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An Introduction to Practice and Procedure Under the California Administrative Procedure Act

By CHARLES H. BOBBY*

THERE ARE more than one hundred state licensing agencies¹ with regulatory responsibility over almost a million licensees engaged in businesses and professions in the State of California. These agencies issue licenses which permit qualified individuals and other legal entities to engage in a particular trade or profession. In 1945, the legislature adopted the Administrative Procedure Act (A.P.A.)² which prescribes hearing procedures to be followed where denial, suspension or revocation of a license by the listed³ agencies is protested. Later statutes make the A.P.A. applicable to many proceedings of state licensing agencies originally not encompassed by the Act.⁴

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¹ "Agency" as used in this article refers to any agency, board, commission or other administrative body subject to the Administrative Procedure Act. See CAL. GOV. CODE § 11445(a).

² Cal. Stat. 1945, ch. 867; CAL. GOV. CODE §§ 11370-528.

³ CAL. GOV. CODE § 11501(b) lists the agencies originally covered by the Act.

⁴ Sections of the CAL. BUS. & PROF. CODE which make the A.P.A. applicable to agencies not originally covered are: Board of Accountancy § 5102; Department of Alcoholic Beverage Control §§ 23988, 24016, 24300; Board of Architectural Examiners §§ 5553, 5560, 5561.5, 5570, 5573; Director of Agriculture §§ 12701, 21715, 21822; Board of Barber Examiners § 6570; Cemetery Board §§ 9737, 9685; Collection Agency Licensing Bureau §§ 6894.11, 6904.1, 6925.1, 6949.2; Registrar of Contractors §§ 7073, 7091; Commissioner of Corporations §§ 17772, 17841; Board of Cosmetology § 7425; Board of Dental Examiners §§ 1670, 1747, 4233, 4238; Board of Dry Cleaners § 9595; Bureau of Electronic Repair Dealers Registration § 9848; Board of Registration for Civil and Professional Engineers §§ 6776, 8781; Board of Funeral Directors and Embalmers §§ 7686, 7626.5, 7647.5; Bureau of Furniture and Bedding Inspection § 19209; Board of Guide Dogs for the Blind §§ 7212, 7216; Horse Racing Board § 19461; Bureau of Private Investigators and Adjusters §§ 7550, 7530.5, 7544.25; Board of Landscape Architects § 5662; Board of Medical Examiners §§ 2360, 2364, 2555, 2617, 2657, 2965,

The title "Administrative Procedure Act" is descriptive of its provisions. It prescribes procedures for a hearing resembling an adversary judicial proceeding. Where the applicant or licensee protests an agency's action, a hearing under the Act is required. An exception exists, however, where the revocation or suspension occurs by operation of law by reason of a criminal conviction.⁵

In A.P.A. proceedings the parties are designated "complainant" (plaintiff) and "respondent" (defendant). No attempt should be made to equate the parties or their positions other than this. The complainant, i.e., the state, is represented by either an attorney from the agency or the attorney general. The respondent "may be but need

4233, 4238; Board of Nursing Education and Nurse Registration § 2750; Board of Osteopathic Examiners § 2490; see also §§ 4233, 4238; Board of Optometry §§ 3090, 3044; Board of Pharmacy §§ 4233, 4238, 4350; Department of Public Health §§ 4233, 4238; Real Estate Commissioner § 10100 (see 25 Ops. CAL. ATT'Y GEN. 144 (1955)); Shorthand Reporters Board § 8009; Board of Social Work Examiners § 9028.5; Structural Pest Control Board §§ 8568, 8620; Board of Examiners in Veterinary Medicine §§ 4875, 4233, 4238; Board of Vocational Nurse Examiners §§ 2875, 4520; Yacht and Ship Brokers Commission §§ 8952, 8938.3.

