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Charles A. Pacheco

University of the Pacific; McGeorge School of Law

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Admin Per Se For The Practitioner

Charles A. Pacheco*

On July 1, 1990, the provisions of Senate Bill 1623 became operative, enacting extensive changes in California's traffic safety regulation.¹ Because this new law authorized the California Department of Motor Vehicles to administratively suspend or revoke a person's privilege to operate a motor vehicle,² many criminal defense attorneys who routinely handled drunk driving cases were suddenly dragged kicking and screaming into the unfamiliar realm of administrative law. As a result, attorneys who represented clients charged with driving under the influence of alcohol were forced to venture into an area of jurisprudence not often visited by criminal defense attorneys—civil procedure, administrative writs, and equitable remedies.³ The purpose of this Article is to assist criminal defense

* Juris Doctor, Lincoln University School of Law, Sacramento, California, 1978; Private Practitioner, Sacramento, California. Mr. Pacheco has conducted several hundred Admin Per Se hearings since July 1, 1990, when the newly created Administrative Per Se law became effective, and acted as both trial and appellate counsel in *Helmandollar v. Department of Motor Vehicles*, 7 Cal. App. 4th 52, 9 Cal. Rptr. 2d 155 (1992), discussed *infra*, at notes 166-171, and accompanying text.

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1. See generally 1989 Cal. Legis. Serv. ch. 1460, at 5548 (West) (amending CAL. VEH. CODE §§ 13353, 13551, 14100, 14601.2, 23157; amending and renumbering CAL. VEH. CODE § 13353.1; enacting CAL. VEH. CODE §§ 13353.2, 13353.3, 13353.4, 13353.6, 13353.7, 13557, 13558, 13559, 14905, 23158.2, 23158.5).

2. See CAL. VEH. CODE § 13353.2(a) (West Supp. 1992) (authorizing the Department of Motor Vehicles to administratively suspend a driver's license under specified conditions).

3. This Article has been written with the criminal defense practitioner in mind. Because the author has assumed a basic understanding of the fundamentals of criminal defense, and, necessarily, the ability to meet the California Bar Examination's requirements on the thirteen required California subjects such as Constitutional Law, Criminal Law, and Criminal Procedure, this Article will not go into an extensive review of these subjects. See generally 7 & 8 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW, (9th ed. 1988) (discussing both state and federal constitutional law from the practitioner's viewpoint); BERNARD E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW

practitioners who are unfamiliar with the administrative procedures utilized in the process of defending an administrative license suspension.

In Part I, this Article will discuss the background of the administrative suspension process.⁴ Part II will examine the administrative proceedings, including the relevant rules of evidence, the requirements to sustain a suspension, and the requirements for license reinstatement.⁵ Part III will explain how to obtain review of an adverse decision by the Department of Motor Vehicles.⁶ Part IV looks at cases which have attacked the new procedure as violative of federal and state constitutional rights.⁷

I. BACKGROUND

Prior to 1990, a person's privilege to drive an automobile could be suspended or revoked in an alcohol related incident only under three circumstances: (1) If the driver was convicted of driving while under the influence of an alcoholic beverage, any drug, or both;⁸ (2) driving with an excessive blood-alcohol concentration or driving while addicted to narcotics;⁹ or (3) if the driver refused to submit to a blood, breath, or urine chemical test after an arrest for these offenses.¹⁰ If the driver had suffered a prior conviction for the same offense within the previous seven years, the suspension or revocation was enhanced.¹¹ The actual suspension or revocation itself was generally carried out by the Department of Motor Vehicles.¹²

(2d ed. 1989) (discussing both state and federal criminal law and criminal procedure from the practitioner's viewpoint).

4. See *infra* notes 8-23 and accompanying text.

5. See *infra* notes 224-102 and accompanying text.

6. See *infra* notes 103-205 and accompanying text.

7. See *infra* notes 184-205 and accompanying text.

8. CAL. VEH. CODE § 13352 (West Supp. 1992); see *id.* § 23152 (West Supp. 1992) (stating that it is illegal to drive with a Blood-alcohol level of more than .08%).

9. *Id.* § 13352 (West Supp. 1992).

10. *Id.* § 13353(a) (West Supp. 1992).

11. *Id.* § 13352 (West Supp. 1992).

12. In the case of a conviction for California Vehicle Code §§ 23152 or 23153, the Department of Motor Vehicles would normally receive a duly certified abstract of judgment from the trial court. CAL. VEH. CODE § 13352 (West Supp. 1992). In the case of a driver who refused to submit to chemical testing, the Department of Motor Vehicles required only the arresting officer's

On October 2, 1989, then California Governor George Deukmejian signed into law one of California's newest weapons in the war on drunk drivers—automatic license suspension for driving with an excessive blood alcohol level.¹³ This area has become known as the "Administrative Per Se" law.¹⁴

Under the new law, the above statutory scheme remained essentially the same. However, added to the arsenal of weapons designed to combat drunk drivers was California Vehicle Code section 13353.2. Under this section, the Department of Motor Vehicles is required to "immediately" suspend the driving privilege of anyone who is found to have operated a vehicle with a blood-alcohol level exceeding a specific limit.¹⁵

sworn statement that the officer had reasonable cause to believe the person was driving while under the influence of alcohol or drugs and refused to submit to a chemical test. *Id.* § 13353 (West Supp. 1992).

13. 1989 Cal. Legis. Serv. ch. 1460, sec. 7, at 5554 (West) (enacting CAL. VEH. CODE § 13353.2). Although new in California, the automatic license suspension procedure was not new to the United States. At the time California enacted California Vehicle Code § 13353.2, at least 23 other states had enacted similar legislation. *See generally* UNITED STATES DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., QUESTIONS MOST FREQUENTLY ASKED ABOUT ADMINISTRATIVE LICENSE REVOCATION (1989).

14. *See Peretto v. Department of Motor Vehicles*, 235 Cal. App. 3d 449, 452, 1 Cal. Rptr. 2d 392, 393 (1991) (recognizing the administrative license suspension or revocation procedure as being commonly called "administrative per se").

15. CAL. VEH. CODE § 13353.2(a) (West Supp. 1992). When first enacted, California Vehicle Code § 13353.2, subdivision (a), provided for immediate suspension of a person's driving privilege for operating or being in physical control of a motor vehicle with a blood alcohol level of 0.10 percent or more. *Id.* However, in 1990, the California Legislature lowered the required blood alcohol level to 0.08 percent or more to conform with the recent lowering of the blood alcohol level required for a criminal conviction of California Vehicle Code § 23152, subdivision (b). 1990 Cal. Legis. Serv. ch. 431, sec. 4, at 1536 (West) (amending CAL. VEH. CODE § 13353.2); *see Review of Selected 1990 California Legislation*, 22 PAC. L.J. 321, 753 (1991) (explaining the effect of Chapter 431).

Although the admin per se procedures appear to fit in well with existing statutes, at least one case has challenged the statutory scheme on the basis that it is in conflict with existing law. In *Robertson v. Department of Motor Vehicles*, 7 Cal. App. 4th 938, 9 Cal. Rptr. 2d 319 (1992), the First District Court of Appeal was asked to determine whether there was a conflict between the admin per se statutes requiring automatic suspension and the second offender probation statutes providing for a restricted license. *Id.* at 940, 9 Cal. Rptr. 2d at 320. Robertson was arrested and pleaded guilty to driving under the influence of alcohol. *Id.* at 942-43, 9 Cal. Rptr. 2d at 322. The sentencing court placed Robertson on probation and restricted his driver's license for eighteen months, restricting travel to and from work, to and from jail, and to and from a drunk driver program. *Id.* After Robertson was sentenced by the municipal court, the Department of Motor Vehicles conducted an admin per se hearing to determine whether Robertson's driving privileges should be suspended. *Id.* Robertson opposed his license suspension based on a conflict between the admin per se statutes and the second offender restricted driver's license provisions of the California Vehicle Code. *Id.* The

The immediate suspension process under California Vehicle Code section 13353.2 works as follows: A law enforcement officer arrests a person for driving under the influence of alcohol. After submitting to a chemical test, if the officer believes the person was driving or in physical control of a motor vehicle with a blood-alcohol level in excess of the legal limit, the officer takes physical custody of the person's driver's license.¹⁶ The officer must notify the driver that his or her driving privilege will be automatically suspended in forty-five days.¹⁷ The driver is then issued a written notification which operates as a temporary driver's license until the end of the forty-five day period.¹⁸

The notification given to the driver must include the reason and statutory ground for the suspension, the right to request an administrative hearing, and the date when a request must be made to receive a determination prior to the effective date of the suspension.¹⁹ If no hearing is requested, the suspension becomes effective upon the date

Department of Motor Vehicles subsequently suspended Robertson's license. *Id.* at 943-44, 2 Cal. Rptr. 2d at 322. Robertson filed for a writ of mandate in the superior court, which issued the writ because of the apparent conflict. *Id.* at 944, 2 Cal. Rptr. 2d at 322. The Department of Motor Vehicles appealed. *Id.* In finding that the two statutory schemes did not conflict, the First District Court of Appeal explicitly recognized that the Legislature contemplated two separate processes in the civil and criminal prosecution of people who drive under the influence of alcohol. *Id.* at 947, 2 Cal. Rptr. 2d at 325. Reasoning that the Legislature contemplated two processes—the criminal court proceeding, and the administrative civil proceeding—the court of appeal held that it is possible for a person to suffer dual periods of suspension, revocation or restriction. *Id.* at 947, 2 Cal. Rptr. at 325. Therefore, although it is possible for a criminal court to grant a restricted license as a term of probation in an alcohol related driving offense, this action does not preclude the Department of Motor Vehicles from acting independently under the *admin per se* statutes to suspend or revoke a driver's privilege to operate a motor vehicle.

16. CAL. VEH. CODE § 23158.5(b) (West Supp. 1992).

17. *Id.* § 13353.2(b) (West Supp. 1992).

18. *Id.* § 23158.5(b) (West Supp. 1992).

19. *Id.* § 13353.2(b), (c) (West Supp. 1992) (the arresting officer must give written notice of the order of suspension to the driver pursuant to California Vehicle Code § 23158.5, or the Department of Motor Vehicles must give written notice of the order of suspension by mail to the last known address of the driver upon receipt of the report of the arresting officer); *id.* § 13353.3(a) (West Supp. 1992) (providing that the effective date of an administrative suspension pursuant to California Vehicle Code § 13353.2 shall be forty-five days after the driver is served with the written notice); *id.* § 23158.5(a) (West Supp. 1992) (authorizing a peace officer to act on behalf of the Department of Motor Vehicles to serve a written notice of the administrative suspension on a person who has been arrested for a violation of California Vehicle Code §§ 23152 or 23153 with a blood-alcohol level exceeding the legal limit).

specified in the written notice.²⁰ If the driver makes a timely request, the Department of Motor Vehicles must hold a hearing before the effective date of the order of suspension.²¹ The only issues to be decided at the hearing are: (1) Whether the officer had reasonable cause to believe the driver was driving a vehicle in violation of Vehicle Code section 23152 or 23153; (2) whether the driver was lawfully placed under arrest; and (3) whether the driver was driving or in actual physical control of a motor vehicle with a blood alcohol level of 0.08 percent or more.²² The Department of Motor Vehicles' determination of these issues is subject to a petition for judicial review.²³

II. ADMIN PER SE PROCEEDINGS

As stated above, because of the newly enacted administrative per se laws, many criminal defense attorneys who routinely handled drunk driving cases were suddenly faced with the unfamiliar realm of administrative law. As a result, attorneys who represented clients charged with driving under the influence of alcohol were forced to venture into an area of jurisprudence not often visited by criminal defense attorneys. Although a comprehensive and in depth review of administrative law is beyond the scope and purpose of this Article, this section is intended to briefly expose the criminal lawyer to administrative law by providing a broad overview of administrative proceedings, including the relevant rules of evidence, the requirements to sustain a suspension, and the requirements for license reinstatement.

20. *Id.* § 13353.3(a) (West Supp. 1992). However, prior to the effective suspension date, the Department of Motor Vehicles must make a factual determination of whether the driver was operating or in actual physical control of a motor vehicle with a blood-alcohol level of 0.08 percent or more. *Id.* §§ 13353.2(d), 13557(a) (West Supp. 1992).

21. *Id.* § 13558(d) (West Supp. 1992).

22. *Id.* §§ 13558(a), (c)(2), 14100-14112 (West 1987 & Supp. 1992).

23. *Id.* § 13559 (West Supp. 1992).

A. General Overview of Evidentiary Rules

As a preliminary matter, it must be pointed out that administrative hearings are civil in nature and therefore require a determination based on a preponderance of the evidence standard.²⁴ Furthermore, although the consequences of an administrative hearing may be punitive in nature, they are not criminal proceedings.²⁵ In fact, the California Evidence Code does not even apply to administrative proceedings unless there is a statute making it applicable.²⁶ As a result, such proceedings need not be carried out in accordance with the rules of evidence employed in criminal proceedings.²⁷ Instead, administrative hearings are carried out according to administrative rules which cannot be characterized as entirely civil nor entirely criminal. The rules to be followed in an administrative hearing are governed primarily by the California Administrative Procedure Act (APA) which has liberalized the evidentiary rules in administrative proceedings as compared to those used in criminal proceedings.²⁸

24. *Peretto v. Department of Motor Vehicles*, 235 Cal. App. 3d 449, 462, 1 Cal. Rptr. 2d 392, 400 (1991).

25. *Ford Dealers Ass'n v. Department of Motor Vehicles*, 32 Cal. 3d 347, 366 n.12, 650 P.2d 328, 339 n.12, 185 Cal. Rptr. 453, 464 n.12 (1982) (finding that when an administrative regulation is challenged, the standard of constitutional vagueness is less strict than when a criminal law is attacked; due process mandates do not necessarily require that the rules of procedure employed in criminal courts be applied in license revocation proceedings); *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 538, 110 P.2d 992, 995 (1941) (holding that the overwhelming weight of authority has rejected any analogy which would require [an administrative] board to conduct its proceedings in accordance with theories developed in the field of criminal law).

