In the Supreme Court of the State of California

Saint Francis Memorial Hospital,

Plaintiff and Appellant,

v.

California Department of Public Health,

Defendant and Respondent.

Case No. S249132

First Appellate District, Division One, Case No. A150545
San Mateo County Superior Court, Case No. CIV537118
Honorable George A. Miram, Judge

REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF GONZALO C. MARTINEZ

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General

*GONZALO C. MARTINEZ (SBN 231724)
Deputy Solicitor General
SUSAN M. CARSON
Supervising Deputy Attorney General
GREGORY D. BROWN (SBN 219209)
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(415) 510-3922
Gonzalo.Martinez@doj.ca.gov

Attorneys for Defendant and Respondent California Department of Public Health

TO APPELLANT AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rules 8.520(g) and 8.252(a) of the California Rules of Court, Respondent California Department of Public Health moves this Court to take judicial notice of certain materials cited in the Department's Answer Brief on the Merits.

This motion is made on the following grounds:

1) Evidence Code sections 452, 453, and 459 authorize this Court to take judicial notice of the materials set forth in this motion; and

2) The materials are relevant to the issues addressed in the Department's brief.

Alternatively, to the extent the Court determines that judicial notice is unavailable, the Department respectfully asks the Court to augment the record pursuant to Rule 8.155(a) to include those documents lodged with the superior court.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Gonzalo C. Martinez, and the attached exhibits, which are true and correct copies of the documents described.

Dated: December 5, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
GREGORY D. BROWN
Deputy Attorney General

GONZALO C. MARTINEZ
Deputy Solicitor General
Attorneys for Defendant and Respondent
California Department of Public Health

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Evidence Code sections 452, 453, and 459, and California Rules of Court, rules 8.252(a), and 8.520(g), Respondent California Department of Public Health hereby requests that this Court take judicial notice of the following documents:

1) **Exhibit A**, "Request for Reconsideration," dated December 30, 2015, filed by Appellant Saint Francis Memorial Hospital (Saint Francis) in the underlying administrative proceedings, CDPH case no. 12-AL-LNC-4998, Penalty No. 220009104. Exhibit A is part of the Administrative Record that was lodged with the trial court; Saint Francis cited it in, but did not attach it to, its writ petition.

2) **Exhibit B**, a letter from CDPH's final adjudicator, Mike Rainville, Assistant Chief Counsel, to counsel for Saint Francis, dated January 14, 2016, denying Saint Francis' request for reconsideration in the underlying administrative proceedings, Penalty No. 220009104. Exhibit B is part of the Administrative Record that was lodged with the trial court; Saint Francis cited it in, but did not attach it to, its writ petition.

3) **Exhibit C**, an analysis of Assembly Bill No. 2067 (1971 Reg. Sess.) from the files of the Assembly Committee on Judiciary, dated May 17, 1971.

To the extent the Court determines judicial notice is unavailable for Exhibits A or B, the Department respectfully asks the Court to augment the record pursuant to Rule 8.155(a) (authorizing reviewing court to augment the record "[a]t any time" by motion or sua sponte with "[a]ny document filed or lodged in the case in superior court").

Additionally, for the convenience of the Court and the parties, the Department also attaches:

4) **Exhibit D**, excerpts from the Judicial Council's Tenth Biennial Report to the Governor and to the Legislature (1944).

5) **Exhibit E**, excerpts from the former Division of Administrative Procedure's First Biennial Report to the Governor and to the Legislature (1947).

The Department is aware of this Court's guidance that a "request for judicial notice of published material is unnecessary. Citation to the material is sufficient." (See, e.g., *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45, fn. 9, citing *Stop Youth Addiction v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 571, fn. 9; see also *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. 4 [same].) Accordingly, these exhibits are attached for the convenience of the Court and the parties.

True and correct copies of all Exhibits are attached to the accompanying declaration.

II. THE EVIDENCE CODE AND THE RULES OF COURT AUTHORIZE JUDICIAL NOTICE OF THESE MATERIALS

The materials that are the subject of this request are relevant to this matter for the reasons explained in the Department's Answer Brief on the Merits. Briefly, Exhibits A and B are documents from the underlying administrative proceedings that demonstrate the basis for Saint Francis's request for reconsideration and the Department's denial. These documents were cited in, but not attached to, Saint Francis's petition for administrative mandate (see CT 100-156); they were lodged with the trial court as part of the administrative record (CT 231). Exhibit C is an analysis from the Assembly Committee on the Judiciary that provides helpful background regarding the 1971 amendment to the Administrative Procedure Act, which supports the Department's argument the APA was intended to serve as a comprehensive legislative solution to the issues of administrative

adjudication and judicial review. (As noted above, Exhibits D and E are published reports for which judicial notice is unnecessary, but they too provide helpful background regarding the legislative history of the APA.) These materials provide helpful context to the present dispute between Saint Francis and the Department. (Rule of Court 8.252(a)(2)(A).)

Exhibits A through C are subject to judicial notice. (Rule of Court 8.252(a)(2)(C).) Under Evidence Code section 452, this Court may take judicial notice of any matter that would be subject to discretionary judicial notice by the trial court. (Evid. Code, § 459, subd. (a); see also *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379 [appellate court can take judicial notice of matters that were not before the trial court].)

Pursuant to Evidence Code section 452, this Court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).) Courts may take judicial notice of decisions by quasi-judicial state administrative agencies. (See, e.g., *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945, 954 fn. 6; see also 31 Cal. Jur. 3d Evidence § 35 [collecting authorities].) They may also take judicial notice of filings before governmental administrative bodies. (See, e.g., *Heston v. Farmers Ins. Group* (1984) 160 Cal.App.3d 402, 413-414 [trial court "[p]roperly judicially noticed" a brief filed by Farmers's counsel before the National Labor Relations Board].) Additionally, courts may take judicial notice of legislative committee analyses. (See, e.g., *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7.)

All of the materials are publicly available documents as further described in the accompanying declaration. Exhibits A and B are part of the administrative record, which was lodged, but not filed, in the trial court. (Rule of Court 8.252(a)(2)(B).) Exhibit C was not presented to the trial

court. (*Id.*) None relate to proceedings occurring after the trial court order that is the subject of this appeal. (Rule of Court 8.252(a)(2)(D)).

To the extent the Court determines judicial notice is unavailable for those documents lodged with the trial court, the Department respectfully asks that this Request for Judicial Notice be deemed a Motion to Augment the Record under Rule 8.155. That rule authorizes augmentation of the record by a reviewing court "[a]t any time, on motion of a party or its own motion" to include "[a]ny document filed or lodged in the case in superior court." (Rule 8.155(a).) Additionally, as noted above, Exhibits A and B were cited in, but not attached to, Saint Francis's petition for administrative mandamus.

Copies of all materials are filed and served with this motion. (Rules of Court 8.252(a)(3), 8.155(a)(2).)

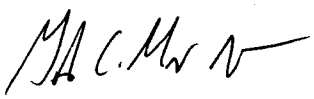
III. CONCLUSION

For these reasons, the Department respectfully requests that the Court take judicial notice of Exhibits A, B, and C. Alternatively, if the Court deems judicial notice of Exhibit A and B is unavailable, the Department requests the Court augment the record to include these documents.

Dated: December 5, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
GREGORY D. BROWN
Deputy Attorney General



GONZALO C. MARTINEZ
Deputy Solicitor General
Attorneys for Defendant and Respondent
California Department of Public Health

DECLARATION OF GONZALO C. MARTINEZ

I, Gonzalo C. Martinez declare:

1. I am a Deputy Solicitor General, employed by the Office of the Solicitor General in the California Attorney General's Office, California Department of Justice. I am one of the attorneys representing the California Department of Public Health. I have personal knowledge of the contents of, and may competently testify concerning, this declaration.

2. I execute this declaration pursuant to California Rules of Court, rules 8.252 and 8.54(a)(2), which require a motion for judicial notice of matters outside the record to be accompanied by a supporting declaration, and also pursuant to rule 8.155(a)(2), which requires a party to attach a copy of "any document it wants added to the record" as part of a motion to augment the record.

3. The information in this declaration concerns two documents from the administrative proceedings below, and a legislative committee analysis for the Administrative Procedure Act. The information provided is sufficient to allow the Court in its discretion to take judicial notice of these documents, as they will assist the Court in ruling on the appeal for the reasons set out in the accompanying memorandum and points and authorities.

4. **Exhibit A**: "Request for Reconsideration," dated December 30, 2015, filed by Appellant Saint Francis Memorial Hospital (Saint Francis) in the underlying administrative proceedings, CDPH case no. 12-AL-LNC-4998, Penalty No. 220009104. Exhibit A is part of the administrative record that was lodged, but not filed, with the trial court; Saint Francis cited Exhibit A in its writ petition, but did not attach it thereto. It was obtained at my direction from the Office of the Attorney General's copy of the certified administrative record. A true and correct copy is attached as Exhibit A.

