq., 162 et seq.)

There are two basic requirements for issuance of the writ: (1) A clear, present, ministerial duty owed by the agency or official, and (2) a clear, present beneficial right in the petitioner to performance of that duty. (C.C.P. 1085; *Saleeby v. State Bar* (1985) 39 C.3d 547, 561, 216 C.R. 367, 702 P.2d 525.) Relief is available when an agency has "clearly abused its discretion." (*Thelander v. El Monte* (1983) 147 C.A.3d 736, 748, 195 C.R. 318.)

Administrative mandamus, with its broader scope of review for quasi-judicial action by an agency, is not available for review of quasi-legislative action. (*Lewin v. St. Joseph Hosp. of Orange* (1978) 82 C.A.3d 368, 383, 146 C.R. 892; on review of quasi-judicial action by administrative mandamus, see *infra*, §148.) A quasi-legislative act is one that "generally predetermines what the rule shall be for the regulation of future cases falling under its provisions," while a quasi-adjudicatory act "applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing." A quasi-legislative decision, as opposed to a quasi-judicial one, "contemplates the function performed rather than the area of performance." The mere fact that a proceeding before a deliberative body may possess certain characteristics of the judicial process does not convert legislative action into an adjudication of a private controversy. (*Joint Council of Interns & Residents v. Board of Supervisors* (1989) 210 C.A.3d 1202, 1209, 258 C.R. 762.)

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4. Declaratory Relief.

a. In General.

9 *Witkin Cal. Proc. Admin Proc* § 141

[§ 141] In General.

The Administrative Procedure Act authorizes an action for declaratory relief to determine the validity of a regulation or order of repeal. The action is brought in superior court "in accordance with the Code of Civil Procedure." (*Govt.C. 11350(a)*); see *Voss v. Superior Court* (1996) 46 C.A.4th 900, 923, 54 C.R.2d 225 [issuance of marketing order by Secretary of Department of Agriculture pursuant to *Food & Ag.C. 58601* et seq. could be challenged by action for declaratory relief]; *Farm Sanctuary v. Department of Food & Agriculture* (1998) 63 C.A.4th 495, 502, 74 C.R.2d 75 [Department of Food and Agriculture regulation allowing department to approve religious ritualistic slaughter of poultry could be challenged by declaratory judgment action; declaratory relief is appropriate where questions of public interest are involved, including avoidance of cruelty to animals].) The procedures generally applicable to declaratory judgment proceedings under C.C.P. 1060 et seq. apply. (*Los Angeles v. State Dept. of Public Health* (1958) 158 C.A.2d 425, 443, 322 P.2d 968 [former *Govt.C. 11440* (now *Govt.C. 11350*) effectively amended C.C.P. 1060 to add validity of administrative regulation to subjects for declaratory relief enumerated in that statute]; on declaratory relief generally, see 5 *Cal. Proc.* (5th), *Pleading*, §849 et seq.) The right to declaratory relief is not affected by failure to petition, or seek reconsideration of a petition, for adoption, amendment, or repeal of a regulation. (*Govt.C. 11350(a)*); on petitioning for administrative regulatory action, see *supra*, §45.)

The action must be brought before proceedings are commenced to enforce the rule. Once enforcement proceedings commence, administrative mandamus becomes the exclusive remedy. (*Tushner v. Griesinger* (1959) 171 C.A.2d 599, 605, 341 P.2d 416; on review of administrative adjudications by administrative mandamus, see *infra*, §148 et seq.)

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b. Standing.

9 Witkin Cal. Proc. Admin Proc § 142

[§ 142] Standing.

A declaratory judgment action may be brought by "any interested person." (*Govt.C. 11350(a).*)

In *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 C.A.4th 1011, 50 C.R.2d 892, an environmental group sought a judicial declaration that a Board of Forestry regulation exempting timber operations on parcels of land of less than three acres from the necessity of preparing a timber harvest plan was not authorized by the Public Resources Code and hence invalid. The group was a bona fide environmental organization with several hundred members in three major timber producing counties. *Held*, plaintiff had standing to contest the regulation.

(a) In *Associated Boat Industries of Northern Calif. v. Marshall* (1951) 104 C.A.2d 21, 230 P.2d 379, the case on which defendant principally relies, this court held that a trade association composed of members subject to a challenged regulation, but not itself so subject, was not an "interested person" under *Govt.C. 11350(a)*. The court reasoned that the association's status was a purely representative one, acting on behalf of its members, because it could not be legally affected by the regulation, and that it accordingly lacked standing under the statute. (43 C.A.4th 1016.) Subsequently, however, in *Residents of Beverly Glen v. Los Angeles* (1973) 34 C.A.3d 117, 109 C.R. 724, a nonprofit civic corporation that consisted of approximately 300 families was found to have standing to challenge a conditional use permit granted to a developer in their area where the nonprofit corporation's pleadings sufficiently alleged that its members would suffer injury from the planned development. The court there suggested that the focus should not be on the word "interested" alone, but rather on whether either the plaintiff or its members might be impacted by the challenged administrative action. On reflection, this court agrees with the *Residents* court and disapproves of *Marshall*. It simply no longer makes good sense to draw a hard-and-fast line between an organization, particularly a nonprofit one, and its members in analyzing whether that organization is an "interested party" for purposes of the statute. Accordingly, this court now holds that an organization may be an "interested person" for purposes of *Govt.C. 11350* "if either it or its members is or may well be impacted by a challenged regulation." (43 C.A.4th 1017.)

(b) Plaintiff states that the practical effect of the regulation here has been to deprive it and its members of the right to inspect and comment on timber harvest plans before timber operations take place on parcels of three acres or smaller.

This argument has considerable merit. The fact that plaintiff and its members are, by virtue of the regulation, denied the ability to review and comment means, at the very minimum, that they could be subject to the challenged regulation and hence must be considered interested parties for purposes of *Govt.C. 11350(a)*. (43 C.A.4th 1019.)

(c) Defendants urge the court to digress from established California law regarding standing and import into California law principles derived from such United States Supreme Court cases as *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351, 7 Summary (10th), *Constitutional Law*, §139. That case held that an organization challenging governmental action affecting the environment lacked standing to sue. It did so, however, with particular reference to the "case and controversy" language of U.S. Const., Art. III and the long line of cases respecting that language, cases that, among other things, have required that the plaintiff show not only "injury in fact" but also injury that is both "concrete and particularized," "actual or imminent," causally connected with the conduct complained of, and "likely" as opposed to "speculative." Whether this should be the law in California need not be discussed, because it clearly is not. This court perceives neither justification nor authorization to import these federal law principles into the state's jurisprudence. (43 C.A.4th 1020.)

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c. Matters Considered and Excluded.

9 *Witkin Cal. Proc. Admin Proc* § 143

[§ 143] Matters Considered and Excluded.

(1) *Matters Considered.* In a proceeding under *Govt.C. 11350*, the court may consider the following evidence:

(a) The rulemaking file prepared under *Govt.C. 11347.3* (see *supra*, §51). (*Govt.C. 11350(d)(1).*)

(b) The finding of emergency in support of an emergency regulation or order of repeal under *Govt.C. 11346.1* (see *supra*, §§48, 49). (*Govt.C. 11350(d)(2).*)

(c) An item required to be included in the rulemaking file that has been omitted, for the sole purpose of proving its omission. (*Govt.C. 11350(d)(3).*)

(d) Evidence relevant to whether the Administrative Procedure Act requires that a regulation be adopted. (*Govt.C. 11350(d)(4).*)

(2) *Matters Excluded.* The court may not consider the following:

(a) The approval of a regulation or order of repeal by the Office of Administrative Law. (*Govt.C. 11350(c).*)

(b) The Governor's overruling of a decision of the office to disapprove a regulation or order of repeal. (*Govt.C. 11350(c).*)

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d. Grounds for Declaration of Invalidity.

9 Witkin Cal. Proc. Admin Proc § 144

[§ 144] Grounds for Declaration of Invalidity.

A regulation may be declared invalid on the following grounds:

(1) "Substantial failure" to comply with the Administrative Procedure Act's rulemaking provisions (*Govt.C. 11340 et seq.*). (*Govt.C. 11350(a)*; see *Masonite Corp. v. Superior Court* (1994) 25 C.A.4th 1045, 1053, 1054, 31 C.R.2d 173, 49 C.R.2d 639 [regulation adopted by administrative agency is invalid if inconsistent with governing statute].)

(2) In the case of an emergency regulation or order of repeal under *Govt.C. 11346.1* (supra, §§48, 49), the facts recited in the agency's finding of emergency do not constitute an emergency. (*Govt.C. 11350(a)*.)

(3) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the provision of law being implemented (supra, §47) is not supported by substantial evidence. (*Govt.C. 11350(b)(1)*; see *Agricultural Lab. Rel. Bd. v. Exeter Packers* (1986) 184 C.A.3d 483, 492, 229 C.R. 87 [court must apply substantial evidence standard in determining whether regulation is reasonably necessary].)

(4) The agency's declaration under *Govt.C. 11346.5(a)(8)* that the regulation will not have a significant adverse economic impact on business enterprises (supra, §51) is in conflict with substantial evidence in the record. (*Govt.C. 11350(b)(2)*.) (See *12 Stanf. L. Rev.* 826 [denial of retroactive effect to invalidation of rule].)

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e. Declaration of Validity of Disapproved Regulation.

9 *Witkin Cal. Proc. Admin Proc* § 145

[§ 145] Declaration of Validity of Disapproved Regulation.

In a case subject to the Administrative Procedure Act, an interested person may bring an action seeking a judicial declaration on the validity of a regulation or order of repeal that the Office of Administrative Law has disapproved or ordered repealed. The court may declare the regulation valid if it meets the standards for administrative review specified in *Govt.C. 11349.1* (supra, §51) and if the agency has complied with all other rulemaking provisions of the Act. (*Govt.C. 11350.3*)

If the court determines the regulation to be valid, it may order that it be immediately filed with the Secretary of State. (*Govt.C. 11350.3*)

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5. Injunction.

9 *Witkin Cal. Proc. Admin Proc* § 146

[§ 146] Injunction.

A court may not, as a general rule, enjoin enforcement of legislation. (See C.C. 3423(d); C.C.P. 526(b)(4); *Agricultural Lab. Rel. Bd. v. Superior Court* (1976) 16 C.3d 392, 401, 128 C.R. 183, 546 P.2d 687; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §331.) Injunctive relief is proper, however, where the administrative rule itself is unconstitutional or otherwise invalid. (*Agricultural Lab. Rel. Bd. v. Superior Court*, *supra*, 16 C.3d 401; see *Henry George School of Social Science of San Diego v. San Diego Unified School Dist.* (1960) 183 C.A.2d 82, 84, 6 C.R. 661 [action to enjoin collection of amounts not statutorily authorized]; *Voss v. Superior Court* (1996) 46 C.A.4th 900, 923, 54 C.R.2d 225 [marketing order issued by Secretary of Department of Agriculture could be challenged by action for injunctive relief for failure to comply with governing statutory procedures].)

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6. Rulemaking by Private Organizations.

