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Public Entities Officers and Employees

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Public Entities, Officers, and Employees

Public Entities, Officers, and Employees; Administrative Procedure Act

Business and Professions Code §§ 124, 4160, 10175.2, 23083 (amended); Education Code § 92001 (new); §§ 232, 94323 (amended); Evidence Code § 755.5 (amended); Financial Code §§ 3373, 8054 (amended); Fish and Game Code §§ 202, 355 (amended); Government Code §§ 11346.14, 11346.6, 11501.5, 11502.1, 11510, 11511.7, 11512, 11513.5, 11525, 11530 (repealed); §§ 11340.4, 11380, 11400, 11400.10, 11400.20, 11405.10, 11405.20, 11405.30, 11405.40, 11405.50, 11405.60, 11405.70, 11405.80, 11410.10, 11410.20, 11410.30, 11410.40, 11410.50, 11415.10, 11415.20, 11415.30, 11415.40, 11415.50, 11415.60, 11420.10, 11420.20, 11420.30, 11425.10, 11425.20, 11425.30, 11425.40, 11425.50, 11430.10, 11430.20, 11430.30, 11430.40, 11430.50, 11430.60, 11430.70, 11430.80, 11435.05, 11435.10, 11435.15, 11435.20, 11435.25, 11435.30, 11435.35, 11435.40, 11435.45, 11435.50, 11435.55, 11435.60, 11435.65, 11440.10, 11440.20, 11440.30, 11440.40, 11440.50, 11445.10, 11445.20, 11445.30, 11445.40, 11445.50, 11445.60, 11450.05, 11450.10, 11450.20, 11450.30, 11450.40, 11450.50, 11455.10, 11455.20, 11455.30, 11460.10, 11460.20, 11460.30, 11460.40, 11460.50, 11460.60, 11460.70, 11460.80, 11465.10, 11465.20, 11465.30, 11465.40, 11465.50, 11465.60, 11465.70, 11470.10, 11470.20, 11470.30, 11470.40, 11474.50, 11507.3, 11511.7, 11513, 11518.5, 15609.5, 17533 (new); §§ 3541.3, 3563, 8541, 11018, 11125.7, 11340.5, 11342, 11346.2, 11349.5, 11349.9, 11350, 11370, 11370.3, 11370.5, 11371, 11500, 11502, 11505, 11506, 11507.6, 11507.7, 11508, 11509, 11511, 11511.5, 11512, 11513, 11517, 11518, 11519, 11520, 11523, 11524, 11526, 11529, 12935, 19582.5, 37624.2 (amended); §§ 11501, 68560.5 (amended, repealed, and new); Health and Safety Code §§ 443.37, 1551.5, 1568.065, 1569.515, 1596.8875, 11830, 11830.5, 11834.37, 11994, 18930, 18949.6, 25149, 25229, 25299.59, 25375.5, 32154, 39657, 40843, 50199.17, 57005 (amended); Labor Code § 1144.5 (new); §§ 146, 4600, 5278, 5710, 5811, 6380.5, 6603 (amended); Military and Veterans Code § 105 (new); Penal Code § 3066 (new); Public Resources Code §§ 25513.3, 30329 (new); §§ 663.1, 4204, 40412 (amended); Public Utilities Code § 1701 (amended); Revenue and Taxation Code §§ 1636, 19044, 19084 (amended); Unemployment Insurance Code § 409 (amended); Vehicle Code §§ 3066, 11728, 14112 (amended); Welfare and Institutions Code §§ 1778, 3158 (new); § 4689.5, § 11350.6 (amended).

SB 523 (Kopp); 1995 STAT. Ch. 938

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I. INTRODUCTION

Chapter 938 recasts, revises and expands the Administrative Procedure Act. It provides for more options in the type of hearings permitted and sets forth several procedural changes for such hearings.¹ Further, Chapter 938 establishes an Administrative Adjudication Bill of Rights applicable to hearings.² Finally, Chapter 938 makes additional technical changes to existing law.³

II. OFFICE OF ADMINISTRATIVE HEARINGS

Chapter 938 sets forth requirements to be satisfied by the Office of Administrative Hearings.⁴ Chapter 938 also refocuses the direction of the Office of Administrative Hearings' study.⁵

Existing law empowers the director of the Office of Administrative Hearings to appoint technical and clerical personnel.⁶ Additionally, under prior law, the director was required to assign an administrative law judge upon the request of a public prosecutor in certain proceedings.⁷

1. See *infra* notes 11-106 and accompanying text.

2. See *infra* notes 107-49 and accompanying text.

3. See *infra* notes 191-92 and accompanying text.

4. CAL. GOV'T CODE § 11340.4(a) (enacted by Chapter 938); see *id.* (authorizing and requiring the Office of Administrative Law to: (1) study all aspects of administrative rule-making; (2) submit its suggestions to the various agencies; and (3) report its recommendations to the Governor and Legislature at the commencement of each general session); see also *id.* § 11340.1 (West 1992) (declaring that the Office of Administrative Laws is responsible for the review of adopted regulations, is part of the executive branch of state government, and if requested, reports directly to the Legislature in order to accomplish regulatory reform in California).

5. Compare 1961 Cal. Stat. ch. 2048, sec. 7, at 4268 (enacting CAL. GOV'T CODE § 11370.5) (directing the office to study the subject of administrative law and procedure) with CAL. GOV'T CODE § 11370.5 (amended by Chapter 938) (limiting the authority of the Office of Administrative Hearings to the study of administrative adjudication).

6. Compare 1985 Cal. Stat. ch. 324, sec. 14, at 1433 (amending CAL. GOV'T CODE § 11370.3) (providing expressly that the director must appoint hearing officers and shorthand reporters and other technical and clerical staff) with CAL. GOV'T CODE § 11370.3 (amended by Chapter 938) (deleting the reference to hearing officers and shorthand reporters).

7. 1985 Cal. Stat. ch. 324, sec. 14, at 1433 (amending CAL. GOV'T CODE § 11370.3); see *id.* (requiring the director to assign an administrative law judge if the public prosecutor so requests, and the proceeding is to be conducted pursuant to California Business and Professions Code §§ 22450-22463).

Under existing law, the Office of Administrative Hearings is charged with hearing and rendering a decision on appeals by a business pursuant to California Government Code section 14775.⁸

Given that the Office of Administrative Hearings is granted access to state records and information under existing law, Chapter 938 expressly provides that an agency is entitled to refrain from providing access to records which are required by statute to be kept confidential.⁹

III. OPTIONS FOR ADMINISTRATIVE ADJUDICATIVE HEARINGS

Existing law establishes guidelines for formal hearings held by an agency.¹⁰ Chapter 938 revises the Administrative Procedure Act¹¹ to allow for several modes of adjudicative proceedings¹² including formal and informal hearings, alternative dispute resolution, and opportunities for emergency and declaratory decisions.¹³ Further, Chapter 938 also provides that an agency may not be required to hold an adjudicative hearing in certain circumstances.¹⁴

8. CAL. GOV'T CODE § 11380 (enacted by Chapter 938); *see id.* (incorporating 1994 Cal. Legis. Serv. ch. 769, sec. 1, at 3297).

9. CAL. GOV'T CODE § 11370.5(a) (amended by Chapter 938); *see id.* § 11340.4(b) (enacted by Chapter 938) (requiring all agencies in California to give the Office of Administrative Laws access to their records and full information and reasonable assistance in any matter of research); *id.* (noting that an agency need not provide access to records required by statute to be kept confidential).

10. *Id.* §§ 11500-11529; *see infra* notes 15-81 and accompanying text (setting forth the procedures governing formal hearings).

11. Compare 1981 Cal. Stat. ch. 714, sec. 176, at 2659 (providing that the Administrative Procedure Act consists of California Government Code §§ 11340-11349.11, 11370-11370.5, 11500-11529) with CAL. GOV'T CODE § 11370 (amended by Chapter 938) (adding California Government Code §§ 11400-11470.50 as part of the Administrative Procedure Act); *see also id.* § 11415.40 (enacted by Chapter 938) (providing that a person may waive a right conferred by the administrative adjudications provisions of the Administrative Procedure Act, unless doing so would be prohibited by another statute or regulation).

12. *See* CAL. GOV'T CODE § 11405.20 (enacted by Chapter 938) (defining "adjudicative proceeding" as a hearing, evidentiary in nature, held to determine the facts pursuant to which an agency formulates and issues a decision).

13. *Id.* § 11400 (enacted by Chapter 938); *see id.* (stating that §§ 11400-11470.50 and §§ 11500-11529 of the California Government Code constitute the administrative adjudication provisions of the Administrative Procedure Act); *see also infra* notes 15-81 and accompanying text (discussing the provisions governing a formal hearing); *infra* notes 82-91 and accompanying text (proscribing the provisions which govern the informal hearing procedure); *infra* notes 92-96 and accompanying text (setting forth the provisions of Chapter 938 applicable to alternative dispute resolution); *infra* notes 97-100 and accompanying text (enumerating the provisions governing emergency decisions); *infra* notes 101-106 and accompanying text (discussing the provisions governing declaratory decisions).

14. CAL. GOV'T CODE § 11415.50 (enacted by Chapter 938); *see id.* § 11415.50(b) (noting that an adjudicative proceeding is not necessary for an informal fact finding hearing, an informal investigatory hearing, or a decision whether or not to initiate an investigation, prosecution, or other proceeding before the agency or another agency); *see also id.* § 11415.50(a) (enacted by Chapter 938) (allowing an agency to adopt procedures to address situations where an adjudicative proceeding is not required); *id.* § 11415.60 (enacted by Chapter 938) (providing that an agency is permitted to issue a decision by settlement, without an adjudicative hearing, so long as the parties agree); *id.* (noting that the settlement may be on any terms the parties determine are appropriate subject to California Government Code § 11415.60(c)); *id.* § 11415.60(a) (enacted by Chapter 938) (declaring that evidence of an offer of compromise or settlement made in settlement negotiations is not admissible in an adjudicative proceeding or civil action, whether admitted as affirmative evidence, by way of

A. Formal Hearings

An agency¹⁵ must comply with the provisions of Chapter 938 governing formal hearings.¹⁶ While prior law required the proceedings to be reported by phonographic reporter, Chapter 938 requires instead that the proceedings be recorded by a stenographic reporter and allows the proceedings to be recorded electronically so long as the parties consent.¹⁷

1. Notice

Existing law establishes the procedure for giving notice of a formal hearing, including specific information which the notice must contain.¹⁸ Chapter 938 adds

impeachment, or for any other purpose); *id.* § 11415.60(b) (enacted by Chapter 938) (recognizing that a settlement can be made prior to, during, or after the hearing and can be made prior to or subsequent to the issuance of an agency pleading except if the purpose of the adjudicative proceeding is to determine whether an occupational license should be revoked); *id.* § 11415.60(c) (enacted by Chapter 938) (permitting the terms of a settlement to include sanctions otherwise unavailable to the agency); *id.* (subjecting any settlement to agency approval and allowing an agency head to delegate the power to approve a settlement). *But see id.* § 11415.60(b) (enacted by Chapter 938) (prohibiting a settlement prior to the issuance of the agency's pleading in a proceeding to determine whether an occupational license should be revoked, suspended, limited or conditioned); CAL. VEH. CODE § 11728 (amended by Chapter 938) (providing that California Government Code § 11415.60 is inapplicable to a compromise settlement agreement entered into pursuant to California Vehicle Code §§ 11707 or 11808.5).

15. CAL. GOV'T CODE § 11500(a) (amended by Chapter 938); *see id.* (noting that the word "agency," as used alone, is an indication that the power to act may be delegated); *id.* (acknowledging that where the words "agency itself" are employed, the power to act is not delegated unless the authorization to delegate the agency's power to hear and decide a case is contained within another statute). *Compare* 1985 Cal. Stat. ch. 324, sec. 15, at 1433 (amending CAL. GOV'T CODE § 11500(a)) (defining "agency" to include state boards, commissions and officers enumerated in California Government Code § 11501) *with* CAL. GOV'T CODE § 11500(a) (amended by Chapter 938) (defining "agency" to include state boards, commissions and officers, by deleting the requirement that such officers be enumerated in California Government Code § 11501).

16. 1995 Cal. Legis. Serv. ch. 938, sec. 24, at 5550-52 (amending and repealing CAL. GOV'T CODE § 11501); 1995 Cal. Legis. Serv. ch. 938, sec. 25, at 5552 (repealing CAL. GOV'T CODE § 11501.5); *see* 1995 Cal. Legis. Serv. ch. 938, sec. 24, at 5550-52 (amending and repealing CAL. GOV'T CODE § 11501(b)) (enumerating the 63 state agencies, boards, commissions, and departments which are subject to the formal hearing procedures set forth in California Government Code §§ 15000-11529); 1995 Cal. Legis. Serv. ch. 938, sec. 24.5, at 5552 (enacting CAL. GOV'T CODE § 11501(a)) (declaring that California Government Code §§ 11500-11529 apply to an agency if the agency's statutes provide so); 1995 Cal. Legis. Serv. ch. 938, sec. 24.5, at 5552 (enacting CAL. GOV'T CODE § 11501(b)) (stating that Section 24.5 of Chapter 938 applies to an adjudicative proceeding of an agency which is created on or after July 1, 1997, unless provided otherwise by statute); 1995 Cal. Legis. Serv. ch. 938, sec. 24.5, at 5552 (enacting CAL. GOV'T CODE § 11501(c)) (noting that California Government Code §§ 11400-11470.50 apply to a adjudicative proceeding which is required by California Government Code §§ 11500-11529, unless provided otherwise by statute); *see also* 1995 Cal. Legis. Serv. ch. 938, sec. 24, at 5550-52 (amending and repealing CAL. GOV'T CODE § 11501(c)) (stating that 1995 Cal. Legis. Serv. ch. 938, sec. 24, at 5550-52 is inoperative effective July 1, 1997 and is repealed effective January 1, 1998 unless a statute which deletes or extends these dates is subsequently enacted and becomes operative prior to or on January 1, 1998).

17. *Compare* 1985 Cal. Stat. ch. 324, sec. 19, at 1435-36 (amending CAL. GOV'T CODE § 11512(d)) *with* CAL. GOV'T CODE § 11512(d) (amended by Chapter 938).

18. CAL. GOV'T CODE § 11509 (amended by Chapter 938); *see id.* (requiring that the agency deliver or mail notice of the hearing at least 10 days prior to the hearing to all parties); *id.* (stating that the notice, must contain substantially, but not exclusively, the following information: (1) the time and place of the hearing; (2)

additional language which must be included in the notice regarding the procedure for objecting to the place of the hearing.¹⁹

2. Service on the Respondent

Existing law provides for service of a copy of the accusation upon the respondent.²⁰ In the statement to the respondent, the agency is required, under existing law, to state that a hearing may be postponed for good cause.²¹ Under existing law, the statement must provide that a respondent notify the agency of the need for a postponement.²² However, Chapter 938 requires the respondent to notify either the agency or the Office of Administrative Hearings of the need for a postponement.²³

3. Time and Place of Hearing

Under existing law, the agency determines the time and place of the hearing.²⁴ Existing law provides that hearings will be held in either Oakland, Los Angeles County, or Sacramento County depending upon where the transaction occurred or where the respondent lives.²⁵

Chapter 938 provides that hearings will be held in San Diego county if the transaction occurred or the respondent resides in either Imperial or San Diego Counties.²⁶ Existing law also sets forth reasons which may justify holding a hearing in a location where neither the transaction occurred nor the respondent

the fact that the party may be present at the hearing; (3) the party has the right to be represented by an attorney, at the party's expense; (4) a party is not entitled to the appointment of an attorney at public expense; (5) a party may represent oneself without legal counsel; (6) the party can present evidence, if relevant, and may cross-examine all witnesses who testify against the party; and (7) the party is entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of records).

19. *Id.*; *see id.* (requiring the respondent to notify the presiding officer of an objection to the place of the hearing within 10 days of service after notice); *id.* (warning the respondent that failure to notify the presiding officer within 10 days will prohibit any change of venue for the hearing).

20. *Id.* § 11505 (amended by Chapter 938); *see id.* § 11505(b) (amended by Chapter 938) (including a sample of the notice required to be sent to the respondent); *see also id.* § 11500(c) (amended by Chapter 938) (defining "respondent" as the person against whom an accusation is filed pursuant to California Government Code § 11503 or against whom a statement of issues is filed pursuant to California Government Code § 11504).

21. *Id.* § 11505(c) (amended by Chapter 938).

22. *Id.*

23. *Id.* § 11505(b) (amended by Chapter 938); *see id.* (stating that the notice to the respondent is required to include information providing that the respondent is to notify the Office of Administrative Hearings only if an administrative law judge has been assigned to the hearing; otherwise, the respondent is to notify the agency).

24. *Id.* § 11508(a) (amended by Chapter 938); *see id.* (noting that such a determination must occur after consulting the office and determining the availability of the staff).

25. *Id.* § 11508(a) (amended by Chapter 938).

26. *Id.*

lives.²⁷ A respondent may make a motion for a change in the place of hearing under Chapter 938.²⁸

4. Depositions

Under existing law, an agency is empowered to order the deposition of a material witness.²⁹ However, Chapter 938 shifts this power to an administrative law judge,³⁰ if one has been appointed.³¹

5. Prehearing Conference

An administrative law judge may conduct a prehearing conference in accordance with existing law.³² Chapter 938 expands the issues appropriate for discussion at a prehearing conference to include an exchange of information, motions for intervention, or a discussion of the possibility of using either alternative dispute resolution or the informal hearing procedure.³³ Also, Chapter 938 states that a prehearing conference can be conducted electronically so long as each participant can participate in and hear the proceeding.³⁴

While prior law required that an agency give written notice to the parties³⁵ of the time and place of the prehearing conference, Chapter 938 instead places the

27. *Id.* § 11508(b) (amended by Chapter 938).

28. *Id.* § 11508(c) (amended by Chapter 938); *see id.* (requiring that a motion for a change in the place of hearing be made within 10 days after service of the notice of hearing on the respondent); *id.* (granting the administrative law judge discretion in granting or denying the request).

29. *Id.* § 11511 (amended by Chapter 938).

30. *See id.* § 11500(d) (amended by Chapter 938) (defining "administrative law judge" as an individual who satisfies the qualifications of California Government Code § 11512); *see also infra* notes 117-19 and accompanying text (discussing the qualifications of an administrative law judge).

31. *Id.* § 11511 (amended by Chapter 938).

32. *Id.* § 11511.5 (amended by Chapter 938); *see id.* § 11511.5(b)(1)-(8), (12) (amended by Chapter 938) (listing items for discussion at a prehearing conference to include such things as: (1) exploration of settlement possibilities; (2) clarification of issues; (3) rulings regarding issuance of subpoenas and protective orders; or (4) any other matter which promotes the orderly and prompt conduct of the hearing).

33. *Id.* § 11511.5(b)(9)-(11) (amended by Chapter 938); *see id.* § 11511.5(b)(9) (amended by Chapter 938) (stating that the exchange of witness lists and exhibits or documents to be offered in evidence at the hearing can be discussed at a prehearing conference); *id.* § 11511.5(b)(10) (amended by Chapter 938) (stating that motions for intervention are appropriate for discussion at a prehearing conference); *id.* § 11511.5(b)(11) (amended by Chapter 938) (noting that the use of the alternative dispute resolution or the informal hearing procedure is subject to California Government Code § 11511.5(d) regarding the conversion of a prehearing conference into an alternative dispute resolution or an informal hearing).

34. *Id.* § 11511.5(c) (amended by Chapter 938); *see id.* (enumerating that a prehearing conference can be held via telephone, television or other electronic means).

35. *See id.* § 11500(b) (amended by Chapter 938) (defining "party" for purposes of California Government Code §§ 11500-11529 as including the agency, respondent, and any person permitted to appear or participate in the proceeding); *id.* (excluding an officer or an employee of the agency in the person's official capacity).

responsibility of serving notice upon the administrative law judge.³⁶ Additionally, existing law places the burden of issuing a prehearing order upon the administrative law judge.³⁷

A prehearing conference can be converted, under Chapter 938, into either an alternative dispute resolution or an informal hearing.³⁸

6. Settlement Conference

An administrative law judge can order the parties to participate in a settlement conference under Chapter 938.³⁹ Chapter 938 allows settlement conferences to be conducted via electronic media.⁴⁰

7. Subpoenas and Subpoenas Duces Tecum

Subpoenas and subpoenas duces tecum, under existing law, may be issued to effectuate attendance at a hearing or production of documents at a hearing or at any other reasonable time or place.⁴¹ However, under Chapter 938, service of a subpoena upon certain witnesses is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person.⁴² Chapter 938 also specifies the ways in which the

36. Compare 1986 Cal. Stat. ch. 899, sec. 1, at 3115-16 (enacting CAL. GOV'T CODE § 11511.5(a)) (placing the responsibility for service upon the agency) with CAL. GOV'T CODE § 11511.5(a) (amended by Chapter 938) (placing the burden of providing notice upon the administrative law judge).

37. CAL. GOV'T CODE § 11511.5(e) (amended by Chapter 938); *see id.* (requiring the prehearing order to include mention of the matters determined at the prehearing conference, and noting that the administrative law judge may direct one or more of the parties to prepare a prehearing order).

38. *Id.* § 11511.5(d) (amended by Chapter 938); *see id.* (requiring that for conversion into an alternative dispute resolution, all parties must consent; however, for conversion into the informal hearing procedure, the agency must consent); *see also infra* notes 92-96 and accompanying text (discussing the provisions governing alternative dispute resolution); *infra* notes 82-91 and accompanying text (discussing the provisions governing the informal hearing procedure).

39. *Id.* § 11511.7(a) (enacted by Chapter 938); *see id.* (directing the administrative law judge to set the time and place for the settlement conference and to give reasonable written notice to the parties). *But see id.* § 11511.7(b) (enacted by Chapter 938) (declaring that the administrative law judge at the settlement conference may not preside as such at the hearing unless the parties stipulate).

40. *Id.* § 11511.7(b) (enacted by Chapter 938); *see id.* (allowing the administrative law judge to conduct, all or part of the settlement conference, by telephone, television, or other electronic means so long as each participant has the opportunity to participate in and can hear the proceeding while it is taking place).

41. *Id.* § 11450.10(a) (enacted by Chapter 938); *see id.* (incorporating the substantive provisions of 1994 Cal. Stat. ch. 1206, sec. 28, at 6127-28).

42. *Id.* § 11450.50(a) (enacted by Chapter 938); *see id.* (providing that the witnesses who need not be served include those witnesses relating to the production of a party to the record of a proceeding or a person for whose benefit a proceeding is being prosecuted or defended); *see also id.* § 11450.50(b) (enacted by Chapter 938) (requiring that service of written notice must be made in accordance with California Code of Civil Procedure § 1987).

custodian of documents that are the subject of a subpoena duces tecum can satisfy such a subpoena.⁴³

Existing law provides the procedures for the issuance of a subpoena by the agency or presiding officer at the request of a party.⁴⁴ Chapter 938 expands existing law to permit an attorney of record for a party to request a subpoena.⁴⁵ An objection to the terms of a subpoena or a subpoena duces tecum may be made pursuant to Chapter 938 by a motion for a protective order, including a motion to quash.⁴⁶

Existing law provides that a witness who appears pursuant to a subpoena is entitled to compensation for witness fees.⁴⁷ Chapter 938 expressly provides that witnesses who appear pursuant to a subpoena duces tecum receive witness fees as well.⁴⁸

Prior law established a schedule for the calculation of witness fees and mileage.⁴⁹ Chapter 938 makes the calculation of witness fees and mileage similar to that of other civil proceedings.⁵⁰

8. Discovery

While prior law required that a party seeking to compel discovery seek relief from the court, Chapter 938 instead compels such party to seek relief from the administrative law judge.⁵¹

43. *Id.* § 11450.10(b) (enacted by Chapter 938); *see id.* (listing the ways in which to satisfy a subpoena as either (1) delivering the original or a copy of the documents requested or (2) making the documents available for inspection or copying so long as an affidavit in compliance with California Evidence Code § 1561 is provided).

44. *Id.* § 11450.20 (enacted by Chapter 938); *see id.* (incorporating the substantive provisions of 1994 Cal. Legis. Serv. ch. 1206, sec. 28, at 6127-28).

45. *Id.* § 11450.20(a) (enacted by Chapter 938); *see id.* (incorporating 1994 Cal. Legis. Serv. ch. 1206, sec. 28, at 6127-28).

46. *Id.* § 11450.30(a) (enacted by Chapter 938); *see id.* § 11450.30(b) (enacted by Chapter 938) (declaring that the presiding officer is vested with the authority to resolve the objection); *id.* (granting a presiding officer the ability to make another order so long as the order is appropriate to protect the parties or witnesses from unreasonable or oppressive demands); *id.* § 11450.30(c) (enacted by Chapter 938) (providing that a subpoena or a subpoena duces tecum which is issued by the agency on its own motion can be quashed by the agency).

47. *Id.* § 11450.40 (enacted by Chapter 938); *see id.* (incorporating the substantive provisions of 1994 Cal. Legis. Serv. ch. 1206, sec. 28, at 6127-28).

48. *Id.*

49. 1994 Cal. Legis. Serv. ch. 1206, sec. 28, at 6128.