5. **Exhibit B**: A letter from CDPH's final adjudicator, Mike Rainville, Assistant Chief Counsel, to counsel for Saint Francis, dated January 14, 2016, denying Saint Francis' request for reconsideration in the underlying administrative proceedings, Penalty No. 220009104. Exhibit B is part of the administrative record that was lodged, but not filed, with the trial court; Saint Francis cited Exhibit B in its writ petition, but did not attach it thereto. It was obtained at my direction from the Office of the Attorney General's copy of the certified administrative record. A true and correct copy is attached as Exhibit B.

6. **Exhibit C:** An analysis of Assembly Bill No. 2067 (1971 Reg. Sess.) from the files of the Assembly Committee on Judiciary, dated May 17, 1971. Exhibit C was in the Attorney General's copy of the legislative history file for that bill, which was obtained at my direction. A true and correct copy is attached as Exhibit C.

7. To the extent the Court considers the Department's alternative request to augment the record under Rule 8.155, this motion is made within a reasonable time and not for purposes of delay.

8. Additionally, for the convenience of the Court and parties, attached are true and correct copies of **Exhibit D**, excerpts from the Judicial Council's Tenth Biennial Report to the Governor and to the Legislature (1944), and **Exhibit E**, excerpts from the former Division of Administrative Procedure's First Biennial Report to the Governor and to the Legislature (1947); both were obtained from the respective published reports.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this declaration in San Francisco, California on December 5, 2018.

GONZALO C. MARTINEZ

EXHIBIT A

Cyrus A. Tabari SB#133842
SHEUERMAN, MARTINI, TABARI,
ZENERE & GARVIN
A Professional Corporation
1033 Willow Street
San Jose, California 95125
(408) 288-9700
Fax: (408) 350-1432

Attorneys for Respondent
SAINT FRANCIS MEMORIAL HOSPITAL

BEFORE THE DEPARTMENT OF HEALTH CARE SERVICES

OFFICE OF ADMINISTRATIVE HEARINGS AND APPEALS

In the Matter of the Accusation Against: SAINT FRANCIS MEMORIAL HOSPITAL Penalty No. 220009104 Respondent.	CDPH Case No. 12-AL-LNC-4998 REQUEST FOR RECONSIDERATION [Government Code §11518.5]

Pursuant to Government Code §11518.5 (a) Respondent SAINT FRANCIS MEMORIAL HOSPITAL (SFMH) hereby requests that the California Department of Public Health (CDPH) reconsider the decision signed on December 15, 2015 by Brandon Nunes, Chief Deputy Director of Operations, denying the appeal of the CDPH finding of immediate jeopardy and the accompanying fine of $50,000. The request for reconsideration is made on the grounds the CDPH decision to deny the appeal was based on mistake of fact and law.

While SFMH does not otherwise challenge the final decision by way of this request for reconsideration, it reserves its right to bring up other grounds not included here in future proceedings.

I. INTRODUCTION

The finding of immediate jeopardy, and the accompanying fine, arose from a surgical procedure performed at SFMH on October 14, 2010. On January 3, 2011 it was found that the

patient, Mr. B, had a retained surgical sponge from the October 14, 2010 procedure. He needed subsequent surgery to remove the sponge, and was placed on prophylactic antibiotic therapy for approximately six weeks thereafter.

The retained sponge event was reported to CDPH by SFMH. After an investigation a statement of deficiencies was issued, with a finding of immediate jeopardy, and an accompanying fine of $50,000. SFMH appealed the IJ finding and the fine.

II. PROCEDURAL HISTORY

This matter came on for Administrative Hearing on July 16, 2014, and the evidentiary portion of the hearing concluded on July 17, 2014. Judge Mary Stober, Administrative Law Judge, presided. The parties thereafter submitted their written argument to Judge Stober. On May 7, 2015 Judge Stober issued her proposed decision granting the appeal. In her decision Judge Stober found that the CDPH had applied an impermissibly expansive reading of the regulation in question (22 CCR §70223 (b)(3)) that was contrary to the plain language of the regulation in question. She went on to find CDPH did not meet its burden of proving a violation of 22 CCR §70223 (b)(3).

On June 8, 2015 CDPH attorney Tze Ming U wrote to Mike Rainville, Assistant Chief Counsel for CDPH, and argued that the decision by Judge Stober should be rejected by CDPH. In his letter Mr. U said:

> "Although Respondent did have a policy and procedure in place to ensure that all sponges be "accounted for and [that] none remain in the patient", the undisputed fact that a 4" x 8" sponge was left in Patient 1 **is indicative, if not obvious**, that Respondent violated section 70223(b)(3) in not developing, maintaining and implementing their sponge policy and procedure." (emphasis added)

In concluding his letter Mr. U argued that the Title 22 regulations " were adopted to hold facilities such as the Respondent accountable in delivering the highest level of healthcare to patients." His letter, however, was devoid of any legal analysis tying the facts of the case to (22 CCR §70223 (b)(3).

Thereafter, on August 17, 2015 Mr. Rainville wrote to the counsel for the parties to give notice that CDPH had elected to reject the decision by Judge Stober pursuant to Government Code §11517 (c)(2)(E). The parties were requested to submit further arguments to support their positions, and to submit further evidence on five enumerated issues.

Further written arguments were submitted by both parties. SFMH also submitted further evidence to show the sponge count policy and procedure had been approved the Medical Staff and the Hospital Governing Board, and also to show that in-service training had been given to the staff on the sponge count policy in question. CDPH submitted no further evidence on any of the enumerated issues listed by Mr. Rainville.

On December 15, 2015 CDPH issued its final decision rejecting the appeal. In doing so CDPH found that "Respondent failed to introduce evidence that the staff involved in the surgical operation actually used the policy or put it into effect." (12:6-7). The final decision also said "the staff who left the surgical sponge in Mr. B failed to actually carry out or use the policy. Had the staff done so, the sponge count would have revealed that a four-inch by eight-inch sponge was still inside the patient and the surgical sponge would have been removed before the surgery ended." (12:16-19)

In reaching this conclusion the CDPH erroneously applied the applicable burden of proof to SFMH, and also ignored the clear evidence from the administrative hearing, as set forth in more detail below. Because of these mistakes CDPH should reconsider its decision rejecting the appeal.

III. CDPH BEARS THE BURDEN OF PROOF IN PROVING THE ALLEGED VIOLATION

The law that applies to the appeal presented by SFMH is unequivocal in holding the burden of proof in this type of citation appeal is borne by the agency, not the respondent. *Owen v. Sands* (2009) 176 Cal. App. 4th 985, 992. At the administrative hearing CDPH did not object to the argument CDPH bore the burden of proof by preponderance of the evidence. Judge Stober ruled CDPH bore the burden of proof in her decision, and this was not contested in the subsequent October 2015 closing argument from CDPH.

Evidence Code §115 defines burden of proof as follows:

> "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.
>
> Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

In the present matter, CDPH bore the burden of proving the sponge count policy and

procedure had not been "implemented." However, in the final decision recently issued CDPH found that "Respondent failed to introduce evidence that the staff involved in the surgical operation actually used the policy or put it into effect." In addition to being factually wrong, this finding is based on the mistaken position that SFMH bore the burden of proving the staff used the policy or put it into effect.

SFMH did not need to submit any evidence on this point because it was CDPH's burden of proof. Absent proof from CDPH to the contrary, as a matter of law CDPH must assume that SFMH did use the policy and put it into effect. This is how the burden of proof works. The approach taken by CDPH appears to have been that the retained sponge itself was all the proof necessary to show the violation, and that SFMH then bore the burden of proof to there was no violation. This is a classic cart-before-the-horse approach.

Moreover, there was testimony at the hearing from Helen Karow contrary to the finding of CDPH; Ms Karow was the Senior Director of Perioperative Services at SFMH at the time in question. Ms. Karow testified the sponge count policy and procedure started to be implemented in January 2009, before it was even finally approved:

> Q. So the official date was June 12, 2009, but the process of rolling it out and training everything started before that?
>
> A. It started in January. (Hearing Transcript vol. 2, 14:16-19).

With regard to the process of implementing the sponge count policy Ms. Karow testified:

> A. I participate in all of the training that the staff nurses received and did ll of the documentation that they were required to do documenting the competency process.
>
> I attended a manager/director-level education program with Dr. Gibbs so that there was a foundation and understanding of the principles behind the changes that we were implementing to our sponge accounting process
>
> And then I rounded on a [sic] initially daily basis and would be in and out of the rooms watching people counting and documenting, and then coaching and correcting as needed so that there was compliance with the changes to the policy. (Hearing Transcript vol. 2, 12:19-13:7).

Michelle Cupa-Hofer was the traveler nurse who was the circulating nurse for the October 2010; it was stipulated at the hearing she had been at SFMH ten months as of the date of the surgery. Ms. Karow testified Ms. Cupa-Hofer had been specifically trained on the sponge count policy and

procedure:

> A. . . .Then once she was there, she went though hospital orientation. She received department orientation. She was oriented to sponge accounting. And then she would be–have been included in the audits that were done both by myself and my staff nurse for that–that would help with quality and different projects I the department.
>
> So there was a lot of assessment and work going on on a daily basis to make sure that all our travelers, including Michelle, were competent and performing as we needed them to. (Hearing Transcript vol. 2, 19:23-20:8)

Finally, Ms. Karow testified that after the retained sponge was discovered she went back over the documentation from the surgery and determined that the staff had followed the sponge count policy in doing the sponge counts:

> Q. When you learned about the retained sponge and did your investigation, you reviewed these OR nursing notes; correct?
>
> A. Immediately.
>
> Q. And from your review did you determine that Michelle Cupa-Hofer had complied with the existing policy and procedure on sponge counts for this procedure?
>
> A. Yes, from the documentation. (Hearing Transcript vol. 2, 22:17-25).