9 Witkin Cal. Proc. Admin Proc § 147

[§ 147] Rulemaking by Private Organizations.

The principles governing judicial review of public administrative regulations have been applied in reviewing rulemaking by nonprofit corporations or associations. (See *Mateo-Woodburn v. Fresno Community Hosp. & Med. Center* (1990) 221 C.A.3d 1169, 270 C.R. 894; *Abrams v. St. John's Hosp. & Health Center* (1994) 25 C.A.4th 628, 631, 30 C.R.2d 603; *Pomona College v. Superior Court* (1996) 45 C.A.4th 1716, 1722, 53 C.R.2d 662, *infra*, §152 [traditional mandamus under C.C. 1085 is available not only to compel official acts by governmental agencies, "but also to compel nongovernmental bodies or officers to perform their legal duties"]; 13 Southwestern U. L. Rev. 337, 345, 361.)

In *Lewin v. St. Joseph Hosp. of Orange* (1978) 82 C.A.3d 368, 146 C.R. 892, the governing board of defendant private hospital decided to operate its artificial kidney facility on a "closed-staff" basis, i.e., by arranging for exclusive use with a single group of nephrologist specialists. Plaintiff physician sought, and the trial judge granted, mandamus to compel the hospital to operate the facility on an "open-staff" basis. *Held*, reversed with directions to enter judgment for defendant.

(a) *Anton v. San Antonio Community Hosp.* (1977) 19 C.3d 802, 140 C.R. 442, 567 P.2d 1162, held that administrative mandamus under C.C.P. 1094.5 is appropriate to review quasi-judicial decisions of nongovernmental agencies, and that the trial judge should exercise an independent judgment on the evidence if the decision affects a fundamental, vested right. These principles have no application, however, to *quasi-legislative* determinations, which are reviewed by traditional mandamus, and in which the inquiry is only whether the action taken was arbitrary, without evidentiary support, or without compliance with prescribed procedures. (82 C.A.3d 383.) (On scope of extraordinary writs, see 8 Cal. Proc. (5th), *Extraordinary Writs*.)

(b) Although the term "quasi-legislative" is generally applied to proceedings of a governmental agency, the "rulemaking" or "policymaking" decisions of a "private" nonprofit corporation are similar and should be subject to the same limited judicial review. The reason for deference to the presumed expertise of administrative agencies is fully applicable to the governing board of a hospital; courts are ill-equipped to act as supervening boards of directors for hospitals. (82 C.A.3d 384, 385.)

(c) If the trial judge exercised an independent judgment on the evidence, he erred; both the trial court and the appellate court perform the same function: They must determine whether the proceedings were arbitrary or without evidentiary support. (82 C.A.3d 386, 387.) Here, the governing board held a full hearing on the "closed staff" issue, took opinions from qualified persons, and reached a decision similar to that of a substantial number of hospitals in the area. (82 C.A.3d 389, 390.)

In *Major v. Memorial Hosp. Assn.* (1999) 71 C.A.4th 1380, 84 C.R.2d 510. problems relating to the medical services provided by a hospital's anesthesiology department led the hospital to change the department from an open staff system to a closed system using an exclusive provider of anesthesia services. When not offered subcontracts by the new exclusive provider, three former open staff anesthesiologists sued the hospital, the exclusive provider, and others, asserting causes of action for breach of contract, civil conspiracy, and tortious interference with plaintiffs' professional business relationships. *Held*, judgment for defendants affirmed.

(a) A physician is entitled to a proceeding consistent with minimal due process requirements prior to termination of hospital staff privileges, when the action taken is adjudicative in nature. The minimal due process requirements are not applicable, however, if the action is quasi-legislative. In a quasi-legislative proceeding, there is no constitutional right to a hearing. A decision is quasi-legislative if it is one of general application intended to address an administrative problem as a whole and not directed at specific individuals. (71 C.A.4th 1397.)

(b) Characterization of a decision as adjudicative or quasi-judicial has a significant effect on the applicable standard of review. If the decision is adjudicative, the court reviews whether due process was provided. A claim that due process rights have been violated is reviewed de novo. On the other hand, if the decision is quasi-legislative in nature, judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law. This standard only requires that there be some reasonable basis for a decision in order to pass muster on review. (71 C.A.4th 1398.)

(c) Defendant's decision here was quasi-legislative and not adjudicative, because the closure decision was not directed at excluding any specific physician or group of physicians, but rather was motivated by the overall problems associated with the operation of the department. Therefore, plaintiffs were not entitled to due process in accordance with the medical staff bylaws prior to termination of their medical staff privileges. Further, applying the appropriate standard of review, the decision complied with prescribed procedures and was reasonably based. There was ample evidence of systemic problems in the department that affected the quality of medical services at the hospital. (71 C.A.4th 1399.)

Legislative delegations of adjudicative authority to private entities are relatively common. (See, e.g., *Fin.C.* 17311 [Escrow Agents' Fidelity Corporation]; *Ins.C.* 1063 [California Insurance Guarantee Association]; *Ins.C.* 11770, 11773 [State Compensation Insurance Fund].)

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See *Nasim v. Los Robles Regional Med. Center* (2008) 165 C.A.4th 1538, 1543, 82 C.R.3d 58 [hospital acted unreasonably by retroactively applying rule requiring board certification in specialty to practice that specialty at hospital, with result that physician lost nephrology privileges; earliest available test for physician to obtain board certification was later than deadline hospital set for him when it enacted rule, and hospital admitted that physician was impetus for new rule; distinguishing *Major v. Memorial Hosp. Assn.* (1999) 71 C.A.4th 1380, 84 C.R.2d 510, text, p. 1279.]



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Witkin Summary of California Law

IV. JUDICIAL REVIEW

E. Review of Adjudication.

1. Administrative Mandamus As Remedy.

9 *Witkin Cal. Proc. Admin Proc* § 148

[§ 148] Administrative Mandamus As Remedy.

(1) *In General.* Administrative adjudications (quasi-judicial determinations) under the Administrative Procedure Act are reviewable by administrative mandamus under *C.C.P. 1094.5*, subject to the statutes governing the particular agency. (*Govt.C. 11523*; see *C.E.B., Administrative Hearing Practice* 2d, §8.102 et seq.; *C.E.B., Administrative Mandamus* 3d; 2 *Pierce, Admin. Law* 4th, Chap. 11.) Quasi-legislative determinations, in contrast, are reviewable by ordinary mandamus. (See *supra*, §140.)

The court's inquiry is limited to whether the agency has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was prejudicial abuse of discretion. (*C.C.P. 1094.5(b)*; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §277; on scope of review of administrative action generally, see *supra*, §130 et seq.)

(2) *Independent Judgment.* In reviewing factual determinations by an agency without judicial power under the California Constitution, courts exercise independent judgment and weigh the evidence, if the proceeding substantially deprives a party of a fundamental vested right. (*Bixby v. Pierno* (1971) 4 *C.3d* 130, 143, 93 *C.R.* 234, 481 *P.2d* 242; *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 *C.3d* 28, 33, 112 *C.R.* 805, 520 *P.2d* 29; see *AFL-CIO v. Unemp. Ins. App. Bd.* (1996) 13 *C.4th* 1017, 1022, 56 *C.R.2d* 109, 920 *P.2d* 1314, *supra*, §61 [Unemployment Insurance Appeals Board benefits decision impacted fundamental vested right and was therefore subject to independent judgment review in trial court]; *Fukuda v. Angels* (1999) 20 *C.4th* 805, 823, 85 *C.R.2d* 696, 977 *P.2d* 693, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §287 [in view of judicial application of independent judgment rule for more than half century, policy arguments supporting change to different standard should be directed to Legislature]; *McNary v. Department of Motor Vehicles* (1996) 45 *C.A.4th* 688, 692, 53 *C.R.2d* 55 [trial court was required to exercise independent judgment in reviewing Department of Motor Vehicles suspension of driver's license]; *Boctor v. Los Angeles County Metropolitan Transit Authority* (1996) 48 *C.A.4th* 560, 573, 55 *C.R.2d* 861 [trial court was required to exercise independent judgment in determining whether administrative decision demoting employee was supported by weight of evidence]; *San Benito Foods v. Veneman* (1996) 50 *C.A.4th* 1889, 1895, 58 *C.R.2d* 571 [decision involving suspension of food processing license required review under independent judgment standard, even though suspension was conditioned on nonpayment of fine; nature of right itself is crucial in determining whether it is fundamental, not actual harm in particular case]; 21 *Cal. L. Rev.* 266; on nature and application of independent judgment rule, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §278 et seq.)

(3) *Substantial Evidence*. If a fundamental vested right is not involved, or in reviewing decisions by agencies with constitutional judicial power, the courts examine whether the agency's findings are supported by substantial evidence in light of the whole record. (*Bixby v. Pierno*, *supra*, 4 C.3d 143; *Strumsky v. San Diego County Employees Retirement Assn.*, *supra*, 11 C.3d 33; see 12 *Pacific L. J.* 41 [proposed uniform substantial evidence rule]; on nature and application of substantial evidence rule, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §277 et seq.) The trial court must also apply the substantial evidence rule where the Legislature expressly accords finality to the agency's findings. Thus, in *Kensington University v. Council for Private Postsecondary & Vocational Education* (1997) 54 C.A.4th 27, 62 C.R.2d 582, the trial court properly applied the substantial evidence standard in reviewing the council's denial of an application to operate as a degree-granting institution. Former Educ.C. 94323(k)(2) provided that the "council's statement of decision shall be conclusive if supported by substantial evidence on the record considered as a whole." (54 C.A.4th 40.)

(4) *Scope of Trial de Novo*. An independent judgment, where required, is exercised on the evidence disclosed in a "limited trial de novo," i.e., on the basis of (a) evidence produced before the agency, (b) evidence that could not, in the exercise of reasonable diligence, have been produced before the agency, and (c) evidence that may have been improperly excluded by the agency. (*Bixby v. Pierno*, *supra*, 4 C.3d 143, footnote 10; see 25 *Hastings L. J.* 963 [de novo review of quasi-judicial determinations].) In exercising its independent judgment, (a) the trial court must afford a strong presumption of correctness to the administrative findings, and (b) the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. There is no inconsistency in requiring the court both to accord deference to the agency decision and to exercise its own independent judgment; the court is free to substitute its own findings after first giving due respect to the agency's findings. The burden imposed on the party challenging the administrative decision is a burden of proof and not merely a burden of producing evidence. (See *Fukuda v. Angels*, *supra*, 20 C.4th 817.)