50. CAL. GOV'T CODE § 11450.40(a), (b) (enacted by Chapter 938); *see id.* (incorporating the substantive provisions of 1994 Cal. Legis. Serv. ch. 1206, sec. 28, at 6127-28). *But see id.* § 11450.40(b) (enacted by Chapter 938) (incorporating 1994 Cal. Legis. Serv. ch. 1206, sec. 28, at 6127-28); *id.* (stating that California Government Code § 11450.40(b) is inapplicable to an officer or employee of the state or a political subdivision of the state).

51. *Compare* 1980 Cal. Stat. ch. 548, sec. 2, at 1530 (amending CAL. GOV'T CODE § 11507.7(a) (requiring a party seeking to compel discovery to file a petition with the superior court for the county in which the administrative hearing was to be held) *with* CAL. GOV'T CODE § 11507.7(a) (amended by Chapter 938) (requiring that a party serve and file a motion with the administrative law judge). *Compare* 1980 Cal. Stat. ch. 548, sec. 2 at 1530 (amending CAL. GOV'T CODE § 11507.7(e)) (vesting the court with the ability to order a

Prior law also established that any order of the superior court was final thereby not subject to review by appeal.⁵² If a party failed to comply with an order of the court, prior law allowed the court to award court costs and reasonable attorney fees to the opposing party.⁵³

Under prior law, no petition was permitted to be filed within fifteen days of the date set for commencement of the administrative hearing unless certain criteria were satisfied.⁵⁴ Prior law required that if the petition set forth good cause for relief, the court was required to enter an order to show cause, and such order had to be served upon the respondent and the attorney of record within established time constraints.⁵⁵ Also, prior law provided that the court had the discretion to order the administrative proceeding stayed during the determination of the motion to compel, and if necessary, for a reasonable time after the determination to afford the parties time to comply with the court order.⁵⁶

Existing law establishes that the motion to compel discovery be filed either within fifteen days after the respondent's failure or refusal to comply with the request, or within thirty days after the request was made and the party failed to reply to the request, whichever period is longer.⁵⁷ The hearing on the motion to compel discovery must be held, under Chapter 938, within fifteen days after the motion was made or at a later time.⁵⁸

Under prior law, the court had thirty days after the filing of the petition to make its order to grant or deny the petition.⁵⁹ Chapter 938, however, narrows the time in which the administrative law judge must make its order by requiring that

party to place with the court any matter being sought for discovery and the authority to examine the matter in accordance with California Evidence Code § 915(b) where the respondent party asserts that the matter is not discoverable) with CAL. GOV'T CODE § 11507.7(d) (amended by Chapter 938) (vesting the administrative law judge with such powers). Compare 1980 Cal. Stat. ch. 548, sec. 2, at 1530 (amending CAL. GOV'T CODE § 11507.7(f)) (granting the court the right to decide the case on the basis of the matters examined in camera, the papers filed by the parties, and any oral argument and additional evidence which the court allowed) with CAL. GOV'T CODE § 11507.7(e) (amended by Chapter 938) (stating that the administrative law judge instead has the ability to decide the case and the discretion to permit oral argument and additional evidence). Compare 1980 Cal. Stat. ch. 548, sec. 2, at 1530 (amending CAL. GOV'T CODE § 11507.7(g)) (providing that the copy of the order denying or granting the motion must be served by mail by the court) with CAL. GOV'T CODE § 11507.7(f) (amended by Chapter 938) (providing that the administrative law judge must serve, by mail, a copy of the order).

52. 1980 Cal. Stat. ch. 548, sec. 2, at 1530 (amending CAL. GOV'T CODE § 11507.7(h)).

53. *Id.* (amending CAL. GOV'T CODE § 11507.7(i)).

54. *Id.* (amending CAL. GOV'T CODE § 11507.7(b)).

55. *Id.* (amending CAL. GOV'T CODE § 11507.7(c)). Compare *id.* (declaring that the responding party has the right to serve and file a written answer or other response to the petition) with CAL. GOV'T CODE § 11507.7(c) (amended by Chapter 938) (specifying further that the responding party may serve and file a written answer at or prior to the time of the hearing).

56. 1980 Cal. Stat. ch. 548, sec. 2, at 1530 (amending CAL. GOV'T CODE § 11507.7(d)).

57. CAL. GOV'T CODE § 11507.7(b) (amended by Chapter 938). But see *id.* (noting that another time period may be provided for by stipulation).

58. *Id.* § 11507.7(c) (amended by Chapter 938); see *id.* (permitting the hearing to be held at a time later than 15 days after the making of the motion if the administrative law judge upon his or her own motion determines that good cause exists).

59. 1980 Cal. Stat. ch. 548, sec. 2, at 1530 (amending CAL. GOV'T CODE § 11507.7(g)).

such order be issued within fifteen days after the hearing.⁶⁰ However, Chapter 938 provides that the motion may be made within another time frame, if stipulated.⁶¹

9. Evidence

Prior law provided that irrelevant and unduly repetitious evidence was excluded from a formal hearing.⁶² Chapter 938 instead declares that the presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.⁶³

Hearsay evidence may be used, under existing law, for the purpose of supplementing or explaining other evidence, but is insufficient in itself to support a finding unless admissible over objection in civil actions.⁶⁴ Chapter 938 qualifies this requirement by adding that such evidence, over timely objection, is not sufficient in itself to withstand a finding of admissibility in a civil action.⁶⁵

10. Defaults

Under existing law, if the respondent either fails to file a notice of defense or appear at the hearing, the agency may take action in the absence of the respondent.⁶⁶

Prior law established that a respondent should not be deprived of the right to make a showing by way of mitigation in the face of default.⁶⁷ Under Chapter 938,

60. CAL. GOV'T CODE § 11507.7(f) (amended by Chapter 938).

61. *Id.* § 11507.7(b) (amended by Chapter 938).

62. 1992 Cal. Legis. Serv. ch. 1302, sec. 9, at 5404-06 (enacting CAL. GOV'T CODE § 11513(c)).

63. CAL. GOV'T CODE § 11513(f) (amended by Chapter 938).

64. *Id.* § 11513(d) (amended by Chapter 938); *see* Walker v. City of San Gabriel, 20 Cal. 2d 879, 881, 129 P.2d 349, 351 (1942) (holding that hearsay evidence cannot be the sole basis for findings as part of an administrative proceeding).

65. *Id.* § 11513(d) (amended by Chapter 938); *see id.* (noting that an objection is timely if it is made before submission of the case or on reconsideration or other administrative review).

66. CAL. GOV'T CODE § 11520(a) (amended by Chapter 938); *see id.* (providing that in a default, the agency may take action upon the respondent's express admissions or upon other evidence and affidavits without any notice to respondent where the respondent does not bear the burden of proof). *But see id.* (stating that where the respondent bears the burden of proof to establish that he is entitled to the agency action sought, the agency may act without considering any evidence).

67. 1963 Cal. Stat. ch. 931, sec. 2, at 2184-85.

an agency may grant a hearing subsequent to a default.⁶⁸ In addition, Chapter 938 also provides the respondent with a manner in which to cure a default.⁶⁹

11. Voting

Under existing law, a member of an agency who is qualified to vote is allowed to vote on a decision by mail.⁷⁰ Chapter 938 expands existing law to permit qualified members to vote by any other appropriate method.⁷¹

12. Consolidation and Severance

The administrative judge may order certain proceedings consolidated in accordance with Chapter 938 and may hold a joint hearing where the matters at issue in separate proceedings involve a common question of law or fact and where such order may avoid unnecessary costs and delay.⁷² Conversely, Chapter 938 provides that issues may be heard separately, and thus severed, when convenient or in the interests of judicial economy.⁷³

13. Decisions

Under existing law, a decision must either be delivered to the parties personally or sent to them via registered mail.⁷⁴ Chapter 938 establishes that certain persons may not be required to comply with a decision.⁷⁵

68. CAL. GOV'T CODE § 11520(b) (amended by Chapter 938); *see id.* (establishing that prior to the issuance of a proposed decision, the agency or the administrative law judge has the discretion to grant a hearing on reasonable notice to the parties); *see also id.* (declaring that an agency's order has precedence if the agency and the administrative law judge make conflicting orders); *id.* (permitting the administrative law judge to order the respondent, or the respondent's attorney or representative, or both, to pay reasonable expenses, including attorney's fees, incurred by the other party as a result of respondent's default).

69. *Id.* § 11520(c) (amended by Chapter 938); *see id.* (giving the respondent, seven days after service of a decision based upon the respondent's default, the ability to serve a written motion requesting that the decision be vacated along with the grounds for such a request); *id.* (granting an agency the discretion to vacate a decision and grant a hearing if good cause exists); *id.* (stating that good cause includes, but is not limited to, the following: (1) the failure of the person to receive notice pursuant to California Government Code § 11505; or (2) mistake, inadvertence, surprise, or excusable neglect).

70. *Id.* § 11526 (amended by Chapter 938).

71. *Id.*

72. *Id.* § 11507.3(a) (enacted by Chapter 938); *see id.* (noting that such action may be made either on the judge's own motion or on the motion of a party).

73. *Id.* § 11507.3(b) (enacted by Chapter 938); *see id.* (specifying further that the administrative law judge upon his or her own motion or on motion of a party may order a separate hearing of any issue, including an issue raised in notice of the defense or of any number of issues).

74. *Id.* § 11518 (amended by Chapter 938).

75. *Id.* § 11519(e), (f) (enacted by Chapter 938); *see id.* § 11519(e) (enacted by Chapter 938) (stating that a person to whom an agency action is directed is not required to comply with a decision unless the person has been served with the decision in accordance with California Government Code § 11505, or unless the person has actual knowledge of the decision); *id.* § 11519(f) (enacted by Chapter 938) (providing that a nonparty may not be required to comply with a decision unless the agency has made the decision available for

Chapter 938 establishes the parameters for addressing the correction of mistakes and clerical errors in a decision.⁷⁶ An application for the correction of mistakes or clerical errors is not a prerequisite for seeking judicial review under Chapter 938.⁷⁷ Chapter 938 declares that an agency can deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings.⁷⁸ If a correction of a mistake or clerical error is required, Chapter 938 requires that the agency must make the correction and provide a copy of the correction to each party.⁷⁹

Under existing law, a decision generally becomes effective thirty days after it is delivered or mailed to the respondent.⁸⁰ Furthermore, if the respondent was required to register with a public officer, notification of a suspension or revocation must be sent to the officer after the decision has become effective.⁸¹

B. Informal Hearing

An agency may conduct an informal adjudicative proceeding in certain circumstances under Chapter 938.⁸² Guidelines for conducting an informal hearing

public inspection and copying, or unless the nonparty has actual knowledge of the decision); *see also id.* § 11519(g) (enacted by Chapter 938) (declaring that California Government Code § 11519 does not preclude an agency from taking immediate action to protect the public interest in accordance with California Government Code §§ 11460.10-11460.80).

76. *Id.* § 11518.5 (enacted by Chapter 938); *see id.* § 11518.5(a) (enacted by Chapter 938) (granting a party the ability to apply to the agency for a correction of a mistake or clerical error in the decision so long as: (1) the applicant gives the specific grounds on which the application is made; (2) it is within 15 days after service of a copy of the decision on the party, and no later than the effective date of the decision; and (3) notice of the application is given to the other parties of the proceeding); *id.* § 11518.5(b) (enacted by Chapter 938) (allowing an agency to either refer the application to the administrative law judge who formulated the proposed decision or to delegate its authority to one or more persons).

77. *Id.* § 11518.5(a) (enacted by Chapter 938).

78. *Id.* § 11518.5(c) (enacted by Chapter 938); *see id.* (noting that an application is considered denied if the agency does not dispose of it within 15 days of when it is made, or after expiration of a longer time as provided by an agency-issued regulation). *But see id.* § 11518.5(d) (providing that California Government Code § 11518.5 does not preclude the agency, either on its own motion or on a motion by the administrative law judge, from modifying the decision to correct a mistake or clerical error); *id.* (requiring that a modification induced by action of the agency or the administrative law judge must be made within 15 days after issuance of the decision).

79. *Id.* § 11518.5(e) (enacted by Chapter 938); *see id.* (requiring that the agency serve the corrected decision upon each party within 15 days after the correction of a mistake or clerical error).

80. *Id.* § 11519(a) (amended by Chapter 938); *see id.* (providing that the decision becomes effective unless a reconsideration is ordered with 30 days after delivery, the agency orders that a decision becomes effective sooner than 30 days after delivery, or a stay of execution is granted); *see also id.* § 11519(b) (amended by Chapter 938) (noting that a stay of execution can either be included in the decision or may be granted by the agency at any time before the decision becomes effective); *id.* (recognizing that a stay of execution can be accompanied by an express condition that respondent must comply with specified terms of probation so long as the probation is just and reasonable in light of the findings and the decision).

81. *Id.* § 11519(c) (amended by Chapter 938).

82. *Id.* § 11445.10(a) (enacted by Chapter 938); *see id.* § 11445.20 (enacted by Chapter 938) (enumerating the circumstances in which an informal hearing is appropriate, so long as its use does not violate another statute or the federal or the state Constitution); *id.* (subjecting the ability to conduct an informal hearing to limitations imposed by California Government Code § 11445.30); *id.* (declaring that an informal hearing

procedure are provided by Chapter 938.⁸³

Chapter 938 requires that it be stated in a notice of hearing that the agency has selected the informal hearing procedure.⁸⁴ Moreover, Chapter 938 provides that any objection to the use of the informal hearing procedure must be made in the party's pleading.⁸⁵

Chapter 938 allows for the conducting of all or part of an informal hearing by telephone, television, or other electronic means so long as each participant in the hearing has an opportunity to participate, can hear the entire proceeding while it is taking place, and can observe exhibits.⁸⁶ However, if a party objects, the presiding officer cannot conduct the hearing by such means.⁸⁷ The presiding officer is charged with resolving any objection to the informal hearing procedure.⁸⁸

Chapter 938 grants the presiding officer, upon a reasonable belief that material facts are in dispute, the power to require that a party state the identity of witnesses or provide other sources through which the party would propose to present such proof were the procedure converted to a formal or other applicable hearing procedure.⁸⁹

is appropriate when: (1) there is no dispute of material fact; (2) there is a dispute of material fact, but the matter is limited to (a) a monetary amount of \$1000 or less, (b) a disciplinary sanction against a student which will not involve expulsion or suspension from an academic institution for more than 10 days, (c) a disciplinary sanction against an employee which will not result in either the discharge from employment, demotion or suspension for more than 5 days, (d) a disciplinary sanction against a licensee which will not result in either the actual revocation or actual suspension of a license for more than five days; (3) there is a regulation promulgated by the agency which authorizes an informal hearing; or (4) the hearing may be constitutionally required but an evidentiary hearing for determination of facts is not required by statute); *see also id.* § 11445.10(b) (enacted by Chapter 938) (specifying that the Legislature's intent in providing for an informal hearing procedure encompasses the desire to (1) satisfy due process and public policy concerns in a more expeditious manner than otherwise permitted by statute; (2) provide a forum similar to a conference, in which the party has an opportunity to be heard by a presiding officer; and (3) provide an opportunity for a member of the public to participate without appearing or intervening as a party).

83. *Id.* § 11445.40 (enacted by Chapter 938); *see id.* § 11445.40(a) (enacted by Chapter 938) (providing that unless otherwise excepted, the hearing procedures required by Chapter 938 for an adjudicative proceeding apply to an informal hearing); *id.* § 11445.40(b) (enacted by Chapter 938) (granting the presiding officer the power to regulate the course of the proceeding, including the ability (1) to permit the offerance of written or oral comments on the issues; (2) to limit the use of testimony, witnesses, evidence, and argument; and (3) to limit, and even eliminate, the use of pleadings, intervention, discovery, prehearing conferences and rebuttal).

84. *Id.* § 11445.30(a) (enacted by Chapter 938).

85. *Id.* § 11445.30(b) (enacted by Chapter 938).

86. *Id.* § 11440.30(a) (enacted by Chapter 938).

87. *Id.* § 11440.30(b) (enacted by Chapter 938).

88. *Id.* § 11445.30(c) (enacted by Chapter 938); *see id.* (requiring that the presiding officer resolve the objection prior to the hearing on the basis of the pleading and any written submissions in support of the pleadings). *But see id.* (mandating that if an objection to using the informal hearing procedure arises in a disciplinary proceeding involving an occupational license, such objection must be resolved in favor of the licensee).

89. *Id.* § 11445.60(a) (enacted by Chapter 938); *see id.* (noting that the presiding officer is permitted to require that a party indicate that a confidential issue is involved, but may not demand disclosure of facts, allegations or sources if such disclosure is privileged or expressly prohibited by a regulation, statute or the federal or state constitution); *see also id.* § 11445.60(b) (enacted by Chapter 938) (permitting a party to inform the presiding officer that essential facts must be obtained in order to permit an adequate presentation of the

The presiding officer may deny use of an informal hearing, or may convert an informal hearing to a formal hearing, when cross-examination is necessary, and the delay, burden, and complication that such cross-examination will cause is more than minimal.⁹⁰

C. Alternative Dispute Resolution

Under Chapter 938, the Office of Administrative Hearings must adopt and promulgate model regulations governing alternative dispute resolution.⁹¹ Also, Chapter 938 provides that upon the consent of all parties, an agency⁹² may refer a dispute that is the subject of an adjudicative proceeding⁹³ to be resolved through different forums.⁹⁴ Moreover, any communication made in the course of an alternative dispute resolution proceeding is protected by Chapter 938 as a confidential communication, and may be privileged.⁹⁵

case); *id.* (allowing a party to provide the presiding officer with the general nature of the facts, and the sources from which the party would propose to obtain the facts, were the proceeding converted to a formal or another type of hearing).

90. *Id.* § 11445.50(a) (enacted by Chapter 938); *see id.* § 11445.50(b) (enacted by Chapter 938) (allowing an agency to adopt regulations in which the agency specifies those categories of cases in which cross-examination is not necessary for a proper determination of the matter under the informal hearing process); *id.* § 11445.50(c) (enacted by Chapter 938) (declaring that the actions of the presiding officer pursuant to California Government Code § 11445.50 are not subject to judicial review). *But see id.* § 11445.50(b) (enacted by Chapter 938) (permitting a presiding officer to allow cross-examination, even if a regulation provides that cross-examination is not necessary, so long as necessary for proper determination of the matter).

91. *Id.* § 11420.20(a) (enacted by Chapter 938); *see id.* (noting that the model regulations will govern alternative dispute resolution by any agency unless the agency adopts, by subsequent regulation, inconsistent rules or provides that the model regulations are inapplicable to the agency's proceedings); *id.* § 11420.20(b) (enacted by Chapter 938) (requiring that the model regulations include provisions concerning the selection, compensation, and qualifications of a mediator or arbitrator, as well as provisions governing the confidentiality of the proceeding).

92. *See id.* § 11405.30 (enacted by Chapter 938) (defining "agency" as either a board, bureau, commission, department, division, office, officer, or other administrative unit—including the agency head, one or more members of the agency head or agency employees or any other persons who purport, directly or indirectly, to act on behalf of or under the authority of an agency head).

93. *See id.* § 11405.20 (enacted by Chapter 938) (defining "adjudicative proceeding" as a hearing, evidentiary in nature, to determine the facts pursuant to which an agency formulates and issues a decision).

94. *Id.* § 11420.10(a) (enacted by Chapter 938); *see id.* (providing that resolution can occur through mediation by a neutral mediator, or binding or nonbinding arbitration by a neutral arbitrator); *see also id.* § 11420.10(a)(2) (enacted by Chapter 938) (declaring that an award in a binding arbitration is subject to judicial review in accordance with California Code of Civil Procedure §§ 1285-1288.8); *id.* § 11420.10(a)(3) (enacted by Chapter 938) (noting that a decision in a nonbinding arbitration is final unless a party requests, within 30 days after the deliverance of the award to the agency head by the arbitrator, that the agency conduct a de novo adjudicative proceeding); *id.* (requiring the party who elected the de novo proceeding to pay the costs and fees described in California Code of Civil Procedure § 1141.21 if the decision in the de novo proceeding is not more favorable than the decision of the arbitrator); *id.* § 11420.10(b) (enacted by Chapter 938) (declaring that if another statute requires mediation or arbitration in an adjudicative proceeding, that statute controls); *id.* § 11420.10(c) (enacted by Chapter 938) (permitting an agency to provide by regulation that California Government Code § 11420.10 does not apply to a proceeding of the agency).

95. *Id.* § 11420.30(a) (enacted by Chapter 938); *see id.* (declaring as confidential, anything said or any admissions made, or documents prepared in the course of, or during mediation); *id.* (acknowledging that a party to the mediation has a privilege to refuse disclosure of such confidential information and that such privilege extends to adjudicative proceedings, civil action or other proceedings); *id.* § 11420.30(b) (enacted by Chapter

D. Emergency Decisions

Chapter 938 allows an agency to conduct an adjudicative proceeding under emergency decision procedures so long as such a proceeding is permitted by agency regulation, is necessary to prevent or avoid immediate danger, and the situation requires immediate agency action that justifies the issuance of an emergency decision.⁹⁶ Chapter 938 requires an agency, so long as practicable, to give notice and an opportunity to be heard to the person to whom the agency action is directed.⁹⁷ However, an emergency decision, under Chapter 938, is limited to temporary, interim relief and may be subjected to judicial review.⁹⁸

938) (stating that references to nonbinding arbitration proceedings, arbitrator decisions which are rejected by a party's request for a de novo adjudicative proceeding, any evidence introduced, or any other aspect of the adjudicative proceeding or civil action may be made in an adjudicative proceeding as affirmative evidence for impeachment or for any other purpose); *id.* § 11420.30(c) (enacted by Chapter 938) (declaring that a mediator or arbitrator is not competent to testify in subsequent administrative or civil proceedings with respect to any statement, conduct, decision or order occurring at, or in association with, an alternative dispute resolution); *id.* § 11420.30(d) (enacted by Chapter 938) (providing that evidence which is admissible outside of alternative dispute resolution is not inadmissible or protected from disclosure solely because of its introduction or use in alternative dispute resolution); *see also* CAL. EVID. CODE § 703.5 (West 1995) (declaring that an arbitrator, mediator or any person who presided at any judicial or quasi-judicial proceeding is not competent to testify as to any statement, conduct, decision or ruling which occurred at or in conjunction with the proceeding unless the statement (1) gives rise to civil or criminal contempt; (2) constitutes a crime; (3) is the subject of investigation by the State Bar or the Commission on Judicial Performance; or (4) gives rise to disqualification proceedings in accordance with California Code of Civil Procedure § 170.1(a)(1)-(6)); *id.* § 1152.5(a) (West 1995) (providing provisions, analogous to California Government Code § 11420.30(a), but applicable to mediation). *But see* CAL. GOV'T CODE § 11420.30(a) (enacted by Chapter 938) (providing that if all parties to the proceedings consent, the evidence may be admissible).

96. CAL. GOV'T CODE § 11460.10 (enacted by Chapter 938); *id.* § 11460.20(a) (enacted by Chapter 938); *id.* § 11460.30(a), (b) (enacted by Chapter 938); *see id.* § 11460.10 (enacted by Chapter 938) (noting that an agency can conduct such a proceeding subject to express limitations in California Government Code §§ 11460.10-11460.80); *id.* § 11460.20(b) (enacted by Chapter 938) (requiring that any regulation, promulgated by an agency to permit an emergency decision to encompass: (1) the specific circumstances which allow the issuance of an emergency decision; (2) a statement of the nature of the temporary, interim relief that an agency is permitted to order; (3) prescribe the procedures available prior to and subsequent to the issuance of an emergency decision); *id.* § 11460.50 (enacted by Chapter 938) (requiring that an emergency decision issued by an agency include a brief explanation of the factual and legal basis and reasons for the emergency decision which justify the specific action by the agency); *id.* § 11460.50(b) (enacted by Chapter 938) (mandating that an agency, if practicable, give notice to the party to whom the agency's action is taken and declaring that the emergency decision is effective either upon its issuance or at another time if specified in the decision); *see also id.* § 11460.70 (enacted by Chapter 938) (providing that the agency record consists of any documents which concern the matter and were considered or were prepared by the agency); *id.* (requiring the agency to maintain these documents as its official record). *But see id.* § 11460.20(c) (enacted by Chapter 938) (declaring that California Government Code §§ 11460.20-11460.80 are inapplicable to emergency decisions issued pursuant to express statutory authority, including either a cease and desist order or a temporary suspension order).

97. *Id.* § 11460.40(a) (enacted by Chapter 938); *see id.* § 11460.40(b) (enacted by Chapter 938) (establishing that the notice and hearing may be either oral or written and can be conducted via telephone, fax, or other electronic means); *id.* (permitting a hearing to be conducted in accordance with the informal hearing process enumerated in California Government Code §§ 11445.10-11445.50).

98. *Id.* § 11460.30(c) (enacted by Chapter 938); *see id.* (providing that an order for temporary interim relief is subject to judicial review under California Government Code § 11460.80 and that the underlying issue of the order remains subject to an adjudicative proceeding in compliance with California Government Code § 11460.10); *see also id.* § 11460.80 (enacted by Chapter 938) (permitting a person to which the emergency decision is directed the ability to obtain judicial review of the decision in accordance with California Code of

Subsequent to an emergency decision, an agency is required to conduct an adjudicative proceeding to resolve the underlying issues giving rise to the temporary, interim relief.⁹⁹

E. Declaratory Decisions

Chapter 938 allows a person to apply to an agency for a declaratory decision.¹⁰⁰ The requirements of a declaratory decision are set forth in Chapter 938.¹⁰¹ Under Chapter 938, the Office of Administrative Hearings is charged with developing model regulations pertaining to declaratory decisions.¹⁰² The procedures that an agency must follow after the receipt of an application for a declaratory decision are provided in Chapter 938.¹⁰³ Generally, the provisions of

Civil Procedure § 1094.5 subject to the following guidelines: (1) that the hearing be held on the first day that the business of the court will allow, but no later than 15 days after service of the petition for judicial review on the agency; (2) if the claim for judicial review is based upon findings not supported by the evidence and the court agrees, abuse of discretion is established; (3) upon the written request to another party, a party is entitled to appropriate discovery so long as such request is made prior to the proceedings for review and within 10 days after the issuance of the emergency decision; and (4) the only relief which may be ordered upon judicial review is limited to a stay of the emergency decision).