Other code sections which make the A.P.A. applicable to agencies not originally covered are: Division of Aeronautics, CAL. PUB. UTIL. CODE § 21691; Director of Agriculture, CAL. AGR. CODE §§ 120.3, 160.8, 216.7, 352, 360.4, 364.7, 375.7(c), 380.58, 707, 728, 737.11, 1041, 830.35, 1043, 1072, 1080.2, 1241, 1254, 4004, 4415-16; Board of Chiropractic Examiners, DEERING'S GEN. LAWS, Act 4811, § 10; Cancer Advisory Council, CAL. HEALTH & S. CODE § 1720; Commissioner of Corporations, CAL. CORP. CODE §§ 25710, 25809, 27108, 28304, 28409, CAL. FIN. CODE §§ 12402, 14006, 17613, 22211, 22617, 24211, 24611; Board of Education, CAL. EDUC. CODE §§ 13109, 13174, 13203, 13444, 13855, 29007, 30055; Fair Employment Practice Commission, CAL. LABOR CODE § 1424; Fire Marshal, CAL. HEALTH & S. CODE §§ 12666, 13123; Department of Fish and Game, CAL. FISH & G. CODE §§ 3291, 6427, 6656, 7855, 7706; Insurance Commissioner, CAL. INS. CODE §§ 700, 704, 725, 777.2, 790.05, 790.07, 851, 1106, 1153.5, 1373.2, 1667, 1692, 1737, 1738, 1742, 1744, 1746, 1807.5, 1821, 1838, 1858.5, 9080.1, 10205.6, 11513.2, 11625, 11754.1, 11754.4, 12411; Labor Commissioner, CAL. LABOR CODE §§ 1584, 1597, 1692, 1700.8, 1700.22; Department of Mental Hygiene, CAL. WELF. & INST. CODE §§ 5703, 5753; Department of Motor Vehicles, CAL. VEH. CODE §§ 11111-12, 11511-12, 11705-08, 11803, 14112; Department of Natural Resources, CAL. PUB. RES. CODE §§ 4966, 4969; Board of Pilot Commissioners (San Francisco), CAL. HARB. & NAV. CODE §§ 1101, 1190, 1192-93; Board of Pilot Commissioners (Humboldt Bay) CAL. HARB. & NAV. CODE §§ 1272, 1290; Board of Pilot Commissioners (San Diego), CAL. HARB. & NAV. CODE §§ 1371, 1392; Board of Public Health, CAL. HEALTH & S. CODE §§ 28377, 28335, 28418, 28479; Department of Public Health, CAL. HEALTH & S. CODE §§ 1216, 1413, 1413.5, 1511, 1615, 1668, 28013, 28721; CAL. INS. CODE § 11503; Board of Administration, State Employees Retirement System, CAL. GOV. CODE § 20133; Savings and Loan Commissioner, CAL. FIN. CODE §§ 6210, 6216; Board of Social Welfare, CAL. WELF. & INST. CODE § 2356; Department of Social Welfare, CAL. WELF. & INST. CODE §§ 1624, 1625, 2304-05, 2355; State Geologist, CAL. PUB. RES. CODE §§ 2256, 2257; Teachers Retirement Board, CAL. EDUC. CODE § 13855; Department of Water Resources, CAL. WATER CODE § 414.

⁵ E.g., CAL. EDUC. CODE § 13207.

not be represented by counsel" in his own discretion.⁶ Such counsel would be of respondent's own choice and employment.

Every hearing in a contested case under the Act must be "presided over"⁷ and "conducted by"⁸ a hearing officer on the staff of the Office of Administrative Procedure, Department of General Services, unless the statutes relating to a particular agency otherwise prescribe. The Office of Administrative Procedure has three regional offices. The head office is in Sacramento, where there are three hearing officers, with branches in Los Angeles (thirteen hearing officers) and San Francisco (five hearing officers). The hearing officers must have practiced law in California for at least five years immediately preceding appointment to the staff, and as a matter of fact the professional experience of staff hearing officers is significantly longer. The officers are compensated under the civil service system of the state.