(5) *Role of Appellate Court*. After the trial court has exercised its independent judgment on the weight of the evidence, an appellate court need only review the record to determine whether the trial court's findings are supported by substantial evidence. (*Moran v. Board of Med. Examiners of Calif.* (1948) 32 C.2d 301, 308, 196 P.2d 20; 9 *Cal. Proc.* (5th), *Appeal*, §385; see *Vinson v. Snyder* (1999) 75 C.A.4th 182, 186, footnote 3, 89 C.R.2d 44, *supra*, §72 [where independent judgment is made, appellate court reviews trial court's independent assessment of administrative record and not findings of administrative agency].) However, the trial court's legal conclusions are subject to the appellate court's independent review. (*Gai v. Selma* (1998) 68 C.A.4th 213, 219, 79 C.R.2d 910; see *Calderon v. Anderson* (1996) 45 C.A.4th 607, 612, 52 C.R.2d 846 [in administrative mandamus proceeding in which facts are not in dispute and issues involve proper application of statute or administrative regulation, reviewing court is not bound by trial court's determination]; *Family Planning Associates Med. Group v. Belshe* (1998) 62 C.A.4th 999, 1004, 73 C.R.2d 221 [although appellate court review of facts in administrative mandamus proceeding is limited by substantial evidence rule, it is not bound by findings to extent that they are conclusions of law; appellate court then need only determine whether agency's findings were so arbitrary and capricious as to amount to abuse of discretion].) (For full discussion of administrative mandamus, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §258 et seq.)

West's Key Number Digest, Administrative Law and Procedure 651 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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2. Petition.

9 *Witkin Cal. Proc. Admin Proc* § 149

[§ 149] Petition.

A petition for review of an Administrative Procedure Act adjudication must be filed within 30 days after the last day on which reconsideration can be ordered, but if the petitioner requests a record within 10 days after that day, the time is extended until 30 days after delivery of the record. The right to petition is not affected by the failure to seek reconsideration before the agency. (*Govt.C. 11523*; see *Economic Empowerment Foundation v. Quackenbush* (1998) 65 C.A.4th 1397, 1401, 77 C.R.2d 390 [statute permitting alternative procedure for obtaining early review of Insurance Commissioner decision did not require party to follow that procedure; petition was timely under *Govt.C. 11523*]; *Fair Emp. & Housing Com. v. Superior Court* (2004) 115 C.A.4th 629, 633, 9 C.R.3d 409 [30-day limit for reviewing adjudication in *Govt.C. 11523* applies to Fair Employment and Housing Commission determination]; on reconsideration of decision, see *supra*, §118; on record on review, see *infra*, §151; on time to file administrative mandamus petition generally, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§307, 308; on time limitations on review generally, see *supra*, §129.)

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3. Stay Pending Review.

9 *Witkin Cal. Proc. Admin Proc* § 150

[§ 150] Stay Pending Review.

An agency may be given power to stay enforcement of its own adjudicative decision. (See *Govt.C. 11519(b)*, supra, §117 [stay after Administrative Procedure Act formal adjudicatory hearing].) Whether or not the agency has or exercises that power, the court generally has discretion to stay the agency's action in administrative mandamus proceedings. However, the court may not impose or continue a stay that would be against the public interest. (*C.C.P. 1094.5(g)*; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §316.)

The fact that no stay of the administrative order is allowed pending judicial review is ordinarily not a denial of due process. (*Yakus v. United States* (1944) 321 U.S. 414, 64 S.Ct. 660, 673, 88 L.Ed. 834, 855 [Price Control Act was not open to objection that only method to test validity of regulations promulgated under it was by violating statute and thereby risking imposition of penalties]; on power of federal courts under federal A.P.A. to stay administrative orders to prevent irreparable injury, see 5 U.S.C., §705; 67 *Harv. L. Rev.* 876; on stay of administrative actions generally, see 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §552 et seq.)

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4. Record on Review.

9 Witkin Cal. Proc. Admin Proc § 151

[§ 151] Record on Review.

On request, and payment of the cost for preparation of the transcript and other portions of the record and for certification, a petitioner for a writ of mandamus is entitled to the complete record of the proceedings, or those parts that are designated by the petitioner, within 30 days after the request, subject to extension for good cause shown. (*Govt.C. 11523*; on manner of reporting hearing, see *supra*, §109; on record generally, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §309 et seq.; on use of record in an administrative proceeding on appeal, see 9 *Cal. Proc.* (5th), *Appeal*, §634.)

The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence, and any other papers in the case. The agency may file with the court the original of any document in the record in lieu of a copy. (*Govt.C. 11523*; see *Caldo Oil Co. v. State Water Resources Control Bd.* (1996) 44 *C.A.4th* 1821, 1826, 52 *C.R.2d* 609 [where administrative record is lodged with trial court but not included in record on appeal, reviewing court takes facts from briefs].) (On transcription fees generally, see 2 *Cal. Proc.* (5th), *Courts*, §384 et seq.)

If the petitioner prevails in overturning the administrative decision following judicial review, the agency must reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification. (*Govt.C. 11523*.)

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5. Adjudication by Private Organizations.

9 Witkin Cal. Proc. Admin Proc § 152

[§ 152] Adjudication by Private Organizations.

In *Pomona College v. Superior Court* (1996) 45 C.A.4th 1716, 53 C.R.2d 662, plaintiff assistant professor sued defendant college for damages, claiming wrongful termination and breach of contract and of implied covenants, after defendant declined to offer him lifetime academic tenure. Defendant's demurrer on the ground that plaintiff's exclusive remedy was administrative mandamus review under C.C.P. 1094.5 was overruled. *Held*, defendant was entitled to have its demurrer sustained. C.C.P. 1094.5 applies to nongovernmental administrative determinations, including private university employment decisions.

(a) *Administrative mandamus review extends to nongovernmental quasi-judicial decisions.* Administrative mandamus review under C.C.P. 1094.5 applies to nongovernmental administrative quasi-judicial decisions. Nothing in the statutory language or supporting legislative materials leads to an assumption that review under C.C.P. 1094.5 is available only with respect to administrative decisions by governmental agencies. C.C.P. 1094.5 is by its terms applicable to "any final administrative order or decision" made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the "inferior tribunal, corporation, board, or officer." This language is not limited to governmental agencies. Moreover, the statutory language appears to have been drawn directly from C.C.P. 1085, dealing with traditional mandamus. C.C.P. 1085 mandamus is available not only to compel official acts on the part of governmental agencies, but also to compel nongovernmental bodies or officers to perform their legal duties. It follows that C.C.P. 1094.5 was intended to apply to the same spectrum of agencies. (45 C.A.4th 1722, citing *Anton v. San Antonio Community Hosp.* (1977) 19 C.3d 802, 140 C.R. 442, 567 P.2d 1162, 8 Cal. Proc. (5th), *Extraordinary Writs*, §265.)

(b) *Private university employment decisions are reviewable by administrative mandamus.* Important public policy interests are served by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions to deny lifetime academic tenure. Tenure decisions in an academic setting involve a combination of factors that tend to set them apart from employment decisions generally. (45 C.A.4th 1724, 1725.) These factors affect the quality of education at the institution, and therefore the decisions are best made within the university by the candidate's peers. The United States Supreme Court has recognized "four essential freedoms" of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. (45 C.A.4th 1726, citing *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311, 1332.)

Because de novo review by lay juries of the merits of tenure candidacies will severely impact these freedoms, absent discrimination, judicial review of tenure decisions must be limited to evaluating the fairness of the administrative hearing in an administrative mandamus action under *C.C.P. 1094.5*. (45 *C.A.4th* 1726.)

(c) *Requirement of hearing and evidence, not actual holding of hearing and taking of evidence, triggers administrative mandamus review.* Plaintiff contends that, even if *C.C.P. 1094.5* extends to private universities, he should not be required to avail himself of that remedy, because defendant failed to hold a hearing regarding plaintiff's grievance and failed to take evidence as required by *C.C.P. 1094.5*. (45 *C.A.4th* 1727.) However, it is the *requirement* of a hearing and taking of evidence, not whether a hearing is actually held and evidence actually taken, that triggers the availability of review under that statute. In support of its demurrer to plaintiff's breach of contract complaint, defendant requested that the trial judge take judicial notice of a handbook and certain other documents that described the nature of defendant's mandatory tenure review and grievance procedures. These documents demonstrated that defendant required both a hearing and the taking of evidence in reaching its initial tenure decision and provided for a "formal hearing" on the filing of a grievance complaint by the dissatisfied faculty member. Because the handbook governed the employment relationship, defendant was required by law to provide the hearing described in it. Thus, administrative mandamus was plaintiff's exclusive remedy for any procedural defects. (45 *C.A.4th* 1728, 1729.) (See *Gutkin v. University of Southern Calif.* (2002) 101 *C.A.4th* 967, 976, 125 *C.R.2d* 115 [extending administrative mandamus requirement of *Pomona College* to professor's challenge to revocation of tenure by private university]; *Pollock v. University of Southern Calif.* (2003) 112 *C.A.4th* 1416, 1425, 6 *C.R.3d* 122 [following *Pomona College* and refusing dismissed professor's request to disregard decision as unsound]; *Gupta v. Stanford University* (2004) 124 *C.A.4th* 407, 411, 21 *C.R.3d* 192 [extending administrative mandamus requirement of *Pomona College* and *Gutkin* to student's challenge to suspension imposed for cheating in violation of university's honor code]; on application of Administrative Procedure Act to quasi-public entities, see *supra*, §64.)

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6. Permit Decisions Involving Expressive Conduct.

9 Witkin Cal. Proc. Admin Proc § 153

[§ 153] Permit Decisions Involving Expressive Conduct.

(1) *Enactment of Statute.* *C.C.P. 1094.8* provides an expedited procedure for judicial review of administrative decisions concerning permits that involve expressive conduct protected by the First Amendment of the United States Constitution. The statute was enacted in response to the holding in *Baby Tam & Co. v. Las Vegas* (9th Cir. 1998) 154 F.3d 1097, requiring that a licensing procedure imposing a prior restraint on speech provide prompt judicial review, with a hearing and a decision within a prescribed period of time. (See Stats. 1999, Chap. 49, §2; 31 *McGeorge L. Rev.* 623.)

(2) *Definitions.* For purposes of the statute, the terms "permit" and "entitlement" are used interchangeably; the term "permit applicant" means both an applicant for a permit and a permit holder; and the term "public agency" means a city, county, city and county, a joint powers authority or similar public entity formed pursuant to *Govt.C. 65850.4*, or any other public entity authorized by law to issue permits for expressive conduct protected by the First Amendment. (*C.C.P. 1094.8(b)*.)

(3) *Expedited Procedure.* Under *C.C.P. 1094.8(a)*, an action or proceeding to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the First Amendment must be conducted as follows:

(a) Within 5 court days after receipt of written notification from a permit applicant that the applicant will seek judicial review of a public agency's action on the permit, the agency must prepare, certify, and make available the administrative record to the applicant. (*C.C.P. 1094.8(d)(1)*.)

(b) Either the public agency or the permit applicant may bring an action in accordance with the procedure set forth in this statute. If the applicant brings the action, the action must be in the form of a petition for mandamus pursuant to *C.C.P. 1085* (ordinary mandamus) or *C.C.P. 1094.5* (administrative mandamus), as appropriate. (*C.C.P. 1094.8(d)(2)*.)

(c) The party bringing the action must file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition must contain the following language in capital letters and 18-point type: "ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND

SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE." (C.C.P. 1094.8(d)(3).)

(d) The clerk of the court must set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers are filed as provided in the California Rules of Court. The petitioner must lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date. (C.C.P. 1094.8(d)(4).)