99. *Id.* § 11460.60(a) (enacted by Chapter 938); *see id.* (recognizing that the adjudicative proceeding may be either a formal hearing, an informal hearing or another applicable hearing procedure); *id.* § 11460.60(b) (enacted by Chapter 938) (giving an agency 10 days after the issuance of an emergency decision to commence an adjudicative proceeding under another procedure, notwithstanding the pendency of proceedings for judicial review of the emergency decision).

100. *Id.* § 11465.10 (enacted by Chapter 938); *see id.* § 11465.20(a) (permitting a person to apply to an agency for a declaratory decision as to the applicability of a statute, regulation, or decision which is within the primary jurisdiction of the agency to a set of specified circumstances). *But see id.* § 11465.70(c) (enacted by Chapter 938) (providing that California Government Code §§ 11465-11465.70 are inapplicable to an adjudicative proceeding if, by regulation, an agency provides inconsistent rules or provides that such sections do not apply).

101. *Id.* § 11465.60 (enacted by Chapter 938); *see id.* § 11465.60(a) (enacted by Chapter 938) (requiring a declaratory decision to include the names of all the parties, the particular facts upon which the decision is based and the reasons for the conclusion); *see also id.* § 11465.60(b) (equating the status and binding effect of a declaratory decision with any other decision issued by the agency).

102. *Id.* § 11465.70(a) (enacted by Chapter 938); *see id.* (mandating that the model regulations provide for: (1) a description of the classes of circumstance in which an agency will not issue a declaratory decision; (2) the form, contents, and filing of an application for a declaratory decision; (3) the procedural rights of a person in relation to an application; and (4) the disposition of an application); *see also id.* § 11465.70(b) (enacted by Chapter 938) (declaring that any regulations adopted by the Office of Administrative Hearings relating to a declaratory decision govern in an adjudicative proceeding unless an agency adopts its own regulations governing declaratory decisions).

103. *Id.* § 11465.30 (enacted by Chapter 938); *see id.* (requiring an agency to give notice of the application to all persons to whom notice of an adjudicative proceeding is otherwise required within 30 days after the application for declaratory relief was received); *id.* (permitting an agency to also give notice to any other person); *id.* § 11465.50(a) (enacted by Chapter 938) (directing an agency, within 60 days of receipt of the application, to, in writing: (1) issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances; (2) set the matter for specified proceedings; (3) agree to issue a declaratory decision by a specified time; or (4) decline to issue a declaratory decision and provide the reasons for doing so). *But see id.* § 11465.50(c) (enacted by Chapter 938) (noting that if an agency fails to take action within 60 days after the receipt of the application, it is deemed to have declined to take such action); *id.* § 11465.50(b)(4) (enacted by Chapter 938) (protecting the agency's decision from judicial review); *id.* § 11465.50(b) (enacted by Chapter 938) (requiring that a copy of the agency's action be served promptly on the

a formal, informal or other hearing procedure do not apply to an agency proceeding involving a declaratory decision.¹⁰⁴ Furthermore, Chapter 938 proscribes the circumstances in which an agency is prohibited from issuing a declaratory decision.¹⁰⁵

IV. PROVISIONS OF CHAPTER 938 GOVERNING MORE THAN ONE TYPE OF ADMINISTRATION ADJUDICATION PROCEEDING

In addition to provisions which govern specific types of administrative adjudication processes, Chapter 938 enacts provisions which govern all or some of the different agency adjudication options.

A. Provisions Generally Affecting All Administrative Adjudication Options

1. Administrative Adjudication Bill of Rights

Chapter 938 establishes an Administrative Adjudication Bill of Rights which governs administrative proceedings held under either the formal or informal hearing procedures, alternative dispute resolution, or emergency decision or declaratory decision process.¹⁰⁶

Under Chapter 938, an agency must give the person¹⁰⁷ to whom the agency action is directed notice and an opportunity to be heard.¹⁰⁸ Further, Chapter 938 requires that an agency make available to the person subject to the agency action, a copy of the governing procedure of the hearing process.¹⁰⁹

applicant and any other party).

104. *Id.* § 11465.40 (enacted by Chapter 938); *see id.* (stating, however, that the provisions apply to the extent the agency so provides by regulation or order, or to the extent provided in California Government Code §§ 11465-11465.70).

105. *Id.* § 11465.20(b) (enacted by Chapter 938); *see id.* (providing that an agency cannot issue a declaratory decision if: (1) issuance of the decision is contrary to a regulation; (2) the decision would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory decision proceeding; or (3) the decision involves a matter which is the subject of pending administrative or judicial proceedings); *id.* § 11465.20(c) (enacted by Chapter 938) (declaring that an application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review).

106. *Id.* § 11425.10(a) (enacted by Chapter 938); *see id.* (declaring that an agency's governing procedure for an adjudicative proceeding must encompass the requirements of California Government Code § 11425.10(a)(1)-(9)).

107. *See id.* § 11405.70 (enacted by Chapter 938) (defining "person" to include an individual, partnership, corporation, governmental subdivision, or unit of a governmental subdivision, or a public or private organization or entity of any character).

108. *Id.* § 11425.10(a)(1) (enacted by Chapter 938); *see id.* (providing that notice and opportunity to be heard encompasses the opportunity to be present and to rebut evidence).

109. *Id.* § 11425.10(a)(2) (enacted by Chapter 938); *see id.* (stating that an agency must include within the notice a statement regarding whether California Government Code §§ 11500-11529, governing formal hearings, is applicable).

A hearing is open to public observation under Chapter 938.¹¹⁰ However, the presiding officer¹¹¹ has the authority to either order the meeting closed or to make other protective orders.¹¹² Hearings conducted by telephone, television, or other electronic means can comply with the open meeting requirement so long as certain criteria are met.¹¹³ However, the provisions of Chapter 938 regarding open

110. *Id.* § 11425.10(a)(3) (enacted by Chapter 938); *see id.* (providing that a hearing will be open for public observation in accordance with California Government Code § 11425.20); *id.* § 11425.20(a) (enacted by Chapter 938) (noting the situations where closure of the hearing is appropriate); *see also id.* §§ 11120-11132 (West 1992 & Supp. 1995) (constituting the Bagley-Keene Open Meeting Act and setting forth requirements for the holding of open meetings); *id.* § 11120 (West 1992) (declaring that open meetings ensure that the public agencies keep the public informed of their actions and serve as a reminder to public agencies that the people of California, in their delegation of authority to public servants, retain control over the entities which they have created). *But see id.* § 11126(d) (West Supp. 1995) (allowing state bodies to conduct closed sessions where the deliberations to be held are on a decision to be reached based upon evidence introduced in an adjudicative proceeding); *id.* § 11126(g) (West Supp. 1995) (permitting a state body, upon the advice of legal counsel, to hold a closed session to discuss and obtain legal advice from its legal counsel which pertains to pending litigation if such discussion, were it to be conducted in public, would prejudice the position of the state body in the litigation).

111. *Id.* § 11405.80 (enacted by Chapter 938); *see id.* (defining "presiding officer" as either an agency head, a member of the agency head, an administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding).

112. *Id.* § 11425.20(a) (enacted by Chapter 938); *see id.* (allowing a presiding officer to act to the extent necessary or proper to achieve certain purposes); *id.* (listing the following as bona fide purposes which may facilitate the need for the closure of an open meeting or the issuance of protective orders: (1) satisfying federal and state constitutions or law and complying with the laws protecting privileged, confidential or other protected information; (2) ensuring a fair hearing; (3) conducting a hearing with witnesses who are either minors or who possess a developmental disability defined in California Welfare and Institutions Code § 4512, and a need exists to prevent the witness from intimidation or other harm; however, the rights of all persons must be considered prior to closure); *see also* CAL. EVID. CODE § 952 (West 1995) (defining "confidential communication between client and lawyer" to encompass information which is relayed between a client and his or her lawyer during the course of the attorney-client relationship which is disclosed to only those present during the original communication or to those to whom disclosure is reasonably necessary for the transmission of information or the accomplishment of the purpose for which the lawyer is consulted); *id.* (recognizing that a communication between a client and his or her lawyer does not automatically lose its status as confidential merely because the communication was transmitted by facsimile, cellular telephone, or other electronic means); *id.* § 954 (West 1995) (granting a client, irrelevant of party status, a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication so long as the privilege is claimed by either (1) the holder of the privilege; (2) a person authorized by the holder to claim the privilege; (3) the person who was the lawyer at the time of the confidential communication if (a) there is not a holder of the privilege in existence; or (b) the lawyer is otherwise instructed by a person authorized to permit disclosure); CAL. WELF. & INST. CODE § 4512(a) (West Supp. 1995) (defining "developmental disability" as any of the following: (1) a substantial disability which originates before an individual reaches the age of 18 and continues, or can be expected to continue indefinitely; (2) mental retardation, cerebral palsy, epilepsy, and autism; (3) disabling conditions which are closely related to mental retardation or which require similar treatment to that required for mentally retarded individuals). *But see id.* (excluding from the definition of "developmental disability" handicapped conditions which are solely physical in nature).

113. CAL. GOV'T CODE § 11425.20(b) (enacted by Chapter 938); *see id.* (finding compliance with the open meeting requirement if the following two criteria are satisfied: (1) the public has access to hear and inspect the agency's record and transcript at reasonable times, and (2) the public is permitted to be physically present at the place where the presiding officer is conducting the hearing); *cf.* 1995 Alaska Sess. Laws, sec. 4 (allowing a party to request that the party or a witness participate by telephone in the hearing so long as the requesting party bears the cost of the telephonic participation and declaring that an agency must subsequently grant the request if: (1) no party objects; (2) the witness lives more than 30 miles one way from the hearing site; (3) the party lives more than 100 miles one way from the hearing site; or (4) other good cause exists and the use of the telephone will not substantially prejudice the rights of the opposing party).

hearings do not apply to prehearing or settlement conferences or proceedings for alternative dispute resolution other than binding arbitration.¹¹⁴

Chapter 938 requires an agency to separate its administrative functions from its investigative, prosecutorial, and advocacy functions.¹¹⁵

Existing law provides that a presiding officer may be disqualified for bias, prejudice, or interest.¹¹⁶ However, under Chapter 938, bias, prejudice, or interest in the proceeding is alone insufficient for disqualification.¹¹⁷

Under existing law, the party may file an affidavit requesting the disqualification of the administrative law judge; therefore, Chapter 938 provides similarly

114. CAL. GOV'T CODE § 11425.20(c) (enacted by Chapter 938).

115. *Id.* § 11425.10(a)(4) (enacted by Chapter 938); *see id.* § 11425.30(a) (enacted by Chapter 938) (prohibiting a person from serving as a presiding officer in an adjudicative proceeding if the person: (1) served as an investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative state; or (2) is subject to the authority, direction or discretion of such an investigator, prosecutor, or advocate in the proceeding); *id.* § 11425.30(b)(1) (enacted by Chapter 938) (noting that a person may serve as a presiding officer at successive stages of an adjudicative proceeding); *id.* § 11425.30(b)(2) (enacted by Chapter 938) (allowing a person to serve as a presiding officer so long as the person participated only as a decision maker or as an advisor to a decision maker in a preliminary determination, such as probable cause, in either the adjudicative proceeding or its preadjudicative stage); *id.* § 11425.30(c) (enacted by Chapter 938) (declaring that the provisions of California Government Code § 11425.30 also apply to an agency head or any person or body to whom the power to hear or decide a proceeding has been delegated). *But see* CAL. PUB. RES. CODE § 25513.3 (enacted by Chapter 938) (allowing a person who has served as an investigator or advocate in an adjudicative proceeding of the State Energy Resources Conservation and Development Commission to serve as either a supervisor of the presiding officer or as an assistant or advisor to the presiding officer in the same proceeding so long as (1) the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate; (2) the content of any advice is disclosed on the record and (3) all of the parties have an opportunity to comment on the advice); CAL. VEH. CODE § 14112(b) (amended by Chapter 938) (providing that California Government Code § 11425.30(a) does not apply to a proceeding for the issuance, denial, revocation, or suspension of a driver's license, and requiring the Department of Motor Vehicles to study the effect of California Government Code § 11425.30(a) on proceedings involving vehicle operation certificates and report the findings to the Legislature by December 31, 1999).

116. CAL. GOV'T CODE § 11425.40(a) (enacted by Chapter 938); *see id.* § 11425.40(c) (enacted by Chapter 938) (providing that California Government Code § 11425.40 also governs the disqualification of an agency head or other person or body to whom the power to hear and decide a proceeding has been delegated). *Compare* 1985 Cal. Stat. ch. 324, sec. 19, at 1435-36 (amending CAL. GOV'T CODE § 11512(c)) (requiring an administrative judge or agency member to voluntarily disqualify and withdraw from any case where the person cannot accord a fair and impartial hearing or consideration) *with* CAL. GOV'T CODE § 11425.40(a) (enacted by Chapter 938) (subjecting the presiding officer to disqualification for bias, prejudice, or interest in the proceeding). *See generally* Joseph E. Maloney, *Disqualification of Administrative Law Judges in California*, 16 U.S.F. L. REV. 229 (1982) (discussing the circumstances surrounding disqualification of an administrative law judge).

117. CAL. GOV'T CODE § 11425.40(b) (enacted by Chapter 938); *see id.* (stating that without further evidence of bias, prejudice or interest, a presiding officer may not be disqualified); *id.* § 11425.40(b)(1) (enacted by Chapter 938) (providing that further evidence of bias, prejudice or interest may exist where the presiding officer is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group); *id.* § 11425.40(b)(2) (enacted by Chapter 938) (including as further evidence of bias, prejudice, or interest, the fact of having expressed an opinion or possessing experience, technical competence, or specialized knowledge of a legal, factual, or policy issue which is presented in the proceeding); *id.* § 11425.40(b)(3) (enacted by Chapter 938) (adding within the realm of bias, prejudice, or interest, the fact of having participated as a lawyer or public official in the legislative process of either a law or regulation which is in issue in the proceeding); *see also id.* § 11425.40(c) (enacted by Chapter 938) (providing that the provisions of California Government Code § 11425.40 are applicable to the disqualification of any person, agency or body to whom the authority to hear or decide a proceeding is delegated).

that any agency that conducts adjudicative proceedings adopt regulations that address preemptory challenges of the proposed presiding officer.¹¹⁸

Under existing law, a decision¹¹⁹ must be in writing, be based on the record, and include a statement of the factual and legal basis for the decision.¹²⁰ Also, the decision may be in the language of the pleadings in accordance with existing law.¹²¹ Chapter 938 provides the parameters for the statement of the factual basis for the decision.¹²² Finally, a penalty may not be based on anything unless it has been adopted as a regulation.¹²³

118. Compare 1985 Cal. Stat. ch. 324, sec. 19, at 1435-36 (amending CAL. GOV'T CODE § 11512(c)) (allowing a party to request the disqualification of any administrative law judge so long as the affidavit states the particular grounds upon which it is claimed that a fair and impartial hearing cannot be accorded) with CAL. GOV'T CODE § 11425.40(d) (enacted by Chapter 938) (granting an agency the ability to adopt regulations which provide for preemptory challenge of the presiding officer).

119. See CAL. GOV'T CODE § 11405.50(a) (enacted by Chapter 938) (defining "decision" as an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person); *id.* § 11405.50(b) (enacted by Chapter 938) (noting that the definition of "decision" does not limit the precedential effect of a decision under California Government Code § 11425.60, or the authority of an agency to make a declaratory decision pursuant to California Government Code §§ 11465.10-11465.70); see also *id.* § 11410.10 (enacted by Chapter 938) (providing that California Government Code §§ 11400-11470.50 apply to a decision by an agency if an evidentiary hearing for determination of facts is required for the formulation and issuance of the decision under either the federal or state constitution or a federal or state statute).

120. Compare 1947 Cal. Stat. ch. 491, sec. 7, at 1472 (amending CAL. GOV'T CODE § 11518) (requiring that a decision be in writing, contain findings of fact, a determination of the issues presented and the penalty, if any, and also providing that the findings may be stated in the language of the pleadings) with CAL. GOV'T CODE § 11425.50(a) (enacted by Chapter 938) (requiring that a decision be in writing and contain a statement of the factual and legal basis for the decision). See, e.g., *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515, 522 P.2d 12, 16, 113 Cal. Rptr. 836, 841 (1974) (finding a requirement within California Code of Civil Procedure § 1094.5 that an agency provide detailed findings and reasons to support its decisions in order to "bridge the gap" between the evidence and the order).

121. CAL. GOV'T CODE § 11425.50(b) (enacted by Chapter 938); see *id.* (incorporating provisions similar to those found in 1947 Cal. Stat. ch. 491, sec. 7, at 1472).

122. *Id.* § 11425.50(b), (c) (enacted by Chapter 938); see *id.* (providing that where the factual basis for a decision is based substantially on the credibility of a witness, the statement must identify any specific evidence relating to the demeanor, manner or attitude of the witness which supports the determination); *id.* (requiring the court to give great weight, upon judicial review, to the determination to the extent the determination identifies the observed demeanor, manner or attitude of the witness); *id.* § 11425.50(c) (enacted by Chapter 938) (requiring the statement of the factual basis for the decision be based in the evidence in the record and on matters officially noticed in the proceeding); *id.* (allowing the presiding officer to use experience, technical competence, and specialized knowledge while evaluating evidence). But see *id.* § 11425.50(b) (enacted by Chapter 938) (requiring that where the statement contains no more than a recitment of the relevant statute or regulation, the statement must also contain a concise and explicit statement of the facts which support the decision); *id.* § 11425.50(d) (enacted by Chapter 938) (stating that California Government Code § 11425.50 is not intended to limit the information which may be contained in the decision).

123. *Id.* § 11425.50(e) (enacted by Chapter 938); see *id.* (declaring that a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application or any other rule subject to California Government Code §§ 11340-11349.11). But see *id.* (providing that a penalty can be based on such things if it has been adopted as a regulation in accordance with California Government Code §§ 11340-11349.11).

A decision may not be relied upon as precedent, under Chapter 938, unless the decision is designated and indexed as precedent.¹²⁴ An agency is permitted, by Chapter 938, to designate as precedent a decision, in whole or in part, which contains a legal or policy determination of significance which is likely to reoccur.¹²⁵ Chapter 938 prescribes the procedure for the indexing of precedent.¹²⁶ Finally, Chapter 938 shields the decision to designate or not designate a decision as precedent from judicial review.¹²⁷

Under existing law, ex parte communications are restricted.¹²⁸ When a proceeding is pending,¹²⁹ communication between the presiding officer and either an employee or representative of an agency or interested person is prohibited, unless there is notice and an opportunity for all parties to participate.¹³⁰ However, under Chapter 938, communications otherwise prohibited may in certain circumstances be permissible.¹³¹

124. *Id.* § 11425.10(a)(7) (enacted by Chapter 938); *id.* § 11425.60(d) (enacted by Chapter 938); *see id.* (recognizing that California Government Code § 11425.60 applies to decisions issued on or after July 1, 1997). *But see id.* (providing, however, that an agency may designate a decision, issued prior to July 1, 1997, as precedent); *see also* CAL. UNEMP. INS. CODE § 409 (amended by Chapter 938) (making clear that decisions of the Unemployment Insurance Appeals Board are governed by California Government Code § 11425.60).

125. CAL. GOV'T CODE § 11425.60(b) (enacted by Chapter 938); *see id.* (noting further, that a designation as precedent is not considered rule making, thus need not comply with California Government Code §§ 11340-11349.11).

126. *Id.* § 11425.60(c) (enacted by Chapter 938); *see id.* (requiring agencies to maintain an index of significant legal and policy determinations which must be updated a minimum of once a year and which must be made available to the public by subscription and advertisement in the California Regulatory Notice Register). *But see id.* (stating that if no precedent decision has been designated since the last update, the index may be updated less than annually).

127. *Id.* § 11425.60(b) (enacted by Chapter 938).

128. *Id.* § 11425.10(a)(8) (enacted by Chapter 938); *see id.* (noting that any restriction must be in accordance with California Government Code, Article 7).

129. *See id.* § 11430.10(c) (enacted by Chapter 938) (defining "pending" for the purposes of California Government Code § 11430.10 as beginning from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier).

130. *Id.* § 11430.10 (enacted by Chapter 938). *But see id.* 11430.10(b) (enacted by Chapter 938) (providing that California Government Code § 11430.10 does not affect communications which are made on the record at the hearing).

131. *Id.* § 11430.20 (enacted by Chapter 938); *id.* § 11430.30 (enacted by Chapter 938); *see id.* § 11430.20(a) (enacted by Chapter 938) (granting an exception to California Government Code § 11430.20 when the communication is necessary for the disposition of an ex parte matter which is mandated by statute); *id.* § 11430.20(b) (enacted by Chapter 938) (allowing communication which concerns a matter or procedure or practice that is not in controversy); *id.* § 11430.30 (enacted by Chapter 938) (providing instances where communication from either an employee or representative of an agency that is a party to a presiding officer is permissible); *id.* § 11430.30(a) (enacted by Chapter 938) (categorizing as permissible, communication which serves to assist and advise the presiding officer so long as it is from a person who has not served as either an investigator, prosecutor, or advocate in the proceeding or its preadjudicative state); *id.* (permitting an advisor or assistant to evaluate the evidence, but not furnish, augment, diminish or modify the evidence); *id.* § 11430.30(b) (enacted by Chapter 938) (allowing communication which advises the presiding officer of a settlement proposal being advocated by the advisor); *id.* § 11430.30(c) (enacted by Chapter 938) (declaring that a communication which is nonprosecutorial in character is permissible so long as one of the following two criteria are satisfied: (1) the advice involves a technical issue the presiding officer needs to know, so long as it is disclosed on the record and each party is given an opportunity to respond in accordance with California Government Code § 11430.50; or (2) the advice concerns a proceeding of either the San Francisco Bay Conservation and Development Commission, the California Tahoe Regional Planning Agency, the Delta

Prior law provided that prior to serving as the administrative law judge in an adjudicative proceeding, a person who received a prohibited ex parte communication was required to disclose such communication.¹³² Existing law provides the procedures for disclosure of ex parte communications.¹³³ The provisions of Chapter 938 restricting ex parte communications to a presiding officer apply to ex parte communications to persons, other than presiding officers, to whom the power to hear or decide a proceeding is delegated.¹³⁴ Furthermore, Chapter 938 also prohibits communication between the presiding officer and a person or body to whom the power to hear or decide a hearing has been delegated.¹³⁵ However, certain proceedings are excepted from the ex parte communications provisions of the Administrative Procedure Act.¹³⁶ Additionally, Chapter 938 limits the requirement for disclosure of ex parte communications received by the presiding officer to those received while the proceeding is pending.¹³⁷

Protection Commission, the Water Resources Control Board, or a regional water quality control board).

132. 1986 Cal. Stat. ch. 899, sec. 2, at 3116 (enacting CAL. GOV'T CODE § 11513.5(c)).

133. CAL. GOV'T CODE § 11430.50 (enacted by Chapter 938); *see id.* (incorporating provisions similar to those found in 1986 Cal. Stat. ch. 899, sec. 2, at 3116).

134. *Id.* § 11430.70(a) (enacted by Chapter 938). *But see id.* § 11430.70(b) (enacted by Chapter 938) (permitting ex parte communications in an individualized rate-making proceeding so long as the content of the communication is made on the record and all parties are given an opportunity to respond in accordance with California Government Code § 11430.50).

135. *Id.* § 11430.80(a) (enacted by Chapter 938). *But see id.* § 11430.80(b) (enacted by Chapter 938) (stating that California Government Code § 11430.80 is inapplicable where (1) the person to whom the power to hear or decide the proceeding is delegated serves as both presiding officer and agency head; or (2) the presiding officer does not issue a decision in the proceeding).

136. CAL. PUB. RES. CODE § 663.1(g) (amended by Chapter 938); *see id.* (providing the ex parte communications contained in California Government Code §§ 11430.10-11430.80 do not apply to hearings under the State Mining and Geology Board); *id.* § 30329 (enacted by Chapter 938) (declaring that California Government Code §§ 11430.10-11430.80, governing ex parte communications, are inapplicable to proceedings of the California Coastal Commission); *id.* § 40412 (amended by Chapter 938) (setting forth the ex parte provisions governing the California Integrated Waste Management Board and exempting the Board from the ex parte communication provisions of California Government Code §§ 11430.10-11430.80, notwithstanding California Government Code § 11425.10).