Initially, the Office of Administrative Procedure was a part of the Department of Professional and Vocational Standards, the housekeeping department for some twenty-seven licensing agencies for which the office furnished hearing officers. In two instances the director of the department was also the single head of the licensing agency; he was at the same time the appointing power (employer) of the hearing officers. Although never abused in practice, the director's power to appoint the hearing officer and his authority to adopt the officer's proposed decision gave the appearance of insufficient separation between investigation, case presentation, and decision making. In 1961 the Office of Administrative Procedure was transferred to the Department of Finance, and in 1963 again transferred to the newly established Department of General Services, thereby disassociating the hearing officers from any agency for which they would hear cases.

Two Different Proceedings

Proceedings under the Act may be generally divided into two classifications; those which relate to denial of an application for a license and those which relate to suspension or revocation of an issued license. The complaint or accusatory pleading in a denial proceeding is termed a "statement of issues," and in a revocation proceeding, an "accusation." While proceedings under statements of issues and accusations are basically similar, the manner of initiating proceedings under them differs. When an applicant is denied his license he may

⁶ CAL. GOV. CODE § 11509; *Givens v. Department of Alcoholic Beverage Control*, 176 Cal. App. 2d 529, 1 Cal. Rptr. 446 (1959).

⁷ CAL. GOV. CODE § 11512; see *Yanke v. State Dept. of Pub. Health*, 162 Cal. App. 2d 600, 328 P.2d 556 (1958).

⁸ CAL. GOV. CODE § 11502.

initiate proceedings under the Act by "appealing" to the agency which will then prepare a "statement of issues."⁹ On the other hand, the agency independently initiates suspension or revocation proceedings by preparing and serving an "accusation."¹⁰

The burden of proof is also said to differ. The burden generally lies on the alleging party: the respondent in a denial proceeding (alleging entitlement), and the complainant in a revocation proceeding (alleging grounds for revocation). Most denial statutes prescribe certain conduct or omissions as affirmative grounds for denial, and therefore statements of issues often contain, as grounds for denial, allegations of conduct or omissions on the part of the applicant. Since as a practical matter basic entitlement is usually easily shown in the denial proceeding, the ultimate burden rests on the complainant to prove its affirmative allegations as grounds for the denial. Thus the complainant bears the important burdens on both types of proceedings.

Both statements of issues and accusations must be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held.¹¹ Where made by a public official or an employee of the agency, usually an investigator, the statement of issues or accusation will contain an allegation to that effect. Where required, verification may be made on information and belief.¹²

Statement of Issues—Denial Proceedings

The A.P.A. provides that the statement of issues be in writing and specify "the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial. . . ."¹³ There is no answering pleading, as such, to a statement of issues. However, where appropriate the special defenses prescribed in Government Code section 11506 can and should be pleaded, filed, and served on all parties prior to the hearing.¹⁴

⁹ CAL. GOV. CODE § 11504; *Andrews v. State Board of Registration*, 123 Cal. App. 2d 685, 267 P.2d 352 (1954). Cf: *Akopianz v. Board of Medical Examiners*, 146 Cal. App. 2d 331, 304 P.2d 52 (1956).

¹⁰ CAL. GOV. CODE § 11503.

¹¹ CAL. GOV. CODE §§ 11503-04.

¹² *Ibid.*

¹³ CAL. GOV. CODE § 11504.

¹⁴ See CAL. GOV. CODE § 11504.5. These defenses are listed *infra* under the heading "Special Defenses."

The Accusation—Revocation Proceedings

"The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense."¹⁵ It must give the statutes and rules which authorize the agency to revoke, suspend, limit or condition the license by reason of the stated "acts or omissions" of the respondent.¹⁶ Upon filing the accusation the agency must serve a copy on the respondent,¹⁷ together with a "notice of defense" and a "statement to respondent."¹⁸ The notice of defense (a blank form of which is sent to the respondent with the accusation) constitutes the answering pleading to an accusation. The statement to respondent must inform the respondent that he will waive his right to a hearing unless he files his notice of defense within fifteen days after service of the accusation.¹⁹ In practice, the statement to respondent contains additional information describing respondent's rights under the Act; the degree and content thereof will depend upon the particular agency involved.