(e) Following the conclusion of the hearing, the court must render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event may the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed, whichever is earlier. (C.C.P. 1094.8(d)(5).)

(4) *Assignment of Judges.* If the presiding judge of the court in which the action is filed determines that, as a result of either the press of other court business or other factors, the court will be unable to meet any one or more of the specified deadlines, the presiding judge must request the temporary assignment of a judicial officer to hear the petition and render a decision within these time limits, pursuant to Govt.C. 68543.8 (temporary assignment of retired judges). Given the short time period involved, the request is entitled to priority. (C.C.P. 1094.8(e).)

(5) *Designation by Agency of Permits Subject to Procedure.* A public agency may, if it so chooses, designate the permits or entitlements to which the statute applies by adopting an ordinance or resolution that contains a specific listing or other description of the permits or entitlements issued by the agency that are eligible for expedited judicial review pursuant to the statute because the permits regulate expressive conduct protected by the First Amendment. (C.C.P. 1094.8(c).)

(6) *Waiver of Time Limits.* The parties to the action may jointly waive the time limits provided by the statute. (C.C.P. 1094.8(f).)

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(3) *Expedited Procedure.*

(c) *Filing and service of petition within 21 days of final decision on permit:* See *Stearn v. San Bernardino* (2009) 170 C.A.4th 434, 443, 88 C.R.3d 330 [limitations period did not apply where proceeding was initiated by third party, rather than by permit applicant].



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V. CALIFORNIA STATE AGENCIES
A. In General.

9 *Witkin Cal. Proc. Admin Proc* § 154

[§ 154] In General.

State agencies are of several basic types, depending on their function. They include, among others, regulatory or permitting agencies, licensing agencies, ratemaking agencies, and social welfare or entitlement agencies. Some perform multiple functions. For example, the Public Utilities Commission is both a regulatory and a ratemaking agency.

Six major agencies have been established in the executive branch of state government (*Govt.C. 12800*):

- (1) Business, Transportation and Housing Agency.
- (2) California Environmental Protection Agency.
- (3) Health and Human Services Agency.
- (4) Labor and Workforce Development Agency.
- (5) Resources Agency.
- (6) State and Consumer Services Agency.

Each of these major agencies is divided into departments, commissions, boards, and other subagencies. Thus, the Resources Agency includes, among other subagencies, the State Air Resources Board, the State Lands Commission, the Fish and Game Department, and the Department of Water Resources. (*Govt.C. 12805*.) Many of the subagencies are further divided. For example, the Department of Consumer Affairs in the State and Consumer Services Agency includes numerous licensing boards. (See *B. & P.C. 101* [listing boards].)

There are a number of independent agencies, frequently constitutional in origin (*supra*, §2), not within the major agencies. An example is the State Board of Education, created pursuant to constitutional directive (see *Cal. Const.*, Art. IX, §7) and appointed by the Governor with the advice and consent of two-thirds of the Senate (*Educ.C. 33000*).

The primary sources of information on specific administrative agencies and practice before them are, of course, the constitution, statutes, and regulations. The following additional sources may be useful: California State Government

Directory (State Net); C.E.B., Administrative Hearing Practice 2d, Appendix A: State Agencies and Procedures That Apply to Adjudicative Hearings; California Regulatory Law Bulletin (published weekly) [rulemaking of major agencies].

This division of the chapter provides brief, general information on some of the more important California state agencies.

West's Key Number Digest, Administrative Law and Procedure 101 et seq.; States 19 et seq.

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(5) *Resources Agency*: The Resources Agency has been renamed the Natural Resources Agency (*Govt.C. 12800*, amended in 2008; *Govt.C. 12802*, added in 2008), and the list of entities within the agency has been revised to reflect its current composition (*Govt.C. 12805*, amended in 2008 and 2009).



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B. Business, Transportation and Housing Agency.

1. Department of Alcoholic Beverage Control.

9 Witkin Cal. Proc. Admin Proc § 155

[§ 155] Department of Alcoholic Beverage Control.

The Department of Alcoholic Beverage Control in the Business, Transportation and Housing Agency licenses and regulates the manufacture, purchase and sale, possession, and transportation of alcohol in California. It also regulates, subject to federal law, the import and export of alcoholic beverages to and from the state.

Governing Statutes: B. & P.C. 23000 et seq.

Governing Regulations: 4 Cal. Code Reg. §1 et seq.

Sacramento Address: 3927 Lennane Dr., Suite 100; Sacramento, CA 95834

Sacramento Phone: 916/419-2500

Cerritos Address: 12750 Center Court Dr., Suite 700; Cerritos, CA 90703

Cerritos Phone: 562/402-0659

Website: <http://www.abc.ca.gov>

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B. Business, Transportation and Housing Agency.
2. Department of Corporations.

9 *Witkin Cal. Proc. Admin Proc* § 156

[§ 156] Department of Corporations.

The Department of Corporations in the Business, Transportation and Housing Agency regulates the sale of securities, and licenses and regulates securities brokers, investment advisers, finance lenders, and various other entities. The department is headed by the Commissioner of Corporations.

Governing Statutes: *Corp.C.* 25000 et seq. (Corporate Securities Law of 1968); *Corp.C.* 31000 et seq. (Franchise Investment Law); *Fin.C.* 12000 et seq. (check sellers, bill payers, and proraters); *Fin.C.* 14000 et seq. (credit unions); *Fin.C.* 17000 et seq. (escrow agents); *Fin.C.* 18000 et seq. (industrial loan companies); *Fin.C.* 22000 et seq. (finance lenders); *Health & Saf.C.* 1340 et seq. (health care service plans)

Governing Regulations: 10 *Cal. Code Reg.* §250.1 et seq.

Los Angeles Address: 320 W. 4th St., Suite 750; Los Angeles, CA 90013-2344

Los Angeles Phone: 213/576-7500

Sacramento Address: 1515 K St., Suite 200; Sacramento, CA 95814-4052

Sacramento Phone: 916/445-7205 or 866/275-2677

San Diego Address: 1350 Front St., Room 2034; San Diego, CA 92101-3697

San Diego Phone: 619/525-4234

San Francisco Address: 71 Stevenson St., Suite 2100; San Francisco, CA 94105-2908

San Francisco Phone: 415/972-8559

Website: <http://www.corp.ca.gov>

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B. Business, Transportation and Housing Agency.
3. Department of Financial Institutions.

9 *Witkin Cal. Proc. Admin Proc* § 157

[§ 157] Department of Financial Institutions.

The Department of Financial Institutions in the Business, Transportation and Housing Agency licenses and supervises banks, credit unions, savings and loan associations, and trust companies, and otherwise administers laws relating to banking. The department is headed by the Commissioner of Financial Institutions.

Governing Statutes: *Fin.C.* 99 et seq. (Banking Law); *Fin.C.* 112, 200

Governing Regulations: 10 *Cal. Code Reg.* §1.1 et seq.

Los Angeles Address: 300 South Spring St., Suite 15513; Los Angeles, CA 90013-1204

Los Angeles Phone: 213/897-2085

Sacramento Address: 1810 13th St.; Sacramento, CA 95811-7118

Sacramento Phone: 916/322-5966

San Diego Address: 7575 Metropolitan Dr., Suite 108; San Diego, CA 92108

San Diego Phone: 619/682-7227

San Francisco Address: 111 Pine St., Suite 1100; San Francisco, CA 94111-5613

San Francisco Phone: 415/263-8500

Website: <http://www.dfi.ca.gov>

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San Francisco Address: 45 Fremont St., Suite 1700; San Francisco, CA 94105-2219



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B. Business, Transportation and Housing Agency.

4. Department of the California Highway Patrol.

9 Witkin Cal. Proc. Admin Proc § 158

[§ 158] Department of the California Highway Patrol.

The Department of the California Highway Patrol in the Business, Transportation and Housing Agency is responsible for ensuring the safe and efficient movement of persons and goods along the state's highways. Additional duties include investigating accidents, inspecting vehicles, and providing for the security of elected officials and state facilities.

Governing Statutes: Veh.C. 2100 et seq.

Governing Regulations: 13 Cal. Code Reg. §600 et seq.

Address: 2555 First Ave; Sacramento, CA 95818-2696

Phone: 916/657-7261

Alternate Address: Box 942898; Sacramento, CA 94298-0001

Website: <http://www.chp.ca.gov>

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B. Business, Transportation and Housing Agency.

5. Department of Housing and Community Development.

9 *Witkin Cal. Proc. Admin Proc* § 159

[§ 159] Department of Housing and Community Development.

The Department of Housing and Community Development in the Business, Transportation and Housing Agency operates programs and provides services to help secure safe and affordable housing to state residents. The department also reviews city and county plans to ensure compliance with state housing laws, and implements and enforces housing standards.

Governing Statutes: Health & Saf.C. 50400 et seq.

Governing Regulations: 25 Cal. Code Reg. §1 et seq.

Address: 1800 Third St; Sacramento, CA 95814

Phone: 916/445-4775

Alternate Address: Box 952051; Sacramento, CA 94252-2051

Website: <http://www.hcd.ca.gov>

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B. Business, Transportation and Housing Agency.
6. California Housing Finance Agency.

9 *Witkin Cal. Proc. Admin Proc* § 160

[§ 160] California Housing Finance Agency.

The California Housing Finance Agency in the Business, Transportation and Housing Agency issues primarily tax-exempt revenue bonds to facilitate low-interest rate housing loans to low- and moderate-income families.

Governing Statutes: Health & Saf.C. 50900 et seq.

Governing Regulations: 25 Cal. Code Reg. §10001 et seq.

Address: 1415 L St., Fifth Floor; Sacramento, CA 95814

Phone: 916/322-3991

Website: <http://www.calhfa.ca.gov>

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B. Business, Transportation and Housing Agency.
7. Department of Managed Health Care.

9 *Witkin Cal. Proc. Admin Proc* § 161

[§ 161] Department of Managed Health Care.

The Department of Managed Health Care in the Business, Transportation and Housing Agency seeks to bring about an accountable, viable managed health care delivery system that promotes better health among state residents.

Governing Statutes: Health & Saf.C. 1341 et seq.

Governing Regulations: 28 Cal. Code Reg. §1000 et seq.

Address: 980 Ninth St., Suite 500; Sacramento, CA 95814-2725

Phone: 916/324-8176; Consumer Information Hotline: 888/466-2219

Website: <http://www.dmhc.ca.gov>; <http://www.hmohelp.ca.gov>

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B. Business, Transportation and Housing Agency.

8. Department of Motor Vehicles.

9 *Witkin Cal. Proc. Admin Proc* § 162

[§ 162] Department of Motor Vehicles.

The Department of Motor Vehicles in the Business, Transportation and Housing Agency licenses and registers vehicles; licenses drivers; regulates vehicle manufacturers, transporters, sellers, distributors, and dismantlers; enforces maintenance of automobile liability insurance, and promotes public safety on roads and highways.

Governing Statutes: Veh.C. 1 et seq.

Governing Regulations: 13 Cal. Code Reg. §1 et seq.