137. CAL. GOV'T CODE § 11430.40 (enacted by Chapter 938); *id.* § 11430.50 (enacted by Chapter 938); *see id.* § 11430.40 (enacted by Chapter 938) (specifying that if, while a proceeding is pending but prior to serving as a presiding officer, a person receives a communication which would be prohibited were the person serving as a presiding officer, the person, promptly upon the commencement of service as a presiding officer, must disclose, on the record, the content of the communication and give all parties an opportunity to address the issue in accordance with California Government Code § 11430.50); *id.* § 11430.50(a) (enacted by Chapter 938) (requiring a presiding officer, upon receipt of a prohibited communication, to make part of the record the following: (1) the writing and any written response by the presiding officer if the communication was written; (2) a memorandum declaring the substance of the communication, the presiding officer's response and the identity of each person from whom the presiding officer received the communication); *id.* § 11430.50(b) (enacted by Chapter 938) (requiring the presiding officer to notify all parties that a prohibited communication has been made part of the record); *id.* § 11430.50(c) (enacted by Chapter 938) (providing that if, within 10 days after the receipt of notice, a party requests an opportunity to address the communication, the party must be permitted to comment and the presiding officer is granted the discretion to (1) permit the presentation of evidence concerning the communication and (2) reopen a hearing, if it has concluded); *see also id.* § 11430.60 (enacted by Chapter 938) (stating that grounds for disqualification of the presiding officer may exist if the presiding officer receives a prohibited communication); *id.* (providing that if a presiding officer is disqualified due to the receipt of a prohibited communication, the record concerning the ex parte communication can be sealed by protective order).

Under prior law, language assistance extended only to a party; Chapter 938 provides instead that language assistance must be made available under Chapter 938 for both parties and witnesses.¹³⁸ Existing law specifies the state agencies that are required to provide language assistance in adjudicative proceedings.¹³⁹

Under existing law, any hearing or medical examination which is held for the purpose of determining compensation or monetary award must be conducted in English.¹⁴⁰ Existing law provides that if a party does not speak or understand English proficiently, those agencies required by Chapter 938 to provide language assistance must provide the party an interpreter.¹⁴¹ Chapter 938 extends this requirement to a party's witness.¹⁴² Moreover, Chapter 938 dictates that each party must be advised of the right to an interpreter when the party is advised of the hearing date or medical examination.¹⁴³

Interpreters utilized in accordance with the provisions of Chapter 938 must

138. *Id.* § 11425.10(a)(9) (enacted by Chapter 938); *see id.* (requiring that an agency described in California Government Code § 11018 or § 11435.15 provide language assistance in accordance with California Government Code §§ 11435.05-11435.60). *Compare* 1945 Cal. Stat. ch. 867, sec. 1, at 1626 (amending and enacting CAL. GOV'T. CODE § 11500, and defining "language assistance" as either the oral interpretation or written translation of a language other than English into English or English into another language for a party who cannot speak or understand English) *with* CAL. GOV'T CODE § 11435.05 (enacted by Chapter 938) (defining "language assistance" to extend also to witnesses).

139. CAL. GOV'T CODE § 11435.15(a) (enacted by Chapter 938); *see id.* (incorporating 1994 Cal. Legis. Serv. ch. 26, sec. 232, at 210-11); *id.* (listing the state agencies required to provide language assistance in adjudicative proceedings and deleting the Bureau of Employment Agencies); *see also id.* § 11435.15(d) (enacted by Chapter 938) (incorporating 1994 Cal. Legis. Serv. ch. 26, sec. 232, at 211) (stating that California Government Code §§ 11435.05-11435.65 apply to those agencies enumerated in California Government Code § 11435.15(a), notwithstanding a general provision that the Chapter is inapplicable to some or all of that agency's adjudicative proceedings). *But see id.* § 11435.15(b) (enacted by Chapter 938) (incorporating 1994 Cal. Legis. Serv. ch. 25, sec. 232, at 211) (providing that an agency not listed in California Government Code § 11435.15 may provide language assistance so long as the selection of an interpreter complies with California Government Code § 11435.30). *Compare* 1985 Cal. Stat. ch. 324, sec. 15, at 1433-34 (amending CAL. GOV'T CODE § 11500 (f)) (noting that an adjudicatory hearing does not encompass an informal fact finding or informal investigatory hearing, therefore an interpreter is not required; however, an interpreter may be provided by an agency during an informal hearing) *with* CAL. GOV'T CODE § 11435.15(c) (enacted by Chapter 938) (declaring that an agency is permitted, not required, to provide an interpreter during informal fact finding or informal investigatory hearing).

140. CAL. GOV'T CODE § 11435.20(a) (enacted by Chapter 938).

141. *Id.* § 11435.20(b) (enacted by Chapter 938).

142. *Id.*; *see id.* § 11435.30 (enacted by Chapter 938) (requiring the State Personnel Board to establish, maintain and publish annually an updated listing of certified administrative hearing interpreters who meet the minimum standards outlined in California Government Code § 11435.40, and satisfy the certification standards in California Government Code § 68562); *id.* § 11435.35 (enacted by Chapter 938) (requiring the State Personnel Board to maintain a listing of those persons who are certified medical examination interpreters, who meet the minimum standards designated in California Government Code § 11435.40, and satisfy the certification requirements for court interpreters pursuant to California Government Code § 68562); *id.* § 11435.40(a) (enacted by Chapter 938) (authorizing the State Personnel Board to designate the specific languages to be certified, including Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese).

143. *Id.* § 11435.60 (enacted by Chapter 938); *see id.* (incorporating 1993 Cal. Legis. Serv. ch. 701, sec. 1, at 3256); *id.* (declaring that each party who desires the services of an interpreter be encouraged to give timely notice to the agency so that arrangements can be made for an interpreter to attend the hearing or medical examination).

comply with the rules of confidentiality.¹⁴⁴ Generally, existing law also provides that an interpreter to be used in a hearing must be certified.¹⁴⁵ Chapter 938 establishes the appropriate procedures for addressing the absence of a certified interpreter at a hearing.¹⁴⁶

Existing law determines who bears the cost of the interpreter.¹⁴⁷ The State Personnel Board is responsible for providing a listing of certified administrative hearing interpreters and medical examination interpreters, designating the languages for certification, establishing and charging fees for interpreter examination applications and renewal of certifications, and decertifying interpreters.¹⁴⁸

2. Conversion of the Proceeding

The provisions of Chapter 938 allow for the conversion of one type of adjudicative proceeding to another type.¹⁴⁹ If conversion occurs and the person responsible for the original proceeding does not have authority over the new proceeding, the agency head is charged by Chapter 938 with the authority to

144. *Id.* § 11435.65 (enacted by Chapter 938); *see id.* (incorporating 1993 Cal. Legis. Serv. ch. 701, sec. 1, at 3256-57); *id.* § 11435.65(a) (enacted by Chapter 938); *id.* (incorporating 1993 Cal. Legis. Serv. ch. 701, sec. 1, at 3256-57); *id.* (applying the rules of confidentiality which apply to an agency in an adjudicative proceeding to interpreters in a hearing or medical examination); *id.* § 11435.65(b) (incorporating 1993 Cal. Legis. Serv. ch. 701, sec. 1, at 3256-57 (enacted by Chapter 938)) (prohibiting an interpreter from having involvement in the issues of the case prior to the hearing).

145. *Id.* § 11435.55(a) (enacted by Chapter 938); *see id.* (requiring that interpreters used in a hearing be certified according to California Government Code § 11435.30, but permitting the use of a provisionally qualified interpreter should a certified interpreter not be available); *see also id.* § 11435.30(a) (enacted by Chapter 938) (asserting that the State Personnel Board will compile and publish annually lists of certified administrative hearing interpreters); *id.* (listing certified interpreters as determined under the standards provided by California Government Code § 11435.40).

146. *Id.* § 11435.55 (enacted by Chapter 938) (incorporating 1993 Cal. Stat. ch. 701, sec. 1, at 3256-58); *see id.* (granting the agency conducting the hearing discretionary authority to provisionally qualify and use a non-certified interpreter when a certified interpreter cannot attend the hearing); *id.* § 11435.55(b) (enacted by Chapter 938) (incorporating 1993 Cal. Legis. Serv. ch. 701, sec. 1, at 3256-58) (stating that when a certified medical examiner cannot be present at the medical examination, the physician may use another interpreter so long as it is noted in the record of the medical evaluation).

147. *Id.* § 11435.25 (enacted by Chapter 938) (incorporating 1992 Cal. Legis. Serv. ch. 1302, sec. 7, at 5400-02); *see id.* (placing the cost of providing an interpreter upon the agency requesting the interpreter unless the presiding officer directs, based upon an equitable consideration of the circumstances, that the agency having jurisdiction bear the cost); *see also id.* § 11435.25(c) (enacted by Chapter 938) (incorporating 1992 Cal. Legis. Serv. ch. 1302, sec. 7, at 5400-02) (stating that the payment of the cost for providing an interpreter in hearings before the Workers' Compensation Appeals Board of the Division of Workers' Compensation is governed by the rules promulgated by either the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation).

148. *Id.* §§ 11435.30, 11435.35, 11435.40, 11435.45, 11435.50 (enacted by Chapter 938) (incorporating 1993 Cal. Legis. Serv. ch. 701, sec. 1, at 3256-57).

149. *Id.* § 11470.10 (enacted by Chapter 938); *see id.* (requiring conversion if mandated by statute or regulation and permitting conversion where the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party so long as notice to all parties to the original proceeding is served); *see also id.* (noting that conversion may occur at any point in an agency proceeding); *id.* (vesting the presiding officer or other agency official with the ability to convert the proceedings); *id.* § 11470.50 (enacted by Chapter 938) (stating that an agency may adopt regulations which address the factors for consideration in determining whether and under what circumstances one type of proceeding can be converted to another).

appoint a successor to preside over the new proceeding.¹⁵⁰ Also, Chapter 938 stipulates that the record of the original agency proceeding will be used in the new proceeding.¹⁵¹

3. Intervention

The provisions of Chapter 938 relating to intervention apply in the adjudicative proceedings of an agency so long as the agency adopts regulations deeming the provisions applicable.¹⁵² The presiding officer must grant a motion for intervention in accordance with Chapter 938 upon the satisfaction of enumerated conditions.¹⁵³ Chapter 938 allows conditions to be placed upon the intervenor's participation in the proceeding.¹⁵⁴ Any determination made by the presiding officer is protected from administrative or judicial review by Chapter 938.¹⁵⁵

150. *Id.* § 11470.20 (enacted by Chapter 938); *see id.* § 11470.40 (enacted by Chapter 938) (directing the person responsible for the new proceeding to (1) give additional notice to the parties and other persons in order to satisfy the statutory requirements governing the new proceeding; (2) dispose of matters involved without further proceedings if sufficient proceedings have been held to satisfy the statutory requirements relating to the new proceeding; and (3) conduct or cause to be conducted any additional proceedings necessary to satisfy the statutory requirements relating to the new proceeding, and allow the parties a reasonable time for the new proceeding).

151. *Id.* § 11470.30 (enacted by Chapter 938); *see id.* (noting that the record shall be used to the extent practicable and consistent with the rights of the parties).

152. *Id.* § 11440.50(a) (enacted by Chapter 938). *But see id.* § 11440.50(f) (enacted by Chapter 938) (stating that California Government Code § 11440.50 does not prohibit an agency from adopting regulations which permits participation by a person short of intervention of a party, subject to the provisions of California Government Code § 11430.10-11430.80).

153. *Id.* § 11440.50 (b) (enacted by Chapter 938); *see id.* (setting forth the conditions which require the granting of a motion for intervention to include: (1) the motion is to be submitted in writing with copies served upon all the parties named in the agency's pleading; (2) the motion is made as early as practicable in advance of the hearing; (3) facts demonstrating the applicant's legal rights, duties, privileges or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor are stated in the motion; and (4) a determination by the presiding officer that the interests of justice will not be impaired by allowing the intervention); *see also id.* § 11440.50(d) (enacted by Chapter 938) (requiring that the presiding officer issue the order, granting or denying the motion for intervention as early as practicable and give notice of the order to the applicant and all parties); *id.* (noting that the order must specify any conditions and state the reasons for the order); *id.* (allowing a presiding officer to modify the order at any time so long as reasons for the modification are given).

154. *Id.* § 11440.50(c) (enacted by Chapter 938); *see id.* (enumerating a non-exhaustive list of available conditions to include (1) limiting the intervenor's participation to only those issues designated as a particular interest in the motion; (2) limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor in order to promote an efficient proceeding; (3) requiring that two or more intervenors combine their presentations of evidence, argument, cross-examination, and discovery; (4) limiting or excluding the intervenor's participation in settlement negotiations).

155. *Id.* § 11440.50(e) (enacted by Chapter 938); *see id.* (declaring that whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by permitting intervention is a determination to be made in the sole discretion of the presiding officer).

4. Contempt

Existing law provides grounds for which a person may be subject to a contempt sanction during an adjudicative proceeding before an agency.¹⁵⁶ Chapter 938 further expands the behaviors which may be punished for contempt to encompass obstruction or interruption of the due course of the proceeding, or violation of the prohibition of ex parte communications.¹⁵⁷

Existing law sets forth the procedures for determining whether a person should be punished for contempt.¹⁵⁸ Under prior law, an agency was charged to certify the facts to the superior court.¹⁵⁹ Chapter 938 instead declares that a presiding officer or agency head may certify the facts that justify the contempt sanction.¹⁶⁰ Moreover, a monetary sanction, in accordance with Chapter 938, can be imposed by the presiding officer against a party or the party's attorney if the party acted in bad faith, used frivolous tactics, or intended solely to cause unnecessary delay.¹⁶¹

5. Evidence Regarding Complainant's Sexual Conduct

Evidence of specific instances of a complainant's¹⁶² sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible under

156. *Id.* § 11455.10(a), (b) (enacted by Chapter 938) (incorporating 1945 Cal. Stat. ch. 867, sec. 1, at 1635); *id.* § 11455.10(e) (enacted by Chapter 938) (incorporating 1945 Cal. Stat. ch. 867, sec. 1, at 1635); *see id.* § 11455.10(a), (b) (enacted by Chapter 938) (incorporating 1945 Cal. Stat. ch. 867, sec. 1, at 1635) (including disobedience of or resistance to a lawful order, the refusal to take the oath or affirmation as a witness, or the refusal to be examined); *id.* § 11455.10(e) (enacted by Chapter 938) (incorporating 1945 Cal. Stat. ch. 867, sec. 1, at 1635) (listing the failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer, or moving, without substantial justification, to compel discovery).

157. *Id.* § 11455.10(c) (enacted by Chapter 938); *id.* § 11455.10(d) (enacted by Chapter 938); *see id.* § 11455.10(c) (enacted by Chapter 938) (declaring that obstruction or interruption of the due course of a proceeding during a hearing or near the place of a hearing can occur through (1) disorderly conduct or insolent behavior towards the presiding officer; (2) breach of the peace, boisterous conduct, or violent disturbance; and (3) other unlawful interference with the process or proceedings of the agency); *id.* § 11455.10(d) (enacted by Chapter 938) (noting that ex parte communications must comply with the provisions of California Government Code §§ 11430.10-11430.80).

158. *Id.* § 11455.20 (enacted by Chapter 938) (incorporating 1945 Cal. Stat. ch. 867, sec. 1, at 1635).

159. 1945 Cal. Stat. ch. 867, sec. 1, at 1635.

160. CAL. GOV'T CODE § 11455.20(a) (enacted by Chapter 938).

161. *Id.* § 11455.30(a) (enacted by Chapter 938); *see id.* (noting that unnecessary delay is defined in California Code of Civil Procedure § 128.5); *see also id.* § 11455.30(b) (enacted by Chapter 938) (declaring that an order or denial of an order for monetary sanctions is subject to judicial review in accordance with the provisions governing judicial review of a decision); *id.* (providing that an order is enforceable in the same manner as a money judgement or by the contempt sanction).

162. *See id.* § 11440.40(c) (enacted by Chapter 938, incorporating CAL. GOV'T CODE § 11513(p)) (defining "complainant" as a person who claims to have been subjected to conduct constituting sexual assault, battery, or harassment).

existing law.¹⁶³ Under Chapter 938, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator may be admissible in certain proceedings,¹⁶⁴ regardless of the hearing structure, provided certain requirements are met.¹⁶⁵

B. Provisions Affecting More than One, But Not All of the Administrative Adjudication Methods

1. Presiding Officer

Existing law provides that formal hearings held by an agency must be conducted by an administrative law judge on the staff of the Office of Administrative Hearings.¹⁶⁶ Chapter 938 provides express language that hearings conducted pursuant to the informal hearing or emergency decision process must also be conducted by an administrative law judge on the staff of the Office of Administrative Hearings.¹⁶⁷

V. HEARINGS NOT AFFECTED BY CHAPTER 938

Certain hearings are exempt from the provisions of California Government Code sections 11400-11474, notwithstanding California Government Code section 11425.10.¹⁶⁸ Further, other hearings are exempt from the provisions of

163. *Id.* § 11440.40(b) (enacted by Chapter 938, incorporating CAL. GOV'T CODE § 11513(o)); *see id.* (noting that the presumption of inadmissibility may be rebutted by an offer of proof establishing its relevance and reliability, and that "its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue").

164. *See id.* § 11440.40 (a) (enacted by Chapter 938) (providing that the proceeding must be pursuant to either California Government Code §§ 12940(h), (i), 19572, or 19702).

165. *Id.* § 11440.40(a) (enacted by Chapter 938) (incorporating CAL. GOV'T CODE § 11507.6(g)); *see id.* § 11440.40(a)(1) (enacted by Chapter 938) (stating that evidence is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant); *id.* (providing that the purpose of California Government Code § 11440.40(a) is to limit the scope of discovery, and not to affect the methods of discovery); *id.* § 11440.40(a)(2) (enacted by Chapter 938) (declaring such evidence to be admissible at the hearing if offered to attack the credibility of the complainant); *id.* (prohibiting the admission of reputation or opinion evidence regarding the sexual behavior for any purpose).

166. *Id.* § 11502 (amended by Chapter 938).

167. *Id.* § 11502(a) (amended by Chapter 938).

168. CAL. BUS. & PROF. CODE § 23083(b) (amended by Chapter 938); *see id.* (exempting a determination of an appeal by the Alcoholic Beverage Control Appeals Board); CAL. EDUC. CODE § 92001 (enacted by Chapter 938) (providing that hearings conducted by the University of California are exempt); CAL. GOV'T CODE § 3541.3(h) (amended by Chapter 938) (establishing that hearings conducted by the Public Employment Relations Board regarding election certification, with the exception of hearings to determine unfair practice charges, are exempt); *id.* § 3563(g) (amended by Chapter 938) (declaring that hearings conducted by the Public Employees Relations Board as part of Higher Education Employer-Employee Relations are exempt); *id.* § 17533 (enacted by Chapter 938) (providing that hearings conducted by the Commission on State Mandates are exempt); CAL. LAB. CODE § 1144.5 (enacted by Chapter 938) (declaring that hearings by the Agricultural Labor Relations Board with the exception of hearings to determine unfair labor practices charges are exempt); CAL. MIL. & VET. CODE § 105 (enacted by Chapter 938) (granting hearings by the Military Department an exemption); CAL. PENAL CODE § 3066 (enacted by Chapter 938) (establishing that parole hearings or other

California Government Code section 11400-11470.10 and 11500-11529, notwithstanding California Government Code section 11425.10.¹⁶⁹

VI. VARIOUS OTHER CHANGES

Prior law expressly provided that specified terms of probation required under California Government Code section 11519(b) could include an order of restitution requiring the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged by the party's breach of contract.¹⁷⁰ Under Chapter 938, specified terms of probation may include an order of restitution.¹⁷¹

Prior law granted departments, boards and commissions with the Environmental Protection Agency, the Resources Agency and the Office of the State Fire Marshal the ability to adopt regulations which differ from regulations in the Code of Federal Regulations on the same topics in certain circumstances.¹⁷² Chapter 938 repeals this provision.¹⁷³

Prior law established within the Office of Administrative Hearings a unit of administrative law judges who exhibited a knowledge of health planning and certificate of need matters who would give priority on their calendar for health planning matters.¹⁷⁴ This provision is repealed by Chapter 938.¹⁷⁵

Prior law expressly provided the necessary components of a decision by the California Unemployment Insurance Appeals Board.¹⁷⁶ Existing law provides that the board may designate decisions as precedent;¹⁷⁷ furthermore, Chapter 938

adjudications conducted by the Department of Corrections or the Board of Prison Terms which concern the rights of an inmate or parolee are exempt); CAL. PUB. UTIL. CODE § 1701(b) (amended by Chapter 938) (declaring a hearing conducted by a public utility is exempt); CAL. REV. & TAX. CODE § 19044(a) (amended by Chapter 938) (granting an exemption to hearings conducted by the Franchise Tax Board); *id.* § 19084(a)(4) (amended by Chapter 938) (providing that an oral hearing conducted by the Franchise Tax Board pursuant to California Revenue and Taxation Code § 19084(a)(4) is exempt); CAL. WELF. & INST. CODE § 1778 (enacted by Chapter 938) (excluding a parole hearing or other adjudication pertaining to a person committed to the control of the Youth Authority conducted by the Youth Authority or the Youthful Offender Parole Board); *id.* § 3158 (enacted by Chapter 938) (providing that a release hearing or other adjudication conducted by the Narcotic Addiction Evaluation Authority concerning the rights of a person committed to the custody of the Director of Corrections is exempted).

169. CAL. GOV'T CODE § 15609.5 (enacted by Chapter 938); *see id.* (providing that hearings conducted by the State Board of Equalization are exempted).

170. 1977 Cal. Stat. ch. 680, sec. 1, at 2206 (amending CAL. GOV'T CODE § 11519(d)); *see id.* (requiring that such a decision must include the findings that a breach of contract occurred and specify the amount of actual damages sustained as a result of the breach).

171. CAL. GOV'T CODE § 11519(d) (amended by Chapter 938); *see id.* (deleting the wording regarding breach of contract, thus expanding the options for an order of restitution); *see also id.* (noting that if restitution is ordered and paid, the amount paid must be credited to any subsequent judgment in a civil action).

172. 1993 Cal. Legis. Serv. ch. 1046, sec. 2, at 4712 (enacting CAL. GOV'T CODE § 11346.6).

173. 1995 Cal. Legis. Serv. ch. 938, sec. 15.1, at 5529 (repealing CAL. GOV'T CODE § 11346.6).

174. 1985 Cal. Stat. ch. 324, sec. 17, at 1434-35 (amending CAL. GOV'T CODE § 11502.1).

175. 1995 Cal. Legis. Serv. ch. 938, sec. 27, at 5552 (repealing CAL. GOV'T CODE § 11502.1).

176. 1994 Cal. Legis. Serv. ch. 967, sec. 1, at 4761 (amending CAL. UNEMP. INS. CODE § 409).

177. *See* CAL. UNEMP. INS. CODE § 409 (amended by Chapter 938).

provides that beginning January 1, 1997, precedent decisions are subject to California Government Code § 11425.60.¹⁷⁸ Moreover, existing law grants the California Unemployment Insurance Appeals Board the power to charge fees to defray the costs of publication and distribution.¹⁷⁹ Chapter 938 allows the California Unemployment Insurance Appeals Board to also charge for the costs of indexing precedent decisions.¹⁸⁰

Prior law required that if the adoption or amendment of a regulation required particular technologies or equipment, the agency had to provide a statement supporting their need for the technologies or equipment.¹⁸¹ Chapter 938 repeals this provision.¹⁸²

In order to prevent a loss or delay in funding from the federal government, Chapter 938 grants the Governor of California, through the use of an executive order, the ability to take certain enumerated actions.¹⁸³

Certain provisions of Chapter 938 are effective January 1, 1996.¹⁸⁴ The amendments to California Welfare and Institutions Code § 14105.41 are operative January 1, 1997.¹⁸⁵ The remaining provisions of Chapter 938 are effective July 1, 1997 and thus apply to adjudicative proceedings commenced on or after July 1, 1997.¹⁸⁶

Provisions for the adoption of interim or permanent regulations by an agency

178. *Id.*

179. *Id.*

180. *Id.*

181. 1936 Cal. Stat. ch. 205, sec. 1, at 1118 (amending CAL. GOV'T CODE § 11346.14); *see id.* (providing that the statement also include (1) a description of the alternatives to the regulation considered by the agency, (2) the reasons for rejecting the alternatives, and (3) an affirmation that no alternative which was considered by the agency would have been more effective than the proposed regulation); *id.* (noting that where the regulation mandates the use of specific equipment or prescribes specific actions, the imposition of performance standards must be considered as an alternative).

182. 1995 Cal. Legis. Serv. ch. 938, sec. 15.2, at 5528 (repealing CAL. GOV'T CODE § 11346.14).

183. CAL. GOV'T CODE § 11415.30 (enacted by Chapter 938); *see id.* (listing as actions the Governor may take: (1) suspending, in whole or in part, any administrative adjudication provision of the Administrative Procedure Act or (2) adopting a rule of procedure which will prevent the loss or delay of the federal funding); *see also id.* § 11415.30(b) (enacted by Chapter 938) (requiring the Governor to rescind any executive order, issued pursuant to California Government Code § 11415.30, when it is no longer necessary to prevent the loss or delay of federal funding or services); *id.* § 11415.30(c) (enacted by Chapter 938) (mandating that the Governor notify the Legislature, promptly, of any suspension of a administrative adjudication provision or the adoption of a rule of procedure and requiring the Governor to provide recommendations regarding legislation which may be necessary to conform the provision with federal law).