26. CAL. EVID. CODE § 300 Cmt. (West 1966) (Law Revision Commission) (stating that "the provisions of the [Evidence] Code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them").

27. *See Gilbert v. Superior Court*, 193 Cal. App. 3d 161, 173, 238 Cal. Rptr. 220, 227 (1987) (stating that a number of California cases relating to license revocation proceedings have rejected the notion that a state regulatory board must conduct proceedings in accordance with theories developed in the criminal law and specifically pointed out that due process requirements in criminal cases differ from those applicable in administrative proceedings); *Gore v. Board of Medical Quality Assurance*, 110 Cal. App. 3d 184, 198, 167 Cal. Rptr. 881, 889 (1980) (stating that the principles of criminal law protecting uninhibited appeal do not apply to civil cases arising out of administrative proceedings).

28. *See* CAL. GOV'T CODE §§ 11340-11528 (West 1992) (establishing the California Administrative Procedure Act); *see also* CAL. VEH. CODE § 14112 (West Supp. 1992) (providing that all matters in a Department of Motor Vehicles license hearing not covered by the Vehicle Code are to be governed by the California Administrative Procedure Act).

This section of the Article will not only discuss the liberal nature of the evidentiary rules in administrative hearings, but will also discuss several other differences and similarities between the rules used in administrative and criminal proceedings. These other areas of discussion include: (1) The use of objections, (2) the use of privileges, (3) the exclusionary rule, and (4) the use of presumptions.

1. Liberal Nature of the Rules

The first noteworthy difference between administrative and criminal evidentiary rules is that the rules used in administrative hearings are more liberal. The APA specifically states that an administrative hearing "need not be conducted according to the technical rules relating to evidence and witnesses."²⁹ As a result, any relevant evidence will be admitted at an administrative hearing "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."³⁰ However, any evidence that is irrelevant or unduly repetitious will be excluded if properly objected to by counsel.³¹

The rule regarding the admissibility of hearsay evidence in administrative hearings has also been relaxed as compared to the rule in criminal proceedings. The California APA specifically provides that hearsay evidence may be used for the purpose of *supplementing or explaining* other evidence but cannot be sufficient in itself to

29. CAL. GOV'T CODE § 11513(c) (West 1992); cf. *Greenblatt v. Munro*, 161 Cal. App. 2d 596, 605, 326 P.2d 929, 935 (1958) (holding that a party in an administrative hearing cannot make a skeletal presentation with the expectation of making a more complete showing before a court).

30. CAL. GOV'T CODE § 11513(c) (West 1992); cf. CAL. EVID. CODE § 210 (West 1966) (defining relevant evidence as evidence "having any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action.").

31. CAL. GOV'T CODE § 11513(c) (West 1992); see *infra* notes 36-54 and accompanying text (discussing objections in administrative hearings).

support a finding unless it would be admissible over objection in civil actions.³²

Finally, even though there are several differences between the evidentiary rules used in administrative and criminal proceedings, there are also similarities. For example, the rules regarding privileges in administrative hearings are similar to those used in criminal proceedings. In fact, the APA specifically states that the rules of privilege, as provided for in the Evidence Code, are applicable in administrative hearings.³³

Although the administrative rules as stated above are liberal in nature, the APA specifically includes various due process protections in an attempt to ensure that the parties to an administrative hearing receive a fair hearing. These protections include: (1) Testimony on oath or affirmation; (2) the right to call and examine witnesses; (3) the right to introduce exhibits; (4) the right to cross-examine opposing witnesses on any relevant matter; (5) the right to impeach any witness; and (6) the right to rebut evidence.³⁴ It is also interesting to note that even if the respondent does not testify on her own behalf, she may be called and cross-examined as if under cross-examination.³⁵

2. Objections at Administrative Hearings

As stated above, the APA specifically provides that irrelevant and unduly repetitious evidence are to be excluded from administrative

32. CAL. GOV'T CODE § 11513(c) (West 1992); *see* *Carlton v. Department of Motor Vehicles*, 203 Cal. App. 3d 1428, 1432, 250 Cal. Rptr. 809, 810 (1988) (finding that a police officer's opinion in his report that the licensee was "most responsible" for the accident is a legal conclusion and not a proper subject for an expert opinion, thus it would not be admissible over objection at a civil trial); *Daniels v. Department of Motor Vehicles*, 33 Cal. 3d 532, 538, 658 P.2d 1313, 1317-18, 189 Cal. Rptr. 512, 516 (1983) (holding that the legislative mandate in § 11513 against sole reliance on hearsay is not superseded by § 14108 of the Vehicle Code allowing the DMV to consider its own official records if such records would not be admissible over objection at a civil trial).

33. CAL. GOV'T CODE § 11513(c) (West 1992); *see infra* notes 55-59 and accompanying text (discussing the use of privileges in administrative hearings).

34. CAL. GOV'T CODE 11513(a)-(b) (West 1992); *see* *Desert Turf Club v. Board of Supervisors*, 141 Cal. App. 2d 446, 455, 296 P.2d 882, 887 (1956) (holding that common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts will be determined).

35. CAL. GOV'T CODE § 11513(b) (West 1992).

hearings and are therefore a proper basis for an objection.³⁶ In addition, there are many other standard objections in court proceedings which are also applicable at administrative hearings. These include: (1) The form of a question (i.e. leading and/or narrative); (2) cumulative evidence; (3) lack of foundation and/or authentication; and (4) the best evidence rule.³⁷ Objections in an administrative hearing should be made in essentially the same manner and according to the same form and procedure in which they are made in a typical court proceeding: Make the objection promptly; object before a witness has a chance to answer, if possible, or move to strike an unresponsive answer; make a continuing objection if necessary; ask for a ruling if the administrative law judge (ALJ)³⁸ does not give one; and make an offer of proof if there is a question about the correctness of the ALJ's ruling.³⁹ Although offers of proof should also be made in the same manner as in court proceedings,⁴⁰ it is important to remember that offers of proof in the administrative setting are especially important since the records of administrative hearings are frequently reviewed by administrative bodies with final decision making authority, and by the courts.⁴¹

Finally, the same rule concerning the effect of a *failure* to object in a court proceeding also applies in an administrative hearing.⁴² In

36. *Id.* § 11513(c) (West 1992).

37. See generally THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES, 331-63 (2d. ed. 1988) (providing a thorough discussion about objections at the trial level); see also CAL. EVID. CODE § 1500 (West Supp. 1992) (providing for the best evidence rule).

38. It should be noted that there are no Administrative Law Judges at Department of Motor Vehicle hearings. Such hearings are administered by an employee of the Department of Motor Vehicles who acts as a referee. CAL. VEH. CODE § 14104.2 (West Supp. 1992). However, the same rules governing Administrative Law Judges are also applicable to the Department's referees.

39. See generally MAUET, *supra* note 37, at 331-63 (providing a thorough discussion about objections at the trial level).

40. The offer of proof should consist of the substance, purpose, and relevance of the excluded evidence. See CAL. EVID. CODE § 354(a) (West 1966) (providing for offer of proof requirements).

41. To make an offer of proof in an administrative hearing, counsel need only ask ALJ for permission to do so. Normally, the ALJ will simply grant counsel permission, but she may have the attorney make the offer only after any board or panel members are dismissed. See CAL. GOV'T CODE § 11517(a) (West 1992) (providing that members of an agency may hear a case together with the ALJ).

42. CAL. EVID. CODE § 353 (West 1966) (providing that a verdict or judgment will not be reversed based on an erroneous admission of evidence when no objection or motion to exclude was made); see *Savelli v. Board of Medical Examiners*, 229 Cal. App. 2d 124, 139, 40 Cal. Rptr. 171,

other words, such a failure to object will constitute a waiver. This rule applies even if the party failing to object is not represented by counsel.⁴³

Although there are many similarities between the types of objections applicable in both administrative hearings and court proceedings, there are also several differences of which an attorney should be aware. The most noteworthy difference, for purposes of this Article, deals with the concept of hearsay. Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing which is offered to prove the truth of the matter stated.⁴⁴ In court proceedings, hearsay evidence is generally inadmissible unless it falls within a specific exception.⁴⁵

On the other hand, hearsay which would be inadmissible in a court proceeding is often found to be admissible in administrative hearings. The APA specifically provides in Government Code section 11513, subdivision (c), that "[h]earsay evidence may be used for the purpose of *supplementing or explaining* other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."⁴⁶ In interpreting this provision, several cases have held that the hearsay statement of a public employee, such as the statement of a police officer, or the test administrator's written report of the results of a blood-alcohol test, is

181 (1964) (finding that hearsay evidence was of probative value because it was not objected to when it was offered) *cert. denied* 380 U.S. 934 (1965); *Tennant v. Civil Serv. Comm'n*, 77 Cal. App. 2d 489, 498, 175 P.2d 568, 573 (1946) (holding that respondent could not later object to the fact that a report was not introduced since he failed to object at the hearing).

43. *August v. Department of Motor Vehicles*, 264 Cal. App. 2d 52, 64, 70 Cal. Rptr. 172, 180 (1968).

44. CAL. EVID. CODE § 1200(a) (West 1966). Hearsay can also consist of oral or written verbal expression, or nonverbal conduct intended as a substitute for oral or written verbal expression. *Id.*

45. *See id.* § 1200(b) (West 1966) (stating that except as otherwise provided by law, hearsay is inadmissible).

46. CAL. GOV'T CODE § 11513(c) (West 1992) (emphasis added); *see Carlton v. Department of Motor Vehicles*, 203 Cal. App. 3d 1428, 1432, 250 Cal. Rptr. 809, 810 (1988) (holding that a police officer's opinion in an accident report was hearsay and insufficient to support a license revocation because the report would not be admissible under the business records or official records exceptions to the hearsay rule); *Szmaciarsz v. State Personnel Bd.*, 79 Cal. App. 3d 904, 913-14, 145 Cal. Rptr. 396, 400-01 (1978) (finding that hearsay testimony of witnesses regarding respondent's marijuana use was admissible since it would be admissible in a civil action over objection as an admission by a party).

admissible at a Department of Motor Vehicles hearing and is sufficient in and of itself to support a finding of fact, if it meets the criteria of the public employee business record exception to the hearsay rule.⁴⁷ This otherwise objectionable hearsay, which is admissible in administrative hearings, is referred to as "administrative hearsay."⁴⁸

Although the above statutory language of Government Code section 11513, subdivision (c), regarding the admissibility of administrative hearsay does not specifically require that there be an objection to the hearsay, there is a split of authority among the various districts of the California Court of Appeal as to whether administrative hearsay that has not been objected to can be used in itself to support a finding of fact.⁴⁹ The question is whether section 11513, subdivision (c), *implies* the necessity for an objection.

The First District has repeatedly held that hearsay that is not objected to *is* sufficient to support a finding in the absence of contrary evidence.⁵⁰ In other words, the First District has held that an objection *is* necessary to preclude the use of hearsay alone to support a finding of fact. The Second, Third and Fourth District Courts of Appeal, however, have read section 11513, subdivision (c), more literally. These districts have found that the legislative mandate

47. *Burge v. Department of Motor Vehicles*, 5 Cal. App. 4th 384, 388, 7 Cal. Rptr. 2d 5, 7-8 (1992) (holding that the hearsay statement of a police officer satisfied the requirements of Government Code § 11513 and was admissible at the Department of Motor Vehicles' hearing since it met the public employee business record exception and was therefore admissible over objection at a civil trial); *Imachi v. Department of Motor Vehicles*, 2 Cal. App. 4th 809, 815, 3 Cal. Rptr. 2d 478, 480-81 (1992); *see* CAL. EVID. CODE § 1280 (West 1966) (providing for public employee record exception to the hearsay rule).

48. *Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control*, 246 Cal. App. 2d 198, 205, 54 Cal. Rptr. 547, 551 (1966).

49. *See infra* notes 50-51 and accompanying text (discussing the split of authority among the various district courts).

50. *See Borror v. Department of Investment*, 15 Cal. App. 3d 531, 546-47, 92 Cal. Rptr. 525, 534 (1971) (holding that hearsay evidence that has not been objected to serves to shift the burden of producing evidence of the existence or non-existence of the fact disclosed to the party failing to object); *Kirby v. Alcoholic Beverage Appeals Bd.*, 8 Cal. App. 3d 1009, 1019-20, 87 Cal. Rptr. 908, 915-16 (1970) (finding that hearsay admitted without objection will have probative value unless there is some admissible evidence to the contrary); *Savelli v. Board of Medical Examiners*, 229 Cal. App. 2d 124, 139, 40 Cal. Rptr. 171, 181 (1964) *cert. denied* 380 U.S. 934 (1965) (allowing the introduction of objectionable hearsay admitted without objection to be considered in support of a finding of fact).

in subdivision (c) is controlling and does *not* require an objection to preclude the use of administrative hearsay alone to support a finding of fact.⁵¹

As stated above, although the literal language of section 11513, subdivision (c) does not appear to require the making of an objection to preclude the use of administrative hearsay alone to support a finding of fact, counsel should always make such an objection in light of the fact that there is such a split of authority. Finally, even though otherwise inadmissible hearsay is often admissible in administrative hearings, it is important to remember that it may be inadmissible for other reasons. First, a proper foundation may not have been laid for the introduction of the hearsay.⁵² Second, the hearsay evidence may not meet the relevance standard used in administrative hearings, i.e. it is not "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."⁵³ This would be so, for example, if the hearsay were double or triple hearsay or if any of the other dangers of hearsay were present making the hearsay unreliable.⁵⁴

3. *Privileges*

The California APA specifically provides that "the rules of privilege shall be effective to the extent that they are otherwise

51. See *San Dieguito Union High Sch. Dist. v. Commission on Professional Competence*, 174 Cal. App. 3d 1176, 1189, 220 Cal. Rptr. 351, 358 (1985) (stating that the lack of an objection does not convert incompetent evidence into substantial evidence to support a finding); *Carl. S. v. Commission for Teacher Preparation & Licensing*, 126 Cal. App. 3d 365, 371-72, 178 Cal. Rptr. 753, 757 (1981) (providing that if evidence has insufficient probative value to sustain the proposition for which it is offered, the want of an objection adds nothing to its worth and it will not support a finding); *Martin v. State Personnel Bd.*, 26 Cal. App. 3d 573, 582-83, 103 Cal. Rptr. 306, 312 (1972) (stating that, contrary to *Borror*, *Kirby*, and *Savelli*, the absence of objection to hearsay will not support a finding of fact).