In addition to Ms. Karow, the CDPH expert witness who testified, Mildred Mannion, also agreed there was a sponge count policy that had been implemented and utilized for the surgery in question:

> Q. The St. Francis Memorial Hospital had a policy and procedure in place for sponge counts, correct?
>
> A. They did.
>
> Q. And a sponge count was done in this case, correct?
>
> A. Yes, a sponge - -
>
> Q. So there was- -
>
> A. - -count was done.
>
> Q. - -implementation of the policy and procedure on sponge counts, correct?
>
> A. There was implementation of a sponge count, yes. (Hearing Transcript, Vol. 1, 166:12-23)

Finally, the expert who testified for SFMH also testified the records showed the sponge count policy and procedure was followed by the nurses for the procedure in question:

Q. In your opinion, did the OR nursing notes comply and follow the surgical services sponge count policy that was in effect at the time?

A. Yes. (Hearing Transcript vol. 2, 85:19-22)

There was no evidence submitted by CDPH to contradict Ms. Karow or to otherwise show the sponge count policy and procedure had not been implemented and utilized for the surgery in question. To the contrary, their own witness admitted the policy and procedure had been implemented and utilized. Thus, the conclusion that SFMH "failed to introduce evidence that the staff involved in the surgical operation actually used the policy or put it into effect" is mistaken. There was an absence of evidence submitted by CDPH at the hearing, and subsequently in the October 5, 2015 submission, to support the conclusion that SFMH had failed to implement or utilize the policy and procedure.

Accordingly, to the extent the CDPH decision to reject to the appeal was based on a finding that SFMH failed to implement and utilize the sponge count policy and procedure for the surgery in question, this conclusion was based on a mistake of fact and law. As such, it should be reconsidered, and the appeal should be granted.

IV. THE CONCLUSION THE PRESENCE OF A RETAINED SPONGE MEANS THE POLICY WAS NOT IMPLEMENTED OR FOLLOWED IS ERRONEOUS

In the CDPH final decision rejecting the appeal it is asserted " . . . the staff who left the surgical sponge in Mr. B failed to actually carry out or use the policy. Had the staff done so, the sponge count would have revealed that a four-inch by eight-inch sponge was still inside the patient and the surgical sponge would have been removed before the surgery ended." (12:16-19) This conclusion was mistaken in that (1) Ms. Karow testified the policy was followed by the staff, and (2) the CDPH expert who testified at the hearing admitted there is no perfect policy, and even if followed retained sponges can and do occur:

Q. Ms. Mannion, is it also fair to say that sponge count policies nd procedures that follow precisely along with AORN guidelines don't guarantee that a retained sponge won't occur?

A. There's no guarantees in anything. (Hearing Transcript, Vol. 1, 157:19-23).

The SFMH expert, Rosemary Welde, similarly testified that she has seen incidents before where there was a correct sponge count, but the patient nevertheless was later found to have a

retained sponge:

> Q. If a retained sponge remains in patient, is it - - after a surgery and that sponge was not intended and it was not in the patient when he came into surgery, can you say that a correct sponge count occurred?
>
> A. I have seen it happen before.
>
> Q. You've see it happen?
>
> A. Yes, I have. (Hearing Transcript vol. 2, 102:5-11)

The notion that the presence of a retained sponge means the sponge count policy and procedure was not complied with is unsupported by any evidence that was submitted in this proceeding. Legally, such a conclusion lack a foundation. Evidence Code §400 et. seq. The two experts who testified confirmed retained sponges still do occur when policies are in place and are followed. Thus, there is no evidentiary foundation for the conclusion reached by CDPH that the presence of the retained sponge meant, ipso facto, the policy and procedure had not been implemented. Because this conclusion was based on a mistake, it should be reconsidered.

V. CONCLUSION

The CDPH final decision to reject the appeal was based on mistakes of fact or law. The fact a retained sponge occurred does not mean the sponge count policy and procedure was not implemented, and CDPH failed to submit any *evidence* to show that in this case the policy was not implemented or followed. The analysis supporting the rejection of the appeal was a result oriented analysis, and was based on either a failed understanding of the evidence, or a lack of consideration of it.

CDPH bore the burden of proof, and failed to meet this burden at the administrative hearing. This failure carried on to consideration by CDPH after Judge Stober's decision was rejected. CDPH should reconsider its decision and find in favor of SFMH and grant the appeal.

Dated: December 30, 2015

SHEUERMAN, MARTINI, TABARI, ZENERE & GARVIN

CYRUS A. TABARI
Attorney for Respondent
SAINT FRANCIS MEMORIAL HOSPITAL

CASE NAME: IN RE SAINT FRANCIS MEMORIAL HOSPITAL

APPEAL NO. LNC14-0114-689-MS
CDPH Case NO. 12-AL-LNC-4998

PROOF OF SERVICE
[CCP §§ 1012.5, 1013a and 2015.5; CRC 2008]

I am a citizen of the United States. My business address is 1033 Willow Street, San Jose, CA 95125. I am employed in Santa Clara County where this service occurred. I am over the age of 18 years and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing and facsimile. In the case of mailing [other than overnight delivery], the practice is that correspondence is deposited in the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On December 30, 2015, I served the within: REQUEST FOR RECONSIDERATION on the PARTIES in said action as follows:

Sharon Stevenson
Chief Administrative Law Judge
Office of Administrative Hearings
and Appeals
Department of Health Care Services
1029 J Street, Suite 200, MS 0017
Sacramento CA 95814

Mary Stober
Administrative Law Judge
Office of Administrative Hearings
and Appeals
1029 J Street, Suite 200, MS 0017
Sacramento, CA 95819

Mike Rainville
Assistant Chief Counsel
Licensing & Regulatory Enforcement
and Administrative Litigation
Department of Public Health
P. O. Box 997377, MS 0506
Sacramento, CA 95899-7377

Craig Thomas
Acting Assistant Chief Counsel
Licensing & Regulatory Enforcement
and Administrative Litigation
Department of Public Health
P. O. Box 997377, MS 0506
Sacramento, CA 95899-7377

Evelyn Hodson
Staff Counsel
Licensing & Regulatory Enforcement
and Administrative Litigation
Department of Public Health
P. O. Box 997377, MS 0506
Sacramento, CA 95899-7377

__X__ (BY MAIL) I caused a true copy of each document identified above to be placed in a sealed envelope with first-class postage affixed. Each such envelope was deposited for collection and mailing that same day in the ordinary course of business in the United States mail at San Jose, California.

_____ (BY PERSONAL SERVICE) I caused a true copy of each document identified above to be delivered by hand to the offices of each addressee above.

_____ (BY OVERNIGHT DELIVERY) I caused a true copy of each document identified above to be sealed in an envelope to be delivered to an overnight carrier with delivery fees provided for, addressed of each addressee above.

_____ (BY FACSIMILE SERVICE) I caused each of the above-named documents to be delivered by facsimile transmission to the office at each fax number noted above at __ .m., by use of

facsimile machine telephone number (408) 295-9900. The facsimile machine used complied with CRC §2003(3), and no error was reported by the machine. A copy of the transmission record is attached to this declaration.

__X__ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Diane Point

Diane Point

EXHIBIT B

State of California—Health and Human Services Agency
California Department of Public Health

KAREN L. SMITH, MD, MPH
Director and State Health Officer

EDMUND G. BROWN JR.
Governor

January 14, 2016

Mr. Cyrus A. Tabari
Sheuerman, Martini, Tabari, Zenere & Garvin
1033 Willow St.
San Jose, California 95125

Re: St. Francis Memorial Hospital Penalty No. 220009104,
Denial of Request for Reconsideration

Dear Mr. Tabari:

On January 5, 2016, the California Department of Public Health received your Request for Reconsideration [Government Code §11518.5], dated December 30, 2015.

California Government Code section 11518.5, subdivision (a) provides that within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the agency for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made.

Since the Final Decision on this matter was issued on December 15, 2015, and was made effective immediately, we are unable to consider your Request for Reconsideration which is deemed denied under California Government Code section 11518.5, subdivision (a).

Sincerely,

Mike Rainville
Assistant Chief Counsel
California Department of Public Health

EXHIBIT C

AB 2067 (Miller)

Judicial review of administrative hearing: extends time to petition

If a proceeding is subject to the Administrative Procedure Act, there are five time limitations affecting calculation of when to file for judicial review:

1. Thirty Days after Reconsideration: Govt. C §11523 provides that any petition for judicial review must be filed within 30 days after reconsideration could have been ordered by the administrative agency.