Special Defenses

The notice of defense may take several forms, and the respondent or his attorney should pay particular attention to the provisions of Government Code section 11506. This section provides that the respondent, in his notice of defense, may:

- (1) Request a hearing [treated as a specific denial of all parts of the accusation];
- (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed [treated as a specific denial of all parts of the accusation];
- (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he can not identify the transaction or prepare his defense [treated as a specific denial of all parts of the accusation, but unless taken as provided in the section, all objections to the form of the accusation are deemed waived];
- (4) Admit the accusation in whole or in part [treated as a specific denial of all parts of the accusation not specifically admitted];
- (5) Present new matter by way of defense [treated as a specific denial of all parts of the accusation not specifically or by necessary inference admitted].

¹⁵ CAL. GOV. CODE § 11503.

¹⁶ *Ibid.*

¹⁷ CAL. GOV. CODE § 11505.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

The notice of defense which merely "requests a hearing" is used in most cases. Respondent should, however, consider the appropriateness of the permitted special defenses; on the other hand, it would be frivolous and time consuming to assert unwarranted special defenses and the practice is not recommended. Where the accusation or statement of issues "is so indefinite or uncertain that respondent cannot identify the transaction or prepare his defense,"²⁰ that special defense should be pleaded. If sustained, the agency has an absolute right to amend.²¹ While the special defense cannot defeat the complainant, it can accomplish clarification of the issues.

Section 11506 further provides that the respondent "may file a statement by way of mitigation even if he does not file a notice of defense." This provision, adopted in 1963, appears not to have been utilized as of the date of this writing. The meaning of the provision is obscure and the effect of its use, in the light of other provisions of the Act, cannot be predicted with any degree of certainty. A reasonable construction of this provision might be that the filing of a "statement by way of mitigation" constitutes an "admission and excuse." The "admission" is of the allegations in the statement of issues or accusation, and the "excuse" would be a claim of facts in mitigation which the respondent would have to prove by evidence presented at a hearing.

Further Procedure Before Hearing

In a denial proceeding the time and place of hearing will be determined prior to service of the statement of issues.²² In revocation proceedings the agency will set a time and place for hearing when it receives the respondent's notice of defense. In both cases, the notice of hearing must be served upon him at least ten days before the hearing.²³ However, some agencies in revocation proceedings set a hearing date and serve a notice of hearing along with the accusation, statement to respondent, and form notice of defense. When this is done, the respondent must file a notice of defense within fifteen days of service in order to perfect his right to a hearing. The form of the notice of hearing is prescribed in Government Code section 11509.

Where the respondent fails to file a notice of defense (or to appear at the hearing after filing a notice of defense) "the agency may take action based upon the respondent's express admissions or upon other

²⁰ CAL. GOV. CODE § 11506(a)(3).

²¹ CAL. GOV. CODE § 11507; *Stuck v. Board of Medical Examiners*, 94 Cal. App. 2d 751, 211 P.2d 389 (1949).

²² CAL. GOV. CODE §§ 11504, 11509.

²³ CAL. GOV. CODE § 11509.

evidence, and affidavits may be used as evidence without any notice to respondent."²⁴ These latter proceedings are in the nature of default and are customarily so described. A.P.A. default proceedings differ from judicial default proceedings in that failure to file a notice of defense, or to appear at the hearing, does not constitute an admission of facts alleged in the accusation. Although no answering pleading exists for statements of issues, where affirmative grounds for denial have been alleged (requiring proof on the part of complainant), and the respondent fails to appear at the hearing, the matter would be similarly disposed of. In the denial proceedings where the burden is on the applicant to evidence entitlement to the license and he fails to appear at the hearing, "the agency may act without taking evidence."²⁵

Service of pleadings, notices and other documents may be made and proved in the manner authorized for civil actions. However, alternatively, service by registered (certified) mail is effective if a statute or agency rule requires the respondent to file his address with the agency and to keep it up to date.²⁶ The customary practice is to serve documents by certified mail, return receipt requested, and to prove the service by both the affidavit or declaration of the person who mailed them and the introduction of the return receipt.