184. 1995 Cal. Legis. Serv. ch. 938, sec. 98, at 5598; *see id.* (providing that changes made to California Financial Code §§ 3373, 8054; California Fish and Game Code §§ 202, 355; California Government Code §§ 11340.5, 11342, 11346.2, 11346.6, 11349.9, 11350, 11501, 21758, 68560.5, 11830, 11830.5, 11994, 18930; California Health and Safety Code §§ 39657, 50199.17, 57005; California Labor Code § 6380.5; California Public Resources Code § 4204; and California Welfare and Institutions Code § 11350.6, pursuant to Chapter 938, are operative January 1, 1996).

185. CAL. GOV'T CODE § 14105.41(e) (amended by Chapter 938); 1995 Cal. Legis. Serv. ch. 938, sec. 98, at 5598.

186. CAL. GOV'T CODE § 11400.10(a), (b) (enacted by Chapter 938); 1995 Cal. Legis. Serv. ch. 938, sec. 98, at 5598. *But see id.* § 11400.10(c) (enacted by Chapter 938) (declaring that Chapter 938 does not apply to adjudicative proceedings instituted prior to July 1, 1997, unless the proceeding being conducted is on a remand from another court or agency on or after July 1, 1997).

to govern adjudicative proceedings exist within Chapter 938.¹⁸⁷

VII. CONFORMING PROVISIONS

Chapter 938 makes several technical conforming changes to California law.¹⁸⁸

187. CAL. GOV'T CODE § 11400.20(a) (enacted by Chapter 938); *see id.* § 11400.20(b) (enacted by Chapter 938) (establishing that interim regulations, unless California Government Code § 11351 provides otherwise: (1) need not comply with California Government Code §§ 11346-11349; (2) are governed by California Government Code §§ 11340-11349.11; and (3) expire on December 31, 1998, unless terminated, replaced or readopted as permanent regulations); *id.* § 11400.20(b)(3) (amended by Chapter 938) (subjecting permanent regulations to California Government Code §§ 11340-11349.11). *But see id.* § 11400.20(b)(2) (enacted by Chapter 938) (extending interim regulations until either the date the permanent regulations are filed with the Secretary of State or March 31, 1999, whichever is earlier, so long as an agency has completed necessary proceedings to replace or readopt the interim regulations and submitted the regulations to the Office of Administrative Law on December 31, 1998); *id.* § 11400.20(b)(3) (providing that if an agency submits regulations to the Office of Administrative Law for review prior to December 31, 1998, such regulations are exempted from review for necessity required under California Government Code § 11349.1 or § 11350).

188. Compare 1994 Cal. Legis. Serv. ch. 26, sec. 4, at 148 (amending CAL. BUS. & PROF. CODE § 124); 1985 Cal. Stat. ch. 106, sec. 4, at 254 (amending CAL. BUS. & PROF. CODE § 4160); 1985 Cal. Stat. ch. 394, sec. 1, at 1572-73 (enacting CAL. BUS. & PROF. CODE § 10175.2(b)); 1987 Cal. Stat. ch. 118, sec. 1, at 403 (amending CAL. EDUC. CODE § 232); 1994 Cal. Legis. Serv. ch. 809, sec. 1, at 3447-50 (amending CAL. EDUC. CODE § 94323(e)); 1992 Cal. Legis. Serv. ch. 1302, sec. 5, at 5400 (amending CAL. EVID. CODE § 755.5); 1985 Cal. Stat. ch. 956, sec. 6, at 3034-35 (amending CAL. FIN. CODE § 3373); 1983 Cal. Stat. ch. 1091, sec. 2, at 3953 (amending CAL. FIN. CODE § 8054); 1982 Cal. Stat. ch. 1336, sec. 1, at 4952-53 (amending CAL. FISH & GAME CODE § 202); 1982 Cal. Stat. ch. 1336, sec. 2, at 4953 (amending CAL. FISH & GAME CODE § 355); 1967 Cal. Stat. ch. 1625, sec. 12, at 3893 (amending CAL. GOV'T CODE § 8541); 1983 Cal. Stat. ch. 142, sec. 35, at 342 (amending CAL. GOV'T CODE § 11018); 1993 Cal. Legis. Serv. ch. 1289, sec. 2, at 6075 (enacting CAL. GOV'T CODE § 11125.7(f)); 1994 Cal. Legis. Serv. ch. 1039, sec. 4, at 5251 (enacting CAL. GOV'T CODE § 11340.5(e)(3)); 1993 Cal. Legis. Serv. ch. 1267, sec. 51, at 5996-97 (amending CAL. GOV'T CODE § 11371(d)); 1989 Cal. Stat. ch. 103, sec. 13, at 935-36 (amending CAL. GOV'T CODE § 19582); 1992 Cal. Legis. Serv. ch. 72, sec. 29, at 225 (enacting CAL. GOV'T CODE § 37624.2); 1992 Cal. Legis. Serv. ch. 770, sec. 2, at 3182-83 (amending CAL. GOV'T CODE § 68560.5); 1985 Cal. Stat. ch. 1021, sec. 9, at 3337 (amending CAL. HEALTH & SAFETY CODE § 443.47(d)); 1989 Cal. Stat. ch. 919, sec. 3, at 3193 (amending CAL. HEALTH & SAFETY CODE § 11830.5); 1993 Cal. Legis. Serv. ch. 741, sec. 20, at 3367 (amending and renumbering CAL. HEALTH & SAFETY CODE § 11834.37); 1984 Cal. Stat. ch. 1329, sec. 55, at 4659-60 (enacting CAL. HEALTH & SAFETY CODE § 11994); 1992 Cal. Legis. Serv. ch. 897, sec. 17.5, at 3582-83 (enacting CAL. HEALTH & SAFETY CODE § 18930(a)); 1993 Cal. Legis. Serv. ch. 56, sec. 27, at 734 (amending CAL. HEALTH & SAFETY CODE § 18949.6(c)); 1986 Cal. Stat. ch. 1502, sec. 2, at 5383-85 (amending CAL. HEALTH & SAFETY CODE § 25149(c)); 1989 Cal. Stat. ch. 906, sec. 6, at 3115-16 (amending CAL. HEALTH & SAFETY CODE § 25229(d)); 1990 Cal. Stat. ch. 1366, sec. 22, at 6142-43 (amending and renumbering CAL. HEALTH & SAFETY CODE § 25299.59(a)); 1985 Cal. Stat. ch. 104, sec. 4, at 249 (enacting CAL. HEALTH & SAFETY CODE § 25375.5(a)); 1965 Cal. Stat. ch. 731, sec. 1, at 2136 (enacting CAL. HEALTH & SAFETY CODE § 32154); 1992 Cal. Legis. Serv. ch. 1161, sec. 3, at 4660 (amending CAL. HEALTH & SAFETY CODE § 39657(b)); 1975 Cal. Stat. ch. 957, sec. 12, at 2171 (enacting CAL. HEALTH & SAFETY CODE § 40843); 1990 Cal. Stat. ch. 1349, sec. 1.3, at 5860-61 (amending CAL. HEALTH & SAFETY CODE § 50199.17(b)); 1993 Cal. Legis. Serv. ch. 418, sec. 5, at 1976-78 (enacting CAL. HEALTH & SAFETY CODE § 57005(a), (b)); 1973 Cal. Stat. ch. 993, sec. 29, at 1924 (enacting CAL. LAB. CODE § 146); 1994 Cal. Legis. Serv. ch. 477, sec. 1, at 2194-95 (amending CAL. LAB. CODE § 4600); 1990 Cal. Stat. ch. 1550, sec. 54, at 7293 (enacting CAL. LAB. CODE § 5278); 1993 Cal. Legis. Serv. ch. 121, sec. 65, at 1119-20 (amending CAL. LAB. CODE § 5710); 1993 Cal. Legis. Serv. ch. 121, sec. 65.5, at 1120 (amending CAL. LAB. CODE § 5811(b)); 1980 Cal. Stat. ch. 874, sec. 1, at 2736 (enacting CAL. LAB. CODE § 6380.5); 1974 Cal. Stat. ch. 1284, sec. 20, at 2784 (amending CAL. LAB. CODE § 6603); 1982 Cal. Stat. ch. 806, sec. 3, at 3094-95 (enacting CAL. PUB. RES. CODE § 4204); 1970 Cal. Stat. ch. 797, sec. 2, at 1512 (enacting CAL. REV. & TAX. CODE § 1636); 1985 Cal. Stat. ch. 1566, sec. 2, at 5776 (amending CAL. VEH. CODE § 3066); CAL. WELF. & INST. CODE § 14105.41(a) (West Supp. 1995) (including cross references to California code sections which are made *obsolete* by the provisions of Chapter 938) *with* CAL. BUS. & PROF.

Also, Chapter 938 makes insignificant changes in several sections to clarify meaning.¹⁸⁹

VIII. COMMENT

In 1945, California adopted an Administrative Procedure Act, focused

CODE § 124 (amended by Chapter 938); *id.* § 4160 (amended by Chapter 938); *id.* § 10175.2 (amended by Chapter 938); CAL. EDUC. CODE § 232 (amended by Chapter 938); *id.* § 94323(e) (amended by Chapter 938); CAL. EVID. CODE § 755.5 (amended by Chapter 938); CAL. FIN. CODE § 3373 (amended by Chapter 938); *id.* § 8054 (amended by Chapter 938); CAL. FISH & GAME CODE § 202 (amended by Chapter 938); *id.* § 355 (amended by Chapter 938); CAL. GOV'T CODE § 8541(h) (amended by Chapter 938); *id.* § 11018 (amended by Chapter 938); *id.* § 11125.7(f) (amended by Chapter 938); *id.* § 11340.5(e)(3) (amended by Chapter 938); *id.* § 11371(d) (amended by Chapter 938); *id.* § 19582.5 (amended by Chapter 938); *id.* § 37624.2 (amended by Chapter 938); *id.* § 68560.5 (amended by Chapter 938); CAL. HEALTH & SAFETY CODE § 443.37(d) (amended by Chapter 938); *id.* § 11830.5 (amended by Chapter 938); *id.* § 11834.7(a) (amended by Chapter 938); *id.* § 11994(a) (amended by Chapter 938); *id.* § 18930(a) (amended by Chapter 938); *id.* § 18949.6 (amended by Chapter 938); *id.* § 25149(c) (amended by Chapter 938); *id.* § 25229(d) (amended by Chapter 938); *id.* § 25299.59(a) (amended by Chapter 938); *id.* § 25373.5(a) (amended by Chapter 938); *id.* § 32154 (amended by Chapter 938); *id.* § 39657(b) (amended by Chapter 938); *id.* § 40843 (amended by Chapter 938); *id.* § 50199.17 (amended by Chapter 938); *id.* § 57005 (amended by Chapter 938); CAL. LAB. CODE § 146 (amended by Chapter 938); *id.* § 4600 (amended by Chapter 938); *id.* § 5278(b) (amended by Chapter 938); *id.* § 5710(b)(5) (amended by Chapter 938); *id.* § 5811(b) (amended by Chapter 938); *id.* § 6380.5 (amended by Chapter 938); *id.* § 6603 (amended by Chapter 938); CAL. PUB. RES. CODE § 4204 (amended by Chapter 938); CAL. REV. & TAX. CODE § 1636 (amended by Chapter 938); CAL. VEH. CODE § 3066(a) (amended by Chapter 938) (correcting the cross-reference to reflect the appropriate cross-reference under Chapter 938). Compare 1985 Cal. Stat. ch. 1021, sec. 9, at 3337 (amending CAL. HEALTH & SAFETY CODE § 443.37) (utilizing the term "hearing officer") with CAL. HEALTH & SAFETY CODE § 443.37 (amended by Chapter 938) (replacing, throughout, the term "hearing officer," with "administrative law judge"). Compare 1990 Cal. Stat. ch. 1488, sec. 1.5, at 6900-01 (enacting CAL. HEALTH & SAFETY CODE § 1551.5); 1994 Cal. Legis. Serv. ch. 1267, sec. 4, at 6556 (enacting CAL. HEALTH & SAFETY CODE § 1568.0651(d)); 1990 Cal. Stat. ch. 1488, sec. 2.5, at 6901 (enacting CAL. HEALTH & SAFETY CODE § 1569.515); 1990 Cal. Stat. ch. 1488, sec. 3, at 6901-02 (enacting CAL. HEALTH & SAFETY CODE § 1596.8875); 1994 Cal. Legis. Serv. ch. 1095 sec. 11, at 5414 (enacting CAL. WELF. & INST. CODE § 4689.5) (noting that, notwithstanding California Government Code § 11510, witnesses subpoenaed for a hearing and who attend the hearing are entitled to payment for witness fees and mileage provided for in California Government Code § 68093) with CAL. HEALTH & SAFETY CODE § 1551.5 (amended by Chapter 938); *id.* § 1568.065(d) (amended by Chapter 938); *id.* § 1569.515 (amended by Chapter 938); *id.* § 1596.8875 (amended by Chapter 938); CAL. WELF. & INST. CODE § 4689.5 (amended by Chapter 938) (deleting the provisions regarding the applicability of California Government Code §§ 11520 and 68093 as § 11520 is repealed by Chapter 938 and § 68093 refers to the payment of witness fees and mileage in civil suits and adding that witness fees and mileage are determined by California Government Code § 11450.40 under Chapter 938).

189. Compare 1985 Cal. Stat. ch. 106, sec. 4, at 254 (amending CAL. BUS. & PROF. CODE § 4160(b)); 1994 Cal. Legis. Serv. ch. 870, sec. 2, at 3748-49 (amending CAL. GOV'T CODE § 11342(h)(2)); 1994 Cal. Legis. Serv. ch. 1039, sec. 23, at 5256-57 (enacting CAL. GOV'T CODE § 11346.2(c)); 1994 Cal. Legis. Serv. ch. 1039, sec. 41, at 5264-65 (amending CAL. GOV'T CODE § 11349.5); 1994 Cal. Legis. Serv. ch. 1039, sec. 49, at 5628 (enacting CAL. GOV'T CODE § 11350(a)); 1986 Cal. Stat. ch. 597, sec. 3 (amending CAL. GOV'T CODE § 11523); 1985 Cal. Stat. ch. 324, sec. 24, at 1440 (amending CAL. GOV'T CODE § 11524(a)); 1993 Cal. Legis. Serv. ch. 1267, sec. 54, at 5997-98 (amending CAL. GOV'T CODE § 11529(e), (f)); 1993 Cal. Legis. Serv. ch. 418, sec. 5, at 1978 (enacting CAL. HEALTH & SAFETY CODE § 57005) with CAL. BUS. & PROF. CODE § 4160(b) (amended by Chapter 938); CAL. GOV'T CODE § 11342(h)(2) (amended by Chapter 938); *id.* § 11346.2(c) (amended by Chapter 938); *id.* § 11349.5(f) (amended by Chapter 938); *id.* § 11350(a) (amended by Chapter 938); *id.* § 11524(a) (amended by Chapter 938); *id.* § 11523 (amended by Chapter 938); *id.* § 11529(e), (f) (amended by Chapter 938); CAL. HEALTH & SAFETY CODE § 57005 (amended by Chapter 938).

exclusively on a formal hearing process.¹⁹⁰ In 1987, the California Legislature directed the California Law Revision Commission to study whether changes were necessary in the area of administrative law.¹⁹¹ Recognizing the evolution of the administrative adjudication process over the past fifty years, and the need for reform, the California Law Revision Commission recommended revisions to the Administrative Procedure Act, including: expanding the forums in which adjudications can occur, establishing an Administrative Adjudication “Bill of Rights,” providing for hearings via telephone or other electronic means, and modernizing other hearing practices.¹⁹²

Chapter 938 provides for adjudication in a variety of fora, in addition to the formal hearing process, such as alternative dispute resolution, informal hearings, the opportunity for declaratory or emergency decisions, and the possibility of converting a proceeding into a different proceeding after commencement.¹⁹³ Additionally, by enacting the Administrative Adjudication Bill of Rights, state agencies must comply with due process requirements.¹⁹⁴

Finally, Chapter 938 reflects the development of technology in the electronic media by allowing hearings via telephone and by permitting board members to vote by means other than in person and by mail.¹⁹⁵

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190. 1945 Cal. Stat. ch. 867, at 1626; *Administrative Adjudication by State Agencies*, 25 CAL. L. REVISION COMM’N REP. 78 (1995); *see id.* (recognizing that the 1945 California Administrative Procedure Act set forth a single, inflexible formal hearing structure).

191. SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 523, at 3 (Apr. 4, 1995).

192. *See generally* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067 (1992) (arguing that the 1945 California Administrative Procedure Act is obsolete and discussing proposed revisions); *Administrative Adjudication by State Agencies*, 25 CAL. L. REVISION COMM’N REP. 55 (1995) (discussing the rationale supporting the revisions proposed by the California Law Revision Commission); *Farmers Insurance Responds to California Department of Insurance Decisions Approving Earthquake Rating Plan*, BUSINESS WIRE, June 7, 1995 (declaring that the Department of Insurance administrative hearing process needs reform); Mark Thompson, *No Revolution: Agency Narrows Proposal for Overhauling Administrative Law*, L.A. DAILY J., Nov. 17, 1994, at 1 (quoting Michael Asimow as stating that many of the regulations are in need of revision because they are “incomplete, outmoded, or inaccurate descriptions of existing practice”).

193. *Administrative Adjudication by State Agencies*, 25 CAL. L. REVISION COMM’N REP. 82 (1995).

194. *Id.* at 81; *see Asimow, supra* note 192 at 338-39 (comparing the requirements of due process under federal and state law and noting that procedural due process guarantees adequate notice, hearing and an unbiased decision maker).

195. *Administrative Adjudication by State Agencies*, 25 CAL. L. REVISION COMM’N REP. 107 (1995).

Public Entities, Officers, and Employees; county ordinances

Government Code § 25124 (amended).
AB 390 (House); 1995 STAT. Ch. 23

Existing law specifies the manner of publication or posting of ordinances or summaries that the county board of supervisors¹ enacts or amends.² Furthermore, existing law imposes various duties upon the county clerk³ regarding ordinances.⁴

Chapter 23 instructs that any exhibit, except for maps, attached to and referenced in the ordinance does not need to be published in its entirety if the publication lists the exhibits and includes an indication that a complete copy of

1. See CAL. GOV'T CODE § 25000 (West 1988) (declaring that each county must have a board of supervisors consisting of five members); see also *Johnston v. Marin County Bd. of Supervisors*, 31 Cal. 2d 66, 74, 187 P.2d 686, 691 (1947) (finding that the county board of supervisors may conduct administrative functions as well as legislative functions).

2. CAL. GOV'T CODE § 25124(a), (b) (amended by Chapter 23); see *id.* § 25124(a) (amended by Chapter 23) (providing that an ordinance must be published once before the conclusion of 15 days after passage in a newspaper published in the county, or posted in a prominent location at the board of supervisors' chambers if there is no newspaper published); *id.* § 25124(b)(1) (amended by Chapter 23) (permitting the county board of supervisors to publish a summary of a proposed enactment or amendment of an ordinance, and requiring the county board to publish a summary of the ordinance within 15 days after the adoption); *id.* § 25124(b)(2) (amended by Chapter 23) (requiring a display advertisement no smaller than a quarter-page in a newspaper circulated within the county at least five days before the county board meets if there is no other feasible way to prepare a fair and adequate summary of the proposed ordinance); *id.* (mandating that within 15 days after the ordinance's enactment the display advertisement indicating the nature of, and information regarding, the ordinance, including information to enable the public to obtain copies or the complete text); cf. COLO. REV. STAT. § 30-15-405(1) (1986) (requiring publication of an ordinance in a newspaper, or posting of the ordinance in three public places designated by the board if there is no newspaper published or generally circulated in the county); ILL. ANN. STAT. ch. 55, para. 5/5-11003 (Smith-Hurd 1993) (mandating that the ordinance be published once in a newspaper, which has a general circulation in the county, or in at least five public places if there is no newspaper, and that the ordinance will become effective 10 days after publication); MINN. STAT. ANN. § 375.51(3) (West 1989) (requiring publication of an ordinance in an official county newspaper at least once).

3. See CAL. GOV'T CODE § 25100 (West 1988) (providing that the county clerk is ex officio clerk of the board of supervisors); see also *id.* § 25100.5 (West 1988) (permitting the board of supervisors to establish an ordinance allowing the appointment of the county clerk as other county officers are appointed, and specifying that these clerks are not considered as ex officio clerks of the board); *id.* § 25101 (West 1988) (declaring that the duties of the county clerk include, but are not limited to, maintaining the minutes and the records of the board, and filing and preserving, or disposing of, all petitions, applications and other papers and records).

4. *Id.* § 25124(b)(1) (amended by Chapter 23); see *id.* § 25101(e) (West 1988) (establishing that the clerk shall authenticate the enactment of the ordinance with his or her signature, provide the seal of the board, and file each ordinance passed by the board of supervisors with the county clerk's office); *id.* § 25124(b)(1) (amended by Chapter 23) (mandating that the full text of the proposed ordinance or amendment be posted with the clerk's office within five days of the next board meeting); *id.* (requiring the clerk to post in his or her office a certified copy of the full text of the adopted ordinance or amendment within 15 days of adopting the ordinance); cf. ILL. ANN. STAT. ch. 55, para. 5/5-29005 (Smith-Hurd 1993) (setting forth the duty of the county clerk to record all ordinances passed, to produce a memorandum denoting the date of passage, the date of publication, and the date of posting). See generally Ana K. Ramares, Annotation, *Application of Requirements that a Newspaper Be Locally Published for Official Notice Publication*, 84 A.L.R. 4TH 581 (1991 & Supp. 1994) (discussing the requirements held by localities with respect to publishing or posting local ordinances).

each exhibit is on file with the clerk and available as a public record.⁵

COMMENT

Because most complicated development projects contain many attached exhibits, the bulk of the cost for full publication is due to such attachments.⁶ Although publication of these documents is a convenience to the public, it is burdensome to smaller counties.⁷ Thus, the intent of Chapter 23 is to provide counties the ability to save publishing costs of lengthy exhibits, which are attached to county zoning ordinances.⁸ In addition, because the ordinances may be lengthy and the newspaper type size are small, some publications may lose their impact.⁹

Although counties are interested in saving money, Chapter 23 does reduce the level of services to the public.¹⁰ However, each county still retains the discretion as to what extent the county wishes to limit its publishing requirements.¹¹

5. CAL. GOV'T CODE § 25124(a) (amended by Chapter 23); *see id.* § 6250 (West 1995) (declaring that access to information concerning the conduct of local government business, mindful of a person's right to privacy, is a fundamental and necessary right of every person); *cf.* MINN. STAT. ANN. § 375.51(3) (West 1989) (excepting from the publication requirement lengthy ordinances or ordinances which includes charts or maps, and allowing a summary of such ordinances that includes a notice that a printed copy is available for inspection by the public).

6. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 390, at 2 (June 1, 1995); *see* SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 390, at 2 (May 17, 1995) (noting that in Madera County, there are approximately 100 zoning or rezoning actions involving development projects where there are various memoranda and documents that detail conditions for the development included as part and parcel of the ordinance); *see also* Letter from Carolyn McIntyre, Legislative Representative, California State Association of Counties, to Assemblymember George House (May 15, 1995) (copy on file with the *Pacific Law Journal*) (indicating that some ordinances can sometimes have a great number of attached exhibits, especially those ordinances that relate to developments and other complicated projects).

7. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF AB 390, at 2 (May 17, 1995); *see* Letter from Carolyn McIntyre, *supra* note 6 (noting that ordinances with extensive attachments are costly and cumbersome to publish).

8. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 390, at 1 (May 25, 1995); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 390, at 1 (June 1, 1995) (noting that all counties will receive a small savings through the reduction of costs and staff time); *id.* (estimating that AB 390 will provide a savings of \$12,900 per county); Letter from Kathleen Moran, County Clerk and Ex-Officio Clerk of the Board of Supervisors, to Assemblymember Richard K. Rainey (Mar. 27, 1995) (copy on file with the *Pacific Law Journal*) (suggesting that AB 390 could save the county money that could be used for more vital purposes); *see also* Letter from Ted Lember, President of the San Mateo County Board of Supervisors, to Assemblymember George House (Apr. 4, 1995) (copy on file with the *Pacific Law Journal*) (contending that AB 390 will reduce publication costs of ordinances); Letter from John V. Montero, Legislative Representative, to Diane Longshore, Chief Consultant, Assembly Local Government (Mar. 14, 1995) (copy on file with the *Pacific Law Journal*) (estimating that the savings per county will be \$12,900, and that the average cost per large ad is \$1100); Memorandum from John V. Montero, Legislative Representative, to Diane Longshore, Chief Consultant, Assembly Local Government (Mar. 13, 1995) (copy on file with the *Pacific Law Journal*) (suggesting that a large advertisement may cost \$1900 to run in the San Diego Union-Tribune).

9. FLOOR ALERT, ANALYSIS OF AB 390 (May 31, 1995) (copy on file with the *Pacific Law Journal*).

10. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 390, at 2 (Mar. 29, 1995).

11. *Id.*; *see id.* (determining that counties need not publish the entire ordinance when the exhibit exceeded three pages).

Furthermore, Chapter 23 still provides the public adequate notice regarding the contents of the ordinance.¹²

Chad D. Bernard

Public Entities, Officers, and Employees; local agencies—utility charge liens

Government Code § 43008 (new).