Address: 2415 First Ave.; Sacramento, CA 95818

Phone: 916/657-6940

Website: <http://www.dmv.ca.gov>

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B. Business, Transportation and Housing Agency.
9. Department of Real Estate.

9 Witkin Cal. Proc. Admin Proc § 163

[§ 163] Department of Real Estate.

The Department of Real Estate in the Business, Transportation and Housing Agency licenses real estate brokers and salespersons. The department also regulates residential subdivision offerings and other specified real estate transactions. The department is headed by the Real Estate Commissioner.

Governing Statutes: B. & P.C. 10000 et seq. (Real Estate Law)

Governing Regulations: 10 Cal. Code Reg. §2700 et seq.

Fresno Address: 2550 Mariposa Mall, Room 3070; Fresno, CA 93721-2273

Fresno Phone: 559/445-5009

Los Angeles Address: 320 W. 4th St., Suite 350; Los Angeles, CA 90013-1105

Los Angeles Phone: 213/620-2072

Oakland Address: 1515 Clay St., Suite 702; Oakland, CA 94612-1462

Oakland Phone: 510/622-2552

Sacramento Address: 2201 Broadway; Sacramento, CA 95818-2500

Sacramento Phone: 916/227-0772

San Diego Address: 1350 Front St., Suite 3064; San Diego, CA 92101-3687

San Diego Phone: 619/525-4192

Website: <http://www.dre.ca.gov>

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Sacramento Phone: 916/227-0789



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B. Business, Transportation and Housing Agency.
10. Department of Transportation (Caltrans).

9 Witkin Cal. Proc. Admin Proc § 164

[§ 164] Department of Transportation (Caltrans).

The Department of Transportation in the Business, Transportation and Housing Agency designs, operates, and maintains improvements to California's transportation system. It assists in the operation of local road and transit systems, and provides for the safe operation of airports.

Governing Statutes: Govt.C. 14001 et seq.; Sts. & H.C. 90 et seq.

Governing Regulations: 4 Cal. Code Reg. §2240 et seq.; 21 Cal. Code Reg. §1401.1 et seq.

Address: 1120 N St., Room 1100; Sacramento, CA 95814

Phone: 916/654-5266

Website: <http://www.dot.ca.gov>

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C. California Environmental Protection Agency.
1. State Air Resources Board.

9 Witkin Cal. Proc. Admin Proc § 165

[§ 165] State Air Resources Board.

The Air Resources Board in the California Environmental Protection Agency coordinates efforts to attain and maintain air quality standards. The board regulates vehicular pollution sources, adopting emission controls for motor vehicles, fuels, and other vehicular sources of pollution. While local air pollution control districts and air quality management districts have primary responsibility for controlling emissions from sources other than vehicles, the board adopts regulations to assist the districts, oversees their enforcement activities, and provides financial and technical assistance.

Governing Statutes: Health & Saf.C. 39500 et seq.

Governing Regulations: 13 Cal. Code Reg. §1900 et seq.; 17 Cal. Code Reg. §60000 et seq.; 26 Cal. Code Reg. §13-2263.7 et seq.

Address: 1001 I St.; Sacramento, CA 95814

Phone: 916/322-2990

Alternate Address: P.O. Box 2815; Sacramento, CA 95812-2815

Website: <http://www.arb.ca.gov>

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C. California Environmental Protection Agency.
2. Office of Environmental Health Hazard Assessment.

9 Witkin Cal. Proc. Admin Proc § 166

[§ 166] Office of Environmental Health Hazard Assessment.

The Office of Environmental Health Hazard Assessment in the California Environmental Protection Agency protects public health and the environment by scientifically evaluating the risks posed by hazardous substances. It is also the lead agency for implementing the Safe Drinking Water and Toxic Enforcement Act of 1986.

Governing Statutes: Health & Saf.C. 59000 et seq.

Governing Regulations: 17 Cal. Code Reg. §96100 et seq.; 22 Cal. Code Reg. §60001 et seq.

Sacramento Address: 1001 I St., Box 4010; Sacramento, CA 95812-4010

Sacramento Phone: 916/324-7572

Oakland Address: 1515 Clay St., 16th Floor; Oakland, CA 94612

Oakland Phone: 510/622-3200

Website: <http://www.oehha.ca.gov>

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C. California Environmental Protection Agency.
3. California Integrated Waste Management Board.

9 Witkin Cal. Proc. Admin Proc § 167

[§ 167] California Integrated Waste Management Board.

The California Integrated Waste Management Board in the California Environmental Protection Agency coordinates solid waste management activities throughout the state. The board sets and enforces minimum standards for solid waste disposal, reviews city and county waste management plans for compliance with state law, and certifies local agencies as enforcement agencies.

Governing Statutes: Pub.Res.C.40000 et seq.

Governing Regulations: 14 Cal. Code Reg. §17000 et seq.

Address: 1001 I St.; Sacramento, CA 95814

Phone: 916/341-6000

Alternate Address: P.O. Box 4025; Sacramento, CA 95812-4025

Website: <http://www.ciwmb.ca.gov>

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C. California Environmental Protection Agency.
4. Department of Pesticide Regulation.

9 Witkin Cal. Proc. Admin Proc § 168

[§ 168] Department of Pesticide Regulation.

The Department of Pesticide Regulation in the California Environmental Protection Agency regulates pesticide sale and use in order to protect the public health and environment and to insure product effectiveness. Among other functions, the department oversees licensing and certification of pesticide dealers and pest control operators.

Governing Statutes: Food & Ag.C. 11401 et seq.

Governing Regulations: 3 Cal. Code Reg. §6000 et seq.

Address: 1001 I St.; Sacramento, CA 95814

Phone: 916/445-4300

Alternate Address: Box 4015; Sacramento, CA 95812-4015

Website: <http://www.cdpr.ca.gov>

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C. California Environmental Protection Agency.

5. Department of Toxic Substances Control.

9 Witkin Cal. Proc. Admin Proc § 169

[§ 169] Department of Toxic Substances Control.

The Department of Toxic Substances Control in the California Environmental Protection Agency protects public health and the environment from exposure to hazardous substances, taking care to avoid unnecessarily impacting sustainable growth and development.

Governing Statutes: Health & Saf.C. 58000 et seq.

Governing Regulations: 22 Cal. Code Reg. §66001 et seq.

Address: 1001 I St.; Sacramento, CA 95814-2828

Phone: 800/728-6942

Alternate Address: P.O. Box 806; Sacramento, CA 95812-0806

Website: <http://www.dtsc.ca.gov>

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C. California Environmental Protection Agency.

6. State Water Resources Control Board.

9 Witkin Cal. Proc. Admin Proc § 170

[§ 170] State Water Resources Control Board.

The State Water Resources Control Board in the California Environmental Protection Agency shares with the Department of Health Care Services responsibility for the quality of state water. The board also administers California's water rights laws through licensing appropriative rights and adjudicating disputed rights. It reviews actions or failures to act by regional water quality control boards.

Governing Statutes: Water C. 174 et seq., 1000 et seq., 13000 et seq.

Governing Regulations: 23 Cal. Code Reg. §640 et seq.

Address: 1001 I St.; Sacramento, CA 95814

Phone: 916/341-5250

Alternate Address: P.O. Box 100; Sacramento, CA 95812-0100

Website: <http://www.waterboards.ca.gov>; <http://www.swrcb.ca.gov>

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D. Health and Human Services Agency.
1. Department of Aging.

9 Witkin Cal. Proc. Admin Proc § 171

[§ 171] Department of Aging.

The Department of Aging in the Health and Human Services Agency assists senior citizens to live independently and productively by administering nutrition programs and support services for them; assisting local communities in developing elderly services; providing information on aging; and serving as a link between local, state, and federal programs for the elderly.

Governing Statutes: Welf.C. 9100 et seq.

Governing Regulations: 22 Cal. Code Reg. §7000 et seq.

Address: 1300 National Dr., Suite 200; Sacramento, CA 95834-1992

Phone: 916/419-7500

Website: <http://www.aging.ca.gov>-

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D. Health and Human Services Agency.
2. Department of Child Support Services.

9 *Witkin Cal. Proc. Admin Proc* § 172

[§ 172] Department of Child Support Services.

The Department of Child Support Services in the Health and Human Services Agency is responsible for administering all services and performing all functions necessary to establish, collect, and distribute child support.

Governing Statutes: Family C. 17000 et seq.

Governing Regulations: 22 Cal. Code Reg. §110000 et seq.

Address: 11120 International Dr.; Rancho Cordova, CA 95742

Phone: 866/249-0773 or 916/464-5000

Alternate Address: Box 419064; Rancho Cordova, CA 95741-9064

Website: <http://www.childsup.gov>

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Website: <http://www.childsup.ca.gov>



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D. Health and Human Services Agency.
3. Department of Health Care Services.

9 *Witkin Cal. Proc. Admin Proc* § 173

[§ 173] Department of Health Care Services.

The Department of Health Care Services in the Health and Human Services Agency provides medical care to the state's low-income residents and administers preventive-care programs.

Governing Statutes: *Health & Saf.C. 100100* et seq.

Governing Regulations: *22 Cal. Code Reg. §§10001* et seq., *50000* et seq.

Address: 1501 Capitol Ave., MS 0015; Sacramento, CA 95814

Phone: 916/445-4171

Alternate Address: P.O. Box 997413; Sacramento, CA 95899-7413

Website: <http://www.dhcs.ca.gov>

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D. Health and Human Services Agency.
4. Department of Mental Health.

9 Witkin Cal. Proc. Admin Proc § 174

[§ 174] Department of Mental Health.

The Department of Mental Health in the Health and Human Services Agency oversees the state's mental health system to enable persons with disabling mental illnesses or serious emotional disturbances to access appropriate programs and services.

Governing Statutes: Welf.C. 4000 et seq.

Governing Regulations: 9 Cal. Code Reg. §400 et seq.

Address: 1600 Ninth St., Room 151; Sacramento, CA 95814

Phone: 916/654-2309 or 800/896-4042

Website: <http://www.dmh.ca.gov>

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D. Health and Human Services Agency.
5. Department of Public Health.

9 *Witkin Cal. Proc. Admin Proc* § 175

[§ 175] Department of Public Health.

The Department of Public Health in the Health and Human Services Agency protects and promotes the health of Californians through population-based public health programs and services. For example, the department works to maintain safe drinking water and to provide protection from communicable diseases, epidemics, and contaminated food.

Governing Statutes: *Health & Saf.C. 131000* et seq.

Governing Regulations: *17 Cal. Code Reg. §100* et seq.; *22 Cal. Code Reg. §§12000* et seq., *60001* et seq.

Address: 1616 Capitol Ave., P.O. Box 997377, Sacramento, CA 95899-7377

Phone: 916/558-1784

Website: <http://www.cdph.ca.gov>

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Governing Regulations: As a result of a 2008 revision, the Department of Public Health now is responsible for enforcing the following administrative regulations: *17 Cal. Code Reg. §100* et seq.; *22 Cal. Code Reg. §60001* et seq.; and *27 Cal. Code Reg. §25102* et seq.