52. See *White v. Board of Medical Quality Assurance*, 128 Cal. App. 3d 699, 705-06, 180 Cal. Rptr. 516, 520 (1982) (refusing to admit a document containing several hundred pages when lack of foundation required the court to speculate on its relevancy and reliability).

53. See CAL. GOV'T CODE § 11513(c) (West 1992) (defining the administrative relevance standard).

54. See EDWARD J. IMWINKELRIED ET AL., CALIFORNIA EVIDENTIARY FOUNDATIONS, 237-39 (1988) (discussing the rationale underlying the hearsay rule).

required by statute to be recognized at the [administrative] hearing.”⁵⁵ Thus, the evidentiary rules relating to privileges, as set forth in the Evidence Code, are applicable in administrative hearings. Such privileges include all of those privileges that could ordinarily be invoked in a civil court case.⁵⁶ In the absence of a specific statute, privileges are not recognized.⁵⁷ However, when the existence of a privilege has been established, no adverse inference can be drawn after it is raised.⁵⁸ In addition, the attorney’s work product doctrine is also available at administrative hearings to protect work product from administrative discovery and administrative subpoenas.⁵⁹

4. Exclusionary Rule

The Fourth Amendment of the Constitution guarantees that individuals will not be subjected to unreasonable searches and seizures.⁶⁰ Thus, in *Mapp v. Ohio*,⁶¹ the Supreme Court held that

55. CAL. GOV’T CODE § 11513(c) (West 1992).

56. See CAL. EVID. CODE § 940 (West 1966) (providing for the privilege against self-incrimination). A party in an administrative hearing is not afforded the privilege granted to defendants in criminal proceedings allowing the defendant to refuse to testify as a witness. *Comb v. Superior Court*, 68 Cal. App. 3d 89, 98, 137 Cal. Rptr. 233, 238 (1977); *In re Vaughan*, 189 Cal. 491, 495, 209 P. 353, 355 (1922). However, if called as a witness, a party in an administrative hearing may invoke the privilege against self-incrimination. *Borror v. Department of Inv.*, 15 Cal. App. 3d 531, 542, 92 Cal. Rptr. 525, 531 (1971). In California APA hearings, a party who does not testify in her own behalf may be called and examined as if under cross-examination. CAL. GOV’T CODE § 11513(b) (West 1992); see also CAL. EVID. CODE §§ 950-962 (West 1966 & Supp. 1992) (providing for the attorney-client privilege); *id.* §§ 970-980 (West 1966 & Supp. 1992) (providing for the husband-wife privilege); *id.* §§ 990-1007 (West 1966 & Supp. 1992) (providing for the physician-patient privilege); *id.* §§ 1010-1027 (West 1966 & Supp. 1992) (providing for the psychotherapist-patient privilege); *id.* §§ 1030-1034 (West 1966) (providing for the clergyman-penitent privilege); *id.* §§ 1035-1036.2 (West 1966 & Supp. 1992) (providing for the sexual assault victim-counselor privilege); *id.* §§ 1060-1061 (West 1966 & Supp. 1992) (providing trade secrets privilege); *id.* § 1070 (West Supp. 1992) (providing for the news source privilege).

57. *Id.* § 911 (West 1966); see *Chronicle Pub. Co. v. Superior Court*, 54 Cal. App. 2d 548, 565, 354 P.2d 637, 645, 7 Cal. Rptr. 109, 117 (1960) (holding that the burden of establishing the fact that the evidence is within the terms of the statute creating the privilege is on the party asserting the privilege).

58. CAL. EVID. CODE § 913(a) (West 1966).

59. CAL. GOV’T CODE § 11507.6(f) (West 1992); see *Kizer v. Sulnick*, 202 Cal. App. 3d 431, 440-41, 248 Cal. Rptr. 712, 717-18 (1988) (stating that the protection of the work product doctrine has been extended to testimony as well as discovery in both civil and criminal cases and it even applies if the attorney is working in a non-adversarial context).

60. U.S. CONST. amend IV.

evidence obtained in violation of the Fourth Amendment is inadmissible in a state court.⁶² Although the exclusionary rule is usually only applied in criminal cases, it has been applied in some civil cases when it advances the aims and objectives of criminal law enforcement.⁶³

The exclusionary rule has generally been held inapplicable in administrative proceedings; however, in determining whether the exclusionary rule is to be used in an administrative hearing, the California Supreme Court has identified several factors that must be balanced: (1) Whether the purposes of the proceeding are similar to the aims and objectives of criminal law enforcement; (2) whether application of the rule would serve any real deterrence to illegal searches and seizures in the type of case; (3) the social consequences of its application; and (4) whether the evidence was obtained under circumstances that shock the conscience.⁶⁴ However, since it cannot be known with certainty ahead of time whether a judge will apply the rule or not, counsel should make it a practice to object to illegally obtained evidence at the administrative level as early as possible by a written motion in limine in advance of the hearing or during a pre-hearing conference.

61. 367 U.S. 643 (1961).

62. *Mapp*, 367 U.S. at 655.

63. See *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 96, 396 P. 2d 706, 709, 41 Cal. Rptr. 290, 293 (1964) (finding that the exclusionary rule can be used in a proceeding for forfeiture of a car used in unlawful transportation of marijuana when there was a close identity to the aims and objectives of criminal law enforcement); see also *People v. Moore*, 69 Cal. 2d 674, 682, 446 P.2d 800, 804-805, 72 Cal. Rptr. 800, 805-06 (1968) (applying the exclusionary rule in a civil narcotic addict commitment proceeding that was closely identified with the aims and objectives of criminal law enforcement and the deterrent policy for applying the rule), *overruled on other grounds in People v. Thomas*, 19 Cal. 3d 630, 637-38, 566 P.2d 228, 232, 139 Cal. Rptr. 594, 598 (1977).

64. *Emislie v. State Bar*, 11 Cal. 3d 210, 227-28, 520 P. 2d 991, 1000, 113 Cal. Rptr. 175, 184-84 (1974) (in applying these factors, the court determined that the rule was not applicable in state bar disciplinary proceedings); see *Governing Bd. v. Metcalf*, 36 Cal. App. 3d 546, 549, 111 Cal. Rptr. 724, 762 (1974) (stating that one of the policies underlying the exclusionary rule in both civil and criminal cases is to preserve the integrity of the judicial process); *In re Martinez*, 1 Cal. 3d 641, 649-50, 463 P.2d 734, 739, 83 Cal. Rptr. 382, 388-89 (1970) (refusing to apply the exclusionary rule to exclude an illegally obtained confession in a parole revocation proceeding since there was practically no deterrent effect to be gained by its application, but also stating that exclusion may be proper if the confession had been coerced or had resulted from egregious police conduct).

5. Presumptions

Even though the California APA does not specifically refer to the use of presumptions in an administrative proceeding, the presumptions applicable in court proceedings are also used at the administrative level.⁶⁵ For purposes of this Article, the most noteworthy presumptions concern the use of chemical tests when a person is arrested for driving under the influence of alcohol. There are basically three such presumptions used in administrative proceedings which relate to the use of chemical tests. First, according to California Vehicle Code section 23152, subdivision (b), "it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test *within three hours after the driving.*"⁶⁶ Therefore, if a person is arrested for driving under the influence of alcohol and performs a chemical test *more than three hours after being originally stopped*, the presumption in section 23152, subdivision (b) does *not* apply. In other words, when a chemical test is administered more than three hours after a person has been detained for driving under the influence of alcohol, the claim that a person had a blood alcohol level of more than 0.08 percent at the time of driving enjoys no legal presumption and that fact must be shown to be true by a preponderance of the evidence.⁶⁷ Second, courts have generally recognized that tests

65. See CAL. EVID. CODE §§ 600-669.5 (West 1966 & Supp. 1992) (providing for presumptions in court proceedings).

66. CAL. VEH. CODE § 23152(b) (West Supp. 1992) (emphasis added); see also *Burge v. Department of Motor Vehicles*, 5 Cal. App. 4th 384, 391, 7 Cal. Rptr. 2d 5, 9 (1992) (citing the rebuttable presumption contained in § 23152, subdivision (b)). The court in *Burge* stated that since the Legislature, recognizing that breath tests are taken within three hours after driving, determined that independent proof of this fact need not be offered, there can be "no reason" why the Legislature would choose to accept the fact as presumed in criminal prosecutions but not in administrative proceedings. *Id.*

67. See *Santos v. Department of Motor Vehicles*, 5 Cal. App. 4th 537, 549, 7 Cal. Rptr. 2d 10, 16-17 (1992) (finding that since there was no record of when the blood sample was taken, there can be no presumption since it cannot be said that the test was given within three hours of operating a motor vehicle).

performed by authorized laboratories are presumptively valid.⁶⁸ Finally, Evidence Code section 664 contains the presumption that "official duty has been regularly performed."⁶⁹ Although these three presumptions appear to present insurmountable obstacles for an attorney to overcome, it must be remembered that these presumptions are *rebuttable*. The following cases discuss the interrelationship of these presumptions as well as the evidence needed to effectively rebut them.

In *Coombs v. Pierce*,⁷⁰ the Fifth District Court of Appeal was faced with the issue of who has the burden of proof regarding the reliability of a breath test utilized to show a driver's blood-alcohol level at the time of arrest.⁷¹ Coombs argued that the Department of Motor Vehicles failed to lay a proper foundation required to show the scientific evidence of Coombs' blood-alcohol level was admissible in the administrative proceeding.⁷² The court recognized that when testing equipment is in compliance with the state Department of Health licensing requirements, the machine is *presumed* reliable.⁷³

68. See *infra* note 73 and accompanying text.

69. See CAL. EVID. CODE § 664 (West 1966) (providing for the statutory presumption that "official duty has been regularly performed").

70. 1 Cal. App. 4th 568, 2 Cal. Rptr. 2d 249 (1991).

71. *Coombs*, 1 Cal. App. 4th at 579, 2 Cal. Rptr. 2d at 255 (1991). Coombs was arrested by a California Highway Patrol officer for driving under the influence of alcohol and Coombs completed a breath test with the results of .16 and .17. *Id.* at 573, 2 Cal. Rptr. 2d at 251. The Department of Motor Vehicles suspended Coombs' privilege to drive for driving with an excessive blood-alcohol level pursuant to California Vehicle Code § 13353.2. *Id.* Coombs filed a writ of mandate in the superior court, which was denied. *Id.* at 573-74, 2 Cal. Rptr. 2d at 251. Coombs appealed to the court of appeal, challenging the sufficiency of the evidence introduced to show his blood-alcohol level by attacking the foundational requirements necessary to support scientific evidence. *Id.* at 576, 2 Cal. Rptr. 2d at 253.

72. *Id.* at 576, 2 Cal. Rptr. 2d at 253.

73. *Id.* at 580, 2 Cal. Rptr. 2d at 255-56; see, *Imachi v. Department of Motor Vehicles*, 2 Cal. App. 4th 809, 816-817, 3 Cal. Rptr. 2d 478, 481-82 (1992) (holding that tests performed by authorized laboratories have been held to be presumptively valid). In finding that a report of a chemical test is presumptively valid, the *Imachi* court reasoned that such reports have the requisite indicia of trustworthiness:

Chemical tests to determine blood-alcohol concentration at the time of the arrest are performed by forensic laboratories which must comply with procedures set out in the California Code of Regulations. ([CAL.] HEALTH & SAFETY CODE § 436.50; CAL. CODE REGS. tit. 17, §§ 1215-1220.4) These regulations include requirements for forensic laboratories and analysts, collection and handling of samples and methods of analysis. Methods of analysis must be in accord with specified standards of performance and procedure (including the requirement that instruments used for alcohol analysis must be

However, when such licensing is not present, the proponent of the evidence must show scientific reliability through traditional foundational evidence.⁷⁴ In order to meet the traditional prerequisites for admission of breath test evidence, the proponent must establish that: (1) The equipment was in proper working order; (2) the testing procedure was properly administered; and (3) the person operating the testing equipment was competent and properly qualified.⁷⁵

The testing equipment utilized to establish Coombs' blood-alcohol level was not licensed by the state and the Department of Motor Vehicles did not present any evidence of the traditional prerequisites for admissibility.⁷⁶ The Department of Motor Vehicles argued that the Legislature intended the results obtained from equipment utilized to show blood-alcohol levels to be presumed reliable and that a driver should have the burden of overcoming such a presumption.⁷⁷ The court of appeal disagreed, stating that even though reports presented without proof of reliability are sufficient to support an initial summary finding of license suspension, once a hearing is requested, the report is insufficient to establish a prima facie showing of facts necessary to support the suspension of a driver's license.⁷⁸ Therefore, when breath test evidence of a driver's blood-alcohol level is submitted in an administrative proceeding, the equipment utilized to test the driver's breath must either be properly

in good working order and be routinely checked for accuracy and precision (CAL. CODE REGS. tit. 17, § 1220.2, subd. (a)(5)) as well as a quality control program adopted by the Department of Health Services. (CAL. CODE REGS. tit. 17, §§ 1220.1, 1220.2, 1220.3).

Id.; see also *Burge v. Department of Motor Vehicles*, 5 Cal. App. 4th 384, 389 n.1, 7 Cal. Rptr. 2d 5, 8 n.1 (1992) (citing *Imachi* with approval).

74. *Coombs*, 1 Cal. App. 4th at 580, 2 Cal. Rptr. 2d at 255-56; see *People v. Adams*, 59 Cal. App. 3d 559, 567, 131 Cal. Rptr. 190, 195 (1976) (holding that noncompliance with licensing regulations goes only to the weight of the evidence when foundational prerequisites of admissibility are independently established).

75. *Coombs*, 1 Cal. App. 4th at 576, 2 Cal. Rptr. 2d at 253; see *Adams*, 59 Cal. App. 3d at 561, 131 Cal. Rptr. at 191 (discussing foundational requirements for admissibility of testing results).