Before the hearing has commenced the agency or the assigned hearing officer will issue subpoenas and subpoenas duces tecum at the request of any party in accordance with the provisions of section 1985 of the Code of Civil Procedure.²⁷

Continuances may be granted only upon a showing of good cause.²⁸ Although not required by statute, motions for continuance should be made in writing with copies served on all other parties and their attorneys. Such motions should be directed to the hearing officer assigned to the case or the hearing officer in charge of the appropriate regional office of the Office of Administrative Procedure.²⁹ Because of the requirement that notice of hearing be served at least ten days prior to hearing, any continuance granted within ten days of the hearing results in wasteful loss of hearing time for the hearing officer as other cases cannot be set on that day.

²⁴ CAL. Gov. CODE § 11520.

²⁵ *Ibid.*

²⁶ CAL. Gov. CODE §§ 11504.5, 11505; *Miller v. Department of Alcoholic Beverage Control*, 160 Cal. App. 2d 658, 325 P.2d 601 (1958).

²⁷ CAL. Gov. CODE § 11510(a).

²⁸ CAL. Gov. CODE § 11524; *Skipitar v. Munro*, 175 Cal. App. 2d 1, 345 P.2d 508 (1959); *Givens v. Department of Alcoholic Beverage Control*, 176 Cal. App. 2d 529, 1 Cal. Rptr. 446 (1959).

²⁹ CAL. Gov. CODE § 11524.

The agency determines whether the hearing officer is to hear the case sitting alone or whether the agency will hear the case with the hearing officer presiding.³⁰ In either case, the agency has the ultimate authority to render the decision. When the agency itself hears the case, the hearing officer presides at the hearing, rules on the admission and exclusion of evidence, and advises the agency on matters of law. The agency itself exercises all other powers relating to the conduct of the hearing but may delegate any or all of them to the hearing officer.³¹ After the hearing is concluded and the case submitted, the agency will go into "executive session," with only the hearing officer present, and determine the issues of fact and law and make its decision. The decision will be reduced to writing and subsequently served on the respondent. As an alternative, the agency may refer the case to a hearing officer sitting alone, and he exercises all powers relating to the conduct of the hearing.³²

The Hearing

The hearing somewhat resembles a civil trial. It is a contested, adversary proceeding with the hearing officer occupying a position in relation to the parties and exercising responsibilities much in the nature of a judge. Similarly, the proceedings at the hearing must be reported by a phonographic reporter.³³ It is not, in law, a judicial proceeding; however, the term "administrative adjudication" has been applied, as well as the term "quasi-judicial proceeding."

At the commencement of the hearing, the hearing officer will open the record, call the matter for hearing, identify himself and ask that the parties and attorneys present identify themselves. Next he will ask that the original pleadings be filed to constitute a part of the record and will mark them Exhibit 1.

At this time, any special defenses (objections) in the nature of demurrer³⁴ will be disposed of. If objections to form are sustained, the complainant (agency) will be given opportunity to amend.³⁵ Amendment may be made either "on the face" of the original pleading or by filing of an amended or supplemental pleading. If the amended or supplemental pleading "presents new charges" the respondent will

³⁰ CAL. GOV. CODE § 11512(a).

³¹ CAL. GOV. CODE §§ 11502, 11512(b).

³² CAL. GOV. CODE § 11512(b); *Bartosh v. Board of Osteopathic Examiners*, 82 Cal. App. 2d 486, 186 P.2d 984 (1947).

³³ CAL. GOV. CODE § 11512(d); *cf.* 11 OPS. CAL. ATT'Y GEN. 49 (1948).

³⁴ CAL. GOV. CODE § 11506; *Rolfe v. Munro*, 165 Cal. App. 2d 726, 332 P.2d 404 (1958).

³⁵ CAL. GOV. CODE § 11507.

be afforded a reasonable opportunity, usually in the form of a continuance, to prepare his defense.³⁶

The order of presentation is the complainant's evidence, the respondent's evidence, rebuttal, if any, and so on. Opening statements, though not customary, may be made at the discretion of the parties. Opportunity for closing arguments is afforded and they may be oral or in writing; the oral arguments may be phonographically reported if the parties request.