Address: 1615 Capitol Ave., MS 0500; Sacramento, CA 95814



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D. Health and Human Services Agency.
6. Department of Social Services.

9 Witkin Cal. Proc. Admin Proc § 176

[§ 176] Department of Social Services.

The Department of Social Services in the Health and Human Services Agency administers income maintenance, food stamp, and other social service programs, licenses community care facilities, and conducts hearings relating to eligibility for benefits administered by the department.

Governing Statutes: Health & Saf.C. 1500 et seq.; Welf.C. 10550 et seq.

Governing Regulations: 22 Cal. Code Reg. §80000 et seq.

Address: 744 P St., Suite 1740; Sacramento, CA 95814

Phone: 916/651-8848

Website: <http://www.cdss.ca.gov>; <http://www.dss.cahwnet.gov>

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E. Labor and Workforce Development Agency.
1. Agricultural Labor Relations Board.

9 *Witkin Cal. Proc. Admin Proc* § 177

[§ 177] Agricultural Labor Relations Board.

The Agricultural Labor Relations Board in the Labor and Workforce Development Agency protects the rights of agricultural workers to organize and bargain collectively, and investigates and resolves unfair labor practices.

Governing Statutes: Lab.C. 1141 et seq.

Governing Regulations: 8 Cal. Code Reg. §20100 et seq.

Address: 915 Capitol Mall, 3rd Floor; Sacramento, CA 95814

Phone: 916/653-3699

Website: <http://www.alrb.ca.gov>

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E. Labor and Workforce Development Agency.
2. Employment Development Department.

9 *Witkin Cal. Proc. Admin Proc* § 178

[§ 178] Employment Development Department.

The Employment Development Department in the Labor and Workforce Development Agency helps California employers meet their labor needs, and assists job applicants in finding employment. The department also serves as the state's administrator for employment training, and pays to eligible claimants unemployment and disability insurance benefits.

Governing Statutes: Unemp.Ins.C. 301 et seq., 9500 et seq.

Governing Regulations: 22 Cal. Code Reg. §125-1 et seq.

Address: 800 Capitol Mall, 5th Floor; Sacramento, CA 95814

Phone: 916/654-8210

Website: <http://www.edd.ca.gov>

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E. Labor and Workforce Development Agency.
3. Department of Industrial Relations.

9 *Witkin Cal. Proc. Admin Proc* § 179

[§ 179] Department of Industrial Relations.

The Department of Industrial Relations in the Labor and Workforce Development Agency is responsible for protecting California workers and improving their working conditions.

Governing Statutes: *Lab.C.* 50 et seq.

Governing Regulations: 8 *Cal. Code Reg.* §1 et seq.

Address: 455 Golden Gate Ave., 10th Floor; San Francisco, CA 94102

Phone: 415/703-5050

Website: <http://www.dir.ca.gov>

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Phone: 415/703-5070



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E. Labor and Workforce Development Agency.
4. Division of Occupational Safety and Health.

9 Witkin Cal. Proc. Admin Proc § 180

[§ 180] Division of Occupational Safety and Health.

Several agencies in the Department of Industrial Relations in the Labor and Workforce Development Agency administer Cal-OSHA, the state programs directed to worker health and safety. The Division of Occupational Safety and Health enforces standards and orders adopted by the Occupational Safety and Health Standards Board. The Occupational Safety and Health Appeals Board adjudicates related disputes.

Governing Statutes: Lab.C. 140 et seq., 6300 et seq.

Governing Regulations: 8 Cal. Code Reg. §330 et seq.

Division of Occupational Safety and Health:

Address: 1515 Clay St., Suite 1901; Oakland, CA 94612

Phone: 510/286-7000

Website: <http://www.dir.ca.gov/dosh/dosh1.html>

Occupational Safety and Health Standards Board:

Address: 2520 Venture Oaks Way, Suite 350; Sacramento, CA 95833

Phone: 916/274-5721

Website: <http://www.dir.ca.gov/oshsb/oshsb.html>

Occupational Safety and Health Appeals Board:

Address: 2520 Venture Oaks Way, Suite 300; Sacramento, CA 95833

Phone: 916/274-5751

Website: <http://www.dir.ca.gov/oshappeals>

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E. Labor and Workforce Development Agency.
5. California Unemployment Insurance Appeals Board.

9 *Witkin Cal. Proc. Admin Proc* § 181

[§ 181] California Unemployment Insurance Appeals Board.

The California Unemployment Insurance Appeals Board reviews unemployment and disability compensation assessment and benefit decisions. (See 3 *Summary* (10th), *Agency and Employment*, §459 et seq.)

Governing Statutes: Unemp.Ins.C. 401 et seq., 1030 et seq., 1221 et seq., 1330 et seq., 2738, 3264

Governing Regulations: 22 Cal. Code Reg. §5000 et seq.

Address: 2400 Venture Oaks Way; Sacramento, CA 95833

Phone: 916/263-6722

Website: <http://www.cuiab.ca.gov>

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E. Labor and Workforce Development Agency.
6. Workers' Compensation Appeals Board.

9 *Witkin Cal. Proc. Admin Proc* § 182

[§ 182] Workers' Compensation Appeals Board.

The Workers' Compensation Appeals Board in the Department of Industrial Relations in the Labor and Workforce Development Agency reviews adjudication of contested claims for benefits resulting from work-related accidents. It has related rulemaking authority. (See 2 *Summary* (10th), *Workers' Compensation*, §§13 et seq., 345 et seq.)

Governing Constitutional and Statutory Provisions: Cal. Const., Art. XIV, §§1, 4; *Lab. C.* 110 et seq., 3200 et seq.

Governing Regulations: 8 *Cal. Code Reg.* §10300 et seq.

Address: 455 Golden Gate Ave., 9th Floor, Room 9328; San Francisco, CA 94102

Phone: 415/703-4580

Alternate Address: P.O. Box 429459; San Francisco, CA 94142-9459

Website: <http://www.dir.ca.gov/wcab/wcab.htm>

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F. Resources Agency.
1. California Coastal Commission.

9 Witkin Cal. Proc. Admin Proc § 183

[§ 183] California Coastal Commission.

The California Coastal Commission in the Resources Agency regulates development on much of the California coast and certifies local coastal programs. It also administers the Federal Coastal Zone Management Act.

Governing Statutes: Pub.Res.C. 30000 et seq. (California Coastal Act); 16 U.S.C., 1451 et seq. (Coastal Zone Management Act)

Governing Regulations: 14 Cal. Code Reg. §13001 et seq.

Address: 45 Fremont St., Suite 2000; San Francisco, CA 94105-2219

Phone: 415/904-5200

Website: <http://www.coastal.ca.gov>

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F. Resources Agency.
2. Department of Conservation.

9 Witkin Cal. Proc. Admin Proc § 184

[§ 184] Department of Conservation.

The Department of Conservation in the Resources Agency promotes conservation and reasonable use of California's land, energy, and mineral resources. It provides services and information regarding geology, seismology, soils, minerals, petroleum and geothermal resources, and agricultural and open space lands. It also provides financial incentives and convenient return systems to encourage beverage container recycling.

Governing Statutes: Pub.Res.C. 600 et seq.

Governing Regulations: 14 Cal. Code Reg. §1670 et seq.

Address: 801 K St., 24th Floor; Sacramento, CA 95814

Phone: 916/322-1080

Website: <http://www.conservation.ca.gov>

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F. Resources Agency.
3. Department of Fish and Game.

9 Witkin Cal. Proc. Admin Proc § 185

[§ 185] Department of Fish and Game.

The Department of Fish and Game in the Resources Agency manages wildlife, fish, and plant resources to protect their ecological, commercial, recreational, and scientific value. Among its duties are issuing hunting and fishing licenses; reviewing environmental impact reports; enforcing hunting and fishing regulations; and developing waterway management plans.

Governing Statutes: Fish & Game C. 700 et seq.

Governing Regulations: 14 Cal. Code Reg. §1.04 et seq.

Fresno Address: 1234 E Shaw Ave.; Fresno, CA 93710

Fresno Phone: 559/243-4005

Napa Address: 7329 Silverado Trail; Napa, CA 94558

Napa Phone: 707/944-5500

Ontario Address: 3602 Inland Empire Blvd., Suite C-220; Ontario, CA 91764

Ontario Phone: 909/484-0167-

Rancho Cordova Address: 1701 Nimbus Rd.; Rancho Cordova, CA 95670

Rancho Cordova Phone: 916/358-2900

Redding Address: 601 Locust Street; Redding, CA 96001

Redding Phone: 530/225-2300

Sacramento Address: 1416 Ninth St., 12th Floor, Room 117; Sacramento, CA 95814

Sacramento Phone: 916/445-0411

San Diego Address: 4949 View Ridge Ave.; San Diego, CA 92123

San Diego Phone: 858/467-4201

Website: <http://www.dfg.ca.gov>

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(New) Monterey Address: 20 Lower Ragsdale Dr., Suite 100; Monterey, CA 93940

(New) Monterey Phone: 831/649-2870-



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F. Resources Agency.
4. Department of Parks and Recreation.

9 Witkin Cal. Proc. Admin Proc § 186

[§ 186] Department of Parks and Recreation.

The Department of Parks and Recreation in the Resources Agency helps preserve California's biological diversity, protects its natural and cultural resources, and creates opportunities for outdoor recreation.

Governing Statutes: Pub.Res.C. 500 et seq.

Governing Regulations: 14 Cal. Code Reg. §4300 et seq.

Address: 1416 Ninth St., Room 1405; Sacramento, CA 95814

Phone: 916/653-6995 or 800/777-0369

Alternate Address: P.O. Box 942896; Sacramento, CA 94296-0001

Website: <http://www.parks.ca.gov>

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F. Resources Agency.
5. Department of Water Resources.

9 Witkin Cal. Proc. Admin Proc § 187

[§ 187] Department of Water Resources.

The Department of Water Resources in the Resources Agency maintains and operates the State Water Project, including the California aqueduct. It provides dam safety and flood control services, assists local water districts with water management and conservation, and plans for California's future water needs.

Governing Statutes: Water C. 120 et seq.

Governing Regulations: 23 Cal. Code Reg. §§200 et seq., 4000 et seq.

Address: 1416 Ninth Street, Room 1115-1; Sacramento, CA 95814

Phone: 916/653-5791

Alternate Address: Box 942836; Sacramento, CA 94236-0001

Website: <http://www.water.ca.gov>-

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G. State and Consumer Services Agency.

1. Department of Fair Employment and Housing.

9 Witkin Cal. Proc. Admin Proc § 188

[§ 188] Department of Fair Employment and Housing.

The Department of Fair Employment and Housing within the State and Consumer Services Agency administers and enforces state statutes barring discrimination in employment, housing, and public accommodations or services on the basis of race, religion, ancestry, national origin, gender, marital status, sexual orientation, age, disability, or denial of family care leave. The department prosecutes cases before the Fair Employment and Housing Commission, which also adopts regulations to enforce these statutes.