2. Sixty Days after Delivery of Decision: Govt. C §11521(a) provides that the administrative agency has thirty days after delivery or mailing of its decision to order reconsideration. This section and section 11523 (above) establish a sixty day period of limitation.

3. Effective Date of Decision as Set by Agency: Govt. C §11521(a) also states that the agency's power to order reconsideration expires on this date if it occurs within 30 days after the date on which the decision is delivered or mailed.

4. The End of any Stay Granted by the Agency to File for Reconsideration: A stay may be granted, not to exceed 30 days, to file for reconsideration. §11521(a).

5. The Effective Date of Decision: Thirty days after the decision is delivered or mailed. §11519(a).

On account of the difficulty a party may have assessing which limitation period controls his ability to petition for judicial review, Section 11523 provides that if the party makes a timely demand for all or part of the hearing record, the time to file for review is extended until five days after delivery of the record.

But, is five days sufficient time to review a record in order to find if judicial review is appropriate?

AB 2067 proposes that the five days after delivery of the record be extended until thirty days after delivery.

COMMENT:

1. "A quick way to escape the pressure of time in cases falling under the Administrative Procedure Act is to request the administrative record." Administrative Mandamus, C.E.B.

5/17/71
N

Exhibit C - 1

2. Given the complexity of issues raised at administrative proceedings, is five days after delivery of the record sufficient time to determine if judicial review is appropriate?

3. Will this provision further delay the administration of justice?

EXHIBIT D

TENTH BIENNIAL REPORT

JUDICIAL COUNCIL OF CALIFORNIA

TO THE

GOVERNOR AND THE LEGISLATURE

DECEMBER 31, 1944

41000

Exhibit D - 1

TABLE OF CONTENTS

Exhibit D - 2

TENTH BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA

PART TWO

REPORT ON THE ADMINISTRATIVE AGENCIES SURVEY

I. Introduction

The 1943 Legislature directed the Judicial Council to undertake a study of the procedure of California administrative agencies and of the judicial review of their decisions. This delegation was contained in Statutes of 1943, Chapter 991 (Deering's General Laws, 1944, Act 40), which reads as follows:

"SEC. 1. The increasing complexity of economic relationships has resulted in a rapid extension of the field of administrative law, and a growing need for the development of an administrative procedure, particularly including the review of administrative decisions, that assuredly will afford adequate protection to the citizen without impairment of expedition in the transaction of the public business. Much research in relation to the method and manner of the review of such decisions has been done by the State Bar of California, the American Bar Association, the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other agencies and groups. It is timely that the results of this research be correlated and applied to the problem as it exists in California and an adequate and comprehensive plan formulated for submission to the Legislature for its consideration and action.

"SEC. 2. The Judicial Council is authorized and directed to make a thorough study of the subject, in all its aspects, of review of decisions of administrative boards, commissions and officers in this and other jurisdictions, formulate a comprehensive and detailed plan by the council found suitable to the needs of this State, and report thereon with its recommendations not later than the tenth legislative day of the Fifty-sixth Regular Session of the Legislature, to the Governor and the Legislature, the report to include drafts of such legislative measures as may be calculated to carry out and effectuate the plan. The council may include in its report recommendations as to changes in administrative procedure which may not require legislation as well as those which will require legislation for their effectuation.

"SEC. 3. All departments, commissions, boards, agencies, officers and employees of the State shall give the Judicial Council ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control."

A similar direction to the Judicial Council had been made by the 1941 Legislature (Stats. 1941, Ch. 1190). No action was taken under the 1941 statute, however, because no funds were provided for the necessary technical staff to carry out the survey (Ninth Report of the Judicial Council of California (1943), p. 5). This delegation of responsi-

bility to the Judicial Council, both in 1941 and again 1943, constituted only one part of a general legislative interest in the field of administrative procedure. In 1941 the Legislature enacted Secs. 720-725.4 of the Political Code, providing for the publication of administrative rules and regulations in a publication to be known as the California Administrative Code. The responsibility for carrying out this program was vested in a Codification Board to which the 1943 Legislature appropriated the sum of $70,000 during the period of 1943-1945 (Stats. 1943, Ch. 1060). In addition to the interest in administrative procedure which has recently been manifested by the Legislature, the Attorney General's office and the various State agencies themselves have been active in the attempt to improve their procedure. The State Bar of California for several years has had a very active committee on administrative agencies and tribunals which has earnestly studied the problems of administrative procedure with reference to the California agencies.

The Legislature's request that an investigation of administrative procedure be made by the Judicial Council is but a part of a nation-wide attempt to improve the operation of both Federal and State agencies. The studies made by groups in other jurisdictions have been examined and carefully considered in connection with the Council's work. These studies have been summarized in an appendix to this report (See Appendix B). Among the organizations which have engaged in this type of work are: the United States Attorney General's Committee on Administrative Procedure, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, a staff working under Commissioner Robert M. Benjamin in New York, the Revisor of Statutes in Minnesota, the Ohio Administrative Law Commission and the Illinois Administrative Practice and Review Commission.

A detailed statement of the methods used by the Judicial Council in this survey has been appended to this report (See Appendix B, p. 48). The ground work was done by a special three-man committee of the Council consisting of Justice John T. Nourse, Chairman, and Judges C. J. Goodell and Maurice T. Dooling, Jr. In its work the committee was assisted by a research staff under the direction of Ralph N. Kleps, of the San Francisco Bar. This staff consisted of John J. Eagan, who had previously worked in connection with the Council's revision of the rules on appeal, B. Abbott Goldberg, who joined the staff on April 1, 1944, following his retirement from the U. S. Army, and Martin J. Katz.

II. Scope of the Survey

Following the appointment of the committee and the selection of the research staff, the Council undertook a general investigation to ascertain the number and kind of administrative agencies in the State Government. A fairly detailed examination of our statute law indicated that there are more than 100 agencies which might possibly come within the Legislature's authorization to the Judicial Council.

By the time this preliminary investigation had been completed, approximately a year and three months were left prior to the meeting of the 1945 Legislature. It was apparent, therefore, that the Council could not hope to include all of the agencies of State Government in the present report. It was thought desirable to select a fairly large group of agencies which were engaged in approximately the same kind of opera-

tions. Various factors were considered in making this selection. For example, many State agencies do not possess the power to regulate or control private activities in any way. Typical of such agencies are the State departments and officers whose duties are limited to the internal functioning of State Government or the agencies which have been created from time to time merely for the purpose of assembling information and making it available to other governmental bodies or to the public generally. Among the State agencies which do have the power to affect private rights, there are many whose activities are primarily legislative in nature. Such agencies generally have the power to adopt rules and regulations under which the public, or some segment of the public, is required to operate. Because of the primarily judicial interest of the Council, it was thought that its most valuable contribution could be made in the field of administrative adjudication rather than in the field of quasi-legislative action. For that reason no attempt has been made in this report to include the agencies which are primarily rule-making in nature.

Even in the field of administrative adjudication, the Council did not have time to make an over-all investigation and recommendation. The adjudicating power of State agencies varies greatly and includes such diverse functions as those involved in the fields of taxation, workmen's compensation, public utilities regulation and the payment of unemployment or social security benefits. It was not possible to cover this extensive field of administrative activity in complete detail, and the Council considered it far more desirable to offer a careful and detailed proposal with respect to a portion of the field of administrative adjudication than to attempt to cover the entire field with a general, less precise statute. It was determined, therefore, to select a portion of the field of administrative adjudication which seemed most in need of improvement. This, the Council concluded, was the one occupied by the agencies engaged in licensing and disciplining the members of the various professions and occupations. The decisions of such agencies have been challenged frequently before the California courts and this group seemed to furnish the largest single category of State agencies.

The Council's survey of administrative procedure has been limited, therefore, to this particular type of administrative adjudication. The proposed legislation is designed to provide a solution for many of the difficulties and injustices arising in the administrative licensing and disciplining of private citizens. The theories underlying the Council's proposals in this limited field are susceptible, of course, of adaptation to other kinds of administrative action; and it is the Council's hope that this adaptation and extension of its work will be undertaken in the future.

III. Legislation Proposed by the Judicial Council

A. Department of Administrative Procedure *

The investigation conducted by the Judicial Council demonstrated that the greatest single defect in the present procedure of State administrative agencies is the lack of uniformity in their proceedings. The Council's survey indicated that an almost unbelievable diversity exists in the statutes under which the State's agencies operate, as well as in the practices of the agencies themselves, even where the administrative

* The proposed legislation is set forth in Appendix A, Part 1.

if his decision is adopted; the agency itself if it does not adopt the proposed decision. But each decision carries the official sanction of the agency itself; and the agency becomes responsible for all decisions and is able by its close control and supervision over all decisions to adhere to a consistent policy.

If the agency hears the evidence in the first instance the hearing officer is required to sit with it during the consideration of the case and to give advice on request. The fact that many of the agencies require legal advice during their deliberations is indicated by the fact that they call on their own prosecuting counsel to prepare the decisions or, in many cases to consult with them during their executive sessions. The unfortunate appearance of collaboration between prosecutor and judge which results is obvious. It has been suggested also that the mere presence of an outside expert in procedural matters should lead to a more discriminating and careful consideration of the evidence by the agency.