76. *Coombs*, 1 Cal. App. 4th at 580, 2 Cal. Rptr. 2d at 255-56.

77. *Id.*

78. *Id.* at 581, 2 Cal. Rptr. 2d at 256; see *Daniels v. Department of Motor Vehicles*, 33 Cal. 3d 532, 541, 658 P.2d 1313, 1319, 189 Cal. Rptr. 512, 518 (1983) (quoted in *Coombs*) (holding that reports alone are insufficient to support a license suspension at an administrative hearing).

licensed by the state, or the proponent must establish the traditional prerequisites for admissibility of the test results.⁷⁹

In *Santos v. Department of Motor Vehicles*, the First District Court of Appeal was faced with the same issue as presented in *Coombs*: who has the burden of proof regarding the reliability of a breath test.⁸⁰ In *Santos*, the primary evidence of respondent's blood alcohol level was a laboratory report of the blood test.⁸¹ The court noted that because of the presumption regarding the validity of chemical tests, the traditional foundational requirements for chemical tests are not ordinarily required in the absence of evidence that the test was not properly performed or that the forensic laboratory was not properly licensed.⁸² As a result of the presumption, the court determined that the burden was shifted to the licensee to demonstrate that the test was not properly performed.⁸³ However, the report of the blood test failed to indicate the time the blood sample was taken.⁸⁴ Santos' expert testified that in order to determine the blood-alcohol level at the time of drawing, it was critical to know when the blood sample was taken.⁸⁵ Since the Department did not rebut the expert testimony that the test results failed to accurately prove the blood-alcohol level, the court held that Santos had rebutted the presumption in section 23152, subdivision (b), and that the Department failed to meet its burden of proof.⁸⁶

Finally, in *Davenport v. Department v. Motor Vehicles*, the Second District Court of Appeal was confronted with the issue of

79. *Coombs*, 1 Cal. App. 4th at 581, 2 Cal. Rptr. 2d at 256.

80. 5 Cal. App. 4th 537, 7 Cal. Rptr. 2d 10 (1992).

81. *Santos*, 5 Cal. App. 4th at 546, 7 Cal. Rptr. 2d at 14.

82. *Id.* at 550, 7 Cal. Rptr. 2d at 17 (citing *Imachi v. Department of Motor Vehicles*, 2 Cal. App. 4th 809, 816, 3 Cal. Rptr. 2d 478, 481-82 (1992)).

83. *Id.* at 547, 7 Cal. Rptr. 2d at 15.

84. *Id.* at 547, 7 Cal. Rptr. 2d at 16.

85. *Id.* at 548, 7 Cal. Rptr. 2d at 17. Santos' expert testified that the blood-alcohol levels rise for a period of time after a drink is consumed, so that a test administered shortly after consumption would be lower than a test performed later when the alcohol had reached its maximum level. *Id.*

86. *Id.* at 549, 7 Cal. Rptr. 2d at 18. The court specifically stated that no presumption can supply the missing information when a report of a chemical test fails to indicate the time the sample was drawn. *Id.* at 550, 7 Cal. Rptr. 2d at 17. Therefore, since there is was no evidence as to the time that the test was given, there can be no presumption that the test was given within three hours of driving a vehicle. *Id.* at 549 n.8, 7 Cal. Rptr. 2d at 16 n.8.

whether the Department of Motor Vehicles can rely on the rebuttable presumption contained in Evidence Code section 664 to prove that the licensee was driving with a blood-alcohol concentration in violation of section 13353.2.⁸⁷ Evidence Code section 664 provides that "it is presumed that official duty has been regularly performed."⁸⁸ An "official duty" is imposed upon law enforcement agencies and their officers and employees to perform blood alcohol analyses by methods devised to assure reliability.⁸⁹

In concluding that the Department of Motor Vehicles could rely on the presumption contained in section 664, the court stated that the presumption effectively places the burden upon the licensee to establish "the nonexistence of the foundational trustworthiness of the report as a whole, and in particular, the nonexistence of the foundational reliability of tests upon which the report is partly based."⁹⁰ The court went on to find that if the information in the report was the result of direct observations and was within the personal knowledge of the reporting officer, then the report, including the results of blood tests administered by the officer, will constitute sufficient evidence to support a suspension of the licensee's driving privilege.⁹¹ Since Davenport failed to introduce any evidence that the test was not reliable, he did not rebut the

87. 6 Cal. App. 4th 133, 7 Cal. Rptr. 2d 818 (1992).

88. CAL. EVID. CODE § 664 (West 1966).

89. See CAL. HEALTH & SAFETY CODE § 436.52 (West 1990) (authorizing the Department of Health Services to establish regulations governing the procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentration of ethyl alcohol in a person's blood); see also CAL. CODE REGS. tit. 17, §§ 1215-1222.2 (1992) (setting forth detailed standards for the licensing and operation of forensic alcohol laboratories, the training of personnel, the collection and analysis of samples in general, and the manner of expressing results); *People v Adams*, 59 Cal. App. 3d 559, 567, 131 Cal. Rptr. 190, 195 (1976) (finding that compliance with the regulations establishes both a foundation for admission of test results into evidence in any proceeding and a basis for finding such results to be legally sufficient evidence to support the requisite findings in such proceedings).

90. *Davenport*, 6 Cal. App. 4th at 143, 7 Cal. Rptr. 2d at 825. The court also concluded that due process is not offended by this allocation of the burden in license suspension proceedings. *Id.* at 145, 7 Cal. Rptr. 2d at 826.

91. *Id.*

presumption and the court determined that the order of suspension should be affirmed.⁹²

Therefore, as a result of the presumptions contained in Vehicle Code sections 23152, subdivision (b) and Evidence Code section 664, as well as the presumption regarding chemical tests performed properly and by a licensed forensic laboratory, the Department of Motor Vehicles is not required to lay a traditional foundation to admit such evidence.⁹³ Instead, the burden of proof shifts to the licensee to show that a presumption should not apply.⁹⁴ At least one court has specifically held that due process is not offended by such an allocation of the burden of proof at license revocation hearings.⁹⁵

Counsel should also be aware that the use of presumptions regarding the reliability of intoxilyzer tests has been the subject of much controversy.⁹⁶ One of the main arguments focuses on the use of statistical averages which, it is argued, cannot be applied to individuals since there are too many factors that affect each individual's intoxilyzer results.⁹⁷ This argument can further be broken down into two sub-arguments. First, the standard conversion ratio of 2100:1 erroneously assumes that the same ratio applies to everyone.⁹⁸

92. *Id.* at 140, 7 Cal. Rptr. 2d at 823. Davenport did testify that he consumed 12 to 14 ounces of wine with dinner, over a period of 2-1/2 to three hours on the night of his arrest, which, according to his expert witness, would produce a blood-alcohol concentration (BAC) substantially less than .10 percent if properly tested within 1 to 3 hours after Davenport stopped drinking. *Id.* However, the court determined that this type of evidence did not prove that the test was improperly given and therefore did not properly rebut the presumption as contained within Evidence Code § 664. *Id.*

93. *See supra* note 75 and accompanying text (discussing the traditional foundational requirements for the admission of scientific evidence).

94. *See supra* notes 66-69 and accompanying text (discussing the presumptions that shifts in the burden of proof).

95. *Davenport*, 6 Cal. App. 4th at 137, 7 Cal. Rptr. 2d at 826.

96. *See infra* notes 98-99 and accompanying text (discussing many of the arguments attacking the reliability of intoxilyzer tests).

97. *See* Terrance C. Wade, *DUI Statistics Often Don't Add Up: Here's How To Change Them In Court*, Vol. 5 CRIMINAL JUSTICE 1, 19 (1990).

98. The ratio of 2100:1 represents the average breath-alcohol concentration (BrAC) to blood alcohol concentration (BAC). It has been argued that an average cannot be applied to the vast majority of people who aren't average; instead, the appropriate statistic is the "range" which extends from at least 1100:1 to 3400:1. *See* Terrance C. Wade, *DUI Statistics Often Don't Add Up: Here's How To Change Them In Court*, Vol. 5 CRIMINAL JUSTICE 1, 19 (1990). Furthermore, when repeated measurements of the combined blood-breath alcohol ratio were taken over longer periods of time, variations as much as 1100 to 1300 were found within the same person. *Id.* Consequently, a person's true blood breath ratio may be less than half the average ratio of 2100:1 used by the intoxilyzer. *See*

Second, statutes erroneously assume that alcohol is absorbed and eliminated at the same rates by everyone.⁹⁹ In addition, it has been recognized that since intoxilyzer tests are well-accepted methods of determining a person's blood-alcohol level, there is no need for the Department of Motor Vehicles to comply with the principles set forth in *People v. Kelly*¹⁰⁰ and *Frye v. United States*¹⁰¹ requiring foundational evidence as to the general acceptance of a new scientific method.¹⁰²

As is evident from the above discussion, evidentiary rules regarding the use of presumptions provide the Department of Motor Vehicles with a very potent weapon in administrative per se hearings.

T.A.A., et al., *Significance of Variations in Blood: Breath Partition Coefficient of Alcohol*, 2 BRIT. MED. J. 1479 (1976). Finally, even a person's body temperature can adversely affect an intoxilyzer test; every degree of increase in the body temperature can cause an increase of 7 percent to 9 percent in BrAC which the intoxilyzer does not take into account. See M. F. Mason & K. M. Dubowski, *Breath-Alcohol Analysis: Uses, Methods, and Some Forensic Problems-Review and Opinion*, 21 J. FORENSIC SCIENCE 9 (1976).

99. The alcohol absorption rate occurs more rapidly on an empty stomach; however, even then an individual may not reach his or her peak alcohol concentration for up to three hours after consumption of the alcohol. See Kurt M. Dubowski, *Human Pharmacokinetics of Ethanol: Further Studies*, 22 CLINICAL CHEMISTRY 1199 (1976). On the other hand, when alcohol is consumed after eating or while eating food, the alcohol is, for the most part, retained in the stomach with the food. See M.F. Mason & K.M. Dubowski, *Alcohol, Traffic, and Chemical Testing in the United States: A Resume and Some Remaining Problems*, 20 CLINICAL CHEMISTRY 126 (1974); Ken Smith, *Science, the Intoxilyzer and Breath Alcohol Testing*, THE CHAMPION, May 4, 1987 (discussing the relationship that eating has on alcohol retention in the stomach). Finally, trauma, which may occur as the result of an accident or even from being arrested, often causes the stomach to retain its contents for hours or even days. See also, E. F. Rose, *Factors Influencing Gastric Emptying*, 24 J. FORENSIC SCIENCE 200 (1979).

Furthermore, according to statistical averages, the alcohol elimination rate is 0.015 percent BAC per hour; however, individual elimination rates can vary from as little as 0.006 percent and up to 0.04 percent BAC per hour. See M. Bogusz, *Comparative Studies on the Rate of Ethanol Elimination*, 22 J. FORENSIC SCIENCE 446 (1977); KURT M. DUBOWSKI, *ALCOHOL AND TRAFFIC SAFETY* (United States Department of Health Education, and Welfare, Public Health Service Pub No. 1043, 1961). As a result, it may take some individuals more than twice as long as the average to eliminate the same BAC. This factor makes the timing of the test critical since a later test result will "always be of uncertain validity and therefore forensically unacceptable." K. M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety*, 10 J. STUDIES ON ALCOHOL 98, 106 (Supp. 1985).

100. 17 Cal. 3d 24, 130 Cal. Rptr. 144 (1976).

101. 293 F. 1013 (D.C. Cir. 1923)

102. *Imachi* at 817 n.6, 3 Cal. Rptr. 2d at 482 n.6; see also *Burge v. Department of Motor Vehicles*, 5 Cal. App. 4th 384, 389, 7 Cal. Rptr. 5, 8 (1992) (citing *Imachi* with approval); *McKinney v. Department of Motor Vehicles*, 5 Cal. App. 4th 519, 525, 7 Cal. Rptr. 2d 18, 22 (1992) (recognizing that the validity of blood tests has been accepted for more than 30 years).

This is especially true in light of the fact that the APA has liberalized the rules relating to the use of hearsay in such proceedings, essentially allowing the admission of otherwise inadmissible evidence. Although the APA attempts to provide various due process protections in administrative proceedings, the liberalized evidentiary rules used in license suspension proceedings potentially threaten to undermine the fundamental right to a fair hearing.

B. Requirements to Sustain Suspension

As stated earlier, prior to 1990, a person's privilege to drive an automobile could be suspended or revoked in an alcohol related incident only if the driver was convicted of driving under the influence of an alcoholic beverage and/or drug, if the driver was convicted of driving with an excessive blood alcohol concentration or while addicted to narcotics, or if the driver refused to submit to chemical testing.¹⁰³ After the passage of Senate Bill 1623, the Department of Motor Vehicles was authorized to suspend or revoke a person's privilege to drive an automobile for having a blood-alcohol level of 0.08 percent or more, regardless of whether the driver was convicted of an alcohol related offense in the criminal courts.¹⁰⁴ This section will discuss the provisions of the Vehicle Code authorizing suspension for driving with a specified blood-alcohol level¹⁰⁵ and for refusing to complete a chemical test.¹⁰⁶

1. Blood-Alcohol Level of 0.08 Percent or More

California Vehicle Code section 13353.3 provides that the Department of Motor Vehicles must suspend a person's driver's license if the driver was operating or in actual control of a motor vehicle while the driver's blood-alcohol level was 0.08 percent or more.¹⁰⁷ Under this statute, when a person is arrested for a violation

103. See *supra* notes 8-11 and accompanying text.

104. CAL. VEH. CODE § 13353.2(a) (West Supp. 1992).

105. See *infra* notes 107-114 and accompanying text.

106. See *infra* notes 115-142 and accompanying text.

107. CAL. VEH. CODE § 13353.3(a) (West Supp. 1992).

of Vehicle Code section 23152 or 23153, and is determined to have a blood alcohol level of at least 0.08 percent, the arresting officer is required to serve the person with notice of an administrative order suspending his or her driving privileges.¹⁰⁸ The suspension order served by the officer becomes effective 45 days after service of the notice.¹⁰⁹ That notice must include the reason and statutory grounds for the suspension, the right to request an administrative hearing, and the date when a request must be made to receive a determination prior to the effective date of the suspension.¹¹⁰

In order to sustain the suspension order, the Department of Motor Vehicles has the evidentiary burden of proving the facts necessary to justify its order.¹¹¹ More specifically, the Department of Motor Vehicles itself must automatically review the order to determine, by a preponderance of the evidence, the following issues: (1) Whether the officer had reasonable cause to believe that the person violated section 23152 or 23153; (2) whether the person was placed under arrest; and (3) whether the person with a blood-alcohol level of 0.08 percent or more was driving or was in actual physical control of the vehicle.¹¹²

The general rules providing for the period of suspension are set forth in section 13353.3 of the Vehicle Code. The driving privileges of first time offenders are suspended for six months, while those of repeat offenders are suspended for a period of one year.¹¹³ Of course, the Department of Motor Vehicles' determination is subject to a petition for judicial review.¹¹⁴

108. *Id.* § 23158.5(a) (West Supp. 1992).