AB 486 (Goldsmith); 1995 STAT. Ch. 604

Existing law provides that a local agency may, by resolution or ordinance, provide for the attachment of a lien¹ on a parcel of property in the amount of the delinquent charges due on the property, plus any interest and penalties that may have accrued.² Such a lien acquires the attributes of a judgment lien.³

Chapter 604 provides that a lien on real property resulting from unpaid water or other utility bills, from services supplied by a city and/or county⁴ to the owners or occupants of real property, is subordinate to any prior recorded lien on the property.⁵

12. FLOOR ALERT, ANALYSIS OF AB 390 (May 31, 1995) (copy on file with the *Pacific Law Journal*); see also Letter from Kathleen Moran, *supra* note 8 (noting that provisions of AB 390 meet the public's need and right to know those actions taken by local government); see also Letter from Joanne Sturges, Co-Chair, Clerks of the Board of Supervisors, to Governor Pete Wilson (June 8, 1995) (copy on file with the *Pacific Law Journal*) (indicating that AB 390 continues to safeguard the public's access to vital information); Letter from Lonna B. Smith, Clerk of the Board of Supervisors, to Assemblymember Richard K. Rainey, Chair, Assembly Committee on Local Government (Mar. 23 1995) (copy on file with the *Pacific Law Journal*) (asserting that AB 390 still preserves the public's access to information).

1. See CAL. CIV. PROC. CODE § 1180 (West Supp. 1995) (defining "lien" as a charge placed upon a parcel of property in order to ensure the performance of an act).

2. CAL. GOV'T CODE § 54984.9(a) (West Supp. 1995); see *id.* (stating that the delinquent charges, together with interest and penalties, will become a lien on the property upon the filing of a certificate in the office of the county recorder, pursuant to specified procedures); *id.* § 54984.9(b) (West Supp. 1995) (providing that a lien will attach on certain property when the district files a certificate in the office of the county recorder that specifies the following: (a) the amount of delinquent charges along with any accrued interest and fees; (b) the assessor's parcel number; and (c) a legal description of the property); see also *Friedman v. District of Columbia*, 172 A.2d 562, 563 (D.C. 1961) (stating that arrearage for water rents incurred by a former owner cannot be enforced against a subsequent owner in the absence of a statute authorizing such charges to become a lien on the property); *Rockford Sav. & Loan Ass'n v. City of Rockford*, 185 N.E. 623, 626-27 (Ill. 1933) (declaring that water liens are not enforceable against a foreclosing lender without notice that there was any default in the payment of water rent). See generally C.C. Marvel, Annotation, *Liability of Premises, or Their Owner or Occupant, for Electricity, Gas, or Water Charges, Irrespective of Who Is the User*, 19 A.L.R. 3d 1227 (1968) (discussing cases that consider the liability of the owner or occupant for charges incurred for certain utilities regardless of who was the user).

3. CAL. GOV'T CODE § 54984.9(a) (West Supp. 1995).

4. See *id.* § 53368 (West Supp. 1995) (defining "city" as any city, including a chartered city, and defining "county" as any county of the state).

5. *Id.* § 43008 (enacted by Chapter 604); see *id.* (stating that a lien to discharge bonded indebtedness is not subject to the restrictions of this chapter).

COMMENT

Ordinances creating super-priority utility liens⁶ were enacted, in some cities, to combat "slumlords" who failed to pay the water bills that had accrued on their master-metered⁷ apartment buildings. ⁸Such super-priority utility liens grant utility liens the same status typically reserved for real property taxes, thereby enabling all utility liens to take precedence over other prior recorded liens.⁹ Although in theory these ordinances were initially designed to be enforced against the owners of apartment buildings to compel them to pay their delinquent utility bills, in practice they have had greater impact on lenders.¹⁰

Chapter 604 was enacted largely in response to complaints made by lenders that super-priority utility liens unfairly singled them out as "deep pockets," requiring them to pay hundreds of thousands of dollars in accrued utility bills.¹¹ These complaints mounted since the decline in property values often left lenders under-secured after paying off the large utility bills that had become due on properties.¹²

6. See Thomas E. McCurnin, *Don't Lien on Me*, L.A. LAW., Feb. 1995, at 38 (stating that super-priority utility liens are liens that, once recorded, automatically jump into first position, thereby superseding all prior recorded liens).

7. See Letter from Connie Barker, Director of Government Relations, Association of California Water Agencies, to Assemblymember Jan Goldsmith (Apr. 12, 1995) (copy on file with the *Pacific Law Journal*) (explaining that in Los Angeles and other cities, buildings are "master-metered," meaning that the utility creates a master account for the entire complex, thereby requiring tenants to pay for utilities as part of their rent).

8. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 486, at 1 (May 11, 1995); see McCurnin, *supra* note 6 (stating that the Los Angeles Department of Water and Power believes that apartment owners would keep their utility bills current if faced with the threat of a super-priority lien); Alan Silverstein, *Why Give So Much Power to Public Utilities Firms?*, TORONTO STAR, Feb. 5, 1994, at F2 (describing the consequences of a Toronto law that enabled unpaid utility charges to become a special lien on the property that was enforceable against subsequent owners of the property).

9. McCurnin, *supra* note 6; see *id.* (providing a portion of a Los Angeles super-priority utility lien). See generally 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property Law* § 48 (9th ed. 1987) (reporting that tax liens are generally given priority over prior recorded mortgages or other private recorded liens).

10. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 486, at 2 (May 11, 1995).

11. McCurnin, *supra* note 6.

12. Letter from Linda J. Gwyn, Vice President and Director, Great Western Financial Corporation, to Assemblymember Jan Goldsmith (May 9, 1995) (copy on file with the *Pacific Law Journal*); see *id.* (explaining that where large water bills have accrued, a foreclosing lender may find himself or herself undersecured); *id.* (declaring that a foreclosing lender bears the brunt of the burden due to the fact that California's anti-deficiency statutes prevent the lender from suing the borrower for the deficiency); Letter from Edward Levy, Senior Vice-President, Legislative Counsel, Western League of Savings Institutions, to Assemblymember Jan Goldsmith (May 8, 1995) (copy on file with the *Pacific Law Journal*) (stating that in some cases over \$300,000 in unpaid water bills had accrued, seriously jeopardizing the security interest of lenders with recorded deeds); Letter from Craig C. Page, Vice President and Legislative Counsel, California Land Title Association, to Assemblymember Jan Goldsmith (Apr. 24, 1995) (copy on file with the *Pacific Law Journal*) (noting that in Los Angeles County lenders are forced to pay liens as high as \$357,704); *id.* (arguing that the lender is powerless to avoid the accumulation of such delinquencies and the attachment of liens because the assessments occur after a lender has approved a loan).

Chapter 604 aims to protect a lender's security interest by subjecting city-owned utilities to the "first in time, first in line" theory of lien recordation.¹³ Proponents of Chapter 604 contend that city utilities should build a reserve into the rates so that the loss incurred by utilities from unpaid utility bills is spread evenly among ratepayers.¹⁴

Opponents of Chapter 604, however, argue that in the absence of super-priority utility liens, city-owned utilities will revert to a policy of shutting off the utilities of innocent low-income tenants.¹⁵ Moreover, opponents contend that lenders could protect themselves by investigating a prospective borrower's past history of paying utility bills before approving a loan.¹⁶

Laura K. O'Connor

Public Entities, Officers, and Employees; membership on governing board

Government Code §§ 53227, 53227.1, 53227.2 (new).
AB 236 (Granlund); 1995 STAT. Ch. 237

Existing law establishes the requirements for serving as a member of the

13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 486, at 2 (May 11, 1995); *see id.* (stating that the "first in time, first in line" system of recording provides that judgment liens be paid in the order that they are recorded); *cf.* CAL. CIV. CODE § 1213 (West Supp. 1995) (stating that certain recorded conveyances are sufficient to provide constructive notice to subsequent purchasers or mortgagees of the contents thereof); *id.* § 1214 (West Supp. 1995) (stating that all unrecorded conveyances are void against the claim of a subsequent purchaser, whose conveyance is first duly recorded).

14. Letter from Linda J. Gwyn, *supra* note 12, at 2; *see id.* (stating that utility companies have more options for dealing with delinquencies than lenders); Letter from Edward Levy, *supra* note 12 (maintaining that the Department of Water and Power should be compelled to exercise the processes frequently employed by other cities, such as obtaining letters of credit or security for the payment of service); Letter from Craig C. Page, *supra* note 12 (arguing that the cities and counties must take responsibility for the collection of unpaid utility bills rather than placing the entire burden on the shoulders of lenders).

15. Victor Merina, *Tax Liens for Unpaid DWP Bills Backed*, L.A. TIMES, Dec. 11, 1986, at 1; *see id.* (declaring that a policy implementing super-priority utility liens would be an attractive alternative to the practice frequently employed by utility companies of terminating water or electrical service in master-metered apartments in response to a landlord's failure to pay utility bills); Letter from Christine Minnehan and Roderick Field, Western Center on Law and Poverty, Inc., to Members of the Assembly (May 10, 1995) (copy on file with the *Pacific Law Journal*) (stating that prior to the enactment of priority lien ordinances, low-income tenants and their children were deprived of basic utility services through no fault of their own); *id.* (stating that the termination of services creates a health risk to tenants and their children).

16. Letter from Norman D. Boyer, Chief Legislative Representative, City of Los Angeles, Office of the Chief Legislative Analyst, to Assemblymember Jan Goldsmith (Apr. 27, 1995) (copy on file with the *Pacific Law Journal*); *see id.* (stating that the abolishment of priority utility liens will encourage poor portfolio management and careless lending practices); Letter from Ernest Silva, Legislative Representative, League of California Cities, to Assemblymember Jan Goldsmith (May 1, 1995) (copy on file with the *Pacific Law Journal*) (arguing that lenders have the means to review municipal records, thereby ascertaining the extent to which a particular property is likely to accumulate delinquent utility charges).

legislative body of a local agency.¹

Existing law provides that an employee of a community college district or school district cannot serve as an elected or appointed member of his or her district's governing board.² If an individual does not resign upon being sworn into office, the individual's employment with the community college district or school district will automatically terminate.³

Chapter 237 expands existing law by mandating that an employee of a local agency⁴ will not be sworn into office as either an elected or appointed member of the legislative body⁵ of that local agency unless the employee resigns.⁶ Chapter 237 stipulates that if an employee does not resign, employment is automatically terminated upon being sworn into office.⁷

For individuals who are employees of a local agency and who were elected and appointed members of that local agency's legislative body, prior to January 1, 1996, the provisions of Chapter 237 apply upon the individuals' reelection or reappointment to the local agency's legislative body.⁸

Chapter 237 exempts from its provisions volunteer firefighters who do not receive a salary.⁹

1. See, e.g., CAL. GOV'T CODE § 25041 (West 1988) (listing the requirements to be a member of the board of supervisors for a county; for example, one must be a registered voter of the district for 30 days prior to filing and reside within the district during incumbency); *id.* § 34882 (West Supp. 1995) (providing that a person may not hold office as a member of a municipal legislative body unless the person is otherwise qualified, resides in the district, and is a registered voter); *id.* § 36502 (West Supp. 1995) (noting that in order to be a council member, a person must be an elector of the city and a registered voter of the city at the time of filing nomination papers).

2. CAL. EDUC. CODE § 35107 (West 1993); *id.* § 72103(b) (West Supp. 1995); see CAL. GOV'T CODE § 53227.1 (enacted by Chapter 237) (providing that California Government Code §§ 53227-53227.2 do not preempt California Education Code §§ 35107 and 72103).

3. CAL. EDUC. CODE § 35107(b) (West 1993); *id.* § 72103(b) (West Supp. 1995).

4. See CAL. GOV'T CODE § 53227.2(a) (enacted by Chapter 237) (defining "local agency" as either a city, a city and county, a district, a municipal or public corporation, political subdivision, or other public agency of the state).

5. See *id.* § 53227.2(b) (enacted by Chapter 237) (defining "legislative body" as any of the following: (1) the city or county board of supervisors of either a city or county; (2) the city council; or (3) the governing body of a district, municipal or public corporation, political subdivision, or other public agency of the state).

6. *Id.* § 53227 (enacted by Chapter 237); cf. FLA. STAT. ANN. § 112.313(10)(a) (West 1992 & Supp. 1995) (prohibiting an employee of a state agency, county, municipality, special taxing district, or political subdivision from also holding office as a member of the governing board of the individual's employer); GA. CODE ANN. § 45-10-23 (Michie 1990) (prohibiting a full time employee from transacting with the employee's employing agency regarding matters in which the employee possesses a substantial interest).

7. CAL. GOV'T CODE § 53227(a) (enacted by Chapter 237).

8. *Id.* § 53227(b) (enacted by Chapter 237). But see Fair Oaks Water District Res. 9513, June 17, 1995 (urging that California Government Code § 53227(b) be deleted from AB 236 because its enactment would require a currently serving and valuable member of the Fair Oaks Water District governing board to resign his or her employment if reelected after January 1, 1996).

9. CAL. GOV'T CODE § 53227(c) (enacted by Chapter 237). But see ASSEMBLY FLOOR, ANALYSIS OF AB 236, at 2 (July 15, 1995) (noting that the express exemption for volunteer firefighters appears to be unnecessary as AB 236 applies only to employees, not volunteers).

COMMENT

Chapter 237 was enacted to prevent potential conflicts of interest that might arise when a person is both an employee of a local agency and a member of that agency's legislative body.¹⁰

In addition, the prohibition of serving as both an employee and as a member of a legislative body will likely result in a reduction of deadlocked legislative bodies that occur when members must abstain from voting because of possible conflicts of interest.¹¹

Critics, however, note that Chapter 237 fails to expressly address what happens when a member of a legislative body later accepts employment with the local agency.¹²

Pamela J. Keeler

Public Entities, Officers, and Employees; on-site investigation of service district violations

Government Code § 61612.5 (new); Public Utilities Code § 16472.5 (amended); Water Code §§ 31016, 35413, 71601 (new).
AB 376 (Bustamante); 1995 STAT. Ch. 798

Existing law permits creation and sets forth the powers of public utility districts,¹ community service districts,² county water districts,³ municipal water

10. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 236, at 2 (May 18, 1995); *see id.* (quoting the sponsor of AB 236, Assemblymember Granlund, as stating that the intent of AB 236 is to "prevent public agency officials from making their own decisions regarding their own pay raises, staffing, and disputes"); Letter from Barbara Glaser, Legislative Advocate, Association of California Hospital Districts, to Pete Wilson, Governor, State of California (July 24, 1995) (copy on file with the *Pacific Law Journal*) (recognizing that AB 236 will avoid conflicts of interests which necessarily arise when an employee also serves on the body that determines that employee's wages and benefits). *See generally*, 63A AM. JUR. 2D *Public Officers and Employees* § 322 (1984 & Supp. 1994) (discussing the ethical considerations in being an administrative official); 67 C.J.S. *Officers* § 204 (1978) (discussing the threat of potential conflict of interests when an officer possesses an individual or personal interest).

11. SENATE COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 236 at 2 (Jun. 21, 1995); Letter from Barbara Glaser, *supra* note 10.

12. SENATE COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 236, at 2 (July 5, 1995).

1. *See* CAL. PUB. UTIL. CODE §§ 15501-18055 (West 1994 & Supp. 1995) (creating and setting forth regulations for public utility districts). *See generally* 39 CAL. JUR. 3D *Public Utilities* §§ 122, 131-37 (1995) (describing the establishment and powers of public utility districts).

2. *See* CAL. GOV'T CODE §§ 25210.1-25211.33, 61600 (West 1988 & Supp. 1995) (creating and setting forth regulations for community service districts); *id.* § 25210.4 (West 1988) (authorizing creation of community service areas to provide the following: (1) extended police protection; (2) structural fire protection; (3) local park, recreation, or parkway facilities and services; (4) any other governmental services the law allows

districts,⁴ and California water districts.⁵ Existing law further provides that counties and cities, under their police powers, may create and enforce local, police, sanitary, and other ordinances and regulations not in conflict with general laws and within their jurisdictional limits.⁶

Chapter 798 grants the aforementioned districts permission, upon consent of the owner or tenant or upon issuance of a probable cause inspection warrant,⁷ to

counties to perform and which the county does not provide in a uniform manner on a county-wide basis; (5) extended library facilities and services; (6) under certain circumstances, television translator station facilities and services; and (7) low-power television services); *see also id.* § 25210.1 (West 1988) (declaring the Legislature's belief that the large growth of California's unincorporated county areas necessitates the provision of extended governmental services to these areas); *id.* (indicating the Legislature's intent that an alternative method for acquiring extended governmental services be provided to residents and property owners in unincorporated county areas); *City of Santa Barbara v. Santa Barbara County*, 94 Cal. App. 3d 277, 282-83, 287, 156 Cal. Rptr. 320, 323, 325-26 (1979) (delineating the proceedings necessary to establish a community service area); *id.* (recognizing that community service areas were established to prevent inequities with regard to provision of municipal services); *id.* (stating actual establishment of such an area is based on a factual determination of need for extended governmental services, not on the existence of sufficient tax revenues to fund the area); Cary B. Lerman, *Ad Valorem Financing of Law Enforcement Services: An Equitable Solution for an Inequitable Condition*, 19 UCLA L. REV. 59, 95 (1971) (concluding that taxing practices permit inequitable subsidization of unincorporated county areas by incorporated areas, because these practices allow an incorporated area's tax funds to be used for an unincorporated area's law enforcement services); *cf.* 77 Op. Cal. Att'y Gen. 197, 198 (1994) (prescribing that county service areas may be continued in areas annexed by a city if discontinuation dispossesses residents of needed services); Tom Furlong, *The Inland Migration; Development: The Search for Affordable Housing is Fueling Building Booms in Rural Areas*, L.A. TIMES, Feb. 11, 1990, at D1 (detailing the need for government services in rural and unincorporated areas due to increased growth in these areas caused by people's search for affordable housing). *But see* 57 Op. Cal. Att'y Gen. 423, 424 (1974) (specifying that community service area establishment is prohibited in unincorporated areas around cities in county service areas when establishment is utilized to defray costs of county planning department and commission). *See generally* 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 226 (1971) (recognizing that municipalities gain their powers from the Legislature and that these powers include all incidental powers necessary to carry their objects into effect within the law).

3. *See* CAL. WATER CODE §§ 30000-33901 (West 1984 & Supp. 1995) (creating and setting forth regulations for county water districts). *See generally* 52 CAL. JUR. 2D *Waters* § 875 (1980) (explaining the formation and powers of county water districts).

4. *See* CAL. WATER CODE §§ 71000-73001 (West 1966 & Supp. 1995) (creating and setting forth regulations for municipal water districts); *see also* *Henshaw v. Foster*, 176 Cal. 507, 508-16, 169 P. 82, 83-86 (1917) (affirming the constitutionality of municipal water district formation); *Yribarne v. County of San Bernardino*, 218 Cal. App. 2d 369, 372-74, 32 Cal. Rptr. 847, 848-49 (1963) (upholding the constitutionality of the Municipal Water District Act of 1911). *See generally* 52 CAL. JUR. 2D *Waters* § 868 (1980) (describing the formation and powers of water districts).

5. *See* CAL. WATER CODE §§ 34000-38501 (West 1984 & Supp. 1995) (creating and setting forth regulations for California water districts). *See generally* 52 CAL. JUR. 2D *Waters* § 868 (1980) (describing the formation and powers of water districts).

6. CAL. CONST. art. XI, § 7; *see* *Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 491-93, 683 P.2d 1150, 1159-61, 204 Cal. Rptr. 897, 906-08 (1984) (finding counties' powers to make local, police, and sanitary ordinances are as broad as the Legislature's so long as the ordinances do not conflict with the Constitution or other general laws); *Barry v. City of Oceanside*, 107 Cal. App. 3d 257, 261, 165 Cal. Rptr. 697, 699 (1980) (stating that municipalities have broad powers to enact ordinances which should be upheld if reasonably related to promoting health, safety, comfort, and welfare and if the means are reasonably appropriate to the purpose).

7. *See* CAL. CIV. PROC. CODE § 1822.50 (West Supp. 1995) (defining an "inspection warrant" as a written order, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding the official to conduct any inspection allowed pursuant to state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning); *id.* § 1822.51 (West Supp. 1995) (mandating that an inspection warrant be supported by an affidavit containing the following: (1) a particular

enter private property to investigate possible ordinance violations.⁸

Additionally, Chapter 798 mandates that water districts notify, within a reasonable time, appropriate county or city officials of actual ordinance violations discovered during the investigations.⁹

description of the place, dwelling, structure, premises, or vehicle to be inspected; (2) a particular description of the purpose of the inspection; and (3) either a statement that consent to inspect was refused, or that circumstances reasonably justify the failure to seek consent); *id.* (recognizing that probable cause is not generally required for state or local inspection warrants, unless mandated by state law, and noting the lesser standard of cause is used for issuance of these warrants); BLACK'S LAW DICTIONARY 1201 (6th ed. 1990) (defining "probable cause" as "a reasonable ground for belief in certain alleged facts . . . more than mere suspicion"); *see also* CAL. CONST. art. I, § 13 (declaring that the people have a right to be free from unreasonable seizures and searches, so they may be secure in their persons, houses, papers, and effects); *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) (indicating that the object of a search determines the type of warrant required); *People v. Lepeilbet*, 4 Cal. App. 4th 1208, 1213, 6 Cal. Rptr. 2d 371, 373 (1992) (explaining that statutory violations of warrant procedures do not call for exclusion of evidence, if the search is constitutionally reasonable); *id.* at 1214, 6 Cal. Rptr. 2d at 374 (specifying that a constitutionally reasonable inspection warrant (1) must be issued by a judicial officer, (2) must be based on reasonable legislative or administrative standards, and (3) usually requires a refusal of entry unless a citizen has complained, or a satisfactory reason exists for immediate entry); *id.* (emphasizing that the Fourth Amendment of the Constitution places few limitations on administrative actions for inspections); *id.* (prescribing that the determination of constitutional reasonableness requires balancing the need to search against the invasive nature of the search); *id.* at 1214-15, 6 Cal. Rptr. 2d at 374 (affirming that the government's interest in inspecting for violations of public health and safety standards is significant, and that such inspections are a limited invasion of privacy); *Vidauri v. Superior Court of San Diego City*, 13 Cal. App. 3d 550, 553, 91 Cal. Rptr. 704, 706 (1970) (ruling that a statute which allowed inspections without a warrant would be unconstitutional); *id.* (holding that evidence found during a search was inadmissible, because the evidence was obtained by police officers who had entered the premises, without a warrant, based on information from an agricultural inspection performed without a warrant); *id.* (declaring that a person who has fenced his yard or limited entry with a gate, whether locked or unlocked, has a reasonable expectation of privacy from warrantless search or government intrusion in that area); *id.* (recognizing that circumstances may excuse the warrant requirement); Yale Kamisar, *When 'Strict Construction' Becomes Loosey-Goosey*, L.A. TIMES, Sept. 12, 1990, at B7 (reporting that during the past 25 years, the Supreme Court has interpreted the Fourth Amendment of the Constitution as a flexible standard permitting the balancing of governmental and individual interests when determining the permissibility of administrative searches or inspections); *cf.* CAL. PENAL CODE § 1523 (West 1982) (defining a "search warrant" as a written order, in the name of the people, signed by a magistrate, directed to a peace-officer, commanding the officer to search for personal property and bring it before the magistrate); *id.* § 1525 (West Supp. 1995) (providing a search warrant will not be issued unless probable cause is shown by affidavit which includes the name or description of the person and particularly describes the property and place to be searched); *People v. Barthel*, 231 Cal. App. 2d 827, 830, 42 Cal. Rptr. 290, 292 (1965) (finding that federal standards must be applied by state courts when determining sufficiency of affidavits for search warrants); 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* §§ 2429, 2443, 2446 (2d ed. 1989 & Supp. 1995) (discussing the constitutional and statutory requirements for search warrants and the affidavits necessary for their issuance). *See generally id.* §§ 2316-2318 (2d ed. 1989 & Supp. 1995) (describing the purpose of inspection warrants, grounds for their issuance, and procedures for their issuance).

8. CAL. GOV'T CODE § 61612.5 (enacted by Chapter 798); CAL. PUB. UTIL. CODE § 16472.5(b) (amended by Chapter 798); CAL. WATER CODE §§ 31016(b), 35413(b), 71601(b) (enacted by Chapter 798).

9. CAL. WATER CODE §§ 31016(c), 35413(c), 71601(c) (enacted by Chapter 798); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 376, at 2 (May 18, 1995) (warning of possible criminal prosecutions resulting from routine investigations); *see also* ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 3706, at 3 (Apr. 20, 1994) (objecting to legislation, similar to AB 376, because it did not deal with the possible discovery of other illegal activities, such as violations of local building standards).

COMMENT

Chapter 798 is designed to expand the aforementioned districts' powers to investigate ordinance violations.¹⁰ Chapter 798 proponents argue that districts can no longer afford to contract out these investigations to health and safety inspectors due to budgetary constraints.¹¹ Chapter 798's probable cause standard for inspection warrants is intended to dispel opponents' concerns about unconstitutional searches.¹²

Kelly L. McDole

10. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 376, at 1 (May 3, 1995); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 376, at 1 (July 11, 1995) (asserting that the purpose of AB 376 is to give certain districts the authority to conduct inspections to determine whether district ordinances are being violated, rather than relying on city or county inspectors); *see also id.* at 2 (arguing that district regulations, in the past, were only sporadically enforced by city and county inspectors conducting city and county inspections).

11. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 376, at 1 (May 18, 1995); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 376, at 3, (July 11, 1995) (commenting on special districts' concerns that city and county fiscal stress is decreasing the discovery of illegal sewer and water hook-ups); *id.* at 3 (revealing that many special districts are not experiencing fiscal stress and can apply more resources to enforcement of district regulations than counties); ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 3706, at 2 (Apr. 20, 1994) (recognizing that the Tulare County Health and Building Departments have already notified the Orosi Public Utility District that they would no longer be providing ordinance violation investigation services).

12. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 376, at 2 (Sept. 15, 1995) (advocating that use of a probable cause standard for inspection warrants addresses concerns which caused the Governor to veto 1994 legislation similar to AB 376); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 376, at 3 (July 11, 1995) (stating that the Governor vetoed 1994 legislation similar to AB 376 because the legislation (1) allowed non-consensual searches without a warrant under emergency situations, and (2) permitted warrant issuance under the lenient inspection warrant standard); *id.* at 4 (arguing that a Penal Code search warrant is not appropriate for inspections, because inspections generally do not deal with felonies, and such a warrant requirement would not grant meaningful inspection authority to special districts); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 376, at 1-2 (May 18, 1995) (discussing inclusion of the probable cause standard to remove the Governor's concerns about unconstitutional searches regarding similar legislation, particularly in view of the fact these investigations could lead to criminal prosecution for illegal service hookups); ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 376, at 2-4 (Mar. 29, 1995) (identifying possible Fourth Amendment violations for any investigation warrant standard lower than probable cause); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3706, at 2 (May 26, 1994) (describing the possible criminal investigations which could result from administrative inspections); *see also* *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) (revealing that evidence of criminal activity discovered during an administrative search may be confiscated under the "plain view" doctrine); *People v. Todd Shipyards Corp.*, 192 Cal. App. 3d Supp. 20, 30-31, 238 Cal. Rptr. 761, 766-67 (1987) (determining that government agents seeking evidence of criminal activity under inspection warrants must show probable cause); *id.* (holding that the felony limitations for a California Penal Code search warrant were not constitutionally required for an inspection warrant); *cf.* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-23 (1978) (deciding that investigation warrants not intended to uncover criminal activity may be issued upon a showing of cause which is based on reasonable legislative or administrative standards for conducting searches with respect to particular establishments, specific enforcement needs, and privacy guarantees); Kamisar, *supra* note 7 (warning that the Supreme Court's balancing approach for determining inspection permissibility is a loose standard which leaves the law-abiding citizen more vulnerable to privacy invasions than alleged criminals and upsets the Fourth Amendment of the Constitution).

**Public Entities, Officers, and Employees; Public Utilities Commission—
harmful matter in telecommunications**

Public Utilities Code § 2889.2 (new); §§ 2884.2, 2884.6 (amended).
SB 664 (Russell); 1995 STAT. CH. 170
(Effective July 22, 1995)

Existing law provides that the Public Utilities Commission,¹ (Commission) has jurisdiction and control over billing and collection of information services except for those dealing with harmful matter.² Under certain circumstances, however, the Commission may reassert jurisdiction and control over these matters.³

Existing law allows a telephone corporation and an information provider to enter into contractual arrangements determining billing and collection.⁴ Additionally, the Commission requires telephone corporations and information providers to institute a system for handling consumer complaints.⁵

Chapter 170 allows telephone corporations to decline to offer billing and collection services to harmful matter providers and provides for a waiver of

1. See CAL. PUB. UTIL. CODE §§ 301-320 (West 1975) (setting forth the powers of the California Public Utilities Commission).

2. *Id.* § 2884.2(a), (b) (amended by Chapter 170); *see id.* (limiting the jurisdiction of the Public Utilities Commission); *id.* § 701 (West 1975) (granting the Commission authority to supervise and regulate every public utility when necessary to exercise their power and jurisdiction); *id.* § 2884(b) (West 1994) (providing that telephone corporations must designate harmful matter to specific telephone prefix numbers); *see also* CAL. PENAL CODE § 313(a) (West Supp. 1995) (defining "harmful matter" as material that appeals to the prurient interest, and which, taken as a whole, depicts or describes sexual conduct in a patently offensive way such that it lacks serious literary, artistic, political, or scientific value for minors); *Sebago, Inc. v. City of Alameda*, 211 Cal. App. 3d 1372, 1386, 259 Cal. Rptr. 918, 925 (1989) (indicating that if a publication is not harmful to minors, then there could not be a compelling state interest to ban the material for the alleged protection of minors).

3. CAL. PUB. UTIL. CODE § 2884.2(c) (amended by Chapter 170); *see id.* (describing "anticompetitive results" as one circumstance where the Commission may assert jurisdiction); *see also id.* § 2884(a) (West 1994) (indicating that the Commission has the authority to require telephone service providers to offer the option of deleting access to "900" and "976" services). *See generally* *Westpac Audiotext, Inc. v. Wilk*, 804 F. Supp. 1225, 1228 (N.D. Cal. 1992) (providing an example of the Public Utilities Commission asserting jurisdiction to require phone companies to offer free blocking of the information providers' access numbers).

4. CAL. PUB. UTIL. CODE § 2884.2(g) (amended by Chapter 170); *see id.* (stating that if a contractual arrangement is entered into, the telephone corporation must provide the same service, terms, conditions and rates that it applies to other information providers); *see also id.* § 2884(b) (West 1994) (indicating that harmful matter must be designated to certain telephone prefix numbers); *Sable Communications v. FCC*, 492 U.S. 115, 124 (1989) (holding that the protection of the First Amendment does not extend to obscene speech). *But see id.* at 126 (finding that a ban on indecent telephone messages does violate the First Amendment because it denies adults access to messages in a way that exceeds the interest in preventing minors from coming into contact with those messages). *See generally* CAL. PUB. UTIL. CODE § 742.5 (West Supp. 1985) (listing prohibited billing and collection services and charges).

5. CAL. PUB. UTIL. CODE § 2884.6 (amended by Chapter 170); *see id.* (providing for a waiver of certain or all of the charges for first time inadvertent or mistaken use); *cf.* 47 U.S.C.A. § 223(c)(1) (West 1991) (noting that for obscene or harassing telephone calls in the District of Columbia, or in interstate, or by foreign communications, a common carrier must not provide access to harmful matter providers absent a written request by the customer to the telephone company).

collect call charges made or accepted by minors.⁶ In addition, it prohibits charges to 800 numbers and eliminates the Commission's duty to prepare and submit to the Legislature an annual report on any anticompetitive effects resulting from the original provisions.⁷ Since prior law would make existing contracts invalid after July 1, 1995, this act contains an urgency clause to ensure that previously authorized contractual arrangements between telephone corporations and information providers with respect to telephone services that contained harmful matter, continue until January 1, 1996.⁸

COMMENT

Chapter 170 was enacted, in large part, to reduce the ability of minors to access services providing harmful matter.⁹ Additionally, the Legislature was concerned with the anti-competitive effects of the telephone company providing

6. CAL. PUB. UTIL. CODE § 2884.6 (amended by Chapter 170); *see* CAL. PENAL CODE § 313(g) (West Supp. 1995) (defining a "minor" as a natural person under the age of 18); CAL. PUB. UTIL. CODE § 2884.5 (West 1994) (providing that service to harmful matter providers be furnished on a subscription basis only); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 664, at 1 (Apr. 27, 1995) (explaining that SB 664 would allow telephone corporations to continue to decline service to harmful matter providers by deleting the sunset provision on the deregulation of billing service for harmful matter). *But see id.* at 2 (noting that absent the provisions of SB 664, telephone companies would be required to offer billing and collections services to harmful matter providers beginning January 1, 1996).

7. CAL. PUB. UTIL. CODE § 2884.2(e) (amended by Chapter 170); *see id.* § 2889.2 (enacted by Chapter 170) (limiting charges for calls to 800 numbers unless the number is an information service complying with presubscription requirements imposed by the Federal Communications Commission); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 664, at 1 (Apr. 27, 1995) (stating that this bill would extend indefinitely the Commission's authority to decline billing and collection service to harmful matter providers); SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF SB 664, at 1 (Mar. 28, 1995) (providing a synopsis of the changes that SB 664 makes, such as deleting the sunset on the deregulation of billing services, allowing for a one time waiver of collect call charges made by a harmful matter provider and accepted by a minor, prohibiting charges to customers for calls to 800 numbers, and eliminating the requirement that the Commission report to the Legislature annually). *See generally* Ellis Booker, *Pac Tel's Bright Prospects*, TELEPHONY, Dec. 19, 1988, at 20 (showing that as early as March 1988, California's largest phone service provider filed suit in order to disconnect pornography providers).

8. 1995 Cal. Legis. Serv. ch. 170, sec. 5, at 528; *see id.* (describing facts resulting in the need for urgency legislation).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 664, at 2 (Apr. 27, 1995); *see id.* (commenting that the statute has accomplished its objective of making it more difficult for minors to access harmful matter); *id.* (indicating that the intent is to make access to harmful matter more difficult and to provide a financial disincentive to the harmful matter provider); Katherine Bishop, *Access of Young to Telephone Pornography Faces Key Challenge*, N.Y. TIMES, Nov. 22, 1987, at 26 (providing an example of a 12 year old boy who spent over two hours listening to sexually explicit material on a dial-a-porn number and two weeks later sexually assaulted a four year old girl); *see also* SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF SB 664, at 2 (Mar. 28, 1995) (stating that the relationship between the customer and the information provider is often contractual, using direct billing, making it more difficult for a minor to access the services); Maitland Zane, *Pac Bell Stops Billing Phone Porn Services*, S.F. CHRON., Oct. 26, 1991, at A18 (citing the phone service providers first major victory against porn providers by giving the companies the option of denying billing services). *See generally* *Sable Communications*, 492 U.S. at 120 n.3 (citing *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 848, (C.C.A.2d 1986)) (providing figures for usage of the dial-a-porn operations, in one six month period, to be seven million calls a month, and the government's interest in regulating and restricting calls placed by minors to such services).

better rates and service for its own services than to the services offered by competitors.¹⁰ Further, Chapter 170's additions prevent the circumvention of the access blocking services.¹¹ Chapter 170 has support from Pacific Telesis, Pacific Bell, and The American Association of Retired Persons.¹²

Andrei F.B. Behdjat

Public Entities, Officers, and Employees; public utilities—energy rate allowances

Public Utilities Code § 739 (amended).
SB 248 (Hayden); 1995 STAT. Ch. 75

Existing law requires the California Public Utilities Commission (CPUC)¹ to establish a baseline quantity² of gas and electricity which is necessary to supply a significant portion of the reasonable energy needs of an average residential

10. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 664, at 2 (Apr. 27, 1995); *see id.* (stating that were the telephone corporations' billing and collection services deregulated, there would be a fear the companies would use it to their advantage); *id.* (indicating that the original concerns relating to anticompetitive actions by the phone company have been shown to be unfounded); *see also* CAL. BUS. & PROF. CODE § 17045 (West 1987) (making it unlawful to extend special services or privileges to certain purchasers not extended to all purchasers purchasing on like terms and conditions, where such privileges inhibit competition).

11. CAL. PUB. UTIL. CODE § 2889.2 (enacted by Chapter 170); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 664, at 2 (Apr. 27, 1995) (indicating that this bill was intended to deal with alternative ways of distributing matter by telephone); SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF SB 664, at 2 (Mar. 28, 1995) (stating that one of the problems has been callers of "800" numbers being automatically switched to a pay-per-call number, thus defeating the block some customers put on "900" and "976" numbers); *see also* Carl T. Hall, *Phone Sex Picks Up a New Line*, S.F. CHRON., Mar. 15, 1990, at C1 (discussing the phone company's preference for "900" numbers as opposed to "976" numbers because they are not associated with pornography, and more and different types of businesses can use the numbers to enhance their sales).

12. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 664, at 2 (Apr. 27, 1995); *see* Zane, *supra* note 9 (discussing Pacific Bell's eight year court battle to refuse to bill the pornography providers, thus requiring them to use credit cards or other means not easily available to minors); *see also* Booker, *supra* note 7, at 20 (indicating Pacific Bell's disdain for harmful matter providers because it gives Pacific Bell a bad reputation and bad press).

1. *See* CAL. CONST. art. XII, § 1 (establishing the Public Utilities Commission (CPUC) and finding that it must consist of five members appointed by the Governor and approved by the Senate for six year terms); *id.* (providing further that the Legislature may remove a member by a two-thirds vote of each house, for incompetence, neglect of duty, or corruption); *see also* CAL. PUB. UTIL. CODE § 20 (West Supp. 1995) (defining "commission" as the Public Utilities Commission, established in California Constitution article XII, § 1).

2. *See* CAL. PUB. UTIL. CODE § 739(d)(1) (amended by Chapter 75) (defining "baseline quantity" as a quantity of electricity or gas used by residential customers, based upon 50-60% of the average use from those customers using both gas and electricity, except where the customers are exclusively gas or exclusively electric, in which case the baseline is based upon 60-70% the average consumption); *see also id.* § 739(d)(2) (amended by Chapter 75) (finding that a "residential customer" is a customer receiving electrical or gas service being charged pursuant to a domestic rate schedule and excluding every other category of customer).

customer.³ Above this baseline rate, customers with certain diseases or afflictions are given an allowance to compensate them for their extra energy needs due to their illnesses.⁴

Chapter 75 would include within the category for the allowance above baseline, those customers with life-threatening illnesses or those who have a compromised immune system.⁵ Chapter 75 also requires those customers seeking the allowance above baseline to have a physician, surgeon or osteopath certify to the utility that the extra heating or cooling is medically necessary.⁶

COMMENT

Chapter 75 represents another step towards recognition and compassion for persons with certain medical disabilities and their increased energy needs.⁷ Chapter 75 is stricter in its requirements for receiving the allowance under its provisions in that it requires certification from a physician, surgeon, or osteopath.⁸

3. *Id.* § 739(a) (amended by Chapter 75).

4. *Id.* § 739(b)(1)-(5) (amended by Chapter 75); *see id.* (listing the requirements for receiving the allowance as any one of the following: (1) a person dependent upon life-support equipment such as respirators, iron lungs, hemodialysis machines, suction machines, electric nerve stimulators, pressure pads and pumps, aerosol tents, electrostatic and ultrasonic nebulizers, compressors, IPPB machines and motorized wheelchairs; (2) persons that are paraplegic or quadriplegic; (3) persons with multiple sclerosis; or (4) persons with scleroderma).

5. *Id.* § 739(b)(6) (amended by Chapter 75).

6. *Id.*; *see id.* (indicating that a licensed physician and surgeon or a licensed osteopath must certify in writing the utility of the additional heating and/or cooling allowance and that the allowance is medically necessary to sustain the person's life or prevent deterioration of the person's medical condition).

7. Sophia Kwong, *Sacramento Update: Sen. Hayden Introduces Utility Bill to Help Those with Compromised Immune Systems*, CATALYST, Mar. 1995, at 2; *see id.* (quoting Senator Tom Hayden in his assessment that California shows compassion to persons living with diseases that require their homes to operate at warmer or cooler temperatures, and concluding that it makes sense to extend this benefit to those persons living with compromised immune systems who may have identical needs, but not identical diseases); *Seniors: Bill Would Lower Fuel Bills*, L.A. TIMES, Feb. 12, 1995, at J6 (reporting the introduction of SB 248 and its effort to provide assistance to those with compromised immune systems, cancer, AIDS, or other life threatening diseases).

8. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 248, at 2 (June 21, 1995); *see id.* (noting that the allowance requirements are stricter under this bill as compared with existing law which does not require a doctor's request for the allowance).

Chapter 75 does not have any known opposition, and supporters stress the need for such additions to existing law.⁹

Darrell C. Martin II

**Public Entities, Officers, and Employees; public utilities—
telecommunications**

Public Utilities Code § 1013 (new).
SB 665 (Russell); 1995 STAT. Ch 74

Existing law requires a public utility,¹ including telephone and telegraph corporations,² to obtain a certificate of public convenience and necessity³ from the Public Utilities Commission (PUC)⁴ in order to construct or extend a line,⁵ plant, or system.⁶

9. SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF SB 248, at 2 (Mar. 28, 1995); see Letter from Debby Boucher, Legislative Advocate, California Nurses Association, to Senator Tom Hayden (Mar. 23, 1995) (copy on file with the *Pacific Law Journal*) (finding that patients with AIDS or other diseases that compromise a person's immune system are highly susceptible to minor illnesses and have increased needs for heating and cooling of their homes); Letter from Regina Aragón, Deputy Director for Public Policy, San Francisco AIDS Foundation, to Senator Steve Peace (Mar. 27, 1995) (copy on file with the *Pacific Law Journal*) (indicating the need for the provisions of SB 248 and providing support for its enactment); see also Letter from Fredericka B. Oakley, Director, Office of Governmental Affairs, CPUC, to Senator Tom Hayden, at 1 (Mar. 21, 1995) (copy on file with the *Pacific Law Journal*) (clarifying that the CPUC is taking a neutral position on the bill, and that they will support any mandated measure with social betterment goals, but that it should be recognized that any discount for one group's rates will necessarily be an increase in another group's rates).

1. See CAL. PUB. UTIL. CODE § 216(a) (West Supp. 1995) (defining "public utility" as including, but not limited to, telephone and telegraph corporations where the service performed is delivered to the public, or any portion thereof).

2. See *id.* § 234 (West Supp. 1995) (defining "telephone corporation" as any corporation or person owning, controlling, operating or managing any telephone line for compensation, but excluding hotels, hospitals, or similar places that temporarily resell telephone services to their patients or guests); *id.* § 236 (West 1975) (defining "telegraph corporation" as including every corporation or person owning, controlling, operating or managing any telegraph line for compensation within California).

3. See *id.* §§ 1001-1011 (West 1994 & Supp. 1995) (setting forth the requirements for a certificate of public convenience and necessity for specified utilities).

4. See *id.* §§ 301-325 (West 1975 & Supp. 1995) (setting forth the organization of the Public Utilities Commission). See generally CAL. CONST. art. 12, § 22 (creating the Public Utilities Commission).

5. See CAL. PUB. UTIL. CODE § 233 (West 1975) (defining "telephone line" as including all conduits, duct, poles, wires, cables, instruments, and all other real estate and personal property owned, operated or managed in connection with communication by telephone whether by transmission wires or not); see also *id.* § 235 (West 1975) (defining "telegraph line" as including all conduits, duct, poles, wires, cables, instruments, and all other real estate and personal property operated and managed in connection with communication by telephone).

6. *Id.* § 1001 (West 1994); see *id.* (requiring telephone and telegraph corporations, among others, to obtain a certificate of public convenience and necessity before constructing or extending any line); see also *id.* § 1002 (West 1994) (listing certification factors which the PUC must consider as a basis for granting a public convenience and necessity certificate as: (1) community values, (2) recreational and park areas, (3)

Chapter 74 allows the PUC to exempt telecommunication services offered by corporations that have been found to be lacking monopoly or market power from the certification requirement and instead subject them to a registration requirement.⁷ Violations of orders, decisions, rules, or other requirements of the PUC are punished with specified sanctions.⁸

Also, Chapter 74 specifically excludes commercial mobile radio services⁹ from its requirements.¹⁰

COMMENT

Society is experiencing an onslaught of new telecommunication technologies and service providers.¹¹ Chapter 74 is part of the Legislature's continuing effort

historical and aesthetic values, and (4) influence on the environment); *Northern Cal. Power Agency v. Public Util. Comm'n*, 5 Cal. 3d 370, 377, 486 P.2d 1218, 1223, 96 Cal. Rptr. 18, 23 (1971) (holding that when considering whether to grant or deny a certificate of public convenience and need, the PUC should consider the antitrust implications of the matter); cf. ARIZ. REV. STAT. ANN. § 40-281(A) (1985) (requiring public service corporations to obtain a certificate of public convenience before constructing or extending any line); NEV. REV. STAT. ANN. § 704.330(1) (Michie 1993) (requiring public utilities to obtain a certificate of public convenience before constructing or extending any line); S.C. CODE ANN. § 58-9-280 (Law. Co-op. 1977) (requiring telephone utilities to obtain a certificate of public convenience before constructing or extending any line).

7. CAL. PUB. UTIL. CODE § 1013(a) (enacted by Chapter 74); see *id.* (allowing the PUC to exempt a telephone corporation from the public convenience and necessity certification requirement of California Public Utilities Code § 1001); see also *id.* § 1001 (West 1994) (requiring telephone corporations to obtain a certificate of public convenience and necessity before extending or constructing a line); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 665, at 2 (June 21, 1995) (stating that lack of market power means that a competitor is unable to affect the market price for a service); Telephone Interview with Jack Leutza, Chief of Telecommunications Branch, Advisory and Compliance Division, California Public Utilities Commission (July 20, 1995) (notes on file with the *Pacific Law Journal*) (noting that in determining a monopoly or market power, the PUC will consider the number of competitors, number of customers, economic scope and sales, market penetration, and services offered).

8. CAL. PUB. UTIL. CODE § 1013(g), (h) (enacted by Chapter 74); see *id.* (permitting the PUC, after a hearing, to revoke the registration, or fine the telephone corporation up to \$20,000 per violation, which include, but are not limited to, corporation's failure to provide the information required by this section, and the corporation conducting any illegal telephone operation, or knowingly defrauding a customer); see also CAL. PENAL CODE § 17(a) (West Supp. 1995) (defining a felony as any crime punishable by death or imprisonment in a state prison a felony, and making all other crimes a misdemeanor); *id.* § 17(b) (West Supp. 1995) (defining a crime as a misdemeanor when it is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail).

9. See 47 C.F.R. § 20.3(a) (1994) (defining "commercial mobile radio service" as a mobile service effectively available to a substantial portion of the public and interconnected by wire, microwave, or other technologies, to a public switched network which allows users to communicate with all other users on the public switched network).

10. CAL. PUB. UTIL. CODE § 1013(f) (enacted by Chapter 74); see Telephone Interview with Kay Lentz, Chief of Staff to Senator Newton Russell (June 5, 1995) (notes on file with the *Pacific Law Journal*) (stating that commercial mobile radio services were specifically excluded because, although there was never an intent for SB 665 to apply to mobile phone companies, mobile phone companies raised opposition because they thought it would be applied to them); see also *Commercial Communications, Inc. v. Public Util. Comm'n of Cal.*, 50 Cal. 2d 512, 523, 327 P.2d 513, 519 (1958) (holding that a radio telephone service is considered a telephone service as defined in the California Public Utilities Code § 233).

11. See CALIFORNIA PUBLIC UTILITIES COMMISSION, A REPORT TO THE GOVERNOR, ENHANCING CALIFORNIA'S COMPETITIVE STRENGTH: A STRATEGY FOR TELECOMMUNICATIONS INFRASTRUCTURE at viii (Nov. 1993) [hereinafter REPORT] (finding that the telecommunications industry is, and will be, subject to a

to open telecommunication markets to competition by January 1, 1997, by making it easier for new telecommunication service providers to enter telecommunication markets.¹² Incumbent telephone companies may slow competitors' entry into their markets by protesting the new provider's application for a certification.¹³ Although Chapter 74 allows the PUC to waive the certification requirements for new providers, it requires the PUC to verify the financial viability of the provider, and ensure the officers of that corporation have no prior history of committing fraud on the public.¹⁴ Chapter 74 also allows, in order to satisfy due process requirements, any person to protest a telephone corporation's application for registration status and exemption from the

punishing rate of technological innovation); *id.* at 3 (explaining that the expanding use of electronic highways for business transactions, electronic mail, data base sharing, cable television, and cellular telephone systems, creates opportunities to develop new services and products); Pat Blake, *Ten Years After: Telecommunications Since the AT&T Split*, IND. BUS., June 1984, at 25 (stating that the breakup of AT&T has created an explosion of competition and implementation of technology, far-lower long-distance prices, and a whole new telecommunications environment); Richard Locker, *Time Warner Gains Tennessee OK to Provide Phone Service*, COM. APPEAL (Memphis), June 28, 1995, at 1A (stating that Time Warner will now provide telephone service simultaneously with cable television service to residential customers in Tennessee, over fiber optic and coaxial cable lines which will enable it to directly compete with South Central Bell for basic telephone service); Andrew Moreau, *LR Company ACSI Asks to Tread on Southwestern Bell Territory*, ARK. DEMOCRAT-GAZETTE, June 26, 1995, at 1D (stating that American Communications Services of Little Rock, Inc., is seeking a Certificate of Public Convenience and Necessity to allow them to offer point-to-point voice data and video service in Arkansas primarily for businesses which would completely bypass the established Southwestern Bell network). See generally *Paving the Highway: The Information Revolution is Coming, and Part of it is Here*, ASIAWEEK, Sept. 14, 1994, at 35 (describing the growth of the Internet and telecommunication technology problems and advances in Malaysia, Hong Kong and Japan).

12. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 665, at 2 (June 21, 1995); see *id.* (stating that by removing entry barriers, SB 665 increases market access, encourages business and job growth, and enhances market competitiveness); see also CAL. PUB. UTIL. CODE § 709.5(a) (West Supp. 1995) (stating that it is the intent of the legislature that all telecommunications markets are opened to competition by January 1, 1997); Letter from Natalie Hanson, Chief of Governmental Affairs, Public Utilities Commission, to Senator Patrick Johnston (May 10, 1995) (copy on file with the *Pacific Law Journal*) (stating that SB 665 will streamline the process for new service providers to enter the market, thereby enabling the PUC to meet the Legislature's goal of opening telecommunications markets by January 1, 1997); Letter from Jeff Buckingham, President, California Association of Long Distance Telephone Companies, to Senator Steve Peace (Mar. 27, 1995) (copy on file with the *Pacific Law Journal*) (stating that SB 665 will ease the time-consuming and burdensome certification requirements under current law); Memorandum from Gretchen Dumas, Legislative Counsel, California Public Utilities Commission to the Commission (Mar. 17, 1995) (copy on file with the *Pacific Law Journal*) (stating that streamlining the regulatory entry requirements, coupled with vigorous consumer protection can encourage business and job growth in California). See generally REPORT, *supra* note 11 (explaining the importance of an updated telecommunications infrastructure, and recommending policies to promote a competitive telecommunications market).

13. SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF SB 665, at 1 (Mar. 28, 1995); see *id.* (stating that incumbent providers can slow new providers entering the market by protesting their application for public convenience and necessity certification).

14. CAL. PUB. UTIL. CODE § 1013 (d)(1), (2) (enacted by Chapter 74); see SENATE FLOOR, COMMITTEE ANALYSIS OF SB 665, at 2 (May 18, 1995) (stating that although the focus of the public convenience and need certification process is to determine whether the corporation is fit to offer service to the public, and to provide a minimal check on the technical competence and financial viability of the corporation, SB 665 provides an alternative process to check the financial fitness of the corporation).

certification requirement.¹⁵

Michael A. Guiliana

Public Entities, Officers, and Employees; public utility drivers—driving hours during emergencies

Vehicle Code § 34501.2 (amended).
SB 253 (Kelley); 1995 STAT. Ch. 102

Existing law requires the Commissioner of the Department of the California Highway Patrol (DCHP)¹ to enforce all laws regulating the operation of motor vehicles² and the use of the highways.³ Existing law further requires the DCHP to adopt reasonable rules and regulations designed to promote the safe operation of vehicles described in California Vehicle Code.⁴ Existing law mandates that the DCHP establish hours-of-service regulations that are consistent with federal law unless otherwise provided or exempted.⁵

15. CAL. PUB. UTIL. CODE § 1013(f) (enacted by Chapter 74); *see id.* (allowing any person entitled to be heard to file a protest on whether a telephone corporation should be eligible for registration status and an exemption from the certification requirement of California Public Utilities Code § 1001); Telephone Interview with Kay Lentz, *supra* note 10 (stating that SB 665 was amended to include a provision for incumbent telephone corporations to protest a new provider's application for registration status, to satisfy due process requirements so that incumbent corporations are not disproportionately burdened).

1. *See* CAL. VEH. CODE § 2100 (West 1987) (establishing the Department of the California Highway Patrol); *id.* § 2107 (West 1987) (providing that the Department of the California Highway Patrol is under the control of a gubernatorially appointed civil executive officer known as the Commissioner of the California Highway Patrol).

2. *See id.* § 415 (West Supp. 1995) (defining a "motor vehicle" as a vehicle which is self-propelled, though not including self-propelled wheelchairs, invalid tricycles, or motorized quadricycles).

3. *Id.* § 2400(b) (West Supp. 1995).

4. *Id.* § 34501(a)(1) (West Supp. 1995); *see id.* § 34500(j) (West Supp. 1995) (including within the list of vehicles subject to the Department of the California Highway Patrol's regulatory oversight, any motor trucks that are regulated by the Public Utilities Commission or the Interstate Commerce Commission); *id.* (providing further that this regulatory control extends only so far as to matters relating to hours-of-service and logbooks of drivers).

5. *Id.* § 34501.2(a) (amended by Chapter 102); *see* 49 C.F.R. § 395.3(a)(1) (1994) (establishing that no motor carrier can permit or require any of its drivers to drive, nor can any driver drive, more than 10 hours following 8 or fewer consecutive hours off duty, unless otherwise provided); *id.* § 395.1(b)(1) (1994) (providing that in the event of adverse driving conditions such as snow, fog, or other adverse conditions, which prevent a motor carrier driver from completing the run within the 10 hour time limit, the driver may drive an additional 2 hours in order to complete the run or find a safe place for the driver and the cargo); *see also* CAL. VEH. CODE § 34501.2(b)(2) (amended by Chapter 102) (providing that no motor carrier can permit or require any of its drivers to drive, nor can any driver drive, for any period after having been on duty for 80 hours in any consecutive 8 day period); *cf.* IOWA CODE ANN. § 321.449 (West Supp. 1995) (requiring every person operating a commercial vehicle on the highways to comply with the federal motor carrier safety regulations set forth in Title 49, Part 395 of the Code of Federal Regulations); N.Y. TRANSP. LAW § 211 (McKinney 1994) (noting that state regulations must be no less than provided under federal law regulating motor carriers); OKLA. STAT. ANN. tit. 47, § 230.15(D) (West Supp. 1995) (indicating that the maximum driving time in a work period

However, existing law provides that drivers employed by an electrical corporation,⁶ a gas corporation,⁷ or a telephone corporation⁸ may be permitted to drive more than the maximum number of hours-of-service if they are operating the vehicle during an emergency restoration of public utility service.⁹

Chapter 102 incorporates drivers employed by a water corporation¹⁰ or a public water district,¹¹ into the class of public utility drivers that may be allowed to drive more than the maximum number of set hours during an emergency restoration of service.¹²

is 12 hours); *id.* (providing, however, that if there has been an emergency declared, there will be no time restrictions upon drivers of public utility vehicles engaged in efforts to restore the necessary facilities); R.I. GEN. LAWS § 31-27-5(4) (1995) (finding that drivers may be declared out of service for violations of Title 49, Part 395 of the Code of Federal Regulations). *See generally* John A. Michaels & Diana L. Patton, *Motor Carriers' Liability For Trucking Accidents*, 27 ARIZ. ATT'Y 17 (July 1991) (finding that the most recurrent allegation in trucking accidents is that the accident occurred because the driver was fatigued and driving past the number of hours allowed); Paul S. Dempsey, *The Deregulation of Intrastate Transportation: The Texas Debate*, 39 BAYLOR L. REV. 1, 11 (1987) (concluding that there has been a significant deterioration in the level of safety of motor carriers with the increase in federal deregulation).

6. *See* CAL. PUB. UTIL. CODE § 218(a) (West Supp. 1995) (defining an "electrical corporation" as every corporation or person owning, operating or controlling an electric plant for compensation within this state, unless the electricity is generated on private property for sole use by the owner or tenants of the property or unless otherwise exempted from the definition); *see also id.* § 217 (West 1975) (providing that an "electric plant" includes all real estate, fixtures, and personal property, which are owned, operated, or controlled to facilitate the production of electricity for light, heat, or power).

7. *See id.* § 222 (West Supp. 1995) (defining a "gas corporation" as every corporation or person owning, operating, or controlling a gas plant for compensation within California, unless the gas is generated on private property for sole use by the owner or tenants of the property or unless otherwise exempted from the definition); *see also id.* § 221 (West Supp. 1995) (providing that a "gas plant" includes all real estate, fixtures, and personal property, which are owned, operated, or controlled to facilitate the production of gas for light, heat, or power); *id.* (providing that the term "gas" does not include propane).

8. *See id.* § 234 (West Supp. 1995) (defining a "telephone corporation" as every corporation or person owning, operating, or controlling a telephone line for compensation within California); *see also id.* § 233 (West 1975) (providing that a "telephone line" includes all real estate, fixtures, and personal property such as conduits, wires, and other appliances which are owned, operated, or controlled to facilitate communication by telephone).

9. CAL. VEH. CODE § 34501.2(b)(3) (amended by Chapter 102); *see* Christian P. Hurley, *Review of Selected 1992 California Legislation*, 24 PAC. L.J. 591, 1061, 1062 (1993) (describing the process for obtaining a waiver of the on-duty driving time limits for agricultural and private carriers, when an emergency exists due to inclement weather, natural disaster, or an adverse economic condition that threatens the orderly movement of farm products during harvest).

10. *See* CAL. PUB. UTIL. CODE § 241 (West 1975) (defining a "water corporation" as every corporation or person owning, operating, or controlling any water system for compensation within the state); *see also id.* § 240 (West 1975) (providing that a "water system" includes all real estate, fixtures, and personal property such as reservoirs, dams, and other appliances which are owned, operated, or controlled to facilitate the use of water for power, irrigation, or other beneficial use).

11. *See* CAL. WATER CODE § 20200 (West Supp. 1995) (defining a "water district" as any district or other political subdivision whose primary function includes the irrigation, reclamation, or storage of water for domestic, agricultural, recreational, or power purposes).

12. CAL. VEH. CODE § 34501.2(b)(3) (amended by Chapter 102).

COMMENT

Chapter 102 is intended to put drivers employed by water utilities in line with the current hours-of-service exemption allowed for gas, electrical, and telephone utility drivers.¹³

Supporters of Chapter 102 report that the restoration of water service during an emergency is essential to protecting public health and safety during these emergencies.¹⁴ These supporters find that during an emergency, water utility drivers often work long hours and can easily exceed the maximum permissible amount of hours for driving.¹⁵ Furthermore, adherence to the hour limits under prior law was seriously impeding the emergency response efforts of water utilities during emergency situations.¹⁶

Chapter 102 will alleviate these impediments to the emergency response efforts of water corporations and water districts.¹⁷

Darrell C. Martin II

Public Entities, Officers, and Employees; reporting telephone service tax

Public Utilities Code § 495.6 (new).

AB 1575 (Murray, K.); 1995 STAT. Ch. 280

Existing law provides that unincorporated areas¹ of counties and charter cities are allowed to impose a tax on telephone service consumption.² Currently, gas and electric service consumption tax rates and methods of calculation are reported

13. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 253, at 2 (June 29, 1995).

14. Letter from Dan Smith, Legislative Advocate, Association of California Water Agencies, to Senator David Kelley (Mar. 2, 1995); *see id.* (providing that earthquakes, fires, and floods are examples of emergencies for which emergency restoration of water services may be needed); *see also* ASSEMBLY COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 253, at 2 (May 8, 1995) (indicating that the supporters of SB 253 also include the California Central Valley Flood Control Association, the California Water Association, and the Valley Center Municipal Water District); Letter from Jerry Jordan, Executive Director, California Municipal Utilities Association, to Senator David Kelley (Mar. 7, 1995) (copy on file with the *Pacific Law Journal*) (indicating that the California Municipal Utilities Association supports the passage of SB 253).

15. ASSEMBLY COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 253, at 2 (May 8, 1995).

16. Letter from Dan Smith, *supra* note 14.

17. *Id.*

1. *See* CAL. GOV'T CODE § 56043 (West Supp. 1995) (defining "incorporation" as a city with corporate powers); *see also id.* § 56017 (West Supp. 1995) (defining "annexation" as including land in city territory). *See generally* City of Olivette v. Graeler, 338 S.W.2d 827, 833 (Mo. 1960) (stating that unincorporated lands are generally lands which are not within the boundaries of an incorporated city).

2. CAL. REV. & TAX. CODE § 7284.2 (West Supp. 1995); *see id.* (allowing counties to impose use taxes); *see also* CAL. GOV'T CODE § 37101(a) (West Supp. 1995) (allowing charter cities to impose use taxes).

to the Public Utilities Commission.³ Chapter 280 extends that reporting requirement to telephone service consumption tax rates.⁴ The report is to be filed periodically, as established by the Public Utilities Commission.⁵ Chapter 280 requires the Public Utilities Commission to make this information available to interested parties and permits the Public Utilities Commission to charge a fee for such information.⁶ Lastly, Chapter 280 relieves the Public Utility Commission from responsibility for accuracy of data provided by the cities or counties.⁷

COMMENT

Telephone service rates have not increased at the rate of inflation, although the industry is growing.⁸ The counties and cities are free to establish telephone service consumption tax rates independently.⁹ As such, the long distance phone companies are subject to a multitude of varying rates, though those rates are not

3. CAL. PUB. UTIL. CODE § 489(a) (West Supp. 1995); *see id.* (requiring public utilities, such as telephone companies, gas companies, and electric companies, to file rates with the Public Utilities Commission and make information available to interested parties); *id.* § 489(c), (d), (f) (West Supp. 1995) (permitting the Public Utilities Commission to exempt telephone or telegraph companies from the reporting requirement for an enhanced service if the company lacks a significant market power in the new service segment); *id.* § 489(e) (West Supp. 1995) (directing the Public Utilities Commission to grant such exemptions unilaterally); *see also id.* § 701 (West Supp. 1995) (delineating the powers of the Public Utilities Commission). *See generally* CAL. CONST. art. XII, § 3 (declaring that companies that provide telephone service are public utilities); CAL. PUB. UTIL. CODE § 451 (West Supp. 1995) (describing unjust and unreasonable public utility charges as unlawful); *id.* § 495 (West Supp. 1995) (requiring telephone services to file rates with the Public Utilities Commission and make information available to interested parties); *Commercial Communication, Inc. v. Public Util. Comm'n of Cal.*, 50 Cal. 2d 512, 522-23, 327 P.2d 513, 519 (1958) (defining "telephone service" to include two-way conversation which incorporates radio technology without wires, such as is used in private mobile communication), *cert. denied and appeal dismissed*, 359 U.S. 341 (1959); *id.* at 522, 327 P.2d at 519 (suggesting that services provided by telephone companies are by definition telephone service); *id.* at 523, 327 P.2d at 519 (defining "public telephone service" to include service of which a portion is extended for public use); *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal. App. 2d 416, 417-18, 246 P.2d 686, 687 (1952) (holding that liability is limited for erroneous directory advertising when the telephone company has filed with the Public Utilities Commission); *In re Economy Tel., Inc.*, No. 92-08-043, 1992 Cal. P.U.C. LEXIS 567, at *10-11 (Aug. 11, 1992) (holding that when tariffs are not filed with the Public Utilities Commission, charges collected are unreasonable and unjust, making the charges illegal).

4. CAL. PUB. UTIL. CODE § 495.6(a) (enacted by Chapter 280); *see id.* (providing that cities, counties, or cities and counties which levy a telephone service consumption tax must provide the Public Utilities Commission with the rate, manner, and frequency of collection).

5. *Id.* § 495.6(b) (enacted by Chapter 280).

6. *Id.*; *see id.* (requiring the release of information reported pursuant to California Public Utilities Code § 495.6(a) to interested parties for a fee not to exceed the direct costs for the preparation and providing of the information).

7. *Id.* § 495.6(d) (enacted by Chapter 280).

8. Daniel W. Edwards et al., *Telecommunications Services; Industry Overview*, U.S. INDUS. OUTLOOK, Jan. 1994, at 29; *see id.* (noting an increase in demand and revenues for telephone service companies).

9. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 1575, at 1-2 (Apr. 26, 1995); Telephone Interview with Amy King, Legislative Consultant to Assemblymember Kevin Murray on AB 1575 (June 27, 1995) (notes on file with the *Pacific Law Journal*).

substantial.¹⁰ Giving this information to one entity—the Public Utilities Commission—will consolidate this effort and alleviate the burden imposed on the long distance phone service carriers.¹¹ Even though this increases the responsibilities of the Public Utilities Commission, the Commission supports this legislation.¹² Simplifying the telephone service sales and use tax process will conform to the legislative intent of establishing a uniform, integrated system of taxation.¹³

There is some concern that assembling this information will give rise to governmental regulation of telephone service consumption tax or give rise to the need to justify high or low tax rates.¹⁴ However, the indication is that the phone companies are interested in merely uniform rates.¹⁵

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Public Entities, Officers, and Employees; water corporations—land disposal

Public Utilities Code §§ 789, 789.1, 790 (new).
SB 1025 (Peace); 1995 STAT. Ch. 431

Under existing law, the Public Utilities Commission (PUC)¹ is vested with

10. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1575, at 2 (June 1, 1995) (noting numerous variances in rates); Telephone Interview with Amy King, *supra* note 9 (indicating that there are many taxing entities with a variety of different taxation formulas); see also Edwards et al., *supra* note 8 (noting the tax rates are not substantial).

11. ASSEMBLY COMMITTEE ON UTILITIES AND COMMERCE, COMMITTEE ANALYSIS OF AB 1575, at 1-2 (Apr. 17, 1995); see Telephone Interview with Amy King, *supra* note 9 (indicating that the burden is great when each telephone company must contact each county or city in which the company has originating phone calls to determine the rate and when the cities and counties do not give prompt attention to these requests). See generally 1992 Cal. Legis. Serv. ch. 980, sec. 1(d), at 4006 (amending, repealing, and adding CAL. PUB. UTIL. CODE §§ 489, 495, and adding CAL. PUB. UTIL. CODE § 495.5) (noting that the telecommunication industry is vital to California's economy and to California's global competitiveness); 1986 Cal. Stat. ch. 524, sec. 1(c), at 1866 (amending CAL. PUB. UTIL. CODE § 489) (indicating that the ability to be fully informed regarding telecommunication services is in the best interest of consumers and the California economy).

12. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 1575, at 2 (Apr. 26, 1995).

13. See 1968 Cal. Stat. ch. 1265, sec. 2, at 2388-89 (amending CAL. REV. & TAX. CODE § 7203.5) (announcing the legislative intent to work toward establishing a uniform, integrated system of taxation).

14. ASSEMBLY COMMITTEE ON UTILITIES AND COMMERCE, COMMITTEE ANALYSIS OF AB 1575, at 2 (Apr. 17, 1995).

15. Telephone Interview with Amy King, *supra* note 9.

1. See CAL. PUB. UTIL. CODE §§ 301-320 (West 1975 & Supp. 1995) (setting forth the organization of the Public Utilities Commission). See generally CAL. CONST. art. 12, § 22 (creating the Public Utilities Commission).

regulatory authority over public utilities,² including water corporations.³ Under these provisions, a water corporation, with consent from the PUC, may sell land that is not necessary or useful in the performance of its duties.⁴ The PUC then has jurisdiction over the utility's expenditure of net proceeds, but has changed position several times recently on how sale proceeds are to be allocated between rate payers and shareholders.⁵

Chapter 431 creates the Water Utility Infrastructure Improvement Act of 1995.⁶ This Act requires a water corporation, when it sells land, to invest any net proceeds, including interest, in water system infrastructure, plants, facilities, or properties that are necessary or useful in the performance of its duties to the

2. See CAL. PUB. UTIL. CODE § 216(a) (West Supp. 1995) (defining "public utility" as including every toll bridge, pipeline, and telephone and telegraph corporation, where the service is performed for, or the commodity is delivered to, the public).

3. *Id.* § 701 (West 1975); see *id.* (empowering the Public Utilities Commission to supervise and regulate every public utility in the state and to do all things which are necessary and convenient in the exercise of such power and jurisdiction); *id.* § 2702 (West 1994) (declaring water corporations to be under the jurisdiction of the PUC); see also *id.* § 241 (West 1975) (defining "water corporation" as every corporation or person owning, controlling, operating, or managing any water system for compensation within this state); *id.* § 701.10(a)-(f) (West Supp. 1995) (setting forth the purpose of rates and charges for water service as including minimizing long-term cost to customers, providing incentives for conservation of water resources, and promoting long-term rate stabilization).

4. *Id.* § 851 (West 1975); see *id.* (voiding any sale, by a public utility, of land necessary or useful in the performance of its duties, but allowing a public utility to sell, lease, or dispose of land that is not necessary or useful in the performance of its duties to the public); *id.* (creating a conclusive presumption that property is not useful or necessary if a public utility disposes of it in any way). But see *South Bay Irrigation Dist. v. California-American Water Co.*, 61 Cal. App. 3d 944, 957, 186 Cal. Rptr. 166, 176 (1976) (holding that property owned by a public utility water company is impressed with a public use and may be transferred only with consent of the Public Utilities Commission); *In re California Water Serv. Co.*, No. 94-09-032, 1994 Cal. P.U.C. LEXIS 529, at *9 (Sept. 1, 1994) (citing *Pacific Gas and Electric Co.*, 10 Cal. P.U.C. 2d 647, 657 (1982)) (holding that although California Public Utilities Code § 851 allows utility discretion to dispose of property no longer used or useful without prior Public Utilities Commission approval, that discretion may not be abused, and management decisions to declare property no longer used and useful must withstand cross examination and overcome contrary evidence); *In re Los Guilicos Water Works*, No. 92-09-008, 1992 Cal. P.U.C. LEXIS 733, at *6 (Sept. 2, 1992) (holding, in a hearing giving consent for the sale of a water utility facility, that no sale of property burdened with public use is valid unless consent from the PUC is first given). See generally 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 908(2) (9th ed. 1988) (stating that a public utility cannot transfer its property without consent of the PUC).

5. See *California Water Serv. Co.*, *supra* note 4, at *3 (holding the gains and losses from the sale of property must be allocated equally between the utility shareholders and the rate payers as a reduction in rates); *In re Suburban Water Systems*, No. 94-01-028, 1994 Cal. P.U.C. LEXIS 45, at *1 (Jan. 7, 1994) (holding that the gain on sale of water utilities property will be allocated 100% to the utility shareholders); *In re Southern Cal. Water Co.*, No. 92-03-094, 43 Cal. P.U.C. 2d 596, 598 (Mar. 31, 1992) (holding that gain on sale of utility property be allocated 100% to rate payers in the form of reduced rates); see also *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (holding that the Federal Power Commission is not bound to any single formula for determining rates); *South Bay Irrigation Dist.*, 61 Cal. App. 3d at 957, 186 Cal. Rptr. at 176 (citing *Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 62 Cal. 2d 634, 645, 44 Cal. Rptr. 1, 7 (1965)) (holding that the rate of return on property owned by a public utility is subject to regulation of the Public Utilities Commission).

6. CAL. PUB. UTIL. CODE § 789 (enacted by Chapter 431); see *id.* (announcing that California Public Utilities Code §§ 784-790 is known as the Water Utility Infrastructure Improvement Act of 1995).

public.⁷ Chapter 431 further provides that if a water corporation does not invest any net proceeds, including interest, from a sale of land within eight years of the end of the calendar year in which it received the net proceeds, those proceeds must be allocated solely to rate payers.⁸

COMMENT

There are approximately 250 investor-owned water utilities which provide water to about twenty percent of California's population.⁹ The state's limited water supply and new stricter water quality standards burden water utilities with increasing demands for infrastructure and supply sources.¹⁰ Because of their small size, it is often difficult for water corporations to obtain financing for improvements.¹¹

The sponsor and supporters of Chapter 431 argue that it gives predictability to business practices and regulatory policies and encourages water corporations to invest in new equipment that is needed to meet the higher standards demanded of water suppliers today.¹²

7. *Id.* § 790(a) (enacted by Chapter 431); *see id.* (empowering the commission to set the interest rate at the rate used for memorandum accounts); *California Water Service Co.*, *supra* note 4, at *21 (awarding interest earned on net proceeds from the sale of utility land, at the historic one-year treasury bill rate, to rate payers as a penalty for a utility's disregard of Commission decisions); *cf.* CONN. GEN. STAT. ANN. § 16-43(c) (West Supp. 1995) (requiring a water company to use proceeds from a sale of land that was at any time in the company's rate base to use those funds for capital projects which improve or protect the water supply system or for the acquisition of land to protect a water supply source); NEB. REV. STAT. § 14-2150 (Supp. 1994) (crediting proceeds from a sale of utility property which is no longer required for the operation of such utility, to the utility); W. VA. CODE § 8-12-17 (1990) (requiring proceeds from the sale of any utility to be used to pay any bonded debt, firefighting equipment, municipal buildings, paved streets, avenues, alleys, sewers and other like improvements, unless the utility property sold is determined to be unnecessary for the efficient rendering of utility service).

8. CAL. PUB. UTIL. CODE § 790(c) (enacted by Chapter 431).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1025, at 1 (Apr. 27, 1995).

10. CAL. PUB. UTIL. CODE § 789.1(a), (b) (enacted by Chapter 431); *see id.* § 789.1(c) (enacted by Chapter 431) (stating that water corporations are also faced with the need to upgrade because of increased flow requirements for fire protection purposes); *see also California Water Service Co.*, *supra* note 4, at *28-29 (finding that water utilities have an ongoing need to invest in infrastructure improvements, and the need for plant additions will accelerate in the next five years as California water utilities face water supply constraints, and stricter water quality standards); Letter from Margaret Catzen, Legislative Advocate, Law Offices of Nossman, Guthner, Knox & Elliot, to Senator Al Alquist (Apr. 24, 1995) (copy on file with the *Pacific Law Journal*) (stating that capital outlay demands on water companies have escalated in recent years, and that the trend is expected to continue).

11. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1025, at 1 (Apr. 27, 1995).

12. *Id.* at 2; *see id.* (noting that proponents argue that SB 1025 creates a uniform standard that results in predictability); *id.* (listing support for SB 1025 from the California Water Association, California Water Service Company, Dominguez Services Corporation, and San Gabriel Valley Water Association); Letter from Margaret Catzen, *supra* note 10 (stating that SB 1025 relieves water company rate payers of the effects of high borrowing costs for capital, as well as allowing water utilities to sell unneeded property without the uncertainty that existed in past decisions); *see also* CAL. PUB. UTIL. CODE § 789.1(d) (enacted by Chapter 431) (declaring that it is the policy of the state to encourage water corporations to dispose of land that is no longer useful and invest those proceeds in infrastructure and properties that are useful for providing water service to the public).

Opponents of Chapter 431 argue that it removes the flexibility of allocating gain from land sales on a case-by-case basis and undermines the PUC's regulatory efforts.¹³

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13. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1025, at 2 (Apr. 27, 1995); *see* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1025, at 2 (July 5, 1995) (stating that the PUC and Department of Finance oppose SB 1025 because it would undermining the PUC's regulatory efforts by eliminating the evaluation of the utility's financial condition, business practices, and related issues).