The requirement that findings be made in every case (Sec. 19) is one which present statutes usually do not contain, although findings are prepared in many cases. The Council proposal will not impose a serious burden on the agencies, particularly because the hearing officer will be available to prepare findings. The findings will enable the reviewing court or anyone else examining the decision to ascertain the basis of the result reached.

In determining the question of when an agency decision should become effective the Council had to consider conflicting policies. It is desirable to allow a period within which the agency can reconsider a case and correct its own errors, thus avoiding the necessity and expense of taking the matter to the courts. It would be improper, however, to make a decision effective during the period allowed for reconsideration if the respondent had no right to appeal to a court. It would be equally improper to allow respondent to have a choice between applying for reconsideration and court review during the same period because of the overlapping jurisdiction between the agency and the court. It is therefore provided that the decision will normally become effective 30 days after its delivery or mailing to respondent (Sec. 20). During this 30-day period reconsideration may be granted (Sec. 22), and only after the decision becomes effective is a petition for review proper (Sec. 24). The second policy considered was the necessity of making some decisions effective immediately, or at least sooner than 30 days, in order to prevent a respondent from abusing his license privileges during the period following an adverse decision. To meet this situation it is provided that by special order the agency can shorten the 30-day period and make the decision effective sooner (Sec. 20). By this action the agency cuts down or eliminates the time for granting reconsideration, because the decision is subject to court review immediately after it becomes effective and no reconsideration can be ordered by the agency.

9. Reconsideration and Reinstatement

Court procedure usually includes a method by which errors in a decision can be called to the attention of the tribunal which made the decision, and the expense and delay of appeal often can be avoided in this way. A section permitting reconsideration is included in the proposed statute because this policy is equally applicable to administrative

proceedings (Sec. 22). An agency is without power to reconsider a decision unless that right is given by statute, and most of the California agencies do not possess the power now.

In order to prevent an overlapping of jurisdiction between the courts and the agencies the power of reconsideration is limited to the period before the agency order becomes effective. As previously explained, this period normally will be 30 days but the agency may shorten it. Any party may petition for reconsideration, or the agency may make an order on its own motion. If reconsideration is granted, the proceedings are similar to those in a case where the agency decides contrary to the hearing officer's proposed decision. It is contemplated that the agencies will consider all petitions for reconsideration, but if the petition is filed too late or for some other reason an agency fails to act, the petition is deemed denied.

After a decision has become effective the agency may want to reduce the penalty or reinstate the respondent. Special statutes of different types now cover these possibilities in connection with a few of the agencies. Most of these specific statutes were designed to meet particular needs and should be retained. It was concluded, however, that a general provision to apply to the other agencies would be desirable (Sec. 23). In order to prevent constant applications for reinstatement or change in penalty, the provision is made that at least a year must elapse between the effective date of the decision and an application or between successive applications. The proposed statute also contains a provision that the Attorney General shall be notified of the filing of an application and may argue the matter. The Attorney General represents the interests of the people of the State and his constant contact with agency cases should enable him to determine whether any public policy militates against the reinstatement of a particular applicant.

C. *Judicial Review of Administrative Action* *

Some solution of the problems involved in the judicial review of administrative action was specifically requested by the Legislature. An analysis of these problems is contained in an appendix to this report (See Appendix B). The legislative measures recommended in this report, it is believed, will do much to clarify the situation. It is true that there are numerous constitutional obstacles to action by the Legislature in this field and, in the past, few statutes have attempted to deal with the judicial review of administrative action. These statutory proposals are limited to the field of administrative adjudication, but they will apply to all quasi-judicial administrative proceedings whether they arise under the proposed administrative procedure act or not. Thus, the proceedings of both local and state-wide agencies can be reviewed by this procedure though the scope of the review may not be the same in each case.

These proposals do not depart from the procedural pattern laid down by recent court decisions, and the proposed statute specifies the details of procedure for judicial review by the writ of mandate. The proposals do not purport to be a complete solution to all the problems of judicial review. Indeed, the steps which have been recommended by some, as for example, the use of a simple statutory proceeding in place of

* The proposed legislation is set forth in Appendix A, Part 3.

the extraordinary writs, do not seem feasible in view of the limited power which the Legislature has to act in this field.

The major proposal consists of an amendment to the sections of the Code of Civil Procedure dealing with the writ of mandate. Without affecting the historic uses of the writ it is suggested that, by the addition of a new section to the statute, the Legislature could prescribe the details of procedure where the writ is used for reviewing the adjudicatory decisions of administrative bodies. One of the strongest arguments in support of such a proposal is contained in the concurring opinion in *Sipper* v. *Urban,* in which Justice Schauer says:

> "As to the legislative constitutional problem previously mentioned, [the Constitution] . . . does not preclude it from setting up a form or forms of procedure in the nature of the mandamus review which has been developed. So long as it does not add to or subtract from the courts' constitutional powers, express or inherent, it may prescribe regulations which would constitute a guide for the public, the administrative officers, and the courts. It should not be necessary for this court to have to improvise rules of procedure for review of the decisions of any of the several boards of the State, as is trenched upon in the Dare case, yet the need for such rules is patent. It seems highly probable that many of the seemingly arbitrary practices of such agencies and many of the claims of injustice to individuals would be obviated if there were legislatively established standards and plans of procedure governing both the initial proceedings and the review thereof, known alike to the courts and boards and known by or available to the public. Not the least of the beneficiaries of such legislation would be the boards and officers themselves, most of whom are striving diligently and conscientiously to serve the public despite the uncertainties of the procedures which they have attempted to follow and to which they have been subjected." [22 Cal. 2d 138, 151, 137 P. 2d 425, 431 (1943).]

The suggested amendment to the Code of Civil Procedure would be numbered Section 1094.5 and it is set forth in Part 3 of Appendix A in this report. The proposal is limited to cases involving administrative adjudication, and provides that the case shall be heard by a judge without a jury. The record of the administrative proceeding is made available to the court and the expense of preparing the record is recoverable as costs by the successful party. The questions which are to be considered by the court upon such review are specified at length and are modeled upon the statutory provisions suggested by other studies as well as upon the case law of this State. They include the questions: whether the board has exceeded its jurisdiction; whether there was a fair trial; whether the board proceeded in the manner which the law requires; whether its order or decision is supported by the findings and the evidence adduced at the hearing. Where a challenge is made to the adequacy of the evidence to support the determination a dual provision is made. Provision is made for the cases in which the court has the power to exercise an independent judgment on the evidence and also for the cases in which the court merely examines the record to ascertain whether the decision is supported by substantial evidence.

This proposed amendment to the Code of Civil Procedure authorizes the court to remand a case for further consideration by the agency in the light of new evidence or, in cases in which the court can exercise an independent judgment on the evidence, it authorizes the taking of the new evidence in court. The judgment entered by the court may order that the administrative decision be set aside or the court may affirm the administrative action by refusing to issue the writ. In setting the case aside the court may order that it be reconsidered by the board in the light of the court's judgment, but provision is made that the court should not attempt to control the discretion which is legally vested in the agency in ordering such reconsideration. Finally it is proposed that, pending the determination of the proceedings for judicial review, a stay of the administrative order may be granted by the court in which the action is pending. The statute provides, however, that no such stay shall be imposed or continued where it is against the public interest. This last provision is intended to cover cases in which the court is satisfied that, because of the particular factual situation, the administrative order should be continued in effect pending the outcome of the proceeding for judicial review.

In addition to the general amendment to the Code of Civil Procedure, the proposed administrative procedure act includes a section designed to cover the particular proceedings to which that act applies (Sec. 24). Review of such proceedings is to be had by the writ of mandate and the petition is required to be filed within 30 days after the agency's power to reconsider its decision expires. Thus, the agency's decision will be a final one and the administrative process will be complete. The statute provides, however, that the right to judicial review is not lost by a failure to petition for reconsideration. The Council decided that the established policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists. The proposed section of the administrative procedure act specifies what a complete record of the administrative proceeding consists of, but permits the petitioner to designate whatever portion of the record he chooses to submit to the court. The agency can submit the rest of the record or the court can order that it be submitted under the proposed Sec. 1094.5 of the Code of Civil Procedure. A provision is made for an extension of the time for filing the petition for mandate where the agency delays in preparing the record after it has been requested by the petitioner. The agency is also permitted to file the original of any document in lieu of a copy thereof.

The proposals in the field of judicial review are in substantially the form in which they were submitted publicly in a tentative draft. They have received general approval from the agencies and from members of the bar and the Council believes that the enactment of these recommended statutes will produce a substantial improvement in our present procedure for the judicial review of administrative orders and decisions.

IV. Conclusion

There are many problems in California administrative procedure untouched by the Judicial Council's survey or by its recommendations to the Legislature. Some of these problems may be more important or

more complex than those which have already been examined. The recommendation that a Department of Administrative Procedure be established in the State Government is intended to provide a means for their ultimate solution but it might be useful to outline briefly the extent of the work which remains to be done.