109. *Id.* § 13353.3(a) (West Supp. 1992).

110. *Id.* § 13353.2(c) (West Supp. 1992).

111. *Burge v. Department of Motor Vehicles*, 5 Cal. App. 4th 384, 388, 7 Cal. Rptr. 2d 5, 7 (1992); *see Coombs v. Pierce*, 1 Cal. App. 4th 568, 580-81, 2 Cal. Rptr. 2d 249, 255 (1991) (citing *Daniels v. Department of Motor Vehicles*, 33 Cal. 3d 532, 536, 658 P.2d 1313, 1315, 189 Cal. Rptr. 512, 514 (1983) (holding that the initiating administrative agency has the burden of proving the facts necessary to support an action to suspend or revoke a license)); *see also supra* note 22 (discussing burden of proof).

112. CAL. VEH. CODE § 13557(b)(2) (West Supp. 1992); *Agresti v. Department of Motor Vehicles*, 5 Cal. App. 4th 599, 603, 7 Cal. Rptr. 2d 353, 355 (1992).

113. CAL. VEH. CODE § 13353.3 (West Supp. 1992).

114. *Id.* § 13559(a) (West Supp. 1992); *see infra* notes 184-192 and accompanying text (discussing review procedures).

2. Refusal or Failure to Complete a Test

California Vehicle Code section 23157 provides that any person who operates a motor vehicle in the State of California is deemed to have given his or her consent to chemical testing for the purpose of determining the driver's blood-alcohol level if the driver has been lawfully arrested for an alcohol or drug related driving offense.¹¹⁵ This section, often referred to as the Implied Consent Statute, also provides that any person who is unconscious or in a condition that renders the person incapable of refusing is deemed *not* to have withdrawn his or her consent to such testing.¹¹⁶ A driver may refuse to submit to a chemical test, but such action exacts a penalty for refusal. California Vehicle Code section 13353, subdivision (a), provides that any person who refuses or fails to complete a chemical test upon an officer's request shall have his or her driving privilege suspended upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the driver was operating a motor vehicle in violation of Vehicle Code section 23152 or 23153 and that the driver refused to submit to or failed to complete a chemical test after a proper request.¹¹⁷

The notice of the order of suspension is normally served on the driver by the arresting officer.¹¹⁸ The Department of Motor Vehicles must perform a review of the record after receipt of an officer's sworn statement describing the refusal or failure to complete a test.¹¹⁹ This review is limited to consideration of: (1) Whether the arresting officer had reasonable cause to believe the driver was operating a motor vehicle in violation of California Vehicle Code section 23152 or 23153; (2) whether the driver was placed under arrest for such violation; (3) whether the driver refused or failed to complete a chemical test after a proper request; and (4) whether the

115. CAL. VEH. CODE § 23157(a) (West Supp. 1992).

116. *Id.* § 23157(a)(2)(C)(5) (West Supp. 1992).

117. *Id.* § 13353(a) (West Supp. 1992).

118. *Id.* § 13353(b) (West Supp. 1992). However, if the notice is not served on the driver by the arresting officer, or the officer who observed the refusal, the Department of Motor Vehicles must immediately notify the driver in writing of the suspension. *Id.*

119. *Id.* § 13353(c) (West Supp. 1992).

driver had been informed of the consequences of a refusal or failure to complete the requested test or tests.¹²⁰ If any one of these findings are not supported by a preponderance of the evidence, the Department of Motor Vehicles may not suspend the driver's privilege to operate a motor vehicle.¹²¹ If the Department of Motor Vehicles chooses to suspend the driver's privilege to operate a motor vehicle, the driver may request an administrative hearing on the suspension.¹²² Although the administrative suspension procedure for refusing or failing to complete a chemical test is not new, the cases discussing this procedure that have been published since the inception of the admin per se statutes have been included to inform the practitioner of several nuances that may or may not be successfully applied in administrative proceedings.

For example, in *Hughey v. Department of Motor Vehicles*,¹²³ the Third District Court of Appeal was asked to decide if diminished capacity was a defense to a suspension for refusing to take a chemical test pursuant to section 23157.¹²⁴ The Sacramento County Superior Court had decided that Hughey was rendered incapable of refusing a chemical test due to severe head trauma caused in an accident preceding his arrest, and issued a writ of mandate ordering the Department of Motor Vehicles to reinstate his driving privileges.¹²⁵

120. *Id.* § 13353(c) (West Supp. 1992).

121. *Hughey v. Department of Motor Vehicles*, 235 Cal. App. 3d 752, 758, 1 Cal. Rptr. 2d 115, 118 (1991); *Janusch v. Department of Motor Vehicles*, 276 Cal. App. 2d 193, 196, 80 Cal. Rptr. 726, 728 (1969).

122. CAL. VEH. CODE § 13353(d) (West Supp. 1992). The request for an administrative hearing does not operate to stay the order of suspension or revocation. *Id.*

123. 235 Cal. App. 3d 752, 1 Cal. Rptr. 2d 115 (1991).

124. *Hughey*, 235 Cal. App. 3d at 754-55, 1 Cal. Rptr. 2d at 116.

125. *Id.* at 754, 1 Cal. Rptr. 2d at 166. Hughey was involved in a single vehicle motorcycle accident where he lost control of his vehicle at 45 miles per hour and ran into a fence. *Id.* at 755, 1 Cal. Rptr. 2d at 116. Hughey was not wearing a helmet at the time of the accident. *Id.* Public safety personnel attempted to administer medical care, but Hughey refused. *Id.* The investigating officer then placed Hughey under arrest and transported him to jail. *Id.* at 755-56, 1 Cal. Rptr. 2d at 117. At the jail, the investigating officer read Hughey the required admonition. *Id.* at 756, 1 Cal. Rptr. 2d at 117. In response to the officers' blood, breath or urine question, Hughey stated, "I'm not taking any test—just let me go, I'll show you something too cool man." *Id.* The investigating officer took this statement for a refusal, although he testified at the administrative hearing that the comment made no sense. *Id.* After being released from jail, Hughey was admitted to a hospital where he remained for five days. *Id.* At the administrative hearing, a neurologist testified that Hughey had suffered a serious head injury from the accident, and that such an injury would have made it "difficult, if not

On appeal, the Department of Motor Vehicles argued that the evidence was insufficient to sustain the superior court's decision.¹²⁶ The court of appeal understood the Department of Motor Vehicles' argument to mean that an arresting officer's "reasonable judgment" should be the controlling issue in determining whether a driver is capable of refusing a chemical test.¹²⁷

The crux of the Department of Motor Vehicles' case focused on the Implied Consent statutes.¹²⁸ According to Vehicle Code section 23157, any person who is unconscious or in a condition rendering the person "incapable of refusal" is deemed not to have withdrawn consent to submit to a chemical test.¹²⁹ However, refusal to submit to a chemical test withdraws the consent impliedly given.¹³⁰ The court of appeal held that because of the incapable of refusal language in California Vehicle Code section 23157,¹³¹ a person who is in a

impossible, for Hughey to have understood the admonition delivered by the officer, nor would have Hughey have understood the significance of his refusal to submit." *Id.* The expert also testified "It was unlikely that alcohol caused [Hughey's] behavior." *Id.* After the administrative hearing, Hughey's driver's license was suspended. *Id.* at 754, 1 Cal. Rptr. 2d at 116. Hughey sought review by filing for a writ of administrative mandate in the superior court. *Id.* The superior court ruled that the Department of Motor Vehicles findings were not supported by the evidence. *Id.* The superior court held that the arresting officer did not have reasonable cause to believe Hughey had been driving under the influence of alcohol and that Hughey was rendered incapable of refusing a chemical test due to his head trauma caused in the accident preceding his arrest. *Id.*

126. *Id.* at 755, 1 Cal. Rptr. 2d at 116. In its decision to affirm the superior court, the court of appeal determined that because a person may, in an administrative hearing, defend a refusal to submit to a chemical test, it was unnecessary to review the trial court's decision that the arresting officer lacked probable cause to arrest. *Id.*

127. *Id.* In other words, the Department of Motor Vehicles asked the court of appeal to rule that a person cannot submit evidence of lack of capacity to refuse a chemical test in an implied-consent hearing. *Id.*

128. See CAL. VEH. CODE § 23157(a)(1) (West Supp. 1992) (stating that any person who operates a motor vehicle is deemed to have consented to chemical testing to determine the alcohol or drug content the driver's blood); 1986 Cal. Stat. ch. 527, sec. 4, at 1881 (amending CAL. VEH. CODE § 13353) (stating that the issues to be covered during an administrative hearing for refusal to test shall be limited to: (1) The arresting officer's probable cause to arrest for California Vehicle Code §§ 23152 or 23153; (2) whether the driver was placed under arrest; (3) whether the driver actually refused or failed to complete a chemical test after a test was requested; and (4) whether the driver had been properly admonished regarding the consequences of a refusal or incomplete test); see also CAL. VEH. CODE § 23152 (West Supp. 1992) (driving under the influence of alcohol and/or any drug); § 23153 (West Supp. 1992) (driving under the influence of alcohol and/or drugs causing bodily injury).

129. CAL. VEH. CODE § 23157(a)(5) (West Supp. 1992).

130. *Hughey*, 235 Cal. App. 3d at 757, 1 Cal. Rptr. 2d at 118.

131. See CAL. VEH. CODE § 23157(a)(5) (West Supp. 1992).

condition that renders the person incapable of refusing a chemical test is deemed not to have withdrawn consent.¹³² The court noted that a self-induced condition, particularly a condition resulting from the consumption of alcohol, does not excuse failure to take a test.¹³³ However,

[i]f . . . the driver is able to convince a trier of fact that he or she was incapable of refusing a test for reasons unconnected with the consumption of alcohol, the statute contemplates a restoration of the driver's license. . . . If the driver presents expert testimony of his incapacity to refuse a test which convinces the trier of fact, this is permitted under section 23157, subdivision (a)(5).¹³⁴

Thus, the defense of incapacity to refuse a chemical test in an implied-consent hearing has been judicially upheld.¹³⁵

Another case dealing with the issue of whether a driver refused to submit to a chemical test is *Payne v. Department of Motor*

132. *Hughey*, 235 Cal. App. 3d at 758, 1 Cal. Rptr. 2d at 118. The Department of Motor Vehicles argued that California Vehicle Code § 23157, subdivision (a)(5), should be interpreted to mean that evidence of the driver's incapacity to refuse a chemical test may not be introduced if the arresting officer acted "reasonably." *Id.* In other words, the only issue to be determined at the administrative proceeding would be whether the arresting officer acted reasonably in deciding the driver's capacity to refuse the test. *Id.* at 758-59, 1 Cal. Rptr. 2d at 118-19. Thus, if the administrative hearing officer decided that the arresting officer acted reasonably, it would be an irrebuttable presumption that the driver did in fact have the capacity to refuse a chemical test. *Id.*

133. *Id.* at 759, 1 Cal. Rptr. 2d at 119; see *McDonnell v. Department of Motor Vehicles*, 45 Cal. App. 3d 653, 662-63, 119 Cal. Rptr. 804, 810-11 (1975) (holding that an impaired judgment defense cannot exist in an implied consent case where voluntary consumption of alcohol caused the impairment in part); *Goodman v. Orr*, 19 Cal. App. 3d 845, 857, 97 Cal. Rptr. 226, 234 (1971) (holding that self-intoxication is not a defense to refusing a chemical test); *Bush v. Bright*, 264 Cal. App. 2d 788, 792, 71 Cal. Rptr. 123, 125-26 (1968) (holding that allowing a person too intoxicated through a self-induced condition to understand the consequences of a refusal to test admonishment would frustrate the purposes of the Legislature).

134. *Hughey*, 235 Cal. App. 3d at 762, 1 Cal. Rptr. 2d at 121.

135. *Id.* at 768, 1 Cal. Rptr. 2d at 125. However, Justice Puglia included a caveat in his concurring opinion, warning that if medical experts are allowed to testify at administrative hearings regarding a driver's incapacity to refuse a chemical test caused by physical trauma, will not "those experts who minister to psychological and emotional trauma be far behind?" *Id.* at 770, 1 Cal. Rptr. 2d at 126 (Puglia, P.J., concurring). Justice Puglia also felt that it was an unfair advantage to allow drivers the ability to submit expert testimony regarding capacity to refuse a chemical test without giving the Department of Motor Vehicles notice sufficient to secure rebuttal testimony. *Id.* at 770-71, 1 Cal. Rptr. 2d at 126. However, "such a requirement would have to be imposed by the Legislature." *Id.* at 770, 1 Cal. Rptr. 2d at 127.

Vehicles.¹³⁶ In *Payne*, the First District Court of Appeal was faced with the issue of whether a driver's conduct of submitting to a chemical test without physical resistance, but insisting that the test was being conducted under protest, constitutes a refusal under California Vehicle Code section 13353.¹³⁷ The court held that, under the circumstances of this case, the driver's response that he was submitting to the test under protest did constitute a refusal.¹³⁸

The court stated the test to determine when a driver's conduct constitutes a refusal under California Vehicle Code section 13353:

In determining whether an arrested driver's conduct amounts to a refusal to submit to a test, the court looks not to the state of mind of the arrested driver, but to "the fair meaning to be given [the driver's] response to the demand he submit to a chemical test."¹³⁹

The court went on to state that when a driver places conditions on consent to a chemical test, such a condition constitutes a refusal

136. 235 Cal. App. 3d 1514, 1 Cal. Rptr. 2d 528 (1991).