Governing Statutes: C.C. 51 (Unruh Civil Rights Act), C.C. 51.7 (Ralph Civil Rights Act), Govt.C. 12900 et seq. (Fair Employment and Housing Act)

Governing Regulations: 2 Cal. Code Reg. §7285.0 et seq.

Department of Fair Employment and Housing:

Address: 2218 Kausen Dr., Suite 100; Elk Grove, CA 95758

Phone: 916/478-7251

Fair Employment and Housing Commission:

Address: 455 Golden Gate Ave., Suite 10600; San Francisco, CA 94102-3660

Phone: 415/557-2325

Website: <http://www.dfeh.ca.gov>; <http://www.fehc.ca.gov>

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G. State and Consumer Services Agency.
2. Franchise Tax Board.

9 *Witkin Cal. Proc. Admin Proc* § 189

[§ 189] Franchise Tax Board.

The Franchise Tax Board within the State and Consumer Services Agency administers the California personal income tax and corporation tax. The board prescribes rules and regulations to enforce these taxes.

Governing Statutes: *Govt.C. 15700* et seq. (Franchise Tax Board); *Rev.C. 17001* et seq. (Personal Income Tax Law), *Rev.C. 23001* et seq. (Corporation Tax Law)

Governing Regulations: *18 Cal. Code Reg. §17000* et seq.

Address: P.O. Box 1468; Sacramento, CA 95812-1468

Phone: 800/852-5711

Website: <http://www.ftb.ca.gov>

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G. State and Consumer Services Agency.
3. State Personnel Board.

9 Witkin Cal. Proc. Admin Proc § 190

[§ 190] State Personnel Board.

The State Personnel Board in the State and Consumer Services Agency administers and enforces the state Civil Service Act, including the appointment, promotion, and discipline processes. The board adopts rules and conducts hearings and investigations. (See 3 *Summary* (10th), *Agency and Employment*, §17 et seq.)

Governing Constitutional and Statutory Provisions: Cal. Const., Art. VII, §§2, 3; *Govt.C. 18210* et seq., *18500* et seq.

Governing Regulations: 2 *Cal. Code Reg. §1* et seq.

Address: 801 Capitol Mall; Sacramento, CA 95814

Phone: 916/653-1705

Alternate Address: P.O. Box 944201; Sacramento, CA 94244-2010

Website: <http://www.spb.ca.gov>

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G. State and Consumer Services Agency.
4. California Public Employees' Retirement System.

9 Witkin Cal. Proc. Admin Proc § 191

[§ 191] California Public Employees' Retirement System.

The Public Employees' Retirement System within the State and Consumer Services Agency administers retirement and related benefit programs for constitutional officers, legislators, judges, and employees of the state. The system is managed by the Board of Administration of the system. Teachers' retirement is administered by the State Teachers' Retirement System (*infra*, §192).

Governing Statutes: Govt.C. 20000 et seq. (Public Employees' Retirement Law)

Governing Regulations: 2 Cal. Code Reg. §550 et seq.

Address: 400 Q St.; Sacramento, CA 95814

Phone: 916/795-3829

Website: <http://www.calpers.ca.gov>

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G. State and Consumer Services Agency.
5. State Teachers' Retirement System.

9 Witkin Cal. Proc. Admin Proc § 192

[§ 192] State Teachers' Retirement System.

The State Teachers' Retirement System within the State and Consumer Services Agency administers retirement and related benefit programs for teachers and other employees in public and state supported schools. The system is managed by the Teachers' Retirement Board.

Governing Statutes: Educ.C. 22000 et seq. (State Teachers' Retirement Law)

Governing Regulations: 5 Cal. Code Reg. §20500 et seq.

Address: 7667 Folsom Blvd., 3rd Floor; Sacramento, CA 95826

Phone: 916/229-3700

Alternate Address: P.O. Box 15275; Sacramento, CA 95851-0275

Website: <http://www.calstrs.ca.gov>-

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G. State and Consumer Services Agency.
6. Department of Consumer Affairs.

9 Witkin Cal. Proc. Admin Proc § 193

[§ 193] Department of Consumer Affairs.

The Department of Consumer Affairs in the State and Consumer Services Agency protects and promotes the interests of California consumers. The Department safeguards consumer health, safety, privacy, and economic well-being; promotes ethical standards of professional conduct; partners with state and national business and consumer groups; and works with law enforcement to enforce consumer protection laws and combat fraud.

Governing Statutes: B. & P.C. 100 et seq.

Governing Regulations: 16 Cal. Code Reg. §1 et seq.

Address: 1625 North Market Blvd., Suite N112; Sacramento, CA 95834

Phone: 916/445-1254 or 800/952-5210

Website: <http://www.dca.ca.gov>

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G. State and Consumer Services Agency.
7. California Board of Accountancy.

9 Witkin Cal. Proc. Admin Proc § 194

[§ 194] California Board of Accountancy.

The California Board of Accountancy within the Department of Consumer Affairs in the State and Consumer Services Agency licenses, regulates, and disciplines certified public accountants, practicing public accountants, and public accounting firms.

Governing Statutes: B. & P.C. 5000 et seq.

Governing Regulations: 16 Cal. Code Reg. §1 et seq.

Address: 2000 Evergreen St., Suite 250; Sacramento, CA 95815-3832

Phone: 916/263-3680

Website: <http://www.dca.ca.gov/cba>

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G. State and Consumer Services Agency.
8. California Architects Board.

9 Witkin Cal. Proc. Admin Proc § 195

[§ 195] California Architects Board.

The California Architects Board within the Department of Consumer Affairs in the State and Consumer Services Agency licenses, regulates, and disciplines architects and otherwise regulates the practice of architecture in the state.

Governing Statutes: B. & P.C. 5500 et seq.

Governing Regulations: 16 Cal. Code Reg. §100 et seq.

Address: 2420 Del Paso Road, Suite 105; Sacramento, CA 95834

Phone: 916/574-7220

Website: <http://www.cab.ca.gov>

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G. State and Consumer Services Agency.
9. Contractors' State License Board.

9 Witkin Cal. Proc. Admin Proc § 196

[§ 196] Contractors' State License Board.

The Contractors' State License Board within the Department of Consumer Affairs in the State and Consumer Services Agency licenses contractors, enforces construction industry standards, and handles consumer complaints and conducts disciplinary proceedings.

Governing Statutes: B. & P.C. 7000 et seq. (Contractors' State License Law)

Governing Regulations: 16 Cal. Code Reg. §810 et seq.

Address: 9821 Business Park Dr.; Sacramento, CA 95827

Phone: 916/255-3900 or 800/321-2752

Alternate Address: P.O. Box 26000; Sacramento, CA 95826

Website: <http://www.cslb.ca.gov>

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G. State and Consumer Services Agency.
10. Dental Board of California.

9 Witkin Cal. Proc. Admin Proc § 197

[§ 197] Dental Board of California.

The Dental Board of California within the Department of Consumer Affairs in the State and Consumer Services Agency licenses and disciplines dentists, dental hygienists and assistants. In addition, it oversees dental education programs.

Governing Statutes: B. & P.C. 1600 et seq. (Dental Practice Act)

Governing Regulations: 16 Cal. Code Reg. §1000 et seq.

Address: 2005 Evergreen St., Suite 1550; Sacramento, CA 95815

Phone: 916/263-2300 or 877/729-7789

Website: <http://www.dbc.ca.gov>

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G. State and Consumer Services Agency.

11. Board for Professional Engineers and Land Surveyors.

9 Witkin Cal. Proc. Admin Proc § 198

[§ 198] Board for Professional Engineers and Land Surveyors.

The Board for Professional Engineers and Land Surveyors within the Department of Consumer Affairs in the State and Consumer Services Agency regulates the practice of engineering and land surveying and licenses and disciplines members of these professions.

Governing Statutes: B. & P.C. 6700 et seq. (Professional Engineers Act); B. & P.C. 8700 et seq. (Professional Land Surveyors Act)

Governing Regulations: 16 Cal. Code Reg. §400 et seq.

Address: 2535 Capitol Oaks Dr., Suite 300; Sacramento, CA 95833-2944

Phone: 916/263-2222 or 866/780-5370

Website: <http://www.pels.ca.gov>

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G. State and Consumer Services Agency.
12. Medical Board of California.

9 Witkin Cal. Proc. Admin Proc § 199

[§ 199] Medical Board of California.

The Medical Board of California within the Department of Consumer Affairs in the State and Consumer Services Agency licenses and disciplines physicians and surgeons. In addition, the board oversees the regulation of psychologists, physical therapists, physicians' assistants, acupuncturists, midwives, research psychoanalysts, speech pathologists and audiologists, and dispensing opticians. It also administers medical educational programs.

Governing Statutes: B. & P.C. 2000 et seq. (Medical Practice Act)

Governing Regulations: 16 Cal. Code Reg. §1300 et seq.

Address: 2005 Evergreen St., Suite 1200; Sacramento, CA 95815

Phone: 916/263-2389

Website: <http://www.medbd.ca.gov>; <http://www.caldocinfo.ca.gov>

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G. State and Consumer Services Agency.
13. State Board of Optometry.

9 Witkin Cal. Proc. Admin Proc § 200

[§ 200] State Board of Optometry.

The State Board of Optometry within the Department of Consumer Affairs in the State and Consumer Services Agency licenses and disciplines optometrists. It also issues, suspends, and revokes certificates of registration as optometric corporations and oversees optometric educational programs.

Governing Statutes: B. & P.C. 3000 et seq.

Governing Regulations: 16 Cal. Code Reg. §1500 et seq.

Address: 2420 Del Paso Road, Suite 255; Sacramento, CA 95834

Phone: 916/575-7170

Website: <http://www.optometry.ca.gov>

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G. State and Consumer Services Agency.
14. California State Board of Pharmacy.

9 Witkin Cal. Proc. Admin Proc § 201

[§ 201] California State Board of Pharmacy.

The California State Board of Pharmacy within the Department of Consumer Affairs in the State and Consumer Services Agency grants licenses and permits to pharmacists, pharmacies, drug wholesalers and distributors, and medical device retailers, and regulates the practice of pharmacy and the dispensing of prescription and dangerous drugs. The board conducts disciplinary hearings and may suspend or revoke licenses or permits.

Governing Statutes: B. & P.C. 4000 et seq.

Governing Regulations: 16 Cal. Code Reg. §1700 et seq.

Address: 1625 North Market Blvd., Suite N219; Sacramento, CA 95834-

Phone: 916/574-7900

Website: <http://www.pharmacy.ca.gov>

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H. Other Agencies.

1. Office of Administrative Hearings.

9 Witkin Cal. Proc. Admin Proc § 202

[§ 202] Office of Administrative Hearings.

The Office of Administrative Hearings performs hearing functions for prescribed agencies, including the assignment of administrative law judges. (See *supra*, §58.)

Governing Statutes: Govt.C. 11370 et seq.

Governing Regulations: 1 Cal. Code Reg. §1000 et seq.