First, there are the fields of administrative action in which no investigation has been made by the Council. It has already been pointed out that no attempt was made to cover the quasi-legislative activities of State agencies. Fair procedure requires adequate publicity for administrative regulations and an opportunity for those who are affected to challenge their validity. The Legislature has already provided for the publication of administrative rules and regulations in this State but the procedure by which they are adopted and the procedure for challenging them before the agency or the courts deserve careful study. Many types of administrative adjudication were not covered by the Council's work, either because the function involved was not comparable to the disciplinary proceedings of licensing boards or because of the organization of the particular board. Thus, no attempt was made to cover preliminary investigatory proceedings, routine examination procedure, informal adjudications, or the formal adjudications of such agencies as the Industrial Accident Commission, the Railroad Commission, the State Personnel Board, the California Employment Stabilization Commission and many others. The omission of these problems and these agencies from the Council's survey was a limitation imposed by practical considerations and did not result from the conclusion that no improvement was needed.

Second, there are many problems which are not strictly procedural in nature. In the course of the Council's survey it was discovered that many statutes prescribe very indefinite or inadequate grounds for administrative action. Thus, the statute under which the State Board of Accountancy operates provides merely that a certificate may be revoked "for cause." There is doubt as to the validity of such a provision and a natural reluctance on the part of the agency to exercise its powers, with a consequent loss of protection to the public. Similarly, the power vested in the State's agencies does not follow any standard form, some having only the power to revoke without the power of suspension, probation or reprimand given to other agencies exercising the same kind of function. One such power is the power to suspend a licensee temporarily pending the determination of his case by the agency. Many State agencies urged that such a provision be incorporated in the Council's recommendations to the Legislature upon the ground that no power exists in many agencies at present to put a particular licensee out of operation in an aggravated case soon enough to protect the public interest. This power involves far more than a problem of administrative procedure and it was concluded that, while the Council's recommendations would preserve any existing power of temporary suspension, any agency desiring such powers should secure them by specific legislation.

Finally, work remains to be done upon certain problems within the Judicial Council's particular field of responsibility. The use of the extraordinary writ of mandate as the means for judicial review of administrative adjudication in California inevitably raises the question of the adequacy of our present procedure in this field. The Council included in its tentative draft a proposed constitutional amendment authorizing

the Legislature to create a single form of special proceeding by which the extraordinary writs of mandamus, certiorari and prohibition could be obtained. This was intended as a procedural change only, for the purpose of adapting the code concept of a single form of action to the field of the extraordinary writs. The Judicial Council concluded, however, that it should not be proposed at the present time and as part of the present report. Such a proposal affects the use of the extraordinary writs in many fields other than that of administrative procedure, and the present study does not constitute a sufficiently comprehensive background upon which to rest the proposal. In addition, there is the possibility that legislation drafted after further study, without a constitutional amendment, might accomplish most if not all of the necessary reforms in our writ procedure.

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE AGENCIES SURVEY
APPENDIX A. PROPOSED LEGISLATION

PART 1. Act Creating a Department of Administrative Procedure

This proposed act would convert the present Department of Professional and Vocational Standards into a Department of Administrative Procedure. The new department would carry on all the functions of the present department and, in addition, would be charged with the duty of maintaining a staff of hearing officers for the use of State agencies and with the duty of continuing the improvement of administrative procedure in California.

An act to amend Sections 23, 23.5, 100, 102, 150, 158, 203, 204, 400, 401, 402, 403, 404, 1601, 2100, 2701, 3010, 3146, 3148, 3151, 4000, 4063, 4070, 4800, 5000, 5510, 6500, 6702, 6710, 6721, 7000, 7301, 7501, 7503, 7601, 7608, 8501, 8702, 8910, 16501, 19004, 19030, 19031 of, and to add Sections 110.5 and 110.6 to the Business and Professions Code, relating to the employment of hearing officers and the continued study of administrative procedure.

The people of the State of California do enact as follows:

SECTION 1. Section 23 of the Business and Professions Code is amended to read as follows:

23. "Department," unless otherwise defined, refers to the Department of Administrative Procedure.

SEC. 2. Section 23.5 of the Business and Professions Code is amended to read as follows:

23.5. "Director," unless otherwise defined, refers to the Director of Administrative Procedure.

SEC. 3. Section 100 of the Business and Professions Code is amended to read as follows:

100. There is in the State Government a Department of Administrative Procedure.

SEC. 4. Section 102 of the Business and Professions Code is amended to read as follows:

102. Upon the request of any board regulating, licensing or controlling any professional or vocational occupation created by an initiative act, the Director of Administrative Procedure may take over the duties of the board under the same conditions and in the same manner as provided in this code for other boards of like character. Such boards shall pay a proportionate cost of the administration of the department on the same basis as is charged other boards included within the department.

Sec. 22. Reconsideration

(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30-day period. If no action is taken on a petition within the time allowed for ordering reconsideration the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer shall be subject to the procedure provided in Section 18. If oral evidence is introduced before the agency itself no agency member may vote unless he heard the evidence.

Sec. 23. Reinstatement and Reduction of Penalty

A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Sec. 24. Judicial Review

Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner upon the payment of the expense of preparation and certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until five days after its delivery to him. The agency may file with the court the original of any document in the record in lieu of a copy thereof.

Sec. 25. Continuances

The agency may grant continuances at any stage of the proceedings.

PART 3. AMENDMENT TO THE CODE OF CIVIL PROCEDURE

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

1. California Statutes and Practice, and
2. California Cases

The California Constitution imposes definite limitations with respect o the procedures which are available for the judicial review of adminis- rative action, and therefore most statutes are noncommital on the subject. Many statutes are silent (Chiropractic, Dental, Medical, Nurse, Optom- try, Pharmacy). Some provide that an administrative decision is "sub- ect to review" (Contractors, Pest Control), "subject to examination n the courts" (Architectural), "subject to such review as is permitted r authorized by law" (Insurance), or is subject to "judicial review in ccordance with law," (Real Estate, Veterinary, Yacht). Statutes ave provided that review may be had by commencing "an action to ompel approval" (Osteopathic) or by a "proceeding in a court of com- etent jurisdiction" which "is governed by the Code of Civil Procedure" Cosmetology). In certain cases the Legislature has attempted to desig- ate the procedure to be used by specifying the writs of review, mandate prohibition (Corporations), and in one case a statute has provided hat the decision of a board as to examinations shall not be "subject to view by any court or other authority" (Nurse).

Generally speaking, writs of mandate and equity actions are used ost frequently to secure judicial review of administrative action. ctions for declaratory relief and writs of review are also used, as are pecific proceedings designated by the Legislature in particular cases. he power of the courts to determine any justiciable issue properly ought before them often furnishes the basis for judicial review in uations where there is no statutory provision as to the judicial review administrative action[1] or where the procedure designated by the egislature can not be used constitutionally.[2]

General limitations imposed by the courts require that proceedings r reviewing administrative action be brought within a reasonable time where none is specified by statute).[3] Similarly the courts have imposed general limitation upon the right to judicial review which requires

[1] Bodingson Mfg. Co. v. Calif. Employ. Comm., 17 Cal. 2d 321, 109 P. 2d 935 941).

[2] Sipper v. Urban, 22 Cal. 2d 138, 137 P. 2d 425 (1943); Hogg v. Real Estate mmissioner, 54 Cal. App. 2d 712, 129 P. 2d 709 (1942).

[3] Orwitz v. Board of Dental Examiners, 55 Cal. App. 2d 888, 132 P. 2d 272 942); Campbell v. City of Los Angeles, 47 Cal. App. 2d 310, 117 P. 2d 901 (1941); checo v. Clark, 44 Cal. App. 2d 147, 112 P. 2d 67 (1941); see Brown v. State rsonnel Board, 43 Cal. App. 2d 70, 110 P. 2d 497 (1941).

There is some indication that the situations in which supersedeas may be issued are increasing, and that the courts are not entirely satisfied with the strict rules as they exist now. Prohibitory injunctions have long been held to be self-executing, and the courts in doubtful cases have held some injunctions to be mandatory in order to issue supersedeas. Recently a writ was issued in a case involving a prohibitory injunction.[85]

3. Comparative Legislation

Parties entitled to review. A few of the statutes studied attempt to specify the parties entitled to review by providing that "any party aggrieved" or "adversely affected" by an administrative adjudication may seek court relief.[86] So general a definition leaves the determination of proper parties to the courts,[87] and is, therefore, futile.[88]

Form of action to obtain review. Some statutes allow appeals from administrative agencies directly to the courts in the same or in a similar manner as in civil actions.[89] Other statutes merely codify the rights to the various remedies heretofore employed by providing that legal, equitable or declaratory relief is available as well as the remedies afforded by the extraordinary writs.[90] Still other statutes provide that review may be had by a special statutory proceeding initiated by a petition in the manner of a petition for an extraordinary writ.[91] In New York such legislation abolishes all the extraordinary writs except *habeas corpus,* thereby simplifying the law and facilitating relief. A similar proposal is incorporated in the *Minn. Proposed Rev. Act;* the *Ill. Proposed Jud. Rev. Act* provides that the petition allowed thereunder shall be the exclusive means of obtaining judicial review, but does not attempt to abolish the writs for all purposes. None of these acts purports to curtail the relief obtainable.[92]

The time within which relief must be sought whether by appeal or special proceeding varies from 15 days to 4 months, with the average being 30 days.