137. *Id.* at 1517, 1 Cal. Rptr. 2d at 529.

138. *Id.* at 1520, 1 Cal. Rptr. 2d at 529. *Payne* was lawfully arrested by a California Highway Patrol officer for driving under the influence of alcohol after an injury accident. *Id.* *Payne* was advised at the scene of his arrest that he was required to submit to a chemical blood-alcohol test. *Id.* *Payne* told the arresting officer that he would not take any test. *Id.* *Payne* was then transported to jail where he was admonished that his driving privileges would be suspended if he failed or refused to submit to a chemical test. *Id.* at 1516-17, 1 Cal. Rptr. 2d at 529. *Payne* responded that he would only take a blood test if his personal physician administered the test. *Id.* The arresting officer explained to *Payne* that the nurse at the jail was registered and qualified to take blood samples. *Id.* The arresting officer then told *Payne* that the nurse would take the blood sample, and that *Payne* was in violation of California Vehicle Code § 13353. *Id.* *Payne* then submitted to the test without physical resistance, however, he insisted that the blood sample was being taken "under protest." *Id.* The Department of Motor Vehicles revoked *Payne's* driving privileges for refusing to submit to a chemical test pursuant to California Vehicle Code § 13353. *Id.* *Payne* petitioned the superior court for a writ of mandate to set aside the Department of Motor Vehicles' order to revoke his driver's license. *Id.* The superior court granted the writ. *Id.* The Department of Motor Vehicles appealed. *Id.*

139. *Id.* at 1518, 1 Cal. Rptr. 2d at 529-30; see *Barrie v. Alexis*, 151 Cal. App. 3d 1157, 1161, 199 Cal. Rptr. 258, 260 (1984) (quoted in *Payne v. Department of Motor Vehicles*, 235 Cal. App. 3d 1514, 1 Cal. Rptr. 2d 528 (1991)) (holding that the determinative factor in a refusal to test case is the objective response of the driver to a demand to submit to a chemical test); *Cole v. Department of Motor Vehicles*, 139 Cal. App. 3d 870, 874, 189 Cal. Rptr. 249, 252 (1983) (holding the same).

within the meaning of California Vehicle Code section 13353.¹⁴⁰ However, the court emphasized that a driver does have the right to request and receive assurance of the qualifications of the individual administering the test.¹⁴¹ Therefore, with the exception of a request for qualifications of the person administering a blood test, a driver who places a condition on consent to take a chemical test or submits to a chemical test under protest will be deemed to have refused to submit to a chemical test under California Vehicle Code section 13353, and risks administrative license suspension or revocation.¹⁴²

In sum, although a driver must submit to a chemical test to determine his or her blood-alcohol level if arrested for an alcohol or drug related driving offense, it is possible to defend a license suspension or revocation for refusing to submit to the test if the driver was incapable of refusing because of a non-self induced condition at the time of the refusal. However, submitting to the testing procedure "under protest" will expose the driver to potential penalty for "refusing" to submit to the test.

C. Requirements for Reinstatement

If the Department of Motor Vehicles has improperly decided to suspend a person's privilege to operate a motor vehicle, the driver must attempt to obtain judicial review of that decision,¹⁴³ and ask the reviewing court to set aside the suspension order. This section will review those cases that have attempted to obtain a set aside by arguing either that the Department of Motor Vehicle's decision to

140. *Payne*, 235 Cal. App. 3d at 1518, 1 Cal. Rptr. 2d at 530; see *Webb v. Miller*, 187 Cal. App. 3d 619, 626, 232 Cal. Rptr. 50, 54 (1986) (holding that a conditional consent to test constitutes refusal); *Cole v. Department of Motor Vehicles*, 139 Cal. App. 3d 870, 873, 189 Cal. Rptr. 249, 252 (1983) (holding that a conditional acceptance to test is tantamount to a refusal); *Fallis v. Department of Motor Vehicles*, 264 Cal. App. 2d 373, 382, 70 Cal. Rptr. 595, 601 (1968) (holding that a person who conditions submission to a chemical test on administration by his own physician has refused to take the test as provided by statute).

141. *Payne*, 235 Cal. App. 3d at 1519, 1 Cal. Rptr. 2d at 530-31; see *Ross v. Department of Motor Vehicles*, 219 Cal. App. 3d 398, 402, 268 Cal. Rptr. 102, 104 (1990) (holding that an arrestee must be informed of the qualifications of the person administering a blood test if hesitation is expressed).

142. *Payne*, 235 Cal. App. 3d at 1520, 1 Cal. Rptr. 2d at 531.

143. See *infra* notes 184-192 and accompanying text (discussing judicial review procedures).

suspend was collaterally estopped by a prior decision of a criminal court,¹⁴⁴ or that the Department was required to reinstate the driver's license because the driver had been acquitted of the criminal charges.¹⁴⁵

1. Collateral Estoppel

The administrative per se laws specifically provide that the determination of the facts at the hearing "is a civil matter which is independent of the determination of the person's guilt or innocence, shall have no collateral estoppel effect on a subsequent criminal prosecution, and shall not preclude the litigation of the same or similar facts in the criminal proceeding."¹⁴⁶ This, along with the related issue of what exactly constitutes an acquittal,¹⁴⁷ has been an area of much litigation between drivers and the Department of Motor Vehicles.

In *Zapata v. Department of Motor Vehicles*,¹⁴⁸ the First District Court of Appeal was faced with the issue of whether a municipal court's suppression order collaterally estopped the Department of Motor Vehicles from relitigating the issue of whether Zapata was lawfully arrested.¹⁴⁹ The Department of Motor Vehicles argued that

144. See *infra* notes 146-155 and accompanying text.

145. See *infra* notes 156-183 and accompanying text.

146. CAL. VEH. CODE § 13353.2(e) (West Supp. 1992). Vehicle Code § 13558 specifically provides that "a determination of facts by the department upon a hearing pursuant to this section has no collateral estoppel effect on a subsequent criminal prosecution and does not preclude litigation of those same facts in the criminal proceeding." See *id.* § 13558(g) (West Supp. 1992).

147. See *infra*, notes 156-183 and accompanying text (discussing acquittal requirements).

148. 2 Cal. App. 4th 108, 2 Cal. Rptr. 2d 855 (1991).

149. *Zapata*, 2 Cal. App. 4th at 111-12, 2 Cal. Rptr. 2d at 857. Zapata was arrested for driving under the influence of alcohol and refused to submit to a chemical test. *Id.* at 111, 2 Cal. Rptr. 2d at 857. Before his administrative hearing on the refusal was conducted, Zapata moved in the municipal court to suppress evidence based on the argument that he was unlawfully arrested. *Id.* The municipal court conducted an adversarial hearing, and concluded that Zapata was arrested without probable cause. *Id.* The district attorney's office then dismissed the charges pending against Zapata. *Id.* Two days after the charges were dismissed, the Department of Motor Vehicles held an administrative hearing on Zapata's refusal to submit to a chemical test. *Id.* Zapata argued that the Department of Motor Vehicles was collaterally estopped from relitigating the issue of whether he was lawfully arrested, a necessary element of the revocation proceeding. *Id.*; see CAL. VEH. CODE § 13353 (West Supp. 1992) (stating the necessary elements that must be found in order to suspend or revoke a driver's license). The Department of Motor Vehicles disagreed and revoked Zapata's driving

it was not collaterally estopped from relitigating the issue of the lawfulness of Zapata's arrest because the district attorney's office responsible for criminally prosecuting Zapata was not in privity with the Department of Motor Vehicles.¹⁵⁰ The court of appeal first laid out the traditional requirements of collateral estoppel: (1) The issue to be precluded from relitigation must be identical to that decided in a former proceeding; (2) this issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party in the former proceeding.¹⁵¹

Finding that the first four elements were present, the court in *Zapata* focused on the Department's challenge that privity did not exist between the Department of Motor Vehicles and the district attorney's office.¹⁵² Noting that there was an apparent split of authority,¹⁵³ the *Zapata* court held that because agents of the same

privileges. *Zapata*, 2 Cal. App. 4th at 111-12, 2 Cal. Rptr. at 857. Zapata filed a writ of mandate in the superior court. *Id.* at 112, 2 Cal. Rptr. 2d at 857. The superior court agreed with Zapata that the Department of Motor Vehicles was collaterally estopped from relitigating the issue of the lawfulness of Zapata's arrest and granted the writ. *Id.* The Department of Motor Vehicles appealed. *Id.* at 111, 2 Cal. Rptr. 2d at 856.

150. *Zapata*, 2 Cal. App. 4th at 111-12, 2 Cal. Rptr. 2d at 857.

151. *Id.* at 112, 2 Cal. Rptr. 2d at 857-58 (quoting *Lucido v. Superior Court*, 51 Cal. 3d 335, 341, 795 P.2d 1223, 1225, 272 Cal. Rptr. 767, 769 (1990)); see *People v. Simms*, 32 Cal. 3d 468, 484, 651 P.2d 321, 331, 186 Cal. Rptr. 77, 87 (1982) (stating the elements of collateral estoppel).

152. *Zapata*, 2 Cal. App. 4th at 113, 2 Cal. Rptr. 2d at 858.

153. The *Zapata* court pointed out several cases which found that privity existed between a district attorney's office and the Department of Motor Vehicles for collateral estoppel purposes. *Id.*, at 113, 2 Cal. Rptr. 2d at 858 (discussing *Shackelton v. Department of Motor Vehicles*, 46 Cal. App. 3d 327, 119 Cal. Rptr. 921 (1975), and *Buttimer v. Alexis*, 146 Cal. App. 3d 754, 194 Cal. Rptr. 603 (1983)); see *Buttimer v. Alexis*, 146 Cal. App. 3d 754, 759-60, 194 Cal. Rptr. 603, 606 (1983) (finding privity between the District Attorney's office and the Department of Motor Vehicles); *Shackelton v. Department of Motor Vehicles*, 46 Cal. App. 3d 327, 330-31, 119 Cal. Rptr. 921, 923-24 (1975) (holding that the Department of Motor Vehicles is in privity with the prosecuting attorney of criminal charges related to driving an automobile for purposes of collateral estoppel). However, the Department of Motor Vehicles argued that the court of appeal should follow the contrary decisions of *Lofthouse v. Department of Motor Vehicles*, 124 Cal. App. 3d 730, 177 Cal. Rptr. 601 (1981), and *Pawlowski v. Pierce*, 202 Cal. App. 3d 692, 249 Cal. Rptr. 49 (1988); see *Pawlowski v. Pierce*, 202 Cal. App. 3d 692, 698, 249 Cal. Rptr. 49, 52 (1988) (agreeing with *Lofthouse* that the Department of Motor Vehicles is not in privity with the prosecuting attorney for lack of a close association between the prosecuting attorney and DMV); *Lofthouse v. Department of Motor Vehicles*, 124 Cal. App. 3d 730, 737, 177 Cal. Rptr. 601, 605 (1981) (holding that the Department of Motor

government represent the rights of that government, they are in privity for collateral estoppel purposes.¹⁵⁴ Therefore, because the Department of Motor Vehicles and the district attorney's office responsible for criminally prosecuting Zapata were both representing the same government, i.e., the State of California, they were in privity and collateral estoppel applied in this case.¹⁵⁵

Although collateral estoppel appears to have been one of the central issues in *admin per se* litigation, the most litigated area has been a similar, yet distinct issue: Whether a driver has been acquitted of the criminal charges which would trigger mandatory reinstatement under Vehicle Code section 13353.2.

2. *Acquittal*

Section 13353.2(e) requires the Department of Motor Vehicles to reinstate a person's driving privilege if the person is "acquitted" of related criminal charges. That section provides in part:

If a person is acquitted of criminal charges relating to a determination of facts under subdivision (a), the department shall immediately reinstate the

Vehicles is not in privity with the prosecutor in a criminal proceeding which charges the driver of a motor vehicle because DMV has no power to control or intervene in the criminal proceedings); . The *Zapata* court distinguished *Lofthouse* by pointing out that the driver's arrest was not the legal issue in that case, and ruling that *Pawlowski* was incorrectly decided. *Zapata*, 2 Cal. App. 4th at 113-14, 2 Cal. Rptr. 2d at 858-59; see *Lofthouse*, 124 Cal. App. 3d at 738, 177 Cal. Rptr. at 605 (stating that the legality of the driver's arrest was not relevant and was therefore not decided in the prior litigation).

154. *Zapata*, 2 Cal. App. 4th at 114, 2 Cal. Rptr. 2d at 859; see *Lerner v. Los Angeles City Bd. of Educ.*, 59 Cal. 2d 382, 398, 380 P.2d 97, 106, 29 Cal. Rptr. 657, 666 (1963) (quoted in *Zapata*) (holding that agents of the same government are in privity with each other because they represent the rights of that government); see also *People v. Sims*, 32 Cal. 3d 468, 487, 651 P.2d 321, 333, 186 Cal. Rptr. 77, 89 (1982) (citing *Lerner* for the same proposition).

155. *Zapata*, 2 Cal. App. 4th at 115, 2 Cal. Rptr. 2d at 859. The court went on to analyze whether any public policy considerations, i.e., judicial integrity, judicial economy, and protection from vexatious litigation, would preclude application of collateral estoppel. *Id.* at 115-16, 2 Cal. Rptr. 2d at 859-60. After discussing these issues, the court held that public policy considerations did not preclude application of collateral estoppel in this case and ruled that the Department of Motor Vehicles was precluded from relitigating the issue the lawfulness of Zapata's arrest. *Id.* at 116, 2 Cal. Rptr. 2d at 860.

person's privilege to operate a motor vehicle if the department has suspended it administratively pursuant to subdivision (a).¹⁵⁶

The precise meaning of the words "acquitted of criminal charges relating to a determination of facts under subdivision (a)" has caused a great deal of confusion. California Vehicle Code section 13353.2, subdivision (a), provides that the Department of Motor Vehicles will suspend a person's privilege to drive if he or she was driving or in actual physical control of a motor vehicle with a blood alcohol level of 0.08 percent or more.¹⁵⁷ Because the elements of section 13353.2, subdivision (a), are essentially the same as California Vehicle Code section 23152, subdivision (b), an acquittal of the charge of section 23152, subdivision (b),¹⁵⁸ should trigger the reinstatement action called for in section 13353.2, subdivision (e).