The form of presentation of evidence resembles that in judicial proceedings. Direct and cross-examination of witnesses is done by the parties, or if represented, by their attorneys. On occasion the hearing officer will ask questions of a witness. The introduction of documentary evidence follows the civil procedure; all documents offered are marked as exhibits and become a part of the record. Oral evidence is taken only on oath or affirmation.³⁷ Each party has the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.³⁸ The rules pertaining to cross-examination and impeachment are more liberal than in judicial proceedings.

The rule regarding the respondent's testimony is narrower than in civil proceedings.³⁹ If respondent does not testify on his own behalf he may be called and examined as if under cross-examination;⁴⁰ as interpreted by the attorney general, the respondent may not be called as a witness by the complainant until he has had opportunity to testify on his own behalf and has failed to do so.⁴¹ In practice, the complainant (agency) first puts on its case after which the respondent is given the opportunity to put on his case; if he fails to testify, the complainant may call and cross-examine him.

Where a material witness, residing within or without the state, is unable or cannot be compelled to attend the hearing, upon verified petition the agency may order that his testimony be taken by deposition in the manner prescribed by law for depositions in civil actions.⁴² The necessary contents of such a petition are prescribed in Govern-

³⁶ *Ibid.*; see *Raab v. Department of Alcoholic Beverage Control*, 177 Cal. App. 2d 333, 2 Cal. Rptr. 26 (1960).

³⁷ CAL. GOV. CODE § 11513(a).

³⁸ CAL. GOV. CODE § 11513(b).

³⁹ CAL. CODE CIV. PROC. § 2055.

⁴⁰ CAL. GOV. CODE § 11513; 11 OPS. CAL. ATT'Y GEN. 116 (1948).

⁴¹ 11 OPS. CAL. ATT'Y GEN. 116 (1948).

⁴² CAL. GOV. CODE § 11511.

ment Code section 11511. When the petition is made prior to hearing, it should be directed to the agency and filed with the hearing officer assigned to hear the case, and copies sent to all other parties and their attorneys. If the witness resides in the state, the order of the agency is adequate. If the witness resides outside the state, additional orders must be obtained from the superior court in Sacramento County. The agency is the proper party petitioner in the superior court and the respondent, if he is the petitioning party, would only be required to petition and obtain the agency order.⁴³ The cost of the actual taking of the deposition will be borne by the party requiring the witness's testimony.

At any time ten or more days before a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in Government Code section 11514(b). Unless the opposing party, within seven days after mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant, his right to cross-examine is waived and the affidavit, if introduced in evidence, is given the same effect as if the affiant had testified at the hearing.⁴⁴ If an opportunity to cross-examine an affiant is not afforded after request is made, the affidavit may be introduced in evidence, but is only given the effect of other administrative hearsay.⁴⁵

The hearing need not be conducted according to the technical rules of evidence developed in judicial proceedings.⁴⁶ The proceedings are not criminal in nature and the rules of criminal evidence do not apply.⁴⁷ The rules of privilege are the same as in civil actions.⁴⁸ Hearsay evidence which is admissible in civil proceedings under an exception to the hearsay rule is admissible in A.P.A. contested proceedings and can, standing alone, support a finding of fact. Relevant hearsay evidence which would not be admissible over objection in civil proceedings is admissible in A.P.A. proceedings "for the purpose of supplementing or explaining any direct evidence but [is not] sufficient in itself to support a finding."⁴⁹ Such hearsay evidence is called "administrative hearsay." In this context, the term "direct evidence" means any admissible relevant evidence, including hearsay which is admissible over objection in civil actions.

⁴³ *Ibid.*

⁴⁴ CAL. GOV. CODE § 11514.

⁴⁵ *Ibid.*; 6 OPS. CAL. ATT'Y GEN. 219 (1945).

⁴⁶ CAL. GOV. CODE § 11513(c).

⁴⁷ *Ibid.*; 11 OPS. CAL. ATT'Y GEN. 116 (1948).

⁴⁸ CAL. GOV. CODE § 11513(c).

⁴⁹ CAL. GOV. CODE § 11513; *Manning v. Watson*, 108 Cal. App. 2d 705, 239 P.2d 688 (1952).