Los Angeles Address: 320 W. Fourth St., Suite 630; Los Angeles, CA 90013

Los Angeles Phone: 213/576-7200

Oakland Address: 1515 Clay St., Suite 206; Oakland, CA 94612

Oakland Phone: 510/622-2722

Sacramento Address: 2349 Gateway Oaks Dr., Suite 200; Sacramento, CA 95833-4231

Sacramento Phone: 916/263-0550

San Diego Address: 1350 Front St., Suite 6022; San Diego, CA 92101

San Diego Phone: 619/525-4475

Website: <http://www.oah.dgs.ca.gov>

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H. Other Agencies.
2. Office of Administrative Law.

9 *Witkin Cal. Proc. Admin Proc* § 203

[§ 203] Office of Administrative Law.

The Office of Administrative Law reviews proposed and existing regulations adopted by state agencies, ensures that agencies follow the Administrative Procedure Act, and arranges for publication of the California Code of Regulations. The office is also authorized to study administrative rulemaking, make suggestions to the various agencies, and make an annual report of its recommendations to the Governor and the Legislature. (See *supra*, §§34 et seq., 37 et seq.)

Governing Statutes: Govt.C. 11340 et seq.

Governing Regulations: 1 Cal. Code Reg. §1 et seq.

Address: 300 Capitol Mall, Suite 1250; Sacramento, CA 95814-4339

Phone: 916/323-6225

Website: <http://www.oal.ca.gov>-

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H. Other Agencies.
3. State Bar of California.

9 Witkin Cal. Proc. Admin Proc § 204

[§ 204] State Bar of California.

The State Bar of California, among other functions, licenses persons to practice law, adopts rules of professional conduct, studies and recommends changes in procedural law and improvement of the administration of justice, approves registration as law corporations, and conducts attorney discipline proceedings and fee arbitration hearings. (See generally 1 *Cal. Proc.* (5th), *Attorneys*, §342 et seq.)

Governing Constitutional and Statutory Provisions: Cal. Const., Art. VI, §9; B. & P.C. 6000 et seq. (State Bar Act)

Governing Rules: State Bar Rules (including, among others, Rules of Professional Conduct; Rules of Procedure of the State Bar; Rules of Practice of the State Bar Court; Law Corporation Rules; Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs; Rules Governing the State Bar of California Program for Certifying Legal Specialists; Rules Regulating Admission to Practice Law in California; and MCLE Rules and Regulations)

Los Angeles Address: 1149 South Hill St.; Los Angeles, CA 90015

Los Angeles Phone: 213/765-1000

Sacramento Address: 1201 K Street, Suite 720; Sacramento, CA 95814

Sacramento Phone: 916/442-8018

San Francisco Address: 180 Howard St.; San Francisco, CA 94105

San Francisco Phone: 415/538-2000

Website: <http://www.calbar.ca.gov>

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H. Other Agencies.

4. Department of Corrections and Rehabilitation.

9 Witkin Cal. Proc. Admin Proc § 205

[§ 205] Department of Corrections and Rehabilitation.

The Department of Corrections and Rehabilitation operates California's adult prisons and juvenile facilities. It also oversees community correctional facilities, and supervises adult and juvenile parolees. Included among its offices and departments are the Adult Operations Division, Adult Programs Division, the Board of Parole Hearings, and the Division of Juvenile Justice. (On reorganization of the state's penal system in 2005, see *3 Cal. Crim. Law (3d), Punishment, Supp.*, §6.)

Governing Statutes: Govt.C. 12838 et seq.; P.C. 5000 et seq.

Governing Regulations: 15 Cal. Code Reg. §3000 et seq.

Address: 1515 S St.; Sacramento, CA 95814

Phone: 916/445-7682

Website: <http://www.cdcr.ca.gov>

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(New) Alternate Address: P.O. Box 942883; Sacramento, CA 94283-0001



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H. Other Agencies.
5. State Board of Education.

9 *Witkin Cal. Proc. Admin Proc* § 206

[§ 206] State Board of Education.

The State Board of Education is the governing and policymaking body of the California Department of Education, and sets education policy in grades K-12. The Department of Education is administered by the Superintendent of Public Instruction, an elected official who serves as the board's executive officer.

Governing Constitutional and Statutory Provisions: Cal. Const., Art. IX, §7; *Educ.C.* 33000 et seq.

Governing Regulations: 5 *Cal. Code Reg.* §18460 et seq.

Address: 1430 N St., Suite 5111; Sacramento, CA 95814

Phone: 916/319-0827

Website: <http://www.cde.ca.gov/be>

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H. Other Agencies.
6. State Board of Equalization.

9 Witkin Cal. Proc. Admin Proc § 207

[§ 207] State Board of Equalization.

The State Board of Equalization oversees local agency property assessment, assesses certain types of property, administers and enforces sales and use taxes, and hears appeals from the Franchise Tax Board (*supra*, §189) under the Personal Income Tax and the Bank and Corporation Tax Laws. (See 9 *Summary* (10th), *Taxation*, §250.)

Governing Constitutional and Statutory Provisions: Cal. Const Art. XIII, §17 et seq.; Rev.C. 721 et seq., 1840, 1841, 6536 et seq., 19046 et seq.

Governing Regulations: 18 Cal. Code Reg. §1 et seq.

Address: 450 N St.; Sacramento, CA 95814

Phone: 800/400-7115

Website: <http://www.boe.ca.gov>

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H. Other Agencies.

7. Fair Political Practices Commission.

9 *Witkin Cal. Proc. Admin Proc* § 208

[§ 208] Fair Political Practices Commission.

The Fair Political Practices Commission enforces the Political Reform Act of 1974. The commission oversees disclosure of campaign receipts and expenditures of public officials and of their assets and income, regulates lobbyists and disclosure of their finances, and hears and determines complaints under the Act. It assists in the preparation of state and local conflict of interest codes.

Governing Statutes: *Govt.C. 81000* et seq. (Political Reform Act of 1974)

Governing Regulations: *2 Cal. Code Reg. §18109* et seq.

Address: 428 J St., Suite 620; Sacramento, CA 95814

Phone: 916/322-5660 or 866/275-3772

Website: <http://www.fppc.ca.gov>

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H. Other Agencies.
8. Department of Insurance.

9 Witkin Cal. Proc. Admin Proc § 209

[§ 209] Department of Insurance.

The Department of Insurance licenses and regulates insurance companies and insurance agents; investigates and resolves complaints regarding insurance claims, premiums, and fraud; approves certain insurance rates; and handles conservation and liquidation of insurers subject to court supervision. The department is headed by the Insurance Commissioner.

Governing Statutes: Ins.C. 12900 et seq.

Governing Regulations: 10 Cal. Code Reg. §2050 et seq.

Los Angeles Address: 300 S. Spring St., South Tower; Los Angeles, CA 90013

Los Angeles Phone: 213/346-6464

Sacramento Address: 300 Capitol Mall, Suite 1700; Sacramento, CA 95814

Sacramento Phone: 916/492-3500

San Francisco Address: 45 Fremont St., 23rd Floor; San Francisco, CA 94105

San Francisco Phone: 415/538-4500

Website: <http://www.insurance.ca.gov>

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H. Other Agencies.
9. Department of Justice.

9 Witkin Cal. Proc. Admin Proc § 210

[§ 210] Department of Justice.

The Department of Justice enforces state laws and provides legal services to state and local agencies. In addition, the department provides training and support to state and local law enforcement agencies and supervises local district attorneys and sheriffs. The department is directed by the Attorney General. (See 1 *Cal. Proc.* (5th), *Attorneys*, §54 et seq.; 4 *Cal. Crim. Law* (3d), *Introduction to Criminal Procedure*, §13 et seq.)

Governing Constitutional and Statutory Provisions: Cal. Const Art. V, §13; *Govt.C.* 12500 et seq. (Attorney General); *Govt.C.* 15000 et seq. (Department of Justice)

Governing Regulations: 11 *Cal. Code Reg.* §1 et seq.

Fresno Address: 2550 Mariposa Mall #5090; Fresno, CA 93721

Fresno Phone: 559/445-6590-

Los Angeles Address: 300 S. Spring St.; Los Angeles, CA 90013-1230

Los Angeles Phone: 213/897-2000

Oakland Address: 1515 Clay St. #2000; Oakland, CA 94612-0550

Oakland Phone: 510/622-2100

Sacramento Address: 1300 I St. #125; Sacramento, CA 95814

Sacramento Phone: 916/322-3360 or 800/952-5225

Alternate Sacramento Address: P.O. Box 944255; Sacramento, CA 94244-2550

San Diego Address: 110 West A St. #1110; San Diego, CA 92101-3702

San Diego Phone: 619/645-2001

San Francisco Address: 455 Golden Gate Ave. #11000; San Francisco, CA 94102-7004

San Francisco Phone: 415/703-5500

Website: <http://ag.state.ca.us>

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10. Public Utilities Commission.

9 Witkin Cal. Proc. Admin Proc § 211

[§ 211] *Public Utilities Commission.*

The Public Utilities Commission regulates the service and rates of privately owned carriers, water companies, gas and electric companies, telephone companies, and other utilities. The Commission does not regulate publicly owned utilities. (See 8 *Summary* (10th), *Constitutional Law*, §1084 et seq.)

Governing Constitutional and Statutory Provisions: Cal. Const., Art. XII, §1 et seq.; *Pub.Util.C.* 1 et seq.

Governing Regulations: 20 *Cal. Code Reg.* §1 et seq.

Address: 505 Van Ness Ave.; San Francisco, CA 94102

Phone: 415/703-2782

Website: <http://www.cpuc.ca.gov>

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin California Procedure, Fifth Edition

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CHAPTER XIV - Administrative Proceedings

Witkin Summary of California Law
V. CALIFORNIA STATE AGENCIES
H. Other Agencies.

11. Office of the Secretary of State.

9 Witkin Cal. Proc. Admin Proc § 212

[§ 212] Office of the Secretary of State.

The Office of the Secretary of State is responsible for recording official acts of the legislative and executive branches of state government, examining and filing various financial, political, and corporate documents as public records, and administering state archives. The office is also charged with the appointment of notaries public. Divisions of the office include Business, Elections, Notary Public, Political Reform, and State Archives.

Governing Constitutional and Statutory Provisions: Cal. Const., Art. V, §11; *Govt.C. 12152 et seq.*

Governing Regulations: 2 *Cal. Code Reg. §19001 et seq.*

Fresno Address: 1315 Van Ness Ave., Suite 203; Fresno, CA 93721-1729

Fresno Phone: 559/445-6018

Los Angeles Address: 300 S. Spring St., Room 12513, South Tower; Los Angeles, CA 90013-1233

Los Angeles Phone: 213/897-3062

Sacramento Address: 1500 11th St.; Sacramento, CA 95814

Sacramento Phone: 916/653-6814

San Diego Address: 1350 Front St., Suite 2060; San Diego, CA 92101-3609

San Diego Phone: 619/525-4113

San Francisco Address: 455 Golden Gate Ave., Suite 14500; San Francisco, CA 94102-7007

San Francisco Phone: 415/557-8000

Website: <http://www.sos.ca.gov>

SUPPLEMENT: [This section is current through the latest supplement]

Fresno Address and Phone: Due to budget constraints, the Fresno regional office closed on May 29, 2009.