The interpretation of Vehicle Code section 13353.2 was the issue to be decided in *Agresti v. Department of Motor Vehicles*.¹⁵⁹ In *Agresti*, the Fifth District Court of Appeal was asked to decide whether a dismissal of the charges for driving under the influence of alcohol in a criminal court required reinstatement of driving privileges that had been administratively suspended pursuant to evidence of the underlying arrest.¹⁶⁰ The case focused on the interpretation of California Vehicle Code section 13353.2, sub-

156. CAL. VEH. CODE § 13353.2(e) (West Supp. 1992).

157. *Id.* § 13353.2(a) (West Supp. 1992).

158. *See id.* § 23152(b) (West Supp. 1992) (providing that: "It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.").

159. 5 Cal. App. 4th 559, 7 Cal. Rptr. 2d 353 (1992).

160. *Agresti*, 5 Cal. App. 4th at 602, 7 Cal. Rptr. 2d at 354. *Agresti* had been arrested for driving under the influence of alcohol at the scene of a reported single vehicle accident although the arresting officer did not observe *Agresti* driving the vehicle. *Id.* at 601-02, 2 Cal. Rptr. 2d at 354. *Agresti* submitted to a blood test to determine his blood-alcohol level. *Id.* at 602, 2 Cal. Rptr. 2d at 354. The test results indicated a blood-alcohol level of 0.09 percent. *Id.* On the day of *Agresti's* scheduled criminal trial, the district attorney's office moved for dismissal, which the court granted. *Id.* Over two months after the charges were dismissed, the Department of Motor Vehicles conducted a formal hearing to determine whether *Agresti's* driving privileges should be suspended for operating a vehicle with a blood-alcohol level of 0.08 percent or more. *Id.* After conducting the hearing, the Department of Motor Vehicles suspended *Agresti's* driver's license. *Id.* On a writ of mandate proceeding, the superior court issued the writ, ruling that because the municipal court had dismissed the charges, California Vehicle Code § 13353.2, subdivision (e), required the Department of Motor Vehicles to reinstate *Agresti's* driving privileges. *Id.* The Department of Motor Vehicles appealed. *Id.* at 601, 2 Cal. Rptr. 2d at 354.

division (e), which requires the Department of Motor Vehicles to reinstate a person's suspended driving privileges if the person is "acquitted" of related criminal charges.¹⁶¹ Section 13353.2 states in part:

(a) The department shall immediately suspend the privilege of any person to operate a motor vehicle if the person was driving or was in actual physical control of a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood.

...
(e) The determination of the facts in subdivision (a) is a civil matter which is independent of the determination of the person's guilt or innocence, shall have no collateral estoppel effect on a subsequent criminal prosecution, and shall not preclude the litigation of the same or similar facts in the criminal proceeding. If a person is acquitted of criminal charges relating to a determination of facts under subdivision (a), the department shall immediately reinstate the person's privilege to operate a motor vehicle if the department has suspended it administratively pursuant to subdivision (a). . . .¹⁶²

The Department of Motor Vehicles argued that the use of the term "acquittal" in section 13353.2 should be interpreted to mean "an adjudication of the facts underlying the administrative suspension."¹⁶³ Agresti argued that because California Penal Code section 1387 bars a second prosecution of a misdemeanor that has been dismissed, he was "acquitted" of the underlying charges within the meaning of section 13353.2.¹⁶⁴

The court of appeal noted that the record below did not disclose the reason for the dismissal, and argued that a dismissal does not necessarily require a consideration of the merits.¹⁶⁵ Therefore,

161. *Id.* at 603, 2 Cal. Rptr. 2d at 355.

162. CAL. VEH. CODE § 13353.2(a), (e) (West Supp. 1992).

163. Agresti, 5 Cal. App. 4th at 604, 2 Cal. Rptr. 2d at 355.

164. *Id.*; see CAL. PENAL CODE § 1387 (West Supp. 1992) (stating that a dismissal of a misdemeanor not charged with a felony is a bar to any other prosecution for the same offense).

165. Agresti, 5 Cal. App. 4th at 604, 7 Cal. Rptr. 2d at 356. The court noted that it was not being asked to decide the effect of a dismissal after a hearing on the merits and how it relates to the required determination of facts in an administrative hearing. *Id.* at 605 n.2, 7 Cal. Rptr. 2d at 356 n.2 (citing *Zapata v. Department of Motor Vehicles*, discussed *supra* at notes 148-155 and accompanying text, as an example of these circumstances). The court also stated that it was not deciding whether

because the term “acquittal” refers to a determination of the merits,¹⁶⁶ and the record in this case did not reveal a factual determination of the merits, Agresti was not “acquitted” within the meaning of California Vehicle Code section 13353.2.¹⁶⁷

In *Helmandollar v. Department of Motor Vehicles*,¹⁶⁸ the Third District Court of Appeal was asked to decide the issue specifically not addressed in *Agresti*: The effect of a dismissal of criminal charges on the administrative hearing after a criminal court decides an issue “on the merits” favorable to the defendant.¹⁶⁹ In *Helmandollar*, the court was faced with a driver who pleaded nolo contendere to “related” charges of driving under the influence of alcohol, but was acquitted in the municipal court of driving with a blood-alcohol level of 0.08 percent or more.¹⁷⁰ On appeal, the court was asked to

a factually compelled dismissal, which occurs after an administrative suspension, would operate as an acquittal within the meaning of California Vehicle Code § 13353.2, subdivision (e). *Agresti*, 5 Cal. App. 4th at 605 n.2, 7 Cal. Rptr. 2d at 356 n.2.

166. See *United States v. Scott*, 437 U.S. 82, 97 (1978) (quoted in *Agresti*) (holding that a criminal defendant is “acquitted” when a court makes a ruling in the defendant’s favor which disposes of a factual element of the charged offense).

167. *Agresti*, 5 Cal. App. 4th at 607, 7 Cal. Rptr. 2d at 357-58.

168. 7 Cal. App. 4th 52, 9 Cal. Rptr. 2d 155 (1992).

169. See *supra* note 165 and accompanying text (discussing the *Agresti* court’s statement that it was not deciding the effect of a dismissal after a criminal court conducts a hearing on the merits).

170. *Helmandollar*, 7 Cal. App. 4th at 54, 9 Cal. Rptr. 2d at 156. *Helmandollar* and Smith (co-appellant) were drinking together after work. *Id.* After leaving the bar in separate cars, they crashed into each other. *Id.* Between thirty minutes and one hour after the accident, a police officer arrived and arrested both men for driving under the influence of alcohol. *Id.* Both were given a breath test to determine their blood-alcohol level. *Id.* Each driver registered 0.12 percent on the breath test. *Id.* The prosecution apparently felt that it would be difficult to accurately establish the drivers’ blood-alcohol level at the time of driving because the evidence was consistent with a raising blood-alcohol level. *Id.* at 54-55, 9 Cal. Rptr. 2d at 156. The drivers’ waived the right to a jury trial on the charge of driving with a blood-alcohol level of 0.08 percent or more and submitted stipulated facts to the court. *Id.* at 55, 7 Cal. Rptr. 2d at 156. Based on the stipulated facts, the court found each driver not guilty of driving with a blood-alcohol level of 0.08 percent or more. *Id.* The prosecutor then amended the remaining charges of driving under the influence of alcohol, California Vehicle Code § 23152, subdivision (a), to alcohol-related reckless driving, California Vehicle Code § 23103.5. *Id.* Each of the drivers pleaded nolo contendere to the amended charges. *Id.* Armed with the acquittals, *Helmandollar* and Smith demanded the Department of Motor Vehicles to reinstate their driving privileges which had been administratively suspended. *Id.* The Department of Motor Vehicles refused, and the drivers sought a writ of mandate in the superior court. *Id.*, 9 Cal. Rptr. 2d at 156-57. The superior court denied the writ and the drivers’ appealed. *Id.*, 9 Cal. Rptr. 2d at 157; see CAL. VEH. CODE § 23152(a) (West Supp. 1992) (unlawful to drive a motor vehicle under the influence of alcohol or any drug); *id.* § 23152(b) (West Supp. 1992) (unlawful to drive a motor vehicle with a blood-alcohol level of 0.08 percent or more); *id.* § 23103.5 (West Supp. 1992) (allowing a prosecutor

decide whether an acquittal of California Vehicle Code section 23152, subdivision (b), required reinstatement of a driver's privilege to operate a motor vehicle under California Vehicle Code section 13353.2.¹⁷¹ The Department of Motor Vehicles argued that the language of California Vehicle Code section 13353.2 requires an acquittal of all criminal charges relating to the incident.¹⁷² The court disagreed and held that when a driver has been acquitted of California Vehicle Code section 23152, subdivision (b), which essentially has the same elements as California Vehicle Code section 13353.2, subdivision (a), the driver has been acquitted within the meaning of section 13353.2, and the Department of Motor Vehicles is required to reinstate.¹⁷³

In *Claxton v. Zolin*,¹⁷⁴ the Fifth District Court of Appeal was faced with a factual situation very similar to that faced by the Third District in *Helmandollar*.¹⁷⁵ In *Claxton*, two drivers entered into a plea bargained acquittal where the prosecutor agreed to stipulate to certain facts.¹⁷⁶ The stipulation stated that it was reasonable that the driver's blood-alcohol level at the time of the stop was below 0.08 percent, and that the court will find the driver not guilty of California

to accept a guilty plea or plea of nolo contendere as a substitute for an original charge of Vehicle Code § 23152).

171. *Helmandollar*, 7 Cal. App. 4th at 54, 9 Cal. Rptr. 2d at 156.

172. *See id.* at 56, 9 Cal. Rptr. 2d at 157. The Department of Motor Vehicles apparently attempted to argue that the use of the word "charges" in § 13353.2 meant that before reinstatement was required, the driver must be acquitted of "all charges" relating to the offense. *Id.* at 56-57, 9 Cal. Rptr. 2d at 157-58.

173. *Id.* at 57, 9 Cal. Rptr. 2d at 157-58.

174. 8 Cal. App. 4th 553, 10 Cal. Rptr. 2d 319 (1992).

175. *Claxton*, 8 Cal. App. 4th at 556-58, 10 Cal. Rptr. 2d at 320-21. *Claxton* involved a number of individuals who had been arrested and charged with driving under the influence of alcohol. *Id.* at 556-57, 10 Cal. Rptr. 2d at 320. However, the decision specifically deals with two drivers who entered into a plea bargain with the prosecutor to stipulate to the facts underlying the charge of driving with a blood-alcohol level of 0.08 percent or more in exchange for a guilty plea to California Vehicle Code § 23152, subdivision (a). *Id.* at 557, 10 Cal. Rptr. at 321. The judgment on the remaining drivers was appealed only as to the award of attorney's fees, which will not be addressed in this article. *See id.* at 558, 10 Cal. Rptr. 2d at 322.

176. *Id.* at 557 n.3, 10 Cal. Rptr. 2d at 321 n.3.

Vehicle Code section 23152, subdivision (b), in exchange for a guilty plea to California Vehicle Code section 23152, subdivision (a).¹⁷⁷

The Department of Motor Vehicles argued that the language of California Vehicle Code section 13353.2, subdivision (a)¹⁷⁸ should be read in such a way as to preclude reinstatement from acquittals that did not involve actual litigation and determination of the essential facts.¹⁷⁹ The drivers' argued that the language contained within California Vehicle Code section 13353.2, subdivision (e), requires reinstatement of a person's driving privilege when the Department of Motor Vehicles receives an abstract of judgment showing that the driver has been acquitted of the charges of California Vehicle Code section 23152, subdivision (b).¹⁸⁰ The court looked to its prior decision in *Agresti*,¹⁸¹ and determined that the not guilty rulings in this case constituted a determination on the merits, and therefore an acquittal:

The not-guilty ruling by the judge in [the drivers'] cases constituted a resolution in [the drivers'] favor of the factual elements of the section 23152(b) charge. Regardless whether the judge's ruling was based on adversarial litigation or a factual stipulation of the parties, the ruling constituted a disposition of the criminal charge on the merits. Thus, [the drivers were] "acquitted of criminal charges relating to a determination of facts under subdivision (a)."¹⁸²

177. *Id.* The record revealed a written stipulation including the facts as stated in the text. *Id.* The trial court reluctantly agreed, and acquitted the two drivers. *Id.* The two drivers then attempted to have their licenses reinstated by the Department of Motor Vehicles. *Id.* at 558, 10 Cal. Rptr. 2d at 321. The Department of Motor Vehicles refused, and the drivers filed a writ of mandate in the superior court. *Id.*, 10 Cal. Rptr. 2d at 321-22. The superior court issued the writ, and the Department of Motor Vehicles appealed. *Id.*, 10 Cal. Rptr. 2d at 322.

178. The relevant language of § 13353.2(e) is: "If a person is *acquitted of criminal charges relating to a determination of facts under subdivision (a)*, the department shall immediately reinstate the person's privilege to operate a motor vehicle if the department has suspended it administratively pursuant to subdivision (a)." CAL. VEH. CODE § 13353.2(e) (West Supp. 1992) (emphasis added).

179. *Claxton*, 8 Cal. App. 4th at 560, 10 Cal. Rptr. 2d at 323.