The general rule favors admission of all reliable relevant evidence. As stated in Government Code section 11513(c): "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions."

Objections to offered evidence which are implicit in the statute⁵⁰ are: (1) that it is not the "sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs"; (2) that it is "irrelevant"; and (3) that it is "unduly repetitious." Under (1), the specific objections of "lack of proper foundation," and "calling for a conclusion of the witness" (*i.e.* unreliable opinion testimony), among others, are appropriate. Objections to the form of a question are in order where the question is compound, ambiguous, unintelligible or argumentative. Of course a question which assumes facts not in evidence is objectionable.

Official notice may be taken of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this state.⁵¹ Under this rule, the agency or hearing officer will take official notice of the contents of the agency's records, including the license status of the respondent. Official notice is ordinarily taken after motion by a party; however, where appropriate, the hearing officer will do so upon his own motion. Parties present must be notified, and given a "reasonable opportunity on request to refute the officially noticed matters by evidence or oral presentation of authority."⁵²

Procedure After Hearing

At the conclusion of the hearing, if conducted by a hearing officer alone, the officer will prepare a written proposed decision containing findings of fact, determinations of issues and a proposed order of disposition. The proposed decision may be adopted by the agency in its entirety, or the agency may reduce the proposed penalty and adopt the balance. In doing either, the agency decides the matter. The Act does not provide for argument before the agency itself in support of or against the adoption of the proposed decision. Where the agency fails to adopt the proposed decision of the hearing officer, it has two alternatives: it "may decide the case [itself] upon the record, including the transcript, with or without taking additional evidence,"

⁵⁰ CAL. GOV. CODE § 11513.

⁵¹ CAL. GOV. CODE § 11515.

⁵² *Ibid.*

affording the parties the opportunity to present either (in the discretion of the agency) oral or written argument; or in the alternative, it "may refer the case to the same or another hearing officer to take additional evidence."⁵³ If this latter course is taken, a noticed supplemental hearing is held under the rules pertaining to regular hearings, and the officer will issue another proposed decision.⁵⁴ In any event, a copy of a proposed decision must be filed by the agency as a public record, and copies must be served on each party and his attorney,⁵⁵ but this service need not be made until after the agency has acted thereon.⁵⁶

Prior to the agency's making its ultimate decision in any of these modes, and after submission of the case for decision, it may order amendment of the accusation⁵⁷ or statement of issues.⁵⁸ Each party must be given notice of the amendment and an opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown, the agency must reopen the case.⁵⁹ This is a little used but important provision because it permits reliance upon cause arising subsequent to submission of the case for decision. For example, the respondent may have committed disqualifying acts or omissions subsequent to the hearing which should be considered by the agency in its determination of his fitness to have a license. Another instance (which would better be done by amendment under the provision allowing amendment prior to submission for decision,⁶⁰ but may be done after submission⁶¹) is amendment to conform to proof. For example, in the original accusation or statement of issues the respondent is alleged to have committed acts which would be cause for denial or revocation; at the hearing, respondent claims and evidences that he was insane to show mitigation. If insanity is a legal ground for denial or revocation, the pleading could be amended to allege that ground as cause, in the alternative.

The agency's decision becomes effective thirty days after it is delivered or mailed to the respondent unless: (1) a reconsideration is ordered within that time pursuant to Government Code section 11521;

⁵³ CAL. GOV. CODE § 11517(b)(c).

⁵⁴ See CAL. GOV. CODE § 11517(c).

⁵⁵ CAL. GOV. CODE § 11517(b).

⁵⁶ *Dami v. Department of Alcoholic Beverage Control*, 176 Cal. App. 2d 144, 1 Cal. Rptr. 213 (1959).

⁵⁷ CAL. GOV. CODE § 11516.

⁵⁸ CAL. GOV. CODE §§ 11504.4, 11516.

⁵⁹ CAL. GOV. CODE § 11516.

⁶⁰ CAL. GOV. CODE § 11507.