---

62 Cal. App. 527, 217 P. 133 (1933) (appeal from denial of writ of prohibition); In re Graves, 62 Cal. App. 168, 216 P. 386 (1923) (appeal from judgment suspending attorney). But see Painless Parker v. Bd. of Dental Examiners, 108 Cal. App. 156, 291 P. 421 (1930) which indicates in a dictum that the cases in which appeals were taken after a denial of certiorari are not controlled by the cases involving appeals after denial of prohibition, and that in the certiorari cases there might be something in the nature of a writ of execution which could be stayed.

[84] Lickley v. County Bd. of Education, *supra,* note 83; Wood v. Bd. of Fire Com., 50 Cal. App. 594, 195 P. 739 (1920).

[85] See Note, "Supersedeas: Use of the Writ to Stay Prohibitory Injunctions," (1942) 30 Cal. L. Rev. 209.

[86] A. B. A. Proposed Act, Sec. 9 (a); Model Act, Sec. 11 (1); N. D. Unif. Prac. Act, Sec. 15; U. S. Sen. Bill 674, Sec. 311 (b).

[87] Comment to A. B. A. Proposed Act, (1944) 20 A. B. A. Jour. 44.

[88] Atty. Gen. Rep., p. 85.

[89] N. C. Revoc. of Licenses Act, Sec. 150-4; N. D. Unif. Prac. Act, Sec. 15; Ohio Unif. Proced. Act, Sec. 154-73; Pa. Proposed Prac. Act, Sec. 41.

[90] A.B.A. Proposed Act, Sec. 9 (b); U. S. Sen. Bill 674, Secs. 311 (a), (b).

[91] Ill. Proposed Jud. Rev. Act, Sec. 1; Minn. Proposed Review Act, Sec. 1; Model Act, Sec. 11; N. C. Proposed Unif. Proced. Act, Sec. 9 (b); N. Y. Civil Practice Act, Sec. 1283 et seq.

[92] On the character of the extraordinary writs as vestigial branches of common-law pleading and the procedural difficulties caused thereby see Third Annual Report of the Judicial Council of New York (1937), p. 129 et ff.

EXHIBIT E

Department of Professional and Vocational Standards

Division of Administrative Procedure

First Biennial Report

to the

Governor and to the Legislature

January 1, 1947

GS050

Exhibit E - 1

Fifty-sixth Regular Session of the Legislature, proceedings for the suspension or revocation of certificates under this chapter shall be conducted in accordance with the provisions of said Chapter 5, and the board shall have all the powers granted therein. In case of conflict between the provisions of this chapter and the provisions of said Chapter 5, the latter provisions shall prevail."

The Administrative Procedure Act was adopted in 1945. Although here are no conflicts between the provisions of the act and Chapter 17 of Division 3 of the Business and Professions Code, it is essential for the ake of clarity and uniformity that Section 9028.5 of said Code be mended to provide a direct, rather than a contingent, cross-reference to he Administrative Procedure Act in the same language which was used n making the Act applicable to other agencies. Only a procedural clarification in the existing law will be made by this recommendation. Its nly effect will be to remove the uncertainty from the law and to make niform the reference to the Administrative Procedure Act.

The division recommends, therefore, that the following proposed ct be enacted into law:

An act to amend Section 9028.5 of the Business and Professions Code, relating to proceedings for the suspension or revocation of certificates of registered social workers.

The people of the State of California do enact as follows:

SECTION 1. Section 9028.5 of the Business and Professions Code s amended to read:

9028.5. ~~If Chapter 5, relating to administrative procedure, is added o Part 1 of Division 3 of Title 2 of the Government Code at the Fifty-ixth Regular Session of the Legislature,~~ *The* proceedings for the suspension or revocation of certificates under this chapter shall be conducted n accordance with the provisions of ~~said~~ Chapter 5 *of Part 1 of Division 3 of Title 2 of the Government Code*, and the board shall have all the powers granted therein. ~~In case of conflict between the provisions of this hapter and the provisions of said Chapter 5, the latter provisions shall prevail.~~

. RECOMMENDATION RELATING TO AMENDMENT OF THE ADMINISTRATIVE PROCEDURE ACT, GOVERNMENT CODE, SECTIONS 11500 THROUGH 11528

In the months of November and December, 1946, conferences were eld in different parts of the State for the purpose of discussing various roblems which have arisen under the Administrative Procedure Act. (Gov. Code, Sec. 11500-11528.) Suggestions for clarifying any ambiguies in the act and for improving the administration thereof were sought nd discussed. Thereafter a rough draft of proposed changes in the act vas prepared by the division and circulated to persons interested in its peration. Comments were requested on these proposals and on any other natters in connection with the act which might require legislation. The mendments which were suggested relate primarily to clarifications in he act except that Section 11514 of the Government Code, dealing with

the use of affidavits as evidence, has not proved satisfactory in practice and it was suggested that this section be rewritten. After a careful study and analysis of the provisions of the act from a practical and operational viewpoint, and a consideration of the suggestions which have been made by others engaged in the administration thereof, the division recommends amendment of the act in the particulars discussed hereafter.

1. *Section 11500.* (a) The present language of subdivision (c) of Section 11500, which provides that the word respondent includes any *licensee* against whom an accusation is filed and any applicant *for a license* against whom a statement of issues is filed, has resulted in some confusion as to the exact meaning of the word "respondent." The use of the word "licensee" and "applicant for a license," though the definition was not intended to be restricted to those terms, suggests that the act must be limited to licensing. In order to make it easier to extend the act or other quasi-judicial administrative hearings when it proves desirable, the word "respondent" should be defined as any *person* against whom an accusation or statement of issues is filed pursuant to Sections 11503 or 11504, respectively.

(b) Subdivision (e) should be amended to provide that "agency member" means any person who is a member of any agency to which the act is applicable including any person who himself constitutes an agency. Under its present provisions the definition of "agency member" is limited to "any person who is a member of any agency enumerated in Section 11501" and is inconsistent with subdivision (a).

2. *Section 11501.* In order to promote clarity, subdivisions (a) and (b) of Section 11501 should be reversed in order, thus emphasizing the fact that inclusion under the act is regulated by each agency's own statutes. The present enumeration of agencies to which the act is applicable should be amended as follows, in order to conform with statutes enacted in 1945: "Secretary of State" should be changed to "Collection Agency Board," and there should be added to the list "State Board of Cleaners" and "Board of Social Work Examiners." In addition, the "Board of Chiropractic Examiners" should be added to the list of agencies since this board has by rule adopted the provisions of the act.

3. *Sections 11503 and 11504.* The pleading sections of the act, Sections 11503 and 11504, have proved imperfect in several particulars. It has been pointed out that nowhere does the statute define the word "accusation" or identify the situations in which it is to be used. In contrast with that, the situations in which a "statement of issues" is to be used are identified, but the contents of the pleading are not specifically set forth. It was thought desirable, therefore, that Section 11503, relating to an accusation, and Section 11504, relating to a statement of issues, should be amended by providing in each section for the situations in which the respective pleadings should be used and what each respective pleading should allege. In deciding which pleading should be used, the basic test is whether the proceeding is for the purpose of determining whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned or whether a right, authority, license or privilege should be granted, issued or renewed. The accusation is

intended to cover the first class of situations mentioned and the statement of issues, the second class of situations. Section 11503 already provides for the contents of an accusation and Section 11504 should be further amended to provide for the contents of a statement of issues and for verification.

Subdivision (b) of Section 11504 deals with default cases and it is recommended that it be transferred to Section 11520, together with other provisions dealing with defaults.

4. *Section 11514.* Subdivisions (a), (b) and (c) of Section 11514, relating to the use of affidavits in contested hearings in lieu of oral testimony, have caused considerable difficulty in practice and are not satisfactory in their present form. Subdivision (d) provides for the use of affidavits in default cases and the substance thereof should be included in Section 11520.

Subdivision (a) authorizes either party to introduce evidence in affidavit form in lieu of oral testimony subject to the right of the opposing party on request to cross-examine the affiant. The use of this subdivision has resulted in undesirable delays in cases where one party has presented affidavits at the last moment during a hearing without having the affiants available for cross-examination and where it was impossible to secure their presence without continuing the hearing. The possibility of this objection to subdivision (a) was anticipated in the report of the Committee on Administrative Agencies to the Judicial Council in which it is stated:

> "* * * Subsection (a) has been drafted to allow either party to introduce affidavits at the hearing. If the agency does not object to the possibility of continuance, there seems to be no reason why it should not put affidavits in evidence without having the affiant available for cross-examination. An objection to this practice might arise from respondent's use of affidavits in the case where a board had come a long distance for a one-day meeting, only to discover that the defense was in the nature of a sworn statement, where they wanted to hear a cross-examination of the person who made the statement, and where he was not present or readily available."

In the practical application of this subdivision experience has proved that it is not satisfactory and that some system of advance notice of the use of affidavits should be substituted.