180. *Id.*

181. See *supra* notes 159-167 and accompanying text (discussing the *Agresti* decision).

182. *Claxton*, 8 Cal. App. 4th at 562, 10 Cal. Rptr. 2d at 324. The court went on to explain why the Department of Motor Vehicles was incorrect in its assertion:

Nothing in the language of the statute requires the narrow reading urged by the Department. The "determination of facts" language does not refer to or qualify the "acquittal of" language. Rather, that phrase qualifies the criminal charges language. It limits licensure reinstatement to those cases where the driver is acquitted of crimes

Therefore, when a driver is acquitted of California Vehicle Code section 23152, subdivision (b), whether as a result of litigation or as a result of a plea bargain, the Department of Motor Vehicles must reinstate the driver's privilege to operate a motor vehicle.¹⁸³

III. APPEALING ADVERSE DECISIONS BY THE DMV: THE ADMINISTRATIVE WRIT PROCEDURE

Administrative mandamus is the proper remedy for judicial review of an administrative action.¹⁸⁴ Generally, provisions of the California Code of Civil Procedure section 1094.5 calling for a writ of mandamus to inquire into the validity of a final administrative order governs judicial review after a formal adjudicatory decision by any administrative agency.¹⁸⁵ More specifically, however, California Vehicle Code section 13559 provides for judicial review of an order suspending or revoking the driving privilege on the basis of chemical test refusal or driving with an excessive blood alcohol content.¹⁸⁶

relating to the factual determinations which authorized the Department to suspend the driver's license under § 13353.2(a).

Id.

183. *Id.* at 562-63, 10 Cal. Rptr. 2d at 325.

184. *Grant v. Board of Medical Examiners*, 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270, 274 (1965). A writ of mandamus will lie when: (1) There is no plain, speedy and adequate remedy; (2) the respondent has a duty to perform; and (3) the petitioner has a clear and beneficial right to perform. *Payne v. Superior Court*, 17 Cal. 3d 908, 925, 132 Cal. Rptr. 405, 417 (1976). This must be specifically plead in the petition for mandamus. *Id.*

185. *Los Angeles County v. Tax Appeals Bd.*, 267 Cal. App. 2d 830, 833, 73 Cal. Rptr. 469, 471 (1968).

186. CAL. VEH. CODE § 13559(a) (West Supp. 1992). California Vehicle Code § 13559 provides for a petition for review within thirty days of an adverse decision suspending or revoking a person's driving privilege *after* a hearing pursuant to California Vehicle Code § 13558. *Id.* Because California Vehicle Code § 13559 is more specific than California Code of Civil Procedure 1094.5, the former controls *unless it is silent on the procedure*. *Coombs v. Pierce*, 1 Cal. App. 4th 568, 575, 2 Cal. Rptr. 2d 249, 252 (1991); *see id.* Therefore, if a driver files for a writ of mandate pursuant to Code of Civil Procedure § 1094.5, and the petition is filed after an adverse decision by the Department of Motor Vehicles without an administrative hearing pursuant to California Vehicle Code § 13558, the procedures will be controlled by those set forth in the Code of Civil Procedure § 1094.5; *see also* CAL. VEH. CODE § 13558(a) (West Supp. 1992) (providing for an administrative hearing on a driver's license suspension or revocation pursuant to California Vehicle Code §§ 13353, 13353.2, 23157, or 23158.5); CAL. CIV. PROC. CODE § 1094.6(b),(d) (West Supp. 1992) (providing that in a mandate proceeding to review decision of local agency other than school district, review

Under section 13559, the petition for review must be filed within thirty days from the order of suspension.¹⁸⁷ According to section 13559, filing the petition for review shall not stay the order of suspension or revocation.¹⁸⁸ However, because a review would be meaningless without a stay,¹⁸⁹ most courts grant stays pending final determination in the superior court.¹⁹⁰

Under both California Vehicle Code section 13559 and Code of Civil Procedure section 1094.5, the reviewing court may not consider any evidence outside the administrative hearing record.¹⁹¹ The reviewing court may rescind the Department of Motor Vehicles' order of suspension or revocation if it finds the Department: (1) Misinterpreted the applicable law; (2) conducted the proceeding in an

must be within ninety days, with a possible extension if request before record filed); CAL. GOV'T CODE § 11523 (West 1992) (allowing a mandate proceeding to review decision of administrative agency subject to provisions of California Administrative Procedure Act and providing that a petition must be filed within thirty days); *Cummings v. City of Vernon*, 214 Cal. App. 3d 919, 920-24, 263 Cal. Rptr. 97, 97-100 (1989) (stating that ninety day period in Code of Civil Procedure § 1094.6, subdivision (b), runs from date that notice is required under Code of Civil Procedure § 1094.6, subdivision (f), is mailed).

187. CAL. VEH. CODE § 13559(a) (West Supp. 1992).

188. *Id.*; but see *Deepwell Homeowners Protective Ass'n v. City Council of Palm Springs*, 239 Cal. App. 2d 63, 65, 48 Cal. Rptr. 321, 323 (1965) (holding that the inherent power of a reviewing court to grant a stay applied where the effect of the judgment is such that a stay is necessary or proper to complete the exercise of its appellate jurisdiction and where denial of a stay will result in depriving the petitioner of the fruits of the review should he be successful); see also CAL. CIV. PROC. CODE § 1094.5(g) (West Supp. 1992) (granting a court the power to stay the operation of the administrative order pending judgment of the court).

189. The time necessary to review the administrative order or decision could easily last long enough to consume a significant portion of the suspension or revocation, so that if a petitioner prevails, she will have nevertheless suffered a large portion of the evils of the suspension order which she rightfully sought to overturn. See generally CAL. CIV. PROC. CODE § 1094.5(g) (West Supp. 1992) (courts may stay administrative orders or decisions pending judgment of the court).

190. See, e.g., *Robertson v. Department of Motor Vehicles*, 7 Cal. App. 4th 938, 944, 9 Cal. Rptr. 2d 319, 322 (1992) (stating that the superior court granted a stay pending the hearing on the writ of mandate).

191. CAL. VEH. CODE § 13559(a) (West Supp. 1992); CAL. CIV. PROC. CODE § 1094.5(b) (West Supp. 1992); see *Coombs v. Pierce*, 1 Cal. App. 4th 568, 574, 2 Cal. Rptr. 2d 249, 252 (1991) (holding that the standard of review in California Vehicle Code § 13559 is consistent with the standard of review stated in California Code of Civil Procedure § 1094.5, subdivision (b)).

arbitrary and capricious manner; or (3) made factual findings which were not supported by the evidence in the record.¹⁹²

IV. CONSTITUTIONAL CHALLENGES

Historically, one of the most successful methods of challenging new statutes has been the Equal Protection Clause of the federal and state constitutions.¹⁹³ The Equal Protection Clause requires that persons under like circumstances be given equal protection in personal and civil rights.¹⁹⁴ However, the clause does not create any new rights; it simply requires that persons similarly situated receive equal treatment.¹⁹⁵ Because the administrative per se statutes appear to treat similarly situated drivers differently, a few cases have challenged the validity of these laws based on the apparent violation of the state and federal equal protection clause.

In *Peretto v. Department of Motor Vehicles*,¹⁹⁶ the Department of Motor Vehicles suspended Peretto's driver's license after an administrative per se hearing pursuant to Vehicle Code section 13353.2.¹⁹⁷ Peretto challenged the new administrative per se law as unconstitutional claiming that it violated the Due Process clause and

192. CAL. VEH. CODE § 13559(a) (West Supp. 1992); CAL. CIV. PROC. CODE § 1094.5(b) (West Supp. 1992). A decision of the Department of Motor Vehicles to suspend or revoke a person's driving privileges will be reviewed under the independent judgment standard. *Berlinghieri v. Department of Motor Vehicles*, 33 Cal. 3d 392, 394, 657 P.2d 383, 384, 188 Cal. Rptr. 891, 892 (1983). Under the independent judgment standard, a trial court finds abuse of discretion if it determines that the findings of the administrative agency were not supported by the weight of the evidence. CAL. CIV. PROC. CODE § 1094.5(c) (West Supp. 1992). However, appellate review of the trial court's decision is governed by the substantial evidence test. *See Hosford v. Board of Admin.*, 77 Cal. App. 3d 854, 859, 143 Cal. Rptr. 760, 763 (1978) (holding that appellate review of a trial court's independent judgment limited to whether there was substantial evidence to support the decision).

193. *See generally* Randall Fox, *Equal Protection Analysis: Laurence Tribe, The Middle, and the Pole of the Court*, 14 U.S.F. L. REV. 525 (1980).

194. U.S. CONST. amend. XIV, §§ 1-2; CAL. CONST. art I, § 7. *See generally* William Rich, *Equal Protection for the Poor: Fair Distribution to Meet Brutal Needs*, 24 SAN DIEGO L. REV. 1117 (1987); Gary J. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

195. *See generally* *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *In re Kotta*, 187 Cal. 27, 200 P. 957 (1921); *In re Finley*, 1 Cal. App. 198, 81 P. 1041 (1905).

196. 235 Cal. App. 3d 449, 1 Cal. Rptr. 2d 392 (1991).

197. *Peretto*, 235 Cal. App. 3d at 452, 1 Cal. Rptr. 2d at 392, 393 (1991).

the Equal Protection clause of both the state and federal constitutions and the state constitution's prohibition against special legislation.¹⁹⁸

The Court of Appeal held that the statutory scheme did not violate the Equal Protection Clause.¹⁹⁹ Equal Protection analysis requires a determination of whether the challenged law involves a fundamental right or a suspect classification scheme.²⁰⁰ Because the statutory scheme involved in administratively suspending a driver's privilege to operate a motor vehicle does not involve a fundamental right or a suspect classification,²⁰¹ the state must only show that its scheme is "rationally related to a proper legislative goal."²⁰²

The court determined that the Legislature had a legitimate interest in a scheme which reduces the number of dangerous drivers who operate a motor vehicle with an excessive amount of alcohol in their blood.²⁰³ The court also found the Legislature's differentiation of commercial drivers from non-commercial drivers could be rationally related to that interest.²⁰⁴ Therefore, the challenged statutory scheme does not violate the equal protection clauses of the state or

198. *Id.* at 454, 1 Cal. Rptr. at 395. After an administrative hearing before the Department of Motor Vehicles, Peretto filed for a temporary restraining order and injunctive relief in the superior court. *Id.*, 1 Cal. Rptr. 2d at 394-95. The superior court rejected Peretto's due process claim but found that Vehicle Code § 13353.6 violates the equal protection clauses of the federal and state Constitutions. *Id.*, 1 Cal. Rptr. 2d 395. The Department of Motor Vehicles then appealed to the First District Court of Appeal. *See id.* at 452, 1 Cal. Rptr. 2d at 393 (directing the trial court on remand to deny "respondent's" [Peretto's] petition).

199. *Id.* at 459, 1 Cal. Rptr. 2d at 398. The court of appeal also agreed with the trial court that the statutory scheme did not violate Due Process. *Id.* at 459-62, 1 Cal. Rptr. 2d at 398-400.

200. *Id.* at 455, 1 Cal. Rptr. 2d at 395; *see D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 16-17, 520 P.2d 10, 22, 112 Cal. Rptr. 786, 798 (1974) (discussing the proper standards in equal protection analysis). The court limited its analysis to equal protection principles because the parties agreed that rational basis test for equal protection also applied to the claim that the challenged statutory scheme violates the state Constitution's prohibition against special legislation. *Peretto*, 235 Cal. App. 3d at 456 n.7, 1 Cal. Rptr. 2d at 396 n.7; *see Serrano v. Priest*, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971) (holding that the "no special privileges" clause of the California Constitution is substantially the equivalent of the Equal Protection clause of the Fourteenth Amendment to the federal constitution).

201. Peretto conceded to the court of appeal that challenged statutory scheme did not involved a suspect classification or a fundamental right for equal protection analysis. *Peretto*, 235 Cal. App. 3d at 455, 1 Cal. Rptr. 2d at 395.

202. *Id.* at 455-56, 1 Cal. Rptr. 2d at 396.

203. *See id.* at 458-59, 1 Cal. Rptr. 2d at 397-98 (arguing that it is a legitimate interest of the Legislature to regulate highway safety and the licensing of drivers on the state's highways).

204. *Id.*

federal Constitutions or the state constitution's prohibition against special legislation.²⁰⁵

V. CONCLUSION

New statutory schemes always include unforeseen problems. Addressing these problems requires a person who has been adversely affected by the statutory scheme. The process of addressing only the issue properly before a court requires many years of litigation before most of the "bugs" have been worked out. Practitioners involved in this litigation must commonly advocate public policy when faced with interpreting a new statutory scheme which has not been previously clarified by an appellate court. In order to effectively argue the policy underlying the administrative per se statutory scheme, practitioners must have a thorough understanding of the background and history of the relevant statutes.

Effective representation of a client's interest in the administrative proceeding requires a working knowledge of the administrative agency's procedures and how they differ from state court criminal procedures. Practitioners must also be able to recognize when the administrative agency's decision is in conflict with existing case law interpretations of the statute in question, and when, lacking appellate guidance, the agency's decision would not withstand judicial scrutiny.

The current case law interpretation of the admin per se statutes is not only the proper way to interpret these statutes, it is the only fair method of suspending a person's privilege to operate a motor vehicle for driving with an excessive blood-alcohol concentration. Admittedly, there is a need to remove dangerous drivers from our highways in order to prevent the carnage of innocent drivers. To date, the admin per se procedure is the most effective tool in this endeavor. However, we must balance the need to remove dangerous drivers from our highways with each individual's constitutional right not to

205. *Id.* at 459, 1 Cal. Rptr. 2d at 398. For a similar case challenging California Vehicle Code § 13353.3, subdivision (b)(1), on the grounds that it violated both the due process and equal protection clauses of the federal and state Constitutions, which reached the same conclusion as the court in *Peretto*, see, *Murphy v. Pierce*, 1 Cal. App. 4th 690, 2 Cal. Rptr. 2d 18 (1991) (a Sixth District Court of Appeal decision filed one month after *Peretto*).

have his or her privilege to operate a motor vehicle suspended without due process of law. Adherence to the foundational belief that every person is entitled to a fundamentally fair hearing procedure where the proponent must bear the burden of proof that a driver actually committed the alleged offense is essential to maintain public confidence in the existing judicial system. As practitioners, it is imperative that we remain alert to legislative changes that may violate one of these fundamental tenants.