⁶¹ CAL. GOV. CODE § 11516.

or (2) the agency orders that the decision shall become effective sooner; or (3) the agency orders a stay of execution.⁶²

There are three remedies, after agency decision, available to an aggrieved respondent: He may (1) petition the agency for reconsideration;⁶³ (2) petition the agency for reinstatement or reduction of the penalty;⁶⁴ and (3) petition the superior court for a writ of mandate ("appeal").⁶⁵

(1) The agency may, on or before the effective date of the decision, order a reconsideration of all or a part of the case on its own motion or on petition of any party. If granted, the agency itself may reconsider the case or it may assign it to a hearing officer, in which latter case the hearing officer will issue a proposed decision on reconsideration which will be acted upon by the agency pursuant to Government Code section 11517. The agency cannot order a reconsideration after the effective date of the decision; it lacks jurisdiction to do so.⁶⁶

(2) A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.⁶⁷ This section has been construed as prohibiting a licensing agency from issuing within one year from the date of the revocation a license of the same class as that which has been revoked.⁶⁸

(3) Judicial review may be had by filing in the superior court a petition for writ of mandate, in accordance with the Code of Civil Procedure,⁶⁹ within thirty days after the last day on which reconsideration can be ordered (the effective date of the decision).⁷⁰ If the respondent desires judicial review, he should make written request to the agency for the record (transcript, exhibits, etc.) or that part of it desired, within ten days after the effective date of the decision. In so doing, he extends the time within which he must file his petition in the superior court until five days after he receives the requested record from the agency.⁷¹ Failing to do this, he must file his petition

⁶² CAL. GOV. CODE § 11519.

⁶³ CAL. GOV. CODE § 11521.

⁶⁴ CAL. GOV. CODE § 11522.

⁶⁵ CAL. GOV. CODE § 11523; CAL. CODE CIV. PROC. § 1094.5.

⁶⁶ See *Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 184 P.2d 323 (1947).

⁶⁷ CAL. GOV. CODE § 11522; see 7 OPS. CAL. ATT'Y GEN. 264 (1946).

⁶⁸ 40 OPS. CAL. ATT'Y GEN. 256 (1962).

⁶⁹ See CAL. CODE CIV. PROC. § 1094.5.

⁷⁰ CAL. GOV. CODE § 11523.

⁷¹ CAL. GOV. CODE § 11523; *Hollywood Turf Club v. Daughterty*, 36 Cal. 2d 352,

in the superior court within thirty days after the effective date of the decision. Often it will take more than thirty days for the hearing reporter to prepare a transcript because of prior calendaring of equally important work. Unless the respondent has tolled the thirty day limitation by making his request within ten days, the statute will run before he can obtain the record.

In considering whether an "appeal" to the superior court is advisable, the respondent should consider the scope of review obtainable. If he is appealing from a denial proceeding, under the "substantial evidence rule" the court must consider only the evidence which supports the finding of the agency; if it is sufficient the agency or board will be upheld, regardless of the amount of contrary evidence.⁷² If he is appealing from a suspension or revocation proceeding, the superior court may form an "independent judgment" in a "limited trial de novo."⁷³ However, the "substantial evidence rule" is applied to all "appeals" from boards or agencies deriving their power from the constitution (*e.g.*, the Alcoholic Beverage Control Board) even in a revocation proceeding.⁷⁴

This article has but skimmed the surface of California Administrative Practice and Procedure under the Administrative Procedure Act. It is designed as an introduction to a much larger area of law than the coverage would indicate. It is past adolescence, yet not mature, and worthy of attention. Its effects are increasingly pervasive. In order that substantial justice be rendered in the ever-increasing number of cases arising under the A.P.A., it is essential that California practitioners be familiar with its provisions.

224 P.2d 359 (1950); *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 196 P.2d 20 (1948).

⁷² *Housman v. Board of Medical Examiners*, 84 Cal. App. 2d 308, 196 P.2d 653 (1948).

⁷³ *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 196 P.2d 20 (1948).

⁷⁴ *Harris v. Alcoholic Beverage Control Appeals Bd.*, 212 Cal. App. 2d 106, 28 Cal. Rptr. 74 (1963).