Subdivisions (a) and (b) differ as to whether an affidavit may be introduced in evidence as hearsay where cross-examination of an affiant is not afforded. In construing subdivision (a), the Attorney General has ruled that the party offering an affidavit cannot be compelled to produce the affiant for cross-examination as a condition precedent to the admission of the affidavit in evidence, but that if the affiant is not so produced, the affidavit can be given only the same effect as other hearsay under Section 11513. (6 Ops. Atty. Gen. 219.) Subdivision (b) provides for advance notice of the intended use of affidavits and applies only to an agency. If a request for the right to cross-examine an affiant is made by the respondent, the *affidavit may not be introduced in evidence for any purpose* unless the affiant is produced at the hearing for cross-examination.

There does not appear to be any sound basis for this difference in the two subdivisions. Some criticism has also been made to subdivision (b) on the ground that it applies only to an agency and that under its provisions an agency can force a respondent either to demand cross-examination of an affiant within the 10-day period provided in the subdivision or waive his right to cross-examine the affiant, whereas the respondent cannot force the agency to such an election prior to a hearing. The Committee on Administrative Agencies of the Judicial Council in its report recognized as a matter of general policy that the respondent should be afforded the same opportunity in this respect as the agency, but it was felt that practical considerations prevented such a system.

In view of the foregoing, it is believed that Section 11514 should be repealed and a new Section 11514 enacted covering the use of affidavits as evidence in lieu of oral testimony. The division recommends that the new section should provide only one method of using affidavits as direct evidence and that the same method be applicable to all parties to the proceeding. The new section should provide that any party, at any time 10 or more days prior to a hearing, may mail or deliver to the opposing party any affidavit which he proposes to introduce in evidence together with a notice of the right to demand the presence of the affiant for cross-examination. The section should provide that unless cross-examination is demanded within seven days, the right to cross-examine is waived and the affidavit, if introduced at the hearing, shall be given the same effect as if affiant had testified orally; and that if an affiant is not produced for cross-examination after request therefor is made, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay.

5. *Section 11518.* Section 11518 provides, among other matters, that the decision shall be "certified as correct by the agency." Inasmuch as the decision made is the decision of the agency, the present requirement that it be "certified as correct by the agency" is meaningless and confusing and should be eliminated.

6. *Section 11520.* Section 11520 provides a procedure in default cases and the substance of subdivision (b) of Section 11504 and subdivision (d) of Section 11514, heretofore discussed, should be added to Section 11520.

7. *Section 11523.* Section 11523 provides for judicial review by petition for a writ of mandate and further provides that a record of the proceedings shall be prepared and delivered to a petitioner "within 20 days after a request therefor by him." Experience has shown that 20 days for the preparation of a record in many cases is too restrictive and this section should be amended to increase the time to 30 days.

8. *Section 11529.* Chapter 5 of Title 2 of Division 3 of Part 1, comprising Sections 11500 through 11528, of the Government Code has become so widely known and referred to as the Administrative Procedure Act that a new Section 11529 should be added to the chapter authorizing its citation as such. It is interesting to note that the chapter is so referred to and cited in the new 1946 edition of Shepard's California Citations, Statutes, under Table of California Acts under "Popular Names."

The division recommends, therefore, that the following proposed act be enacted into law:

An act to amend Sections 11500, 11501, 11503, 11504, 11518, 11520 and 11523 of the Government Code, to repeal Section 11514 thereof, and to add new Sections 11514 and 11529 thereto, all relating to administrative procedure.

The people of the State of California do enact as follows:

SECTION 1. Section 11500 of the Government Code is amended to read:

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent and any person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding.

(c) "Respondent" ~~includes~~ *means* any ~~licensee~~ *person* against whom an accusation is filed pursuant to Section 11503 ~~and any applicant for a license~~ *or* against whom a statement of issues is filed pursuant to Section 11504.

(d) "Hearing officer" means a hearing officer qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency ~~enumerated in Section 11501~~ *to which this chapter is applicable* and includes any person who himself constitutes an agency.

SEC. 2. Section 11501 of said code is amended to read:

11501. *(a) The procedure of any agency shall be conducted pursuant to the provisions of this chapter only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency.*

(b) ~~(a)~~ The enumerated agencies referred to in Section 11500 are:
Board of Dental Examiners of California.
Board of Medical Examiners of the State of California.
Board of Osteopathic Examiners of the State of California.
Board of Nurse Examiners of the State of California.
State Board of Optometry.
California State Board of Pharmacy.
State Department of Public Health.
State Board of Public Health.
Board of Examiners in Veterinary Medicine.
State Board of Accountancy.
California State Board of Architectural Examiners.

State Board of Barber Examiners.
State Board of Registration for Civil Engineers.
Registrar of Contractors.
State Board of Cosmetology.
State Board of Funeral Directors and Embalmers.
Structural Pest Control Board.
Yacht and Ship Brokers Commissioner.
Director of Professional and Vocational Standards.
~~Secretary of State~~ *Collection Agency Board.*
State Fire Marshal.
State Mineralogist.
Director of Agriculture.
Labor Commissioner.
Real Estate Commissioner.
Commissioner of Corporations.
Department of Social Welfare.
Social Welfare Board.
Department of Institutions.
Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun.
Board of Pilot Commissioners for Humboldt Bay and Bar.
Board of Pilot Commissioners for the Harbor of San Diego.
Fish and Game Commission.
State Board of Education.
State Board of Equalization.
Insurance Commissioner.
Building and Loan Commissioner.
State Board of Cleaners.
Board of Social Work Examiners.
Board of Chiropractic Examiners.

~~(b) The procedure of any agency shall be conducted pursuant to the provisions of this chapter only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency.~~

SEC. 3. Section 11503 of said code is amended to read:

11503. *A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation.* 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. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall 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. The verification may be on information and belief.

Sec. 4. Section 11504 of said code is amended to read:

11504. ~~(a) Proceedings~~ *A hearing* to determine whether a *right, authority,* license *or privilege* should be *granted,* issued or renewed shall

be ~~governed~~ *initiated* by ~~the provisions of this chapter except that. If the proceeding is commenced by the agency,~~ *filing* a statement of ~~the~~ issues . ~~to be determined~~ *The statement of issues* shall be *a written statement* ~~served as provided in Section 11505 in place of the accusation; but~~ *specifying 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 of the agency action sought. The statement of issues shall 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. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided that,* if the hearing is held at the request of the respondent , the provisions of Sections 11505 and 11506 shall not apply ; and ~~a~~ *the* statement of ~~the~~ issues ~~to be determined~~ together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509.

~~(b) If in any proceeding to determine whether a license should be issued or renewed the respondent fails to file a notice of defense, where one is required, or to appear at the hearing, and if the burden of proof is on the respondent to establish his right to the issuance or renewal of a license, Section 11520 shall not apply and the agency may act without taking evidence.~~

SEC. 5. Section 11514 of said code is hereby repealed.

SEC. 6. Section 11514 is hereby added to said code, to read:

11514. (a) At any time 10 or more days prior to 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 subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date) seven days after the date of mailing or delivering the affidavit to the opposing party.

SEC. 7. Section 11518 of said code is amended to read:

11518. The decision *shall be in writing and* shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. ~~The decision shall be in writing and certified as correct by the agency.~~ Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

SEC. 8. Section 11520 of said code is amended to read:

11520. If the respondent fails to file a notice of defense or to appear at the hearing, the agency itself may take action based upon the respondent's express admissions or upon other evidence *and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence.* Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

SEC. 9. Section 11523 of said code is amended to read:

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within ~~29~~ *30* days after a request therefor by him, upon the payment of the expense of preparation and certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until five days after its delivery to him. The agency may file with the court the original of any document in the record in lieu of a copy thereof.

SEC. 10. Section 11529 is hereby added to said code, to read:

11529. This chapter may be cited as the Administrative Procedure Act.

G. REPORT ON RECOMMENDATION TO THE LEGISLATURE'S JOINT FACT-FINDING COMMITTEE ON HIGHWAYS, STREETS AND BRIDGES, RELATING TO PROCEEDINGS FOR THE DISCIPLINING OF DRIVERS BY THE DEPARTMENT OF MOTOR VEHICLES

This recommendation and study, made at the request of the Legislature's Joint Fact-Finding Committee on Highways, Streets and Bridges,* is published as part of this report (with the knowledge and

* The recommendation and study is pursuant to the following letter from the Chair-

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Saint Francis Memorial Hospital v. California Department of Public Health**
No.: **S249132**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 5, 2018, I served the attached **REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF GONZALO C. MARTINEZ** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Cyrus Ali Tabari
Sheuerman, Martini, Tabari, Zenere & Garvin
1033 Willow Street
San Jose, CA 95125
Attorneys for Plaintiff and Appellant

Clerk of Court
California Court of Appeal
First District
350 McAllister Street
San Francisco, CA 94102
Case No. A150545

Clerk of Court
San Mateo Superior Court
c/o Hon. George A. Miram
400 County Center
Redwood City, CA 94063
Case No. CIV537118

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 5, 2018, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

SA2018302482
POS for RJN.docx